DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to allow the appeal by the Appellant and to order as follows:

1. **Pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007, the decision of the First-Tier Tribunal (SEND), taken on 10 January 2018, following the hearing on the papers on 2 January 2018 under file reference EH381/17/00002, involves an error of law and is set aside.**

2. **Pursuant to section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal re-makes the decision made by the First-Tier Tribunal (SEND) and orders that:**

    i. **The Respondent local authority shall carry out and conclude an EHC assessment of RB's special educational needs within 10 weeks of the date of this order;**

    ii. **The Respondent shall within 2 weeks of the date of this order notify the Appellant in writing that it shall make the assessment;**

    iii. **Where, following the assessment, the Respondent concludes that it is not necessary for special educational provision to be made for RB in accordance with an EHC Plan, it shall notify the Appellant of its decision, giving reasons for it as soon as practicable, and in any event within 10 weeks of the date of this order;**

    iv. **If the Respondent concludes that it is necessary for special educational provision to be made for RB in accordance with an EHC Plan, it must send the finalised plan to the Appellant within 14 weeks of the date of this order, in accordance with regulation 44(2)(b)(ii) of the Special Educational Needs and Disability Regulations 2014.**

3. **Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**
   there is to be no publication of any matter likely to lead members of the public, directly or indirectly, to identify the young person RB who is the subject of this appeal.

Attendances:

Appellant: Ms Katherine Anderson of Counsel

Respondent: Ms Hannah Lynch of Counsel

REASONS FOR DECISION

Introduction

1. This case concerns a decision by the First-tier Tribunal ('the Tribunal') to dismiss a parent's appeal against the refusal of the local authority to carry out an Education Health and Care ('EHC') needs assessment for her son RB (from now on, simply 'R').

2. I held an oral hearing of the appeal at the Manchester Civil Justice Centre on 14 November 2018. R's mother was represented by Ms Katherine Anderson of Counsel while the local authority, Calderdale Metropolitan Borough Council ('the Council') was represented by Ms Hannah Lynch of Counsel. I am indebted to them both for the positive way in which they worked to secure what is, in effect, a decision by consent.

3. This case highlights the importance of local authorities and tribunals applying the correct test for deciding whether an EHC needs assessment is required. Assuming that the child or young person in question has a disability or a learning difficulty, the correct question at this stage is whether it may be necessary for special educational provision to be made, not whether it is necessary for such provision to be made. The answer to the latter question can only be determined on the basis of the evidence generated by the EHC needs assessment itself. At the prior stage where conducting an EHC needs assessment is being considered, one only needs a provisional rather than definitive answer to the issue of necessity. I am allowing R's appeal for the following reasons.

The legislative framework for this appeal

4. Section 20 of the Children and Families Act 2014 ('the 2014 Act') provides as follows:

> '**When a child or young person has special educational needs**
> **20.** — (1) A child or young person has special educational needs if he or she has a learning difficulty or disability which calls for special educational provision to be made for him or her.
> (2) A child of compulsory school age or a young person has a learning difficulty or disability if he or she—
> (a) has a significantly greater difficulty in learning than the majority of others of the same age, or
> (b) has a disability which prevents or hinders him or her from making use of facilities of a kind generally provided for others of the same age in mainstream schools or mainstream post-16 institutions.
> (3) A child under compulsory school age has a learning difficulty or disability if he or she is likely to be within subsection (2) when of compulsory school age (or would be likely, if no special educational provision were made).
> (4) A child or young person does not have a learning difficulty or disability solely because the language (or form of language) in which he or she is or will be taught is different from a language (or form of language) which is or has been spoken at home.
> (5) This section applies for the purposes of this Part.'

5. Section 21 then goes on to provide the following definitions:

> '**Special educational provision, health care provision and social care provision**

21. — (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,
(b) maintained nursery schools in England,
(c)mainstream post-16 institutions in England, or
(d) places in England at which relevant early years education is provided.
(2) "Special educational provision", for a child aged under two, means educational provision of any kind.
(3) "Health care provision" means the provision of health care services as part of the comprehensive health service in England continued under section 1(1) of the National Health Service Act 2006.
(4) "Social care provision" means the provision made by a local authority in the exercise of its social services functions.
(5) Health care provision or social care provision which educates or trains a child or young person is to be treated as special educational provision (instead of health care provision or social care provision).
(6) This section applies for the purposes of this Part.'

