

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Upper Tribunal case No. HS/1193/2017

Before: Mr E Mitchell, Judge of the Upper Tribunal

Representation: For the appellant, Ms B, Watkins Solicitors;

For the respondent, Herefordshire County Council, the local authority's
in-house legal department

DECISION

This appeal is **DISMISSED**. Under section 11 of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal decides the decision of the First-tier Tribunal of 3 February 2017 (ref. no *EH 884/16/00004*) did not involve an error on a point of law.

Under rule 14(1) of the Upper Tribunal (Tribunal Procedure) Rules 2008 I hereby make an order prohibiting the disclosure or publication of any matter likely to lead to a member of the public identifying the child with whom this appeal is concerned. This order does not apply to (a) the child's guardian/s, (b) any person to whom any guardian discloses such a matter in the proper exercise of the guardian's parental responsibility, (c) any person exercising statutory (including judicial) functions in relation to the child. The child's real name is not used in these reasons.

REASONS FOR DECISION

Background

1. Ms B appealed to the First-tier Tribunal against the contents of an EHC Plan for a child Jessica, following a statutory review. Ms B is Jessica's special guardian. Ms B disputed the plan's description of Jessica's special educational needs, the provision required to meet those needs and the school named in the Plan. Ms B was represented by her solicitor, Ms Watkins of Watkins Solicitors, before the First-tier Tribunal (and the Upper Tribunal).

2. Jessica was in the last year of primary schooling when the Plan was reviewed. The review addressed arrangements for Jessica's secondary education. However, Jessica did not proceed to secondary school in September 2016 and was instead educated at home.

3. The issues on the appeal to the First-tier Tribunal ranged across a number of topics but, for the purpose of these reasons, I shall only describe those with which the present proceedings are concerned namely speech and language therapy (SLT) and Jessica's need to be education in 'small groups'

4. Ms B and the local authority disagreed about Jessica's SLT needs. Ms B's expert witness thought Jessica required ongoing therapeutic input from a qualified speech and language therapist as well as education at a school with an on-site therapist. The local authority expert witness thought that, while Jessica had language difficulties, she did not have a specific language impairment. She had also made progress with her listening and focus skills and her expressive language had improved. The local authority's witness thought the SLT provision sought by Ms B was unnecessary, in particular direct SLT.

5. The First-tier Tribunal found that Jessica needed "targeted input" for her language difficulties but this did not have to be provided directly by a qualified speech and language therapist. And there was not persuasive case for altering existing arrangements save "possibly during the course of any transition into a secondary education setting".

6. The expert witnesses agreed that Jessica would be appropriately educated in 'small groups'. The Tribunal found that Jessica should be educated in small groups, or small classes, and "the emphasis needs to be on [Jessica's] sense of well-being and confidence as she learns, and this will operate primarily at the classroom level, where appropriate adjustments will need to be made to accommodate the full range of her learning difficulties". The size of Jessica's teaching group "will need to be determined according to the particular learning context in which her education is being delivered" which may vary across subjects. It would be unhelpful to be over-prescriptive "as this should be capable of being adjusted at regular intervals".

7. The final EHC Plan, as ordered by the Tribunal, provided that "[Jessica] needs to be taught in small class groups".

Grounds of appeal

8. Following a hearing at Cardiff Civil Justice Centre on 22 September 2017, at which both parties were represented, I granted Ms B permission to appeal to the Upper Tribunal against the First-tier Tribunal's decision on three grounds:

Ground 1 – concerning the size of the child's teaching group

9. The First-tier Tribunal's statement of reasons indicates that Ms B and the local authority agreed "that [Jessica] would be appropriately educated in small groups". The Tribunal also found that, of itself, overall school size was not a relevant factor.

10. The evidence before the First-tier Tribunal about Jessica's need for education in small groups included the report of a local authority Educational Psychologist, Mr Wilkins, dated 16 November 2016 whose contents included the following:

- "[Jessica] should have a daily reading lesson in a small group of children with similar skills". A small group was called for because Jessica needed intensive teacher input part of which would involve "instant feedback";
- "As much as possible...[Jessica] should have her academic needs met within a small group or whole class context rather than individually". The reason for this was to minimise the risk of [Jessica] being "singled out".

11. The First-tier Tribunal's analysis of teaching group size, did not refer expressly to the educational psychology report submitted by Ms B. This report, written by Mr Hall and dated 28 June 2016, criticised the local authority's EHC Plan for failing to clarify the meaning of 'small' in 'small groups'. Mr Hall asked if this meant "2, 3, 4, 5...10?". But, despite that, Mr Hall, in his conclusions, recommended that "the school would need to work with pupils in small groups" but did not himself specify what he thought 'small' should mean.

