IN THE UPPER TRIBUNAL **Appeal No.** HS/1824/2017
ADMINISTRATIVE APPEALS CHAMBER

Before Judge S M Lane

DECISION

The appeal is dismissed. The decision of the First-tier Tribunal heard under reference EH 6330/14/00001 did not involve the making of an error of law.

DIRECTION

I direct that there is to be no publication of any matter likely to lead members of the public directly or indirectly to identify any person who has been involved in the circumstances giving rise to this appeal, pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

REASONS FOR DECISION

1. I apologise for the late issue of this decision. The oral hearing of the appeal took place on 15 September 2017 at Field House in London. The appellant was represented by Ms Anna Tkaczynska, of counsel, instructed by HCB Solicitors. The respondent was represented by Mr Tom Amraoui, of counsel, instructed by the Local Authority's ('the LA's) legal department. I am grateful to both for their assistance.

2. The appellant brings this appeal with my permission. The appeal relates to the LA's decision not to make an Education Health and Care Plan (EHC plan) for the appellant's daughter, whom I shall call K, following an assessment under section 36 of the CFA 2014. There were three arguable grounds: -

Ground 1: the evidence before the F-tT indicated that K's special educational needs (SEN) could only be met within a maintained mainstream school with additional resources being provided and the special educational provision could not be delivered from internal resources. The F-tT [arguably] therefore erred by determining that an EHC plan was not necessary. It also erred in relying on the LA's 'local offer' in reaching its decision that an EHC plan was unnecessary for K;

Ground 2: that the F-tT had no evidence to support its view that skilled and experienced teachers would be available for K within a mainstream school. The appellant argued that, where no school was named in an assessment, the LA had to show that each item of SEP was available in any and all mainstream schools in the area (§ 43, Submission).

Ground 3: that the F-tT erred by requiring the appellant to identify precisely the SEP that K required.

Background facts found by the F-tT

3. K, born on 25 June 2007, was rising 10 years old at the time of the F-tT's decision on 31 March 2017. She is dyslexic, has dyscalculia and working memory difficulties. Her cognitive ability is at the low end of the normal range.

4. K had been attending an independent school, S School, until January 2017 but she was becoming increasingly distressed about, and her parents increasingly concerned by, her lack of progress. At the S School, K was in a class of 18. She had an IEP at the School and had been receiving 1 hour of numeracy help per week in a group of 5 and ½ hour per week of literacy help in a group of 2. K was receiving help at home from the appellant, a trained primary school teacher, and from a home tutor. K found the extra hours of tuition at home exhausting and the home tutor was dropped. The S School requested the LA to carry out an assessment when it felt unable to provide the special educational provision (SEP) identified in private educational psychology reports commissioned by the appellant. The appellant subsequently moved K to an independent special school.

Ground 1: could K's needs only be met with additional resources from outside sources?

5. The appellant argued that there was evidence before the F-tT that K's special educational needs could only be met if additional resources were provided, and special educational provision made, from outside resources. It followed, they submitted, that an EHC plan was necessary to meet K's needs having regard to paragraph 9.55 of the *Code of Practice*. [1]

6. The short answer to this is that F-tT heard such evidence, but rejected it, as it was entitled to do. It found that, although K had poor working memory, all her other results were typical of the lower end of a mainstream class. It considered that her needs were of the kind that many other children in mainstream schools have, which are routinely met by schools without an EHC plan. The F-tT analysed the recommendations of experts on both sides and the large degree of agreement between them, in coming to this conclusion. It rejected three asserted forms of provision - small classes, teaching assistants with post graduate qualifications, and speech and language therapy – as unnecessary after giving them their very careful, expert attention. I can see no fault in the F-tT's findings or reasoning in rejecting them.

7. The longer answer to the first ground depends on the phrase in section 37 *'Where, in the light of an EHC needs assessment it is necessary for special educational provision to be made…'*

8. Section 37 (as relevant to this appeal) is as follows:

> 37(1) Where in the light of an education, health and care needs assessment, it is necessary for special educational provision to be made for a child or young person in accordance with an EHC plan,
>
> (a) the Local Authority must secure that an EHC plan is prepared for the child or young person, and
>
> (b) once an EHC plan has been prepared, it must maintain the plan.

[1] The *Code of Practice is made by the Secretary of State under section* 77 of the CFA 2014.

(2) For the purposes of this Part, an EHC plan is a plan specifying –
(a) the child's…special educational needs;
(b) (not relevant)
(c) the special educational provision required by him or her;
(d) – (f) not relevant

What does 'necessary' mean?

