**IN THE UPPER TRIBUNAL** **Upper Tribunal case No. HS/648/2020**
**ADMINISTRATIVE APPEALS CHAMBER**

On appeal from the First-tier Tribunal (Health, Education and Social Care Chamber)

**Between:**

**PM**

Appellant

**Worcestershire County Council**

Respondent

**Before: Upper Tribunal Judge Mitchell**

Hearing date: 30 July 2021

Venue: Field House, Bream's Buildings, Central London

Attendances: For the Appellant, Mr M Small, solicitor, of Baker Small Solicitors

For the Respondent, Ms L Thompson, solicitor, of EMW Law LLP

**DECISION**

The decision of the Upper Tribunal is to allow the appeal. Under section 12(1) of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal finds that the making of the decision of the First-tier Tribunal on 4 March 2020 under file ref. EH/85/19/00051 involved the making of an error on a point of law. However, under section 12(2)(a) of the 2007 Act, and with the agreement of the parties, the Upper Tribunal does not set aside the decision of the First-tier Tribunal.

**Under rule 14(1) of the Upper Tribunal (Tribunal Procedure) Rules 2008 I hereby make an order prohibiting the disclosure or publication of any matter likely to lead to a member of the public identifying the young person with whom this appeal is concerned. This order does not apply to (a) the young person, (b) any**

**person to whom the young person discloses such a matter or permits publication of such a matter, (c) the disclosure of such a matter by any person exercising statutory (including judicial) functions in relation to the young person.**

## REASONS FOR DECISION

### Introductory

1. The issue of potentially wider interest in this case concerns calculation of the additional cost to the public purse of a young person's placement in a college of further education or an independent learning provider approved under section 41 of the Children and Families Act 2014. Calculating the additional cost of a child's placement in different types of school, for the purposes of statements of SEN, has been the subject of many decisions over the years but there is little case law about the relevant costs of placing a young person in an educational institution other than a school for the purposes of EHC Plans under the 2014 Act.

2. In these reasons:

- "2014 Act" means the Children and Families Act 2014;
- "EHC Plan" means an Education, Health and Care Plan under the 2014 Act;
- "ESFA" means the Education and Skills Funding Agency which, as I understand it, is an executive agency of the Department for Education;
- "FE" means further education;
- "FtT" means the First-tier Tribunal;
- "SALT" (or "SLT") means speech and language therapy.

### Background

*Mr M's amended EHC Plan*

3. On 15 August 2019 the Respondent local authority reviewed the Appellant Mr M's EHC Plan. Mr M, who is a young person, appealed to the FtT against the contents of the EHC Plan.

4. The parties disagreed as to the institution to be specified as Mr M's educational placement in Section I of the EHC Plan. Mr M favoured Derwen College, an

independent college approved under section 41 of the 2014 Act. The local authority's preference was for Kidderminster College, which the FtT described as a mainstream college of FE. Mr M in fact attended Kidderminster College between September 2016 and September 2019.

*Costs*

5. One point of dispute concerned the costs of placements at the respective colleges. The FtT set out its understanding of the evidence regarding annual costs in tabular form as follows:

| | **DERWEN** | **KIDDERMINSTER** |
|---|---|---|
| Element 1 and 2 (funded by ESFA) | £11,000 | £10,000 |
| Element 3 | £12,366 | £8,662 |
| Residential | £35,923 | N/A |
| SALT | Included | Included |
| Transport | (£900) | £18,500 |
| EDUCATION: TOTAL | £59,289 | £38,162 |
| SOCIAL CARE | £1,350 | £4,680 |
| **TOTAL COST** | **£60,639** | **£41,842** |

6. Element 1 refers to placement costs, element 2 to additional support costs and element 3 to 'top-up funding'.

7. On those sums, the annual cost difference between the two placements was £18,797. The FtT found that funding Mr M's placement at Derwen College would be incompatible with the efficient use of the local authority's resources and instead specified Kidderminster College as Mr M's educational placement in section I of his EHC Plan.

*Speech and language therapy*

8. Ms Draxler, speech and language therapist, gave oral evidence for Mr M regarding his needs for SALT provision. The FtT accepted Ms Draxler's assessment of Mr M's SALT needs and her recommended provision, which it described as "more extensive than one might expect" but nevertheless justified in the light of the surprising absence of SLT while Mr M attended Kidderminster College between 2016 and 2019. The

FtT's statement of reasons recorded oral evidence given by Mr Hinksman of Kidderminster College that no additional costs would be incurred in providing the SALT required by Mr M: the college would for this purpose utilise a standing contract for the provision of SALT services. Having accepted that evidence, the FtT found that, were Mr M to be placed at Kidderminster College, no additional costs would be incurred in delivering the SALT provision required under his EHC Plan.

*Suitability of Kidderminster College*

9. The FtT expressed concern at the absence of SALT provision for Mr M when he attended Kidderminster College between September 2016 and September 2019. Nevertheless, the FtT was satisfied that the SALT provision now required under Mr M's EHC Plan would be delivered were he to attend the college. Overall, the FtT found that Kidderminster College would be a suitable educational placement for Mr M. The FtT also found that Derwen College would be a suitable placement but, as I have said, refused to name that college in section I of the EHC Plan on the ground that it wold be incompatible with the efficient use of resources.

