

CDC case law update – October 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.

R (Drexler) v Leicestershire County Council [2020] EWCA Civ 502

The Court of Appeal upheld the decision of the High Court to reject a challenge to Leicestershire County Council's decision to withdraw the provision of school minibuses transport for most 16 to 18-year olds with SEND.

Case Overview

The appeal concerned a young disabled person, Kirstine Drexler, who attends a school for pupils with special educational needs 13 miles from her home (a roughly 30 to 45 minute journey by car each way). Prior to Leicestershire County Council ('LCC') changing its policy, Kirstine's transport to school was provided by minibus alongside other children and young people.

Local authorities' responsibilities around school transportation is a complicated area, with different requirements for different age groups. In short, while local authorities are legally required to provide school transportation to many students with SEN aged 5-15, they are not required to do the same for 16 and 17 year olds. This is despite the fact that 16 and 17 year olds are now required to participate in education and training. While local authorities can choose to provide school transportation to students in this age cohort, they are not obliged to do so.

In the ongoing context of austerity, it is unsurprising that local authorities have looked to make cuts in areas of discretionary spending such as post 16 transport. On 9 March 2018, LCC decided to amend their school transportation policy, so that pupils aged 16 to 18 with special educational needs ('SEN') would no longer be provided with minibus transport. Instead, LCC would provide parents with a cash payment known as a Personal Transport Budget ('PTB'), with which parents would organise their own transport arrangements. For most children and young people affected by the policy, the PTB would not be sufficient to fully meet the actual annual cost of transport. In Kirstine's case, this would require her father to spend up to three hours per day taking his daughter to and from school, reducing the time he gets a break from being Kirstine's primary carer.

Following LCC's decision to adopt its new policy, the Drexler family issued judicial review proceedings in the High Court. Among other grounds, they alleged that the revised policy unlawfully discriminated on grounds of age between children and young people with SEN aged 16-18 (such as Kirstine), and pupils with SEN who are aged 5 to 16. They alleged that this contravened Article 14 of the European Convention on Human Rights ('ECHR'), which prohibits discrimination in the enjoyment of human rights such as the right to education, read

with both the right to education in Article 2 of the First Protocol to the ECHR and the rights to respect for family and private life in Article 8 ECHR.

In the High Court, Mr Justice Swift agreed that LCC's policy treated pupils aged 5 to 16 more favourably than those aged 16 to 18. He held, however, that this did not constitute unlawful discrimination, because the change in policy struck a fair balance between the rights of 16 to 18 year old students with SEN and the general public interest to reduce public expenditure.

In the Court of Appeal, the Drexler family contended that Swift J was wrong to find that the difference in treatment was justified. The Court of Appeal rejected this appeal. Giving judgment, Lord Justice Singh emphasised that the courts should be slow to intervene when the relevant government decision concerned 'the allocation of scarce resources' [71]. In such a context, Singh LJ reasoned, the court should afford the government a greater margin of appreciation, given that decisions of this kind involved 'difficult choices' [79] about how best to spend limited public money.

Singh LJ placed emphasis on the validity of LCC applying their policy in line with the (above discussed) distinction made in legislation between children with SEN aged 5 to 15, for whom school transport must be provided if the child is an 'eligible child', and those aged between 16 and 18 for whom the local authority is not obliged to provide transport. Singh LJ also pointed to the provision in LCC's policy to make exceptions to the system of PTBs in cases of real need, as well as to the availability of appeals to challenge decisions to move individual students onto a PTB.

Given that Kirstine's case concerned a decision regarding how to allocate resources, and involved differential treatment based on age (which is not a 'suspect ground' where particular scrutiny is given by the court), Singh LJ held that Swift J had not erred in applying the 'manifestly without reasonable foundation' test. Applying this test, Singh LJ upheld Swift J's determination that the policy was not unlawful under Article 14 ECHR. Even if this was incorrect, Singh LJ reasoned, LCC's decision would still have been justified applying an conventional proportionality test, given the 'appropriate weight and respect' which courts should afford in contexts concerning the allocation of finite resources by public authorities.

At the time of writing, an application made by the Drexler family to appeal the decision of the Court of Appeal to the Supreme Court remained pending.

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

Families with older children with SEND who need school transport from their local authority will understandably be concerned by this judgment. Other local authorities may seek to use the precedent established by *Drexler* to reduce provision of school transport to the 16 to 18 cohort on the grounds of reducing public expenditure, which could result in additional burdens being placed on parents of children with SEN.

Families can take some comfort, however, in the fact that – despite the gap in the law regarding obligatory provision of school transportation for students with SEN aged 16 and 17 – LCC did not completely remove provision. This indicates that local authorities recognise that the courts will only be willing to go so far in accepting different treatment between

students with SEN aged 16 and 17 and those aged 5 to 15. Families should also note the importance given by the Court to safeguards such as the appeals process in LCC's policy.

More broadly, following *Drexler* families will find it more difficult to challenge local authority spending decisions in discretionary areas. The Court of Appeal has made it clear that the courts should be hesitant to intervene in these contexts, instead giving considerable scope to local authorities' political judgment as to how to best use their limited funds.

Implications for local authorities and other public bodies

Local authorities which choose to take the same approach as Leicestershire towards school transportation for 16 to 18 year olds with SEN will be reassured that the courts will be unlikely to intervene. Local authorities will want to recognise, however, the emphasis placed by Singh LJ on the importance of a mechanism for making exceptions to such a policy, as well as a provision for appeals. A local authority introducing a school transportation policy without such provisions can expect to receive a less sympathetic hearing from the courts.

Local authorities will also take note of the firm distinction drawn in statute between children under 16, who are of compulsory school age, and those above 16. While Parliament has obliged local authorities to provide school transportation for those of compulsory school age who meet the definition of 'eligible' children, it has not done so for those aged 16 to 18. The court has emphasised that it is appropriate for local authorities to have regard to this distinction when considering differential provision of services locally.