

CDC case law update 30 – October 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.

R (KE) v Bristol City Council [2018] EWHC 2103 (Admin)

The High Court allowed an application for judicial review of the Council's decision to cut the Special Education Needs budget on a number of grounds, particularly the Council's failure to consult before making its decision.

Case overview

This application for judicial review was brought by three claimants. The first (KE) was the mother of the second (IE), a nine year old child with significant learning difficulties, physical difficulties, and a diagnosis of autism. The third claimant, CH, was also a nine year old child, who had been diagnosed with ambivalent attachment disorder and encopresis. IE had an education and health care plan, whereas CH was at the time of the hearing attending one of the Council's pupil referral units ('PRU').

The challenge was to the Council's decision to set a schools' budget which included cuts of approximately £5 million to the high needs block budget (which provided for those with special education needs, 'SEN').

The claimants argued that the Council had failed to consult before deciding on the cuts, as required by the Equality Act 2010, the Children and Families Act 2014, and the common law duty of fairness. They argued further that in setting the budget which included these cuts, the Council had breached the 'public sector equality duty' ('PSED') under the Equality Act 2010, as well as section 11 of the Children Act 2004, section 27 of the Children and Families Act 2014, and the common law requirement to act reasonably, take into account all relevant considerations, and ask the right questions.

The Council argued, by contrast, that no decision had yet been taken which would engage the duties identified by the claimants. Rather, any duties would come into play at a later stage when specific proposals for the provision of services were developed. As such, the claim was premature.

The Council also argued that even if it was at fault, it was highly likely that there would not be any substantial difference in the outcome of the claim if it had consulted and / or complied with the other duties the Claimants relied on.

The court considered the statutory requirement for the Council to set a budget, which arose from the duty to set a 'Council Tax Requirement' at such a rate that council expenditure was not greater than its resources.

There were a number of stages to be completed before an education budget could be set. After allocation of a grant from central government, the Council was then required to consult with the School Forum, comprising a number of head teachers and school governors. Under the model in this local authority, the proposed education budget would then be considered by the council executive before being set by the full Council which would consider the executive's proposals.

In the present case, the Council had incurred a significant deficit over the past few years. It was clear that detailed consideration of cuts to the SEN budget was taking place well before the precise details of national funding were known. In December 2017, the Council carried out a public consultation on its budget, but this contained no express reference to cuts to SEN funding. As such, no public consultation on the proposed SEN cuts was carried out.

Detailed proposals for cuts were put before the Schools Forum, but were not subject to a vote. In due course, after council Cabinet consideration, the proposals were approved by the full Council.

The court considered the duties identified by the Claimants. It agreed that in the circumstances of this case, there was a duty under the Equality Act 2010 to consult before setting a budget. Setting a budget was a sufficiently focussed, rigid and significant decision to engage the 'duty of inquiry' under the PSED, and given that meaningful consultation was possible, it was necessary here to ensure the Council had enough information to make a reasoned decision.

There was also a duty to consult under section 27 of the Children and Families Act 2015, which requires consultation when local authorities are keeping education and care services under review and considering their sufficiency. Thirdly, there was also a common law duty to consult in this case. It was unfair not to consult the group that would inevitably suffer from the imposition of such significant cuts. As such, there was a clear requirement to consult before setting the budget which had been breached by the Council.

The judge also found that the Council was in breach of section 11 of the Children Act 2004. There was no evidence that the Council had had any regard to the need to safeguard and promote the welfare of children, still less "actively promote" it.

The judge went on to hold that the failure to take material considerations or necessary information into account meant that the Council was also in breach of the common law duty not to act irrationally.

The judge noted held the court was in no position to say what the outcome would have been if the Council had set the budget lawfully. The decision of the Council following full consultation might well have been different, and more funding might have been allocated. There was, further, no merit to the argument that there were alternative remedies available to the Claimants.

Consequently, the judge found in the Claimants favour and ordered the high needs block budget allocation to be quashed, requiring the Council to reconsider its funding of SEN provision.

What this means for children, young people and families

This judgement demonstrates that individuals or their families affected by funding cuts may be able to successfully challenge those cuts where the decision maker has failed to follow the correct process, including failing to consult and / or to take the right matters into account. While generally the setting of funding levels is a political decision to be taken by elected representatives, it is clear that proper investigation is required before such decisions can be taken. It may well also be necessary to consult families before any significant reduction in funding is imposed.

Implications for local authorities and other public bodies

The need for adequate inquiry by public bodies is of great importance and must be in the forefront of every local authority's mind. Decisions taken without proper gathering of the information necessary to come to a reasoned conclusion are likely to be flawed, and therefore vulnerable to challenge in the courts. In times of strain on public finances, it is vital that authorities take the time to consider what information they need to make fully reasoned decisions. In many cases, this will require public consultation, and especially an attempt to gain the perspective of those most affected by changes to funding. The emphasis placed by the court here on substance over form highlights the importance of carrying out these duties properly, and not simply attempting to do the minimum to meet statutory requirements.