

Issuing an EHC Plan—the meaning of ‘necessary’ (Nottinghamshire County Council v SF and another)

09/03/2020

Local Government analysis: The Court of Appeal held that the First-Tier Tribunal (FTT) had correctly construed the meaning of ‘necessary’ in section 37(1) of the Children and Families Act 2014 (CFA 2014) in finding that it was necessary for special educational provision to be made for HD in accordance with an EHC Plan. This was despite his school having identified his needs, made provision to meet those needs and HD making progress at school. The court considered and affirmed the approach to making a determination under CFA 2014, s 37, determining what is ‘necessary’ requires an evaluative judgment based on the facts of each case. Written by Matthew Wyard, barrister, at 3PB Barristers and Paul Wyard, paralegal, at SinclairsLaw.

Nottinghamshire County Council v SF and another [2020] EWCA Civ 226

What are the practical implications of that decision?

While the confirmation from the court as to the approach to be taken towards the meaning of ‘necessary’ in [CFA 2014, s 37](#) is helpful, this decision is unlikely to change the way in which lawyers advise local authorities or parents of children with special educational needs—the authorities confirmed by the court are regularly cited and it has long been the position that the FTT is entitled to use its specialist expertise to draw fact specific conclusions on necessity—the authorities on the matter merely provide guidance on the types of relevant considerations to be considered as part of the fact finding analysis.

Local authorities, whose officers all too often rely on the Special Educational Needs Code of Practice (the Code of Practice) over the statute, should take this decision as a warning that the FTT and the courts will give limited authority to its contents where it contradicts, or seeks to limit the scope of, statute.

For those seeking to appeal decisions of the FTT, this decision serves as a reminder that when challenging an evaluative judgment, the factual findings must themselves be challenged, otherwise an appellant will be faced with only being able to challenge a decision on the high threshold of Wednesbury reasonableness.

What was the background?

The case concerned a seven years old boy known as HD with autism, dyspraxia and hypermobility at a maintained mainstream school. The school had identified, and was providing for, his needs, and HD was making satisfactory progress. An Education, Health and Care Plan (EHC Plan) Needs Assessment took place in late 2017 to consider whether HD needed an EHC Plan, pursuant to [CFA 2014, s 36](#).

The local authority concluded on 8 August 2018 that all his needs had been identified and that the provision offered by the school met his needs. A letter communicating the decision to not make an EHC plan for him was issued on 14 August 2018.

HD’s parents appealed against this decision to the FTT which allowed the appeal on 10 December 2018.

The local authority unsuccessfully appealed to the Upper Tribunal (UT) in a judgment dated 13 August 2019 ([\[2019\] UKUT 243 \(AAC\)](#)).

What did the court decide?

Three grounds of challenge were advanced by the local authority.

The primary ground of challenge was that as HD's needs were being met and he was making progress at school, it was not 'necessary' for him to have an EHC Plan pursuant to [CFA 2014, s 37](#). Accordingly, in finding that he did, the FTT had erred in law. The court considered and agreed with previous decisions of the UT in *Buckinghamshire County Council v HW* [\[2013\] ELR 519](#) and *Manchester City Council v JW* [2014] UKUT 168, confirming at para [20] that:

'[t]he essence of the UT's case law is that what is necessary is an evaluative judgment based upon the specific facts of the particular case which are for the specialist tribunal to deduce from the evidence in each case. It is not a concept that is to be over-defined. With respect, and for the reasons I shall give, I agree.'

Further, at para [38] that:

'Necessary is a word in common use and its plain meaning has caused no difficulty in the tribunal. The function of the FtT in these cases is to find facts and to exercise an evaluative judgment by using its specialist expertise about whether an EHC plan is necessary. That is a deduction from the facts and it will depend on the nature and extent of the provision required for the child concerned. It is a fact specific conclusion.'

The factual findings made by the FTT were ones open to it to make using its specialist expertise and it was entitled to rely on those factual findings to find that it was necessary for special educational provision to be made for HD and, accordingly, an EHC Plan to be issued.

Secondly, the local authority argued that the Code of Practice related the necessity of an EHC Plan with a lack of sufficient progress at school. As HD was making progress at school, the FTT erred in finding special educational provision was necessary. The court dismissed this on the basis that the Code of Practice was only a guide and could not limit the statute's wider scope.

Thirdly, it was argued that the FTT had gotten its evaluative judgment wrong. The court determined that as the local authority had failed to challenge the tribunal's findings of fact, the court could only determine whether the evaluative judgment was reasonable on the facts of the case relying on *Re B (a child) (care order: proportionality: criterion for review)* [\[2013\] 2 FLR 1075](#). The court found that this test had not been met.

Case details

- Court: Court of Appeal, Civil Division
- Judges: The Senior President of Tribunals Sir Ernest Ryder, Lord Justice Newey, Lord Justice Coulson
- Date of judgment: 03/03/2020

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