

CDC case law update – January 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. Where legal issues arise specialist legal advice should be taken in relation to the particular case.



R (S) v LB Camden [2018] EWHC 3354 (Admin)

The High Court quashed a local authority's decision to issue an amended EHC Plan and declared that the local authority was in breach of its duty to secure the special educational provision specified in the previous plan, being an ABA programme.

Case overview

This claim for judicial review was brought by a seven year old boy with autism, 'S', whose father acted as his 'litigation friend' to manage the claim. The claim concerned a dispute in relation to an Applied Behaviour Analysis ('ABA') programme, which the parents successfully obtained an order for in the First-tier Tribunal ('FTT') after an appeal against the EHC plan issued by the local authority.

After the decision of the FTT, which directed the inclusion of the ABA programme in section F of the EHC Plan, the local authority sent out a revised plan which duly specified ABA. The local authority did not seek to appeal the FTT decision or have it reviewed. However the local authority did seek to proceed with finalising an earlier draft plan issued prior to the FTT hearing which did not include any ABA provision.

Judicial review proceedings were therefore issued challenging the local authority's failure to comply with the duty to secure the educational provision set out in the plan amended in the light of the FTT decision. The family also challenged the decision to amend the EHC plan through finalising the draft plan which did not mention ABA.

The High Court held that the EHC plan including ABA which was revised following the FTT decision was intended to become effective on being signed and dated by the local authority. As such the local authority were in ongoing breach of the duty to secure the ABA provision in the plan, pursuant to section 42 of the Children and Families Act 2014.

Furthermore although the local authority was entitled to start the process of amending an EHC plan at any time, for the power to be used lawfully and rationally there had to be a legitimate trigger for it. This could include further evidence or some other change of circumstances. The fact that the amendment was made so soon after the FTT decision was not sufficient to quash that plan. However the plan issued after the FTT decision superceded the previous draft plan, which then ceased to have effect. As it was not possible to amend a plan which had ceased to have any effect, there was no power to issue a final amended plan which came from that draft plan.

Furthermore the local authority failed to consult with parents in finalising its draft plan without reference to ABA. The local authority's actions were contrary to the whole tenor and wording of the statutory provisions and Code of Practice. Even if the local authority could have continued with its earlier process, it could not ignore the fundamental change to the plan ordered by the FTT in relation to ABA. The local authority failed to consult in such a fundamental way that the plan was unlawful and liable to be quashed.

The local authority's arguments that the errors would not have made a material difference and that a further FTT appeal would be an alternative remedy were both rejected by the Judge.

S was therefore entitled to a declaration that the decision to issue the amended EHC plan without ABA was unlawful, and an order quashing that plan. S was also entitled to a declaration that Camden was in breach of its obligation to secure the special educational provision specified in the plan issued following the FTT decision. Finally, the local authority was ordered to fund 30 hours of ABA provision for S at home until the local authority properly amended his EHC plan.

What this means for children, young people and families

The judgment emphasises that a principle value of EHC plans for families is the guarantee of the special educational (and health) provision specified in the plan. While the plan remains in force, the child or young person is entitled to receive the specified provision at all times. It is only where a local authority properly amends the plan in accordance with the legislation and Code of Practice that the provision made can be changed in accordance with any amendment. In that situation the family will have a further right of appeal to the FTT which can order the local authority to continue to maintain the plan in the previous form if the evidence supports this. Families also have an important right to be consulted in the amendment process.

Implications for local authorities and other public bodies

Local authorities are reminded by this judgment that the duty to secure the special educational provision in a child or young person's EHC plan cannot be avoided, as the local authority sought to do here. The local authority will be required to issue a plan in the form ordered by the FTT and then amend that plan in accordance with the statutory scheme if it considers amendment necessary. Furthermore a process of amending an EHC plan will be unlawful if the family are not properly consulted and involved.