SEN FUNDING CHALLENGES: AN UPDATE

Jennifer Thelen

There are currently a number of SEN funding challenges winding their way through the courts. As with many other austerity cases, they have consultation duties at their core. However, the very nature of their subject matter means that the public sector equality duty, and statutory education duties, are also being relied upon as grounds of challenge.

In ***R (RD) & ors v Worcestershire County Council,*** [2019] EWHC 449 (Admin), Mr Justice Nicklin allowed a substantive legitimate expectation claim. The claim concerned the termination of Portage services, an educational support service for pre-school children with SEN. Mr Justice Nicklin found that a promise to provide transitional arrangements for those currently benefiting from Portage services pre-closure, in August 2016, was sufficient to ground a claim for legitimate expectation. The Judge found that the representation was clear and unambiguous, not subject to qualification and directed at parents of children receiving Portage services. He found that none of the parents had acted in reliance on the determination, but on the facts of that case it was not determinative, given that the representation had been made to a class of persons. Claims relating to section 27 of the Children and Families Act 2014, section 11 of the Children Act 2004, section 17 of the Children Act 1989, section 1 of the Childcare Act 2006 and Section 175 of the Education Act 2002, as well as the PSED, were not determined.

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In ***R (Kian Hollow) v Surrey County Council,*** [2019] EWHC 618 (Admin), Lady Justice Sharp and Mrs Justice McGowan refused the claimants' application to challenge the decision taken by the council's Cabinet to approve a SSEN budget. The claimants claimed the Council's decision to make significant reductions in the funding available for SEN was flawed. No consultation took place on that budget – but the claimants argued it

should have been. The Council argues that it was only obliged to consult when and if identifiable cuts to the SEN services were proposed. The Court accepted this argument.

These two cases demonstrate the variety of ways that these challenges can be brought. It will be important for potential claimants to continue to monitor SEN budgetary decision making throughout the process, and for decision-makers to ensure that at each stage of the process careful thought is given to ensuring statutory and common law obligations are fulfilled, and documented as such.

THE FRAUGHT RELATIONSHIP BETWEEN S.39 AND S.33 OF THE CHILDREN AND FAMILIES ACT 2014: R (AN ACADEMY TRUST) V MEDWAY COUNCIL

Katherine Barnes

R (An Academy Trust) v Medway Council and Secretary of State for Education [2019] EWHC 156 (Admin) is undoubtedly an unusual case with (one hopes) unusual facts. Nevertheless, it contains some useful guidance for all practising in the field of special educational needs law.

In this claim for judicial review an Academy, which had been named by Medway when a boy (X) moved from Greenwich to Medway, successfully challenged the Education, Health and Care Plan ("EHCP") for a boy, X, with Autistic Spectrum Disorder. When asked by Medway to accept X, the Academy refused, considering itself unsuitable. Rather than looking for alternative school, Medway decided to amend the EHCP and formally name the Academy. The result of this (as per s.43 of the Children and Families Act 2014 (the "2014 Act")) was that the Academy was compelled to accept X. In amending the EHCP Medway also removed significant parts of Section F, which is required to specify the special educational provision a child needs. These amendments were made without gathering any additional evidence.

The Academy's primary submission was that Medway's amendment to X's EHCP was irrational because it was unsupported by evidence. Medway argued that it had considered the evidence on which the Greenwich EHCP was based and had reached a different conclusion in light of it. While there was no dispute that Medway was entitled to do this in theory, Philip Mott QC (sitting as a Deputy High Court Judge) concluded the evidence did not support a finding that Medway had done this in a rational manner. In particular, amended Section F was inconsistent with Section B. For example, the Medway plan in Section B recognised a need for signing for communication but then failed to provide for this in Section F.

The Judge went on to consider the part of the EHCP which named the Academy, which was the Academy's real complaint. As the Academy had been requested by X's parents, s.39(3) of the 2014 Act required it to be named in the EHCP unless one of the exceptions in s.39(4) was met. The Academy contended that it was unsuitable such that the s.39(4)(a) exception applied, Medway argued it was not unsuitable. The Judge concluded that Medway's decision under s.39(4)(a) was unlawful. In short, this was because: first, there was no contemporaneous evidence to show the rationale for the s.39(4)(a) decision; secondly, there was no explanation for the significant discrepancy between the Greenwich and the Medway Section Fs; and, thirdly, without a coherent Section F Medway had no basis for taking a lawful decision under s.39(4)(a).