**Grounds of appeal**

*Ground 1 – costs of the rival placements*

10. The Appellant argues that the FtT erred in law in its findings as to the costs of the rival placements. Derwen College attracted a 'statutory preference' under the 2014 Act so that the FtT was required to name it in section I of Mr M's EHC Plan unless it represented "an inefficient use of resources" in accordance with section 39(4)(b)(ii) of the Act. The FtT should have calculated the additional costs of the two placements (*Oxfordshire CC v GB* [2001] EWCA Civ 1358) The tribunal erred by taking into account Derwen College's £11,000 in ESFA 'pre-funding', that is funding that was not dependent on a student taking up the funded place, despite evidence before that the college "had sufficient pre-funded places available and thus, there was no additional placement cost to the local authority if [Mr M] attended". The costs referable to a pre-funded place should be discounted (*Hammersmith & Fulham LBC v L & F* [2015] UKUT 523 (AAC). The FtT further erred by failing to give any reason why this placement cost was included

11. The Upper Tribunal grant of permission to appeal on ground 1 read as follows:

"11. The application does not identify the evidence which, according to the application, showed that, at Derwen College, there were sufficient pre-funded places so that the Appellant's placement would not generate (certain) additional placement costs for the local authority. This was not particularly helpful.

12. I do, however, note that the tribunal's statement of reasons, at paragraph 121, states that the costs now in issue (referred to as Element 1 and 2) were funded by ESFA.

13. This application describes the ESFA-funded element of the proposed placement as a pre-funded place. I cannot locate a similar description in the tribunal's statement of reasons. The document at p.A70 of the First-tier Tribunal bundle, which the tribunal found of assistance, provided the following descriptions:

- Element 1 Placement Cost – "this is the assumed element 1 value for all post-16 high needs students, as set out in DfE guidance. It is funded by the ESFA therefore there is no additional cost";
- Element 2 Additional Support Costs – "£6,000 provided to the college bv the ESFA is not considered to be an additional cost".

14. The statutory question for the First-tier Tribunal was whether the Appellant's attendance at Derwen College would be incompatible with "the efficient use of resources" (section 39(4)(b)(ii) of the Children & Families Act 2014)…

15…this ground raises issues that it is appropriate for the Upper Tribunal to consider. In my opinion, the First-tier Tribunal and local authorities may find it of assistance if the Upper Tribunal is able to address the relationship between ESFA funding and questions of efficient use of resources for the purposes of section 39 of the 2014 Act.

…17. I should, however, point out that, even if the First-tier Tribunal's approach was flawed, there is a question as to whether any error of law would be material. That is because the difference between the ESFA funding that, on the tribunal's findings, would be available at Derwen College and at Kidderminster College was only £1,000 (£11,000 vs £10,000)."

*Ground 2 – SALT costs at Kidderminster College*

12. The application for permission to appeal recounted that Mr Hinksman, SEN Co-ordinator at Kidderminster College, gave oral evidence that, under a 'standing contract' with a private provider, the required SALT would be delivered at the College at no additional cost. Mr M argues that, at the FtT hearing, his solicitor (who also acts for

him in the present proceedings) challenged this oral evidence. The solicitor, argues Mr M, drew the FtT's attention to (a) the absence of a written contract, none having being produced at the hearing nor included in pre-hearing documentary evidence, (b) Mr Hinksman's failure to give any 'specifics about the quantum of therapy' that could be provided under the SALT contract beyond 'assessments, designing interventions and reviews' or, indeed, any details of terms of the SALT contract; (c) inconsistency between Mr Hinksman's oral evidence and his written evidence that SALT services were purchased as and when required; (d) Kidderminster College's previous failure to provide SALT in accordance with the earlier iterations of the Appellant's EHC Plan/s, which was difficult to reconcile with Mr Hinksman's oral evidence: if SALT could be sourced under a standing contract, why had Kidderminster College historically failed to provide the Appellant with the SLT he required?

13. The application argued that the FtT's finding that Mr Hinksman's oral evidence was unchallenged could not be supported. In any event, his evidence should not have been accepted without further supporting evidence and the FtT, as an inquisitorial body, should of its own volition have interrogated inconsistencies in Mr Hinksman's oral evidence.

14. The application for permission to appeal also included Kidderminster College's response to a post-hearing Freedom of Information Act 2000 request which, according to the application, showed that the college accepted that it had no standing SALT contract and that, generally, therapeutic input was limited and the costs of delivering SALT would vary.

15. The Upper Tribunal's determination of the application for permission to appeal on ground 2 read as follows:

> "19. A difficulty facing ground (2) is that, in paragraph 115 of the tribunal's statement of reasons, it finds that Mr Hinksman's evidence that the required SLT could be provided 'on contract' at no additional cost was not subject to challenge. In the light of that finding, it is hardly surprising that the statement says nothing about challenges to this evidence that Mr Small, the Appellant's solicitor, says were made at the hearing.
>
> …21. I have decided to grant permission to appeal on a ground similar to that identified in the First-tier Tribunal's determination when [it refused] permission to appeal. In the light of the written documentary evidence about funding for SLT provision at Kidderminster College, arguably the tribunal erred in law by failing adequately to inquire into the apparent alteration in SLT-funding arrangements as described in the local authority's evidence especially in the light of the tribunal's finding that, for whatever reason, the SLT provision in earlier EHC

> Plans was not delivered to the Appellant while he was a student at Kidderminster College.
>
> 22. I note that the First-tier Tribunal, despite [identifying] an arguable error of law in the tribunal's treatment of the SLT costs evidence, concluded that the error was immaterial. In other words, even if the error had not been made the outcome would have been the same. In my judgment, the matter is not so clear-cut as to justify a finding, at the permission stage, that the error could not have affected the outcome."

