IN THE UPPER TRIBUNAL **Appeal No.** HS/1429/2018
ADMINISTRATIVE APPEALS CHAMBER

Before Judge S M Lane

DECISION

The decision of the First-tier Tribunal heard on 8 February 2018 under reference EH808/17/00014 involved the making of an errors of law. The decision is SET ASIDE and REMADE in the same terms, making such findings of fact as are necessary, indicated in the body of the decision.

Anonymity: I direct that there is to be no publication of any matter likely to lead members of the public directly or indirectly to identify any person who has been involved in the circumstances giving rise to this appeal, pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

IN ATTENDANCE

Counsel for the Appellants: Mr Alexander Line
Counsel for the Respondent: Mr Jack Anderson

Ms Lucy Hayes, of IPSEA
Ms April Pilgrim, Respondent's instructing solicitor:

REASONS FOR DECISION

1. I apologise for the delay in issuing this decision.

2. Following an oral hearing on 5 September 2018, I granted the appellants limited permission to appeal in respect of the First-tier Tribunal's (F-tT's) decision dated 8 February 2018. The hearing of the substantive appeal took place on 30 October 2018.

3. The appeal involved the terms of an Education Health and Care Plan for CD, a child with significant learning difficulties and disabilities. A number of issues relating to the special educational provision to be made for her, and the name of the Academy at which she would be placed, were issues to be resolved. The appellants, who are CD's parents, requested that BHA (BHA) be specified in Section I of the EHC plan as her placement. She was already attending BHA but it was in another authority's area and was substantially more expensive in terms of the amount the LA would have to reimburse the other Authority and the cost of home-to-school transport.

4. The LA accepted that BHA was suitable, but that the additional expense was incompatible with the efficient use of resources under the Children and Families Act 2014 section 39(4) of the Children and Families Act 2014. They considered that ATA, an academy in its own area, was also suitable and considerably less

expensive. It was, however, prepared to name BHA subject to the condition that the appellants pay for CD's home-to-school transport; otherwise CD was to attend ATA.

5. The main argument on costs related to the impact of home-to-school transport arrangements on the suitability of the two Academies for CD. If CD were not to be taken to BHA each day by the appellants or friends, she would require a taxi capable of transporting her and an escort. It would cost just under £25,000 per year. The LA submitted that the cost of transport to ATA was very small because of existing transport vehicles and routes that could accommodate CD. The appellants argued that the nature, distance and travel time to ATA as envisaged by the LA's proposal (a 'bus' picking up children at a total of four stops, taking about an hour) was so arduous that CD could not cope with the journeys. ATA could not be considered a suitable placement unless a suitable form of transportation could be arranged. They argued that the real cost of transportation to ATA, if CD were taken by taxi with an escort, would be much the same as that to BHA. On that basis, the overall difference in costs between the placements was greatly reduced, and it was possible that had the F-tT gone on to consider section 9 of the Education Act 1996, as they should have done after considering section 39(4) of the Children and Families Act 2014, it might have come to the conclusion that BHA be named solely in the EHC plan. They also criticised the way in which the F-tT calculated the cost of the academies themselves, but these would be mere quibbles if their argument on home-to-school transport failed.

6. It is noted that

   i. the parties agreed changes to section B of the plan relating to special educational needs, which the F-tT implemented;
   ii. the parties agreed the provision to be made in section F (special educational provision) for hydrotherapy apart from a caveat added by the LA that the provision would be delivered 'except in unforeseen or unavoidable circumstances'. The F-tT implemented the provision as worded by the LA;
   iii. the F-tT implemented agreed changes in section F in respect of SALT (speech and language therapy);
   iv. the F-tT accepted that physiotherapy was special educational provision for CD and included it within section F.
   v. the F-tT rejected the appellants' proposed amendment to include access to mainstream integration in section F.
   vi. the F-tT found that both ATA and the appellants' preferred Academy, BHA, were suitable for CD. However, it considered that the additional expenditure for the LA if CD were to attend BHA was incompatible with the efficient use of resources. The F-tT accordingly only named BHA in section I of the plan on conditional that the appellants pay for home-to-school transport to that Academy.