One of Medway's secondary arguments was that any unlawfulness in respect of the s.39(4)(a) decision did not matter because the presumption in favour of mainstream in s.33 of the 2014 Act meant it was highly likely that the Academy would have been named in any event. In addressing this the Judge provided helpful guidance at [93]-[95], well worth reading in full, on the interaction between s.39 and s.33. The key point is that the only gateway to s.33 is s.39(5)[1], which requires the local authority to name a school *"which the local authority thinks would be appropriate for the child".* In turn, the only gateway to s.39(5) is where one of the conditions in s.39(4) applies (the requested school is considered unsuitable or attendance there by the child would be incompatible with the provision of efficient education of others or the efficient use of resources).

As for how "appropriate" in s.39(5) is to be understood, the Judge found that this must be interpreted in light of the s.33(2) duty to provide mainstream schooling (unless it is incompatible with the parents' wishes or would be incompatible with the efficient education of

1 Or s.40(2) which applies when there has been no request for a particular school.

others). There is therefore no "suitability" exception in s.33(2). This means that "appropriate" in s.39(5) does not means suitable – it refers to a school which allows the local authority to comply with its strict, though not absolute, obligation in s.33(2). This means that a school could avoid being named under s.39 because it is unsuitable but end up being named under s.33.

However, on the facts here the Judge was not prepared to accept that Medway had demonstrated it was highly likely the Academy would have been named under s.33(2) in any event.

The case is a cautionary tale for local authorities. When a child with an existing EHCP moves into a new area then the new local authority is entitled to amend the EHCP without a review (see [32]). However, careful consideration must be given to the existing evidence base and where the new authority decides to depart from the conclusions of the previous authority, the rationale for this should be properly explained. More broadly, the case is a reminder that shortcutting to s.33 is unlawful. Rather, the decision-maker should work through s.39 before, where relevant, considering s.33. Finally, schools should note that, in appropriate cases, judicial review can be a powerful tool for challenging heavy-handed behaviour by local authorities in the special educational needs context.

EOTAS: AN UPDATE

Tom Amraoui

EOTAS ('Education Otherwise Than At School') is made possible by section 61 of the Children and Families Act 2014. Under section 61, local authorities have the power to consent to a child or young person with SEN being educated somewhere other than a school or post-16 institution (typically at home), but only where the authority is satisfied that "... it would be inappropriate for the provision to be made in a school or post-16 institution or at such a place."

Similar (but not quite identical) provisions existed under the Education Act 1996. Until recently, however, there has been little if any case law on how EOTAS should operate under the new regime. Happily, some clarity has now been provided by the Upper Tribunal in its decision in *M & M v West Sussex County Council* (SEN) [2018] UKUT 347.

The decision in *M & M* recognises that EOTAS has been carved out by the 2014 Act as a discrete status in appropriate circumstances. But the decision also appears to attach two important conditions to this. First, section I of the EHCP cannot in these (or indeed any) circumstances be left blank (it must name at least the type of school to be attended, if not the particular school or other institution to be attended). Second, whilst it is possible where section 61 applies to make EOTAS provision in section F, any such provision must be framed either (a) with the ultimate aim of getting the child into a school, or (b) as part of a mixed package of education in and out of school.

Quite how local authorities first-tier tribunals and local authorities will apply these principles remains to be seen. It is clear that section I cannot lawfully name the child or young person's home (*East Sussex CC v TW* [2016] UKUT 528 (AAC)) so, at a bare minimum, it seems that the *type* of placement that would be suitable for the child or young person must still be named in section I even where EOTAS applies. Further: in cases where even part-time school attendance is inappropriate, how are local authorities and tribunals meant to approach the task of crafting EOTAS provision in such a way that it can be shown to meet the ultimate aim of getting the child to attend school? Must section F incorporate some kind of transition plan? This would make sense if EOTAS is only ever meant to be treated as a stop-gap and short-term emergency (such as where a child is temporarily unable to attend school for medical reasons) but in cases where EOTAS is envisaged to be longer lasting the correct approach is much less clear. It is likely that further guidance from the Upper Tribunal will be required to answer these and other questions.