*Ground 3 – Kidderminster College's suitability to provide required SALT*

16. According to the application for permission to appeal, it was that accepted that Kidderminster College failed to deliver the SALT provision required under earlier EHC Plans/Statements of SEN. The FtT's failure to address this matter, in assessing the suitability of Kidderminster College, was argued to be an error of law.

17. The Upper Tribunal's determination of the application for permission to appeal in respect of ground 3 read as follows:

> "23. The tribunal found that, while studying at Kidderminster College, the Appellant had not been provided with the SLT he required even though, so it seems, earlier EHC Plans specified SLT provision. In those circumstances, arguably the tribunal needed to provide fuller reasons as to why, despite that failure, Kidderminster College was suitable. Even if Mr Hinksman's oral evidence about the 'on contract' SLT arrangement had been correct, arguably the tribunal needed to address why, despite that arrangement, the Appellant had not received the SLT he required before it could arrive at a sound conclusion that, in future, matters would be different so that, at Kidderminster College, the required SLT would be delivered."

**Legal framework**

*Children and Families Act 2014*

18. Section 33(2) of the 2014 Act requires a local authority to secure that a young person's EHC Plan provides for a young person to be educated in a mainstream school or mainstream post-16 institution, unless that it is incompatible with the young person's wishes or "the provision of efficient education for others". "Post-16 institution" is defined by section 83(2) of the 2014 Act as follows:

> ""post-16 institution" means an institution which—
>
> (a) provides education or training for those over compulsory school age, but

(b) is not a school or other institution which is within the higher education sector or which provides only higher education".

19. During the preparation of an EHC Plan, the local authority must give the young person notice of his right to request that the authority secures that an institution within section 38(3) of the 2014 Act is named in the plan (section 38(2)). The institutions within section 38(3) include an institution within the FE sector in England or an institution approved by the Secretary of State under section 41 of the 2014 Act. It is common ground that both Kidderminster College and Derwen College are within section 38(3); Kidderminster College being an institution within the FE sector and Derwen College an institution approved under section 41.

20. Section 39(3) of the 2014 Act requires a local authority to secure that an EHC Plan names an institution duly requested under section 38(2) unless section 39(4) applies. I shall set out section 39(4) in full insofar as it applies to young persons:

"(4) This subsection applies where—

(a) the…institution requested is unsuitable for the age, ability, aptitude or special educational needs of the…young person concerned, or

(b) the attendance of the…young person at the…institution would be incompatible with—

(i) the provision of efficient education for others, or
(ii) the efficient use of resources."

21. If section 39(4) of the 2014 Act applies, the local authority must secure that the EHC Plan names an institution which the local authority thinks would be "appropriate" for the young person or, alternatively, name a type of institution considered appropriate. In this case, the local authority named Kidderminster College.

22. Section 37(2) of the 2014 Act requires a young person's EHC Plan to specify, amongst other matters, "the special educational provision required by him". Where a local authority maintains an EHC Plan for a young person, it "must secure the specified special educational provision for the…young person" (section 42(2)).

*Funding arrangements*

23. Section 14(1) and (2) of the Education Act 2002 confers power on the Secretary of State to give, or make arrangements for the giving of, financial assistance to any person for or in connection with purposes which include the provision of education or educational services (apart from higher education). Section 100(1)(a) of the Apprenticeships, Skills, Children and Learning Act 2009 confers power on the Secretary of State to secure the provision of financial resources to persons providing education or training within the Secretary of State's remit under Part 4 of the Act. I am informed that in 2019/20 ESFA exercised these powers for the Secretary of State in relation to the finding of FE in England.

24. At the date of the FtT's decision. ESFA's *High Needs Funding 2019 to 2020 Operational Guide* was applicable. The guide included the following:

- "17…all FE institutions are funded at £6,000 per place for one element (sometimes referred to as element 2) of their high needs funding allocation…";
- "18. In the case of…FE institutions, place funding is deducted from the initial allocations of high needs funding to authorities by ESFA, and paid directly to the institutions, on the basis of the published data on place numbers and any changes notified by local authorities…";
- "66. Institutions receive high needs funding in different ways: core funding: the annual allocation an institution receives…from ESFA (for…colleges, independent learning providers (ILPs)….and special post-16 institutions)…top-up funding: the funding required over and above the core funding, to enable a…student with high needs to participate in education and training";
- in relation to FE institutions, special post 16 institutions and Independent Learning Providers, the table at paragraph 67 describes the element 1 and 2 funding as "post-16 core funding" made up of "Element 1 (based on 16 to 19 national funding formula) plus element 2 (£6,000 per place) based on number of places to be funded", and that any top-up funding is "agreed per pupil top-up paid by commissioning local authority";
- "68. Place funding should broadly reflect both local authorities' recent commissioning activity and strategic planning to secure suitable SEND provision…In determining the number of funded places, local authorities should consider all high needs providers in their area…";
- "70. Once [high needs] place funding is allocated, it is not associated with or reserved for [an] individual pupil or student. It is for the institution to decide how best to apportion their total allocated core funding across the actual number of places commissioned by local authorities…";

- "71. [high needs] Place funding is not withdrawn if an individual does not occupy the expected place. It provides institutions with a guaranteed budget for the year and gives them a degree of financial stability…";
- "126. Further education institutions, including colleges and independent learning providers (ILPs), receive core funding on the basis of an amount per student calculated using the post-16 national funding formula (element 1) and £6,000 per high needs place (element 2). Top-up funding for students with high needs is paid directly by the local authority commissioning this place.";
- "127. Element 1 student numbers are based on the numbers recorded in the 2018 to 2019 academic year ILR R04 data return…This element of institutions' funding is paid directly by the ESFA on the basis of total student numbers, including those aged 16 to 19 with high needs and those aged 19 to 25 with EHC Plans. The number of students and amount of funding paid has no impact on local authorities' high needs budgets…For 2019 to 2020 local authorities should continue to assume a national average amount of £5,000 for element 1…in respect of all post-16 high needs students."
- "128. The number of high needs places that determines the high needs funding of £6,000 per place is based on the number of places funded for the 2018 to 2019 academic year…".