9 A Local Authority or Tribunal must find that it is *necessary* for special educational provision to be made for a child before EHC plan can be issued: section 37 of the CFA 2014. 'Necessary' is not defined in the CFA 2014, nor was it defined under the Education Act 1996 where the word was used for the same purpose. The case law on the meaning of that word under the Education Act 1996, however, remains relevant both for that reason and because section 83(7) of the CFA 2014 requires Part 3 on special educational needs to be read as if its provisions were contained in the Education Act 1996.

10 Upper Judge Jacobs pointed out in *Buckinghamshire CC v HW*, [2013] ELR 519, paragraph 16 (decided under the Education Act 1996) that 'necessary' has a spectrum of meanings, 'somewhere between indispensable and useful'. It is a word in common usage, and it is that that a Tribunal must apply. Upper Tribunal Judge Mark considered the meaning of 'necessary' in *Manchester CC v DW* [2014] UKUT 168 (AAC), as did Judge Waksman QC in *LB of Islington v LAO* [2008] EWHC 2297 (Admin) and Upper Tribunal Judge Pearl in *NC and DH*[2] *v Leicestershire CC* [2012] ELR 365. All three cases rightly refer to the guidance in the *Code of Practice* which elaborates on when a Statement of Special Educational Needs will be necessary. The *Code* is a matter to which the LA and tribunals must have regards, but it is not guidance only. Judge Mark summarises the law in paragraphs [15] and [17] of the *Manchester* case.

> 15 'Further guidance as to when a statement is necessary is to be found in *LB of Islington v LAO* [2008] EWHC 2297 (Admin) and in *NC and DH*[3] *v Leicestershire CC* [2012] ELR 365. In *Islington v LAO*, Judge Waksman QC stated at para.5 that a decision to make a statement came "at one end of a spectrum of need with which the local authority concerns itself. There are many children within the remit of a local authority who may have learning difficulties and require some form of educational provision, but this does not in and of itself mean that a statement will be required. Hence, of course, the word "necessary" in section 324(1)." He went on in paragraph 6 to describe the conditions in section 324 as being in somewhat stark form and to refer to the further guidance in the Code of Practice. He identified from the Code of Practice three steps that needed to be taken. The first was to ascertain the degree of the child's learning difficulties and the special educational needs that resulted. The second was to determine what provision was required and the third was to determine whether that provision was available in what he paraphrased as the normal resources available to the education authority.
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> 16 In *NC and DH v Leicestershire* CC, Upper Tribunal Judge Pearl held at paragraph 32 that two questions had to be addressed in determining whether it was necessary to issue a statement. The first was whether the provision identified as necessary for the child in the assessment was in fact available within the resources normally available to a mainstream school. If so, the second question was whether the school could 'reasonably be expected to make such provision from within its own resources.'
>
> ….

[2] There is a typographical error in the citation in the submission. The correct name of the case is *NC and DH v Leicestershire CC*

[3] There is a typographical error in the citation, which should read *NC and DH v Leicestershire CC*

> 17 [Both] these cases were concerned with issues that involved consideration of the application of the guidance in the Code of Practice to the facts in those cases. I bear in mind that the Code of Practice is precisely what it is said to be – guidance to which the local authority and the tribunal must have regard. It does not affect the generality of section 324[4] so as to exclude any possibility that a statement may be necessary for some other reason than those indicated in the guidance. For example, if it was the case that a school or local authority, despite having the necessary resources, simply refused to use their best endeavours to provide the requisite special educational provision, a tribunal may well consider it necessary to direct a statement.

10 Upper Tribunal Judge Mark makes the further point in *Manchester City Council v JW* [2014] UKUT 168 [14] that what is necessary may involve a value judgment.

11 Neither the extracts Ms Tkaczynska selected from these cases nor the broadly worded test in the previous *Code of Practice* at paragraph 8.2 identify *which* resources are 'normally available' to mainstream schools. Paragraph 8.2 states: -

> 'The [LA] will make this decision [viz. to issue a Statement] when it considers that the special educational provision necessary to meet the child's needs cannot reasonably be provided within the resources normally available to mainstream schools … in the area.'

12 Chapter 8 of the *Code* did, however, contain information on the standard funding for SEN through 'School Action' and 'School Action Plus', which were available from the school's own budget whether or not a pupil had a Statement of Special Educational Needs, and top up funding for exceptional needs. Very generally, standard funding came from each school's annual delegated budget, which included a basic sum per pupil ('AWPU') plus a notional sum for SEN. In a mainstream school, the AWPU was usually £4000 and the SEN budget was £6000 for each student with SEN. The school was expected to exhaust this notional amount (depending on the needs of the affected pupil) before turning for additional exceptional funding from the LA.

