

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No HS/54/2019

Before UPPER TRIBUNAL JUDGE WARD

Attendances:

For the Appellant: Mr Jonathan Auburn, instructed by Special Educational Needs service, LB Hammersmith and Fulham

For the Respondent: Mr Sean Bowers, SEN Action

Decision: The appeal is allowed. The decision of the First-tier Tribunal sitting at Royal Courts of Justice on 14 November 2018 under reference EH205/18/00006 involved the making of an error of law and is set aside. The case is referred to the First-tier Tribunal (HESC Chamber) for rehearing before a differently constituted tribunal. I direct that the file be placed promptly before a salaried judge of that Chamber for case management directions for the rehearing to be given.

REASONS FOR DECISION

1. The local authority appeals, with permission given by me, against the decision of the First-tier Tribunal ("FtT") which on 14 November 2018 had found for the parents of M, aged 10, as regards the school to be named in section I of her education health and care plan. M's parents wanted school P, an independent special school approved under s.41 of the Children and Families Act 2014, to be named. The local authority wished to name school Q, a maintained special school.
2. M was diagnosed with autism on 2010. She has (put briefly) difficulties with attention and listening, engaging in adult-directed activity because of a tendency to follow her own agenda, expressing herself (she is non-verbal) and with social communication. At the time of the FtT hearing in September 2018, she was aged 10 and thus had just gone into Year 6, the final year of Key Stage 2.
3. The FtT named school P, which the local authority had accepted was suitable, but argued would be an inefficient use of resources, substantially on the ground that school Q, which M had attended in the past and which she was attending again having been removed for a year by her parents, had been unable to counter the suggestion by M's parents that she had not made progress while there (but had made significant progress in the year during which she had been removed from school Q and had followed an ABA programme.)

4. In essence the local authority's complaint is that the FtT ignored the evidence which it had submitted in relation to the progress M had made while attending school Q or, if that is not so, failed adequately to indicate what it made of it.

5. Before turning to the FtT's reasons on the issue, I need to set out parts of the evidence. Mr A, the headteacher of School Q, is recorded at para 35 of the FtT's decision as having given evidence as follows:

"Mr A denied that M had made limited progress at School Q. He stated that M had made progress across areas of the curriculum prior to her withdrawal in 2016. He stated that the school do not keep individual tracking grades for pupils and there were no reports available to support any progress M had made following her return to school Q in September 2017."

There is no suggestion in these proceedings that that was not the evidence Mr A gave.

6. Much of the local authority's documentary evidence of progress pre-dated 2016, when M was removed from school Q. Opinions may differ as to the value of that material in the context of a young pupil, when it was at least 2 years old and sometimes more, and there had for a while been a change in the provision made for her meanwhile. How potentially compelling it was is relevant to what might be expected of the FtT in terms of reasons. I do not need to resolve that as, for the reasons below, it suffices to focus on the period after M's return.

7. However, the documentary evidence also included a recent table, in which each row represented one term (with a gap when M was away from school Q). Four of the columns were for specific subjects – English, Maths, Science and Computing and a further four, derived it appears from the SCERTS methodology of working with people with autism, covering the topics of "self-regulation", "mutual regulation", "joint attention" and "symbol use". Save where for one reason or another data was not available, each box so created contained a description of a single action. Thus, by way of example, in English, for Spring 2018 it was "I can follow a pre-writing pattern", whilst in Summer 2018, it was "I can trace vertical lines". This document was headed "[M] Learning & Autism Data".

8. On a further sheet, headed "Assessment at [School Q]", a narrative explanation of the school's methodology was provided (to which I return below). After that came a section headed "[M] progress against targets". In relating to each of the operative boxes created by the table described in [6] a value of 50, 75 or 100 was assigned. (25 would also have been a possibility but was not used). A key explained that each numerical value corresponded to a "rate of progress" ranging from "experiencing learning" (25) to "mastered skill/concept" (100). This section went up to and included Summer 2018.

9. The narrative read as follows:

“In line with the government directive [School Q] no longer reports on percentage levels of progress against P-scales or National Curriculum levels. This has been done for a number of reasons, primarily to allow teachers to set personalised and functional curriculum targets for young people they support and to allow for assessment and learning reporting to become more transparent to parents.

The new form of assessment is focused around setting achievable and challenging “I-can” statements for young people. The setting of these targets is based on number of inputs, firstly the team of professionals supporting the young person and then the National Curriculum, their current life setting, SCERTS and any other important factors.

Please see the key below which indicates how this progress is judged in its numerical form (the expected rate of progress for [a student at school Q] is 0.75.” [sic -“75” rather than “0.75” must have been intended.]

10. I agree with Mr Auburn that the items described in [7] –[9] purport on their face to convey progress. It is evident that the numerical values are assigned by reference to the single statements, one per term, per subject, to which I referred at [7] (each of which starts with the words “I can”).

11. The evidence before the FtT also included the Ofsted report, dated 23 May 2018, of a short inspection of school Q. It noted, among other things, that:

“Since the last inspection [which had taken place in 2014], you have introduced an assessment system that carefully tracks both academic progress and personal skills development.”

12. What did the FtT make of the evidence on recent progress? In my view, there is only one paragraph in which the FtT gave reasons for its conclusion on progress while at school Q. (Other paragraphs relied upon by Mr Bowers were, variously, recitation of the evidence given by M’s parents and the FtT’s acceptance of the evidence of M’s parents’ educational psychologist as to the progress she had made in her year away from school Q, when she was following an ABA programme, and so do not assist him.)

