SOS!SEN | The independent helpline for Special Educational Needs

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 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 usually substitute what it thinks is the correct decision. However, it may well give guidance as to the matters to be taken into account when remaking the decision; and when the unlawful action is obvious (e.g. failing to meet a statutory deadline) the reality is that the decision can only be remade in a manner that complies with the law. 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 sections F and G of an Education Health and Care Plan (EHCP). Note that this is only practicably possible if provision is properly specified and detailed in these sections.
- Failure to implement the school placement in Section I.
- 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.
- Unlawful exclusion from school.
- Unlawful decisions of appeal panels who have upheld permanent exclusions.
- 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 EHC needs assessment 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 (or 31 March for children due to move to post 16 placements).
- Unlawful school placement, transport or other policies by local authorities, including funding decisions made without proper consideration of Equality duties or proper consultations, and the use of blanket policies where they have a duty to deal with each child according to their individual needs.
- Unlawful decisions by Clinical Commissioning Groups to withdraw health provision in Section G of an EHC Plan.
- Unlawful government decisions.

This is not an exhaustive list.

It is important to note that judicial review is not a remedy for past wrongs. Therefore if, for instance, an LA has failed to meet a deadline in the past but has now taken the relevant action late, judicial review would not be suitable. Likewise, if there has been a delay in arranging for specified special educational provision but it is now in place, again JR is not appropriate. If there has been a failure to arrange provision at one placement but your child has left that placement and is due to move to a new one, again JR is not appropriate unless and until there is a similar failure at the new placement. In most cases the appropriate remedy for past failures is the use of complaints which should if necessary be escalated to the Local Government and Social Care Ombudsman.

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 and Social Care Ombudsman should be used where they are available **and** where they can provide a realistic remedy. **However**, in many education contexts they are not a realistic alternative remedy if they are too slow: an ombudsman complaint can take months to resolve, so it is not a realistic remedy if, for instance, a child is out of school unlawfully, or is not receiving full time education, or if the child's special educational needs are not being met.
- 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 courts' Civil 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.

- However, frequently the pre-action letter itself resolves matters, not least because a copy must be sent to the local authority's lawyers who may well advise case officers simply to obey the law rather than risk losing and having to pay the child's costs.

- High Court judges are not education experts and will not stray into the province of the Special Educational Needs and Disability Tribunal or other experts. Their jurisdiction is limited to considering the decision being challenged. Judges have the power to transfer education JRs for hearing in the Tribunal's Upper Tier, although they are only likely to do so in SEN-based cases, and the power seems to be used only rarely.

- Since the court will not substitute its own decision, a favourable judicial review may 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. 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 an LA to provide transport, or by ordering full-time education.

- There is normally a three-month time limit from the date of the decision in question for beginning JR proceedings. 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, or failing to comply with assessment time limits. This means that in effect the time limit is never reached whilst the failure is continuing.

Legal aid

Most education-related 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, and anything to do with the SEND tribunal (e.g. major delay in issuing a tribunal decision) as these relate to parental rights.

The advantage of the JR challenge being in the name of a child is that the child will probably be financially eligible for legal aid. Local authorities faced with a pre-action letter should therefore be aware that there is no cost barrier to bringing a challenge, and may well therefore be more inclined to concede at an early stage.

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. SOS!SEN can prepare such letters: we request a donation for the purpose, but solicitors generally charge considerably more.

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

Unfortunately we find that employees of the Legal Aid Agency do not necessarily always understand that legal aid is available in the name of children for judicial reviews: it is usually better to contact experienced solicitors direct to deal with the legal aid application.

Judicial review procedure

Before commencing proceedings, a formal letter must be sent in a defined format set out in a pre-action protocol set out in the courts' Civil Procedure Rules. 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. It is usually advisable for this to be sent by a lawyer. Unfortunately, however, legal aid in the child's name will not usually cover this.

