

CDC case law update 19 – July 2017

This update is intended to provide general information about recent decisions of the courts and Upper Tribunal which are relevant to disabled children, young people, families and professionals. It cannot and does not provide advice in relation to individual cases. Where legal issues arise specialist legal advice should be taken in relation to the particular case.

Royal Borough of Kensington and Chelsea v GG (SEN) [2017] UKUT 0141 (AAC)

The Upper Tribunal clarified the exclusion of 'higher education' from the scope of the Children and Families Act 2014, emphasising that this only applies to higher education courses, not other courses which may be offered by or with higher education institutions.

Case overview

The Upper Tribunal ('UT') remade a decision by the First-tier Tribunal ('FTT') in relation to a local authority's refusal to assess a young person's needs and ordered the local authority to arrange an EHC needs assessment.

Decision

The issue in this appeal was whether a local authority was entitled to refuse to carry out an EHC needs assessment for a young person who was pursuing Open University 'modules' delivered by an independent institution. The UT allowed the local authority's appeal on the basis of a number of case management failures by the FTT. However it remade the decision of the FTT and ordered the local authority to carry out the assessment. The UT went on to give guidance on the application of the new scheme under the Children and Families Act 2014 to higher education and institutions within the higher education sector. A lengthy and complex decision was helpfully summarised by the UT in a guidance section, the essential elements of which are set out below.

The UT reiterated that the provision of higher education is 'not a concern of Part 3 of CFA 2014'. This follows from the exclusion of references to 'higher education' from the definition of 'education' in section 83(4).

If a young person is simply seeking higher education, a local authority must refuse to carry out an EHC needs assessment. The UT held that 'An assessment would be pointless because it could not lead to an EHC plan that would deliver what the young person wants'.

However a course provided by or under an arrangement with an institution within the higher education sector is not necessarily a form of higher education. What matters is whether the course is of a type mentioned in Schedule 6 to the Education Reform Act 1998. If it is not, then the course would come within the scope of the CFA 2014 even though it is provided by a higher education institution.

The UT however went on to emphasise that an institution within the HE sector, or other institution which provides only higher education, cannot be named in section I of an EHC plan, because it cannot be a 'post-16 institution within the definition in section 83(2) CFA 2014'.

The UT also gave important general guidance in this decision that "special educational provision" is a young person-specific concept. It only has meaning in relation to a particular young person'.

In deciding whether provision is "special educational provision", the UT emphasised that the 'reference point' is the provision made generally in England'. However this does not require investigation of every relevant institution in England. The task of the local authority and (FTT) is to exercise professional judgment 'in order to fix the typical nature of provision made in England for a particular age group'. Furthermore as a general rule 'local provision can be relied on as being typical of the provision made generally in England'.

Finally, in the body of its decision the UT held that activity which prepares a person for the requirements of HE is not outside the scope of the CFA 2014.

Turning to the facts of the appeal, the UT decided that there was a realistic prospect that the young person may require an EHC plan, both because of the extent of his needs and the lack of evidence that he would be pursuing higher education as properly defined. The local authority had erred in concluding that all courses that would lead to the grant of qualifications by an institution within the HE sector were necessarily forms of HE.

What this means for children, young people and families

Parents and young people have a somewhat greater entitlement to support in post-16 education as a result of this decision than may previously had been thought. It is clear that some courses offered by or with the involvement of an institution within the higher education sector will still come within the scope of the CFA 2014 if the course itself is not within the definition of higher education. If there is any doubt as to the nature of a particular course parents and young people will need to seek

case-specific advice before deciding whether to seek an EHC needs assessment or the continuation of an EHC plan. Parents and young people will need to note the absolute exclusion of institutions within the HE sector from section I of EHC plans.

Implications for local authorities and other public bodies

Following this decision, local authorities will need to keep in mind that a course is not necessarily an HE course because it is provided by an institution within the HE sector. What matters is whether the course falls within the specified statutory list of HE courses.

The UT also emphasised that local authorities should not be too quick to refuse to assess young people who may want to attend a higher education course; '[a] vague aspiration to pursue HE or the inclusion of HE amongst the educational options that a young person is thinking of pursuing should not be seized upon as reason to exclude a young person from the CFA system of entitlements'.

Local authorities will also note the UT's general guidance on the approach to "special educational provision", and may well welcome confirmation that it may well be appropriate to focus on local provision as the relevant comparator, as a proxy for the provision made generally in England'. It is possible to see however how this aspect of the UT's guidance could be controversial and potentially reversed in another case, where it was directly relevant to the outcome of the appeal.