

## The distinction between educational and healthcare provision (East Sussex County Council v JC)

27/04/2018

**Local Government analysis:** Lachlan Wilson, barrister at 3 Paper Buildings, advises that the Upper Tribunal's judgment in *East Sussex County Council v JC* leaves open the possibility that in an appropriate case the provision of a powered wheelchair may constitute educational—rather than healthcare—provision.

*East Sussex County Council v JC* [\[2018\] UKUT 81 \(AAC\)](#)

### What are the practical implications of this case?

In this decision, the Upper Tribunal, through Judge Levenson, leaves open the possibility that the provision of a powered wheelchair may constitute educational provision (as distinct from healthcare provision), and stresses that provision which gives 'access to education' is not excluded from being capable of constituting educational provision by itself.

The importance of the distinction is that healthcare provision falls to be provided by healthcare commissioners, who may take into account their budgets when allocating provision, whereas educational provision falls to be provided by local authorities, who may not have regard to budgets when allocating provision that has been determined to be essential provision for a child or young person with special educational needs.

The practical implications of the judgment of Judge Levenson are that, in an appropriate case, the provision of a powered wheelchair (which traditionally has been regarded as a healthcare provision) may be regarded as educational provision if use of the wheelchair educates or trains the user, for example because learning to use it, and developing and applying that learning, in itself amounts to education or training.

If so, consideration would need to be given as to whether this is a one-off process that only takes a very short time, or an ongoing, developing and cumulative process, like learning computer skills. Alternatively, it may be that the circumstances suggest that there is nothing to learn in the process of using the wheelchair, other than from the facilities that the wheelchair enables the user to travel to—in which case, the provision of the wheelchair would ordinarily be regarded as healthcare provision.

### What was the background?

The central issue in the case before the First-tier Tribunal (FTT) was whether the provision of a powered wheelchair for a young person, referred to as 'William' (not his actual name), with significant mobility impairments should be considered special educational provision or healthcare provision.

William, at the time of the hearing before the FTT, was a young man with a diagnosis of dystonic/dyskinetic cerebral palsy affecting all limbs following birth asphyxia. His underlying cognitive ability was largely preserved, but he had significantly impaired motor and communication development. His physical movement was very limited to the control of his fingers and it required immense physical effort to neurologically 'program' any physical movement he wanted to achieve. This created physical and mental fatigue.

An educational psychologist gave evidence to the FTT that 'a powered wheelchair is an essential tool for all aspects of [William]'s life and that his ability to be able to use one is the basis for

everything else he has to do or accomplish'. An occupational therapist noted that William spent the majority of his waking day in his powered wheelchair and 'despite his significant motor impairment he is able operate it using the back of his right hand which is really the extent of his motor function'. Without a powered wheelchair, it would be impossible for William to acquire the necessary skills to live as independently as possible. The combination of the communication aid and the powered wheelchair allows William to move around independently and converse with others, and to make his own choices and decisions. A powered wheelchair 'is an essential tool' in all aspects of William's life.

Before the FTT and the Upper Tribunal (UT) it was argued for the parents that the wheelchair provided as much education and training to William as a communications device—he had to learn how to use the powered wheelchair and exercise independent decision-making about where and when he wished to go. The wheelchair was essential for him to exercise independence of judgment in his movement about the college.

## What did the tribunal decide?

The essential legal framework in this case is provided by the following sections of the [Children and Families Act 2014](#) (CFA 2014):

- [CFA 2014, s 21\(1\)](#): 'special educational provision' for '...a young person means educational or training provision that is additional to, or different from, that made generally for others of the same age...'
- [CFA 2014, s 21\(3\)](#) defines 'healthcare provision' and [CFA 2014, s 21\(4\)](#) defines 'social care provision'
- [CFA 2014, s 21\(5\)](#): healthcare provision or social care provision which educates or trains a child or young person is to be treated as special educational provision (instead of healthcare provision or social care provision)
- 'trains' in [CFA 2014, s 21\(5\)](#) must relate to the activities within the meaning of 'training' in [CFA 2014, s 21\(1\)](#) and that by virtue of [CFA 2014, s 83\(2\)](#) and [section 15ZA\(8\)](#) of the [Education Act 1996](#) (EA 1996), 'training' includes full-time and part-time training, apprenticeship training, and ([EA 1996, s 15ZA8\(b\)](#)) vocational, social, physical and recreational training

The FTT identified a distinction between the wheelchair's provision, which it determined was a healthcare provision, and its maintenance and repair in the educational setting, which it regarded as an educational provision.

In the appeal before the UT, Judge Levenson did not determine the central issue, but allowed the local authority's appeal in respect of the distinction that the FTT made between (a) supply or provision and (b) repair or maintenance, having identified criticisms of the FTT's reasoning in respect of this finding. Crucially, however, Judge Levenson did not rule out the possibility of that distinction being possible in an appropriate case, provided there was evidence in support and an explanation as to how that would work. Even on this issue, there would need to be findings and an explanation as to how William's use of the wheelchair actually educates or trains him.

Of greater significance, however, is that the judgment leaves open the possibility that in an appropriate case (which may be William's case—but that will need to be determined by a freshly constituted FTT) the provision of a powered wheelchair may constitute educational provision. Judge Levenson regarded as unhelpful the FTT's characterisation of the wheelchair as an inanimate object, and pointed out that inanimate objects can be educational or training provision—think of books.

He further identified an inconsistency in the FTT's reasoning regarding William's use of the wheelchair. The FTT had concluded that William's use of the wheelchair did educate or train him for

the purposes of [CFA 2014, s 21\(5\)](#), and yet held that provision of the wheelchair was not educational or training provision. Judge Levenson asked rhetorically, for what purpose is special educational provision provided if not for use?

Judge Levenson also held that there is no rule excluding from consideration as special educational provision that which provides access—if (and it might be a big if) the use of the powered wheelchair educates or trains, as per the statutory tests at [CFA 2014, ss 21\(1\)](#) and [21\(5\)](#), there is no rule excluding its provision from being educational or training provision merely because it may also be said to provide ‘access to education’.

For these reasons, Judge Levenson found that the FTT had erred in law and the central issue—whether the powered wheelchair was to be regarded as educational or healthcare provision—was remitted to a freshly constituted FTT.

*Lachlan Wilson’s public and administrative law practice is centred on the field of education. He taught for a number of years before qualifying as a lawyer and now conducts cases involving a wide range of education law issues at all levels from the Special Educational Needs and Disability Tribunal to the Court of Appeal. Lachlan advises and represents children, parents, school proprietors and governing bodies, local education authorities, voluntary organisations and charitable trusts, further and higher education institutions, students, and universities, on the full range of education disputes. In ESCC v JC (SEN) Lachlan represented the respondent parent and the young person.*

*Interviewed by Kate Beaumont.*

*The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.*