



High Court to hear legal challenge about rights of children with special educational needs during the coronavirus pandemic

Shaw and ABC v Secretary of State for Education CO/2331/2020

Press Statement on behalf of the Claimants

28.7.2020

On 29 July 2020, two disabled children, supported by their parents, will take their legal challenge to the High Court against the Secretary of State for Education's downgrading of important legal duties for children with special educational needs during the Coronavirus pandemic.

The challenge is being brought against the decisions (covering the months of May, June and July) to modify the core legal duty on local authorities, under section 42 Children and Families 2014, to secure provision to meet special educational needs and health needs as set out in a child's Education, Health and Care Plan – replacing it with a requirement to use 'reasonable endeavours' to secure that provision. This core entitlement in relation to education had been in place undisturbed for decades for children through successive pieces of legislation. In addition, the claim challenges the Secretary of State's decision to issue Amendment Regulations which provide exceptions to the strict timescales which local authorities are required to comply with during the planning and reviewing process for Education, Health and Care Plans where these cannot be met because of a reason relating to the coronavirus.

The Children's Commissioner has responded publicly to these changes in a statement in which she expresses "serious concerns about the regulations that came into effect on 1 May, downgrading the duties of councils towards children with Education, Health and Care Plans (EHCPs)" and that "I am of the view that the downgrading of key duties towards children with SEND is disproportionate to the situation. The SEND system was already under considerable strain before Covid-19 and I am worried that these changes could result in local services being stripped back further."

These concerns were echoed by representatives of 49 charities and organisations that work with and support children with special needs and/or disabilities (SEND), and their families who wrote jointly to Vicky Ford MP, Minister for Children and Families on 29 May 2020, stating "we have significant concerns about the disproportionate impact on this group of children, who already experience poorer outcomes than their peers. In particular, we are concerned about the modification of Section 42 of the Children and Families Act and the variability in the interpretation of 'reasonable endeavours'."

The grounds of claim include that the Secretary of State failed to consult and failed to carry out 'sufficient inquiry' before making the decisions and that it was irrational for him to determine that it was appropriate and proportionate to make the Notices. In addition, lawyers argue that the Amendment Regulations should have been laid before Parliament for scrutiny before they came into force and that the Secretary of State breached his duty under section 7 of the Children and Young Persons Act 2008 to have regard to the well-being of children prior to making these decisions.

Since the proceedings were issued, the government has announced that, unless the evidence changes, it does not intend to issue further notices modifying the section 42 duty beyond the end of July.

However, the Claimants are concerned that the Secretary of State retains a power to issue further notices at any time and there are real prospects that a further notice might be issued, for example in the event of a 'second wave'. In addition, the Amendment Regulations currently remain in force until at least 25 September and the Claimants are concerned that the backlog of assessments and decisions by local authorities continues to grow by the day.

The claim has already received 'urgent consideration' by the court and Mr Justice Saini said that: "Without expressing any views as to the merits, it is clear that the claim raises issues of serious concern in relation to vulnerable children with special educational needs and as to how such needs are to be met in the Pandemic".

Polly Sweeney, Consultant Solicitor at Scott-Moncrieff who acts for the Claimants said:

"The Claimants are concerned that the Secretary of State's decisions have been driven by a desire to protect local authorities, without considering whether this is proportionate to the actual impact on children and families. Evidence has been filed on behalf of the claimants from organisations such as IPSEA, SOSISEN, National Autistic Society, SEND Action and the Special Needs Jungle which demonstrates the devastating impact of the changes on children and young people with special educational needs and in particular that families have been left feeling 'abandoned'. We believe that the Secretary of State did not have adequate information about this impact before making these decisions."

Mr Justice Kerr will now hear the full case over a two day 'rolled up' hearing at the Royal Courts of Justice on 29 and 30 July 2020.

Notes:

Counsel instructed to act on behalf of the Claimants are Steve Broach of 39 Essex Chambers and Alice Irving of 1 Crown Office Row.

A link to the full statement of the Children's Commissioner: <https://www.childrenscommissioner.gov.uk/2020/05/12/response-to-steps-taken-to-relieve-councils-of-certain-duties-to-children-with-special-educational-needs-and-disabilities-send/>

A link to the sector letter on behalf of 49 representative organisations and charities:

<http://www.nnpcf.org.uk/wp-content/uploads/2020/05/Sector-letter-to-the-Childrens-Minister-May2020.pdf>

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