EHRC GUIDANCE ON FREEDOM OF EXPRESSION

Tom Tabori

The Equality and Human Rights Commission has issued new guidance: 'Freedom of expression: a guide for education providers and student unions in England and Wales' (Feb 2019).

It comes off the back of the Joint Committee on Human rights inquiry into the state of freedom of expression in HEPs, which had expressed concern about: *"increased bureaucracy", "potential self-censorship from students on campus as a result of the Prevent duty guidance", "intolerant attitudes and violent protests as potential obstacles";* and *"Potential conflict in interpretation of existing laws and guidance"* [EHRC Guide, p 5]. In response to this, the Universities Minister called for a summit of leaders in the HE sector, who in turn agreed that it should support the EHRC to develop this new guidance.

The Guidance covers freedom of expression ("FOE") generally in UK law (largely (i) HEPs' duty under s 43 Education (No. 2) Act 1986 to take reasonably practicable steps to ensure FOE within the law for members, students, employees and visiting speakers; and (ii) art 10 ECHR).

It gives specific attention to: (i) where that law allows for limitation on FOE and (ii) the interaction of other legal duties with FOE (including the Prevent duty and the public sector equality duty). It then gives guidance on (i) how higher education providers ("HEPs") and student unions ("SUs") can work together for FOE; and (ii) making decisions on how to promote FOE. Lastly it addresses key questions in relation to FOE.

The Guide's headlines points [p 6] are:

a. *"Everyone has the right to express and receive views and opinions, including those that may 'offend, shock or disturb others'",* taken from *Delfi As v Estonia* [2014] 58 E.H.R.R. 29, ECtHR Grand Chamber.

b. *"[HEPs] need to have a code that sets out their policies and procedures relating to external speakers, and make sure their procedures don't create unnecessary barriers to free speech. They also need to make sure that all students are aware of the code".* – This obligation comes from s 43.

c. *"Protecting [FOE] is a legal requirement for most [HEPs]. [SUs] also have a role to play, although their legal duties are different".* – SUs are not likely to be public authorities subject to art 10 ECHR, nor subject to s 43, but will have to follow their HEP's code.

d. *"There are some circumstances where UK law limits the right to [FOE], for example, to protect national security or to prevent crime".* E.g. speech causing fear or provocation of violence [Public Order Act 1986 ("POA"), s 4], acts intended to stir up hatred on grounds of race, religion or sexual orientation [POA, ss 18 and 29B], speech amounting to a terrorism-related offence [Terrorism Act 2000 or 2006], causing harassment, alarm or distress [POA, ss 4a and 5].

e. *"Most [HEPs] and [SUs] are registered charities and have a charitable purpose to further students' education for the public benefit. [FOE] is an important part of meeting that purpose".* In particular, (i) charities advancing education must be neutral and not promote a particular point of view; but (ii) charities can carry out political activities such as campaigning for a change in the law if this furthers their charitable purpose [*Baldry v Feintuck* [1972] 1 WLR 552; Charity Commission guide CC9, 'Campaigning and Political Activities Guidance for Charities].

f. *"The starting point is that any event can go ahead, but [HEPs] have to consider all their legal duties carefully"* and *"only consider cancelling an event if there are no reasonable options of running it",* assessed via due diligence checks and risk assessments, with documentation evidencing the same [p 31].

The Verdict? The Guidance is a terrific distillation of the law with helpful examples and case studies, well formulated for its HEP/SU audience, whilst managing to be weighty enough not to require recourse to textbooks over every issue that audience might face.

BUTT V SSHD

Rachel Sullivan

In an interesting case concerning the effects of over-stringent guidance on freedom of speech, the Court of Appeal has held that parts of the Home Office's Prevent Guidance is unlawful: *R (Butt) v Secretary of State for the Home Department* [2019] EWCA Civ 256.

The *Prevent* strategy is part of the Government's wider counter-terrorism strategy: it imposes a statutory duty on higher education providers to 'have due regard to the need to prevent people from being drawn into terrorism' (s. 26 Counter-Terrorism and Security Act 2015). The Home Office issued two sets of guidance in September 2015, the *Prevent* Duty Guidance (PDG) and the Higher Education *Prevent* Duty Guidance (HEPDG). These set out in practical terms what this duty might mean for higher education providers. In relation to visiting speakers, the HEPDG states that providers should consider carefully 'whether the views being expressed, or likely to be expressed, constitute extremist views that risk drawing people into terrorism or are shared by terrorist groups'. Events should not go ahead unless providers 'are entirely convinced that such risk can be fully mitigated without cancellation of the event' (HEPDG §11).