25. It is common ground that, by virtue of paragraphs 70 and 71 of the ESFA guide, element 1 and 2 funding is not dependent on a particular high needs place being taken up by a student. Even if a place is not filled, the institution receives element 1 and 2 funding allocated to the place. The parties have referred to this as 'pre-funding'.

26. ESFA also issued general *Funding Guidance for Young People 2019 to 2020*. Provision made by this guidance includes:

- "11. This document sets out the ESFA funding conditions for provision to students who meet both the student eligibility requirements in section 3 and the following criteria:
    - are aged 16 to 19;
    - are aged 19 to 24 and have an Education, Health and Care (EHC) plan…";
- "13. Institutions must (a) only record as funded those students assessed as eligible for ESFA funding under Section 3 of this document…". Section 3 is comprised of paragraphs 26 to 83 of the guidance document;

- "33. For funding purposes, institutions must establish a student's eligibility at the start of their programme…";
- "35. In determining student eligibility, institutions must also satisfy themselves that there is a reasonable likelihood that the student will be able to complete their study programme before seeking funding for the student…";
- "76. Institutions must scrutinise applications for study by all students to ensure that they are eligible for ESFA funding…";
- "81. An institution must retain a learning agreement and/or enrolment form signed on behalf of the institution and by the student as compliance evidence to support its funding claim…";
- "127. Institutions must have evidence that individual students were undertaking the specified study programme during the learning period for which funding and retention is being recorded."

27. It is common ground that, under ESFA's general guidance, funding is dependent on a particular place being taken up by a student in academic year 2019/20. In other words, the parties agree that, unlike ESFA's high needs funding guide, the general guidance does not provide for pre-funding of designated places.

**Arguments**

*Ground 1 - costs*

28. The local authority concedes that the FtT's costs findings were flawed but submit that the error was immaterial. According to the authority, the FtT erred in finding that there was a £1,000 difference between element 1 and 2 funding for the rival placements. The FtT should have found that, for both placements, the ESFA element 1 and 2 funding was £11,000 (rather than £10,000 for one and £11,000 for the other). Given the significant costs differential that remained, this error could not be considered material. However, there had been no need for the FtT to consider element 1 and 2 funding at all. Available place funding should not be treated as an additional cost in determining the finding for rival placements (*Hammersmith & Fulham LBC*) and both colleges' evidence to the FtT confirmed that element 1 and 2 funding was available. Element 1 and 2 funding was effectively a nil cost for the purposes of the FtT's costs comparison and should have been left out of account. Had it been ignored, the costs difference would have remained at about £18,000 per annum.

29. The local authority submits that, for funding purposes, Derwen College, being approved under section 41 of the 2014 Act, was a "special post-16 institution" and Kidderminster College a "further education college". Despite this, my understanding is

that the authority argues that Kidderminster College, like Derwen College, had pre-funded places that attracted both element 1 and element 2 funding and, had Mr M attended either college, he would have taken up a pre-funded place. This argument relies on the fact that, before the FtT, both colleges' evidence was that they sought only top-up funding were Mr M to attend. For both colleges, submits the authority, the sum of £11,000 should have been discounted in determining additional placement costs. That the FtT included element 1 and 2 funding in quantifying the additional costs of both colleges was of no consequence since it made no difference to the overall costs difference between the two.

30. The Appellant submits that it is settled law that 'pre-funded' places at an educational institution are to be left out of account in determining the additional costs of rival educational placements (*Hammersmith & Fulham LBC v L & F* [2015] UKUT 523 (AAC)). To that extent, there is common ground between the parties. However, the Appellant submits that, in this case, the position regarding pre-funding differed between the two colleges. For Derwen College, the quantum of each pre-funded place is £11,000. This is because it is a specialist college of FE approved under section 41 of the 2014 Act and, as such, each designated place attracted annual ESFA funding of £11,000 (£5,000 per annum in element 1 funding, £6,000 in element 2 funding). This funding is paid direct to Derwen College by ESFA for each designated high needs place. The evidence before the FtT was that Derwen College had not exceeded their designated number of pre-funded places so that, in Mr M's case, the additional placement cost for the local authority, were Mr M to attend, would not include £11,000 in ESFA pre-funding. The only additional cost for the local authority would have been the top-up funding necessary to ensure that the provision specified in Mr M's EHC Plan were delivered.

31. The Appellant submits that Kidderminster College, unlike Derwen College, is not a specialist provider and it is therefore subject to a different funding regime. As a mainstream college of FE, Kidderminster College does not have pre-funded high needs places. In the case of Kidderminster College, funding is dependent on certain criteria being met which include a requirement for a particular student's attendance at the college. In support, the Appellant relies on ESFA's general funding guidance *Funding Guidance for Young People 2019 to 2020* (see above in these reasons). Kidderminster College had no pre-funded places and the FtT therefore erred in law by leaving out of account, in determining placement costs, supposed element 1 and element 2 funding in the amount of £10,000 (although the correct amount was in fact £11,000).

