IN THE UPPER TRIBUNAL **Appeal No. HS/2053/2019**
(ADMINISTRATIVE APPEALS CHAMBER)

ON APPEAL FROM THE FIRST-TIER TRIBUNAL (HESC)
(SPECIAL EDUCATIONAL NEEDS & DISABILITY)
Tribunal Ref EH306/19/00015

BEFORE JUDGE WEST

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 child's parents, in due exercise of their parental responsibility, disclose 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 child where knowledge of the matter is reasonably necessary for the proper exercise of the functions.

DETERMINATION

The hearing took place before the imposition of the General Stay ordered by the Chamber President on 25 March 2020, although the decision is completed after it came into force. The General Stay ordered by the Chamber President on 25 March 2020 expressly exempted from its scope hearings, such as the present one, which had already been arranged and taken place. However, for the avoidance of doubt and so far as may be required, I lift the stay to enable the issue of this decision, if practicable, within the period of the General Stay.

The decision of the First-tier Tribunal (HESC) (Special Educational Needs & Disability) (which sat on 6 July 2019) dated 19 July 2019 under file reference EH306/19/00015 involves an error on a point of law. The appeal against that decision is allowed.

The matter is remitted to a differently constituted tribunal for a complete rehearing.

The new tribunal must consider and make relevant findings as to whether the placement named in Section I of the ECHP for G should be Bensham Manor School or Wickham Court School.

The new tribunal is not bound in any way by the decision of the previous Tribunal.

These directions may be supplemented as appropriate by later directions by a Tribunal Judge of the First-tier Tribunal (Health, Education and Social Care Chamber).

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

Representation:
Appellant: Mr David Wolfe QC (instructed by Simpson Millar LLP)
Respondent: Mr Leon Glenister (instructed by Croydon London Borough Council)

REASONS

Introduction

1. This case concerns the following questions:

(i) whether the First-tier Tribunal unlawfully treated as being in issue questions of special educational provision arising from section F of the EHCP, but without section F having been amended or being the subject of an appeal and whether the Tribunal unlawfully ordered a placement at an ASD special school when nothing in section F suggested or provided that the child required such a placement

(ii) whether the Tribunal failed to give lawfully sufficient reasons for its conclusion that the maintained special school was a suitable placement, including failing lawfully

to explain the basis on which it rejected points raised by the child's parent about its suitability

(iii) whether the Tribunal acted unlawfully in proceeding as if the burden lay on the parent to show that the independent maintained school was suitable, particularly in circumstances where the child had attended that school for several years and without its suitability having been previously questioned by the Council

(iv) whether the Tribunal unlawfully failed to give effect to obligations arising on it as an inquisitorial tribunal, including in adjourning its deliberations to allow for a hearing or further evidence having reached a conclusion that persuasive evidence was lacking

(v) whether the respective costs of placement were such that, even if the Tribunal's decision were unlawful, the Upper Tribunal could nonetheless substitute its own decision that the difference in the costs between the placements meant that the child's parent was bound to lose.

2. The parties to the appeal are the child's mother, who is the Appellant, and the Respondent, which is the Council of the London Borough of Croydon ("the Council"). In order to preserve his anonymity, and meaning no disrespect to him, I shall refer to the Appellant's son only as "G". The appeal was against the terms of Section I of G's Education, Health and Care Plan ("EHCP") (page 11). The Council's proposal was that G attend Bensham Manor School ("Bensham Manor") for his secondary education, whilst his parents' position was that he should continue at Wickham Court School ("Wickham Court") and move into secondary provision there in September 2019. G had attended Wickham Court since nursery. That placement was initially privately funded, but had been funded by the Council since 12 March 2017. Wickham Court is an independent mainstream school.

3. The Council's position was that Wickham Court was unsuitable as a placement and it proposed Bensham Manor, a maintained special school, instead. G's parents by contrast wanted him to continue his placement in accordance with his current EHCP at Wickham Court. The suitability of both of the respective placements was therefore

disputed by the parties. The EHCP was served on 8 February 2019 (page 23) following the last annual review in May 2018 (pages 317 to 324). Sections B and F were unchanged (the EHCP itself is to be found on pages 59 to 87). Section I was amended so that Wickham Court, an independent school, was named until July 2019; thereafter the named school was Bensham Manor, a specialist school for children with ASD and associated difficulties (page 84).

The Tribunal's Decision

4. The parties agreed to the appeal being considered on the papers without an oral hearing. (I shall return to that aspect of the case when I consider the fourth ground of appeal below.) The Tribunal concluded pursuant to rule 19 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 that the case was suitable for consideration on the papers and agreed to conclude the appeal without an oral hearing. Having considered the evidence, the Tribunal concluded that Wickham Court would be unsuitable as a placement for G's special educational needs and that Bensham Manor was able to meet his needs. In consequence it did not need to make a determination on the additional cost to the Council of the provision at Wickham Court.

5. In its decision the Tribunal dealt with the preliminary matter of the disposal of the hearing on the papers in paragraph 2 and defined the issue before it in paragraph 3. In paragraphs 4 to 7 it dealt with the background and in paragraphs 8 to 20 it considered the evidence and the submissions. Its conclusions with reasons were set out in paragraphs 21 to 29 as follows:

> "21. We carefully considered the written evidence submitted to the Tribunal. We also took account of the Code of Practice 2015 and the relevant sections of the Children and Families Act 2014 and the Special Educational Needs and Disability Regulations 2014 (as amended). Of particular relevance is Section 9.79 of the SEN Code of Practice which states:
>
> > *"If a child's parent … makes a request for a particular … school … the local authority must comply with that preference and name the school … in the EHC plan unless:*

- *it would be unsuitable for the age, ability, aptitude or SEN of the child … or*

- *the attendance of the child or young person there would be incompatible with the efficient use of resources".*

22. It is not in dispute that [G] has SEN. While parental preference is the starting point for placement the LA is able to assert an exception to the proposed school based upon Section 9.79 of the SEN Code of Practice (see preceding paragraph). In this appeal the Tribunal is first required to compare the provisions between the two schools and how each will address [G]'s SEN.

23. We are sympathetic to the Parents' view that [G] is settled and that a transition to a new secondary school environment will not be without its challenges. We considered carefully the evidence from Ms Robinson of Bensham Manor and we were satisfied that both in terms of its overall experience in supporting you[ng] people with ASD and consideration of [G]'s specific learning difficulties it is capable of meeting his needs as identified to the Tribunal.

24. We noted that Wickham Court is not a school that specialises in meeting the needs of pupils with any particular special educational need.

25. No persuasive evidence was produced of how [G] would fit alongside his peers at Wickham Court, or whether there are pupils there with a similar profile of need, whether the school has the expertise and/or experience to meet the needs of a pupil with [G]'s profile of needs and whether or not the school is able to differentiate the curriculum as required for [G] while still educating him alongside his peers and without isolating him academically and socially.

26. There was no persuasive evidence presented from Wickham School about its focus and specific plans to address meeting [G]'s SEN beyond Year 6.

27. In addition to the information recorded previously concerning [G]'s attainment, the Tribunal received the inCAS Progress Levels and Scores Table from which it can be seen that in the years 2014-15 and 2015-16 [G]'s Reading Age was 0:9 years above his chronological age. From 2016 to 2018 his Reading Age then fell to a level where it was below his chron[olog]ical age by 1:2 years. In 2018 in Maths he was 1:7 years below age related expectations. The Table further makes clear that as of June 2018 [G] is only achieving age related expectations for his multiplication. In virtually all other

> subjects he is at least 1 year behind age-related expectations. The Tribunal found that despite efforts around [G] he has not been making progress in line with the anticipated attainments set by Dr Alison Bell (see paragraph 13). This is indicative of weaknesses in the ability of Wickham Court to meet [G]'s needs.
>
> 28. Having considered the evidence before the Tribunal, on balance it determines that Wickham Court would be unsuitable as placement for [G]'s SEN. We further determine that Bensham Manor School is able to meet his needs.
>
> 29. In consequence of our findings it is unnecessary for the Tribunal to make a determination on the additional cost to the LA of the provision at Wickham Court."

The Tribunal's Order

6. Consequent upon its findings, the Tribunal made an order that the placement named in Section I of the ECHP for G should be Bensham Manor School.

Permission to Appeal

7. The Appellant initially sought permission to appeal to the Upper Tribunal from that decision, which was issued on 19 July 2019 after the hearing on 6 July 2019. Permission to appeal was initially refused by Tribunal Judge McCarthy on 23 August 2019. The Appellant applied to the Upper Tribunal for permission to appeal on 19 September 2019. Upper Tribunal Judge Jacobs refused permission to appeal on the papers on 2 October 2019.

8. In accordance with rules 22(3) - (5) of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant sought an oral hearing of her renewed application, which I heard on the morning of 27 November 2019. The Appellant was represented by Mr David Wolfe QC (instructed by Simpson Millar LLP). The Council was represented by Mr Leon Glenister (instructed by the Council itself).

9. An appeal to the Upper Tribunal lies only on "any point of law arising from a decision" (section 11(1) of the Tribunals, Courts and Enforcement Act 2007), not on the facts of the case. The Upper Tribunal has a discretion to give permission to appeal if there is a realistic prospect that the First-tier Tribunal's decision was erroneous in law or if there is some other good reason to do so (Lord Woolf MR in ***Smith v.***

Cosworth Casting Processes Ltd [1997] 1 WLR 1538). In the exercise of its discretion the Upper Tribunal may take into account whether any arguable error of law was material to the First-tier Tribunal's decision.

10. I handed down a written decision granting permission to appeal on all of the grounds adduced on 16 December 2019. Although the grounds were then in an unamended form, it seemed to me that there was a realistic prospect that the Appellant could demonstrate that the First-tier Tribunal's decision was erroneous in law in respect of all of the matters upon which there had been argument.

11. I directed that the grounds of appeal be amended to reflect those argued before me by Mr Wolfe and that the appeal be listed for hearing in London either before me or before another Judge of the Upper Tribunal authorised to hear this type of case on a date as the Listings Section might advise with a time estimate of ½ day. As matters turned out, the matter came on for argument before me on the morning of Friday, 7 February 2020.

12. Mr Wolfe and Mr Glenister again appeared respectively for the Appellant and the Council. I am very much indebted to them for their assistance in both the permission application and the substantive appeal itself. Their submissions, both written and oral, were concise, focussed and to the point.

Parties

13. At the outset of the permission hearing I raised with Mr Wolfe the issue of the correct identity of the Appellant or Appellants. This had also been raised by Judge Jacobs in his decision. He had treated both parents as appellants to the Upper Tribunal. Form UT4 showed only G's mother as an appellant, but the grounds of appeal, completed by their solicitor, showed both parents. He took that to indicate that the appeal was made by both parents, who were both parties before the First-tier Tribunal. Mr Wolfe on instructions, however, confirmed that in fact only G's mother was party to the appeal, although with the full support of his father. I therefore amended the title of the action to show that only she was party to the appeal.

Rolled Up Application & Appeal

14. At the conclusion of the oral hearing of the permission application, Mr Wolfe raised the possibility of dealing with the application as a rolled-up hearing, with the substantive appeal being decided at the same time as the determination of the application for permission to appeal, so as to dispense with the need for a second hearing in the event that permission to appeal were to be granted. Mr Glenister, who explained that he had only very recently been instructed by the Council and had not had the opportunity to take instructions on that matter, said that he was not in a position to consent to that proposal and Mr Wolfe quite properly did not press the matter.

15. It was therefore necessary to hold a second hearing, of the substantive appeal itself, but I was conscious of the need in my permission decision not to pre-empt the submissions which might be adduced on the appeal or to determine them before the substantive appeal itself. Mr Glenister frankly admitted that he had only been instructed at a very late juncture; he had only had sight of Mr Wolfe's skeleton argument not long before the hearing and had not had an opportunity to research and deal with certain of the issues as fully as he would have wished, particularly given the shift in the proposed grounds of appeal produced by his opponent. That was not a criticism of him, or of Mr Wolfe, but it illustrated the fact that, taken in conjunction with the reasons which I set out in the earlier decision, it was more appropriate to deal with matters when they were fully fleshed out on a substantive appeal than to preclude them by dismissing the application for permission at the outset.

The Amended Grounds of Appeal

16. The grounds of appeal to the Upper Tribunal, as originally drafted by those instructing Mr Wolfe, were contained in an attachment to the completed form UT4 dated 13 June 2019. There were, as originally formulated, two grounds of appeal. The first ground was that the Tribunal should have adjourned the hearing and directed that further evidence be provided by Wickham Court or that an oral hearing take place. The second was that the Tribunal had failed to explain properly why it concluded that Bensham Manor was suitable.

17. However, in Mr Wolfe's skeleton argument on the application hearing four (initially five) grounds of appeal were put forward. I allowed him to argue them, but pointed out that, in the event that permission to appeal were to be granted, he would need to amend the grounds of appeal in due course to reflect the grounds now being adduced on his client's behalf. He accepted that that would need to be done.

