IN THE UPPER TRIBUNAL **Appeal No: HS/1364/2019**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

ORDER

Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the child in these proceedings. This order does not apply to: (a) the child's parents, (b) any person to whom the children's parents, in due exercise of their parental responsibility, discloses such a matter or who learns of it through publication by either parent, where such publication is a due exercise of parental responsibility; (c) any person exercising statutory (including judicial) functions in relation to the children where knowledge of the matter is reasonably necessary for the proper exercise of the functions.

DECISION

The Upper Tribunal allows the appeal of the appellant parents.

The decision of the First-tier Tribunal made on 2 April 2019 under the reference EH852/18/00021 involved an error on a material point of law and is set aside.

The Upper Tribunal is not in a position to re-decide the appeal. It therefore refers the appeal to be decided afresh by a completely differently constituted First-tier Tribunal and in accordance with the Directions set out below.

This decision is made under section 12(1), 12 (2)(a) and 12(2)(b)(i) of the Tribunals Courts and Enforcement Act 2007

DIRECTIONS

Subject to any later Directions by a Judge of the First-tier Tribunal, the Upper Tribunal directs as follows:

(1) The new hearing will be at an oral hearing.

(2) If either party has any further evidence that they wish to put before the tribunal, this should be sent to the First-tier Tribunal's office within one month of the date this decision is issued.

(3) The new First-tier Tribunal should have regard to the points made below.

Representation: **Leon Glenister of counsel for the parents.**

Emma Waldron of counsel for Southampton City Council.

Hearing date: **1st October 2019**

REASONS FOR DECISION

1. This appeal concerns a young girl, who I will refer to as EE, who is the daughter of the appellant parents. It is an appeal made against a First-tier Tribunal decision dated 2 April 2019 ("the tribunal"), pursuant to permission to appeal granted by Upper Tribunal Judge Rowley on 4 July 2019.

2. At the date of the tribunal's decision EE was 16 years old. She has a diagnosis of Prader Willi Syndrome, as a result of which her development has been delayed and her eating has to be managed. She has moderate learning difficulties and difficulties with speech, language and communication, as well as hypermobility in her joints and poor co-ordination.

3. The central issues on the appeal were and remain whether a 'waking day curriculum' ought to have appeared in Section F of the EHC Plan and the related issue which place of education should be named in Section I of that Plan.

4. The first ground of appeal advanced by Mr Glenister on behalf of the parents had a number of aspects, all of which fell under a heading that the tribunal had erred in law in its consideration of EE's progress at Great Oaks College. That College was the place of education that EE had been attending for over six months and was the place the respondent argued, and the tribunal accepted, should be named as EE's place of education in Section I of the EHC Plan. It was a key aspect of the appellants' case that their daughter had not been making any real progress at the College and for that reason (amongst others) it was not a suitable place of post 16 education for her. The parents' preferred place of education was the Fortune Centre for Riding Therapy ("the Centre"). The respondent did not argue that the Centre was not suitable for EE. Its case was that both the Centre and the College were suitable but that the cost of the Centre was incompatible with the efficient use of resources and would amount to unreasonable public expenditure. The tribunal accepted the respondent's case. It is thus apparent that the College's suitability, and the evidence going to that issue, was a critical part of the tribunal's decision.

5. The tribunal's central reasoning on Section I and the College's suitability was as follows.

> "36. The most important aspect of the appeal for both parties was the identification of the school to be named in Section I. We had first to consider the suitability of Great Oaks College. Although it was unfortunate that we had no current record of [EE's] progress, and we agree there was no reason to delay her Annual Review, it was noted in the Additional Annual Review that [EE] made good progress while she was at Great Oaks School. There is no evidence from Great Oaks College that [EE's] progress had halted or regressed. Dr Pinkard observed her engaging in activities and it is reported that she takes part in all activities.