7. The grounds of appeal can be broken down into three basic submissions:

8. **Submission 1: Was the F-tT's decision that ATA was suitable for CD sustainable in light of the evidence on transportation difficulties she would encounter and the costs?** There were three aspects:

   i. the nature of the trip to and from the LA's chosen Academy: time, distance, CD's ability to cope with the journey;
   ii. the cost of transportation,

9. **Submission 2: Mainstream integration.** Was the F-tT's understanding of the appellants case in respect of mainstream integration fundamentally flawed, leading to a negative credibility finding on this matter? Did the F-tT's erroneous approach render unsustainable its conclusion that ATA was suitable for CD?

10. **Submission 3: Failure to deal with section 9 of the Education Act 1996.** Although the F-tT correctly considered section 39(4) of the Children and Families Act 2014 ('the Act') it failed to consider section 9 of the Education Act 1996. Had the 'balancing exercise' involved in section 9 been carried out, the F-tT might have come to the conclusion that the parental preference for BHA should prevail. Factors to be balanced in the section 9 scales would include:

    i. the relatively modest difference in the cost between the Academies, had the costs been correctly determined (including provision of SALT at ATA);
    ii. an accurate calculation of the distances involved in, and the duration of, the journeys to the Academies
    iii. the benefits of BHA, considered 'holistically' (including the availability of mainstream integration).

11. I granted permission to appeal on these 3 submissions, though I have reworded and rearranged them.

12. I rejected the appellants' submission that the wording of the special educational provision made for CD's hydrotherapy was unlawful because it adopted the caveat that CD's hydrotherapy would be 'subject to unforeseen or unavoidable circumstances'. Mr Line argued that this caveat made the provision too vague or uncertain to be enforced, relying on well-known case law.

13. I consider this to be unarguably incorrect. The caveat did no more than make express that which would otherwise be implicit. The words must be seen in the context of the LA's statutory obligations to provide the special educational provision specified in an EHC plan. Section 66(2) of the Act provides that, where a child has special educational needs, the appropriate authority must, in exercising its functions in relation to the Academy, use its best endeavours to secure that the special educational provision called for by the pupil's special educational needs is made: section 66(2). This imposes a high standard on the LA.

14 The basic provision in the EHC plan was for the LA to provide hydrotherapy at least once a week, subject to unforeseeable or unavoidable circumstances. In my view, in addition to using its best endeavours, the LA must also act in good faith.

I can see nothing that realistically suggested that the LA would act in breach of both of these.

15 What might happen that would trigger the caveat? An unforeseen breakdown might occur at any Academy site. If this happened and the problem could not be fixed with reasonable dispatch, the LA would be expected to make alternative arrangements to comply with its obligations. Another problem that the appellants mooted was a rise in the number of pupils needing to use the pool. Variations in student numbers are neither unforeseeable, nor are their consequences unavoidable. The LA's duty is to use its best endeavours to avoid the consequences. At the end of the day, it is difficult to think of circumstances that could fairly be said to be unforeseeable or unavoidable that would be any different from the LA's duty to use its best endeavours.

Submission 1 – transport issues

16 I deal with these first. If the submissions on this issue fails, the significance of the Tribunal's failure to apply section 9 of the Education Act 1996 (as it undoubtedly should have done) becomes immaterial.

17 It is to be remembered that the issue here is whether ATA was unsuitable for CD because she could not cope with the journeys.

18 **(a) The nature of the trip to and from the LA's chosen Academy.** The appellants submitted that the nature, distance and duration of journey to AHA was such that CD would not be able to cope with it. They submitted that the failed to make relevant findings of fact and give adequate reasons on this issue, making its finding that ATA was suitable untenable.