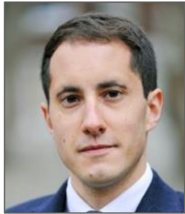
The coming into force of the guidance was announced by way of press release, which also identified a number of individuals as extremist hate speakers. This included Dr Butt, who edits an Islamic website and who denies this characterisation.

Dr Butt brought judicial review proceedings, claiming amongst other things that the trenchant terms in which §11 of the HEPDG is expressed demonstrated a failure by the Secretary of State to comply with his duty under s. 31(3) CTSA 2015 to have 'particular regard to the duty to ensure free speech' as defined by s. 42 Education (No. 2) Act 1986.

Rejecting the decision on this point at first instance, the Court of Appeal held that the duty on universities and higher education providers to ensure freedom of speech must extend to prospective visiting speakers (and members, students and employees) as well as those already invited. That being the case, the HEPDG was liable to lead institutions into acting unlawfully.

Although ultimately responsibility for compliance rests with the institutions, the reader of the HEPDG was likely to conclude that it was specific and pointed guidance as to the decision they had to take. It could not properly be said that in promulgating such unbalanced guidance, the Secretary of State had had due regard to the duty under s. 31(3).

CONTRIBUTORS



Tom Amraoui

tom.amraoui@39essex.com

Tom is ranked as a leading junior in Education law by Chambers and Partners and The Legal 500. He regularly represents local authorities in special educational needs cases, has advised and represented schools in discrimination cases and has experience in the Upper Tribunal on education matters. Tom speaks regularly at education law conferences and seminars, and has delivered training to many authorities on effective case preparation in SEN appeals. Tom also has extensive experience of school admissions and exclusion appeals, having acted as both a representative and clerk at many such appeals. To view full CV click here.

Jennifer Thelen

jennifer.thelen@39essex.com

Jennifer is recognised in the Education law section of Chambers and Partners (Band 4) and The Legal 500 (Tier 5). She regularly appears in the First tier Tribunal and Upper Tribunal on behalf of local authorities in education cases as well as, for both local and central government, on education matters in the High Court. She has been instructed to advise and appear across a range of education matters including special educational needs, disability discrimination, governance, admissions and exclusions appeals, as well as challenges by way of judicial review to the implementation of statements of special educational needs and Ofsted reports. Jennifer has a broad legal background, having practised corporate and regulatory law before being called to the Bar. Jennifer is a member of the Attorney General's B Panel of Junior Counsel to the Crown. To view full CV click here.

Tom Tabori

tom.tabori@39essex.com

Tom has a broad education law practice, from multitrack damages claims for Equality Act breaches or negligent PhD supervision, to judicial reviews of university CAS decisions and academy admissions and exclusion decisions. He regularly appears in the Upper Tribunal (Administrative Appeals Chamber) in cases concerning the evolving interpretation of the Children and Families Act 2014 SEN regime. His extensive education law experience also includes claims against independent schools, DfE local authority funding arrangements, and use of restraint against students. Tom is a part-time university lecturer and has given EHCP-training to local authorities. To view full CV click here.

Katherine Barnes

katherine.barnes@39essex.com

Katherine is a public law and human rights specialist, with particular expertise in education law. She has worked on several claims for the judicial review in this area including a recent challenge to the closure of a rural primary school and a decision by a local authority to reduce its special educational needs funding. In addition to her judicial review work, Katherine regularly appears before the First-Tier Tribunal and Upper Tribunal in special educational needs cases and disability discrimination claims. She also has significant experience of admissions and exclusions appeals. In respect of higher education matters, Katherine's recent work includes advice on student finances and various complaints to the Office of the Independent Adjudicator. Katherine recently acted for Ofsted in relation to the case study on child sexual abuse at residential Catholic schools as part of the Independent Inquiry into Child Sexual Abuse. To view full CV click here.

Rachel Sullivan

rachel.sullivan@39essex.com

Rachel is developing her education law practice, having joined chambers in 2017 following the completion of pupillage. She has recently appeared for a local authority in a CCMC for an Equality Act claim. To view full CV click here.

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