

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 City Academies) but not private schools. It 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.

Potential JR challenges in education

This is a non-exhaustive list of education-related issues for which JR might be available:

1. The failure to make available the special educational needs provision set out in Part 3 of Statements of Special Educational Needs. The same would apply in relation to the failure to implement the school placement in Part 4. Note that this is only practicably possible if provision is properly specified and detailed in Part 3.
2. The failure to provide full time education.
3. The failure to provide education out of school for children who for any lawful reason are unable to attend school.
4. Failure to make provision for education for children unable to attend school for medical reasons.
5. Unlawful exclusion from school.
6. Unlawful decisions of independent appeal panels who have upheld permanent exclusions.
7. Challenges to governors who have upheld fixed term exclusions.
8. Challenges to the decisions of school admission appeal panels.
9. The failure to provide the full national curriculum to children eligible to receive it.
10. The failure to provide school transport.
11. Challenges to the refusal of local authorities to comply with SENDIST decisions or directions.
12. Challenges to the refusal of local authorities to amend Statements of Special Educational Needs following clear annual review recommendations that they should be amended.
13. Challenges to school reorganisation plans.

14. General challenges to other local authority decisions relating to education.
15. There may also be relevant challenges in connected areas, for example the failure to make proper care provision.

Note:

1. Judicial review is a remedy of last resort. Therefore it is necessary to demonstrate that the claimant has exhausted all other possible remedies (including internal complaints and appeal procedures and the local government ombudsman) unless it can be demonstrated that this is impracticable (notably by reason of delay) or does not provide a suitable remedy.
2. JR judges are not education experts and will not stray into the province of SENDIST or other experts. However, under the new tribunal rules they have power to transfer education JRs for hearing in the 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.
3. There is normally a three month time limit from the date of the decision in question in which to begin judicial review proceedings. However the court may find that even 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.
4. Since the court will not substitute its own decision, a favourable judicial review decision 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.
5. 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.

Current topical issues

1. Changes to local authority SEN policies

A number of authorities (including Hertfordshire and Hounslow) are introducing SEN policies ostensibly aimed at reducing costs by cutting down the number of Statements on the basis that the funding saved is devolved to schools for assisting children at School Action Plus. There are a number of variants to this, including the Hertfordshire policy of failing to specify provision under 15 hours a week. Such policies are likely to be unlawful and may well be subject to JR challenge. See the IPSEA website for further details - <http://www.ipsea.org.uk> .

2. 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>.

This requires amongst other matters that local authorities have a robust internal appeal process in place in relation to school transport issues but does not define what that involves: some authorities have no such process, and it is dubious whether the processes put in place by others satisfies normal requirements for a fair hearing.

Additionally, some authorities are attempting to take into account the eligibility of disabled children for mobility allowance and Motability vehicles. Not only does this fail to promote “sustainable transport” as required by the policy, it is likely to constitute disability discrimination since the means of non-disabled children would not be taken into account when deciding their eligibility for school transport.

A further interesting issue arises in relation to authorities which will only provide transport on the basis that the parents act as escorts. Under the current law this is arguably only possible if the parent consents, although the wording is slightly abstruse and it has yet to be tested by the courts.

3. We are seeing an increasing trend for local authorities to amend Statements at an early stage after inconvenient SENDIST decisions. Although the obvious remedy for this is another SENDIST appeal, a decision of this nature may well be subject to JR on the basis that it effectively constitutes contempt of SENDIST and it is unreasonable and unfair to expect parents to have to go through the stress and expense of repeated SENDIST appeals. However 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.
4. We are also seeing 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 JR.
4. The decisions of school exclusion independent appeal panels may be challenged through JR. However the success rate of such cases is low.

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:

1. 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 this 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.

2. 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 approximately a year 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.

Legal aid

Note that legal aid is available for litigants who are financially eligible. Judicial reviews directly relating to the child's right to education can normally be brought in the child's name, and therefore legal aid will be available to the child. This does not cover admission appeals. Legal aid will not cover the preparation of a pre-action protocol 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.

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