32. It seems to me that the above argument regarding funding arrangements for Kidderminster College was not relied on by the Appellant before the FtT. This may be why the Appellant further argues that the evidence before the FtT regarding Kidderminster College's funding arrangements was not clear and consisted of only Mr Hinksman's evidence. The FtT relied on Mr Hinksman's evidence in determining that, at Kidderminster College, there was relevant pre-funding of £10,000 per annum but, now, even the local authority submit that was incorrect. At the hearing, Mr Small for the Appellant submitted that the FtT erred in law by accepting that Kidderminster received element 1 and 2 funding (that is pre-funding). The FtT should not have accepted Mr Hinksman's funding evidence without further enquiry.

*Ground 2 – funding for speech and language therapy provision*

33. The local authority submits that the Appellant seeks to rely in these proceedings on a matter that was not pursued at the FtT hearing. The authority also challenges the Appellant's solicitor's assertion that he challenged Mr Hinksman's SALT funding evidence at the hearing. If his evidence contained such "glaring" contradictions the solicitor could and should have raised this as an issue at the hearing. Similarly, he should have submitted that additional information was called if he considered that the SALT funding evidence put before the FtT was inadequate. Nevertheless, the authority accepts, in written submissions, that the FtT's description of Mr Hinksman's evidence was contradictory and matters were "further confused" by the post-decision evidence obtained by the Appellant. However, the fact remains that Mr Hinksman gave clear oral evidence, which was accepted by the FtT, that Kidderminster College would not seek additional funding from the local authority in order to deliver the SLT required under Mr M's EHC Plan.

34. The authority argues that the FtT was entitled to accept Mr Hinksman's evidence that Kidderminster College would not seek additional funding even if all of Ms Draxler's SALT recommendations were accepted by the FtT and specified in Mr M's EHC Plan. The new evidence now relied on by the Appellant still fails to show that Kidderminster College would have needed to seek additional SALT funding for Mr M.

35. Alternatively, the local authority submits, the "higher end" of the anticipated SALT costs would have been around £5,000. That would still have left a cost difference between the two placements of £13,000 which would not have led the FtT to make a different decision as to inefficient use of resources. For this reason, argues the authority, ground 2 is subsidiary to ground 1. Unless the Appellant succeeds on ground 1, he cannot hope to persuade the Upper Tribunal that the FtT made a

material error on a point of law in determining the additional cost of SALT provision for Mr M at Kidderminster College.

36. The Appellant argues that Mr Hinksman's oral evidence materially differed from his written evidence. His oral evidence was recorded in the FtT's statement of reasons as "we have a standing contract for the year, so we do not attract any additional cost. It's a contract with the private provider. That pays for the assessment and to design interventions and regular review". This evidence has now been found to be "untrue" since new evidence shows that there is no standing SALT contract at Kidderminster College and, if SALT services are required, the college turn to either the local authority or 'spot purchase' from an approved supplier.

37. The Appellant's solicitor continues to maintain that he did challenge Mr Hinksman's oral evidence before the FtT and this is supported by necessary inference drawn from the statement of reasons . If Mr Hinksman's evidence was unchallenged, as the FtT stated, why was he also "questioned in detail" as the FtT also stated. But, in any event, it was incumbent on the FtT, given the inconsistencies in Mr Hinksman's evidence, to seek further clarificatory evidence (*W v Gloucestershire CC* EWHC Admin 481; *J v SENDIST & Brent LBC* [2005] EWHC 3315).

*Ground 3 – Kidderminster College's ability to provide SALT*

38. The local authority argues that this ground is a thinly disguised attempt by the Appellant to re-argue a point that was considered and rejected by the FtT. To the extent that the Appellant argues that the FtT gave inadequate reasons for its decision, this is not borne out by its statement of reasons. The FtT's reasons clearly show that it took into account Kidderminster College's historical failures to provide SALT for Mr M, and it identified the benefits for Mr M were he to attend that institution which "plainly outweighed any earlier oversight on the part of the college" (as the authority's skeleton argument put it). The Appellant's submissions overlook that placement suitability is always informed by a range of factors and, in this case, the FtT carefully set out in paragraphs 111 to 118 of its statement of reasons why it considered Kidderminster College to be a suitable placement for Mr M.

39. Regarding the argument that the FTT was swayed by Mr Hinksman's supposedly mistaken evidence that a 'therapy contract' was in place, the authority submits that this is rendered an immaterial point by the Appellant's own late evidence.

Regardless of the existence of a contract, this evidence clearly showed that Kidderminster College had arrangements in place to enable it to secure the necessary SALT.

40. The Appellant asks the Upper Tribunal to note that the local authority do not dispute that, while enrolled at Kidderminster College from September 2016 to September 2019, Mr M did not receive the SALT that he should have received. The FtT failed adequately to address the college's previous SLT failings, and failed adequately to explain why it was satisfied that, henceforth, those failings would not be repeated. Alternatively, it was irrational for the FtT to conclude that a placement which had demonstrated its inability to deliver identified SEN provision was nevertheless a suitable placement.

