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Introduction

- Key provision: s61 of the Children and Families Act 2014
- Key case: *NN v Cheshire East Council* [2021] UKUT 220
- Questions:
 - What SEP is necessary?
 - Inappropriateness?
 - Has there been consultation?
 - Discretion or duty
 - Where does EOTAS provision go in the EHC Plan?
 - What goes in Section I

Children and Families Act 2014

Special educational provision otherwise than in schools, post-16 institutions etc

- (1) A local authority in England may arrange for any special educational provision that it has decided is necessary for a child or young person for whom it is responsible to be made otherwise than in a school or post-16 institution or a place at which relevant early years education is provided.
- (2) An authority may do so only if satisfied that it would be inappropriate for the provision to be made in a school or post-16 institution or at such a place.
- (3) Before doing so, the authority must consult the child's parent or the young person.

Q1: what SEP is necessary?

- Applies to SEP that it has decided is necessary for a child or young person
- Therefore, EOTAS question arises AFTER the question of what SEP is necessary to meet the child or young person's SEN: *S v Bracknell Forest* [1999] ELR 51

Q2: inappropriateness: “a school” or “any school”

- Means “any” school or post 16 institution, not just that it is inappropriate for the LA proposed placement to make the provision: *Derbyshire CC v EM and DM* [2019] UKUT 240 (AAC).
- This means factors will usually centre on the child or young person (e.g. anxiety) or the nature of the special educational provision (e.g. specific equipment).

Q2: inappropriateness: meaning of “inappropriate”

- LA / Tribunal is not just asking if school “can” make SEP, but whether it “would not be suitable” or “would not be proper”: *TM v Hounslow* [2009] EWCA Civ 859 paragraph 26, *NN* paragraph 32
- This includes evaluation of circumstances of case including: the child’s background and medical history, the particular educational needs of the child, facilities that can be provided by a school and otherwise than at a school, the comparative costs of alternative provisions, the child’s reaction to the provisions, the parents’ wishes and any other particular circumstances that might apply.
- Parental wishes also relevant by section 9 EA 1996, but not determinative.

Q2: inappropriateness: meaning of “inappropriate”

- Examples:
 - A child’s “school related anxiety“ may lead for it to be “inappropriate” for provision to be made at a school: *M v Hertfordshire CC* [2019] UKUT 37
 - A child’s “firm views”, in the context of “extreme controlling behaviour” should have been taken into account: *NN*.
- Overall, wide discretion for LA / Tribunal

Q2: inappropriateness: part of SEP being EOTAS

- It is possible for a specific part of SEP to be provided out of school, e.g. a particular therapy: *NN* paragraph 30

Q3: has there been consultation

- The LA must consult with child's parent or young person on EOTAS.
- Principles of consultation will apply:
 - Decision must be at a formative stage
 - Parents or young person must be given sufficient information
 - Adequate time to respond
 - Response to consultation must be given conscientious consideration
- Decision ultimately that for judgment of LA or Tribunal.

Q4: discretion or duty?

- Section 61: the LA “may arrange” for any SEP to be provided otherwise than at school/institution/placement
- But:
 - Framed as discretion, but effectively a duty with reference to section 42 CFA 2014
 - Discretion already exercised as to whether “inappropriate” or not

Q5: Where does EOTAS provision go in the EHC Plan?

- Provision goes in Section F: *NN* para 47(i).
- Does EOTAS affect specificity in Section F?

DM v Cornwall CC [2022] UKUT 230 (AAC): the specificity required will depend on a specific case, but “in some very general sense...education which is bounded by a school building and the provision and rules that may apply to all pupils in that school may to an extent be assumed and not need to be stated whereas that provision *may* need to appear more explicitly in a case where the EHCP concerns a child being educated at home and otherwise than in school.”

Q6: what goes in Section I?

- The FTT should consider whether a school or type of school will be “attended by” the child, i.e. “be present at”: *NN* paragraph 43. This includes part time attendance.
- If the child does not attend a school, section I should be left blank (this is logical as the LA has decided no school/institution is “appropriate”): *Derbyshire CC v EM and DM* [2019] UKUT 240 (AAC).
- What is specified must be strictly limited to the name and type of school, and home tuition is not included in Section I: *East Sussex v TW* [2016] UKUT 528 (AAC) paragraph 33.

Q6: what goes in Section I?

- A “school” is an educational institution outside FE and HE sector that provides primary and/or secondary education: s4 EA 1996.
- Whether something is a school is a question of fact for the Tribunal: *TB v Essex CC (SEN)* [2013] UKUT 0534.
- A “post 16 institution” is an institution which provides education or training for those over compulsory school age but is not a school or HE institution: CFA 2014 s83(2).

Thank you for listening

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