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.

Derbyshire CC v EM and DM [2019] UKUT 240 (AAC)

The Upper Tribunal held that there was no absolute requirement that all EHC plans must specify a school or other institution in Section I. The naming duty does not arise if the local authority considers that no school or other institution would be appropriate for the child.

Case Overview

This case concerned the SEN provision for two disabled sisters. Specifically, the issue was whether it was necessary for Section I of their EHC plans to name a school or other institution (or type of school or other institution) even though the local authority had determined that it would not be appropriate for the girls to receive their SEN provision in any school or other institutional setting at the relevant time.

The First-Tier Tribunal concluded that there was no such requirement, and that it was appropriate to leave Section I of the EHC Plans blank because the sisters would not be attending a school or other institution. Where a child needed to receive their SEN provision otherwise than at a school (such as through home schooling)[1], the tribunal determined that this provision should be recorded in Section F of the EHC Plan (which covers what special educational provision the child requires) rather than in Section I. Given that the tribunal was satisfied that neither girl could appropriately receive their SEN provision at a school or other institution, Section I was left blank.

The Upper Tribunal upheld the First-Tier Tribunal's ruling, departing from a previous Upper Tribunal decision (*M & M v West Sussex County Council (SEN)* [2018] UKUT 347 (AAC)) in so doing. The Upper Tribunal observed that Section I of the EHC Plan required local authorities to name a school or other institution which it thought 'would be appropriate'. If the local authority did not consider any school or other institution to be appropriate, the Upper Tribunal reasoned that it would be 'absurd' for the local authority to nonetheless be required to name one in Section I of an EHC Plan. Accordingly, the Upper Tribunal determined that in such a circumstance there was

[1] Section 61 of the Children and Families Act 2014 provides: 'A local authority in England may arrange for any special educational provision that it has decided is necessary for a child …for whom it is responsible to be made otherwise than in a school …. (2) An authority may do so only if satisfied that it would be inappropriate for the provision to be made in a school ….

no obligation for a local authority to name a school or other institution in Section I and section I should therefore be left blank.

The Upper Tribunal also followed the decision in *East Sussex CC v TW* [2016] UKUT 528 (AAC), where it was held that 'education otherwise than at school' (for example, the child's home), cannot be named in section I of an EHC Plan.

Importantly, the Upper Tribunal emphasised the need to read Part 3 of the Children and Families Act 2014 – which governs the provision of education to children with special educational needs or disabilities – as 'a unified code'. Where a local authority has determined that it would not be appropriate for a child to receive their SEN provision in a school or other institution, under the Act this would by necessity require arrangements to be made for provision outside of a school or other institution setting. This means that in no circumstances should a child be able to slip between the different schemes for SEN provision within a school or other institution, and SEN provision other than in a school or institution.

What this means for children, young people and families

This is a helpful judgment which will be welcomed by families with children for whom SEN provision within a school or other institution would not be suitable. It is likely to reduce the anxiety of parents, who might previously have seen a school named in Section I of their child's EHC Plan despite it not being appropriate and there being no expectation that the child would actually attend there.

Parents hoping that a child currently being educated otherwise than at school will be able to later transition into a school setting should not be alarmed by this judgment. The system of annual reviews for EHC Plans means that a plan which leaves section I blank can (and indeed must) later be amended if a change in circumstances led to a school or other institution becoming a suitable option for a child.

Implications for local authorities and other public bodies

Local authorities will welcome the clarification given by this decision. Where, having carried out a full and properly conducted EHC needs assessment, a local authority determines that making special educational provision for a child within a school or other institution would not be appropriate, they are not required to name a school or other institution in Section I of that child's EHC plan. The same principles of course apply in relation to young people and colleges.

Local authorities must ensure, however, that Section I of an EHC Plan is left blank only when it would genuinely be inappropriate for a child's SEN provision to be made within a school or other institution. In short, the *potential* for Section I to remain blank must not mean that this occurs in circumstances when a child's SEN provision *could* appropriately be provided within a school or other institution. Importantly, section 61

of the Act requires that provision must be made in a school unless this would be ‘inappropriate’.