41. The Appellant also argues that the FtT's findings regarding Kidderminster College's historical SLT failings were inconsistent. On the one hand, the FtT found that it was "surprising and significant that [Mr M] has had no direct SLT since 2016" (paragraph 86, statement of reasons). On the other hand, the FtT also found "we do not have evidence of other EHC Plans to identify and quantify the scale of the omission" (paragraph 114). Moreover, the finding that the FtT lacked evidence about the SALT provision required under earlier iterations of Mr M's EHC Plan was flawed. While the documentary evidence may not have included each and every iteration of Mr M's EHC Plans for 2016 to 2019, the evidence still permitted the FtT to piece together the SALT provision required and which Kidderminster College should have secured.

*Disposal*

42. The local authority submits that, as between the parties, this appeal is academic because a recent review of Mr M's EHC Plan resulted in its amendment which named Derwen College in section I of the plan. Despite the appeal having become academic, the authority submits that it would be appropriate for the Upper Tribunal to decide the appeal because local authorities and the FtT may be assisted by the Upper Tribunal's determination of the funding issues arising under ground 1. If, however, the appeal is allowed, there would be no point in remitting the case to the FtT for re-determination.

43. The Appellant confirms that, on 7 October 2020, the local authority reviewed Mr M's EHC Plan and amended it so that Derwen College was named as his educational

institution. He has attended Derwen College since 25 January 2021. The Appellant agrees with the local authority that, if his appeal succeeds, there is no need to remit the case to the FtT for redetermination.

**Conclusions**

*Ground 1*

44. There is a degree of common ground between the parties under ground 1:

(a) the parties agree that the high needs place-funding streams provided for by the ESFA high needs funding guidance, often referred to as element 1 and element 2 funding, are not contingent on a student taking up a funded place. In other words, the parties agree that institutions subject to ESFA high needs funding guidance have a certain number of pre-funded places;

(b) the parties agree that comparative costs case law under the Education Act 1996 (statement of SEN case law), in relation to institutions with pre-funded places, dictates the correct approach to comparative costs analysis under the 2014 Act. It is common ground that, for the purposes of determining whether a young person's placement at an educational institution would be incompatible with the efficient use of resources for the purposes of section 39(4)(b) of the 2014 Act, where a young person proposes to take up a place that attracts element 1 and 2 funding, such funding is to be discounted. Since the resources represented by such funding would be expended whether or not the young person attended the institution, the additional costs arising from such a placement should not to include ESFA 'pre-funding' when it is being determined under section 39(4) of the 2014 Act whether the placement would be incompatible with the efficient use of resources;

(c) the parties agree that, had Mr M attended Derwen College, he would have taken up a pre-funded place that attracted element 1 and 2 ESFA funding for 2019/20, and the amount of pre-funding referable to that place was £11,000. This amount should not have been taken into account by the FtT in its comparative costs analysis of the two placements;

(d) the local authority does not dispute the Appellant's argument that, under ESFA's general funding guidance, funding is linked to a particular student taking up a particular place at an educational institution. In other words, it is not disputed that,

under the general guidance, places are not pre-funded. This means that the entire amount of ESFA ‘general’ funding for a particular placement is to be taken into account for the purposes of determining whether a placement would be incompatible with the efficient use of resources (section 39(4) of the 2014 Act does not restrict resources only to those that would be expended by a local authority were a young person to attend a particular educational institution);

(e) the parties agree that the FtT erred in finding that the place at Kidderminster College provisionally allocated to Mr M attracted element 1 and 2 funding in the sum of £10,000. The Appellant argues that the amount of element 1 and 2 funding was nil; the local authority that, like Derwen College, it was £11,000.

45. The area of dispute is therefore relatively narrow. It concerns funding arrangements for Kidderminster College, specifically whether the place provisionally allocated for Mr M attracted element 1 and 2 funding under ESFA’s high needs funding guide.

46. It should not be unduly difficult for local authorities to supply the FtT with evidence that a particular post-16 institution has designated places for high needs students. This is because the ESFA high needs funding guide, at paragraph 68, indicates that it is for local authorities to determine “the number of funded places” in their area. Had such evidence been supplied in the present case, that would have dealt with the issue. The local authority would have demonstrated that Kidderminster College was one of the learning providers within Worcestershire that had been allocated places that attracted ESFA high needs funding.

47. In this case, the local authority’s written response to Mr M’s appeal to the FtT included a table setting out their analysis of placement costs for Kidderminster and Derwen Colleges (page 70, FtT bundle). For both colleges, the table included an entry for element 1 and 2 funding (£5,000 and £6,000 respectively) adding, for both elements, that this funding was provided by ESFA and not considered to be an additional placement cost (for some reason the FtT found that one college would receive £1,000 less in ESFA high needs funding than the other but both parties agree that, to this extent, any error made by the FtT was immaterial). There was no direct evidence before the FtT that Worcestershire Council had, for the purposes of ESFA’s high needs funding guide, designated places at Kidderminster College as high needs places. However, an OFSTED report of May 2018 (p.385) stated that across the five education settings operated by the NCG Group, one of which was Kidderminster

College, the “number of learners for which the provider receives high-needs funding” was 500. And a Kidderminster College ‘Governing Body Response Form’, at p.374, quantified the costs of Mr M’s proposed placement and concluded with “less £6,000 element 2”.

