

## CDC case law update 26 – April 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 JC [2018] UKUT 81 (AAC)**

*The Upper Tribunal held that a powered wheelchair was capable of being 'special educational provision' for the purposes of an EHC Plan. The UT also held that in general terms the provision specified in Section F of an EHC Plan is predicated on the needs specified in Section B.*

#### Case overview

This appeal concerned a young person ('William') then aged 20 with a diagnosis of dystonic/dyskinetic cerebral palsy, resulting in significantly impaired motor and communication development. The First-tier Tribunal ('FtT') found that William's physical movement was 'very limited to the control of his fingers' and that 'it requires immense physical effort to neurologically "program" and physical movement he wants to achieve'.

William's mother appealed to the FtT against the contents of his EHC Plan. The issue which went to the Upper Tribunal ('UT') related to 'whether the provision of a powered wheelchair for [William] should be considered special educational provision or healthcare provision'. The evidence before the FtT included that of an educational psychologist who held that 'a powered wheelchair is an essential tool for all aspects of [William's] life and that his ability to be able to use one is the basis for everything else he has to do or accomplish'.

The FtT held that 'The powered wheelchair is an inanimate object and we could not see how in isolation it can be said to educate and train [William]', this being the legal question in relation to whether the wheelchair constituted special educational provision. The FtT said there was a 'fundamental distinction...between the provision of the powered wheelchair and [the] use of it once provided.' If the local authority had to provide a powered wheelchair as special educational provision this would 'result in an artificial distinction being made between educational and non-educational activities'. The FtT went on to hold that the provision of a powered wheelchair was 'rightly specified in Section G of his EHC plan' as health provision.

However the FtT held that the maintenance of the wheelchair was special educational provision 'because without it he is unable to access the education and training relevant to the development of his independence skills'.

The UT held that the provision of a wheelchair was clearly additional provision to that made generally for others of William's age. The question was therefore whether it was 'educational or training provision'. The FtT's categorisation of the wheelchair as an "inanimate object" was 'unhelpful', because objects such as

books can be educational or training provision. Moreover if it was correct that the use of the wheelchair educated or trained William, the provision of the wheelchair would also seem to be 'education or training provision'.

The UT Judge concluded that 'If (and it might be a big if) the use of the powered wheelchair educates or trains, there is no rule excluding its provision from being educational or training provision'. However the UT Judge was not satisfied that the FtT had made adequate findings and given an adequate explanation as to how William's use of the wheelchair actually educated or trained him. As such the appeal was allowed that the issue was referred to a differently constituted FtT for a fresh hearing.

In discussing the legislation the UT Judge further stated that 'In general terms the provision specified in section F is predicated on the needs specified in section B'.

### What this means for children, young people and families

This decision confirms that equipment such as powered wheelchairs is capable of being special educational provision which should go in Section F of a child or young person's EHC Plan (rather than Section G) if it is 'educational or training provision'. This is important because on an appeal by a parent or young person the Tribunal can rewrite Section F to include additional provision, whereas for Section G (and Sections H1/H2 in relation to social care) the Tribunal's powers under the national trial are limited to making non-binding recommendations.

The Tribunal will decide whether equipment (and indeed any other provision) is 'educational or training provision' based on all the evidence. It should be noted that these are broad concepts; for example the UT Judge highlighted that under the relevant legislation 'training' includes 'vocational, social, physical and recreational training'

Parents and young people will also note the restatement by the UT Judge of the link between Sections B and F of an EHC Plan. This is discussed further below.

### Implications for local authorities and other public bodies

Local authorities and CCGs need to ensure that the provision set out in a child or young person's EHC Plan is appropriately identified as special educational provision, health provision or social care provision. The primary question is whether the provision is 'educational or training provision', as if it is then it must go in Section F of the Plan. This UT decision emphasises that there is no general exclusion of equipment from the category of special educational provision. The key question in each case is the effect of the provision – if it educates or trains a child or young person then it should go in Section F. However the UT Judge cited an earlier decision that even if medical or nursing support is essential for the child to be educated 'that does not of itself make it special educational provision'; *East Sussex CC v KS* at para 89 (see Case Law Update 25). As such the question is whether the provision is itself educational or training provision – or for the purposes of section 21(5) whether it 'educates or trains' the child or young person.

The implication of a conclusion that equipment is special educational provision is that the responsibility to secure the provision as included in Section F of a Plan falls on the local authority. Whether the local authority or the relevant health body actually funds the provision is a matter for local agreement, bearing in mind the extensive co-operation duties imposed by the Children and Families Act 2014. However any legal challenge for the failure to secure the provision in Section F, including any equipment specified there, should be brought against the local authority.

Local authorities will also note the clear restatement of the link 'in general terms' between Sections B and F of EHC Plans. This may call into question the practice of specifying provision in Section F against the outcomes in Section E, rather than the needs in Section B. Local authorities which have adopted this practice may wish to seek advice in this regard.