CDC case law update 12 – September 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.

R (DAT and BNM) v West Berkshire Council **[2016] EWHC 1876 (Admin)**

Case overview

This case was a successful judicial review challenge to a local authority's decision to reduce funding for short breaks provided by voluntary sector organisations. The judgment shows the importance of local authorities taking into account all relevant statutory duties when making decisions to reduce funding for frontline services. As a result of this judgment the local authority will shortly reconsider the funding allocated to these short breaks for the remainder of 2016-17.

Decision

The claim was brought by two disabled children acting through their mothers as their 'litigation friends'. The issue for the court was whether the local authority had acted lawfully in deciding to make a significant reduction in the funding for short breaks provided by voluntary sector organisations. This decision was taken as part of setting the local authority's revenue budget for 2016-17. After the claimants obtained permission to apply for judicial review, the local authority took a second decision to 'reaffirm' the original decision. The Judge held that the intense financial and time pressures on the local authority were not relevant to the question of whether the decisions were lawful.

The original decision was unlawful for two reasons. Firstly, in their reports officers had misdirected Members as to the requirements of the 'public sector equality duty' (section 149 of the Equality Act 2010) in this context. Secondly, Members' attention was not drawn to the other relevant statutory duties, being:

1. Regulations 3 and 4 of the Breaks for Carers of Disabled Children Regulations 2011 ('the 2011 Regulations'), which flesh out the short breaks duty under the Children Act 1989.
2. Section 27(2) of the Children and Families Act 2014, which requires local authorities to consider the sufficiency of social care provision for disabled children and young people.

3. Section 11 of the Children Act 2004, which requires regard to the need to safeguard and promote the welfare of children in decisions affecting them.
4. The 'best value' duty in section 3 of the Local Government Act 1999 and the accompanying statutory guidance.

The second decision was unlawful because there was 'a very clear appearance of predetermination'. The Judge held that 'the way in which the issue was presented to members [for the second decision] gave a very clear impression that they were expected to apply a rubber stamp to [the original decision]'. As such although the reports for the second decision equipped members to take into account the factors relevant to a lawful decision their decision was 'materially affected by apparent predetermination'.

Two technical arguments by the local authority as to why 'relief' should be refused by the Court were dismissed. Firstly, the Judge rejected the local authority's reliance on the rule in section 31 of the Senior Courts Act 1981 that relief should be refused if it was highly likely that the outcome for the claimants would have been the same if the decision had been taken lawfully. When the original decision was taken a transitional funding grant had not yet been fully allocated. Although this had been allocated by the time of the second decision the local authority may still have had room to manoeuvre, whether by using reserves or making savings in other areas. The court also held that there was an exceptional public interest in ensuring that local authorities are seen to observe the relevant legal provisions when cutting spending in a way which affects vulnerable children. Secondly, there was no barrier to relief under section 66 of the Local Government Finance Act 1992 because the claimants were not challenging the overall revenue budget calculation.

Both decisions were therefore quashed, with the result that the local authority would reconsider the funding to be allocated to this area.

What this means for children, young people and families

Families with disabled children and local groups can use this judgment to help ensure that any proposed cuts to frontline services in their area are taken only after proper consideration of the relevant statutory duties. In particular, the 2011 Regulations and section 27 of the Children and Families Act 2014 require consideration by local authorities of whether services are 'sufficient' to meet the needs of families in their area. Families and local groups can also remind local authorities of the need for proper compliance with and understanding of the public sector equality duty, as set out in the judgment.

Families and local groups may want to ensure that this judgment is brought to the attention of the relevant Lead Member and Director in their area before decisions are made on budgets for 2017-18. Although these decisions will not be taken until early 2017, the process of setting the budgets for the next financial year is likely to have already begun.

Implications for local authorities and other public bodies

The judgment emphasises that local authorities and health bodies will need to demonstrate (if challenged) that proper consideration has been given to relevant statutory duties when budgets are set, particularly when funding is reduced for frontline services.

The judgment also emphasises the importance of ensuring that any summaries of legal duties provided to decision makers are accurate and take full account of the context of the decision.

Although ringfenced funding for short breaks has come to an end, local authorities will need to take account of all the relevant statutory duties mentioned in the judgment in deciding on what general funding to allocate to this area in each financial year.