18. There was one matter raised by Mr Wolfe in his skeleton argument which he did not pursue on the hearing of the permission application. That was the question of the provision of 1:1 support. It was initially submitted that 1:1 support was required in G's needs in his EHCP, but could not be provided by the School. However, Mr Glenister was able to produce at the hearing an email string, culminating in an email of 27 November 2019, which provided confirmation from Mrs Robinson, the Deputy Head and SENCo, that Bensham Manor would be able to provide 1:1 support as set out in the EHCP as follows:

> "1. The school is able to provide a 1:1 to provide the support as needed in the EHCP.
>
> 2. That the school has sufficient staffing to be able to allocate the above 1:1 without additional funding [being] provided. They in essence have a pool of TAs and as most pupils do not have a 1:1 they have sufficient capacity to allocate one to [G].
>
> 3. That they have had a 1:1 allocated and ready to work with [G] since the start of this academic year, but as parents have refused to send [G] in that TA has of course not been able to work with him.
>
> 4. That the school confirmed directly with the parents over the summer that they could deliver this 1:1 support. See the attached email chain. That I should hope [sic] would supersede the parental reports of the open day meeting".

In the light of that information Mr Wolfe did not press that ground of appeal any further.

19. The grounds of appeal as subsequently formulated by Mr Wolfe were as follows:

(1) the Tribunal unlawfully ordered a placement at an ASD special school when nothing in section F of G's EHCP suggested or provided that he required such a placement (or indeed required anything other than a mainstream placement). In the course of doing so the Tribunal unlawfully treated as being in issue, or put in issue, questions of special educational provision arising from, or to be specified in, section F, but without section F having been amended or being the subject of an appeal before the Tribunal

(2) the Tribunal failed to give lawfully sufficient reasons for its conclusion that Bensham Manor was a suitable placement, including failing lawfully to explain the basis on which it rejected points raised by the Appellant about its suitability

(3) the Tribunal acted unlawfully in proceeding as if the burden lay on the Appellant to show that Wickham Court was suitable (such that she needed to produce persuasive evidence on the point despite there being no evidence identifying it as not suitable), particularly in circumstances where G had attended Wickham Court for several years and without its suitability having been previously questioned by the Council or otherwise

(4) the Tribunal unlawfully failed to give effect to the obligations arising on it as an inquisitorial tribunal, including in adjourning its deliberations to allow for a hearing or further evidence having reached a conclusion (assumed lawful for the purposes of the ground only) that "persuasive evidence" was lacking. Even if, contrary to that primary submission, the matter was merely a case management direction for the discretion of the Tribunal (with the possibility that countervailing considerations might weigh against an adjournment), then it at least needed lawfully to consider whether and how to exercise the relevant powers (which it did not), identify any such countervailing considerations (which it did not, not least because there were none) and explain its decision (which it did not).

The First Ground of Appeal

Submissions

20. Mr Wolfe's first ground of appeal was based on peer group inconsistency: placement at a special school was inconsistent with the EHCP, which did not indicate

that G required a peer group other than a mainstream peer group. Nothing, he submitted, in Sections B or F suggested a special school or a peer group in anything other than a maintained school.

21. The Appellant had appealed to the Tribunal against only section I (placement) of the EHCP newly made for her son G and indeed the Council had only changed that section from the previous EHCP (which had named Wickham Court, his placement of 8 years), leaving all the other sections unchanged. She wanted her son to continue his placement at Wickham Court School, a small independent mainstream school.[1]

22. G's EHCP (pages 59-87) specified in Section F that G needed

> "A consistent, full time, one to one, teaching assistant to deliver input throughout the school year" (page 73)

(effectively repeated at pages 74, 76, 78 and 82). Nothing in the specification of G's special educational needs (Section B) or the special educational provision which he required (Section F) suggested, let alone specified, that he required a peer group other than a mainstream peer group. (For a child who required a non-mainstream peer group, that would be "special educational provision" which would thus need to be specified in Section F of the EHCP, as he explained in more detail later in his submission.)

23. This particular EHCP was made on 8 February 2019 (page 59). The only change from G's previous EHCP (which had been subject to a recent and supportive Annual Review: page 200) was an amendment to its Section I to change the named placement from Wickham Court to Bensham Manor (a special school for children with ASD) with effect from September 2019 (pages 23 and 84).

24. The Appellant appealed to the Tribunal on 18 March 2019 (page 9). The Council's educational psychologist, Clare Morgado, had visited Wickham Court and spoken with G and staff just days and weeks before, in February/March 2019 (page

[1] In the paragraphs which follow, the underlinings are those in the submissions of counsel rather than ones introduced into the text by me.

346) and she produced her report on 25 March 2019 (page 354). Her "analysis and conclusion" (pages 350 to 351) expressed the view that G would benefit from moving and she said that

> "I am not convinced that such an academically focussed mainstream school will be able to meet G's complex needs beyond Y6 as well as they could be met at a specialist provision such as the one being proposed for G by Croydon Council SERN department."

25. However, she very specifically did *not* say that Wickham Court was not a suitable school placement and, in particular, she did not say anything about the peer group not being suitable, the school lacking the necessary expertise or the school being unable to differentiate for G. Nor did she say that she lacked the information to address those questions, being matters which she plainly could have investigated and commented on in the course of her visits and report had they been of any material concern for her or if they had been raised with her by the Council.

26. The Council responded to the appeal on 8 May 2019 (pages 31 to 45). In that document, submitted Mr Wolfe, it newly and unilaterally

> "raise[d] concerns about the suitability of the peer group at the school for G and whether there are pupils with a similar profile of needs, whether the school has the expertise and/or experience to meet the needs of a pupil with G's profile of needs, and whether or not the school can realistically differentiate the curriculum for G whilst still educating him alongside his peers and without isolating him academically and socially."

27. However, those points were *not* based on (and indeed flew in the face of) the educational psychologist's report and, insofar as they suggested a need for further information (page 39 paragraph 28), that was all information which she could have obtained (and presumably would have obtained and reported on if she thought it relevant), or information which the Council could have asked her about, including asking her to visit again if it wanted to make anything of the points. Moreover, the points relating to peer group (pages 39 to 40 paragraph 29) were specifically inconsistent with Sections B and F of G's agreed EHCP. The Council raised a series

of questions, but did not suggest that there was a problem (page 40 paragraph 31). In any event, against that background, the Tribunal had correctly identified that it needed to decide whether each school was suitable.

28. Although he had initially relied on it in the context of the provision of 1:1 support, Mr Wolfe also relied in this context on the decision in ***JF v Croydon LBC*** [2006] EWHC 2368 at [11] per Sullivan J:

> " … Although the proceedings are in part adversarial because the LA will be responding to the parents' appeal, the role of an education authority as a public body at such a hearing is to assist the Tribunal by making all relevant information available. Its role is not to provide only so much information as will assist its own case. At the hearing, the LA should be placing all its cards on the table, including those which might assist the parents' case. It is not an adequate answer to a failure to disclose information to the Tribunal for an LA to say that the parents could have unearthed the information for themselves if they had dug deep enough."

29. Mr Wolfe submitted that the Tribunal needed to decide the issues in the right order and he relied on the judgment of David Lloyd-Jones QC (as he then was) in ***A v Barnet LBC*** [2003] EWHC 3368 at [17] to the effect that

> "In producing a statement of special educational needs under section 324, Education Act 1996 it is the duty of a local education authority to decide first what are a child's special educational needs within Part 2, secondly what special educational provision is necessary to meet those needs within Part 3 and thirdly to make an appropriate placement within Part 4. These questions have to be addressed in this order because it is only when a decision has been taken as to a child's special educational needs that it is possible to decide what provision is required to meet them. Similarly, it is only when a decision has been taken as to the necessary provision that it is possible to decide which school can make that provision. By way of example, if the amendment to the Statement of Provision in Part 3 proposed by Mr. and Mrs. A, quoted above, had been accepted, it would clearly have been determinative of the placement under Part 4. Thus in *R v. Kingston Upon Thames Council and Hunter* [1997] ELR 223 McCullough J stated the principle as follows (at p. 9):

> "… Part 4 cannot influence Part 3. It is not a matter of fitting Part 3 to Part 4 but of considering the fitness of Part 4 to meet the provision in Part 3."
>
> For the same reasons, it is essential that a Special Educational Needs and Disability Tribunal decide these issues in that order"

(and see too to the like effect ***The Learning Trust v MP*** [2007] EWHC 1634 (Admin), [2007] ELR 658 at [42] per Andrew Nicol QC (as he then was)).

30. Thus, the contents of Sections B and F had to be decided before Section I could be completed, not the other way round. Here, Sections B and F were not in issue, but had impermissibly been put in issue by the local authority.

31. Here, placement at an ASD special school (as proposed by the Council) was entirely *inconsistent* with sections B and F of G's EHCP which did not in any way indicate that G should not have a mainstream peer group.

32. The parents served a response to the Council (pages 259 to 263), making the point that the Council was seeking to set aside the status quo of the past 8 years. They made the points that G had always attended school with a mainstream cohort (paragraph 5), that Wickham Court had helped him with his self-esteem and social skills (paragraphs 9 and 10) and that his social needs would not be met at Bensham Manor (paragraph 12). His progress in that respect would deteriorate significantly at Bensham Manor. Indeed a placement there would be a real setback and devastating for his self-esteem.

33. If the local authority had wanted to call into question G's continuing placement at a mainstream school (i.e. so as permissibly to specify an ASD special school placement for him) then it should (if the evidence supported it, which it did not) have amended section F of G's EHCP when making this new EHCP (to specify its view that he required something other than a mainstream peer group), and not merely changed the type and name of school specified in section I.

34. Given that section F had not been changed at all, let alone in any way suggesting a move away from a mainstream placement, it had not been the subject of any appeal to the Tribunal and the point was therefore not live before it.

35. Yet in paragraph 15 of its decision the Tribunal recorded that the local authority was not clear about G's current cohort of pupils at Wickham Court. That, said Mr Wolfe, was extraordinary: G had been there for 8 years, the educational psychologist did not comment on that issue and the local authority did not ask her to comment on it.

36. In addition, in paragraph 23 of its decision there was no consideration by the Tribunal of the question of peer groups in either a maintained school or a special school; there was no sense of the question being addressed by the Tribunal at all. The comment in paragraph 25 about there being no persuasive evidence of how G would fit in alongside his peers at Wickham Court did not come from Clare Morgado: she was not concerned about the matter and, if the Council had been, it should have raised the issue with her. The conclusion in paragraph 26 did not even come from the local authority at all. The conclusion in paragraph 28, that the Tribunal had considered the evidence and found that Wickham Court would be unsuitable as placement for G's special educational needs, was based on paragraphs 25, 26 and the weaknesses identified in paragraph 27 and was nothing to do with the expert evidence.

37. Mr Wolfe submitted that the decision of the Tribunal was thus flawed: it had ordered a special school and a special school cohort when there was no indication in the EHCP that that was appropriate. G should have been placed with a mainstream peer group. If the Council had wanted to end that, it should have sought to amend Sections B and F so that those matters could have been addressed.

38. The Council's answer at the permission hearing was to suggest that any requirement for an ASD special school peer group need not be specified in section F (i.e. as if special educational provision) because (so it was argued) "peer group" as such did not involve education or training (which it identified as the indicators of special educational provision). The problem with that was that it started from the wrong place. That was because G's ordinary classroom experience was all part of his

education: it was all "educational provision". By section 21 of the Children and Families Act 2014, it would all amount to special educational provision if all made in a way different to that made generally for others of the same and that would be the case if it were with a peer group other than a mainstream peer group.

39. To put the point in another way, argued Mr Wolfe, the educational provision generally made for children is education with a mainstream peer group. If the child is instead to be educated with a different (here ASD) peer group, then all of its educational provision is different to that generally provided, so it is all special educational provision.

40. Thus it was not a question of whether peer group (or different peer group) was itself special educational provision; it was the effect of that on the whole global appraisal of the child's situation.

41. That legal result was akin to that in which a child was to be educated with a different age cohort to his own; again, his education (and again, all of it) was different from that generally provided to children of his age in mainstream schools (because children are generally educated with their age cohort). That would need to be reflected in section F of the EHCP.

42. In that context Mr Wolfe referred to the decision in ***AB v. North Somerset Council*** [2010] UKUT 8 (AAC) where Upper Tribunal Judge Ward opined that

> "28. Section 324(3)(b) of the Education Act 1996 requires a statement to specify the "special educational provision" to be made for the purpose of meeting a child's special educational needs. "Special educational provision" is defined so far as relevant in section 312(4) as meaning:
>
> > "educational provision which is additional to, or otherwise different from, the educational provision made generally for children of his age in schools maintained by the local education authority (other than special schools)".
>
> Counsel were unable to direct me to any provision of law underpinning the allocation of children to year groups, which

> appears to be done as a matter of established practice. As such, the allocation of a child to a different year group seems capable of falling within the wording of section 312(4) and thus of being a matter capable of falling within a statement and one over which the tribunal, on an appeal under section 326, has jurisdiction."

43. The point under consideration there was a different one, namely placement with an out of year group (as opposed to a different in year peer group), but in his submission it was an analogous one. Just as placement with a different *age* group was special educational provision, so also placement in a different *peer* group, particularly with children with ASD, was special educational provision too.

44. He submitted that the question of peer group placement and whether or not it was special educational provision was not a matter on which there was any authority in either the High Court or the Upper Tribunal.

45. Mr Glenister for his part took issue with the Appellant's argument that, in circumstances where Section F made no provision for peer group or any particular type of school, the Tribunal was required to place G in a mainstream peer group. That, it was submitted, did not follow for two reasons.

46. First, whilst provision in Section F of an EHCP must be met by the placement named in Section I, a placement can provide more special educational provision than is set out in Section F. This commonly arises in Tribunals where a local authority argues that a parental placement is not unsuitable, but constitutes "over provision" or "Rolls Royce provision". As such, "over provision" does not make a placement unsuitable.

