

CDC case law update 28 – July 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.

SB v Herefordshire CC [2018] UKUT 141 (AAC)

The Upper Tribunal dismissed an appeal in relation to a child's EHC Plan, in particular because there was no error of law in failing to specify the size of the small teaching groups for the child.

Case overview

The case concerned 'Jessica', a child who was transitioning from primary to secondary education. The parents appealed to the First-tier Tribunal ('FtT') in relation to the contents of her EHC Plan. The issue for the Upper Tribunal ('UT') was whether the FtT erred in its approach to Jessica's need for speech and language therapy ('SLT') and to be educated in 'small groups'.

The FtT found that (1) Jessica needed 'targeted input' for her language difficulties but that this did not have to be provided directly by a qualified SLT, and (2) she needed to be educated in 'small groups', with the size of the teaching group 'determined according to the particular learning context...'.

The parents appealed to the UT, arguing that the SLT provision was unclear and insufficiently specific and that the failure to specify the size of the teaching group was unsupported by evidence and could not be justified.

The UT began by considering the effect of the decision in *H v Lancashire CC* [2000] 1 EL 471. In that case the Judge had held that the staff:pupil ratio was 'so unparticularised and so unclear as to leave substantial argument as to what the tribunal was deciding was necessary'. However in the present appeal, no party had argued for a class of a specified size, nor a specific staff:pupil ratio. In the context of this appeal the FtT was not required to specify the size of the small groups in which Jessica would be taught. It was rational for the Tribunal to proceed on the basis that the appropriate size of the small groups might vary. It was clear that the groups must be small enough to deliver the other provision within the Plan.

In relation to SLT provision, once the plan was read as a whole it could not reasonably be argued that this was unclear. The Plan provide for one type of SLT provision during the transition period and then further ongoing SLT-related provision. Any lack of specificity was justified because the extent of the input required would inevitably vary according to how well Jessica coped with transition.

What this means for children, young people and families

This decision reminds parents and young people that the requirement of specificity in relation to EHC Plans, although important, is not absolute. There will be certain situations (such as the UT held arose here) where less specific provision is appropriate. However the UT did not seek to undermine or qualify what is said about specificity in the SEND Code of Practice at para 9.69 (including 'Provision **must** be detailed and specific and should normally be quantified...') and by the Court of Appeal in *E v LB Newham and SENT* [2003] EWCA Civ 09 ('the statutory duty will not be discharged if the description of the special educational provision...is framed in terms so vague and uncertain that one cannot discern from it what (if anything) the tribunal has decided...').

There is also an important reminder in this decision that if particular provision is sought in an EHC Plan it is necessary for the family to specify and quantify the request for that provision – for example not just saying 'small groups' but specifying the size of the group, perhaps by reference to a range (e.g. '6-8 children').

Implications for local authorities and other public bodies

Local authorities will be able to rely on this decision to demonstrate that the requirement for specificity has limits, and that some factual scenarios may justify a degree of flexibility. However local authorities should note that the FtT will generally continue to apply the guidance in the SEND Code (see above) that 'Provision **must** be detailed and specific and should normally be quantified...'.

It is likely that issues as to specificity will come up in relation to the health and social care provision which will be recommended by the FtT in certain appeals under the new national trial, and so this decision will also be of interest to CCGs and local authority social care teams.