13. The paragraph reads:

“We accepted the parental evidence that [M] had made limited progress at [school Q] and she had made good functional and notable progress since the introduction of the ABA programme. [M] can now recognise her family and her behaviour has improved. We did not

have any reports from [school Q] as to the progress if any, which [M] had made since her return to [school Q] on the provisions available within the school. [Mr A] told the Tribunal that the school did not keep any tracking records and any records from the period after [M's] return were not available.”

14. Mr Bowers submits that the FtT relied on what the headteacher, Mr A, had said and there is no error of law in that. I note that there is a minor discrepancy between Mr A's evidence as set out by the FtT at [5] and its reasons, in that Mr A is recorded as having said “we do not keep individual tracking grades” rather than “tracking records” (emphasis added) but in any event he appears to have said, and the FtT relied upon it, that there were no records available to support progress M had made.

15. The problem is that, within the evidence, and in a visible format, there were records. I asked Mr Auburn and Mr Bowers for some background which might explain the narrative set out at [9] above. They referred me to the Rochford report¹. My understanding is that following that report, the decision was taken by the Department for Education to retain the P level system previously in use for the time being for pupils not yet engaged in subject-specific study, but for those engaged in subject-specific study (such as, evidently from the table described at [6], M) to replace P levels with new standards, in this case new pre-key stage 2 standards. Interim arrangements were set out in *Interim pre-key stage 2: pupils working below the test standard - For use in the 2017 to 2018 academic year* published by the Standards and Testing Agency, while for 2018-19 that has been replaced by *Pre-key stage 2: pupils working below the national curriculum assessment standard - For use from the 2018/19 academic year onwards.*” They take the form of “pupil can” statements.

16. The rubric to the latter indicates (emphasis added) that:

“The standards are not a formative assessment tool: **they should not be used to track progress throughout the key stage** ... Those reviewing school performance, including Ofsted inspectors, would not expect them to be used for anything other than summative assessment at the end of the key stage.”

17. One may contrast the rubric for P scales in *Performance – P Scale – attainment targets for pupils with special educational needs* (Department for Education, June 2017):

“The use of P scales is statutory for reporting teacher assessment in English, mathematics and science to the Department for Education at the end of key stages 1 and 2. **P scales can also be used for**

¹ “*The Rochford Review: final report -Review of assessment for pupils working below the standard of national curriculum tests*”, Standards and Testing Agency, October 2016.

reporting teacher assessment to parents in other national curriculum subjects and **at other times.**" (emphasis added).

18. I was referred at the hearing to PIVATS. My understanding is that at any rate when P levels were in full use (I am unsure of the present position) PIVATS provided a structured approach to assessing, planning for learning, tracking and measuring small steps in attainment, focusing on small steps within the P scales.

19. One can thus see that whereas P levels (plus PIVATS where appropriate) might have provided a vehicle for tracking progress in the past, even when a child was not at the conclusion of a Key Stage, what has replaced P levels for this category of pupil following the Rochford review does not. M was not at the conclusion of Key Stage 2 when Mr A was giving evidence to the FtT.

20. Against this background the narrative in [8] makes perfect sense, while the descriptions in [6] are recognisable as "pupil can" statements, written in the first person. Whilst I have had to take steps to familiarise myself with the background, the FtT(HESC) is a specialist tribunal with specialist membership and must be taken to be aware of requirements (imposed, I believe, by way of statutory guidance) in respect of measuring the attainment and progress of pupils within the special educational needs cohort.

21. Seen against that background, I do not regard it as a rational or sufficient justification for preferring the parents' evidence to rely on (more or less) what Mr A said in evidence, when the documentary evidence contained, entirely contrary to what the FtT appears to have thought he was saying, what appears to have been evidence of progress in accordance with the relevant Government guidance. Mr A is headteacher of a school rated as "Outstanding" and which clearly (from the Ofsted report) did, at some point between 2014 and May 2018, introduce an assessment system tracking a pupil's progress and development. What the FtT latched on to simply did not stack up. It is highly unlikely that Mr A was mistaken on whether his school had a system to track progress or not. Whether in the light of the recent changes summarised above there was a misunderstanding of what was being asked or said, or whether terminology was being used in a different way, or there was some other explanation, I do not know and is not for me to resolve. But the FtT, deploying its specialist knowledge of assessment methods for this cohort of pupils with SEN, needed to do so in order to consider properly the evidence described at [7] – [9] and to demonstrate that it had done so.

21. Mr Auburn does not limit his complaint to the FtT's treatment of this evidence, but it was on a central issue, recent and visible and the FtT's failure to address it adequately for the reason above is sufficient reason to allow the appeal and to set the FtT's decision aside.

22. It is not necessary for me to express a view on the other matters Mr Auburn relied upon, namely the FtT's treatment of the local authority's seeking

to place M in ABA schools when it came to secondary education and of the evidence of its educational psychologist, both of which it regarded as inconsistent with the position adopted by the local authority in the litigation.

23. As this decision is based in some measure on research undertaken since the oral hearing it was circulated as a draft before being issued, so as to allow the representatives the opportunity to comment on any new matters contained within it. The local authority provided a “no comment” response and no response was received on behalf of the parents.

24. The fact that the appeal has been allowed on a point of law carries no implication as to the eventual outcome, which is entirely a matter for the tribunal to which the case is remitted.

CG Ward
Judge of the Upper Tribunal
4 June 2019