IN THE UPPER TRIBUNAL **Appeal No: HS/1940/2019 (V)**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

ORDER

Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the child in these proceedings. This order does not apply to: (a) the child's parents, (b) any person to whom the children's parents, in due exercise of their parental responsibility, discloses such a matter or who learns of it through publication by either parent, where such publication is a due exercise of parental responsibility; (c) any person exercising statutory (including judicial) functions in relation to the children where knowledge of the matter is reasonably necessary for the proper exercise of the functions.

DECISION

The Upper Tribunal allows the appeal of the appellant parents.

The decision of the First-tier Tribunal made on 12 June 2019 under the reference EH919/18/00091 involved an error on a material point of law and is set aside.

The Upper Tribunal is not in a position to re-decide the appeal. It therefore refers the appeal to be decided afresh by a completely differently constituted First-tier Tribunal, at an oral hearing.

(*In the present Covid-19 pandemic emergency it may be that such a hearing will need to be conducted by telephone or by video conferencing (e.g. Skype or Kinly).*)

This decision is made under section 12(1), 12 (2)(a) and 12(2)(b)(i) of the Tribunals Courts and Enforcement Act 2007

Representation: **Mark Small, solicitor, for the parents.**

Laura Thompson, solicitor, for Hertfordshire County Council.

Hearing date: **28th May 2020 – conducted remotely by Skype for Business**

REASONS FOR DECISION

1. This appeal concerns a young boy now aged eight, who I will refer to as PI, who is the son of the appellant parents. He has a developmental language disorder in the areas of syntax, semantics, word finding and narrative, and has difficulties with cognition and learning, speech, language and communication skills, and fine and gross motor skills. The appeal is made against a First-tier Tribunal decision dated 12 June 2019 ("the tribunal"), pursuant to permission to appeal granted by myself on 24 September 2019.

2. This appeal was decided after a remote oral hearing conducted through Skype for Business, with the representatives for both parties attending the hearing via Skype along with an observer from Hertfordshire County Council. Neither party had sought a hearing in private.

3. The hearing and the form in which it was to take place had been notified in the 'daily courts list' along with information telling any member of the public or press how they could observe the hearing at the time it took place through Skype for Business. No member of the public or press sought to attend the hearing. Furthermore, I directed at the start of the hearing pursuant to section 29ZA of the Tribunals, Courts and Enforcement Act 2007 (inserted by the Coronavirus Act 2020) that the Upper Tribunal was to use its reasonable endeavours to make a recording of these proceedings using the Skype for Business recording facility and preserve that recording for a reasonable time in case members of the public or the press would wish to view the

proceedings. I heard oral submissions at the hearing just as I would have done had we all been sitting in the tribunal room.

4. I am satisfied in all the above circumstances that the hearing therefore constituted a public hearing (with members of the public and press able to attend and observe the hearing), that no party had been prejudiced and that the open justice principle had been secured.

5. However, to the extent that the hearing may not be considered to constitute a public hearing, I directed that in the light of the exceptional public health considerations arising under the Covid-19 pandemic and the fact that the case did not raise any issues of a wider public interest, the hearing could proceed as a private hearing, and that in so far as there has been any restriction on a right or interest it is justified as necessary and proportionate.

6. The appellants advanced four grounds of appeal. These were put as follows:

> (i) the First-tier Tribunal failed to address the expert evidence in respect of suitability of a mainstream setting for PI;
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> (ii) the First-tier Tribunal erred in law by finding that the [Central Primary School] could provide PI with a "low arousal environment";
>
> (iii) the First-tier Tribunal erred in law by failing to properly describe the specialist provision it felt was required for PI at [Central Primary School]; and
>
> (iv) the First-tier Tribunal failed to properly calculate the difference in costs between the different placements [at Central Primary School and ERS].

7. The four grounds on proper analysis are in fact simply separate reasons challenges to the adequacy of the stated basis for the tribunal's decision. For example, ground two is not really an attack on the finding of fact that the Central Primary School could provide a low arousal environment (such an attack would involve an argument (which was

not made) that no reasonable First-tier Tribunal could have made that finding on the available evidence). Rather, it is an argument the tribunal failed adequately and sufficiently to explain in its fact-finding and reasoning *why* it considered Central Primary School could provide the "low arousal environment".