48. The Appellant has not drawn my attention to any material that shows that, before the FtT, his solicitor Mr Small argued that Kidderminster College did not have designated places for high needs students that attracted element 1 and 2 ESFA funding. The solicitor’s ‘position statement’ of 5 December 2019 (p.58, FtT bundle) raised certain costs issues but these were all concerned with the costs of specific services such as SALT which the solicitor argued should have been quantified but were not. Before me, Mr Small argued that Kidderminster College was a general, non-specialist provider of education and, if I understood his argument correctly, was therefore ineligible for element 1 and 2 funding under ESFA’s high needs funding guide. However, ESFA’s guide does not draw a distinction in this respect between general and specialist colleges within the state-funded sector and I also note that Mr M’s notice of appeal to the FtT stated that, at Kidderminster College, he had been pursuing “a course for young people with learning disabilities offering basic maths and English, cooking, drama etc.”.

49. In my judgment, Mr M seeks to rely on a point that was not in issue before the FtT. The FtT was not invited to re-calculate the additional costs of Mr M’s placement at Kidderminster College, as put forward by the local authority, on the basis that the college had no ‘pre-funded’ places that attracted ESFA element 1 and 2 funding. Of itself, that is sufficient to reject the argument that the FtT erred in law by finding that Mr M’s proposed placement at Kidderminster College would attract ESFA element 1 and 2 ‘pre-funding’. Moreover, there was (a) evidence before the FtT to support the finding that, were Mr M to attend Kidderminster College, he would take up a designated place for students with high needs, but (b) no evidence to support a contrary finding (a finding that Kidderminster College did not, and could not, have designated places for high needs students for the purposes of ESFA’s high needs funding guide).

50. It is not clear why the FtT found that, were Mr M to attend Kidderminster College, he would take up a place that attracted element 1 and 2 funding in the sum of £10,000. Both parties agree that under ESFA’s high needs funding guide the aggregate of element 1 and 2 funding for a designated high needs place in 2019/20 was £11,000. However, this could not have made any difference to the FtT’s

conclusion that a placement at Derwen College would have been incompatible with the efficient use of resources (in fact, increasing by £1,000 the element 1 and 2 funding for a place at Kidderminster College would make Derwen College £1,000 more expensive, in terms of additional placement cost). Any error made by the FtT in its findings as to the element 1 and 2 funding attracted by a place at Kidderminster College could not have been a material error.

51. For the above reasons, ground 1 is not made out.

*Ground 2*

52. Paragraph 52 of the FtT's statement of reasons records verbatim Mr Hinksman's evidence that "we have available to use a SALT we can use on 4-5 days' notice. We have a standing contract for the year so we do not attract any additional cost. It's a contract with the private provider. That pays for an assessment and to design interventions and regular review". According to paragraph 115 of the statement of reasons, while "Mr Hinksman was questioned in detail as to Kidderminster's ability to input the programme of SALT which has now been directed", his evidence that the college had "a speech and language therapist on contract who can input the required provision at no additional cost to the college" was not subject to challenge.

53. It is, perhaps, odd for Mr Hinksman to have been subject to detailed questioning about Kidderminster College's ability to provide the required SALT yet for no mention of the nature of that questioning to be found in the FtT's statement of reasons. It would have been preferable for the FtT to have given some description of the 'detailed questioning' to which Mr Hinksman's was subject. However, that does not necessarily establish that Mr Small, for Mr M, submitted that (a) Kidderminster College could not in fact provide Mr M's required SALT at no additional cost and (b) the FtT failed to deal with this submission. I say this because the key SALT-related issue before the FtT appears to have been whether Kidderminster College, in the light of its previous failure to provide Mr M with SALT, could be relied on to provide the required SALT in the future, rather than how such SALT would be funded.

54. Ms Thompson, for the local authority, argues that Mr Small criticises the FtT for failing to deal with an issue that was not put before it. Mr Small did not argue before the FtT, Ms Thompson submits, that Kidderminster College could not in fact avail itself of pre-funded SALT services under a standing contract with an external provider

so that the local authority's estimated additional costs of a placement at Kidderminster College was unrealistically deflated.

55. If Mr M argues that, before the FtT, his solicitor Mr Small disputed Kidderminster College's ability to avail itself of pre-funded SALT services, the argument is not made out. My attention has not been drawn to any written submission to that effect, Mr Small does not explain how he might have known, at the date of the FtT hearing, that Kidderminster College did not have a standing contract for SALT services under which the college could have provided the SALT required by Mr M without incurring additional costs, and the key issue regarding SALT before the FtT was whether Kidderminster College could be relied on to provide Mr M with the SALT he required not whether it could avail itself of SALT services under an 'on contract' without incurring additional cost.

56. Mr M also argues that the FtT, since it is an inquisitorial tribunal, should have investigated the veracity of Mr Hinksman's evidence that SALT services would be provided under a pre-funded 'on contract' arrangement. The difficulty with this argument is that the FtT's statement of reasons recounts that, in this respect, Mr Hinksman's evidence was unchallenged. If the evidence were unchallenged, the FtT was under no obligation to go behind Mr Hinksman's oral evidence and require documentary evidence of the college's contractual arrangements for provision of SALT. Mr Small argues that Mr Hinksman's oral evidence was inconsistent with his earlier written evidence that SALT services had previously been 'bought in' as and when required. But if Mr Hinksman's oral evidence was unchallenged, the FtT was entitled to proceed on the basis that the current arrangement was as he described in oral evidence.

57. For the above reasons, ground 2 is not made out.

58. Mr Small submits that new evidence has come to light which shows that Kidderminster College did not in fact have a standing contractual arrangement for the provision of SALT services. The Appellant makes no application for the admission of new evidence but the local authority do not argue that he should have done so.

