

CDC case law update 18 – July 2017

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.

S v Worcestershire County Council (SEN) [2017] UKUT 0092 (AAC)

The Upper Tribunal gave guidance on issues including whether the First-tier Tribunal could order amendments to the outcomes section of EHC plans and how appeals in relation to independent schools should be approached.

Case overview

The Upper Tribunal ('UT') allowed an appeal by a young person against a decision of the First-tier Tribunal ('FTT') in relation to the young person's post 16 educational placement. The UT remitted the case for re-hearing by the FTT.

Decision

The appeal to the FTT was made by the young person on the basis that his EHC plan did not identify a post-16 educational placement. The young person sought an order naming B school, an independent school. In resisting the appeal the local authority relied on the availability of a maintained college placement, asserting that all the young person's special educational needs could properly be met there.

Permission to appeal was granted in relation to five grounds of appeal. Ground 1 was that the FTT had failed to have regard to the views, wishes and feelings of the young person, as required by section 19 of the Children and Families Act 2014. The UT rejected the local authority's case that section 19 did not apply to the FTT but held that the obligation had been discharged on the facts of the case. Offering general guidance, the UT stated that compliance by the FTT with its procedural rules including the overriding objective of dealing with cases fairly and justly would show compliance with this aspect of section 19.

The second ground of appeal related to whether the FTT had erred in finding that B school was not appropriate. The UT held that the FTT was entitled to look at the general educational provision offered by B School and conclude that it was too demanding for the young person.

The third and fourth grounds of appeal concerned the outcomes section of the EHC plan and the Tribunal's failure to bring the plan up to date generally. The UT reached the important conclusion that the FTT has the power to modify the outcomes section of EHC Plans under regulation 43(2)(f) of the SEN and Disability Regulations 2014, which allows for 'consequential amendments' to be made where an FTT orders amendments to special educational needs and / or provision. In this regard the UT noted that 'The outcomes are a function of the special educational provision. They describe what the provision is designed to achieve'. The UT stated that it would be 'absurd' if an FTT was 'unable to alter outcomes that no longer related to the provision or needs determined by the Tribunal'. The FTT in this case erred by failing to consider whether its decision required amendments to the plan to make it 'workable and up-to-date'.

The fifth ground of appeal relied on the error by the FTT in directing itself to section 39 of the Children and Families Act 2014, which establishes a qualified duty for local authorities to name a school or institution put forward by the parent or young person. Section 39 did not apply in this case because the independent school sought by the young person was not approved by the Secretary of State under section 41 of the 2014 Act. The duty on the local authority (and FTT) was therefore to name the school or institution or type of school or institution considered 'appropriate', see section 40(2). Section 9 of the Education Act 1996, concerning the education of pupils in accordance with their parents' wishes, may also continue to apply.

What this means for children, young people and families

The wider importance of this decision by the UT lies in the clear finding as to the breadth of the FTT's powers to amend an EHC plan on a successful appeal. In particular parents and young people should now be able to obtain amendments to the outcomes section of plans where these are necessary to reflect the needs and / or provision ordered by the FTT. This is particularly important given the fact that local authorities must have regard to whether the educational or training outcomes specified in a plan have been achieved in deciding whether to cease a plan for a 19-25 year old. Parents and young people therefore have the opportunity as a result of this decision to ask the FTT to ensure that the outcomes sections of plans are properly robust and relevant to the needs and provision identified by the FTT. However there remains no direct right of appeal in relation to the outcomes sections of plans, so that it seems that amendments to outcomes sections can only be ordered by the FTT to the extent necessary to ensure that the outcomes relate to the needs and provision sections as ordered by the FTT.

There is also an important reminder for parents and young people that independent schools which are not approved by the Secretary of State are treated differently within the EHC planning process and may be harder to obtain through an appeal to the Tribunal than those schools and institutions which fall within the scope of section 39.

Implications for local authorities and other public bodies

Local authorities must now take account of the fact that in practical terms, the outcomes sections of EHC plans now fall within the scope of appeals to the FTT. Local authorities may therefore need to work with parents and young people and their representatives to seek to agree alternative and / or additional wording for the outcomes section of a plan in the event that an appeal in relation to special educational needs and provision succeeds. Local authorities will also need to assist the FTT to ensure that the relevant statutory provision governing placement is identified in every appeal.