

INFORMATION SHEET

JUDICIAL REVIEW

Judicial review (JR) is an action in which the court is asked to review the lawfulness of a decision or action made by a public body. It therefore covers government departments, local authorities and state-maintained schools (including academies and, probably, free schools) but not private schools.

Judicial review is a challenge to the way in which a decision has been made, rather than the rights and wrongs of the conclusions reached. Provided that the right procedures have been followed when reaching a decision, the court will not substitute what it thinks is the correct decision. A decision will only be set aside if it is found to be unlawful or wholly irrational.

However, in many respects the advantage of a judicial review lies in the threat: local authorities and schools may well be persuaded to take parents more seriously if they realise that the parents know judicial review is an available remedy. It also lies in the fact that local authorities are forced to account for themselves when they are trying to be evasive, and also to think about negotiating and complying with their legal duties.

When might judicial review be used in education cases?

In the education context JR may be used for challenging:

- ▼ Failure to provide support specified in Part 3 of a Statement of SEN. Note that this is only practicably possible if provision is properly specified and detailed in Part 3.
- ▼ Failure to implement the school placement in Part 4.
- ▼ Failure to provide full-time education.
- ▼ Failure to provide the full national curriculum to children eligible to receive it.
- ▼ Failure to provide education out of school for children who for any lawful reason are unable to attend school.
- ▼ Failure to make provision for education for children unable to attend school for medical reasons.
- ▼ Unlawful exclusion from school.
- ▼ Unlawful decisions of appeal panels who have upheld permanent exclusions.
- ▼ Refusal of schools to readmit after exclusions are overturned.
- ▼ Decisions of school admission appeal panels.
- ▼ Failure to provide school transport, or the decisions of independent panels considering school transport issues.
- ▼ Refusal of local authorities to comply with Special Educational Needs and Disability Tribunal decisions or directions.
- ▼ Failure to meet time limits during the statementing process.
- ▼ Failure to carry out annual reviews when due, or to complete the annual review

- process within a reasonable period.
- ▼ Failure to issue change of school phase statements by 15 February in the relevant year.
- ▼ Attempts by local authorities to change statements, particularly with regard to school placements, too soon after previous appeals.
- ▼ Unlawful school placement policies by local authorities.
- ▼ Unlawful school closure or reorganisation arrangements.
- ▼ General local authority decisions relating to education and connected areas, for example the failure to make proper care provision.
- ▼ Unlawful government decisions.
- ▼ Challenges to the refusal of leave to appeal to the Upper Tribunal from the First-tier SEND tribunal.

This is not an exhaustive list.

Issues commonly the subject of judicial review

A number of topical issues are likely to attract challenges by way of judicial review.

Changes to local authority SEN policies

A number of authorities appear to be reacting to the proposed changes in SEN Legislation in the Children and Families Bill by assuming that the number of Education, Health and Care Plans issued will be substantially less than the number of statements which they will replace. There are in particular suggestions that what are perceived to be less severe types of learning difficulty (e.g. dyslexia and Asperger's Syndrome) will not normally attract statements. Whilst that may be correct if the reality is that children are receiving adequate support without an EHCP, nevertheless this should not be a blanket policy and the circumstances of each child should be carefully considered. If children are routinely being refused statements as a result of such a policy that might possibly be challenged by way of judicial review.

A variant of this is that LAs are arguing that if the cost of provision is less than £10,000 per year (the amount of basic funding per child with SEN delegated to schools) then there is no need even to start the process of statutory assessment which may lead to a statement, because a statement will not lead to the child receiving any different or greater provision. That type of policy may again be challengeable, because in fact after assessment it may well transpire that the child does need more; further, the benefit of a statement is that the provision is enforceable through the courts, so if support is withdrawn from a child who has no statement (or, in future, EHCP) there is little that can be done to enforce its reinstatement.

School transport

The entitlement of children with SEN and disability to school transport has been further defined by the Education and Inspections Act 2006 and guidance issued by the then DfES in May 2007, Home to School Travel and Transport Guidance – see <http://publications.teachernet.gov.uk/eOrderingDownload/DFES-00373-2007.pdf>. However, at a time of funding cuts many LAs are revising their transport policies to try to reduce transport bills. For example, some are claiming to take into account parents'

means or the eligibility of disabled children for mobility allowance and Motability vehicles and are suggesting that if parents can afford it they should be providing transport. However, the relevant legislation make it clear that LAs' duty to provide transport is absolute when the relevant criteria are met and there is no suggestion that they are entitled to take means into account.

A further interesting issue arises in relation to authorities that will only provide transport on the basis that the parents act as escorts. Under the current law this is only possible if the parent consents.

Revised policies are also tending to state that, where children are placed in specialist residential schools, their entitlement to transport depends solely on the nature of the placement – i.e. in a weekly boarding school children can have transport every weekend, but those in termly schools can only have transport at school holidays and half terms, and those in 52 week placements can only have transport at the beginning and end of the placement – i.e. they are not entitled to come home at all over their entire school careers! Such policies have not been tested through the courts because LAs have tended to concede when challenged, but it is strongly arguable that they breach the rights of children to family life and are seriously discriminatory.

Amendments to statements

Occasionally LAs attempt to amend statements at an early stage after inconvenient SEND Tribunal decisions. Although the obvious remedy for this is another appeal, a decision of this nature may well be subject to judicial review on the basis that it effectively constitutes contempt of the Tribunal and it is unreasonable and unfair to expect parents to have to go through the stress and expense of repeated appeals. Such JRs would normally have to be brought in the name of the parents unless it can be demonstrated that the child also is prejudiced, for example if the amendment to the statement involves placement in another school and the authority insists on implementing this.

