

## CDC case law update 8 – March 2016



*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. Where legal issues arise specialist legal advice should be taken in relation to the particular case.*

*Hammersmith and Fulham v L and F and others [2015] UKUT 0523 (AAC)*

### Case overview

In these joined cases the Upper Tribunal considered the proper approach to the assessment of relative placement costs for maintained and independent schools.

However the Upper Tribunal emphasised that there is a different test under the section 39 of the Children and Families Act 2014 to the test in section 9 of the Education Act 1996, with which the Upper Tribunal was concerned. As such advice will need to be sought as to the ongoing relevance of this decision in Tribunal appeals involving non-maintained special schools and independent special schools on the Secretary of State's approved list.

The Upper Tribunal stated the problem as follows: 'From the perspective of the Upper Tribunal, during 2014 the outcome of special educational needs (SEN) appeals in England, where parents sought independent schooling, started to resemble a lottery. This was certainly not due to lack of care on the part of the First-tier Tribunal. The problem was that different tribunals took very different approaches to quantifying the costs of rival schools (maintained and independent).'

The Upper Tribunal held that where a local authority is putting forward a maintained special school or a specialist unit in a maintained school, 'its place funding is not to be treated as an additional cost'. However 'local authority 'top-up' funding for the child's placement is an additional cost to be taken into account'.

If the local authority is putting forward a maintained mainstream school without reserved places, the 'Age Weighted Pupil Unit' normally represents an additional cost for that school. Any additional funding to meet the child's needs at the school should also be taken into account.

The consequence of the Upper Tribunal's decision is that parents may find it harder to succeed on an appeal to the Tribunal on grounds of relative placement cost, particularly if the same approach is adopted to the test under section 39 of the Children and Families Act 2014. In those cases parents may need to show that the local authority's preferred school cannot meet the child's needs for their appeal to succeed in relation to placement.

The Upper Tribunal also emphasised the importance of ensuring that Tribunal hearings are held in venues where children are able to participate, if they wish to do so. The decision states 'it is potentially an error of law for the First-tier Tribunal to list cases in venues that preclude the participation of a child who wishes to participate

although I recognise we do not live in a perfect world and countervailing considerations may apply in some cases.'