59. The local authority dispute Mr Small's interpretation of information supplied by Kidderminster College in response to a Freedom of Information Act 2000 request. I note that the college's response of 9 April 2020 states that they do not have a contract with an organisation called Talk Therapy (I do not know why that particular

organisation was referred to) but sometimes purchase services from that provider if the authority's preferred supplier, Babcock, cannot deliver particular services. Having considered the authority's submissions, I now agree with the authority that the information provided on 9 April 2020 arguably fails to establish that Mr Hinksman's oral evidence was incorrect (for instance, the 'on contract' SALT provider he mentioned in oral evidence might have been Babcock). But, if it had, the preferable course of action might have been to apply to the FtT for its decision to be set aside under rule 45 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008. Rule 45 provides for tribunal decisions to be set aside whether there has been a procedural irregularity in proceedings before the FtT, as specified in rule 45(2), and it is in the interests of justice to set aside a decision of the FtT. I make these remarks lest readers of this decision be left with the impression that nothing can be done if, following a FtT's decision, new evidence demonstrates that the FtT relied to a material extent on evidence subsequently shown to have been wrong.

*Ground 3*

60. As noted above, Mr M attended Kidderminster College for three years between September 2016 and September 2019. The FtT made the following findings about provision of SALT to Mr M during this period:

(a) "We agreed [with Ms Draxler] that it is both surprising and significant that [Mr M] has had no direct SALT since leaving secondary school in 2016" (paragraph 86, FtT statement of reasons);

(b) "Where Ms Draxler's proposals are more intensive than one might expect, we agree that the deficits in [Mr M's] SALT provision over a number of years needs to be both accounted for (in terms of his current levels) and made up…" (paragraph 86);

(c) "We take account of the failure of Kidderminster to arrange SALT provision for [Mr M]. The evidence of Mr Hinksman was that [Mr M] had been "signed off" from SALT (D490). This appears not to have been the case although we do not have evidence of previous EHC Plans to identify and quantify the scale of the omission. That is to say, it is unclear whether specific provision was ignored or whether the provision was expressed to be general, generic and advisory (and would thereby be unenforceable)" (paragraph 114);

(d) “Mr Hinksman was questioned in detail as to Kidderminster’s ability to input the programme of SALT which has now been directed. His evidence…was that Kidderminster have a speech and language therapist on contract who can input the required provision at no additional cost to the college. This information is not subject to challenge” (paragraph 115).

61. While not stated in terms, the natural inference from the FtT’s conclusion that Kidderminster College was a suitable educational placement for Mr M is that it found that the college, despite its previous failings, would now be able to deliver the extensive SALT provision specified in his EHC Plan.

62. The FtT’s statement of reasons said that it had no evidence of earlier EHC Plans and could not therefore “identify and quantify the scale of the omission [to provide SALT services]”. This was clearly incorrect:

(a) beginning at p.131 of the FtT’s bundle is an EHC Plan dated 4 March 2016 (six months before Mr M started attending Kidderminster College). The provision specified in section F of the Plan included routine involvement, in the form of advice and input, of a speech and language therapist “in the establishment of those aspects of the programme concerned with language and communication and the monitoring of them”, consultation between teaching staff and a speech and language therapist to translate the Plan’s aims “into specific and detailed objectives capable of measurement and close evaluation over the period of review”;

(b) beginning at p.145 is an EHC Plan annual review report dated 21 March 2017, by which time Mr M was attending Kidderminster College and it had been specified as his educational institution in section I of his EHC Plan. While the report referred to Mr M’s mother’s suggestion for further contact with a speech and language therapist and noted “oral speech remains unclear” and Mr M’s “receptive language is an area for further and ongoing development”, there was no mention of any input from a speech and language therapist. This was despite the review report stating that the provision in section F of Mr M’s EHC Plan is to “continue” at Kidderminster College;

(c) beginning at p.157 is an EHC Plan Amendment Notice, signed by Mr Hinksman on 1 July 2019. The notice repeated the SALT provision specified in the plan dated 4 March 2016.

63. In finding that it was unable to quantify the scale of Kidderminster College's failure to arrange the SALT provision specified in the EHC Plans current while Mr M was a student at the college, the FtT failed to have regard to relevant evidence. The documentary evidence showed the nature of the SALT provision that should have been arranged for Mr M while he attended the college from September 2016 to September 2019. In my judgment, this cannot be considered an immaterial error. The FtT determined that it was unable to quantify the scale of the college's failings because it had no evidence of the provision that should have been made. Had the FtT taken into account the evidence described above, it might not have found that Kidderminster College was capable of securing the SALT provision required under the EHC Plan as ordered by the FtT which, as Mr Small submits, was considerably more extensive than the SALT provision required under earlier iterations of Mr M's EHC Plan. The FtT's decision involved a material error on a point of law.

**Disposal**

64. Despite the FtT's decision having involved a material error on a point of law, I do not set aside its decision. Matters have moved on and I am informed that the current iteration of Mr M's EHC Plan specifies Derwen College as his educational institution. The provision specified in section F of Mr M's EHC Plan, as ordered by the FtT, is not itself challenged. I therefore agree with the parties that it would serve no useful purpose were I to set aside the FtT's decision and remit this case to that tribunal for re-determination.

65. Finally, I apologise for the delay in giving this decision. As well as delay caused by Upper Tribunal staff checking, on my instruction, that the full FtT bundle had been supplied to the Upper Tribunal, I contracted Covid after the hearing and was temporarily unable to attend to my duties.

**(Signed on the Original)**

E Mitchell
**Judge of the Upper Tribunal**
**16 January 2022**