6. Section 36 of the 2014 Act deals with the process for EHC needs assessments:

'**Assessment of education, health and care needs**
36. — (1) A request for a local authority in England to secure an EHC needs assessment for a child or young person may be made to the authority by the child's parent, the young person or a person acting on behalf of a school or post-16 institution.
(2) An "EHC needs assessment" is an assessment of the educational, health care and social care needs of a child or young person.
(3) When a request is made to a local authority under subsection (1), or a local authority otherwise becomes responsible for a child or young person, the authority must determine whether it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.
(4) In making a determination under subsection (3), the local authority must consult the child's parent or the young person.
(5) Where the local authority determines that it is not necessary for special educational provision to be made for the child or young person in accordance with an EHC plan it must notify the child's parent or the young person—
(a) of the reasons for that determination, and
(b) that accordingly it has decided not to secure an EHC needs assessment for the child or young person.
(6) Subsection (7) applies where—
(a) no EHC plan is maintained for the child or young person,
(b) the child or young person has not been assessed under this section or section 71 during the previous six months, and
(c) the local authority determines that it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.
(7) The authority must notify the child's parent or the young person—
(a) that it is considering securing an EHC needs assessment for the child or young person, and
(b) that the parent or young person has the right to—
(i) express views to the authority (orally or in writing), and
(ii) submit evidence to the authority.

(8) The local authority must secure an EHC needs assessment for the child or young person if, after having regard to any views expressed and evidence submitted under subsection (7), the authority is of the opinion that—

(a) the child or young person has or may have special educational needs, and

(b) it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.

(9) After an EHC needs assessment has been carried out, the local authority must notify the child's parent or the young person of—

(a) the outcome of the assessment,

(b) whether it proposes to secure that an EHC plan is prepared for the child or young person, and

(c) the reasons for that decision.

(10) In making a determination or forming an opinion for the purposes of this section in relation to a young person aged over 18, a local authority must consider whether he or she requires additional time, in comparison to the majority of others of the same age who do not have special educational needs, to complete his or her education or training.

(11) Regulations may make provision about EHC needs assessments, in particular—

(a) about requests under subsection (1);

(b) imposing time limits in relation to consultation under subsection (4);

(c) about giving notice;

(d) about expressing views and submitting evidence under subsection (7);

(e) about how assessments are to be conducted;

(f) about advice to be obtained in connection with an assessment;

(g) about combining an EHC needs assessment with other assessments;

(h) about the use for the purposes of an EHC needs assessment of information obtained as a result of other assessments;

(i) about the use of information obtained as a result of an EHC needs assessment, including the use of that information for the purposes of other assessments;

(j) about the provision of information, advice and support in connection with an EHC needs assessment.'

7. Section 37(1) then provides that "Where, in the light of an EHC needs assessment, it is necessary for special educational provision to be made for a child or young person in accordance with an EHC plan — (a) the local authority must secure that an EHC plan is prepared for the child or young person, and (b) once an EHC plan has been prepared, it must maintain the plan." Finally, "a decision of a local authority not to secure an EHC needs assessment for the child or young person" is a decision that may be appealed to the Tribunal (see section 51(2)(a)). There is a separate right of appeal against "a decision of a local authority, following an EHC needs assessment, that it is not necessary for special educational provision to be made for the child or young person in accordance with an EHC plan" (section 51(2)(b)).

The background to the appeal to the First-tier Tribunal

8. R is a boy now aged 14. He has a diagnosis of indeterminate colitis, one consequence of which is that he has missed a significant amount of schooling. R's mother asked the Council to carry out an EHC needs assessment. The Council declined, by a letter dated 14 July 2017, arguing that R's needs were medically related and that he could be supported at school by a health care plan. The Council accordingly concluded that an EHC needs assessment was not the appropriate mechanism. R's mother appealed to the Tribunal.

