

CDC case law update 27 – 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.

CB v Birmingham CC [2018] UKUT 13 (AAC)

The Upper Tribunal dismissed an appeal in relation to a decision by a local authority not to make an EHC Plan and gave guidance on the test for when a Plan should be made.

Case overview

Having carried out an EHC needs assessment, the local authority decided not to make an EHC Plan for K, a girl aged nearly 10 with dyslexia and dyscalculia. K's parents appealed to the First-tier Tribunal ('FtT') which dismissed their appeal. The parents made a further appeal to the Upper Tribunal ('UT') which also dismissed their appeal, giving useful general guidance on the legal test for when an EHC Plan needs to be issued.

The first ground of appeal turned on the question of what 'necessary' means in section 37 of the Children and Families Act 2014, which establishes the test for when an EHC Plan should be made. The UT Judge highlighted a previous decision that 'necessary' means 'somewhere between indispensable and useful'. In another previous decision, the test was said to be (1) whether the provision identified as necessary for the child in the assessment was in fact available within the resources normally available to a mainstream school, and if so (2) whether the school could reasonably be expected to make such provision from within its own resources. This is broadly reflected in para 9.55 of the current SEND Code of Practice.

The UT Judge held as follows in relation to SEN funding; 'The funding for the preponderance of pupils with SEN at a mainstream school is intended to come, as before from the school's annual delegated budget...and its notional SEN budget of £6,000. The school is expected to exhaust the £6000 before asking for a top up funding from the LA.'

The Judge then went on to hold that:

1. There is a 'clear, albeit rough and ready resource line to be crossed before an EHC plan is considered to be necessary. It is based on the kinds of provision a school could make from its own notional SEN budget.'
2. The provision the local authority expects to make available as published in its local offer is 'a relevant consideration in working out what will, on balance, be available from a school's internal resources.'

On the parents' second ground in relation to the availability of skilled and experienced teachers within mainstream schools, the Judge held that it was not necessary for the local authority to show that each item of provision was

available in any and all mainstream schools in the area. In particular the Code of Practice refers to resources 'normally' available to mainstream schools and the assessment does not seek to identify any particular school.

Finally, there was no failure by the FtT to engage in the 'provisional and predictive' judgment required at that stage on 'the nature and degree of K's underlying needs, the kinds of provision that should be made, the appropriate school setting, and class size.'

What this means for children, young people and families

The Judge's decision in this case makes clear that parents and young people who want an EHC Plan to be made will need to demonstrate that provision is required which goes beyond the resources normally available to mainstream schools – in essence, that the provision required is likely to cost more than £6,000 per year.

Implications for local authorities and other public bodies

Local authorities may seek to rely on this decision to refuse to make EHC Plans where an assessment demonstrates to their satisfaction that the child or young person's educational needs can be appropriately provided for from within the resources normally available to maintained schools, including the notional SEN budget. Furthermore local authorities which have in place a detailed and specific local offer of educational provision may be more likely to persuade a Tribunal not to order that an EHC Plan is made than those authorities who have a less impressive local offer.