From absolute statutory duty to reasonable endeavours: the consequences of modifying section 42 of the Children and Families Act 2014

By Matthew Wyard
3PB Barristers

The Issue

On 30th April 2020, the Secretary of State for Education exercised his power to give notice of modification of section 42 Children and Families Act 2014 under Schedule 17 of the Coronavirus Act 2020 ("the 2020 Act"). The effect of this is that the absolute duty to secure special educational provision specified in an EHC Plan in section 42 is now a duty to use reasonable endeavours to secure such provision. The notice is to be reviewed monthly but is expected to remain in force until September 2020.

This development is not unexpected. Concerns have already been raised amongst those acting for parents and young people that watering down the duty to make provision for children with special educational needs could prejudice already vulnerable children. All lawyers who act in these cases will be asking themselves what "reasonable endeavours" means, and what will the courts deem to be a reasonable endeavour to secure provision. This article aims to provide guidance on this issue.

The meaning of 'reasonable endeavours'

The concept of 'reasonable endeavours' is not a new one, albeit admittedly it is not one that will necessarily be familiar to those working exclusively in the education sector.

The concept can be approached from two perspectives resting upon two different interpretations: a commercial interpretation (an arena in which the concept of "reasonable endeavours" is commonplace) and a public law interpretation. The reality is that a court is likely to approach any challenge to a local authority's exercise of a reasonable endeavours duty from a public law perspective, with relevant considerations such as those that fit with the commercial law perspective being taken into account. It is therefore necessary to understand what both of these interpretations look like.

From a commercial perspective, using reasonable endeavours requires the organisation that is obliged to use its reasonable endeavours to assess whether or not to act, by weighing up the benefit of their obligation to the other party, as well as taking into account their own commercial considerations. Crucially, the obligor is not required to sacrifice its own commercial interests or prejudice itself in any way to carry out the obligation.

From a public law perspective the question is framed slightly differently, namely, whether the steps taken by the relevant local authority were the steps that a reasonable local authority, with the same knowledge as the local authority under scrutiny, would have taken i.e. *Wednesbury* reasonableness.

Accordingly, should a court be required to consider whether a local authority has used its reasonable endeavours properly my view is that the test is likely to be applied as the *Wednesbury* formulation outlined above, with the relevant considerations that must be considered being those commercial obligations above, as well as some scenario specific obligations.

To put this into an example, suppose that J has an EHC Plan. He has ASD and learning difficulties. Section F of the EHC Plan provides for him to receive full time 1:1 teaching assistant support, and his LA, 'B County Council', fails to put this in place. In considering whether B County Council has used its reasonable endeavours to secure the provision, the court will consider whether it acted reasonably and, in so doing, will take into account factors such as:

- The benefit that J will have likely secured from the provision of the support. This will be a particularly important consideration if J is at home rather than at school;
- The reasons underlying the need for 1:1 teaching assistant support and how this is balanced against prejudice to other children who may also need the same resource;
- The practicalities of securing the support, for instance, there might be a limited number of teaching assistants available in J's area due to being socially isolated;
- The resources of B County Council and whether, in light of the additional financial burden imposed by coronavirus, they are financially able to buy in another teaching assistant for J;
- The health risk to J, the teaching assistant and other school staff in having a large group of people in school being exposed to, and exposing others, to potential health risks;
- What alternatives B County Council has considered and why, if at all, it has discounted them;
- Whether there is any reasonable way to replicate the 1:1 support whilst also protecting everyone's health;

- If J is at home, whether he can be educated at home or offsite with the additional support, or equally beneficial additional support, in place.

Notwithstanding this, the court will have to adopt a common sense approach bearing in mind the increased pressures placed on local authorities and their resources at the present time.

Tips for parents and young person's seeking to enforce provision in an EHC Plan pursuant to the modified section 42 duty

Generally, parents and young people may enforce Section F of the EHC Plan by bringing a claim for judicial review against the local authority. It is sometimes argued on behalf of local authorities that an alternative remedy exists in the form of a complaint to the Local Government Ombudsman; leaving the merits or otherwise of that argument aside, the LGO is not currently adjudicating upon complaints and so judicial review is likely to be the only means of enforcement. If the section 42 duty is modified, claimants will need to bear in mind a number of legal and evidential issues.

Firstly, as with breaches of reasonable endeavours duties in commercial claims, claimants will have to demonstrate to the court that the provision underlying the claim (e.g. in the case of J the 1:1 support) is sufficiently clearly specified and quantified be capable to of enforcement. Claimant representatives will already be accustomed to scrutinising EHC Plans in accordance with the settled principle that the contents of an EHC Plan must be specific and quantifiable.

Secondly, they will need to support the claim with evidence of how the local authority has failed to exercise its reasonable endeavours, and what the local authority should have done that it failed to do.

Thirdly, they will need to put forward clear and compelling submissions that promote the special educational needs of the child/young person, and their consequent need for the provision set out in the EHC Plan, whilst recognising the pressures faced by the local authority.

Tips for local authorities defending claims pursuant to the modified section 42 duty

Officers should clearly document the decision-making process and make sure that the reasons for concluding that special educational provision specified in an EHC plan cannot be secured are clearly and contemporaneously recorded. Legal advice should be sought, either in-house or externally, to ensure that the reasons for the decision are sufficient to explain the decision, and that they include the factors taken into account and any potential alternatives that were considered and rejected. The decision letter sent to the parent or young person

must be clear enough to ensure that the recipient understands why the decision has been made.

Any pre-action correspondence that is received should be forwarded immediately to in-house or external legal advisors; limitation periods are strict in judicial review claims and a failure to engage promptly with pre-action correspondence may result in a claim being issued that might otherwise have been avoided.

Matthew Wyard is a specialist public law and judicial review barrister with a particular expertise in claims concerning education, mental capacity, health and social care.

6 May 2020

Matthew Wyard

Barrister
3PB

0330 332 2633
Matthew.wyard@3pb.co.uk

3pb.co.uk