12. Ms B's application to the Upper Tribunal for permission to appeal argued the First-tier Tribunal's failure to specify the size of [Jessica's] teaching group was unsupported by the evidence and could not be justified in the light of her needs. Ms Watkins, for Ms B, argued that the High Court's decision in *H v Leicestershire CC* (2000) ELR 471 requires that "different class sizes should be specified". In my view, as expressed in provisional terms in my permission determination and to which I still hold, is that a close examination of the judgement in *H v Leicestershire* shows that it is not, in terms, authority for the proposition advanced by Ms Watkins.

13. *H v Leicestershire* involved a challenge to a statement of SEN that provided "[the child] requires an educational environment with a staff pupil ratio that can support and facilitate his communication in a structured and consistent manner". The statement also said:

'[the child] would benefit from tuition during most of his school week in small groups, supported by staff who are experienced in working with youngsters who experience a combination of severe learning difficulties with communication and social difficulties within the autism spectrum. He should receive daily individual attention, even when he is in a small group setting to simulate and encourage his interaction and communication.'

14. On my reading of *H v Leicestershire*, the staff: pupil ratio provision was intended to deliver the 'benefit' referred to in the statement of SEN. The parents' counsel argued the provision was not specific enough because it did not fix staffing arrangements. Expert evidence before the SEN Tribunal, whose decision was under challenge, included that the child required a staff: pupil ratio of 1:2 but, at the school named by the tribunal, the child would be educated in a class of 8 pupils but only 3 staff members. Dyson J (as he then was) accepted the argument that the staff: pupil ratio provision "was so unparticularised and so unclear as to leave substantial argument as to what the tribunal was deciding was necessary". Dyson J held the provision was "far too vague and uncertain and begs the question of what staff pupil ratio is required to support and facilitate [the child's] communication in a structured and consistent manner".

15. So *H v Leicestershire* was concerned with staff: pupil ratios, rather than class size *per se*, although I accept, of course, that class size determines the ratio where staffing numbers are fixed.

16. In my determination of Ms B's application for permission to appeal, I noted that the reason why a particular staff: pupil configuration is needed may not be the same in every case. In some cases, it may be relevant because a particular minimum ratio is needed for effective teaching. In such cases, class size itself is not the real issue; what matters is the number of staff available in the class. In other cases, however, class size may be the real issue. For example, a child with sensory difficulties might have difficulty coping with a larger class size – an issue that crops up fairly frequently in SEN appeals to the Upper Tribunal – so that a smaller class would be an important factor in the child being able to learn effectively.

17. Mr Wilkins' report recommended a small group for largely teaching-related reasons rather than any general difficulty on Jessica's part in coping with larger groups. In substance, therefore, it seemed to me that this case was a staff: pupil ratio type case and permission was granted on the ground that the First-tier Tribunal arguably erred in law by failing to specify the size of, or staff: pupil ratio within, Jessica's teaching group and/or failed to give adequate reasons for not doing so.

Ground 2 – whether the EHC Plan's SLT provision was unclear

18. The EHC Plan, as ordered by the First-tier Tribunal, made provision for SLT in relation to the outcome concerned with 'functional learning skills in literacy and numeracy'. The provision anticipated Jessica's discharge from a SLT service at the end of her period of transition to secondary school. However, the SLT provision for the next outcome in the Plan anticipated ongoing SLT provision. The second ground on which permission to appeal was granted was that, arguably, the EHC Plan's provision for SLT, involved an error of law because apparent inconsistency in provision made it unclear what was being ordered.

Ground 3 – whether the EHC Plan's provision for SLT was not specific enough

19. The third ground of appeal is that, arguably, the EHC's Plans SLT provision did not meet the legal requirement as to specificity because the provision ordered in relation to the 'functioning learning skills' outcome did not quantify the SLT input required.

The arguments

Ground 1

20. The local authority in their written response to the appeal point out that neither party supplied the First-tier Tribunal with expert evidence recommending a small group of a particular size. A tribunal can only act on the evidence put before it. In the circumstances, the provision ordered by the Tribunal incorporated an appropriate degree of flexibility (see *E v London Borough of Newham & the SEN Tribunal* [2003] EWCA Civ 09). The Tribunal gave adequate reasons for this element of provision, explaining that the appropriate size would depend on the subject in question and Jessica's capability in that subject, to be based on on-going assessment of her progress.