47. In the present case, it was not argued that Bensham Manor was not able to provide any particular provision in Section F. There was also no expert evidence that G required a mainstream peer group and the evidence tended away from that conclusion in light of the progress which he was making at Wickham Court. Therefore, as long as the Tribunal was satisfied that Bensham Manor could meet G's overall needs, it was entitled to name it in Section I.

48. The point, submitted Mr Glenister, was best demonstrated by considering the inverse of the present situation which, in practice, was the more common situation. A child might have no particular specification of peer group in Section F and a local authority might argue that the child's current mainstream placement was meeting need, but the parents sought a special school primarily on the basis that the child's progress was extremely slow. Whilst the local authority might argue that the mainstream placement provided the specification in Section F, the Tribunal would be entitled to name the special school in Section I on the basis of a lack of progress. That was despite there being no provision in Section F in relation to peer group.

49. Second, the Tribunal's consideration of Section F and I were two distinct determinations with overlapping, but not identical, issues. Consideration of Section I was much more than a simple consideration of whether, on paper, a placement could meet the provision in Section F. The Tribunal was required to consider whether a placement was suitable, taking into account any particular factors which were specific to the placement. These were often not set out, or were incapable of being set out, in Section F. But that did not make Sections F and I inconsistent; it was a consequence of the Tribunal being required to determine suitability as a separate consideration. This was best demonstrated by considering situations where a Tribunal might find a placement unsuitable despite meeting, on paper, the provision set out in Section F:

> (a) a child might require an "ASD peer group" pursuant to Section F, but the Tribunal would still be required to consider the particular peer group of a proposed school. That would often take the form of a placement witness giving a profile of the other pupils in the class which it was proposed that a child join. It might be that the peer group met what was provided for in Section F, but for another reason the peer group was not appropriate, perhaps based on the level of need of the group or due to particular individuals in that peer group. That was not inconsistency between Sections F and I, but a determination that a placement could not meet need, quite apart from what Section F specified.
>
> (b) a child might have significant Section F provision set out which could be met at a particular proposed placement; there might, however, be

> something entirely separate which might cause it to be unsuitable. It might be far from the child's home and the Tribunal would then need to assess whether the child could cope with the journey or it might be a school split across two sites separated by a road which might cause safety issues for the child. Again, there was no inconsistency between Sections F and I.

50. For both of those reasons, the Tribunal in the present case was plainly entitled to name Bensham Manor, despite there being no specific provision in relation to peer group in Section F of G's EHCP. Whether or not Bensham Manor was suitable was a clear issue from the time when the EHCP was issued, regardless of the specification in Section F, and there was no expert evidence to suggest it was not.

51. At the permission hearing it was in issue, as noted in paragraphs 38 and 45 above, whether placement in a different peer group, particularly with children with ASD, was special educational provision, a point on which there appeared to be no binding authority. Mr Glenister had originally argued that the fact that peer group was not specified in Section F was unsurprising since it was not special educational provision as it did not involve instruction or training and he cited the decision of Upper Tribunal Judge Lane in ***DC & DC v Hertfordshire CC*** [2016] UKUT 0379 (AAC) at [17] to the effect that

> "Education, although it may be very wide ranging in concept, is about instruction, schooling or training, so one or more of these factors is likely to be discernible in provision which is asserted to be educational ... The provision should relate to a specified educational objective and it should be possible to see what the provision is trying to instil, teach or train the pupil to do. There may be teaching strategies or learning strategies built into the provision … One would expect some outcomes to be built in."

52. However, at the outset of the substantive appeal it became apparent that Mr Glenister accepted that placement in a non-mainstream peer group was special educational provision. It seems to me that that concession was rightly made in the light of what Upper Tribunal Judge Ward had said in ***AB v. North Somerset Council*** about the analogous question of the placement of a child in a different year group

potentially amounting to special educational provision and in the light of the wording of s.21 of the Children and Families Act 2014 which provides that

> "(1) "Special educational provision", for a child aged two or more or a young person, means educational or training provision that is additional to, or different from, that made generally for others of the same age in—
>
> (a) mainstream schools in England …).

(That replaced s.312(4) of the Education Act 1996, but the two provisions are not materially different.) The benchmark is educational or training provision which is the same as that made generally for others of the same age in mainstream schools in England. Educational or training provision which is additional to, or different from, that benchmark is special educational provision.

Analysis

53. What is striking in this case is the chronology of events. The context in which the events under consideration took place was set out in paragraphs 4 to 6 of the local authority's first submission. G's annual EHCP review had taken place in May 2018 (page 317 and following). On 8 February 2019 his parents received his amended EHCP which named Bensham Manor in Section I (page 23). The EHCP was dated with the same date (pages 59 to 84). The only difference was that in Section I Wickham Court, an independent school, was replaced by Bensham Manor, a specialist school for children with ASD and associated difficulties. There was no change to either Section B relating to educational needs or Section F relating to educational provision.

54. Only *after* the EHCP had been amended did the educational psychologist, Clare Morgado, become substantively involved, making her first visit to Wickham Court on 13 February 2019 (page 346). That was after the local authority had informed the parents of its decision on placement. It was not therefore a case where the educational psychologist's prior input influenced the subsequent decision of the local authority; it came after it – indeed she did not complete her report until 25 March 2019.

55. A week before the report had been produced, the appeal was on foot as of 18 March 2019 (page 9). The parents had ticked the box in Section 2 (page 11) that they disagreed with the school named in Section I of the EHCP. That defined the Tribunal's jurisdiction: the appeal was only in relation to the placement in Section I.

56. The parents then set out their position in response to the proposed placement. Again, this was before the educational psychologist's report:

> "2. … It was raised by the School Principal, Mrs Lisa Harries, that [G] could continue to be supported at Wickham Court and it would ensure minimum disruption to him. We had thought there was a consensus that Wickham Court would be listed for secondary education.
>
> 3. When [G]'s plan was reviewed in May 2018, I flagged the importance of communicating to [G] quite promptly that Wickham Court would continue to be his school. It was not raised at this time that any change would take place, let alone such a significant change to his educational experience. On the 13 July 2018, I returned the school preference form supplied to me. I listed Wickham Court as our preferred school. I then chased on 24 October 2019, However, I did not receive a response. The first communication we had from Croydon LA about the proposed placement at Bensham Manor was on 1 February 2019. Despite our objections, on 8 February 2019 the LA sent a "final" updated version of this plan, which listed Bensham Manor as [G]'s school from September 2019. This final plan was delivered one week before the 15 February deadline, despite out repeated requests for this matter to be managed in a way that considered [G]'s needs
>
> 4. [G] moves into Year 7 in September 2019 and he has been offered a place at Wickham Court. He has been a pupil since Nursery (some 8 years). His older sister … is also a pupil (she is neurotypical) and will start Year 9 in September. She has been a pupil at the school for over 10 years. Wickham Court is the only school environment [G] has experienced since he was 6 months old and this is very much our school of choice as parents. We have proactively chosen this school for our children as it is an inclusive, claim, safe, caring and nurturing environment. Children at Wickham Court, including [G], thrive emotionally which is so important for him. Wickham Court children are confident, they are happy at school and they are encouraged to pursue their interests and passions. It is a truly inclusive environment.

5. [G] has always attended school with mainly neurotypical children. He is aware of his diagnosis. However, he is not identified as "different" and does not feel that way about himself. He is very well supported and happy at school.

6. Wickham Court is a small environment with 37 senior pupils. There is an equal balance of 18 boys and 19 girls. In the absence of a response from Croydon LA, [G] has completed the Wickham Court Year 7 induction and events, including lunches and mixers. He has met with teachers and classmates and he is excited his best friend will be "moving up" with him. He will be taking part in an assembly, where alongside the other Year 7 pupils, he will deliver a short speech about his time at Wickham Court to date and he plans to speak about how happy he is to be moving to the seniors in September. He is looking forward to making his speech, as his interest in politics has encouraged him to appreciate the art of speechmaking.

7. [G] has developed good relationships with other children moving to Year 7 … Five children, including [G], are "moving up". They make up half of the current Year 6 groups and [G] has very much been focussed on moving to the senior school with classmates, teachers and other staff (including his established one to one, Mrs Kendrick) with whom he is familiar.

8. [G] has a particularly close friendship with his classmate [Y]. They have been best friends for over 3 years and enjoy days out together and sleepovers. We've been really pleased to see that [G] is also enjoying friendships more widely now, as in the past he'd be very focussed on – at times dominating - the attention of one child. He has extended his friendship circle. He does have very clear boundaries concerning his friendships and he "enjoys his silence" a great deal. By this I mean he is very happy in his own company, but this is true for both [G] and his sister.

9. [G] enjoys afterschool clubs and extra-curricular activities including: gardening, debating cub (he has a keen interest in politics), swimming, maths and English tutoring and he has studied Kung Fu for over 6 years. He is the highest level Junior Black Belt at his Kung Fu School. He understands the need for discipline that accompanies the skills he has developed. He takes the same examinations that neurotypical children take to earn his belts – and stripes – and studied in one-to-one sessions with an instructor to pass his intensive black belt examination. A sequence of movements named Siu Nim Tao were required to be successfully completed for a pass, which [G] achieved at his first attempt. Last Christmas,

> [G] also took part in a project with some friends for the Charity RNIB. They composed questions to ask blind and partially sighted people and he was filmed and featured in two short films, which were shared on RNIB's social media platforms.
>
> 10. We firmly believe that the efforts made by Wickham Court staff to build G's self-esteem and greatly improve his social skills are what have ensured he can take part in a range of activities and participate and socialised on equal terms with neurotypical children. He is making good progress within the school setting and through his attendance at Explore Learning maths and English tutoring classes, which have again made him more confident at tackling his work. Both environments are working to ensure that [G] is understanding the tasks competed by asking him to explain what he has just learned.
>
> 11. Bensham Manor is described as a large oversubscribed special secondary school … There are 200 children in the school – 150 boys and 50 girls and there have been no discussions with us that [G] needed to transfer to a special school. Indeed, we are unaware of what informed this decision, as Bensham Manor have no written records that they would supply concerning how they came to the decision that they are an appropriate placement for [G]".

57. They encapsulated their concerns in paragraphs 12 and 17, culminating in their view that a move to Bensham Manor School would be devastating for G and his self-esteem:

> "12. Through the Bensham Manor website, we saw that they hold open mornings for prospective parents. We viewed the school and we were introduced to a number of pupils. We were able to identify through these interactions that [G] would not have his needs met socially at Bensham Manor. [G] has made really pleasing progress in this area and we would expect that to deteriorate significantly at Bensham Manor. [G]'s presentation of ASD is an atypical one. He enjoys interactions with others and does become very frustrated if he finds communicating with others difficult. A placement at Bensham Manor would be a real set back and devastating for his self-esteem. We feel expectations of what he can achieve would also decline.
>
> …
>
> 17. A move to Bensham Manor would quite simply be devastating for [G]. They simply cannot provide a suitable

> environment, which is in contrast to how much he thrives at Wickham Court, where he is making good progress and his needs are well met. We respectfully request that Section I remains Wickham Court, listed under its new name Bromley Independent Grammar School".

58. Chronologically next in time was Ms Morgado's report on 25 March 2019. What she concluded was that

> "In my opinion, [G] will benefit most from attending a specialist provision for his secondary education where classes are small and all staff have experience and training in working with young people with Autism, ADHD and other conditions which can present barriers to their learning. He will need a broad and balanced curriculum which is adapted to offer a range of GCSE courses for students where appropriate, alongside other qualifications and types of certification such as functional skills and vocational and life course skills …
>
> Overall, despite the best efforts of the staff to differentiate their curriculum for [G] and the evident fact that they know and care for [G] and his family well, I am not convinced that such an academically focused mainstream school (Wickham Court School) will be able to meet [G]'s complex needs beyond year 6 as well as they could be met at a specialist provision."

59. What she does not say in her report is that Wickham Court is unsuitable as a placement for G. She thought that he would benefit most from attending a specialist provision for his secondary education where classes are small and all staff have experience and training in working with young people with autism; she was not convinced that an academically focused mainstream school such as Wickham Court would be able to meet his complex needs beyond year 6 as well as they could be met at a specialist provision. That is a comparative analysis: in her opinion Bensham Manor would be a better placement, but she does not go so far as to say that Wickham Court was not a suitable placement.

60. In the light of the chronology which I have set out above, it seems to me that in reality this was a case in which the local authority decided the issues in the wrong order. It had decided on the contents of Section I before it had decided on the contents of Section F and addressed the issues the wrong way round. That conclusion, it seems

to me, must inevitably follow from the determination of Section I before the educational psychologist had even visited Wickham Court, let alone produced her report. I have already cited the extract from the judgment of Lloyd-Jones J in ***A v Barnet LBC*** in paragraph 29 above, but the words of Andrew Nicol QC (as he then was) in ***The Learning Trust v MP*** are also apposite in this context:

> "42. I consider that there is force in Ms Stout's comment that this is a classic case of putting the cart before the horse. By Education Act 1996 s.324(3)(a) the Statement must give details of the authority's assessment of the child's special educational needs, and these are set out in Part 2 of the Statement. By s.324(3)(b) the Statement must then specify the special educational provision to be made for the purpose of meeting those needs. These are set out in Part 3 of the Statement. Finally, by s.324(4) the Statement must (in cases such as the present) specify the type of school or other institution which the local authority consider would be appropriate for the child. This is done in Part 4 of the Statement. Parts 2 and 3 have been likened to a medical diagnosis and prescription *R v Secretary of State for Education and Science ex parte E* [1992] 1 FLR 377, 388-389. It is important then to identify or diagnose the need before going on to prescribe the educational provision to which that need gives rise, and only once the necessary educational provision has been identified can one specify the institution or type of institution which is appropriate to provide it. Instead, in this case, the Tribunal seems to have settled on the view that a residential school was necessary and expressed the hope that the parties would agree an amendment to the diagnosis for which this was the prescription. I bear in mind that one cannot be over-prescriptive in this regard. If it is clear, for instance, that a residential school is necessary to meet an identified educational need, the precise form of the provision can be influenced by what is available at a particular school – see *S v City and Council of Swansea* [1999] ELR 315, at 323. However, in the present case, the Tribunal did not, in my view, identify the educational need which required a placement in a residential school."

