

CDC case law update 20 – January 2018



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.

GL v West Sussex County Council (SEN) [2017] UKUT 414 (AAC)

The Upper Tribunal gave guidance on the meaning of the expression 'educates or trains' in relation to the dividing line between educational and social care provision in the context of Education, Health and Care plans (EHCPs).

Case overview

The Upper Tribunal ('UT') upheld the decision of the First-tier Tribunal ('FTT') on an appeal in relation to the placement of a young woman on the autistic spectrum. The FTT's approach to the question of whether provision 'educates or trains' the young woman was approved.

Decision

This appeal concerned G, a young woman aged 17 with a range of needs and diagnoses of oppositional defiance disorder, autistic spectrum condition and ADHD. The family appealed to the Tribunal in relation to sections B, F and I of G's EHCP (educational needs, educational provision, placement). By the time of the hearing, the two issues in dispute were whether G required a 'waking day' curriculum and whether she required a residential placement or if a day placement at a local college with extra support could meet her needs, as the council contended.

The family appealed on the basis that the FTT had adopted the wrong test in applying section 21(5) of the Children and Families Act 2014. This states that 'health care provision or social care provision which educates or trains a child or young person is to be treated as special educational provision (instead of health care provision or social care provision)'. The family argued that the support G needed outside the college day related directly to her special educational needs and so fell within section 21(5) as provision which 'educates or trains' her.

The UT referred to its previous decision in *East Sussex CC v TW* (see Case Law Update 15) which considered both 'direct' special educational provision and 'deemed' special educational provision, i.e. the provision which becomes educational by reference to section 21(5). It also referred to the previous case law under the Education Act 1996. The UT then upheld the approach of the FTT in G's case; the FTT had concluded that although G needed support to help her generalise skills this did not amount to education or training. The UT gave guidance that whether social care provision would amount to education or training was a question of 'fact and degree' in each case. The UT drew a distinction between social care provision which 'educates or trains' (and so becomes 'deemed' special educational provision) and provision which 'merely

supports or assists' the child or young person (and so remains social care provision).

What this means for children, young people and families

Children, young people and parents will continue to benefit from greater protection if provision is included in an EHCP as educational provision than social care provision. This is because (1) there is a clear absolute duty on local authorities to secure the special educational provision identified in an EHCP, rather than the more complex duties in relation to social care, and (2) the FTT can order the local authority to amend the educational sections of an EHCP, whereas even from April 2018 the Tribunal's powers in relation to the health and social care sections will be restricted to making non binding 'recommendations'. As such families may well want to argue that provision which would normally be considered to be social care should be treated as 'deemed' special educational provision because the effect of this provision is to educate or train the child or young person, not merely to support or assist them.

Implications for local authorities and other public bodies

Local authorities and health bodies will need to consider in every case whether provision which is ordinarily social care or health provision has become 'deemed' special educational provision in the context of an EHCP because its effect is to educate or train the child or young person, in order to ensure provision is properly located within an EHCP.