LOCAL AUTHORITIES CHANGING SCHOOL TRANSPORT POLICIES FOR 16 TO 18 YEAR-OLDS

BACKGROUND

The current leading case on changes to school transport for 16 to 18 year-olds is the 2020 case of "Drexler v Leicestershire County Council" which was brought as a Judicial Review claim that was unsuccessful and the judgement for which was upheld by the Court of Appeal.[1]

The challenge was to a local authority's school transport policy whereby the local authority proposed to withdraw the provision of school transport for most 16 to 18 year-olds with special educational needs (SEN) and disabilities and to replace it with personal transport budgets (PTB) which would in most cases be insufficient to cover the cost of the transport currently provided.

There were three grounds of challenge in the judicial review:

1. A claim of age discrimination that the SEN Policy unlawfully discriminated between, on the one hand pupils aged 5 to 16 and students aged 19+, and on the other hand pupils aged 16 to 18.
2. A second claim, also under the Human Rights Act, of indirect discrimination on grounds of disability. The claimant relied on ECHR Article 8 and/or Article 2 of the First Protocol, read together with ECHR Article 14, and on the principle in Thlimmenos v Greece (2000) 31 EHRR 41, applied in Burnip v Birmingham City Council [2013] PTSR 117. The claimant contended that the SEN policy discriminated on grounds of disability, because travel assistance for children aged 16 to 18 under the SEN Policy was insufficiently different to the annual grants paid to pupils aged 16 to 18 under the Mainstream Policy.
3. The third was that the local authority's decision to adopt the new SEN Policy was taken without compliance with the public-sector equality "due regard" requirements under section 149 of the Equality Act 2010.

In the High Court, Mr Justice Swift agreed that Leicestershire County Council's (Leicestershire) policy treated pupils aged 5 to 16 more favourably than those aged 16 to 18. He held, however, that this did not constitute unlawful discrimination, because the change in policy struck a fair balance between the rights of 16 to 18 year old students with SEN and the general public interest to reduce public expenditure.

In the Court of Appeal, the appellant claimed that the High Court was wrong to find that the difference in treatment was justified. The Court of Appeal rejected this appeal.

Giving judgment, Lord Justice Singh emphasised that the courts should be slow to intervene when the relevant government decision concerned "the allocation of scarce public resources" [71]. In such a context, Singh LJ reasoned, the court should afford the

[1] Drexler, R (on the application of) v Leicestershire County Council [2020] EWCA Civ 502

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government a greater margin of appreciation, given that decisions of this kind involved “difficult choices” [79] about how best to spend limited public money.

Singh LJ placed emphasis on the validity of Leicestershire applying their policy in line with the (above discussed) distinction made in legislation between children with SEN aged 5 to 15, for whom school transport must be provided if the child is an “eligible child”, and those aged between 16 and 18 for whom the local authority is not obliged to provide transport.

Singh LJ also pointed to the provision in Leicestershire’s policy to make exceptions to the system of PTBs in cases of real need, as well as to the availability of appeals to challenge decisions to move individual students onto a PTB.

Dismissing the appeal, the Court held that the "manifestly without reasonable foundation test" was not limited to cases involving welfare benefits and that the local authority's decision was not manifestly without reasonable foundation or otherwise disproportionate.

There have been claims that the decision would be challenged in the Supreme Court but to date there has not been any official reporting of such a challenge being launched.

IMPLICATIONS FOR LOCAL AUTHORITIES AND OTHER PUBLIC BODIES

Local authorities which chose to take the same approach as Leicestershire towards school transportation for 16 to 18 year olds with SEN will be reassured that the courts will be unlikely to intervene.

Local authorities will want to recognise, however, the emphasis placed by Singh LJ on the importance of a mechanism for making exceptions to such a policy, as well as a provision for appeals. A local authority introducing a school transportation policy without such provisions could end up finding itself facing a challenge and where the courts may be less sympathetic.

There were a couple of elements that the court felt that maybe were lacking in the actual policy by Leicestershire. For instance, the local authority should have been clear that the actual change was going to have the identified adverse impact on the parent whereby they were not going to be in receipt of that transport arrangement that they were previously in receipt of, and that it may result in a shortfall which a parent may need to make up.

Also for those parents who relied on transport arrangements, they may now be forced to actually make their own arrangements, and so there was a question of whether putting the parents in that position would then go against principles in the relevant legislations such as the Education Act 1996 in respect of transport and travel, and also go against the guidance for the home to school transport policy for 16 to 19 year olds.

Under the relevant statutory guidance which can and should be read in conjunction with the statutory legislation one has to give consideration to necessity. If the parents for the young person or child were unable to make their own arrangements for transport to the place of education or in some cases apprenticeships, then would promulgating such a policy change make it impossible for them to travel and therefore deny them access to the benefits which they would otherwise enjoy?

Local authorities should also be mindful of the firm distinction drawn in statute between children under 16, who are of compulsory school age, and those above 16.

While Parliament has placed local authorities under legal duty to provide school transportation for those of compulsory school age who meet the definition of “eligible” children, it has not done so for those aged 16 to 18. The court has emphasised that it is appropriate for local authorities to have regard to this distinction when considering differential provision of services locally.

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We have a highly skilled team of lawyers specialising in Special Educational Needs and Disability Tribunal cases. We advise and represent local authorities in appeals and advise schools in respect of disability discrimination claims. Our lawyers have a wealth of experience in identifying needs, provision, and placement issues and work closely with SEN officers, educational psychologists, and other specialist witnesses. We pride ourselves on our collaborative approach with parents, for whom the tribunal process can be very stressful. We get to know our client and their schools and colleges very quickly and are able to tailor our service to our client's needs.

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