11KBW

SEN case law update

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Cases

(1) *Essex CC v DH* [2016] UKUT 0463 (AAC)
(2) *S-G v Denbighshire CC* [2016] UKUT 460 (AAC)
(3) *JC v Bromley LBC* [2016] UKUT 388 (AAC)
(4) *JG v Kent CC* [2016] EWHC 1102 (Admin)
(5) *UA v LB Haringey* [2016] UKUT 87 (AAC)
(6) *Staffs CC v JM* [2016] UKUT 0246 (AAC)
(7) *Herts CC v MC & KC* [2016] UKUT 385 (AAC)
(8) *JD v South Tyneside* [2016] UKUT 9 (AAC)
(9) *SC & MS v Worcs CC* [2016] UKUT 0267 (AAC)

(1) *Essex CC v DH*

- LA issued statement, parents appealed seeking residential provision in part 4 and were successful before FTT
- LA appealed to UT but in meantime held annual review following which statement was amended but still naming residential provision
- UT found error of law in FTT decision but granted no remedy – why?

(1) *Essex CC v DH*

This would “have effect of allowing LA to appeal against its own decision”. Distinction between:

- s.326(1)(a) - right to appeal against statement when first made
- s.326(1)(b) - right to appeal against statement when amended

“If that is what the council considered was the correct position on the evidence then that is what it should have decided. Indeed, if it did not consider that J needed a residential placement then it may be that it acted unlawfully in making the annual review decision it did. No doubt a properly reasoned out decision of the First-tier Tribunal, one way or the other, may have influenced any subsequent review decision made by the council, as it would not be in its interests to have each review decision unnecessarily appealed.”

(2) *S-G v Denbighshire CC*

"Where there are opposing operative parental preferences for maintained schools, I have held that Schedule 27 does not require both schools to be named. In those circumstances, *Richardson [v Solihull [*1998] ELR 319]] permits a local authority or tribunal to name a type of school rather than a specific school. In fact, this may provide a solution of sorts in difficult cases such as this where parents with opposing preferences, that would otherwise result in the preferred maintained school being named in a statement of SEN, cannot come to an agreement. It may be open to a tribunal to specify a type of school and thereby avoid becoming unduly enmeshed in a fraught parental dispute as to which school a child should attend. If parents still cannot agree, the family court may need to have the final say but at least it will be assisted by an expert tribunal's identification of the characteristics required of a school in order for it to provide a suitable education for the child."

(3) *JC v Bromley LBC*

- School had residential accommodation nearby which appeared to be part of the school but was legally distinct (children's home)

- Section 517 did not permit FTT to name that residential provision in statement as it was not 'at' the school

(4) *JG v Kent CC*

How and when has a person has ‘moved’ to the area of another local authority so that the statement or EHC plan transfers to the new local authority?

- Reg 23 of the Education (Special Educational Needs) (England) (Consolidation) Regulations 2001 (SI 2001/3455)
- EHC equivalent is reg 15 of the Special Educational Needs and Disability Regulations 2014 (SI 2014/1530)
- Not worded identically but sufficiently similar

(4) *JG v Kent CC*

LA argument that responsibility transfers where a child moves to another area 'for any appreciable time', whether or not for a settled purpose rejected:

- LA decision a child has (or has not) 'moved' challengeable only on traditional public law principles
- There can be only one local authority responsible for a child's SEN
- 'Belonging' regulations (SI 1996/615) do not apply
- 'Ordinary residence' not used – cases on this may be helpful but only indirect pointers
- Procedures envisaged in regs excessively cumbersome for purely temporary short-term absences

(5) *UA v LB Haringey*

- Application for costs can be made within 14 days of a notice by the tribunal under r 17(6) that a withdrawal has taken effect
- Notwithstanding fact that by that point in time proceedings will have come to an end and r 10(5) suggests applications for costs can only be made ‘during the proceedings’
- Reminder of possibility of costs applications even where a case is settled and withdrawn, unless that settlement includes a binding agreement not to make such an application.

(6) *Staffordshire CC v JM*

Facts:

- young person was 21 years old
- EHCP named one institution
- dispute between parents & Council about the information that parents should provide the Council about H's transport needs
- dispute about whether the Council had an obligation to provide transport to the named school

(6) *Staffordshire CC v JM*

Decision:

- Transport is not neither a special educational need nor special educational provision
- Transport arrangements will be relevant in a SEN appeal if the Tribunal is comparing two potential placements ie costs comparison takes into account transport costs
- However, here Tribunal was considering one school only and therefore there was no comparison exercise

(6) *Staffordshire CC v JM*

Decision (cont.):

- Further, there was no right of appeal to FTT against decisions re school transport

- Even though Tribunal had had no jurisdiction on issue, UT gave guidance on transport obligations for over 19s - the duty to provide transport to adult learners only arises if the LA considers it to be necessary in all the circumstances to fund such transport

(7) *Hertfordshire CC v MC & KC*

Issue 1 – learning difficulty?

- s.20 CFA: child has a LD *or* disability if (a) he has significantly greater difficulty in learning or (b) has a disability which prevents or hinders him from making use of facilities
- no strict line between LD & disability; large overlap
- no need to have a medically diagnosed cause for the impairment; what matters is effect of the impairment not cause

(7) *Hertfordshire CC v MC & KC*

Issue 2 - EHCP necessary?

- ‘necessary’ is not defined in the Act and has a spectrum of meanings: ‘somewhere between indispensible and useful’

- Code envisages that the majority of children with additional educational needs will not require EHCPs. Their needs will be met in mainstream setting from resources available at mainstream school

(7) *Hertfordshire CC v MC & KC*

- Code suggests that, in making a decision on whether it is necessary to issue an EHCP, the LA will, in essence, have to look at the information it has about a child's needs and any provision made for him both before and after the assessment

- If the information continues to be well matched to the child's existing needs and provision, then an EHCP is probably not necessary

(8) *JD v South Tyneside Council*

Specificity: statement did not meet the standard set out in *L v Clarke [1998] ELR 129*, which required it to be "so specific and clear as to leave no room for doubt as to what [had] been decided and what [was] needed in the individual case”:

- Statement said "individual programmes tailored to her needs" were necessary - the bare provision for programmes added nothing.
- Also - "access to multi-sensory teaching [might] be helpful ...“ and "opportunities to encounter success in [the child's] work ..."

(9) *SC & MS v Worcestershire CC*

Issue: statutory test for deciding whether an authority is required, under section 324 of the Education Act 1996, to make and maintain a statement of SEN

Previous UT decision considered: *NC & DH v Leics CC* [2012] UKUT 85 (AAC). Two questions to be asked, the second of which is whether "the [maintained, mainstream] school can reasonably be expected to make [the special educational provision called for] from within its resources"

(9) *SC & MS v Worcestershire CC*

Deciding whether “the [maintained, mainstream] school can reasonably be expected to make [the special ed. provision called for] from within its resources” is difficult where a child does not, when the relevant decision falls to be taken, attend a maintained school

Held - *NC & DH* should be applied pragmatically where the child in question does not attend a maintained school. FTT applied the correct test here.