61. Mr Glenister's riposte was essentially one of confession and avoidance. He took issue with the argument that, in circumstances where Section F made no provision for peer group or any particular type of school, the Tribunal was required to place G in a mainstream peer group for two reasons:

(i) whilst provision in Section F of an EHCP must be met by the placement named in Section I, a placement can provide more special educational provision than is set out in Section F

(ii) the Tribunal's consideration of Section F and I were two distinct determinations with overlapping, but not identical, issues.

62. As to the first argument, I accept the proposition that the providing of over provision (or "Rolls Royce provision") as such does not make a placement unsuitable, for example providing residential provision or providing more speech and language therapy than is stipulated in the EHCP. That is permissible because the provision is still being delivered, albeit that more of it is being delivered than was required. Here, by contrast, what is being provided is *different* from that which was stipulated and is not additional to it, but is rather the substitution of one peer group for another. It does not therefore follow that, as long as the Tribunal was satisfied that Bensham Manor could meet G's overall needs, it was entitled to name it in Section I.

63. With regard to the example (a) in his second argument, I agree with Mr Wolfe that it is in fact the opposite of this case. The driver for the special school in the example was nothing to do with peer group. Here, by contrast, at least part of the driver for the special school was peer group and that should properly have been flagged up in Section F rather than the placement in Section I preceding the provision in Section F, as in fact happened, as I have already concluded in paragraph 60 above.

64. As to the second group of examples given in his latter argument relating to unsuitability for extraneous or entirely separate reasons, again I accept that the examples given by Mr Glenister are perfectly proper examples within their field, such as that the placement might be too far away or might involve safety or access issues across a split site bisected by a road, but they are not this case.

65. I am therefore satisfied that Mr Wolfe has made out his first ground of appeal that the Tribunal unlawfully ordered a placement at an ASD special school when nothing in section F of G's EHCP suggested or provided that he required such a placement (or required anything other than a mainstream placement). In the course of

doing so, the Tribunal unlawfully treated as being in issue, or put in issue, questions of special educational provision arising from, or to be specified in, section F, but without section F having been amended or being the subject of an appeal before the Tribunal.

The Second Ground of Appeal

Submissions

66. The second ground of appeal adduced by Mr Wolfe was that the Tribunal had erred in law by not providing sufficient reasons or explaining properly why it concluded that Bensham Manor was suitable, including failing lawfully to explain the basis on which it rejected points raised by the Appellant about its suitability.

67. In the statement of reasons the Tribunal had merely said that

> "23. … we considered carefully the evidence from Mrs Robinson of Bensham Manor and we were satisfied that both in terms of its overall experience in supporting young people with ASD and consideration of [G's] specific learning difficulties it is capable of meeting his needs as identified to the Tribunal.
>
> …
>
> 28. … we further determine that Bensham Manor School is able to meet his needs."

68. Mr Wolfe submitted that it was well established that the local authority and, on appeal the Tribunal, must consider whether the proposed placement could make the specified special educational provision: see, for example, ***A v Barnet LBC*** at [17] per David Lloyd-Jones QC (cited in more detail above) (and ***The Learning Trust v MP*** at [42] per Andrew Nicol QC, ***T v Neath Port Talbot CBC*** [2007] EWHC 3039 at [15] per Bean J and ***R v Kingston upon Thames Council and Hunter*** [1997] ELR 223 at p.233 per McCullough J).

69. However the Tribunal here completely failed to do that. There was nothing in its "reasons" to suggest that it even considered whether Bensham Manor could make the special educational provision set out in section F of G's EHCP. Although the

Appellant no longer relied on the matter of the 1:1 support which G's EHCP said that he must receive, placement at a special school was also entirely inconsistent with Sections B and F, which did not in any way indicate that G should not have a mainstream peer group. Again, the Tribunal did not even address the point. The decision was plainly not lawful in those regards.

70. That point was supplemented by, and aggravated by, the fact that the Tribunal's only explanation for concluding that Bensham Manor was suitable was the evidence from Ms Robinson (paragraph 23). That explanation was plainly insufficient and therefore unlawful reasoning because, apart from anything else, it (1) entirely failed to explain its rejection of the material and reports which specifically showed that G should remain at Wickham Court (page 157) and (2) entirely failed to explain its rejection of other points raised by the parents about the suitability of Bensham Manor (e.g. page 261 paragraph 12).

71. The simple point was that the Appellant was entitled to know the basis on which the Tribunal rejected those points, but its reasons did not reveal that. Indeed, argued Mr Wolfe, there was nothing to suggest that the Tribunal even engaged with the points.

72. Mr Glenister's riposte was that the Applicant's challenge was one as to reasons. The duty to give reasons was set out in ***H v East Sussex CC*** [2009] EWCA Civ 249 at [16] per Waller LJ, where the Court of Appeal explained that the decision of a Tribunal

> " … is not required to be an elaborate formalistic product of refined legal draftsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts."

73. He submitted that the Tribunal's reasons were plainly sufficient, referring to the evidence which was relied upon and the conclusion that Bensham Manor was able to deliver the provision as set out in the EHCP. It provided reasons which met the standard required and considered the suitability of Bensham Manor in light of the evidence of Ms Robinson which had been set out.

74. The Appellant cited paragraph 12 on page 261, which was in relation to G's enjoyment of social interactions and a concern in relation to his self-esteem. That was not a point so central that the Tribunal was required specifically to address it, but, in any event, it was evident that the point was considered:

(1) the Tribunal referred specifically at paragraph 16 of its decision to how Ms Robinson stated that Bensham Manor would meet his needs which she set out on page 372 at paragraph 59. That included a "daily social group plus a termly block of social skills intervention" (page 373)

(2) the FTT specifically considered G's ability to interact socially at his current placement in coming to the decision, setting out the report of Ms Morgado at paragraph 17, thus rejecting an assertion that his social interactions would necessarily deteriorate if he moved from Wickham School:

> ""He is still reported to struggle with forming and maintaining close individual friendships and his class teacher did not feel that they had any particular close friendships within his class, which represents the whole year 6 group".
>
> "[G]'s complex special educational needs mean that [he] is working well below the usual range of attainment expected for his age in most areas of the academic curriculum and presents socially as a child younger than his age, with social and anxiety difficulties which are common amongst pupils with this condition.""

75. From the outset, it was clear that the Tribunal would be required to determine whether Wickham Court could meet G's needs. The Council's response to the appeal put in issue the suitability of Wickham Court:

> "22. For reasons that are set out in detail below the LA is of the view that to continue naming Wickham Court in Section I of his EHCP going into secondary school would be unsuitable for [G] in light of his special educational needs. In contrast the LA would make clear its view that Bensham Manor is a suitable placement for [G] in light of his needs. In addition to this, even if the Tribunal were to find Wickham Court a suitable placement for [G], the LA would submit that to name

> it in Section I would be incompatible with the avoidance of unreasonable public expenditure for the purposes of Section 9 of the Education Act 1996 as set out above."

76. Furthermore, the reason for asserting Wickham Court was unsuitable was also set out from the outset, and in particular progress:

> "27. The fact that [G] is no longer making age related progress in relation to his academic levels is also made clear in the most recent annual review report of 21.05.18 where it states the following:
>
> > "Not on track to meet the expect standard at the end of KS2. [G] consistently acquires an 'immerging' grade in terms of attainment, despite noted progress made."
>
> 28. The LA has sought further information from Wickham Court regarding [G]'s progress over the last two years but still awaits that information currently. However, the LA would make clear its concerns that based upon Ms Morgado's expert findings it does not appear that [G] has continued to make progress in line with his peers. The LA is concerned that the gap will continue to widen if [G] were to attend the secondary element of Wickham Court, it is not clear that despite the school's best efforts that they have the necessary expertise and experience to meet the needs of a pupil with [G]'s range of special educational needs. The LA would submit that a placement at Wickham Court for secondary school would not be suitable for him or capable of ensuring his complex special educational needs are met."

77. Peer group was also cited:

> "29. The LA would also raise concerns about the appropriateness of the peer group for [G] at Wickham Court moving into secondary provision. As noted it is clear from the above that [G] is not performing at the same academic levels as his peers, furthermore it is not clear from Wickham Court how many other pupils at the school have a similar profile of needs to [G]. It is clear from the findings in Ms Morgado's report, based upon feedback from the school staff working with him, that [G] continues to struggle to form and maintain friendships within his peer group.
>
> 30. The LA further notes the following from Ms Morgado's report in relation to comments made by the Headteacher at Wickham Court: "I was told by the Head teacher that while [G] would sit the entrance exam for entry to the secondary department of Wickham Court along with his peers and new

> students, his entry would be guaranteed, whatever his results in the exam, in the interest of inclusivity."
>
> 31. The LA would not seek to criticise any inclusive practices taken by schools, rather it would applaud schools being as inclusive as possible. However, the LA would have concerns about a blanket offer to [G] irrespective of where he were to fit in alongside his peers and this raises further concerns about the suitability of the peer group at the school for [G] and whether there are pupils there with a similar profile of needs, whether the school has the expertise and/or experience to meet the needs of a pupil with [G]'s profile of needs, and whether or not the school is realistically able to differentiate the curriculum as required for [G] whilst still educating him alongside his peers and without isolating him academically and socially."

78. The Council then filed further submissions dated 22 May 2019 (pages 49 to 54) which again repeated its case in relation to those two issues. As to progress, it cited the InCAS Progress Levels and Scores Table which was relied upon by the Tribunal (page 50):

> "5. As previously noted in its response to this appeal the LA has concerns as to whether Wickham Court is an appropriate placement for [G]. The LA previously highlighted that [G] does not appear to be achieving age related expectations and that he is in fact behind his peers within Wickham Court. The LA has attached [G]'s SEN Support Plan for 2018-19 and this highlights that as of, at the least, March 2019 [G] is considered be at an "Emerging" level for Reading, Writing and Maths.
>
> 6. The School Progress Reports for Years 4 and 5 show that [G] has been at this level in these subjects since at least year 4.
>
> 7. From the InCAS Progress Levels and Scores Table it can be seen that in the years 2014-15 and 2015-16 [G]'s Reading Age was 0:9 years above his chronological age. From 2016 to 2018 his Reading Age then fell to a level where it was below his chron[olog]ical age by 1:2 years. In 2018 in Maths he was 1:7 years below age related expectations. The InCAS Progress Levels and Scores Table further makes clear that as of June 2018 [G] is only achieving age related expectations for his multiplication. In virtually all other subjects he is at least 1 year behind age related expectations."

79. Furthermore it cited peer group:

> "8. Although the LA is not clear on [G]'s current cohort of pupils in Wickham Court it is envisaged that for a school that is about to become a grammar school and, generally, requires its pupils to sit an entrance exam it is likely that he would be well behind his peers academically moving into secondary education at the school. The LA considers this to be of particular pertinence when the issue of age related expectations was of paramount to the Tribunal's thinking in the previous Tribunal proceedings referred to in the LA's response."

80. The Council adduced evidence to support its position in relation to both (1) academic progress and (2) G's ability relative to his peers in class. A key piece of evidence was the report of the Council's educational psychologist, Ms Morgado. G's difficulties at Wickham Court were set out in some detail by the Tribunal at paragraph 17 of its decision:

> "17. [G] was assessed by an Educational Psychologist, Ms Clare Morgado and her report is dated 25 March 2019. Ms Morgado observed him in class at Wickham Court, discussed his needs with school staff and the parents and carried out individual work and assessment with [G] in addition to consideration of the relevant papers. She recorded: "In class he was heavily dependent on both his class teacher and his teaching assistants' prompting and scaffolding to allow him to participate in class teaching session. He then needed significant support from his individual teaching assistant while completing examples of the topic covered, even though he was working from a year 3 Numeracy book rather than the Year 6 book which most of his peers were using for this".
>
> "His teachers and teaching assistant had said to Dr Bell in 2015 that [G] had good reading and rote memory skills but that he had difficulty in applying his knowledge, for example in reading comprehension and mathematics problem solving tasks. While observing and working with [G] in February/March 2019, I can state that these observations still do apply to him. While [G] was able to decode basic te[x]t fairly well with both myself individually and with this TA in class, his comprehension of what he had just read was significantly poorer than this in both situations."
>
> Discussion with his teacher after the lesson observations confirmed that she felt [G] was working at around an average year 3 child's level in both literacy and numeracy, although slightly higher than that in some aspects of numeracy.

