CDC case law update – March 2020

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.

Nottinghamshire CC v SF [2020] EWCA Civ 226

The Court of Appeal upheld the decision of a First-tier Tribunal that it was 'necessary' for a local authority to make an EHC Plan for a child with autism. The word 'necessary' does not have a fixed meaning and the judgment on it is to be made by the specialist Tribunal. The comparison is with national mainstream education, not local provision.

Case overview

This appeal by a local authority was the first time that the Court of Appeal had been asked to consider the test of whether it is 'necessary' for an EHC Plan (or its predecessor Statements) to be made and maintained.

The appeal concerned a seven year old boy with autism whose parents appealed against the refusal of their request for an EHC Plan by their local authority. It was agreed that the child's mainstream primary school had successfully identified his needs and was meeting them and that the child was making progress at school. The First-tier Tribunal ('FtT') found that the school was consistently monitoring and adapting their provision to meet his needs. It also found that the child had begun to demonstrate anxiety at school and that 'provision will need to be adapted as he develops and matures'.

The FtT allowed the parents appeal, ordering the local authority to make and maintain an EHC Plan for the child. The FtT found that 'the level and quality of provision currently made by [the school] for [HD] is unlikely to be replicated in other local authority area mainstream schools, and would require an EHC plan to ensure its delivery and monitoring… his provision will require constant monitoring and adapting to manage his anxieties and to develop his skills and for these reasons we have concluded that it is necessary for the LA to make and maintain an EHC plan for him.'

The Upper Tribunal ('UT') held that the FtT had correctly construed and applied the relevant statutory provision (section 37 of the Children and Families Act 2014) and was entitled to conclude that an EHC Plan was necessary. The UT emphasised that under section 21 of the 2014 Act, Parliament had changed the comparator so that it was necessary to consider provision which is additional to or different from that made generally for others of the same age in mainstream schools in England (rather than within the local authority's own area, as previously). The UT concluded that the FtT was entitled to hold that 'notwithstanding the extensive educational provision Nottinghamshire was providing to HD and his 'progress', this was not educational

provision that would be made generally for children of HD's age in mainstream schools in England, and for this reason it was 'necessary' for an EHC Plan to be made for him'.

The Court of Appeal agreed with the Tribunals below. The Senior President of Tribunals held that 'Necessary is a word in common use and its plain meaning has caused no difficulty in the tribunal. The function of the FtT in these cases is to find facts and to exercise an evaluative judgment by using its specialist expertise about whether an EHC plan is necessary.' The Senior President also emphasised that 'An EHC plan is necessarily prospective and to that extent a prediction based on the skill and expertise of the decision maker'. As the FtT had cited the relevant legislation and case law, made findings of fact and used its specialist experience to come to the conclusion that in HD's case there was sufficient reason for an EHC plan to be necessary, there was no basis for the Court of Appeal to interfere. The local authority's appeal was therefore dismissed.

In the appeal, the local authority relied on para 9.55 of the SEND Code of Practice, which focusses on the question of whether "despite appropriate assessment and provision, the child or young person is not progressing, or not progressing sufficiently well". However the Court of Appeal emphasised that 'The wording of the statutory scheme encompasses both the circumstances suggested by the local authority (for example in their reliance on the Code of Practice) and those suggested by the parents and no doubt other circumstances that may arise out of different fact specific contexts.' In the UT decision which the Court of Appeal approved, Judge Wright stated that 'The fact that [his] analysis may appear contrary to the guidance in the Code of Practice is neither here nor there (it is only guidance, and the tribunal had regards to it)…'.

What this means for children, young people and families

The Court of Appeal's decision emphasises that the test for whether an EHC Plan should be made and maintained is simply whether it is 'necessary', and in addressing that test those responsible should look forward, not simply at the current situation. Furthermore the comparator to be drawn is with the provision generally available in mainstream schools nationwide – so that the same decision should be made as to whether a child or young person needs an EHC Plan in every local area, as the quality of local provision is irrelevant.

Importantly, the Court of Appeal emphasised that 'children with an EHC plan are owed an absolute duty by the Local authority to make the provision specified in the EHC plan. Resource constraints are irrelevant once special educational provision has been identified in the EHC plan.' Parent and young people who are concerned that the provision set out in their EHC Plan is not being made can seek advice from their local SENDIASS service, from advice charities such as IPSEA or SOS!SEN or from a specialist solicitor.

Families will also note that the Court of Appeal and Upper Tribunal both emphasised that what matters most is the statutory test in the legislation, not the guidance on that test which may be given in the Code of Practice.

Implications for local authorities and other public bodies

Local authorities will no doubt take particular notice of the clear message from the Court of Appeal that the comparison the Tribunal must draw is between the special educational provision that the particular child or young person requires and provision made generally in mainstream schools in England. It is to be hoped that this does not act as a disincentive to local authorities to invest in local provision, as the only lawful way to limit the number of EHC Plans made and maintained by a local authority is to reduce demand by parents and young people on the basis that they are satisfied with locally available provision.

Local authorities will also need to ensure that they take account of the full range of factors as to why an EHC Plan is said to be necessary in a particular case, not simply limiting themselves to the factors set out in the SEND Code of Practice or otherwise.