SEND Tribunal Case Law Review

Jamie Jenkins

Barrister

St John's Buildings

If you were to poll education lawyers and ask which phrase in a case is most likely to cause an uneasy feeling in the pit of their stomach it's likely that National Trial, Education Other Than at School (EOTAS) and Waking Day Curriculum would feature towards the top of the resulting list. Fortunately, three recent Upper Tribunal Decisions have provided further guidance on these potentially tricky aspects of EHCP appeals.

VS and RS v Hampshire County Council [2021] UKUT 187 (AAC)

This case is the first Upper Tribunal decision on the National Trial, as a result of which tribunals can make recommendations on Sections C, D, G and H (Health and Social Care needs and provision). Judge Ward was asked to consider whether or not the Tribunal had erred in the findings and recommendations that it had made.

In considering the Tribunal's decision, Judge Ward highlighted the considerable difference between enforceable orders, which are made in relation to Sections B, F and I, and recommendations under Sections C, D, G and H, which a sufficiently compelling justification would entitle the relevant authorities not to follow a recommendation at all. He therefore found that, whilst the language of "specifying" provision is the same with all sections, that is a different requirement for recommendations compared to orders, and is less rigid, particularly in an environment where parties are likely to be focused on the education parts of an appeal. Judge Ward did note, however, that the more specific a recommendation is, the more detailed the reasons that will need to be given in order to justify non-compliance.

It has now been confirmed that the National Trial will become permanent, with appeals that request health or social care recommendations now being called Extended Appeals, and there is therefore clearly scope for further Upper Tribunal decisions in future on this subject. Those who have dealt with National Trials will have observed the slightly more rough and ready approach that tribunals can take to recommendations, often out of necessity due to the available evidence, and it is therefore helpful confirmation that recommendations are not subject to the same requirements of specificity as orders relating to educational needs and provision.

NN v Cheshire East Council [2021] UKUT 220 (AAC)

This case concerned a 13 year old who had been diagnosed with ASD. He had significant sensory difficulties and also had a profile suggestive of Pathological Demand Avoidance. He had never attended school and had been educated at home. The local authority had proposed a placement at an academy with entirely bespoke provision. It was acknowledged that he would not physically attend the school initially, and it was not realistic to expect him to learn in a classroom setting, but it was hoped that he would eventually utilise some of the provision available. NN's mother contended that Section I should be left blank, but the Tribunal decided to name "[the school], Bespoke provision" at the local authority's request on the basis that they could not find that it would be inappropriate for him educated in a school.

Judge Rowley reviewed the relevant statutory provisions and case law on the subject of EOTAS, including *TM v London Borough of Hounslow* on the meaning of 'inappropriate' and the more recent decision of Judge Wright in *Derbyshire County Council v EM and DM (SEN)* on the content of Section I and whether additional information can be provided. Following that review, Judge Rowley provided

guidance for tribunals considering the issue of EOTAS at paragraph 47. Applying that guidance to the present case, she found that the Tribunal had erred in not properly considering all relevant factors on the issue of inappropriateness, and in adding additional information to Section I. The matter was therefore remitted to be re-heard by a new tribunal.

Whilst the full text of paragraph 47 is too lengthy to state in full in this article, it pulls together existing principles from statute and case law in a way that provides a clear checklist for tribunals that decide this issue in future. Education law practitioners could do worse than review it when preparing for appeals to ensure that they have the necessary evidence and submissions to address each point.

London Borough of Southwark v WE [2021] UKUT 241 (AAC)

This was an appeal only against Section I, with Section F having been agreed between the parties. The main issue in contention was whether or not O required a waking day curriculum, and therefore a residential placement. The Tribunal considered the wording of Section F, as well as additional evidence and submissions, and concluded that O's needs could only be met with a waking day curriculum and residential placement.

In examining that decision, Judge Jacobs highlighted that "waking day curriculum" is not a statutory phrase, and there is a danger of tribunals becoming distracted by non-statutory language and forgetting to follow the legislation. The basic principle is that Section F informs Section I. In this instance the Tribunal had wrongly taken into account additional evidence, when its focus should have been on the wording of Section I. That may not have rendered the decision wrong if it was the Tribunal's only error, but their recounting of Section F was selective and did not take into account the full wording. In particular, the Tribunal had ignored a column which confirmed the role of O's mother and family in providing support after school hours. Judge Jacobs found that in the context of Section F as a whole, the Tribunal was not entitled to find that a waking day curriculum.

On one reading this decision does not state anything new. Education law practitioners will be well aware that Section B (needs) informs Section F (provision), which in turn informs Section I (placement), and that tribunals must approach the respective sections in that order. It is not uncommon, however, for that to be forgotten when more issues are raised such as whether or not a child or young person requires a waking day curriculum. But as is so often the case, following basic principles is the key to dealing with more complex or obscure issues.

Jamie Jenkins

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clerk@stjohnsbuildings.co.uk