

CHILD 'RESIDENT' AT Boarding School
MAINTAINED BY LIA

CPAG



77/95

RAS/2/LM

Commissioner's File: CIS/164/94

SOCIAL SECURITY ACT 1986
SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A
QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. This is an appeal by the claimant against the decision of the Colchester social security appeal tribunal, given on 19 August 1993 whereby the tribunal confirmed the decision of an adjudication officer that the claimant's entitlement to income support "is reduced by the sum of £46.95 whilst two of her children are at boarding school".

2. I held an oral hearing of the appeal. The claimant attended and presented her own case. The adjudication officer was represented by Mr H. Dunlop of Counsel.

3. The claimant, the mother of three teenage children, made a claim for income support in January 1993. At that time two of the children were at a boarding school in Norfolk though their home, with their mother, is in Essex. According to their letter of 24 November 1992 the Essex County Council "accept[ed] responsibility for the cost of the tuition and boarding fees, minus a parental contribution". An adjudication officer then, by reference to regulation 44(3) of the Income Support (General) Regulations 1987, determined that "a notional income should be taken into account whilst the children were at boarding school". The claimant's income support was accordingly reduced to the amount to which I have referred. The tribunal, as I have said, upheld the adjudication officer's decision.

4. Regulation 44 of the 1987 Regulations deals with various aspects of the capital and income resources of children; paragraph (3) provides -

"(3) Where a child or young person -

- (a) is resident at an educational establishment and he is wholly or partly maintained at that establishment by a local education

authority under section 8 of the Education Act 1944; or

(b) not relevant

he shall for each day he is present at that establishment be treated as possessing an amount of income equal to the sum obtained by dividing the amount of personal allowance and disabled child premium, if any, applicable in respect of him by 7."

The claimant contended, before the tribunal, that, for the reasons to which she referred, the children were not "resident" at the boarding school in the sense in which that word is used in paragraph (3) and accordingly no calculation or deduction fell to be made pursuant to that provision.

5. The claimant has made extensive written submission with regard to the meaning of "resident" in regulation 44(3). In particular she has considered the use of the term in other parts of the social security legislation and indeed in other unrelated legislation and submits that -

"... 'resident' in Regulation 44 should have the meaning attributed to it as throughout the legislation, being permanent occupation of accommodation as a dwelling or home, as in the case of Residential Schools which are educational establishments and are registered under the Registered Homes Act and do not fall within the Residential Care Homes or Residential Accommodation definitions of the IS legislation."

Very recently she wrote to Essex County Council and received this reply -

"Essex LEA maintains residential special schools for pupils with emotional and behavioural difficulties. These operate on a school year basis, with pupils returning to their families or other arranged facilities during holiday periods. The LEA does not therefore maintain any establishments which provide 52 week accommodation. There are cases where the LEA and the Social Services Department take joint financial responsibility for the placement of a child or young person when it is agreed that s/he requires a 52 week placement. In such cases the placement is normally effected at an independent or non-maintained school outside Essex."

As I understand it, the claimant's case is that "resident" in regulation 44(3) describes the circumstances to which Essex refer in that quotation from their letter and does not describe the situation which pertained in respect of her children who came home at half term and during school holidays and could also do so at weekends.

6. The claimant has helpfully drawn attention to the fact that "resident" in regulation 44(3) was considered by the Commissioner in CIS/656/1995. The facts in that case would appear, for all relevant purposes, to be identical to the facts in this one. The Commissioner said -

"7. The claimant's representative put forward to the tribunal a submission that, as regulation 44(3)(a) required that the child should be "resident" at an educational establishment", that was not necessarily so in the case of the present claimant's sons since the claimant had had to incur very considerable expenditure on behalf of the two boys for clothing, school uniforms etc, even during the time that they were actually present at the boarding school. The claimant's representative submits that, as the regulations and the legislation do not contain a definition of what is meant by "resident", the boys could still be regarded as resident at home, even when they were at the boarding school.

11. The real question is whether the boys were, while present at H-School, "resident at an educational establishment". I have given very careful consideration to the detailed arguments that have been put forward both to the tribunal and to the Commissioner, in able written submissions by the claimant's representative. However, I conclude that there can be no doubt that while present at H-School the boys were "resident" there. If it were otherwise then it is difficult to conceive of any circumstances in which a child at a boarding school could be "resident" and yet regulation 44(3)(a) contemplates that it is possible for a child to be resident at an educational establishment. Moreover, the dictionary definitions cited of the word "resident" also lead to the same conclusion in my view. I note that Mr Mesher in his annotation to this particular regulation in his book on "Income related benefits: The Legislation" says of regulation 44(3), "Children and young persons at maintained boarding schools are treated as possessing an income sufficient to wipe out their personal allowance and disabled child premium (if applicable)", Although of course the commentary by an author does not necessarily represent the authoritative law I have no doubt that this annotation is correct.