8. The appellants in my judgment are entitled to succeed on the second and fourth grounds of appeal but are not entitled to succeed on the first ground of appeal. In the circumstances, I do not need to form a concluded view on the third ground of appeal. However, I will provide some comments on the third ground. Both parties urged me to say something of substance about the merits of the third ground of appeal.

Ground 1

9. The first ground of appeal founded on the expert evidence given by Ms Leigh, a speech and language therapist, and Dr Hymans, an educational psychologist, about PI's ability to cope within a mainstream setting due to his language and learning difficulties. The written ground of appeal argued that "the FTT was required to address the concerns put to it by [these] witnesses. It did not do so."

10. Both before and at the hearing before me, Mr Small abandoned this argument in respect of Dr Hymans and his pursuit of it in respect of Ms Leigh's evidence was less than whole-hearted.

11. The relevant parts of the tribunal's decision in respect of Ms Leigh's evidence read as follows:

> "30. Judith Leigh is a Speech and Language Therapist who the parents had instructed to assess [PI]. She explained that the most important for her in considering the question of class size was [PI]'s severe speech and language disorder. The difficulty is that his attention and focus are compromised when he doesn't understand something. An environment with fewer distractions and a linguistically modified curriculum gave him a better chance of learning.
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> 31. Ms Leigh commented that it had been observed that in Harvey Road [PI] would "shut down" and "withdraw". In her view the interactions were too complex. This is what led to his disengagement

> and consequently opportunities for learning were lost. A teacher in mainstream must meet the needs of all the children, but as soon as [PI] doesn't understand he loses interest.
>
> 32. She was asked whether the linguistically modified curriculum is therefore the most important thing and she confirmed that in her view it is, but that it is impossible to tailor the curriculum to [PI] in a large group. The children who do not need this kind of differentiation would end up missing out. In Ms Leigh's view, even a Quality First teacher would find this extremely difficult to manage.
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> 36. The Panel asked about the potential impact on [PI]'s mental wellbeing in the mainstream environment and asked Ms Leigh to expand upon her comments about [PI] withdrawing. She explained that [PI] is a well-behaved child. The children who go quiet can be overlooked. There is much that goes on in in a classroom aside from the teaching. It is the small talk, peer interactions, times and routines that would be lost on [PI]."

12. The tribunal addressed this evidence in its conclusion about Section F of the EHC Plan, in which it said the following of relevance.

> "63. In relation to Section F of the EHC Plan:
>
> (i) The Tribunal is satisfied that [PI] would benefit from a small class environment for some of his learning, but not that he requires a small class at all times. We accepted the evidence that [PI] has engaged well with his placement at ERS and enjoys being in that environment, but were also persuaded by the evidence of Dr Pace that for some subjects, it would be better for him to be able to engage a larger and more diverse peer group. We found Dr Pace's professional opinions to be reasoned, sensible and sensitive to [PI]'s needs.
>
> (ii) We were pleased that [PI] appeared to enjoy and cope well with his drama lessons at ERS which, whilst still not a particularly large class size, was noisy and busy. This is a good indicator that he could indeed benefit from a larger environment for at least some subjects and suggests that there are foundations here which with the right approach to teaching [PI] can be built upon. The Tribunal was persuaded by the evidence of Dr Pace that [PI] would benefit from engaging with more able peers who can provide him with role modelling and challenge him.
>
> (iii) By contrast we were concerned about Dr Hymens' (sic) assertion that [PI] could not, in his observation, cope in "the mainstream environment". It must be borne in mind that the environment at Harvey Road [the previous school] was very different to that which is now being proposed by the LA and we were concerned that Dr Hymens (sic) appeared almost to be writing off [PI]'s potential to develop and improve upon his ability to engage with a more diverse and challenging