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, including relevant statutory provisions. 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 very 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. Where there is a dispute about the facts, the court will normally make a decision based on the defendant's version.

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.

Practicalities

Bearing in mind the requirement that JR is a last resort, you need to be able to demonstrate that you have given the other side every opportunity to resolve the problem. If you find that, for example, your LA is ignoring the EHC needs assessment timetable, or failing to arrange provision set out in your child's EHC Plan, it is helpful to go through a staged warning process.

Taking a hypothetical example of failure to provide speech and language therapy support in an EHC Plan:

1. An email or letter to the case officer notifying them of the failure, e.g:

   > Dear X
   >
   > As you know, section F of my son Y's EHC Plan provides for him to receive 1:1 speech and language therapy from a qualified therapist for one hour a week, plus a programme drawn up by the SALT and delivered throughout the school day by Y's teaching assistant who must be trained and supervised by the SALT for that purpose.
   >
   > Since the EHC Plan came into effect, Y has received no SALT either on a 1:1 basis or via a programme. Y's school tells me that they have been trying to arrange this for some time via your department and the local SALT service but they are not receiving any responses.
   >
   > I am seriously concerned about this failure which is prejudicing Y: SALT should have been put in place some time ago, and the more its commencement is delayed, the more difficult it will be for him to catch up. Moreover, Y's communication difficulties are affecting his ability to access the curriculum generally.
   >
   > Please could you therefore let me know as a matter of urgency what arrangements you are making in this regard, and when we can expect SALT to begin. I understand that the LA has a statutory duty to arrange this, and that if any difficulty is encountered in arranging it via the NHS, it should be arranged via an independent therapist.
   >
   > I should be grateful to receive this information by (*date - one week ahead*) and look forward to hearing from you.

   If you have already raised the issue with the LA, obviously this step can be omitted.

2. If there is no satisfactory reply, a further email or letter, possibly copied also to a senior officer:

   > Dear X

I refer to my email of (date) and am disappointed that I have not heard from you. As pointed out, this matter is becoming increasingly urgent.

I would like to resolve this matter constructively, but in view of the continuing delay, I must warn you that if I do not hear from you as requested by (*date one week ahead*) I will have no choice but to consider action through the courts by way of an application for judicial review in Y's name to enforce his entitlement to special educational provision. Please may I therefore hear from you by that date without fail, with full details of the SALT appointed, his or her experience and qualifications, and the proposed start date which should of course be before (*date two weeks ahead*).

3. If there is still no satisfactory reply, a final letter/email:

   Dear X

   I refer to my emails of (*date*) and (*date*) to which I have received no reply (or no reply other than an acknowledgement dated …..). I am simply writing to let you know that in the circumstances I have had no choice but to take legal advice with a view to judicial review proceedings in which, of course, we will seek an order that the LA pay the costs involved. If you wish to avoid this, no doubt you will take urgent action to confirm arrangements for the immediate commencement of SALT support in accordance with the terms of Y's EHC Plan.

4. If this does not resolve the issue, contact us (or solicitors) with a view to arranging for a pre-action letter to be sent. If you ask us to deal with it and we are able to help (we are very busy!), we will need copies of all relevant documents including your own correspondence to try to resolve the issue. If the issue is failure to implement the EHC Plan, we will need a copy of the Plan and, possibly, the last annual review reports.

In an urgent case obviously this procedure can be foreshortened; and if, as is often the case, parents or carers have already given the LA many opportunities to resolve the matter, it is likely to appropriate to start at stage 3 or even 4 of the above process.

It is worth noting that in our experience over 90% of instances when we have sent pre-action letters have resulted in the problem being resolved without having to take the matter any further. If it is necessary to proceed to JR action, we will be happy to supply details of solicitors with legal aid contracts in education and public law and to liaise with them as necessary.

This article may also be helpful: https://rightsinreality.wordpress.com/2014/08/30/why-judicial-review-is-a-real-remedy-in-sen-and-disability-cases/