9. Following its consideration of the case on the papers on 2 January 2018, the Tribunal dismissed the appeal by R's mother. It concluded, as had the Council, that an EHC needs assessment was not necessary. The core of the Tribunal's reasoning was set out at paragraphs [21] and [22] of its decision:

> "21. We have concluded that an EHC needs assessment is not necessary. Our reasons for reaching this conclusion are that we find that although R's illness does meet the definition in Section 20(1)(b) of a disability which prevents and hinders him from making use of facilities of a kind generally provided in mainstream schools in the sense that he is not able to attend school at present, we do not consider that his condition falls within the definition of section 20(1) of having a disability which calls for special educational provision to be made, as defined in section 21 as being additional to, or different from, that made generally for others in mainstream schools.
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> 22. There is no suggestion in the papers that R has a learning difficulty. [His mother] states that R is a bright boy who wants to be an engineer. She considers that an EHC Plan is needed to support this ambition. [The High School] agree with [R's mother] that R is an able student who at the time of their last report was working on or above target in 8 of his subjects. The additional provision that [R's mother] regards as necessary however does not fall within the definition of Special Educational provision. She lists the provision of a laptop for any time that he is too ill to attend school, home tuition including music lessons at home, and travel for hospital appointments and counselling sessions. We conclude that such provision for a child too unwell to attend school is not different to the provision generally available to other children at mainstream school."

10. The Tribunal concluded by expressing the view that R's needs were more appropriately met by the completion of a Child in Need Plan (paragraphs [23] and [24]).

The grounds of appeal against the First-tier Tribunal's decision

11. The proposed grounds of appeal advanced by R's mother in her application to the Upper Tribunal were understandably not framed in legal terms. Clearly, she disagreed with the Tribunal's decision not to direct the Council to carry out an EHC needs assessment. She included further medical evidence and explained there had been a change of circumstances in that R had been offered a place at a new college in a neighbouring local authority area. She added that she had had no success in securing assistance from the Child in Need meetings as "they have so far not accepted that R needs an assessment as a Disabled Child".

12. Equally understandably, given how the proposed grounds had been formulated, Upper Tribunal Judge Ward was unable to give permission on the papers, and so directed an oral hearing of the application (held in Leeds on 30 May 2018).

The grant of permission to appeal by Upper Tribunal Judge Rowland

13. Upper Tribunal Judge Rowland, who conducted that hearing, subsequently gave R's mother permission to appeal in his ruling dated 8 June 2018. He explained his reasons as follows:

> '2. The Appellant's son is on the roll of a maintained mainstream secondary school but has a form of colitis and had already missed a significant amount of schooling before she asked for the EHC needs assessment. The Appellant was

> dissatisfied with the educational provision being made for her son, both in terms of support in the school and in terms of education while he was unable to attend school. The local authority refused to secure an assessment on the ground that the appropriate mechanism for providing support was through a health care plan. The First-tier Tribunal accepted that the Appellant's son had "a disability which prevents or hinders him … from making use of facilities of a kind generally provided for others of the same age in mainstream schools" and so had a "disability" for the purposes of section 20(1) of the Children and Families Act 2014, but it did not accept that the disability "calls for special educational provision to be made for him" for the purposes of that subsection. Section 21(1) provides that "'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) maintained schools in England, …". The First-tier Tribunal reasoned that the provision sought by the Appellant was not different from the provision made in maintained schools.
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> 3. It is arguable that the First-tier Tribunal's approach was wrong in law and that "special educational provision" must be read in a way that is consistent with the meaning of "special educational needs" so that "special educational provision" encompasses provision that enables or facilitates a child to make use of facilities of a kind generally provided for others of the same age in mainstream schools but which the child or young person would otherwise be prevented or hindered from making use of due to a disability.'