> environment. These is a risk that class sizes as small as 4 (as was the case in the maths lesson observed by Dr Pace) may in fact be limiting [PI]'s opportunities. We were persuaded by Dr Pace's assertion that it is an individualised programme of work and the way that teaching is differentiated and delivered that is important for [PI], rather than the number of other children in the room.
>
> (iv) We did, however, find that for core subjects such as literacy, in which [PI]'s identified difficulties with speech and language would be most prominent, [PI] will continue to be benefit from small class sizes. We accepted the evidence of Ms Leigh that in a large and busy classroom, even the most skilled teachers may struggle to provide the level of differentiation that [PI] is likely to require.
>
> (v) The Tribunal is not satisfied that [PI] needs a TA throughout the school day. The evidence of Dr Pace was again persuasive in reaching this decision. We heard that although there were TAs available in classrooms at ERS, they were not allocated on a one to one basis, and in fact [PI] did not always need to access their support much, if at all.
>
> (vi) It was posited by the parents' witnesses that [PI] is likely to need a higher level of TA support in a large class environment than he would in a small class. We accept this is likely, but we are mindful to bear in mind that [PI]'s experience and needs at Harvey Road cannot be taken as a reliable indicator of his future needs. That was a school which both parties accept was not meeting his needs. When [PI]'s curriculum is delivered to him in a way in which he can understand and engage with, his need for TA support is less, as clearly demonstrated by his not relying upon the TA's at ERS. We therefore favoured the concept described by Ms Perry of the flexible approach in use at Central, whereby TA's from the Base are available to support children on a more flexible basis.
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> (vii) In respect of the parents' request for a one to one LSA to be provided for 3 hours per day, 5 times per week, the Tribunal considered that this support would be appropriate for when [PI] was accessing mainstream lessons in larger class sizes but would not be required in smaller class settings."

13. In my judgment Ms Leigh's evidence was adequately addressed by the tribunal when its reasoning is read as a whole and in context. It is for this reason that I have set out virtually all the sub-paragraphs under paragraph 63 of the tribunal's decision. It is important to bear in mind that addressing a witness's evidence does not mean agreeing with it. When read with the evidence of Dr Pace (which I have not set out), I

am satisfied that the gist of Ms Leigh's evidence about the suitability of a school in a 'mainstream setting' was taken into account and addressed by the tribunal, particularly in the final sentence of paragraph 63(iii) and in paragraph 63(iv) and (vi).

14. This remains the case, in my judgment, even in terms of Ms Leigh's written evidence on page 565 of the First-tier Tribunal bundle, on which Mr Small latterly sought to place reliance. Her evidence there, as relied on before me, was:

> "In my view the provision of SALT alone cannot address the issues that [PI] experiences understanding, retaining and learning. His difficulties are much broader and require a very careful approach delivered by staff who are able to embed therapeutic approaches into and across the curriculum. A mainstream school is unlikely to be able to adopt this approach and this is evident by his progress to date….."

It is important to appreciate that the last sentence in Ms Leigh's evidence above was referring to PI's time at the previous 'mainstream school' at Harvey Road.

15. This written evidence must be read in the context of the oral evidence Ms Leigh then gave to the tribunal including her view about the most important thing for PI being a 'linguistically modified curriculum'. So read, however, I fail to see what in Ms Leigh's substantive evidence was not addressed or missed in the tribunal's reasoning in paragraph 63 of its decision. It accepted that small class sizes were needed during certain school lessons (but not always, and for others lessons there would be benefits to PI being taught in larger classes); it contextualised the Harvey Road school evidence; and it explained how PI's would benefit from an individualised programme of work and would be supported by a learning support assistant in the larger classes. Applying the language of Ms Leigh in paragraph 14 above, the tribunal here was, in my judgment, addressing a careful approach embedded by staff into and across the curriculum, and where the setting was not Harvey Road school.

Ground 2

16. The foundation for this ground is that Section F of the EHC Plan said this at the start:

> "Section F
>
> Education Provision
>
> The following section of the Education, Health and Care Plan details the support and actions that will be put in place to achieve the identified outcomes.
>
> To meet all of the outcomes identified, [PI] requires the following support:……
>
> (4) A low arousal environment where distractions are minimised."

17. This part of Section F was agreed by the parties prior to the hearing. Further, although the tribunal could have brought the need for a 'low arousal environment" into issue on the appeal if it did not consider that such provision was needed by PI (but subject to it acting fairly in bringing this point into issue on the appeal), it did not do so.