13 Under the present *Code of Practice* for the CFA 2014, the relevant guidance is in Chapter 9. The test under paragraph 9.55 is: -

> 9.55 'Where, despite appropriate assessment and provision, the child … is not progressing, or not progressing sufficiently well, the local authority should consider what further provision may be needed. The local authority should take into account
>
> - whether the special educational provision required to meet the child ('s) … needs can reasonably be provided from within the resources normally available to mainstream …schools…, or
> - whether it may be necessary for the local authority to make special educational provision in accordance with an EHC plan.'

14 The test is roughly the same as that in Chapter 8, but the new chapter does not contain information on funding. Put at its barest, however, School Action and School Action Plus have disappeared. 'First-line' funding for SEN at school level has been reborn as 'additional educational support'. The funding for the preponderance of pupils with SEN at a mainstream school is intended to come, as before, from the school's annual delegated budget (which includes an AWPU per pupil) and its notional SEN budget of £6000. The school is expected to exhaust the £6000 before asking for a top up funding from the LA.[5] The F-tT's findings make it unnecessary to get involved in the

[4] The predecessor to section 37 of the CFA 2014.

[5] 'Guidance *High needs funding: operational guide 2016 to 2017'* (Updated 20 December 2016) Gov.uk website

details of additional types of funding but detailed examination of this area can be found in Upper Tribunal Judge Mitchell's decisions in *P v Worcestershire County Council (SEN)* [2016] UKUT 120 (AAC) and *Hammersmith* [2015] UKUT 0523 (AAC)[6]

15 In my decision in *Hertfordshire CC v MC and KC* [2016] UKUT 0385 (AAC), I emphasised the underlying assumptions in the guidance on the need to issue EHC plans and their resourcing. These assumptions include what the LA expects to be available in their schools as expressed in their local offer:

> 27 'The present Code envisages that the majority of children with additional educational needs will not require EHC plans. Their needs will be met in a mainstream setting from resources normally available at mainstream schools [paragraph 9.1]. Local authorities are required to have, and to publish, a 'local offer' (section 30 of the CFA 2014) which tells the public the provision they expect to be available across education, health and social care for children and young people who have special educational needs or are disabled, including those who do not have EHC plans [paragraph 4.1]. Schools have a set amount of additional funds per pupil to meet additional educational needs caused by learning difficulties and disability falling short of requiring an EHC plan. They also have access to exceptional needs funding and specialist advice and training from the Local Authority.
> …
> 31 All three parts contain elements which may not be amenable to easy analysis. There may, for example, be considerable room for argument not only over what the local offer really includes, but what can *reasonably* be provided in the mainstream context and, of course, whether that is enough to meet the child's needs. For example, in a case where a child requires a very high level of input from the class teacher, the Local Authority may conclude that the needs cannot reasonably met without causing considerable harm to the education of twenty or more other pupils in the class. '

16 In my view, there is a clear, albeit rough and ready resource line to be crossed before an EHC plan is considered to be necessary. It is based on the kinds of provision a school could make from its own notional SEN budget.

17 It is also plain, in my view, that the provision the LA expects to make available as published in its local offer is a relevant consideration in working out what will, on balance, be available from a school's internal resources. It is open to a parent who disbelieves the local offer to provide evidence showing that it does not represent what is expected to be available, or that a particular school will not be able to make the provision expected under the local offer. Neither may be easy for a parent to establish, not least because of the SEN budget available to each school. Of course, if such evidence were adduced, a tribunal would have to decide its weight.

Ground 2: Evidence on the availability of skilled and experienced teachers within a mainstream school.

18 There were two parts to this submission. First, the appellant argued that there was no evidence to support its view that skilled and experienced teachers would be available. Secondly, the appellant argued that, where no school was named in an assessment, the LA had to show that each item of SEP was available in any and all mainstream schools in the area (§ 43, Submission).

19 Ms Tkaczynska points out that the bundle does not contain evidence about the specifics of the LA's local offer from which it could be concluded that appropriate staff would be available. It is, perhaps, puzzling that relevant parts of the local offer were not provided given that a great deal of the argument in the case was about it.