> "He is still reported to struggle with forming and maintaining close individual friendships and his class teacher did not feel that they had any particular close friendships within his class, which represents the whole year 6 group".
>
> "[G]'s complex special educational needs mean that is working well below the usual range of attainment expected for his age in most areas of the academic curriculum and presents socially as a child younger than his age, with social and anxiety difficulties which are common amongst pupils with this condition.
>
> "Overall, despite the best efforts of the staff to differentiate their curriculum for [G] and the evident fact that they know and care for [G] and his family well, I am not convinced that such an academically focused mainstream school (Wickham Court School) will be able to meet [G]'s complex needs beyond year 6 as well as they could be met at a specialist provision."

81. There were other parts of the report which supported that, for example:

> "I noticed that [G] gets very easily distracted from his work by other pupils, noises in the environment or his internal thoughts and relies heavily on both his TA and his class teacher to spot this and refocus his attention back to task" (page 349)
>
> "…I am aware that his mother described how she has to work with [G] a lot at home to help him both academically and to manage his numerous anxieties" (page 349).

82. Both the Council and the Tribunal also relied upon the InCAS progress reports (pages 325 to 326). This showed clearly that, in considering his ability compared with his chronological age, G was falling behind. In reading in 2014-15 he was 0:9 years above age expectation, but by 2018 was 1:2 behind; in mathematics in 2014-15 he was 0:2 years behind age expectation, but by 2018 he was 1:7 years behind.

83. There was also evidence in the EHC Annual Review. By way of example, in relation to Cognition and Learning (page 128) it was said that:

> "Full support in lessons to access the curriculum is required and to ensure [G] is on task. He finds sustained concentration difficult and benefits from the task being broken down, with breaks as required. [G] needs regular check ins, he will find

> reasons [to] get off task: water bottle, look out of the window etc."

84. As such, the Council had set out its case on Wickham Court at the outset, had been consistent in its argument and had adduced evidence to support its position on progress, and the connected question of whether G was placed amongst suitable peers. It was therefore not simply 'raising questions' as suggested by the Appellant – its evidence, amongst other things, was that G was falling further behind when compared to age related expectations, and was struggling at Wickham Court without intensive individualised support.

85. The Tribunal found in relation to Wickham Court:

> "24. We noted that Wickham Court is not a school that specialises in meeting the needs of pupils with any particular special educational need.
>
> 25. No persuasive evidence was produced of how [G] would fit alongside his peers at Wickham Court, or whether there are pupils there with a similar profile of need, whether the school has the expertise and/or experience to meet the needs of a pupil with [G]'s profile of needs and whether or not the school is able to differentiate the curriculum as required for [G] while still educating him alongside his peers and without isolating him academically and socially.
>
> 26. There was no persuasive evidence presented from Wickham School about its focus and specific plans to address meeting [G]'s SEN beyond Year 6.
>
> 27. In addition to the information recorded previously concerning [G]'s attainment, the Tribunal received the inCAS Progress Levels and Scores Table from which it can be seen that in the years 2014-15 and 2015-16 [G]'s Reading Age was 0:9 years above his chronological age. From 2016 to 2018 his Reading Age then fell to a level where it was below his chron[olog]ical age by 1:2 years. In 2018 in Maths he was 1:7 years below age related expectations. The Table further makes clear that as of June 2018 [G] is only achieving age related expectations for his multiplication. In virtually all other subjects he is at least 1 year behind age-related expectations. The Tribunal found that despite efforts around [G] he has not been making progress in line with the anticipated attainments set by Dr Alison Bell (see paragraph 13). This is indicative of

> weaknesses in the ability of Wickham Court to meet [G]'s needs.
>
> 28. Having considered the evidence before the Tribunal, on balance it determines that Wickham Court would be unsuitable as placement for [G]'s SEN. We further determine that Bensham Manor School is able to meet his needs."

86. The latter point was referred to earlier in the Tribunal's decision at paragraphs 13 to 14:

> "13. Dr Alison Bell of the Educational Psychology Service completed a review of [G] on 26 January 2016 when he was in Year Group 3. She recorded that it was anticipated that by the end of key stage 2:
>
> "[G] will be able to make academic progress in line with his peers.
>
> [G] will be able to take part in group activities with adult support.
>
> [G] will be able to play games with peers independently for a 30 minute time period.
>
> [G] will be able to manage his sensory needs using equipment and resources available to him independently.
>
> [G] will be able to express to an adult when he is worried, anxious or hurt.
>
> [G] will be able to manage his behaviour in class with adult support" (page 112).
>
> 14. His school reports that in March 2018 (Year Group 5) [G]'s attainment was: Reading – Emerging, Writing – Emerging, Mathematics – Emerging. The School Progress Reports for Years 4 and 5 show that [G] has been at these levels in these subjects since at least Year 4."

Analysis

87. In my judgment the ground of appeal is a short one and can be addressed relatively shortly. The fundamental problem with the Tribunal's decision as to the suitability of Bensham Manor as a placement is its extreme brevity. All that is said by way of reasons for the conclusion that the placement is suitable is that

> "23. … we considered carefully the evidence from Mrs Robinson of Bensham Manor and we were satisfied that both in terms of its overall experience in supporting young people with ASD and consideration of [G's] specific learning difficulties it is capable of meeting his needs as identified to the Tribunal.
>
> …
>
> 28. … we further determine that Bensham Manor School is able to meet his needs".

88. Paragraph 23 is a statement of a conclusion, not a statement of reasons supporting that conclusion. Paragraph 28 is an assertion of suitability which does not add anything to what is said in paragraph 23. What is required, however, by the duty to give reasons as set out in ***H v East Sussex CC*** at [16] is

> "an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions *and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts.*"

89. In my judgment, in relation to the question of the suitability of Bensham Manor as a placement, the Tribunal has not provided a statement of the reasons which have led it to reach the conclusion which it did on those basic facts. What is required is, as the rest of the quotation from Sir Thomas Bingham MR makes clear, is that

> "the parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the [UTAAC] or, on further appeal, this court to see whether any question of law arises …"

90. At the very least one would expect to see some engagement with and resolution of the issue raised by both the Autism Outreach Service report of 21 February 2017 (page 157) that

> "… from this statement, my knowledge of past assessments, his current schooling and interventions and my series of observations I recommend that [G] be NOT moved from his current school and be considered for placement at Wickham Court School".

91. More fundamentally, one would also have expected at least some engagement with, and consideration of, the serious concerns manifested by his parents in their submission that

> "12. Through the Bensham Manor website, we saw that they hold monthly open mornings for prospective parents. We viewed the school and we were introduced to a number of pupils. We were able to identify through these interactions that [G] would not have his needs met socially at Bensham Manor. [G] has made really pleasing progress in this area and we would expect that to deteriorate significantly at Bensham Manor. [G]'s presentation of ASD is an atypical one. He enjoys interactions with others and does become very frustrated if he finds communicating with others difficult. A placement at Bensham Manor would be a real set back and devastating for his self-esteem. We feel expectations of what he can achieve would also decline.
>
> …
>
> 17. A move to Bensham Manor would quite simply be devastating for [G]. They simply cannot provide a suitable environment, which is in contrast to how much he thrives at Wickham Court, where he is making good progress and his needs are well met".

92. There is, however, only a reference to the Autism Outreach Report in paragraph 11, but no findings or conclusions in respect of it and reference to or engagement with the parental concerns are completely absent for the Tribunal's decision.

93. Mr Glenister submitted that the point was not so central that the Tribunal was required specifically to address it, but I disagree. If parents say that a move to another school would be devastating for their child, the Tribunal is not bound to accept that assertion, but it must explain why it does not agree with it and the basis on which it disagrees with those assertions. It is not sufficient merely to say baldly and without supporting reasons that it was satisfied that (a) both in terms of its overall experience in supporting young people with ASD and consideration of [G's] specific learning difficulties the proposed school was capable of meeting his needs and that (b) it further determined that the proposed placement was able to meet his needs.

94. Indeed it is notable that the predominant weight of Mr Glenister's submissions in relation to ground 2 was directed to demonstrating the unsuitability of Wickham Court than the suitability of Bensham Manor, but given the exiguous nature of the Tribunal's conclusions with regard to the suitability of the latter it is hardly surprising that, skilfully though he directed his submissions, he was compelled to attack the unsuitability of the previous placement rather than to assert the suitability of the proposed placement.

95. Mr Glenister pointed to the evidence of Ms Robinson at Bensham Manor as set out in paragraph 16 to the effect that

> "A Witness Statement dated 15 May 2019 was presented from Ms Fiona Robinson, Deputy Headteacher of Bensham Manor, making it clear that in the school's view it is an appropriate and suitable placement for [G]. It caters for pupils with a range of complex special educational needs, including ASD, moderate learning difficulties and speech, language and communication difficulties. "He would be educated in a calm and structured environment where he can make progress alongside peers with a range of difficulties similar to his own." The school has 225 pupils on roll, all of whom have EHCPs; 70% are on the autistic spectrum. Its September 2019 intake is likely to include 60% of students with a diagnosis of ASD. The evidence addressed teaching experience of students with complex needs, how it delivers a broad curriculum and engages with therapy support. Ms Robinson confirmed that she was aware of the contents of [G]'s EHCP and she set out specifics of how the school could meet his needs."

96. However, although the Tribunal apparently accepted that Bensham Manor was suitable in terms of its overall experience in supporting young people with ASD and consideration of the individual learning difficulties, the failure to consider or engage with the matters to which I have referred in paragraphs 90 to 92 does not suffice to make the Tribunal's conclusions invulnerable to challenge on grounds of adequacy. As was said by the Court of Appeal in ***Flannery v. Halifax Estate Agencies Ltd*** [2000] 1 WLR 377 (applied in ***Hampshire CC v. JP*** [2009] UKUT 239 (AAC) at [39]):

> "Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth

> about events which he claims to recall, it is likely to be enough for the judge (having, no doubt, summarised the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation whereas here there is disputed expert evidence; but it is not necessarily limited to such cases."

97. The brevity of the reasoning of the Tribunal in this case as to the suitability of the proposed placement (and the unsuitability of the previous placement) is to be contrasted with the much fuller treatment of those questions in the earlier decision of the Tribunal which sat on 12 March 2017 (pages 159 to 176). The questions there occupied the Tribunal for 17 paragraphs spread over slightly more than 3 pages.

98. That is not to say that that earlier decision was "an elaborate formalistic product of refined legal draftsmanship" or that the decision of the later Tribunal had to be one to survive scrutiny. I am, however, satisfied that it fell short of the standard required as to the duty to give reasons as set out in ***H v East Sussex CC*** at [16].

99. I am also therefore satisfied that Mr Wolfe has made out his second ground, namely that the Tribunal failed to give lawfully sufficient reasons for its conclusion that Bensham Manor was a suitable placement, including failing lawfully to explain the basis on which it rejected points raised by the Appellant about its suitability.

The Third Ground of Appeal

Submissions

100. The third ground of appeal related to the burden of proof. Wickham Court was the school which G was already attending and would in any event attend for nearly two more terms after the amendment of his EHCP. The Council, however, was contending that it was *no longer* suitable. On basic principles it fell to the Council, Mr Wolfe argued, to show that it was no longer suitable.

101. That situation was made all the clearer in the circumstances here by the evidence from the Autism Outreach Service (which the Tribunal mentioned in paragraph 11)

which made clear that Wickham Court was providing a familiar, secure understanding and functional platform for G such that he should not be moved (page 157) and by the Council's own acceptance (recorded by the Tribunal in paragraph 12) that "there may be some additional benefit to G continuing at Wickham Court as he is settled there, and the placement is familiar there".

102. G's recent Annual Review had not cast doubt on its suitability. The Council's educational psychologist had recently visited and, while suggesting that Bensham Manor would be *preferable*, she did not say that Wickham Court was not suitable overall or in particular ways nor did she say that she lacked any information about it in reaching that view. Notably, in explaining its conclusions the Tribunal made no mention of the fact that she was not saying that Wickham Court was not suitable.

103. Accordingly, whatever the general situation, the position *here* was clear: it was the Council which was seeking to displace the status quo of some 8 years and so it was the Council which needed to show why Wickham Court was no longer suitable. It was not for the Appellant to prove that Wickham Court was suitable, as if this were some new, cold, proposal.

104. However, submitted Mr Wolfe, without any evidential foundation the Council had raised questions which cut across its own expert psychological evidence and Sections B and F of G's agreed EHCP (which provided for him to have a mainstream peer group) about aspects of the peer group and the provision at the School.

105. The Appellant's response to that before the Tribunal was specifically to draw its attention to the fact that the Council was seeking to set aside the status quo of 8 years, to stress that G had always attended a school with a mainstream cohort (paragraph 5), to explain how Wickham Court had helped him with his self-esteem and social skills (paragraphs 9 and 10), that his social needs would not be met at Bensham Manor (paragraph 12) and that a placement at Bensham Manor would be a real setback and devastating for his self-esteem. That all reinforced the fact that it was the Council which needed to make out any case for change.

106. Those were all plainly matters on which the local authority could have investigated and reported on positively and, if it wanted to proceed that way (i.e. disagreeing with the conclusions of its own educational psychologist), then it plainly needed to produce evidence to support those points and not just raise questions. Its failure to do so was entirely inexplicable and indefensible.

107. However, in explaining its conclusion that Wickham Court was not a suitable placement, the Tribunal simply adopted the questions raised by the Council (paragraph 25) and complained of "lack of persuasive evidence" on the points (paragraphs 25 and 26):

> "25. No persuasive evidence was produced of how [G] would fit alongside his peers at Wickham Court, or whether there are pupils there with a similar profile of need, whether the school has the expertise and/or experience to meet the needs of a pupil with [G's] profile of needs and whether or not the school is able to differentiate the curriculum as required by [G] while still educating him alongside his peers and without isolating him academically and socially.
>
> 26. … there was no persuasive evidence presented from Wickham School about its focus and specific plans to address meeting [G's] SEN beyond Year 6."