18. The appellant's argued before the tribunal that Central Primary School could not provide such an environment. If they were right on this then on the face of it Central Primary School would not be a suitable school for meeting PI's education needs and so could not be named in Section I of the EHC Plan. This issue therefore needed to be properly and appropriately addressed by the tribunal in its consideration of Section I of the EHC Plan. In my judgment, the tribunal failed to do this.

19. The issue is picked up most directly in terms of evidence by the tribunal at paragraph 48 of its decision. This needs to be read with a few of the preceding paragraphs in the decision. The relevant context was that it was proposed that PI be educated in "the Base" within the Central Primary School in the mornings in a class of eight with a teacher and two speech and language teaching assistants allocated to the class. In the afternoon he would go to mainstream classrooms of approximately

thirty pupils. The following is recorded by the tribunal at paragraphs 46-48 of its decision (Ms Perry was the SENCO (special educational needs coordinator) at Central Primary School and Ms McAllister is a speech and language therapist):

> "46. Ms Perry was asked about Central's policy on children staying in the Base long term. The school's Policy document mentioned "exit criteria" and suggested the placement in the Base was not permanent. Ms Perry clarified this for the Tribunal. She explained that a child's place at the Base is reviewed annually based on that child's needs. Any move back to full-time mainstream provision would also have to be agreed by the parents.
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> 47. Ms McAllister was also able to expand upon this point. She explained that the Policy document is in the process of being updated following changes in the use of terminology over the last few years. Placement for [PI] would reflect the long-term nature of his language disorder. Whilst there are children who do spend a shorter time in the Base and then are integrated successfully into the mainstream school, there are others who, by virtue of their long-term difficulties would stay in the Base long-term. It is a flexible approach based on the environment each child needs.
>
> 48. Ms Perry was challenged by Mr Small on the question of whether Central can provide the "low arousal" environment that [PI] needs. Ms Perry accepted that Central Primary School is situated in an old building with approximately 400 children on the roll. Mainstream schools can be noisy places. Although she was of the view that noise could be contained if it needed to be, she accepted that it was probably not a "low arousal environment."

20. The judge's notes of the evidence taken at the hearing before the tribunal showed the following relevant exchanges between Mr Small (MS) and Ms Perry (TP).

> "MS - Central primary school is quite an old building. [PI] needs a "low arousal environment". Is your setting "low arousal"?
>
> TP - It's a primary school. When noise needs to be contained it can be. 400 odd children.
>
> MS – Acoustics challenging[?]
>
> TP – Accept probably not a "low arousal environment."

21. There is an unfortunate ambiguity in the last sentence in paragraph 48 of the tribunal's decision. This is that it is unclear whether Ms Perry's evidence was that even with noise containment the school would not be a "low arousal environment" or it would be with such containment. The former may be the more natural reading of the flow of the evidence given at the hearing. However, that ambiguity cannot assist the tribunal. It ought to have established and made clear what the true position was in terms of Ms Perry's evidence. As it is, her evidence on at least one analysis was that Central Primary School could not meet the above condition in Section F of the EHC Plan. In a balance of probabilities jurisdiction, "probably not a 'low arousal environment'", absent evidence pointing the other way, on the face of it should lead to a finding of fact that the school was not and could not provide the "low arousal environment" section F of the EHC Plan required. However, there is no other evidence to which the tribunal refers in its decision on this issue. Moreover, this was evidence, so to speak, from Central Primary School about its (in)ability to meet this part of Section F of the EHC Plan.

22. I should add that identifying the different environments that may have existed in 'the Base' and the rest of Central Primary School does not seem to me to be a valuable exercise because the respondent's case is and was that PI was to be educated in both parts of the school each day, and it is this modelling of schooling at Central Primary School upon which the tribunal found it to be suitable. I cannot see anything, or at least anything obvious, in the evidence of Ms Perry and Ms McAllister cited above that contemplated PI remaining full time in the Base. The flexibility vouched for by Ms McAllister was, on the face of it, in the context of moving to <u>full-time</u> mainstream provision (i.e. moving out of any schooling in the Base).

