CDC case law update 32 – 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.

St Helens BC v TE and another [2018] EWUKUT 278 (AAC)

The Upper Tribunal refused to overturn the decision of the First-Tier Tribunal that a child should be educated at an independent rather than maintained school, despite the fact that it was the child's refusal to attend the maintained school that made it inappropriate.

Case overview

This case involved an appeal by the local authority against a decision of the First-Tier Tribunal ('FTT') concerning the education of F, a boy of 7. F had autistic spectrum disorder ('ASD'), and the dispute between his parents and the local authority concerned whether he should be educated at a maintained primary school R (the local authority's proposed school) or an independent special school O (the school sought by the parents).

The FTT directed that F be educated at school O, the independent school. This was appealed by the local authority on the basis that placing F at school O was not an efficient use of resources, as provided for by section 39(4)(b)(ii) of the Children and Families Act 2014.

The Upper Tribunal ('UT') judge proceeded on the basis that the FTT, in considering whether it was an efficient use of resources to send F to school O, held that it would only be inefficient if there was a more efficient option available; this required considering whether school R was appropriate.

The local authority's objection to the FTT's judgement was that it had erred in giving so much weight to the views of F himself. The UT judge therefore considered in detail how the FTT dealt with F's views in its decision.

The FTT had dismissed all the parents' reasons for holding school R inappropriate apart from its finding that F had "formed an entrenched and currently intractable opposition to attending [school R] or any mainstream provision".

There was no evidence that F's opposition was due to the views of or manipulation by his parents. Rather, it was, on the evidence of the educational psychologist ('EP'), rooted in F's special educational needs. The EP stated that the likely consequence of F attending school R would be a failed placement.

The local authority argued that the effect of the decision was to allow F's wishes to be paramount. The UT rejected this, stating that the FTT had properly considered the origin of F's opposition, its roots in his special educational needs, and whether

the strategies employed by the parents and which school R would employ would overcome them, in reaching its decision.

While the judge in the UT accepted that medical evidence could have been useful, the judge noted that the local authority had not sought an adjournment at the time of the FTT hearing to collect further information, and the FTT had evidence from an education psychologist.

It was not appropriate for the UT to reconsider the balancing exercise undertaken by the FTT, as this would involve substituting the Upper Tribunal's judgement for the FTT's. Nor was it accepted that the FTT assumed that transition to and integration into school R would be impossible or too difficult to even attempt "without any rational basis". It was open to a specialist tribunal such as the FTT to reach the conclusions it did. The fact that a different tribunal might have reached different conclusions did not mean that the FTT had made an error of law.

Finally, the local authority's concern that the FTT's decision "[opened] the floodgates" was rejected. The decision did not establish any kind of precedent, and the UT's decision merely affirmed the autonomy allowed to decisions properly made by specialist tribunals of fact. In summary the local authority's case was a 'resourcefully expressed expression of disagreement with the decision, not establishing any error of law on the FTT's part.'

What this means for children, young people and families

This UT decision emphasises that the views of children or young people can be influential when deciding the appropriate placement for them. Particularly where these views are not the result of outside pressure (such as from parents), and where they are rooted in the underlying special educational needs of the child, they may, as here, be able to render a given school placement appropriate or inappropriate. It is open to tribunals to give considerable weight to the child's views, and the UT will be reluctant to interfere with a decision properly made within the FTT's reasonable discretion.

Implications for local authorities and other public bodies

It is important that local authorities note that efficiency considerations and concerns over public funding may not automatically trump the views of the child. Local authorities should consider carefully when assessing the appropriateness of placements whether a child's opposition makes the placement in fact unsuitable. Local authorities must also be wary of confusing disagreements over the outcome of a tribunal decision with an assessment that the tribunal has made an error of law. Specialist tribunals are afforded a broad discretion, and the UT, as demonstrated here, will not lightly interfere with properly made judgments of the FTT.