CDC case law update 39 – April 2019

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, either for families or public bodies. Where legal issues arise specialist legal advice should be taken in relation to the particular case.

R (Hollow and others) v Surrey County Council [2019] EWHC 618 (Admin)

There was nothing unlawful about the decision by Surrey council to set a budget which provided for significant savings in expenditure on SEND services. The savings were not set in stone and the council could not know what the impact of cuts might be or consult upon them as at the time the decision was taken, no cuts had been decided upon.

Case overview

Five children, acting through their mothers as litigation friends, challenged the decision by Surrey County Council to set a budget for schools and SEND services ('SSEND') for the 2018-19 financial year which provided for savings of just over £21 million from the previous financial year. The particular focus of the claim was on a budget item described as "areas of focus" in relation to inclusion, commissioning, provision and transition, the relevant saving totalling £11,694,000.

The grounds of challenge were alleged failures to consult, breach of the public sector equality duty (PSED) in section 149 of the Equality Act 2010, breach of the duty in relation to children's welfare in section 11 of the Children Act 2004, breach of the 'sufficiency' duty in section 27(2) of the Children and Families Act 2014 and irrationality at common law. The claimants sought declarations of unlawfulness and an order quashing the SSEND budget allocation.

The focus of the hearing was on alleged failures to comply with the statutory and common law duties to consult, and on whether it was irrational for the council to set a budget without knowing precisely how the savings would be made or what the likely impact of making them might be.

Prior to the hearing, the council filed evidence which confirmed that no changes to SEND services would be made during the 2018-19 financial year. As a result the council was likely to have to carry forward a significant overspend in the SSEND budget.

The council's case was that the budget was not set in stone. It had merely identified areas of spending upon which it proposed to concentrate as areas in which savings could be made. As such the council could not know what the impact of cuts might be, or consult on them, because at the time of the budget decision no cuts had been decided upon or worked out.

The Court accepted the council's case. The decision under challenge was a decision to include for budgetary planning purposes areas of focus in which work could be done to identify ways of reducing the cost of SEND services. As and when concrete proposals were developed to achieve the identified savings, if they would result in any variation to the services actually provided, the proposals would be consulted upon and assessed at that time.

The Court identified the following key points:

1. The council was not under a statutory obligation to produce a budget
2. The savings identified in the budget were not specific or concrete proposals to make actual cuts or alter services.
3. Nothing in the budget compelled any particular decision or bound the Cabinet.
4. The budget did not represent a finite pot of money with a cap on spending, but a 'spending envelope' with flexibility to overspend.
5. The evidence did not support the proposition that the Cabinet failed to consider the specific factors identified by the claimants.
6. The sum identified in the budget was the difference between the funding available and the costs of provision.

In this context, the Court found first that there had been no duty to consult before the council set the budget. The common law did not impose such a duty, and the previous decision in *KE v Bristol* was distinguishable on its facts or alternatively should not be followed.

The council had complied with the PSED, taking into account the stage that the decision-making had reached. The PSED did not imply any duty to consult, because it was not irrational for the council to conclude that it had sufficient information to pay 'due regard' to the specified needs.

The report to Cabinet had drawn attention to the section 11 welfare duty. The Cabinet was told that it was not possible to identify the impacts of the areas of focus and it was aware that the impacts could be positive and negative. In the circumstances this was appropriate and all that was required.

Finally, there was no breach of the sufficiency duty in section 27(2) of the Children and Families Act 2014, or of the duty to consult in section 27(3). Section 27 is concerned with consideration at a strategic level of the global provision for SEN made by a local authority, or which is accessed by children for whom it is responsible. It imposed a duty on local authorities, which arises from time to time, to consult at reasonable intervals those identified in section 27(3) in order to keep provision under review, in which connection local authorities must consider the extent to which the provision referred to is sufficient to meet the educational needs, training needs and social care needs of the children and young people concerned. The Court held that the different interpretation of section 27 in *DAT v West Berkshire* and *KE v Bristol* was wrong and declined to follow those cases.

What this means for children, young people and families

Perhaps the most important aspect of the Surrey judgment for children, young people and families is the clear finding from the Court that Surrey's budget was

not set in stone. Following this judgment, it may be difficult for local authorities to argue that any particular cuts have to be made to any specific SEND services just because the budget has been set at a particular level, at least unless this was made clear at the time the budget was set. There is also a strong expectation from the Surrey judgment that at the time local authorities propose to make specific savings they should consult with families and comply with all relevant duties.

On the other hand, following *Hollow v Surrey* families will find it much more difficult to challenge the way in which local authority budgets are set, including any failure to consult. Local authorities may still choose to consult before setting budgets, but are unlikely to be required to do so as a matter of law – unless unlike in Surrey the budget is in fact in some way set in stone, i.e. (as in *DAT v West Berkshire* and *KE v Bristol*) services will definitely be negatively affected by the budget decision.

Implications for local authorities and other public bodies

Local authorities which adopt the same position as Surrey on the flexibilities inherent in their budgets will be reassured that they are unlikely to be expected to consult prior to setting their budget or undertake any detailed assessment of the likely implications of potential savings. On the other hand if local authorities treat their budgets less flexibly than Surrey, such that potential claimants can say that any funding cuts are set in stone, the Court may expect a different and more rigorous approach to prior consultation and impact analysis. Moreover local authorities will note the expectation which runs through the Surrey judgment that consultation and compliance with the relevant statutory duties will take place before decisions are made which actually impact on services for children and young people with SEND.

Local authorities will also want to note the way in which the Court in Surrey has interpreted the section 27 duty, in essence to require high level reviews of SEND provision at appropriate intervals with the requisite consultation. Local authorities which have not carried out any such review since the Children and Families Act came into force may wish to take advice on whether such a review ought now take place.

Finally, local authorities may want to take into account the fact that there are now competing first instance decisions on some of the issues which were in play in the Surrey case, and as such the law in this area may not be finally settled until one case reaches the Court of Appeal, or potentially the Supreme Court. As such it would be particularly prudent for local authorities to take specific advice on the legal requirements around changes to SEND budgets and services at this time. See further case law update 40 on the *Hackney* judgment, where the unsuccessful claimant families are seeking permission to appeal to the Court of Appeal.