23. How then did the tribunal answer this evidential difficulty about Central Primary School being suitable for PI? The short answer is not

very well, and inadequately. What the tribunal said was this (paragraph 66 being the crucial paragraph):

> "64. The most important aspect of the appeal for both parties was the identification of the school to be named in Section I.
>
> 65. We were impressed with the evidence of Ms Perry in respect of the suitability of Central school to meet [PI]'s needs. We were able to a very good idea of the Base operates within the school and were impressed with the school's ethos of normalising special educational needs in a way that meant children who were placed in the Base would not be singled out or considered to be different from the other children.
>
> 66. Much was made in the hearing of the question whether Central can provide a "low arousal" environment for [PI]. We accept there will be limitations on what is possible in a large school contained within an old building. However, we were satisfied that appropriate adjustments could and would be made for [PI], if required. There was no sense that Central endeavour to adapt the child to the environment, but rather quite the opposite. Central operates a flexible model in which the environment is adapted to meet the child's needs.
>
> 67. We were impressed by Ms Perry's skills and qualifications and were reassured that all staff at Central receive comprehensive training. The LA's intention is that [PI] would be part of a small peer group in the Base and it is here he would receive teaching in the core subjects. Immersion alone will not address [PI]'s difficulties, but we were persuaded that targeted opportunities for immersion into the mainstream environment would be beneficial. Central can provide this and they also have the flexibility and resourcing to rethink that immersion if for any reason it is not going according to plan.
>
> 68. Consequently, we find that the LA's choice of school, Central Primary School, is an appropriate environment to meet [PI]'s needs……."

24. What is said in these paragraphs, and paragraph 66 in particular, even when read in context, does not furnish an adequate explanation addressing either Ms Perry's evidence that Central Primary School was not a "low arousal environment" or, more importantly, the steps that would be taken by the school to make it a low arousal environment. Without wishing to labour the point, the tribunal had evidence before it from the school which the respondent was contending was suitable to meet PI's educational needs (and the tribunal found was suitable) that was seemingly to the effect that, in one respect, the school was *not* suitable. The tribunal needed to do more than it did, in my judgment,

in paragraphs 65-68 to explain away this evidence and show to the parties before it the factual basis upon which it had concluded that Central Primary School could be made suitable by being able to provide the low arousal environment that (it was agreed) PI needed.

25. I do not accept, as the respondent contended, that the tribunal dealt sufficiently with how Central Primary School would provide a low arousal environment for PI by saying in paragraph 66 of its decision that "appropriate adjustments could and would be made for [PI], if required". With respect, this raises more questions than answers.

26. First, it suggests, with its contingent qualification of "if required", either that no adjustments may have been needed to Central Primary School or that the tribunal was not sure if any adjustments would be needed. The latter would be a failure of the tribunal to determine a key issue of fact on the appeal. The former, however, is difficult to square (at least without more by way of reasoning) with the evidence of Ms Perry as set out in paragraphs 19 and 20 above. On any rational reading of that evidence, Central Primary School as a whole (and PI was to be educated in the 'mainstream' part of it every afternoon) could not provide the low arousal environment PI needed without adjustments.

27. Second, in a context where an issue arose about the acoustics of Central Primary School and where (see paragraph 66 of the tribunal's decision) that school would seek to adapt its school environment to meet PI's needs, there is a lack of any detail or specificity (in other words, findings of fact) in the tribunal's decision about exactly what it was that that school would need to do, and could do, to meet this educational need of PI and thus be suitable for him.

28. The respondent argued that the 'appropriate adjustments' view of the tribunal was justified given what was said elsewhere in section F of the EHC Plan. It relied in particular on the excerpt from section F of the EHC plan set out at page 53 of the Upper Tribunal appeal bundle. This

came under ***Outcome 4*** which itself identified the aim or need as being (at least) for "[PI] to make further progress in his self-help skills". The particular outcome was that by the next review "[PI] will be able to gather tools for learning independently" and for "[PI] to become an independent learner". In that context the educational provision was identified as including:

> "(d) Staff working with [PI] should be trained by the OT to implement sensory processing strategies, including movement breaks and assisting [PI] to regulate his own sensory arousal levels to improve his attention to tasks.
>
> (e) To learn and cope with new things, [PI] needs to be in a calm but alert state, which means he needs regular access to sensory activities. In particular, access to activities which are likely to be regulating and calming, such as sensory inputs that provide strong proprioceptive input as well as vestibular sensations. He will require implementation of a programme of sensory strategies on a daily basis to ensure that he engages in frequent movement breaks to assist with attention and concentration. The specifics of this programme will be developed and monitored by an OT and implemented by a LSA who has been trained by the OT. The programme of practical strategies should be developed in consultation with the education staff to address his sensory and modulation needs (the reader may be familiar with this when referred to as a sensory diet). (1 hour initially)"

29. I do not consider these passages assist the respondent. The first and perhaps most obvious point is that nowhere in its reasoning does the tribunal rely on this provision as meeting the need for a "low arousal environment". Its reasoning is effectively confined to paragraph 66 of the decision. Further, in such a context it is not clear from the above passages that they **are** about the school providing the low arousal environment PI needed. More than that I probably do not need to go because the respondent's argument here is effectively that the provision set out in (d) and (e) in paragraph 27 above is by necessary implication the appropriate adjustments of which the tribunal was speaking in paragraph 66 of its decision. I do not see why that is so.

30. To start with, aiming for PI to make further progress in *his self-help* skills is not obviously about adjusting the environment around PI but rather is about helping him deal with fixed or differing environments.

Secondly, there is nothing here that addresses Ms Perry's evidence that acoustically Central Primary School was not a low arousal environment without adjustments being made to the school. Thirdly, it is difficult to read the provision in (d) and (e) as amounting to adjustments that would be made *if required*. The language of (d) and (e) is about educational provision that PI **did** require. In short, and in agreement with the appellants, this provision has nothing to do with adjustments to the physical environment in which PI was to be educated.

Ground 3

31. I confess that I struggled at times to understand this ground, for reasons I will expand on shortly. It is also a ground which even if correct would now appear to be empty of any successful remedy in reality, given that PI is now attending the Base and Central Primary School more generally. Furthermore, it is a ground which may be thought to sit oddly with the appellant's case before the tribunal that Central Primary School (including the Base) was not suitable for PI and where he was arguing for an alternative school, ERS, which did not include a 'Base'. Had there been an educational need for PI to attend a Base like 'the Base' at Central Primary School, that would have been an argument against the case which the appellants were making and which would have ruled out ERS (or any other school without a 'Base' in it) from being a suitable school to be named in Section I of the EHC Plan. (The tribunal found both Central Primary School and ERS were suitable to meet PI's educational needs.)

32. Put another, and blunter, way the argument advanced under this ground would arguably appear to be inconsistent with the appellants arguing that ERS was suitable to meet PI's educational needs.

33. It is because of these difficulties and because the ground would appear now to be an academic one in terms of the interests of the parties to this appeal (and also because I do not need to determine this ground in

order to decide this appeal), that I limit myself to some non-binding comments on the argument.

34. The ground at first blush may appear an unremarkable one: did the tribunal fail properly to describe the educational provision needed for PI. However, the ground does not end there. Crucially it has the additional closing words of "needed for PI at Central Primary School". Those additional words may be thought to make the ground into one that confuses section F and I of an EHC plan. The educational provision in F is, after all, expected to stand independent of any particular school and it is by that independent assessment of educational need that the suitability of educational settings is then be determined. Further, it was common ground before me that following *MA v Kensington and Chelsea* [2015] UKUT 186 (AAC) 'the Base' could not be considered as a separate school so as to be named in Section I: it is part of Central Primary School. And it was no part of the appellants' argument that 'the Base' (or indeed Central Primary School) should be named in Section I of the EHC Plan.

35. Mr Small expanded on this argument in the following terms. He said that it was the respondent's proposal that PI should attend Central Primary School "and would access its specialist resource provision". As such, he argued on behalf of the appellants, the tribunal was required to specify this as required educational provision in Section F and the tribunal was "required to make findings in respect of [PI]'s access to [the Base] and to specify it in Section F". As it was put in later argument "[i]f a specialist unit was deemed to be necessary for [PI], then it must be specified in the EHC Plan".

