

CDC case law update 25 – March 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.

East Sussex CC v KS (SEN) [2017] UKUT 273 (AAC)

The First-tier Tribunal erred in ordering that an EHC Plan should be amended to name a non-maintained school when the CCG were refusing to fund the 'clinical' element of the fees.

Case overview

This case concerned L, a five-year-old girl with a range of needs including a syndrome which causes tumours, chromosomal disorder and West syndrome (a form of epilepsy). L's parents wanted her to attend a non-maintained special school. The school offered L a place on the basis that the local authority would pay the education fees and the CCG¹ would meet the 'clinical fees'. The CCG repeatedly refused to agree to this as it considered that this provision for L was unnecessary. The cost of the clinical provision identified for L by the school was around £36,000 per annum, although roughly £12,000 would not have represented an additional cost to the CCG. No challenge was made by L's parents to the CCG's decisions via either judicial review or a complaint to the Ombudsman.

The parents appealed to the First-tier Tribunal ('FtT') and asked the FtT to name their chosen school in L's EHC Plan. In relation to placement, the local authority put forward a maintained special school for L. The FtT allowed the parents' appeal, holding the local authority's school to be unsuitable and ordering it to name the parent's chosen school in the EHC Plan. The local authority then appealed on the basis that it should not be made to fund health care provision which the CCG had concluded was not required.

The FtT accepted that it had no jurisdiction over health care needs or provision and that the case was not within the scope of the pilot scheme in relation to health and social care in operation at that time. However the FtT found that the vast majority of 'health' services were in fact educational provision in L's case and that the clinical fee, excluding the element for outpatient clinics, was part of the total fee for the child attending the school.

On appeal the local authority argued that the FtT did not have the power to name the school in Part I of L's EHC Plan without the CCG agreeing to commission the health services. The local authority also argued that much of the provision covered by the 'clinical' fee for L's placement was not 'educational' provision. Several other grounds of appeal were advanced that were specific to

¹ More strictly the 'responsible commissioning body', which is usually the CCG but can be NHS England in certain cases.

the decision in L's case, including that the FtT had erred in finding that its school was unsuitable.

The parents criticised the local authority's reliance on 'artificial divisions' which ignored the high level of specialist support L required in order for her to attend education. The services included as part of the clinical fee were necessary for L to be educated and to enable her to have curriculum access.

The Upper Tribunal ('UT') upheld the FtT's decision that the local authority's school was unsuitable. The question was therefore whether the FtT was entitled to order the parents' chosen school to be named in L's EHC Plan, being the only available suitable school for L.

The UT noted that special educational needs provision, care provision and health provision are the subject of different legislation, with different duties, different bodies and different governance. The clear intention is that it is CCGs which have the function of determining the health provision to be included in the EHC Plan and the duty to arrange it. A high degree of coordination is expected between those responsible for different types of provision. However this does not get rid of the underlying statutory distinctions. Health provision which does not 'educate or train' a young person is not the local authority's responsibility and a local authority has no power to pay for it. The UT further emphasised that the duty on local authorities to pay fees for a school named in an EHC Plan only relates to fees 'payable in respect of education or training'.

The UT held that the FtT was wrong to find that some of the medical and nursing support L required was 'educational' provision. Even if medical and nursing support is essential for L to be educated, that did not of itself make it special educational provision. The specification by the FtT of the parents' school in section I of the EHC Plan had created a situation where L could not attend the school unless both elements of the fees were paid, but the local authority was under no obligation, and had no power, to pay the 'clinical' fees and the CCG had refused to fund them. This was not merely unworkable but gave rise to an error of law on the part of the FtT.

The appeal was therefore allowed on this basis. The decision of the FtT was set aside and the case remitted for redetermination.

What this means for children, young people and families

The UT's decision highlights a potential problem for children and young people with complex health needs, caused by (1) the ongoing distinction in law between education, health and social care provision and (2) the limits of the FtT's jurisdiction. Following this decision, where there is 'health' provision required for a child to attend a school and the CCG is not prepared to fund this provision, it is clear that the remedy for this is a judicial review claim or complaint to the Ombudsman, not a Tribunal appeal. This may change for decisions made from April 2018 when the Tribunal will have a new power to make non-binding recommendations in relation to health and social care. However the Upper Tribunal Judge was sceptical whether this power would have provided a 'complete answer' in L's case, see decision at para 62.

Families looking for school placements for children with complex needs therefore must make sure they are clear about the basis of the fees being charged and in particular whether any fees are for 'health' or 'social care' provision as defined in section 21 of the Children and Families Act 2014. If there is any concern about this then families will need specialist advice ASAP, as the remedy in relation to refusals of funding by the CCG may be an application for judicial review.

Implications for local authorities and other public bodies

Like the Nascot Lawn case (see Case Law Update 24), this decision emphasises the ongoing distinctions between education, health and social care notwithstanding the provisions of Part 3 of the 2014 Act. Local authorities are not permitted to fund 'health' provision of any significant degree and intensity, certainly not if it would make them a 'substitute NHS' (see the Haringey case cited in Nascot Lawn). As such, given the co-operation and welfare duties on both bodies, it is incumbent on local authorities and CCGs to work together to ensure children and young people can obtain appropriate educational placements where any health needs they may have can be properly met, through a jointly funded package.