108. In other words, the Tribunal proceeded on the basis that it was for the Appellant to prove that Wickham Court was suitable, rather than for the Council to prove that it was not suitable. In that regard, insofar as there is a burden of proof in a First-tier Tribunal, then this Tribunal got it wrong and unlawfully so.

109. In any event, given that there was no actual evidence that Wickham Court was lacking in those regards (the Council's own psychologist had not raised the points), then there was no need for "persuasive evidence" on them: there was no need for evidence to rebut things which had not been put in any doubt by any evidence. The Tribunal's approach was, again, unlawful.

110. As Sullivan J explained in ***JF v Croydon LBC*** [2006] EWHC 2368 at [11] (as to which see also paragraph 28 above):

> "… Although the proceedings are in part adversarial because the LA will be responding to the parents' appeal, the role of an education authority as a public body at such a hearing is to assist the Tribunal by making all relevant information available. Its role is not to provide only so much information as will assist its own case. At the hearing, the LA should be placing all its cards on the table, including those which might assist the parents' case. It is not an adequate answer to a failure to disclose information to the Tribunal for an LA to say that the parents could have unearthed the information for themselves if they had dug deep enough."

111. In this context that meant not merely plucking questions out of the air, as the Council did here, but basing its case on proper evidence and, if concerned on points (particularly where, as here, they related to G's attendance at Wickham Court pursuant to the Council's EHCP and with the benefit of a recent psychologist's report) that meant getting positive information and providing it to the Tribunal, but the Council did not do that.

112. For the local authority Mr Glenister submitted that it was apparently being argued that the Tribunal had imposed a "burden of proof" on the Appellant. It appeared to be suggested that because G's current placement was Wickham Court and therefore the Council was interrupting the "status quo" it was for it to demonstrate unsuitability rather than for the parents to demonstrate suitability. However, there was no authority for this shifting burden of proof in particular circumstances.

113. It should be noted, he said, that this was not even a simple "continuation" case because in the summer of 2019, Wickham Court School divided into primary (Wickham Court Preparatory School) and secondary (Bromley Independent Grammar). The latter constituted a significant change as it introduced entrance exams.

114. Mr Glenister's answer to the submission that the Tribunal reversed the burden of proof in stating that there was a "lack of persuasive evidence" about Wickham School's plans to meet G's needs was that discussions of burdens of proof were not particularly helpful in the Tribunal setting, which was inquisitorial. The key point was that the Tribunal had to be satisfied that whatever placement was named in Section I

was suitable for G. If there were a lack of evidence, it was simply unable to find it suitable.

115. In the present case the Tribunal had evidence from the Council that (1) G was not making sufficient progress at Wickham Court and (2) he was behind his peers, which it relied upon and set out in its decision. The reference to "no persuasive evidence" being produced was simply a reference to the fact that, on the evidence before it, the Tribunal found that Wickham School was unsuitable. There was not a "gap" in the evidence in which the Tribunal was unable to make a determination – it was simply that the evidence pointed one way.

116. The Appellant relied upon the fact that Ms Morgado did not expressly state that Wickham Court was unsuitable. However, there was no prerequisite that for a Tribunal to determine a placement was unsuitable there had to be a finding of unsuitability by an expert. Further, Ms Morgado appeared only to have set out to consider in her report "the most appropriate provision" rather than making findings on suitability (page 351) (indeed some educational psychologists specifically did not take a position on suitability and treated it as a matter for the school to demonstrate, which might have been the approach of Ms Morgado). The Tribunal was an expert tribunal and the question of suitability was ultimately for it to determine.

117. Whilst the Council recognised its duty to assist the Tribunal by "placing all its cards on the table" (***JF v Croydon***), it did not have a duty to obtain information to rebut its own evidence. The scope of duty was perhaps equivalent to the "duty of candour" which was demonstrated by the cases in which the duty had been cited. In ***JF***, the Council had misrepresented that its preferred school was accredited by the National Autistic Society and was "not a school for children with emotional and behavioural difficulties" when it was registered under that category with the Department for Education. In ***LS v Oxfordshire CC*** [2013] UKUT 0135 (AAC), the local authority had failed to disclose imminent conversion of its preferred school to an academy. Both cases concerned a failure to disclose a particular fact or to correct a misrepresentation. There was no authority suggesting that the principle extended to a duty to obtain further evidence, let alone evidence which rebutted its own evidence.

118. It would generally be the responsibility of the party proposing a placement as suitable to provide the evidence that it was suitable. That applied to both parents and local authorities, and where placement was in dispute it would be the parents who provided the evidence from their proposed placement. That was demonstrated by the fact that if a school witness attended the hearing, that witness would be a parental witness rather than a local authority witness. There was no difference, or exception, where a child was attending a placement at that time as asserted by the Appellant.

119. A more common situation than the present one was where a child attended a maintained school which the local authority named in Section I, but the parents sought an independent placement. It would be the local authority which was required to provide the evidence that the maintained school was suitable, including progress. It could not be right in that situation that it was for parents to have to prove unsuitability because it was they who were disrupting the status quo and it is they who had to prove, for example, an issue with progress. The matter was more nuanced – the Tribunal needed to determine whether a placement was suitable on the evidence before it.

120. This situation is what arose in ***NE & DE v. Southampton City Council*** [2019] UKUT 388 (AAC) where the Upper Tribunal implicitly accepted the proposition that it was on the local authority to adduce evidence of ongoing progress, in circumstances where the child was attending the local authority's proposed school at the time.

121. In summary, when the decision notice was read fairly and as a whole, it was clear that the Tribunal was entitled to rely upon the evidence before it to find that Wickham Court was not suitable on the basis of evidence of a lack of progress and that G was falling behind his peers. There was no further duty on the Council to obtain evidence.

Analysis

122. It is not clear exactly what the Tribunal meant when it said in paragraphs 25 and 26 that there was "no persuasive evidence" of how G would fit alongside his peers at Wickham Court or as to the school's focus and plans for meeting his needs beyond year 6. It appears to be different from proof on the balance of probabilities as referred to in paragraph 28. It is certainly an odd form of wording; it could mean that there

was an absence of evidence as to those matters or it could mean that there was positive evidence that G would not fit alongside his peers at Wickham Court or that the school did not have either focus or plans for meeting his needs beyond year 6. Again, it exemplifies the fact that the brevity of the Tribunal's reasoning makes it vulnerable to challenge. I shall therefore consider the question on the hypothesis that the Tribunal was considering the burden of proof and in the alternative that it was not and was simply considering whether it was satisfied that whatever placement was named in Section I was suitable for G.

123. I am bound to say that I doubt that there is a burden of proof in an inquisitorial jurisdiction such as this, in contrast to the position where the jurisdiction is essentially adversarial, but I shall proceed on the basis that there is in principle such a burden of proof.

124. I do not accept Mr Glenister's submission that the Appellant's case involved an impermissible shifting of the burden of proof. On first principles, it fell to the Council to demonstrate that Wickham Court was no longer suitable as a placement for G. That was the school which he was already attending and would in any event attend for nearly two more terms after the amendment of his EHCP, but the local authority was now contending that it was no longer suitable. It was for the Council to make good its contention.

125. It seems to me, however, that the Tribunal did proceed on the basis that it was for G's mother to prove that Wickham Court was suitable, rather than for the Council to prove that it was not suitable. In that regard, insofar as there is a burden of proof in an inquisitorial jurisdiction such as this, I am satisfied that the Tribunal fell into error.

126. I therefore turn to the alternative hypothesis that the Tribunal was not considering the burden of proof was simply considering whether it was satisfied that whatever placement was named in Section I was suitable for G.

127. As I have already found in paragraph 59, what the educational psychologist does not say in her report is that Wickham Court is unsuitable as a placement for G. She

thought that he would benefit most from attending a specialist provision for his secondary education where classes are small and all staff have experience and training in working with young people with autism; she was not convinced that an academically focused mainstream school such as Wickham Court would be able to meet his complex needs beyond year 6 as well as they could be met at a specialist provision. That is a comparative analysis: in her opinion Bensham Manor would be a better placement, but she does not go so far as to say that Wickham Court was not a suitable placement. It is correct that it is not a prerequisite that, for a Tribunal to determine that a placement is unsuitable, there has to be a finding of unsuitability by an expert, but what is striking is that what Claire Morgado considered in her report was "the most appropriate provision" rather than making findings on suitability (page 351). (Mr Glenister submitted that some educational psychologists specifically did not take a position on suitability and treated it as a matter for the school to demonstrate, which might have been the approach of Miss Morgado, but that is and must remain in the realms of pure speculation in her individual case). In my judgment, Mr Wolfe was right that if the Council was concerned about the suitability of G's attendance at Wickham Court pursuant to the EHCP, it should have obtained positive evidence on the point from Claire Morgado and provided it to the Tribunal, but that it did not do.

128. Mr Glenister sought to argue that this was not even a "continuation" case because in the summer of 2019 Wickham Court School was due to divide into primary and secondary schools and that the latter constituted a significant change of circumstances in that it introduced entrance exams. I accept that the school was due to divide into two schools, but it should not be forgotten that in the case of G, as Claire Morgado reported (see paragraph 77 above)

> "I was told by the Head teacher that while [G] would sit the entrance exam for entry to the secondary department of Wickham Court along with his peers and new students, his entry would be guaranteed, whatever his results in the exam, in the interest of inclusivity"

so that the change of circumstances in his individual case was by no means as great as Mr Glenister suggested.

129. The duty cast on the local authority in a special educational needs case is as set out by Sullivan J in ***JF***, namely that the role of an education authority as a public body at such a hearing is to assist the Tribunal by making all relevant information available. Its role is not to provide only so much information as will assist its own case. At the hearing, the local authority should be placing all its cards on the table, including those which might assist the parents' case.

130. Mr Glenister submitted that there was no duty cast on the local authority to obtain further evidence, let alone evidence to rebut its own evidence. Yet that is in fact precisely what ***JF*** requires the local authority to do in the appropriate case. Its duty is to assist the Tribunal by making all relevant information available, not only so much information as will assist its own case, but also that which might assist the parents' case by undermining its own evidence. That is not to require the authority to embark on an evidence gathering exercise willy-nilly and regardless of context, but one dependent on the facts of the individual case to provide all such information as is *relevant* to the decision under appeal.

131. Mr Glenister suggested that the scope of the Council's duty was perhaps equivalent to the "duty of candour" which was demonstrated by the cases in which the duty had been cited.

132. It is of course correct that in ***JF*** the Council had misrepresented that its preferred school was accredited by the National Autistic Society and was "not a school for children with emotional and behavioural difficulties" when it was registered under that category with the Department for Education and that in ***LS v Oxfordshire CC*** the local authority had failed to disclose imminent conversion of its preferred school to an academy. Mr Glenister is therefore correct that both cases concerned a failure to disclose a particular fact or to correct a misrepresentation.

133. However, there is nothing in the terms in which Sullivan J laid down the duty in ***JF*** to suggest that the duty is limited in the manner contended for by Mr Glenister. On the contrary, the scope of the duty is not qualified in that way, as the subsequent decision of Upper Tribunal Judge Wikeley in ***LS*** makes clear (with emphasis added):

> "50. As to the second question, I am in no doubt that the Council should have informed the tribunal, either in advance of the hearing or at the hearing, about the imminent conversion. Although I accept Ms Steyn's point that the factual background of *R (on the application of F) v London Borough of Croydon and Another* was different, *the observations of Sullivan J (as he then was) about the nature of the proceedings before the tribunal were of more general application.* Whilst recognising that the proceedings were partly adversarial, Sullivan J held (at paragraph 11) that:
>
> > "… the role of an education authority as a public body at such a hearing is to assist the Tribunal by making all relevant information available. Its role is not to provide only so much information as will assist its own case. At the hearing, the Local Education Authority should be placing all of its cards on the table, including those which might assist the parents' case. It is not an adequate answer to a failure to disclose information to the Tribunal for a Local Education Authority to say that the parents could have unearthed the information for themselves if they had dug deep enough."
>
> 51. *I do not read that final sentence, which deals with a particular argument on the facts of that case, as qualifying the generality of the previous sentence about the local authority placing all of its cards on the table.* In the present case I find that it is not an adequate answer to a failure to disclose information to the tribunal for the Council to say that the Appellant, a litigant in person assisted by a volunteer from the parent partnership, should have raised the matter at the hearing and is precluded from doing so now. *It is not an adequate answer because it fails to have regard to the overriding objective of dealing with cases fairly and justly, bearing in mind in particular the lack of equality of arms as between the Appellant and the Council*."

134. Moreover, Mr Glenister's submission is undermined by the relevant test where information is not disclosed to a tribunal, as Sullivan J explained later in the decision in ***JF***:

> "14. It is common ground that the relevant test where information has not been disclosed to the Tribunal is to be found in the decision of the Court of Appeal in *A v Kirklees Metropolitan Council and Dorsey* [2001] EWCA Civ 582; [2001] ELR 657 …

15. The applicable principles are to be found in holdings (1) and (2) in the headnote:

> (1) the legal nature of the parents' case could be put in either of two ways: a material factor was omitted from the tribunal's consideration, or the family was denied a fair hearing. The matter would be approached upon the basis of well-established principles of domestic law. An argument based on Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 did not anything material in the present context.
>
> (2) The question was whether the information could have made a difference. If it was relevant, or if ignorance of it was a source of unfairness, that it would be only exceptionally that relief would be denied. *R v Chief Constable of Thames Valley ex parte Cotton* at para 60 applied ...

