

## CDC case law update 35 – 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.*

### ***Birmingham City Council v KF [2018] UKUT 261 (AAC)***

*The Upper Tribunal decided that school transport can be special educational provision in an EHC Plan, where the transport fulfils some educational or training function. There is no rule that school transport can never be special educational provision.*

#### Case overview

This case concerned a young person, 'Karen', who has difficulties with dyslexia, numeracy, information and auditory processing, anxiety and PTSD, and self-esteem.

In June 2016, when she was 16, Karen started to attend 'the College', which is some distance from her home. She did not want to attend a more local college where she might come across those who had bullied her at a previous school.

The journey to the College was a multi-stage journey that could take between 60 and 90 minutes each way. On most days, due to her anxiety, Karen found this too difficult and her mother would drive her some or all of the way. The difficulties resulted in a low level of attendance and promptness.

In January 2017, the Council issued an Education, Health and Care Plan (EHC Plan) in respect of Karen under the Children and Families Act 2014 ('the 2014 Act'). Karen objected to the section of the plan that dealt with assistance with transport and appealed to the First-tier Tribunal (FTT).

Relying on the Upper Tribunal's (UT) decision in another case (AA v London Borough of Haringey [2017] UKUT 241 (AAC) ('Haringey')), the FTT found it had jurisdiction to assess Karen's transport difficulties. As to Karen's need, the FTT found that she was not yet an independent traveller due to her anxiety and learning difficulties, and she was unable to access public transport without assistance. The FTT ordered the section of the EHC Plan on special educational provision be amended so that it stated:

"Transport to be provided for [Karen] to secure her attendance at college until the end of the Autumn term to allow an assessment of her transport needs to be concluded. Thereafter, appropriate support to assist [Karen] to become an independent traveller and reduce her anxiety so that she can access public transport without assistance".

The Council appealed against this decision on the basis that transport to and from school could not constitute special educational provision. The Council

argued that there was a clear and consistent line of case law which established this, and that the Upper Tribunal's decision in Haringey, which the FTT had relied upon, was wrongly decided.

The UT rejected the Council's argument that Haringey had been wrongly decided.

Firstly, the UT explained that transport is capable of being special educational provision if satisfies the definition of special educational provision in section 21 of the 2014 Act, namely if it 'educates or trains'. It is for an appellant to make the case that the transport fulfils some educational or training function, or for the First-tier Tribunal to consider this for itself. The answer will depend on the facts of the particular case.

Secondly, the Upper Tribunal acknowledged that previous cases have decided that transport cannot be special educational provision. However, the 2014 Act is a new statutory regime, and it does not exclude the possibility that transport can be special educational provision.

The FTT in this case had made an error of law because it had not considered whether the provision of transport that it ordered would educate or train so as to bring it within what is authorised by the 2014 Act. It had therefore misunderstood and/or misapplied the UT's decision in Haringey.

Despite identifying this error of law in the FTT's decision, the UT decided not to set it aside. The UT did not wish to interfere with the decision on matters other than transport and, as the local authority was now providing Karen with transport under other legislation, the transport issue had become academic.

### [What this means for children, young people and families](#)

Families should note that entitlement to school and college transport for children and young people will normally arise through a separate statutory scheme under the Education Act 1996, for which there are separate appeal processes arranged by each local authority.

It will only be where there is a specific educational need which is being met by school transport that the FTT will have jurisdiction to order it to be included with section F of an EHC Plan.

Although the Upper Tribunal did not make any findings about the provision required in this case, it is now at least arguable that difficulties in accessing public transport which result in a low level of attendance and promptness could give rise to a requirement for transport as special educational provision. Where the provision of transport would fulfil some educational or training function in relation to their special educational needs, evidence will need to be provided to explain how the provision of transport would fulfil that function.

### [Implications for local authorities and other public bodies](#)

This decision confirms that, when preparing EHC Plans, local authorities will need to consider whether the child or young person has transport-related special

educational needs and whether the provision of transport is required to fulfil those needs. Previous decisions which suggested that transport cannot amount to special educational provision can no longer be relied upon in relation to plans prepared under the 2014 Act.