> 37. Mr Urani's criticism of the provision at Great Oaks College set out in his report was based on a two hour visit and was largely withdrawn during the course of his oral evidence as he accepted he had made assertions which he had not explored with [EE's] tutor. We did not accept, as submitted by Mr Glenister, that the entry in [EE's] school book that she had had an excellent day doing a puzzle all day, suggested that the college was unsuitable as we do not know the circumstances or whether she did in fact do nothing but a puzzle. Mr Evans said that this would not be suitable and had some doubt that this could have occurred in the way described.
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> 38. The agreed provision for speech and language therapy and occupational therapy will support the provision made for [EE] at Great Oaks College.
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> 39. We have some concerns about the levels of training and awareness of [EE's] needs arising from [Prader Willi Syndrome]. While we agree with Mr Evans that it is important for [EE] to manage situations such as being with peers who are still eating when she had finished, there have been two concerning incidents that show a lack of awareness. Mr Cooke indicated that training would be put in place for staff and we consider that this is urgent and necessary for [EE] and for other students with the same condition.
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> 40. Although it is reported that [EE] is not happy to attend Great Oaks College and this is evidenced by a number of transcripts, mostly undated, purported to be by [EE] herself, the observations of her by staff at Great Oaks College are largely positive. [EE] indicated to Dr Pinkard that she was happy there and was able to say what she liked about college. An undated document in the bundle entitled "What does [EE] Want', presumably written for her, stated 'I want to go to the Fortune Centre. I like doing jobs! I like sleeping over. I like brushing. I picked up the horse poo! I swept up. I learnt to wash my hands to be clean and safe.' The next sheet is about Great Oaks 6th Form College, on which is written 'My teacher is Pete, he's cool. I like the animals. I want to work with them. I like planting, new art room.' However, [EE] is now preoccupied with moving to [the Centre] but there is no evidence that she is not engaging at Great Oaks College.
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> 41. We found, overall, that Great Oaks College, with the additional agreed therapies, is able to deliver the provision in [EE's] EHC Plan. We accept that Mr Cooke will ensure that training is put in place for staff at Great Oaks College in the needs of students with [Prader Willi Syndrome]."

6. The parents argue that the tribunal's approach here was flawed because it had: (i) wrongly relied on EE's progress at her previous placement; (ii) reversed the burden of proof by requiring the parents to show a lack of progress; (iii) proceeded in a procedurally unfair manner in relying on a review that was never cited by the respondent or the tribunal either at of before the hearing, and so had based its decision on

evidence the parents had not had the opportunity to contest; and (iv) failed to consider, sufficiently or at all, the parents' oral evidence as to EE's (lack of) current progress at the College.

7. In addressing these aspects of the first ground of appeal it is important to note that the tribunal plainly, and in my view correctly, considered that EE's progress at the College was an aspect of whether the College was suitable for her as a place of education as one that could meet her special education needs. If a child is making no progress in terms of her education then that must be relevant to whether the place of education is meeting her special educational needs and, therefore, whether it is suitable. Nor can it be an answer to the parents' arguments that the tribunal had other evidence on which it could assess the College's suitability. It is the very stuff of proper and lawful adjudication that the decision maker (here the tribunal) does so fairly and weighing all relevant evidence.

8. In my judgment, the third and fourth aspects of the parents' first ground of appeal are made out and my so deciding is sufficient to dispose of this appeal to the Upper Tribunal in favour of the parents.

9. The 'Additional Annual Review' dates from March 2018. The tribunal had already noted in its consideration of the evidence in its decision (at paragraph 10) that this additional annual review had taken place at Great Oaks School on 20 March 2018 and had been carried out in respect of EE's transfer from that school to post 16 educational provision. The additional review did appear in the bundle of papers the tribunal had before it on the appeal. It appeared in section B of that bundle's index under the heading "Education, Health and Care Plan", and in that section followed documents relating to the respondent's proposed EHC Plan for EE in respect of her post 16 provision in which the respondent proposed the College as her place of education after 16. However, it is noteworthy that this evidence did not appear in section D of that bundle, which contained what was described as the "Local Authority's Documentary Evidence.

10. Mr Glenister, who appeared for the parents before the tribunal, asserts that this additional review was not relied on by the respondents either before or at the hearing, nor was it raised by the tribunal at or before the hearing. As he described it to me, the tribunal's reliance on that annual review in paragraph 36 of its decision "came like a bolt out of the blue" when he and the parents read the tribunal's decision. It is important to note Mr Glenister's assertion has at no stage been contested by the respondent, and that included at the oral hearing before me.

11. It is clear, in my judgment, from paragraph 36 of its decision that the tribunal did place significant reliance on the March 2018 additional review as evidence of EE's having continued to progress at the College, notwithstanding the lack of a current record of her progress. That is the plain import of the conjunction of the sentence dealing with the additional review and the good progress EE was said to have made at the Great Oaks school with the immediately following sentence about there being no evidence from the College that EE's progress had halted or regressed. It is not necessary for me to decide whether the latter sentence involved the tribunal reversing the burden of proof. It is certainty, I would suggest, an odd form of wording. It could be read as indicating either an absence of evidence or positive evidence that EE's progress had not halted or regressed. The former is the more natural reading; the difficulty with the latter reading being why it wasn't expressed in the terms of the positive evidence as to continuing progression by EE when in the College.