19 ATA has two sites, 'Bowes' and 'Rivaulx'. They are quite close to each other. It emerged at the First-tier hearing that the LA intended CD to attend the Bowes site. The submission to the Upper Tribunal was made on the basis of the LA's evidence to the First-tier Tribunal that the trip from CD's home to the Bowes could take 'about an hour' in a vehicle that would pick up children along the way to the academy, making a total of four pick-ups, of which CD would be the first. The Special Educational Needs and Disability Code of Practice: 0 - 25 ('the Code) recommends that a child of CD's age travel for a maximum of 45 minutes each way. They submitted some medical evidence that CD would have difficulty with a long journey with stops and starts.

20 It must be borne in mind that, if the problematic nature of the trip to ATA could be overcome, there would be little left of the appellants objection to ATA as unsuitable.

21 The F-tT did not make any findings about nature of the trip, the distance or the time it would take to get to the either Bowes or Rivaulx sites. The failure to do so is curious, to say the least, since this is an aspect of suitability that First-tier Tribunals are accustomed to dealing with. An explanation eventually emerged following from an inquiry I made about a cryptic note on a document. The document was a table of costs provided by the LA to the F-tT. IPSEA handed up

to me at the permission hearing. The words 'Bishops Garth School Transport' (p67 of the UT bundle) were handwritten at the bottom of the document. This was puzzling since Bishopsgarth School (now Outwood Academy, Bishopsgarth) was not a placement suggested for CD. At the permission hearing, neither Mr Line nor the two IPSEA representatives who attended (Lucy Hayes and Claire Jackson, of whom the latter represented the appellants at the First-tier Tribunal hearing) could explain the reference.

22 I sent a copy of this document and photocopies of distances to the two Academies, as set out on Google Maps, to the parties for comment. The LA responded with a witness statement from Ms A Pilgrim, the Authority's solicitor at the First-tier Tribunal hearing. It gave her recollection of what happened at the proceedings and of the evidence given on a number of disputed issues. Ms Pilgrim was present at the Upper Tribunal hearing.

23 Mr Line did not have any objection in principle to admitting the document though he submitted that it should be approached cautiously because Ms Pilgrim was recollecting evidence given 20 months ago and had not produced her notes. The First-tier hearing had, in fact, taken place on 8 February 2018, so she was recollecting what happened at a hearing 8 months earlier. Still, eight months is not the blink of an eye, even for a solicitor. I accordingly considered the witness statement with care and tested it against the evidence in the bundle when assessing its weight, if any.

24 First, there is a significant difference between the copies of the table contained in the First-tier Tribunal Bundle (FTB) and those which accompanied the witness statement on the one hand, and the copy handed up by IPSEA. The copies in the bundle and the witness statement are 'clean' copies, with no written note on them, whereas the document handed up by IPSEA had a handwritten note on it. The appellants have not offered another explanation.

25 It is reasonably clear to me that the words 'Bishops Garth School transport' must have been written during the First-tier hearing by IPSEA, to whom the document had been given or sent. When the contents of Ms Pilgrim's witness statement are examined in conjunction with the document, I am able to find this as a fact, on balance of probability.

26 Ms Pilgrim's witness statement gives an account of the evidence on home-to-school transport for CD to the Bowes site at [19] – [26]. It explains the one-hour journey CD would have had to take if she were the first child collected on the school 'bus'. But Ms Pilgrim also states that there was further verbal and documentary evidence regarding an alternative route for CD involving a service from Outwood Academy Bishopsgarth. That service was and is run by the LA and, as such, could do a non-stop run-on service for CD to either of the ATA sites for the minimal cost of the extra petrol that would be required from Bishopsgarth to Bowes [21]. CD's trip would take around 20 minutes [25] and she would be the only child on the service in the morning and afternoon.

27 The presence of the handwritten note in Ms Pilgrim's statement makes sense of an otherwise cryptic reference to a school that has nothing to do with the appeal.