16. The relevant passages are to be found in the judgment of Sedley LJ, with whom Schiemann and Arden LJJ agreed. In paragraphs 20 and 21, Sedley LJ said this:

> "20. If there is an answer to Mr Friel's [who appeared on behalf of the appellants] complaint, it has to be (and Mr Lewis [who appeared on behalf of the respondent LEA] pitches his camp upon this terrain) that the evidence of the earlier accident could not have made a difference to the tribunal's decision. As I have said this is not a topic for ex post facto evidence. Nor, with respect, is to be tested, as Turner J appears to have tested it in refusing permission to appeal, by asking whether the decision was likely to have been influenced by the omitted information. The question is whether the information could have made any difference. The answer to it may turn on law – for example it may not have been legally relevant or admissible – or on fact – for example because it was on any view inconsequential or incapable of disturbing the weight of evidence going in the other direction. If it was relevant, or if ignorance of it was a source of unfairness, then it is only exceptionally that relief will be denied. The reasons for this are classically found in the remarks of Bingham LJ, as he then was, in *R v Chief Constable of the Thames Valley Police ex parte Cotton* [1990] IRLR 344 at 60. I will not recite them, but they are to be borne in mind in every case in which a breach of fair or proper procedure is established but it is asserted that the breach has made no difference.

> 21. Here, however, both Mr Lewis and Mr Friel have, in my judgment, wisely and helpfully premised their argument not on questions of discretion or relief but on the single question: is there a realistic possibility that knowledge of the 1993 accident to D could have altered the tribunal's conclusion that in 1999 it was the right school to name in Part 4 of J's statement."
>
> 17. Thus, the question is not whether the correct information in the present case would or probably would have led the Tribunal to reach a different conclusion but whether it could have done so or, to use the words of Sedley LJ in paragraph 21 of his judgment, the question is whether there is a realistic possibility that the information that the school was registered with the Department as a school for children with emotional and behavioural difficulties and was not registered with the Society could have altered the Tribunal's conclusion that Brantridge was capable of delivering the provision that was agreed to be necessary."

135. I do not therefore accept Mr Glenister's proposition that there was no authority suggesting that the principle extended to a duty to obtain further evidence, let alone evidence which rebutted the local authority's own evidence.

136. For the sake of completeness I should say that I do not otherwise derive assistance in this context from the decision in ***NE & DE***; the question of whether there had been a reversal of the burden of proof did not arise for decision, although Judge Wright suggested that the Tribunal had used an odd form of words which was capable of more than one interpretation.

137. For these reasons I conclude that the Tribunal did fall into error in proceeding as if (insofar as there is a burden of proof in an inquisitorial jurisdiction such as this) the burden lay on the Appellant to show that Wickham Court was suitable given that her son had attended Wickham Court for several years and without its suitability having been previously questioned by the Council. In the alternative, that it was simply deciding whether it was satisfied that whatever placement was named in Section I was suitable for G, I find that the Tribunal could not have been so satisfied in the light of the psychologist's report as it stood and that it should have obtained positive evidence

on the point from Claire Morgado and provided it to the Tribunal, but that it did not do.

The Fourth Ground of Appeal

Submissions

138. Mr Wolfe's final ground of appeal was the Tribunal's failure to take steps to obtain material by adjourning for further evidence or in order to hold an oral hearing.

139. Even if, despite there being no evidential foundation for the questions being raised and despite them actually being contrary to the evidence, the Tribunal nonetheless wanted to satisfy itself on the points, then it was incumbent on it to take the necessary steps to ensure the evidence was available to it, not simply to (in effect) bemoan the lack of anything specifically on those points and treat that as fatal to Wickham Court being considered suitable, including by inappropriately placing the burden on the parents to answer unevidenced questions raised by the Council, rather than by requiring the Council to make good its points.

140. As for the process to be followed, it was well-established that the Tribunal had, and must apply, an inquisitorial jurisdiction on such matters, see ***W v. Gloucestershire CC*** [2001] EWHC Admin 481 at [15] per Scott Baker J that

> " … if there was inadequate information [about the proposed school placement], the Tribunal should have taken the necessary steps to obtain it, if necessary adjourning to do so. Tribunals, it seems to me, cannot proceed on a purely adversarial basis, but have a duty to act inquisitorially, when the occasion arises by making sure they have the necessary information on which to decide the issues before them, rather than rely entirely on the evidence adduced by the parties. The Tribunal will usually have much greater expertise than the parents who appear before them."

(and likewise ***R*(*J) v SENDIST and Brent LBC*** [2005] EWHC 3315 at [32] per Lloyd-Jones J, ***MW v Halton BC*** [2010] UKUT 34 at [36] per Upper Tribunal Judge Ward and ***Birmingham CC v KF*** [2018] UKUT 261 (AAC) at [18-19] per Upper Tribunal Judge Levenson). In the original grounds of appeal the Appellant had also relied on the case of ***C v. Wiltshire CC*** HS/2270/2014 in which it was held that, where

an appellant is unrepresented and there is an evidential shortfall, there may be a duty on the Tribunal to adjourn on its own initiative even if no application for an adjournment has been made.

141. In the present case, both parties had agreed that the Tribunal could consider the matter on the papers, but, once it reached the view that it wanted to satisfy itself on points relating to Wickham Court which the Council's psychologist had not called into question as rendering it unsuitable, this was a clear case in which the Tribunal needed to adjourn, either opening the matter up for an oral hearing, or asking the Council (which had raised the points) to investigate further and make good its concerns (and then give the parents the opportunity to respond to anything put forward). But the Tribunal did not do that and in the circumstances it plainly failed to operate the necessary inquisitorial jurisdiction and approach.

142. The Council's answer at the permission hearing was to suggest that the question of whether to adjourn was a discretionary case management decision which the Tribunal would have needed to evaluate in accordance with the "overriding objective" such that other considerations would come in play beyond merely any need for more evidence. The difficulty with that submission was that, even if it were correct, it would not help the Council here because there is no evidence to suggest that the Tribunal even addressed the point. The Tribunal could not have reached a lawful decision (which the local authority postulated as being a decision not to adjourn but for good reasons) if it reached no decision at all.

143. In response Mr Glenister submitted that, whilst the Appellant asserted there was a duty to adjourn for further evidence on the basis of the principle set out in ***W v Gloucestershire*** that the Tribunal has "a duty to act inquisitorially when the occasion arises by making sure they have the necessary basic information on which to decide the appeal before them", the context was important. In that case there was a *complete lack of* information on the transition for the child and therefore there was a gap in the information.

144. Where, however, the Tribunal did have evidence on a point, the duty to act inquisitorially did not arise. In ***R (J) v SENDIST*** it was argued that the Tribunal did

not have sufficient information about the provision at the local authority's preferred school without an ABA tutor and the local authority accepted there were "gaps in the evidence". The Court found the Tribunal did have sufficient evidence and where that was the case, citing ***Gloucestershire***, the Court said that "the question of whether it should have performed an inquisitorial function in seeking further evidence does not arise."

145. In the present case, as set out above, there was evidence on the suitability before the Tribunal, including the Morgado report and other evidence on progress. The Tribunal, an expert tribunal, plainly felt able to draw a conclusion on the evidence before it on suitability. The duty to act inquisitorially did not arise.

146. In reality the Appellant was seeking a further opportunity to provide evidence on the issue of suitability. However:

(1) the Council's case in respect of Wickham Court was clear from the outset and it had adduced evidence to support that case. The Appellant had sufficient time, and sufficient opportunity to respond to its reasons as to why Wickham School was unsuitable

(2) the Tribunal also had to consider the overriding objective, including dealing with cases proportionately and avoiding delay

(3) to find that the Tribunal had a duty to adjourn where one party's evidence did not answer the other's would be to open the floodgates. In coming to any decision, a Tribunal would have to prefer one side's evidence over another and it created the wholly impractical situation where a Tribunal was required to give a provisional view and invite further evidence before making a final decision.

147. In addition, it was hard to see how it could sensibly be suggested that the Tribunal was under a duty to hold an oral hearing in circumstances where the Appellant had specifically requested that the appeal be dealt with on the papers without an oral hearing both in the appeal form (page 19) and when a hearing date had

been set (page 57). In addition, the Tribunal clearly considered whether an oral hearing would be required and decided it did not (paragraph 2).

148. He wholly endorsed the decisions refusing permission to appeal. As Judge McCarthy set out (page 23 of the Upper Tribunal bundle):

> "6. The case law does not suggest there is a duty on the Tribunal to adjourn where it finds the evidence provided by one party is weak. The Tribunal is neither wholly adversarial nor inquisitorial but must respond to the needs of the parties. The case law cited reminds the Tribunal of the importance of the overriding objective and the need to enable parties, particularly those without legal representation, to participate effectively in proceedings. This does not go so far as to require the Tribunal to step into the shoes of legal representatives. The Tribunal is independent and must be fair to all parties.
>
> 7. The parents were provided with the LA's response to their appeal in May 2019 and the LA clearly set out its concerns that Wickham Manor School would be unsuitable for [G] at secondary level. The parents had sufficient opportunity to respond to those allegations but did not. They were notified by the Tribunal that they would need to provide evidence but did not do so. They did not have to consent to having their appeal decided without a hearing, but they did consent."

149. He also adopted the remarks of Upper Tribunal Judge Jacobs:

> "5. … The cases cited do not support the proposition that a tribunal has to adjourn if the evidence is not sufficient to persuade it to the relevant standard.
>
> 6. Second, there is a limit to the First-tier Tribunal's duty to assist appellants. The fact that they were not represented was a factor for the tribunal to take into account. But against that, the tribunal's procedures are devised to guide people in that position through their appeals, even to the extent of pointing out, which should be obvious anyway, that they will need to obtain evidence to support what they were saying. This was not, after all, the first appeal that the parents had taken to the tribunal, so they had had some experience of what was required. And the parents, with their knowledge of what the local authority was saying, should have been able to work out for themselves what evidence would be needed to counter that case. Finally, the tribunal had the local authority's evidence and there was no reason to doubt the integrity of those who

> gave that evidence. The tribunal was not required to do more to obtain the evidence that the parents might have produced."

150. Finally, submitted Mr Glenister, to require an adjournment here would potentially be to open the floodgates to applications for an adjournment in similar cases, contrary to the need to deal with cases proportionately and to minimise delay.

Analysis

151. The overarching question which the Tribunal had to consider in this context was whether there was sufficient evidence on which it could properly decide the appeal. If it does, I accept that "the question of whether it should have performed an inquisitorial function in seeking further evidence does not arise," as Lloyd-Jones J said in ***J v. SENDIST*** at [33]. Where, however, there is inadequate information to reach a decision, then the Tribunal cannot proceed on a purely adversarial basis, but has "a duty to act inquisitorially when the occasion arises by making sure they have the necessary basic information on which to decide the appeal before them, rather than rely entirely on evidence adduced by the parties" as Scott Baker J held in ***W v Gloucestershire*** at [15], a duty which Lloyd-Jones said in ***J*** at [32] was a duty cast on special educational needs and disabilities tribunals in general.

152. I entirely accept, as Mr Glenister submitted, that what was said in ***W*** arose in the context that there was a paucity of information on the transition for the child and therefore there was a gap in the information and that it was in that context that Scott Baker J aid down the principle in paragraph 15, but although what he said arose in that context, the principle which he laid down was of general application. (To say that there was a complete lack of information seems to me to go too far.) As he went on to say

> "25. Although the tribunal had clearly in mind the provision to be made for "A" at P because Mr A described it, and also that "A" would find transition difficult, they had inadequate information about what he was coming from in terms of the syllabuses he was studying and what work he had undertaken in each subject. Accordingly, they were unable properly to evaluate the extent of the difficulties for him in moving schools and therefore whether P was, in the circumstances, appropriate for him.

> 26. In my judgment, they made an error of law in this regard, notwithstanding that the primary responsibility was on the appellant to ensure that the tribunal had the relevant information. The missing information was, in my judgment, so crucial that the tribunal should, if necessary, have adjourned in order to obtain it."

153. In the light of the conclusion which I have reached in relation to the third ground of appeal, I am therefore satisfied that the Tribunal did not have adequate information on which to decide the case and that, acting inquisitorially, it should have adjourned in order to obtain it.

154. The Council submitted that the question of whether to adjourn was a discretionary case management decision which the Tribunal would have needed to evaluate in accordance with the overriding objective, such that other considerations would come in play beyond merely any need for more evidence. I agree, however, with Mr Wolfe that, assuming that the submission is correct, the brevity of the Tribunal's conclusion in paragraph 2 is such that it cannot be said that there is evidence to suggest that the Tribunal addressed and evaluated the various considerations which come into play when having regard to the overriding objective, weighed the various factors relevant to it and determined which of the panoply of case management powers open to the Tribunal in the light of it should be exercised. What the Tribunal said was that it had concluded that the case was suitable for consideration on the papers and consented to conclude it without an oral hearing, but again that is a statement of a conclusion, not a statement of reasons.