21. In written reply, Ms Watkins for Ms B, argues that the Tribunal may use its own expertise in deciding issues arising on an appeal and should have done so in relation to the 'small groups' issue (*L v Waltham Forest* (2004) ELR 161). The provision ordered by the Tribunal incorporates too much flexibility and is contrary to the approach required by *IPSEA v Secretary of State* (2003) ELR 393.

Grounds 2 & 3

22. The local authority concede that the SLT provisions within Jessica's EHC Plan might appear inconsistent. The provision in relation to the outcome to do with 'expressive language skills and vocabulary and knowledge' jars with later provision for ongoing SLT-input under the direction of a qualified therapist. However, "this [the former] section of the plan contains the detail of the pre-existing programme" and "was not directly reviewed as part of the current Tribunal process". The SLT provision in relation to the outcome 'functioning learning

skills' is clearly intended to be a form of ongoing provision and, to the extent that it incorporates flexibility, was justified.

23. Ms Watkins argues in reply that, whether read separately or together, the SLT provision within the EHC Plan is inconsistent and:

"if such inconsistency is permissible, it would leave any parent in a vulnerable position with regards to enforcing and ensuring delivery of provision when it is arguable that [C] should be discharged from the [SLT] Service and if it is arguable, then it is not specific, quantified and detailed to ensure that the Appellant could be confident that [C] will remain under the [SLT] service."

Legal Framework

Legislation and the Code

24. Section 37(2) of the Children and Families Act 2014 provides that an EHC plan is a plan specifying a number of matters, including "the outcomes sought for [the child]" and "the special educational provision required by...her". Outcomes are to be set out in section E of a plan and special educational provision in section F (regulation 12(1) of the Special Educational Needs and Disability Regulations 2014).

25. Paragraph 9.61 of the SEN Code of Practice, issued under the 2014 Act, provides:

"EHC plans should be clear, concise, understandable and accessible to parents, children, young people, providers and practitioners. They should be written so they can be understood by professionals in any local authority."

26. Paragraph 9.69 of the Code deals with the provision to be specified in section F of a plan:

"-Provision **must** be detailed and specific and should normally be quantified, for example, in terms of the type, hours and frequency of support and level of expertise, including where this support is secured through a Personal Budget;

- Provision must be specified for each and every need specified in section B. It should be clear how the provision will support achievement of the outcomes...

- In some cases, flexibility will be required to meet the changing needs of the child or young person...

- The plan should specify: any appropriate facilities and equipment, staffing arrangements and curriculum...".

27. The First-tier Tribunal must have regard to any provision of the code that appears to it relevant to a question arising on an appeal (section 77(6) of the 2014 Act). Local authorities

must also have regard to the code in exercising their functions under the 2014 Act (section 77(4)).

Case law

28. The Court of Appeal's decision in *E v London Borough of Newham & the SEN Tribunal* [2003] EWCA Civ 09 established (or confirmed) the legal requirement for specificity of special educational provision. In this respect, there is no reason to distinguish statements of SEN from EHC Plans. The Court's findings in paragraph 64 of its decision included:

- "the statutory duty will not be discharged if the description of the special educational provision which is to be made is framed in terms so vague and uncertain that one cannot discern from it what (if anything) the tribunal has decided in that respect";
- "the statutory duty plainly cannot extend to requiring a tribunal to 'specify' (in the sense of identify or particularise) every last detail of the special educational provision to be made";
- the degree of flexibility which is appropriate in 'specifying' the special educational provision to be made in any particular case is essentially a matter for the tribunal, taking into account all relevant factors. In some cases, a high degree of flexibility may be appropriate, in others not.

29. I see no need to set out here details of the other decisions relied on by Ms B.

Conclusions

Ground 1

30. I decide that the First-tier Tribunal did not make an error on a point of law by failing to specify the size of Jessica's small teaching groups (or, to be precise, confirming an EHC Plan that did not specify size). Nor did the Tribunal give inadequate reasons for not specifying small group size.

31. It is not disputed that, before the First-tier Tribunal, while the parties agreed that Jessica needed to be educated in small groups, neither party argued for a class or small group of a specified size nor a specific teaching staff: pupil ratio. Perhaps due to that agreement, the Tribunal's statement of reasons only briefly explains why small group education was considered necessary. I should add that that is not intended as a criticism.

32. To ascertain in more detail why small groups were considered necessary, I must turn to the EHC Plan as ordered by the Tribunal.

