

SEN admissions

A recent judicial review case taken by an academy trust against a local authority has provided some useful guidance for schools when dealing with requests to admit children with EHCPs.

08 March 2019

A recent judicial review case taken by an academy trust against a local authority has provided some useful guidance for schools when dealing with requests to admit children with Education, Health and Care Plans (EHCPs).

The case involved a child who was moving from one local authority area to another. The child had an EHCP and a change of school was required. The new local authority consulted with a school preferred by the parents in accordance with the Children & Families Act 2014. The school responded and set out in detail why the school was not suitable for the child as it did not have the resources to make the provision that the child required. There was some delay in the proceedings at this point and the local authority then contacted the school again with a different version of the EHCP with a great deal of the provision for the child now missing from the EHCP. The school was named in the plan and was therefore under a legal duty to admit the child as a pupil. The school therefore lodged a complaint with the Secretary of State in relation to the local authority's unreasonable actions. The DfE found in favour of the local authority. The school started judicial review proceedings on a number of grounds including the action of removing provision from the EHCP was unlawful; the consultation procedure was flawed and that the local authority had misunderstood the legal framework. The school was successful and the local authority decision naming the school was quashed.

The judge set out that it was appropriate to attempt to resolve the dispute via the DfE prior to initiating legal proceedings and then went on to set out that:

- The local authority's actions in removing large elements of the special educational provision from the EHCP without any evidence to support that move (and indeed where there was evidence to the opposite approach) was unlawful. Whilst, it was possible for a local authority to make changes to a EHCP, substantial changes have to be based on evidence and the judge referred to the documentation attached to a EHCP as being importance evidence in relation to the needs and provision set out in the EHCP. In this case the evidence (set out in section K) contradicted the approach being taken by the local authority on provision.
- Consultation which is a requirement of placement decisions under the Children & Families Act 2014 must meet the wider principles applicable to lawful consultation. This means that the local authority must provide sufficient time and information to allow a school to make an intelligent response to the consultation and to take that consultation response into account when making a decisions on placement. The local authority in this case was unable to provide evidence to show the representations were considered in line with the SEND Code of Practice 2015 and, given the fundamental changes made to the EHCP, it also failed to provide sufficient information to allow an intelligent response to be made.
- The local authority's reliance on parental preference as a trump card was misplaced. Whilst parental preference is a key factor to be considered, it can be displaced where there is evidence of unsuitability or incompatibility under section 39(4) Children & Families Act 2014. In addition, the presumption towards mainstream education will only be relevant where the local authority is unable to name a parentally preferred school. It is not a factor to be considered until such time as there is evidence of unsuitability or incompatibility.

What does it mean for schools?

The decision confirms that:

- There are routes of challenge for schools against local authority decisions on placements for children with EHCPs. These will be to the DfE/ESFA or, ultimately, via the courts.
- It is important for schools to consider the procedure followed, and documents provided, by the local authority. You must ensure that the documentation includes the draft EHCP and all the evidence listed in section K of the EHCP. If that information is not provided, there could be grounds to challenge the local authority's consultation requirements.
- It is important to consider all documents and not just the EHCP. The appendices/evidence are an important part of the consultation process and an important source of information for schools in responding to the consultation. These need to be reviewed and all concerns raised as part of the detailed response to the consultation.
- A response setting out concerns over admission needs to be detailed and must set out all areas of concern. You will need to set out the school's circumstances and context (including pupil numbers and details around existing pupils with complex or additional needs) before setting out concerns over the impact of the admission of the child and the provision required to meet the child's needs.
- Be wary of standard letters from the local authority – it is important that you have evidence of a proper and thorough consideration of your representations.

If you have concerns about any of these issues, do get in contact with us to discuss the individual cases further.

Contact



Mark Hickson

Head of Business Development

onlineteaminbox@brownejacobson.com

+44 (0)370 270 6000

Related expertise

School admission services

Special educational needs and disability matters