It also buttresses the credibility of Ms Pilgrim's recollections. I find that this evidence was, on balance, given and credible.

28 On this point alone, Ms Pilgrim's witness statement would knock out the appellant's objections to the suitability of ATA for CD because of the nature, time and distance involved in the to the journey for Bowes site. Since the two journeys are very similar indeed, problems arising from CD's asserted 'melt downs' on journeys would also fall away.

29 For the avoidance of doubt, I also find that the evidence sent to support the appellants submission that CD is given to screaming episodes in the car was not representative of her behaviour at the material time. The professional evidence on this was of some vintage. According to the letter from Dr Joshi, this problem manifested in or around September 2014 when the car stopped at red traffic lights. The parents hoped this would be a passing phase and indeed by November 2014 the parents believed C was ready to take the bus to nursery school (p171). This is not consonant with the difficulties currently asserted, which are not supported by updated medical evidence. Moreover, the Final draft of the EHC plan in May 2017 (signed off in September 2017) was that the parents had *not* seen the challenging behaviour 'from last summer' (p131 of the First-tier bundle).

30 The question, then, is this: to what effect was the F-tT's asserted failure to find material facts and give reasons for rejecting the appellants' evidence on the journey to ATA? Once the LA had offered an alternative suitable solution that addressed the appellants' criticisms on the nature of the journey, all that was left of the appellants' objection on this point was the comparative costs between the journeys to the two academies. It appears that this is how the F-tT perceived the case to unfold, given that its written reasons focussed entirely on the cost. But that is a dangerous way for a Tribunal to approach its duty to find facts and give reasons. Where an issue of importance is put to a Tribunal, its duty is to weigh the evidence, find the facts, explain how they resolved factual disputes and explain their decision. It is not for the parties to fill the blanks left by the Tribunal. But in light of what has emerged, it would be idle to say that the F-tT's decision left the appellants in the dark about this issue.

31 **(b) Costs of transportation:** The F-tT was, in my view, entitled to accept the method by which the costs to ATA were calculated. That evidence was offered to the F-tT at the hearing and Ms Pilgrim's explanation in the witness statement (which I accept) supports it.

32 **Submission 2 – Access to mainstream integration:** the appellants arguments fell into two parts: (i) the F-tT's asserted failure to give weight to various items of evidence and (ii) a flawed credibility finding made against the appellants.

33 Argument (i) is a submission that the F-tT failed to give weight to items of evidence supporting the need for special educational provision by way access to mainstream integration for CD. The evidence included:

(i) Dr Joshi's report of 15 November 2016 referring to the benefit of mainstream access for the development of CD's social skills and behaviour (p111, FTB),
(ii) evidence that BHA could provide (and provided) flexible mainstream access (154, 156, FTB) as against the struggle ATA would have providing the same;
(iii) the appellants' consistently expressed view that this was important and
(iv) that a principal reason for the appellants choice of BHA was its ability to facilitate mainstream access.

34 I am unable to find any substance in this submission. It is up to the F-tT to decide the weight to be given to evidence. As a specialist body, it is particularly well placed to assess the weight of evidence on matters in its specialist field.

35 The issues it had to decide were whether CD reasonably required special educational provision in the form of access to mainstream integration. It certainly considered (i) and (ii) and, in addition, the evidence of CD's current teacher's description at BHA, of 'flexible access…with pupils hav[ing] opportunities to play and learn alongside their mainstream peers. CD benefits from this'. It also considered Ms Jackson's (the IPSEA representative's) view in a submission that ATA would struggle to put mainstream integration in place. It did not consider Dr Joshi's letter at page 111, written in 2016. I do not see how the omission to mention that letter was of continuing relevance in light of Dr Ramesh's, (her current consultant paediatric neurologist's) report about CD's excellent progress in November 2017 (p142). The Tribunal took a view, looking at the evidence on both sides fairly. The F-tT did not discuss each item individually ([26] – [27]). There is no requirement that a Tribunal attaches weight to each and every item of evidence individually. The matter before the Tribunal was one on which it had to form an impression.