36. Moreover, Mr Small argued that the tribunal was wrong to say the following in the rest of paragraph 68 of its decision.

> "Although we have no power to order attendance at the Speech and Language Base the school is likely to implement the provisions specified in Section F by placement at the Base, and this was understood by the [tribunal] to be the LA's intention."

Mr Small criticized this passage on two fronts: first, that the tribunal had a power; second, that it had not alerted the parties prior to issuing its decision of its thinking that it had no power.

37. In my judgment, the last argument has no independent status because it turns on the correctness of whether the tribunal had a power and could have used such a power to require PI to be schooled at 'the Base'. Both parties were able to make arguments to me on those two points and so the lack of opportunity to make such arguments before the First-tier Tribunal (even assuming that to be true) cannot of itself amount to a material error of law.

38. It seems to me, with respect, that the argument before me on this issue confused the special educational provision needed with the setting in which that provision could be met. I do not see that it was being argued by the respondent that PI had an educational need to be taught through and in a specialist unit such as the Base. Rather, its case was that the special educational provision needed by PI (for example, to be taught core subjects in small class sizes) could be accommodated in Central Primary School including 'the Base' (because of the small class sizes the Base could provide). But the tribunal also proceeded on the basis that the ERS school could meet this special educational provision needed by PI because it also had small class sizes.

39. Furthermore, I do not see how the definition of 'special educational provision' found in section 21 of the Children and Families Act 2014 – meaning "educational or training provision that is additional to, or different from that made generally for others of the same age in mainstream schools….." – necessarily assists Mr Small's argument here. It is not the specialist unit in the mainstream school (here 'the Base') which itself is the provision for section 21 purposes, but rather what it in fact provides in terms of education or training that may amount to special educational provision. It is the latter that needs to be described in Section F of the EHC Plan, not the former.

40. It would appear that a concern which perhaps underpinned this ground of appeal was how to ensure that PI would be educated in 'the Base' if Central Primary School was named (as it was) in Section I of the EHC Plan. Mr Small referred to section 42 of the Children and Families Act 2014 as part of his argument under this ground. That section imposes a duty on the local authority which holds an EHC Plan for a child or young person to "secure the specified special educational provision for the child or young person". Section 42(6) makes it clear that specified means specified in the EHC Plan. Mr Small argued that given the terms of section 42 it was not lawful for the tribunal to use the language it did of the "provision is likely to be implemented'.

41. I am not sure, however, that any of this assists with, or indeed even illuminates, this ground of appeal. For a start, issues around the securing of the special educational provision specified in the EHC Plan is not a matter over which the First-tier Tribunal has any jurisdiction and that is not an issue which may be appealed to that tribunal under section 51 of the Children and Families Act 2014. However, the fact that such a duty exists and may be enforced through other means may have been what the tribunal was seeking to communicate in paragraph 68 of its decision. But nothing in section 42 helps with identifying what special educational provision may amount to.

Ground 4

42. Both parties agree that the tribunal erred in its consideration of the comparative costs of Central Primary School and ERS. Given this and the length of this decision already, and the fact the decision is to be remitted in any event, I will not spend too long on this ground.

43. The respondent accepts that the tribunal did not properly consider the costs of a learning support assistant and transport costs when determining the costs of both schools under section 9 of the Education Act 1996. It argues, however, that on any analysis there was an additional cost associated with PI being a pupil at ERS that meant

funding his placement there would amount unreasonable public expenditure.

44. I do not accept this argument of the respondent. In effect, it amounts to an argument that the error of law was not material to the decision the tribunal arrived because it could only have concluded that ERS had an additional cost which was unreasonable. I am not persuaded that that was the only possible outcome.

45. It would appear from paragraph 39 of the evidence of Beckie Walsh on page 671 of the First-tier Tribunal appeal bundle that the comparative costs of the two schools did take into account that the appellant parents would bear the cost of transporting PI to and from ERS. The argument of the respondent before me proceeded on the basis that the same did not apply if PI was placed at Central Primary School, so it bore an additional cost in respect of transport of £2,661, and the tribunal had been wrong not to include this figure.