14. Judge Rowland directed the Council to file a response to the appeal within one month. After the Council had been granted an extension of time, its SEN Manager replied to the Upper Tribunal by way of a letter dated 15 August 2018. The letter essentially provided the Council's perspective on the facts of the case and supported the Tribunal's decision. However, the letter did not in any meaningful sense address the point made by Judge Rowland in paragraph 3 of his reasons for giving R's mother permission to appeal. This prompted Judge Rowland to issue further directions (dated 5 October 2018) in which he observed that the Council had "wholly failed to grapple with the legal issue that I identified". He accordingly directed a further round of submissions to be made, adding that the Council's representative "may wish to refer the case to the Authority's lawyers for advice".

15. The Council sensibly took the hint and filed further written submissions drafted by Ms Lynch, dated 1 November 2018, in which the Council now acknowledged that the Tribunal had indeed erred in law in its approach to the question it had to decide. Ms Lynch's helpful submissions also proposed that in the circumstances an appropriate remedy would be for the Council to undertake an EHC needs assessment, so obviating any need for a remittal of the appeal to another First-tier Tribunal. Shortly afterwards Ms Anderson, who had also only been recently instructed, filed a further written submission on behalf of R's mother, in essence agreeing with and adopting Ms Lynch's analysis.

The Upper Tribunal's analysis

16. In those circumstances I could simply have allowed this appeal by consent and issued a decision to that effect without giving any reasons. However, I agree with both counsel that the issue arising in this appeal may well face other local authorities (and tribunals). It is therefore appropriate to set out my reasons with a view to this decision achieving some wider circulation, including possibly by reporting. In that context I am indebted to Ms Lynch and Ms Anderson both for their submissions and for settling the draft terms of the Upper Tribunal order.

17. In *Cambridgeshire County Council v FL-J* [2016] UKUT 225 (AAC) Upper Tribunal Judge Jacobs described how the relevant legislation works in these terms (my emphasis in paragraph 4 added), in an analysis which I gratefully adopt:

> "3. The process began with a request under section 36(1). The local authority then had to decide whether or not it 'may be necessary' to make special educational provision for FLJ under section 36(3). In order to this, section 36(3) operates to impose a duty to decide whether he 'has' a learning difficulty within the meaning of section 20(2), which 'calls for' special educational provision within the meaning of section 21. That duty arose as a result of the request; it was preliminary to any decision on whether an assessment should be secured under section 36(1) as requested. In this case, the authority decided that an assessment should not be secured. If it had decided to secure an assessment, it would have had to decide whether special educational provision 'is necessary' for FLJ under section 37(1) and, if so, to secure a plan for him under section 37(1)(a). The different rights of appeal in section 51(2)(a) and (b) reflect those two stages: (a) deals with a decision not to make an assessment and (b) deals with a decision on an assessment that special educational provision is not necessary.
>
> 4. The legislation language is important to the local authority's duties at each stage and to the powers of the First-tier Tribunal on an appeal. *At the initial stage, when the authority or the tribunal is deciding whether an assessment should be secured, two different questions arise. One is a question of present fact: 'has' the young person a learning difficulty or disability? The other is a prediction: is it one that 'calls for' special educational provision (section 20(1)) or for which such provision 'may be necessary' (section 36(3))?* Those different expressions are both framed according to the stage of the process. The authority or tribunal does not have to decide at this initial stage whether special educational provision 'is necessary' (section 37(1)); that question only arises when an assessment has been made. To put it loosely and without intending to rewrite or gloss the language of the legislation, the issue at the initial stage is a provisional and predictive one; it is only when an assessment has been made that a definitive decision has to be made."

18. So, applying that analysis, the Tribunal in the present case was faced with two questions.

19. The first question was what Judge Jacobs described as the question of present fact: 'has' R a learning difficulty or disability? The answer to that was plainly in the affirmative in that, as the Tribunal rightly found, "R's illness does meet the definition in Section 20(1)(b) of a disability which prevents and hinders him from making use of facilities of a kind generally provided in mainstream schools" (paragraph [21]). So, although R did not have a 'learning difficulty', he certainly had a 'disability'.

