IN THE UPPER TRIBUNAL **Case No.** HS/3005/2017
ADMINISTRATIVE APPEALS CHAMBER

Before: A. Rowley, Judge of the Upper Tribunal

Decision:

1. The appellants' appeal against the decision of the First-tier Tribunal following the hearing on 6 July 2017 (under reference EH931/17/00020) is **allowed**. The decision is **set aside** and the case is **remitted** to be decided by ~~the~~ a differently constituted First-tier Tribunal.
2. It is directed that further case management directions are to be issued by the First-tier Tribunal.

Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 it is ordered that no person may disclose or publish any matter likely to lead to a member of the public identifying the child in this appeal. This order does not apply to:

(a) Any person to whom the appellants disclose such a matter or who learns of it through publication by the appellants;

(b) Any person exercising statutory (including judicial) functions in relation to the child, where knowledge of such a matter is reasonably necessary for the proper exercise of the functions.

REASONS FOR DECISION

1. The decision on this appeal turns upon the particular facts of the case, which concerns a child (whom I shall refer to as "C") who was born in 2005 and who has autism, ADHD, a significant developmental coordination disorder and epilepsy. His parents ("Ps") appealed to the First-tier Tribunal against the contents of Sections B, F and I of his EHC plan dated 13 February 2017. The tribunal held an oral hearing of the appeal. By the time of the hearing, in July 2016, C was due to transfer from a mainstream primary school to secondary school. The local authority ("LA") proposed that he should attend a school (which I shall refer to as "L School") which is a secondary foundation school, with a specially resourced provision ("SRP") for students with special educational needs, in particular Autistic Spectrum Disorder, run by LA. Ps, meanwhile, proposed that C should attend a school (which I shall refer to as "P School") which is an independent special school for pupils aged between 11 and 18 with a diagnosis of autism.

2. In its decision dated 7 August 2017 the tribunal ordered a number of amendments to be made to Sections B and F of C's EHC plan, and it dismissed the appeal in respect of Section I, ordering that L School should be named in that section, as the additional cost of sending C to P School would amount to unreasonable public expenditure. Ps appeal to the Upper Tribunal with my permission. LA opposes the appeal, and has provided written submissions which have been replied to by Ps. On granting permission to appeal I directed that if either party wished to have an oral hearing of the

appeal they should so indicate in their submissions. Neither party has requested an oral hearing, and I am satisfied that I am able to decide the appeal without one. The parties' cases have been fully set out in their written submissions.

3. Ps submit that the EHC plan is not "so specific and clear as to leave no room for doubt as to what has been decided and what is needed in the individual case" (Laws J in *L v Clarke and Somerset CC* [1998] ELR 129). It is LA's case that, as the tribunal ordered that C be placed in an SRP for pupils with autism, there was less need for specificity. Relying on *East Sussex CC v TW* [2016] UKUT 528 (AAC) LA submits that specificity is not necessary when a child is placed in specialist provision. In that case Upper Tribunal Judge Jacobs acknowledged the line of authority that provided that there will be cases where there should be flexibility, the degree of flexibility depending on the circumstances of each case. Judge Jacobs cited Sullivan J in *S v City and Council of Swansea and Confrey* [2000] ELR 315 at 328: "Whilst there may have been a need for some flexibility, this should not have been used as an excuse for lack of specificity where detail could reasonably have been provided". Judge Jacobs said that he was not prepared to lay down as a general proposition that flexibility was permissible when provision was being made at a special school or college, although he did "accept that this is a factor to be taken into account that may in an appropriate case permit more flexibility than when a mainstream school is involved".

4. Whilst acknowledging that the tribunal had ordered that C "will be placed in a specially resourced provision for pupils with autism" and whilst noting what it said at paragraphs 94-98, Ps submit that that must be read in the context of the tribunal's reference to the amount of time that SRP pupils spent in the provision varied, and that the majority of pupils already in the unit were spending time in the mainstream. The entry criteria for pupils wishing to join the SRP included a learning profile which meant that they were able to access mainstream education. Indeed, the evidence before the tribunal was that a primary purpose of the provision was to "facilitate access to the mainstream curriculum… to work towards their full and independent inclusion in all aspects of school life". A secondary purpose was to provide a haven from the sensory and social pressures of the mainstream school environment. Further, the EHC plan provided for whole class teaching (as well as individual and small group teaching).

5. Given the above, it may well be that the tribunal failed to have sufficient regard to the issue of support in the mainstream, and in this case I would lean towards finding that provision was not being made at the equivalent of a special school. However, it is not necessary for me to decide the point because, as Ps point out, the authorities do not suggest that, even for children in specialist provision, the requirement of specificity can be abandoned where detail could reasonably be provided. Ps rely upon a number of alleged deficiencies in the EHC plan as ordered by the tribunal. On balance I find that, in the circumstances of this case, in the examples given below (under Section F of the Plan) detail could reasonably have been provided.

(a) "[C] will have support from a Learning Support Assistant". This fails to identify how much support he will have, or what training and experience the LSA should have. Given the complexity of C's difficulties, this is important.

(b) "[C] requires a programme to develop his social communication and social interaction skills delivered in 1:1 and small group settings with opportunities to practice (sic) new skills learnt throughout the day." Ps rely on Upper Tribunal Judge Mitchell's observation in *JD v South Tyneside Council (SEN)* [2016] UKUT 0009 (AAC) that "the bare provision for programmes tailored to needs add nothing". In that case, as in this, while the required programme was described, its content was not specified at all. Further, the word "opportunities" is vague, meaningless and unenforceable.

(c) "Daily opportunities with a teacher to improve self esteem and develop a positive self through increased awareness of individual strengths and attributes and through achieving success in a variety of contexts". This is not radically dis-similar from a provision which was struck down by Judge Mitchell in *JD.*

(d) "[C] requires a structured programme to develop his motor planning coordination skills." The points made under (b) above apply here.

(e) "[C] requires the equivalent 25 hours of support to be used flexibly across the school day to include individual, small group and whole class teaching to meet the outcomes described." This, again, is vague and lacks the required specificity. For example, what is meant by "equivalent"? Who is to provide the support? "

6. For these reasons, the tribunal erred in law in making provision which lacked the necessary degree of specificity. Accordingly, I set aside its decision. As further findings of fact are required I remit the matter to be re-heard by a First-tier Tribunal as soon as possible. The First-tier Tribunal will issue further case management directions. In the circumstances, it is not necessary or proportionate for me to address the other (extremely long) grounds of appeal. Any further errors of law which the tribunal may have made will be subsumed by the rehearing.

7. Although I am setting aside the tribunal's decision, I should make it clear that I am making no finding, nor indeed expressing any view, on the merits of the appeal to the First-tier Tribunal. At the rehearing the tribunal will review all the relevant evidence and make its own findings.

A. Rowley, Judge of the Upper Tribunal

(Signed on the original)

Dated: 29 January 2018

Amended pursuant to rule 42 of the Tribunal Procedure (Upper Tribunal) Rules 2008:
5 February 2018