12. I notice that by 1988 Amendment Regulations (S.I. 1988 No. 663) there was added a paragraph (9) to regulation 44 reading as follows,

" 44. (9) For the purposes of this regulation, a child or young person shall not be treated as present at his educational establishment on any day if on that day he spends the night with a claimant or a member of his household."

That reinforces the view that when the boys are actually

away altogether, they are not only "present" at the educational establishment but also "resident" there."

7. I agree with paragraphs 11 and 12 of that decision. It seems to me that there is no reason to confine the application of regulation 44(3) to the kinds of cases suggested by the claimant. That is because, as I see it, it is both just and logical that there should be a reduction of income support, in relation to the allowance for children, when they are living elsewhere, however temporarily; that is I think emphasised by the reference in regulation 44(3) to "each day he is present" and by paragraph (9). In relation to this matter I see no reason in principle to distinguish between the 52 week children referred to in the Essex letter and the claimant's children in their boarding school in Norfolk. And there is, in my view, nothing in the language used in the provision which requires me to make such a distinction. Accordingly, the claimant fails on this point.

8. There is another point in the case which has troubled me more than the "resident" point. For regulation 44(3) to apply, the child must not only be "resident" but he must be "wholly or partly maintained at [an educational establishment] by a local education authority under section 8 of the Education Act 1944". Section 8 of that Act (a lengthy provision which is in the papers and which I do not need to reproduce here) does not however appear to be directed at maintaining children in schools; it is the provision which puts on local education authorities the general duty to secure the provision of primary and secondary schools and the education within them, having regard to the factors required by the provision to be taken into account. At first glance therefore it would appear that regulation 44(3) simply cannot be made to apply to anyone because section 8 of the Education Act does not appear to operate in the way suggested by that regulation. Section 81 of the 1944 Act (also in the papers) enables the Secretary of State, by regulations, to empower local education authorities to give financial assistance to enable children to attend particular schools and Essex have confirmed that the contribution which they made to the claimant's children's "boarding fees" at the school in Norfolk was made "in accordance with section 81 of the Education Act 1944".

9. I should also mention Schedule 9 of the 1987 Regulations which is a list of sums to be disregarded in the calculation of income. Paragraph 11 of that Schedule provides that there is to be disregarded -

"11. Any sum in respect of a course of study attended by a child or young person payable by virtue of regulations made under section 81 of the Education Act 1944 (assistance by means of scholarships and otherwise) ... "

The current adjudication officer submits that -

" ... even if the children are only partly maintained under section 8 of the Education Act, I submit that

regulation 44(3) would still apply, with a full disregard being allowed on any sums awarded under section 81."

I leave aside the point that, whereas Essex in their letter refer to their contribution under section 81 as having been made in respect of boarding fees, paragraph 11 requires to be disregarded "Any sum in respect of a course of study ... ". As I see it, the scheme intended to be produced by regulation 44(3) and paragraph 11 of Schedule 9 is this. Under the former provision, where a child is resident at a boarding school he is to be treated as possessing income determined in its amount by the calculation to be made on the daily basis referred to. And under the latter provision, contributions made by the local authority are not to be taken into account as income; this means that the parent does not gain from having her child in a local education authority boarding school. Nor does she lose by having the local education authority's contributions taken into account as income of the child. I should perhaps mention that in this case, when it came to the notice of Essex that the claimant was in receipt of income support, they wrote confirming that she was not liable for any contribution towards the children's boarding fees.

10. The current adjudication officer submits to the effect that the tribunal's decision is erroneous in law because they did not have or find the full facts with regard to whether the children were wholly or partly maintained at the Norfolk school under section 8 of the 1944 Act. Although the drafting of regulation 44(3), in its reference to section 8, seems to me to be somewhat unfortunate, I take the view that these children were maintained at a section 8 school at least in the sense that the school was provided by a local education authority and another such authority assisted their attendance. If I were to take the view that, strictly speaking, schools and not children are maintained under section 8, regulation 44(3) would never apply to anyone and that, as it seems to me would be an unjust and illogical outcome. It follows that the tribunal were not in error to assume, as they appear to have done, that once it was established that the children were resident in a local education authority school then regulation 44(3) applied.

11. The outcome is that, as far as I can see, there is no respect in which it can be shown that the tribunal's decision is erroneous in law. In my view they were right on the resident point, they were right about the application of regulation 44(3) and, as it was never suggested that any contributions made by Essex had to be taken into account as income, they did not have to consider the question of disregard under paragraph 11 of Schedule 9.

12. The claimant has plainly put a great deal of time and effort into this appeal and has made some interesting legal points. But I am afraid that, for the reasons to which I have referred, her appeal must fail.

(Signed) R A Sanders
Commissioner

Date: 31 March 1995