12. This then links to the first aspect of this ground of appeal, which put another way was that the evidence of progress EE may have made while at the Great Oaks <u>school</u> was not good evidence of her current progress because it related to her at an earlier stage and in a different setting. I do not need to decide this point either, but it exemplifies that arguments of substance could and would have been made about the

March 2018 additional annual review had it been raised in the course of the First-tier Tribunal proceedings.

13. In all the circumstances it seems that the proceedings were fundamentally unfair because a central evidential plank on which the tribunal based its decision was not one which either of the parties or the tribunal had ever raised as having any importance to the issues the tribunal had to decide: see, if it is needed, *L v Waltham Forest* [2003] EWHC 2907 (Admin); [2004] ELR 161 at paragraph [15] and page 279 of *O'Reilly v Mackman* [1982] 2 AC 237. This is not diluted in my judgment by the fact that the March 2018 additional annual review was in the bundle and 'viewed by' two of the witnesses. The issues before the tribunal were framed by the parties' submissions and the evidence they called in support of them, as supplemented by probing and questions from the tribunal. It is uncontested before me that at no stage was a case advanced prior to the tribunal's decision that founded the answer to current progress significantly or at all on the March 2018 additional review. To then find as the tribunal did was unfair to the parents and amounted to a material error of law on the part of the tribunal in coming to its decision.

14. I also consider that the parents are entitled to succeed on their argument that the tribunal's decision is flawed because it did not address their oral evidence to the tribunal about why they considered their daughter had not made any progress at the College. Again, it was not disputed before me that the parents gave such evidence to the tribunal. Mr Glenister put it this way in his skeleton argument:

> "The parents were specifically asked to give oral evidence on their view of progress since [EE] began at the College and their clear evidence was that they could see no demonstrable progress in her skills since she began. That was evidence, and indeed the *only* evidence of her current progress that the Tribunal had. The Tribunal failed to consider this evidence, and made a very simple error in finding "no current record" of such progress."

15. The respondent made two points against this argument, whilst accepting the premise on which it was based about the parents having given oral evidence to the tribunal about (the lack of) progress. Its points were (a) that there was other evidence of EE's progress in the form of Dr Pinkard's evidence, and (b) that the issue of current progress was really a matter for expert evidence. Whether or not there was other evidence about EE's progress at the College cannot detract from the fact that the parents' evidence, although sought, was disregarded by the tribunal in its decision making. Further, it was for the tribunal using its specialist expertise to evaluate the evidential worth of the parents' evidence on progress, but I can see no basis for it being ruled out completely, and therefore not needing to be addressed at all, on an *a priori* basis simply because it was not given by an expert. Even if this was the tribunal's view, the parents as a party to the appeal were entitled to be provided with an explanation why their evidence here was of no relevance or evidential worth. And an argument based on irrelevance would have real difficulties given the terms of section 19 of the Children and Families Act 2014: see paragraph [8] of *BB v LB Barnet* [2019] UKUT 285 (AAC) and the authorities referred to in that paragraph.

16. The parents, through Mr Glenister, advanced several other grounds of appeal. These encompassed: whether the tribunal had failed to consider how EE would be taught life skills and/or misapplied the law in relation to teaching at home; whether the tribunal had failed to reach any decision on provision for 'Sensory and Physical'; whether it came to an irrational conclusion that the educational psychologist's evidence did not support a 'waking day curriculum'; and whether the tribunal failed to consider relevant considerations as to the suitability of the College. Save for the irrationality challenge, I do not consider I need to address any of these other grounds of appeal. They add nothing to whether the tribunal erred materially in law and that its decision should as a result be set aside, and they can be subsumed in the issues the new First-tier Tribunal will need to address.

17. The irrationality challenge, is, however, in a different category because if made good it may at least support my deciding that the *only* result available to the tribunal was that a 'waking day curriculum' was called for on the evidence before the tribunal. I do not, however, consider that the parents' can succeed on this particular argument.

18. To understand the argument (and its flaws) it is necessary to set out what the tribunal said on this in paragraphs 33-35 of its decision.