46. Turning to the cost of a learning support assistant (LSA), it was agreed before me that the tribunal had also erred in law in including such a cost in the costing for ERS. PI's need for an LSA only arose in large classes. If he had been a pupil at ERS he would only have been taught in small class sizes. Accordingly, no additional cost for an LSA arose at ERS and the tribunal had therefore also been wrong to include this as an additional cost of PI's attending ERS. As we shall, however, there is no agreement (or clarity) on this issue when it comes to Central Primary School.

47. Once these costs have been stripped out, the additional cost of ERS was on any analysis at least £19,000. (The precise figure depends on the cost of additional therapies for PI at ERS, about which the parties before me did not agree, but overall this was a marginal cost consideration).

48. If the additional costs of the two schools were these figures (£2,661 v £19,000) then I would have had no hesitation in concurring with the respondent that the £19,000 cost of ERS would amount to unreasonable public expenditure and the tribunal's error of law would not have been a material one. However, this is not the full story on costs.

49. Mr Small argued that Central Primary School had a further additional cost of £12,500 for the provision of one learning support assistant for five afternoons a week, as the tribunal had found was required in paragraph 63(vii) of its decision (see paragraph 12 above). This would take the comparative cost of Central Primary School to a figure of £15,161 as against £19,000 for ERS, giving a difference of less than £4,000 compared to the differential figures of £30,764, £26,764 and then, finally, £18,263 upon which the tribunal based its decision (see paragraphs 73-75 of the tribunal's decision).

50. I agree that such a large decrease in the differential costs would mean the tribunal's (admitted) error of law on costs amounted to a material error of law because it *might* have meant the tribunal, using its specialist expertise, would have arrived at a different conclusion on unreasonable public expenditure.

51. The respondent sought to counter the appellant's argument on this point solely on the basis that the £12,500 would not be an additional cost of PI's schooling at Central Primary School. This was because, so the respondent argued, such provision would have been made from the resources normally available to the school **and** this 'fact' was obvious from the evidence before the tribunal. I do not accept this. Firstly, the tribunal accepted the sum of £12,500 would be an additional cost of PI's placement at Central Primary School under the EHC Plan it ordered (see the second paragraph in paragraph 75 of the tribunal's decision), so the contrary was not obvious to the tribunal. I appreciate that this finding of the tribunal forms part of the respondent's agreeing

that the tribunal's approach to costs was flawed, but it is only one part of the tribunal's erroneous approach to costs.

52. Secondly, and in any event, having been taken through the evidence before the tribunal on this point by both parties I do not consider the evidence point was obviously against this finding of the tribunal. The critical factor, Mr Small argued, was that although provision for a learning support assistant had appeared in a previous version of PI's EHC Plan, it had been removed in the version of the EHC Plan the respondent was arguing for before the tribunal. It was therefore not a necessary part of the respondent's case even to be arguing about this as an additional cost because it did not consider it was provision which was needed at all. The factual premise for this argument was not disputed by Ms Thompson for the respondent. At the very least Mr Small's is a good argument on the evidence which was before the tribunal. That is sufficient, in my judgment, to negate respondent's argument before me that I ought to rule that it was obvious that the £12,500 was not an additional cost of PI attending Central Primary School under the terms of the EHC Plan as it had been amend by the tribunal.

53. I therefore conclude that the appellant parents are also entitled to succeed on their fourth ground. The tribunal erred materially in law in its approach to determining the additional costs of the two schools in issue before it.

54. As the appellants have succeeded on two of their grounds of appeal, their appeal to the Upper tribunal is must be allowed. I set aside the decision of the tribunal and remit the appeal to be reconsidered entirely afresh (on all matters that remain in issue between the parties) by a completely differently constituted First-tier Tribunal.

55. I make this set aside remedy with some reluctance given the changed position of PI now attending the Central Primary School and the consequent possibility that his attending ERS may no longer be an

outcome which is sought. However, the respondent never pressed this point and it was therefore not a matter I investigated. It is also the case that the "low arousal environment" ground on which the appellants have succeed before me could be of continuing relevance to PI's schooling at Central Primary School. In all these circumstances it seems to me that set aside ought to follow from the appeal being allowed.

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

On 17th June 2020