20 Nevertheless, it is reasonably clear from the references made to the local offer throughout the case by the parties and in the F-tT's decision, that no one was in doubt about the provision for SEN that the LA expected to be available. Even though the 'best evidence' of the local offer may not have been before the F-tT, the 'best evidence' was not necessary. Vestiges of the old 'best evidence' rule may survive elsewhere, but there is no such rule for tribunals which may admit evidence whether or not it would be admissible in a civil trial in the UK. Rule 15(2)(i) of the various formulations of the Tribunal Procedure Rules deals with this. In this case, there was broad agreement by the three specialists (Dr Hussain, Ms Boyd and Dr Allen) on the provision that K required. The F-tT accepted all but a small number of recommendations from Dr Allen's report. Where the F-tT rejected Dr Allen's report, its conclusion was in line with the reports of Dr Hussain and Ms Boyd and demonstrated the exercise of analysis and expertise to be expected of a SEN tribunal.

21 On the agreed areas, the LA confirmed that there was enough money from the notional £6000 to afford the support stated in Dr Hussain's report (§ 20, 21). Ms Tkaczynska objects to this on the basis that no detailed costing were presented; the only evidence of cost was the LA's statement that it used a mainstream resource allocation tool ('CRISP') to establish this. Dr Hussain's opinion was also that all the provision mentioned in her own report and that of Ms Boyd (for the appellant) could be met within the resources available to mainstream schools within the LA's remit without the necessity of a plan.

22 The tribunal was entitled to accept the LA's confirmation regarding cost of provision as being factually accurate. Tribunals are not required to distinguish rigidly between information coming from witnesses and representatives. In any event, Dr Hussain's views provided further buttressing for the F-tT's finding, and the F-tT itself has very considerable experience on these matters. I do not accept, therefore, that there was no evidence on which to conclude that skilled and experienced staff would be available.

23 Ms Tkaczynska submitted that it could not be said that provision 'actually expected to be available' in the local offer would in fact be available. Nothing is certain in life. These matters are decided on the balance of probabilities. Interestingly, the F-tT found (§ 38) that disparities in K's performance were the sorts of thing that 'ongoing observations by skilled teachers within the school setting' would pick up and that 'this is the sort of assessment one would expect a LA mainstream school to have undertaken with advice available to them without the need of an EHC plan.' At § 42 the F-tT conclude that 'so long as there were skilled and experienced teachers working with the children with dyslexia and dyscalculia and SpLD (speech and language difficulties) alongside training which can be provided via the local offer, then that would be sufficient to deliver the suggested support to K…'. Looking at the decision as a whole, I do not read this as injecting any doubt as to whether appropriate staff would be available.

24 The second part of the submission is that the tribunal had failed to show that each item of provision was available in any and all mainstream schools in the area. That

submission cannot be correct. The first reason is that an 'EHC needs assessment' is defined under section 36(2) of the CFA 2014 as an assessment of the educational, healthcare and social care needs of a child (or young person) (section 36(2)). It does not determine the school the child should attend. The second point is that the guidance at paragraph 9.55 of the *Code* is couched in general terms: whether the required special educational provision …' can reasonably be provided from within the resources *normally* available to *mainstream …schools*… ' (italics added). The use of the plural 'schools' points at consideration of schools in general in the local authority area. The assessment does not seek to identify any particular school. If there is ultimately a disagreement over the school a child is to attend, it is settled at a later stage.

Ground 3: did the F-tT err by requiring the appellant to identify precisely the SEP that K required?

25 I do not see any merit in this ground. The LA carried out a statutory assessment of K's needs. There were extensive reports from the parties which the F-tT considered carefully and (apart from the matters in Dr Allen's report which were cogently rejected) adopted. The tribunal asked itself the right questions and made the necessary findings of fact on, inter alia, the nature and degree of K's underlying needs, the kinds of provision that should be made, the appropriate school setting, and class size. It engaged in the provisional and predictive judgment that was required of it .

26 At the hearing, Ms Tkaczynska submitted that the F-tT did not deal with the 'broader picture of how the special methods were to be overseen within a mainstream school'. I do see that this assists her with ground 3.

27 I also do not see that *Gloucestershire County Council v EH* [2017] UKUT 0085 (AAC), cited by Ms Tkaczynska, is on point. In that case, a young woman (over the age of 18) was refused an EHC plan where she had possibly contemplated pursuing an Open University course. The F-tT decided an EHC plan was required. In the instant appeal, there is no doubt about the educational stage K has reached and, with the assistance of both sides, the F-tT was able to determine that an EHC plan was not required. The parents were not in any way required to provide a fully-worked up educational proposal.

[Signed on original]

S M Lane
Judge of the Upper Tribunal

[Date]

11 January 2018