> "33. Waking day curriculum: To order that [EE] reasonably requires a residential placement we have to be satisfied that she has an educational need for instruction and training beyond the school day. This would normally be to enable her to learn to generalise her skills or to have therapy and activities to enable her to develop the skills of daily living. [EE] has needs which are greatly complicated by her diagnosis of [Prader Willi Syndrome] which gives rise to considerable health needs as well as future care needs. We have, however, to focus on [EE's] educational needs. There is no dispute that she requires a structured programme at college although we heard from both Mr Evans and Ms Delves who agreed that the structure in college was less formal and more flexible than school so that young people learn to cope with the unexpected and their learning embedded in activities that were 'real life' situations. It is agreed that she should have regular speech and language therapy and occupational therapy and programmes which should be embedded into her daily activities. Ms White advises that [EE] should practice activities in different environments. Mr Urani was of the view that it was within the ability of Great Oaks College to teach skills but wondered whether they could do so in different environments and different settings. However, we heard that at Great Oaks College, [EE] has opportunities to learn in the classroom, the Lodge, the farm and the community. She also does activities with outreach workers at Rose Road, funded by Social Care. Considering the evidence as a whole, we accept that [EE] needs to practice and develop her skills as she has difficulties learning and retaining skills, although we were unable to find that [EE] was unable to generalise her skills as there is no evidence that that she was able to do things in one environment that she cannot do in others. We were satisfied that [EE] has opportunities to practice her skills in a range of environments in a day placement.
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> 34. The educational psychology evidence did not support a waking day curriculum although Mr Urani observed that the complexity of [EE's] needs led him to the opinion that there was a case for multi-agency joint funding of a walking day curriculum. We agree that [EE] has complex needs spanning education, health and care but we were not asked to make recommendations in relation to health and care. Had this been a case under the National Trial, we may well have considered that recommendations to care and health might be appropriate in view of [EE's] health needs for a higher level of exercise. A transitional assessment of [EE's] care needs when she reaches 18 will be carried

> out later this year and will have to take into account [EE's] needs to be independent.
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> 35. We were not satisfied that there was evidence of an educational need for [EE] to attend a residential placement."

19. I have underlined in paragraph 34 of the tribunal's decision the passage on which the parents base their irrationality argument. One can see immediately, however, that the 'EP evidence' was but part of the overall evidence considered by the tribunal in deciding that no 'waking day curriculum'/residential placement was needed. If the parents are to succeed on the irrationality argument in a manner beyond setting aside the tribunal's decision (which I am already satisfied should occur), that would require me to decide that the tribunal ought to (in the sense of 'could only') have decided on the evidence before it that a 'waking day curriculum' was needed by EE. And that will mean me deciding not only that the educational psychology evidence supported a waking day curriculum but that that evidence overwhelmingly and clearly shifted the evidence decisively in favour of a 'waking day curriculum': see *Yeboah v Crofton* [2002] EWCA Civ 794; [2002] IRLR 634.

20. Otherwise, if the issue before me on setting aside the tribunal's decision was myself to redecide on the evidence what special educational provision and education placement was needed by EE, that would have to be on the basis of the answer to those questions <u>now</u> and not back when the tribunal made its decision over six months ago (see *GO and HO –v- Barnsley MBC* (SEN) [2015] UKUT 184 (AAC)), and the respondent in particular was not in a position to call evidence and address those questions at the time of the hearing before me. In these circumstances, the parties accepted that, absent the pure irrationality argument succeeding in the way I have described in paragraph 19 above, the appeal would need to be remitted to a completely new First-tier Tribunal to be redecided entirely afresh.

21. Given the very high hurdle imposed by a pure irrationality challenge, and given the respect I must pay to the evaluative and expert function of the First-tier Tribunal (see *DWP v ICO* [2016] EWCA Civ 758; [2017] 1 WLR 1), I do not consider this ground of appeal can succeed to the extent of my deciding that the tribunal ought to have decided in favour of the parents on the 'waking day curriculum' issue, even assuming that the educational psychologist's evidence (i.e. that of Dr Pinkard and Dr Urani) did support a 'waking day curriculum'. In any event, a very real difficulty with the parents' argument is that the tribunal relied on oral evidence given by Dr Pinkard and Dr Urani to them at the hearing, as well as the evidence that appeared in their written reports. I have no proper basis for going behind that oral evidence as the tribunal has recorded it in paragraphs 18 and 19 of its decision. However, those paragraphs, and the closing sentence in each of them in particular, cannot in my view support the argument that no rational tribunal could have concluded on the evidence before it that the EP's evidence did not support a waking day curriculum.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal

Dated 10th December 2019