CDC case law update 40 – 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 (AD and others) v London Borough of Hackney [2019] EWHC 943 (Admin)

Two policies adopted by a London borough in relation to the provision of support for children with SEND were lawful. The council was entitled to use 'Resource Levels' to allocate additional funding to mainstream schools, and a 5% reduction in the value of each level was made lawfully. There was also nothing unlawful about the format adopted by the council for its EHC Plans.

Case overview

A group of families of children attending mainstream schools challenged two policies adopted by Hackney council in relation to the provision required to meet their additional needs. The first policy, referred to as the "Resource Levels policy", governs the way the council funds schools to deliver the special educational provision in children's EHC Plans. The council distributes the additional "top-up" element of this funding through five banded resource levels rather than by reference to the individualised cost of the provision specified in EHC Plans. The families also challenged the decision to reduce the value of the Resource Levels by 5% for the 2018-19 financial year. This represented a funding reduction of between £249 and £833 for a pupil over the course of a year. The second policy, referred to as "the Plan Format policy", concerned the format of Hackney's EHC Plans, which the families contended unlawfully referenced the provision in section F to the outcomes in section E, rather than the needs in section B.

On the Resource Levels policy, the council's evidence was that it was possible for additional funding above level 5 to be made available in exceptional cases to children who require it. The Council's evidence recognised the obligation to fund whatever provision is required to meet a child's needs as assessed in the EHCP. The council's witness also confirmed that a child could move to a higher band or could have individual items of provision funded separately from the Resource Level funding if this was thought appropriate.

On the 5% reduction, the council's view was that it was possible for Hackney's schools to absorb a funding reduction at this level without reducing or putting at risk the special educational provision of individual children. Because the 'element 2' funding remained unchanged, the overall funding reduction for each child was not 5% but between 2.3-3.7%. The Court also had evidence from one Hackney head teacher, who stated that 'Our funding is already stretched to the maximum level and we cannot simply 'absorb' these reductions'.

The Court rejected all the families' grounds of challenges to both policies. In relation to the Resource Levels policy, the Court held that the policy was not inconsistent with the duty in section 42 of the Children and Families Act 2014 to 'secure' the specified special educational provision in each child's EHC Plan. The Court held that none of the claimants could demonstrate that there had been a failure to secure provision in his or her case because of the Resource Levels policy. The Court was satisfied that the council's evidence demonstrated that the Resource Levels policy did not lead to the underfunding of SEN provision. There were flexibilities in the way schools delivered provision and managed their budgets. There were also flexibilities in the way in which the Resource Levels policy operated. There was nothing inherent in the policy that gave rise to an unacceptable risk of unlawful decision making or unfairness and there were realistic methods by which the policy could be lawfully implemented. The head teacher's evidence not demonstrate that any individual child did not receive proper SEND provision due to the 5% reduction.

The Court further held that the evidence amply demonstrated that the council did consider children's welfare when adopting the Resource Levels policy and making the 5% reduction. The council in adopting or maintaining the policy plainly focussed on determining the appropriate arrangements for SEN provision for children, and thus the Council properly focussed on the arrangements for promoting the welfare of children. Where the decision was in itself about children's welfare, there was no additional duty to explain how children's welfare was taken into account, above and beyond explaining why needs will be met.

Similarly there was no breach of the PSED (public sector equality duty – section 149 of the Equality Act 2010). The required regard to the relevant needs was present throughout the council's decision making because it was the very matter that the council's decision making was addressing. The council's policy of meeting all of the identified needs of SEN children was specifically targeted at removing the disadvantages such children might otherwise suffer if their needs were unmet.

There was no requirement for the council to consult with families prior to implementing the 5% reduction. On the duty in section 27 of the Children and Families Act 2014, the Court adopted the approach of the Divisional Court in *Hollow v Surrey* (see case law update 39), which meant that the duty to consult under section 27(3) did not arise in this case. Nor was there any duty to consider sufficiency of provision under section 27 in relation to this decision. There was no 'duty of inquiry' under the PSED to consult families on what was a technical issue of funding levels. Nor did the common law impose a duty to consult in these circumstances.

Finally on the Resource Levels policy and the 5% reduction, there was no failure by the council to promote the policy and objects of the legislation (the 'Padfield' principle).

In relation to the Plan Format policy, the Court noted the council's offer to separate out sections E and F of children's plans. The Court held that the council's format was not inconsistent with the statutory scheme. So long as the sections were separately identified, how they were presented was a matter for the local authority. The Code of Practice did not prescribe a particular format for

EHC Plans. The Court did not accept that Hackney's format conflated sections E and F, and held that the council was not prevented from adopting a plan format that has outcomes and provision next to each other on the page.

Furthermore in adopting the new plan format the council had complied with the duties to consider children's welfare and to have due regard to the needs specified in the PSED.

What this means for children, young people and families

Families should note that nothing in the *Hackney* judgment undermines two fundamental principles of SEN law:

1. Local authorities must secure all the specified provision in section F of every child and young person's EHC Plan.
2. Provision must be specified in section F of every EHC Plan to meet all the needs identified section B.

The Court found that Hackney's policies were consistent with these duties. This does not necessarily mean that the policies of other local authorities will be lawful; each case will turn on its own facts.

Implications for local authorities and other public bodies

The *Hackney* judgment establishes that:

1. Local authorities can use banded funding models to allocate funding to schools in order to 'secure' provision in children's EHC Plans, so long as there is no evidence that provision is not in fact being 'secured'.
2. Local authorities have significant discretion as to the format they use for EHC Plans, so long as each section is separately identified and the requirements of the SEND Regulations 2014 and the Code of Practice are met.

Local authorities will also note the limited requirements for specific regard to the matters specified in the welfare duty and the PSED where, as in *Hackney*, the relevant decisions are 'all about' the relevant group (i.e. children with SEND). Furthermore the Court in *Hackney* followed the approach of the Divisional Court in *Surrey* to the duty in section 27 of the CFA 2014; see case law update 39 for analysis of the implications of this approach for local authorities.

Local authorities should note however that the claimants in Hackney have sought permission to appeal on the grounds concerning the Resource Levels policy and the 5% reduction. The application for permission to appeal has not been determined at the time this case law update is published. As such it remains possible (as at April 2019) that the Court of Appeal will take a different approach to the lawfulness of Hackney's policies in relation to 'top up' funding, including on whether Hackney complied with the relevant 'regard' duties.