155. It was hard to see, said Mr Glenister, how it could sensibly be suggested that the Tribunal was under a duty to hold an oral hearing in circumstances where the Appellant had specifically requested the appeal be dealt with on the papers without an oral hearing both in the appeal form and when a hearing date had been set. That, however, is precisely what the inquisitorial jurisdiction requires the Tribunal to consider. Moreover, at the time the parents were acting in person without the benefit of legal representation and thus at that time there was an inadequacy of arms between them and the local authority, a point which was emphasised by Upper Tribunal Judge Wikeley in ***LS*** at [51]. Had they had legal representation at the relevant time and

consented nevertheless to a paper hearing, they might well have had very short shrift on any putative appeal.

156. Mr Glenister's last gambit was to suggest that a requirement to have an adjournment in these circumstances would potentially be to open the floodgates to applications for an adjournment in similar cases, contrary to the need to deal with cases proportionately and to minimise delay. I am bound to say that he put forward that suggestion without much enthusiasm and proffered no evidence in support of it and I not convinced that any such inundation would result as a consequence of this decision. This is a decision on the facts of this case in the light of the particular decision of the First-tier Tribunal which I have found to be wanting in the respects set out above. It is not authority for the proposition that a tribunal must adjourn a hearing if the parents are acting in person; it is not authority for the proposition that a tribunal must adjourn a hearing even if the parents have consented to a paper determination; nor is it authority for the proposition that a tribunal must adjourn a hearing if the evidence proffered by one side or the other is weak.

157. If the parties have consented to a determination of the case on the papers and the Tribunal decides to proceed on the basis of a paper determination, what it should do is to set out a summary of the circumstances in which that consent has been given and an explanation of the reasons which have led it to reach the conclusion that the case is suitable for a determination without a hearing, setting out the factors which it has taken into account in reaching that conclusion and how it has resolved any countervailing considerations within those factors. That explanation does not need to be "an elaborate formalistic product of refined legal draftsmanship", but it should explain to the parties why the Tribunal decided to proceed on that basis, sufficient to enable any appellate tribunal to see whether any question of law arises. Above all the explanation must provide reasons and not just be a statement of a conclusion.

158. I am therefore satisfied that Mr Wolfe makes out his final ground of challenge, namely that on the facts of this case the Tribunal failed to give effect to the obligations arising on it as an inquisitorial tribunal and should have adjourned its deliberations to allow for a hearing or for further evidence once it had reached the conclusion that "persuasive evidence" was lacking.

The Cost of the Placement

159. In the light of the Tribunal's findings as to the suitability of the placement, the Tribunal did not have to make a determination on the additional cost to the Council of the provision at Wickham Court.

160. As to the additional cost of attendance at Wickham Court, G's parents had presented some figures in paragraph 14 of an undated statement (pages 259 to 263), although the source of the information was not clear, to the effect that the relative costs were as follows:

Bensham Manor School
£19,333 cost per pupil
£16,000 - £20,000 one to one Teaching Assistant cost
£1,687.20 annual transport cost
Total cost: £37,020.20 - £41,020.20

Wickham Court School
£22,293 placement and one to one support
£2,234 annual transport cost
Total cost: £24,527

161. By contrast, the local authority produced figures (page 381), showing an additional sum of £24,448.46 per year if G were to attend Wickham Court (or £14,948.46 if his parents were to pay for transport):

Delegated Funding	Bensham Manor School	Wickham Court School	Notes
Top Up Funding	£10,000	N/A	Provided centrally – not included in final calculation
School Fee	**£8,141.54**	**£23,090 pa**	**Bensham Manor only**
Additional Therapies	**Inclusive of Speech and Language Therapy and Occupational Therapy**	**Inclusive of all therapies**	**Wickham Court only**
Transport	**£0 pa***	**£9,500 pa***	***If G were to attend Bensham Manor he could join an existing route at no additional cost** ***Transport to Wickham Court is currently arranged and funded by his parents. It is unclear whether this is proposed to continue if G attends the secondary school. Transport would be via taxi with a journey time of 15-30 minutes both ways at a cost of approximately £25 per journey**
Total	**£8,141.54 pa**	**£32,590 pa**	
Or	**£8,141.54 pa**	**£23,090 pa**	***Excluding Transport***
Cost Difference		**£24,448.46**	
Or excluding transport		**£14,948.46**	

Submissions

162. Mr Glenister submitted that the Upper Tribunal could, even if it found the Tribunal's decision to have been unlawful, nonetheless substitute its own decision to the effect that the difference in the costs between the placements meant that the Appellant was bound to lose.

163. To that Mr Wolfe submitted in answer that that argument could only help the Council in relation to grounds 3 and 4 (which went to the Tribunal's conclusions on Wickham Court) and not in relation to grounds 1 or 2 (which went to its conclusion on Bensham Manor). Mr Glenister for his part accepted that the argument could indeed only help the Council in relation to grounds 3 and 4. Given that I have found in favour of the Appellant on grounds 1 and 2, it must follow that the Council cannot succeed on the argument in any event, but for the sake of completeness I shall explain my conclusion in relation to the question of the costs of the respective placements.

164. The point, Mr Wolfe said, was doomed even in relation to grounds 3 and 4 because the Council was, in effect, inviting the Upper Tribunal to embark on an evaluation of the difference in cost (which was disputed) followed by an assessment of whether the difference in cost inevitably amounted to "unreasonable public expenditure" taking into account all of the benefits of G remaining at Wickham Court: ***K v Hillingdon LBC*** [2011] UKUT 71 (AAC), [2011] ELR 165.

165. It was not open to the Upper Tribunal to second guess the exercise of evaluation, which was properly the preserve of the fact-finding tribunal, but in this case that Tribunal had not carried out that exercise and it was not open to the Upper Tribunal to carry out such an entirely theoretical exercise in the absence of findings by the First-tier Tribunal. Mr Wolfe accepted that one had to look at the difference in the figures between the respective placements, but that one also had to look at the benefit which came from the additional expenditure. One could only reach a correct understanding of the question of costs at the end of a proper and lawful determination of the prior questions before one could essay a determination of the costs of the respective placements.

166. The Upper Tribunal could only lawfully reach that conclusion for itself (denying the Appellant a proper hearing of the evidence before a fully constituted First-tier Tribunal) if it considered that no reasonable tribunal, when considering the matter afresh, including with oral evidence, could do other than conclude that the sum here would in all the circumstances amount to unreasonable public expenditure i.e. that the contrary finding would be perverse and irrational. As for that, he pointed to ***MM & DM v Harrow LBC*** [2010] UKUT 395 (AAC) where the Upper Tribunal declined to

decide whether £17,000 would inevitably be unreasonable public expenditure and to ***KE v Lancashire CC (SEN)*** [2017] UKUT 468 (AAC), where even a £71,000 difference was analysed on the facts and not dismissed as inevitably unreasonable. The Upper Tribunal here plainly could not reach such a conclusion. The matter had to go back to the First-tier Tribunal for determination.

167. Mr Glenister submitted that the Tribunal did not making any findings on costs as it had already found Wickham Court to be unsuitable (paragraph 29). However, the costs were set out by the Council (pages 43-44 and 53 of the bundle) which showed that there was a difference in cost of £24,448.46 per annum. That was a significant difference in the context of a local authority placement costing £8,141.54 per annum. Wickham Court was 300% of the cost of Bensham Manor; or to put it another way, the cost of one student at Wickham Court could be used for three students at Bensham Manor.

168. In that light, the difference was of such a degree in the circumstances that the Tribunal would have named Bensham Manor even if it found both placements suitable. Whilst the Appellant cited ***KE v Lancashire CC (SEN)*** to show that a £71,000 difference was not inevitably unreasonable, that was unsurprising given there is no figure which was automatically unreasonable. However, a figure such as that (or a 300% difference in the present case) was such that it would require something quite exceptional to cause the more expensive placement to be reasonable expenditure. That was consistent with the conclusion in ***KE*** at [29].

169. Even if either ground of appeal relating to Wickham School succeeded, it would have still ordered Bensham Manor in Section I on the basis of cost and, as such, the overall outcome would have been the same, even if there had been any error of law in relation to Wickham Court (which was not accepted).

Analysis

170. Save for one point, I should say at the outset that I do not derive much, if any, assistance from the decisions in ***MM*** and ***KE*** one way or the other, although both cases were no doubt correctly decided on their own facts. In ***MM*** the question of whether the additional amount was unreasonable public expenditure was simply not

decided. ***KE*** was an entirely different case on different facts and there was no such disparity in this case as there was in that case where the difference in the figures was between £31,610 and £102,572, viz. £70,962.

171. It is important to note that the figures provided by the respective parties in this case are disputed and have never been the subject of consideration by the Tribunal.

172. Mr Wolfe made the additional point that the difference in this case was not between £8,141.54 and £32,590.00, but between £18,541.54 and £32,590.00 because one had to take into account the cost of the top-up funding as well. The disparity would be even less if G's parents continued to fund his transport. Transport to Wickham Court was currently arranged and funded by his parents, but it was unclear whether that was proposed to continue if G attended the secondary school. Those points may or may not be correct, but they are currently unresolved.

173. In his written skeleton Mr Glenister submitted that the difference in cost of Wickham Court was 300% that of Bensham Manor; or to put it another way, the cost of one student at Wickham Court could be used for three students at Bensham Manor. In his oral argument he suggested that the cost of Wickham Court was 400% that of Bensham Manor (assuming that transport costs were included), but in either event a 300% or 400% difference was such that it would require something quite exceptional to cause the more expensive placement to be reasonable expenditure and that the difference was of such a degree in the circumstances that the Tribunal would inevitably have named Bensham Manor even if it found both placements suitable.

174. Whilst I continue to see the force of Mr Glenister's submission on the disparity of the respective placement figures, as I mentioned in the grant of permission to appeal, it seems to me that the potential difficulty with that submission is that the Tribunal never in fact carried out the exercise of the evaluation of the respective figures because of its earlier findings on the suitability of the respective placements and that one must additionally look at the benefits which come from the additional expenditure, which was an exercise which the Tribunal did not carry out.

175. What I do, however, derive of assistance from the decision in ***MM*** at [35] is that it is not just a matter of comparing amounts and percentage differences and that the issue is whether, in the context of the case as a whole, a tribunal, properly instructed and acting reasonably, could come to the decision that the parents' preference should prevail notwithstanding the difference in cost.

176. I remain of the view that Mr Glenister's argument that there could be only one conclusion on the basis of the figures, whilst a forceful and cogent submission, is not necessarily decisive of the question of placement. On the untested (and disputed) figures before me, I cannot conclude that the disparity is such no reasonable tribunal, when considering the matter afresh, including with oral evidence, could do other than conclude that the potential sum here would in all the circumstances amount to unreasonable public expenditure such that any finding to the contrary would be perverse and irrational.

177. On these figures and on this untested evidence, I agree with Mr Wolfe that it is not open to the Upper Tribunal to second guess the exercise of evaluation, which is properly the preserve of the fact-finding tribunal. In this case the Tribunal did not carry out that exercise and it is not open to the Upper Tribunal to carry out such an entirely theoretical exercise in the absence of findings by the First-tier Tribunal. The matter must therefore be remitted to the new tribunal for evaluation and decision.

Conclusion

178. For the reasons set out above I am satisfied that the Tribunal made errors of law which were material to the decision and for that reason the decision of the Tribunal should be set aside.

179. I therefore allow the appeal and set aside the decision of the Tribunal. I remit the matter to a new tribunal which should conduct a complete rehearing of the matter.

180. I must stress that the fact that this appeal to the Upper Tribunal has succeeded should not be taken as any indication as to the outcome of the rehearing by the new tribunal. It is quite possible that the new tribunal may end up effectively coming to the

same decision as the previous tribunal, namely that the placement named in Section I of the ECHP for G should be Bensham Manor School.

181. Alternatively, it is possible that the new tribunal might take a different view of the facts from that of the Tribunal and reach the conclusion that in fact the placement named in Section I of the ECHP for G should be Wickham Court School.

182. It is for the new tribunal itself to decide which of these alternative options open to it applies, depending on the view it takes of the facts and providing it makes proper findings of fact and gives adequate reasons. It would not be appropriate for me to express any opinion either way on the merits of the reheard case.

Directions

183. Any more detailed directions for the rehearing before the new tribunal should be left to a Tribunal Judge of the First-tier Tribunal (Health, Education and Social Care Chamber), having considered any further submissions which the parties may wish to make on such practical matters.

184. The following directions apply to the hearing before the new tribunal:

(1) The new tribunal should not involve any member who was a member of the Tribunal involved in the hearing of the original appeal.

(2) The new tribunal must consider and make relevant findings as to whether the placement named in Section I of the ECHP for G should be Bensham Manor School or Wickham Court School.

(3) The new tribunal is not bound in any way by the decision of the previous Tribunal.

(4) These directions may be supplemented as appropriate by later directions by a Tribunal Judge of the First-tier Tribunal (Health, Education and Social Care Chamber).

Stay and Issue of the Decision

185. The hearing took place before the imposition of the General Stay ordered by the Chamber President on 25 March 2020, although the decision is completed after it came into force. The General Stay ordered by the Chamber President on 25 March 2020 expressly exempted from its scope hearings, such as the present one, which had already been arranged and taken place. However, for the avoidance of doubt and so far as may be required, I lift the stay to enable the issue of this decision, if practicable, within the period of the General Stay.

186. Although the decision is dated as of 9 April 2020, there will in the present circumstances inevitably be some delay in issuing it. As of today's date it is not clear how long that delay will be, but the Upper Tribunal Office will do its level best to issue it as soon as circumstances permit.

Signed **Mark West**
Judge of the Upper Tribunal

Dated **9 April 2020**