Child protection

There appears to be a small but increasing trend in local authorities using child protection action where parents are pushing for provision for SEN and social care. This ideally needs a joined-up approach with solicitors who are expert in the child care/child protection area, but there may be challenges available through judicial review.

School exclusion

The appeal process for school exclusions has been amended fairly recently to mean that independent review panels who disagree with governors' panels reviewing a permanent exclusion cannot set the exclusion aside; they can only recommend or direct the governors to reconsider. If the governors reconsider and confirm the original decision to uphold the exclusion, then the only further right of challenge would be by way of an application for judicial review. Historically challenges related to school exclusions did not have a good success rate, but that may change under the new regulations.

Upper Tribunal appeals

Parents and LAs who wish to appeal against a First-tier SEND tribunal decision must apply to the First-tier tribunal for permission to appeal to the Upper Tribunal, and if permission is refused they must apply to the Upper Tribunal. If the UT refuses leave, it may in limited circumstances be possible to challenge that further by way of an application for JR. This would again have to be in the parents' names.

What are the pros and cons of judicial review?

- Judicial review is a remedy of last resort. It should be used only after all other efforts to resolve the issue have failed. This means that, for example, LA complaints and appeals procedures as well as the Local Government Ombudsman should be used where they are available and where they can provide a realistic remedy (it would be accepted that they may not provide an adequate remedy where the issue is urgent). It also means that the opponent should have been given an opportunity to remedy matters by means of a pre-action letter set out in accordance with a protocol prescribed in the Court Procedure rules. Solicitors dealing with JR will always have to be cautious, and if the opponent offers anything approaching a reasonable compromise - for example, a meeting to discuss resolving the issue - JR would not be appropriate.
- JR judges are not education experts and will not stray into the province of the SEND Tribunal or other experts. Their jurisdiction is limited to considering the decision being challenged. They have a wide discretion as to a remedy, but will not get into areas of expertise, particularly with regard to provision for SEN. Under the new Tribunal rules judges have the power to transfer education JRs for hearing in the Tribunal's Upper Tier, although at present they are only likely to do so in SEN-based cases. It is not clear whether, and if so how, that will affect this position.
- Since the court will not substitute its own decision, a favourable judicial review may well simply result in remission of the case back to the original decision maker, but with guidance as to the correct approach to reconsidering the matter in question. In the meantime, the court may order some sort of interim provision and possibly make orders to expedite a SEND Tribunal hearing if appropriate. In some instances the decision the court takes may well resolve the issue – for example, by ordering a school to admit a child or by ordering full-time education.
- There is normally a three-month time limit from the date of the decision in question before judicial review proceedings can begin. However, the court may find that this is too long, particularly in relation to challenges to school admission decisions which should normally be brought before the beginning of the school term for which admission is sought. Some unlawful actions may, however, be deemed to be ongoing for the purposes of calculating the time limit - for example, the continued failure to make special educational needs provision available.
- The remedy is discretionary. Therefore, even if the court finds in favour of the claimant, it may decide not to interfere with the original decision - for example, if this would not have any practical result or would cause undue inconvenience and expense.

Legal aid

Most of these JR challenges relate to the rights of the child, and therefore can be brought in the child's name. The exceptions are challenges to decisions on school admissions, challenges to early attempts to amend statements in defiance of SEND Tribunal decisions that would relate to parental rights, and challenges to the refusal of permission to appeal to the Upper Tribunal.

The advantage of the JR challenge being in the name of a child is that the child may be eligible for legal aid. And of course, because local authorities faced with a pre-action letter know that there is no cost barrier to bringing a challenge, they may well be persuaded to be more sensible.

Legal aid will not cover the preparation of a pre-action letter and associated correspondence up to the point when proceedings are about to be commenced; however work of this nature may be covered under the legal help system, provided that the parents are themselves financially eligible.

It should be noted that only solicitors with education or public law legal aid contracts are able to bring JR challenges under legal aid.

The judicial review procedure

Before commencing proceedings, a formal letter must be sent in a defined format set out in an agreed pre-action protocol. This must set out precisely what it is alleged that the public body has done which is unlawful, and what action is required in order to remedy that. Normally 14 days should be given for a response, although that can be reduced in urgent cases.

Judicial review normally requires two stages:

The permission stage

At this point, the claimant submits the relevant form accompanied by a supporting statement and relevant documents. The bundle of documents will be considered by a judge whose job it is to decide essentially whether there is an arguable case, in which event permission will be given.

If the judge refuses permission, it is possible to reapply for the decision to be reconsidered at an oral hearing in court.

When asking for permission, the claimant can ask the court to make urgent interim orders - for example, to reinstate SEN provision or school transport. In that event, the court may list the case for an urgent hearing to consider that issue. The judge considering the documents may in any event order that the case be listed for hearing.

The full hearing

If permission is granted, the judge will normally make orders as to the timetable for the full application, including the date by which any response by the defence must be

entered and, in an urgent case, the date by which the case should be listed for hearing. Note that non-urgent cases are currently taking several months to come to trial.

The final hearing will be in open court (although children's details are likely to be anonymised). It is very rare for witnesses to be called; decisions are made on the basis of the papers and legal arguments.

It is of course open to the parties to reach agreement at any point during this process, in which case a Consent Order will be lodged and the case will be brought to an end.

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