

Dear Geoff

I am very well thank you and I hope you are too.

You are correct that transport appeals are not a statutory requirement.

The reason why transport appeals exist in Kent and in my opinion the reason why they are and will continue to be legally necessary is set out below-

1. The education legislation provides KCC with a broad discretion to pay the whole or part of the cost of school transport.

2. Under the existing transport policy (in addition to providing free transport where it is legally required to do so) KCC has decided to exercise that discretion in relation to certain categories of pupil e.g. (and in general terms) those attending their nearest denominational school beyond statutory walking distance and those attending grammar school beyond that distance. KCC does not offer free or directly subsidised transport to other categories of pupil to whom it could potentially do so.

3. Under the proposed new transport policy, if adopted, (in addition to providing free transport where it is legally required to do so) KCC will not provide free transport or directly subsidised transport to any new entrants to any category of school.

4. It is well established in administrative law that when given a discretionary power a local authority must not fetter that discretion i.e. it may not say that we will never consider exercising its discretion in relation to categories of individuals who may otherwise potentially benefit from the exercise of that discretion. If a local authority does behave in such a manner it will most probably be behaving unlawfully and its actions will be subject to challenge by way of judicial review. Any such challenge would most probably result in the local authority being ordered by the Court to consider whether or not it should exercise its discretion based upon the facts of the individual applicant.

5. One way in which local authorities can avoid successful legal challenge in these circumstances is to incorporate a safety valve into their policy which allows for awards to be made in exceptional circumstances to those who would not otherwise fall within the published policy. In Kent this is the function which the appeals procedure undertakes, as it allows for awards to be made to those who do not meet the requirements of the published policy and providing that occasionally awards are made following an appeal it provides evidence that KCC is not fettering its discretion. It also carries out a second necessary function of offering an appeal where mistakes have been made.

6. Thus, if KCC was to dispense with its Member appeals procedure it would either have to change its policy to allow for awards to be made by officers (with an appeals stage to a more senior officer) in exceptional circumstances or it would have to risk facing judicial review claims from dissatisfied parents.

7. I also agree that restricting the right to appeal to representations made by the complainant's local Councillor would most probably be found to be procedurally unreasonable in a judicial review sense, in the post Human Rights Act environment, because it does not comply with the requirements of Article 6 the "right to a fair trial".

Best Regards

Mark Radford

Consultant

for and on behalf of Geoffrey Wild, the Director of Governance and Law.

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From: Rudd, Geoffrey - BSS GL

Sent: 10 May 2011 16:29

To: Radford, Mark - BSS GL

Cc: Bagshaw, Scott - ELS SSP; Tait, Andrew - BSS GL

Subject: Transport Appeals to the Regulations Committee Panels

Hi Mark

Hope you are fit and well.

We have been asked about the legal basis for Transport appeals and I attach an e-mal and enclosures relating to that. The question has been asked by County Councillor Mike Whiting.

My understanding is that whereas Admissions Appeals are governed by legislation set out in the Admissions Code which is a legally binding document ther isn't anything quite like that for Transport Appeals. I accept that Natural Justice would require that someone should have the right to appeal a decision but I am not sure where that stands in law. A few years ago parents didn't attend the appeals and there case was put by their County Councillor. It appears other LAs may do something similar to this. The County Council then resolved at one of its meetings (but I can't recall when) that under the Human Rights Act parents had the right to come to an appeal themselves and this has been the practice ever since.

I would welcome your views on this.

No doubt you will advise me about costs involved for your advice.

Many thanks

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