20. The second question was predictive: is that disability one that 'calls for' special educational provision (section 20(1)) or for which such provision 'may be necessary'

(section 36(3))? This was where the Tribunal erred in law. In effect, the Tribunal elided the issue it had to decide under section 36(3) ("whether it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan") with the separate issue under section 37(1) ("where, in the light of an EHC needs assessment, it is necessary for special educational provision to be made for a child or young person in accordance with an EHC plan…"). Thus, the issue under section 36(3) is provisional and predictive; it is only once an assessment has been carried out that a definitive decision needs to be made under section 37(1). As Ms Lynch acknowledged, the Tribunal had moved on to consider whether special educational provision was (rather than may be) necessary for R, within section 37(1) without having the necessary evidence (following an assessment) to do so.

21. As Ms Lynch also correctly conceded, the Tribunal's focus then shifted to the fact that R did not have a learning difficulty and was not struggling academically (and so needed no curriculum differentiation) when last assessed at school. In doing so, the Tribunal erred by looking at the special educational provision issue through the prism of a learning difficulty rather than a disability. As Ms Anderson noted, the SEN Code of Practice (2015) states (at paragraph 6.35) that "some children and young people with a physical disability … require additional ongoing support and equipment to access all opportunities available to their peers". The Tribunal thus failed to give sufficient weight to the fact that R was not at school at the material time and also failed to consider what provision might be necessary to ensure that he was able to return to school. As such, the Tribunal missed the point that the interventions R required to enable him to return to (and remain at) school (e.g. home tuition and help to address the mental health issues associated with his physical disability), delivered "otherwise than at a school", "might" have fallen within the definition of special educational provision.

22. The Tribunal found that these interventions did not amount to provision which was "additional to, or different from, that made generally for others of the same age in ... mainstream schools". However, that finding was symptomatic of the underlying error in the Tribunal's approach in asking itself the wrong question (was special educational provision necessary for R?) rather than whether it may be necessary for special educational provision to be made for R. Putting to one side that error of law, the factual finding in any event seems to me potentially problematic. The Tribunal appear to be equating the type of support R might need with the sort of 'catch up' assistance provided to a pupil with no disability or learning difficulty who misses a few days of school because of a nasty virus. In reality it may be there is a world of difference between the two types of provision, such that one falls within and one outside of the definition in section 21(1). Be that as it may, the fundamental problem was that the Tribunal lost sight of the question it had to answer under section 36(3), namely "whether it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan."

Conclusion and disposal

23. For all the reasons explained above, R's appeal against the decision of the First-tier Tribunal succeeds. The Tribunal's decision involves a material error of law. I therefore set aside the decision of the First-tier Tribunal and by consent order as follows:

1. **Pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007, the decision of the First-Tier Tribunal (SEND), taken on 10 January 2018, following the hearing on the papers on 2 January 2018**

under file reference EH381/17/00002, involves an error of law and is set aside.

2. **Pursuant to section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal re-makes the decision made by the First-Tier Tribunal (SEND) and orders that:**

    i. **The Respondent local authority shall carry out and conclude an EHC assessment of RB's special educational needs within 10 weeks of the date of this order;**

    ii. **The Respondent shall within 2 weeks of the date of this order notify the Appellant in writing that it shall make the assessment;**

    iii. **Where, following the assessment, the Respondent concludes that it is not necessary for special educational provision to be made for RB in accordance with an EHC Plan, it shall notify the Appellant of its decision, giving reasons for it as soon as practicable, and in any event within 10 weeks of the date of this order;**

    iv. **If the Respondent concludes that it is necessary for special educational provision to be made for RB in accordance with an EHC Plan, it must send the finalised plan to the Appellant within 14 weeks of the date of this order, in accordance with regulation 44(2)(b)(ii) of the Special Educational Needs and Disability Regulations 2014.**

3. **Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**
   there is to be no publication of any matter likely to lead members of the public, directly or indirectly, to identify the young person RB who is the subject of this appeal.

Signed on the original
on 19 November 2018

Nicholas Wikeley
Judge of the Upper Tribunal