33. The Plan's provision for Jessica to be taught in small groups relates to the Plan outcome "[Jessica] has functional learning skills in literacy and numeracy and can apply these in context". It is the first specified provision within a list that also includes:

- "Staff need to have an appropriate level of expertise in language and communication needs and there should be an emphasis upon the development of [Jessica's] self-esteem...";
- "[Jessica] needs an environment where staff can support her understanding of language. [Jessica] needs to be supported to use active listening strategies";
- "[Jessica] needs to be educated by staff who are familiar in educating young people with expressive language difficulties, aware of her historic language difficulties and who are able to provide support for her word finding difficulties";
- "[Jessica] must be shown and taught the following skills...". The skills are learning to identify common number blends and their usual pronunciation; identifying the 'magic e', taught and shown frequently consonants that are sometimes hard and sometimes soft;
- "information should be broken down into chunks and explained in different ways with feedback provided on each task to check her understanding";
- "a numeracy programme which uses a structured approach allowing for repetition and over learning";
- "[Jessica] requires support in the classroom to ensure her understanding and expressive use of relevant vocabulary in the learning context".

34. Separately, the Plan also provides for:

- Jessica to be provided with access to a Teaching Assistant for 24 hours each week "so that she is enabled to receive the programme detailed above [in the Plan] individually or in small groups with peers of similar ability";
- "Provide [Jessica] with sufficient time to think and process information";
- "Staff to monitor for signs of falling confidence and self-esteem and to take action if this occurs".

35. Reading the provision within the EHC Plan as a whole, it can be seen that the Tribunal was seeking to construct an educational package for a child who required intensive educational assistance, especially perhaps in relation to literacy, and who also needed sensitive and careful teaching in the light of her vulnerable self-esteem. In my determination, achievement of those aims did not compel the Tribunal to specify the size of the small groups in which Jessica would be taught. It was rational for the Tribunal to proceed on the basis that

the appropriate size of the small groups might vary, without putting Jessica's education at risk, in the light of its findings (both set out in its statement of reasons and as discernible from the contents of the Plan) concerning (a) Jessica's educational profile and her need for different types and intensity of support in different subjects; (b) Jessica's confidence and self-esteem, the future trajectory of which was inevitably uncertain; and (c) Jessica's need to be educated with peers of a similar ability the numbers of whom could not of course be predicted with certainty. Those findings also justify the inherent flexibility in provision for education in 'small groups'. While the EHC Plan contains no upper limit, it is clear that the groups must be small enough to allow effectively delivery of the other provision within the Plan.

Grounds 2 & 3

36. I shall deal with these grounds together because they are closely linked.

37. The SLT provision within Jessica's EHC Plan, as ordered by the Tribunal, was comprised of the following:

- "[Jessica] needs support and advice with regards to strategies to support word finding difficulties and robust vocabulary teaching, to be provided by a speech and language therapist in school during her transition only and to ensure that she has settled into her new school environment, before being discharged from the SLT service". This provision was contained in a section for provision intended to achieve the outcome of functional learning skills in literacy and numeracy;
- Then we have a number of types of SLT provision intended to achieve the outcome "[Jessica] is confident in using her expressive language skills and vocabulary knowledge":
 - o "A [SLT] programme which is devised and managed by the Speech and Language Therapist...The [Learning Support Assistant] would need to attend some of the direct speech and language therapy sessions...";
 - o "The Speech and Language Therapist would need to meet on a minimum of a termly basis with other professionals...";
 - o "The Therapist would also need to provide a report for the Annual Review and be invited to attend the meetings";
 - o "The [Therapist] needs to work collaboratively with colleagues to set targets within [Jessica's] Individual Education Plan...".

38. The EHC Plan must be read as a whole. If that is done, it cannot reasonably be argued that the SLT provision made is unclear. While one part of the Plan provides for Jessica to be discharged from the SLT 'service' following transition, the detailed SLT provision in a

separate part of the Plan shows that the Tribunal cannot have intended that all SLT-related provision should cease following transition. Otherwise, the SLT-related provision for the outcome to do with expressive language skills and vocabulary knowledge outcome would make no sense. The EHC Plan must clearly be read so as to provide for one type of SLT provision related to transition, which is inevitably of limited duration, and further ongoing SLT-related provision in relation to the language skills and vocabulary knowledge outcome.

39. Had the transition-related SLT provision been found in provision that was intended to be ongoing, I might have been persuaded that it failed the specificity test. However, the fact that it was related to transition provides justification for the provision made because the extent of the input required would inevitably vary according to how well Jessica coped with transition.

(Signed on the Original)

E Mitchell

Judge of the Upper Tribunal

15 April 2018