36 In considering the evidence that could bear on this issue, the F-tT was rightly troubled by the parents' refusal to allow the LA to observe CD to assess her needs and the provision reasonably required. This would obviously put the LA at a disadvantage in deciding what, if any, mainstream integration was suitable for CD. The F-tT was also troubled by the sparsity of references to mainstream integration over time. The F-tT may have made mistakes of fact regarding the exact time at which the issue of mainstream integration was raised, but I am unable to see that it made their view untenable or irrational or perverse. The F-tT was entitled to take into consideration the parents' failure to refer to this factor in their choice of BHA in 2015 and in the annual review in May 2017. It was not mentioned in Ms Jackson's email in January 2018, shortly before the hearing was due to take place.

37 The appellants have repeatedly stated that AHA would 'struggle' to make provision for CD, should mainstream integration be considered appropriate. The fact that their representative stressed this does not make it so. AHA's evidence was that it could be arranged if reasonably required, though CD would be taken off site; of course, they had no idea if it *was* reasonably required, since they had been denied access to CD.

38 Since I am finding that there have been errors of law and am remaking the decision, I make the following findings of fact in case I am wrong about the adequacy of the F-tT's decision on this point. I have come to the conclusion that the evidence provided on this issue by the appellants was inadequate to show that special educational provision of this nature was reasonably required. Dr Joshi's letter was well out of date; Dr Ramesh merely said that 'it would be beneficial'. That is far from saying that it is required as special educational provision, as the F-tT itself states in [27] of its written reasons. Moreover, BHA's evidence on the provision of mainstream integration was woefully inadequate. CD's current teacher at BHA did not give any details of CD's access to mainstream integration let alone of 'a programme', and at page 154 BHA admits (at paragraph 12) that it is unable to quantify CD's interaction with mainstreamers except to say that such interactions as would occur would be short, require a high level of support to attend her physical and behavioural needs and so would require 1:1 or 1:2 input, and would be dependent on CD's mood. I have come to the conclusion that the appellants desire for mainstream integration is aspirational only. Indeed, it is almost impossible to see how this could be worded in a way which would meet the requirements of specificity if it were to have been included in an EHC plan.

39 Argument 2 was that the F-tT's conclusions on this issue were tainted by its 'highly negative view' of the manner in which it perceived the appellants to have raised this issue before the Tribunal [26] [27]. In particular, the appellants objected to the F-tT's comment about why the appellants did not seek a place for CD at a resourced unit in a mainstream school. The F-tT was, in my view, entitled to ask this question as a specialist panel.

40 The F-tT may have overlooked earlier references to the appellants desire for CD to have access to mainstream integration, but it is the finder of fact. It may make mistakes in finding facts, but unless its error leads to unfairness in the decision, the error of fact will not be treated as an error of law.

41 At the end of the day, however, the question is not whether the parents think that special educational provision should be made in this form, but whether the Tribunal, exercising its skill and judgment, accepts that such provision is reasonably required. On the evidence before it, it was certainly entitled to take that view. Any reasonable Tribunal looking at this evidence would have come to the same conclusion.

42 The remainder of the submission regarding the negative credibility finding is equally untenable. The F-tT were entitled to look at all the evidence on this matter, including the sparsity of references to mainstream integration, in making its decision. Tribunals, like other judicial bodies, must decide what evidence to accept and what to reject. Sometimes it must make findings that a party finds unpalatable, though that was not the case in this appeal. The F-tT simply did its job.

Submission 3: Section 9 of the Education Act 1996 - interaction of section 39 Children and Families Act 2014 .

43 As under the Education Act 1996, the CFA 2014 gives priority to a parent's wishes regarding the school (or institution) at which their child is to be educated. The parent's preferred school prevails under section 39(3) unless it can be overridden under one of the exceptions in subsection (4):

> 39 (3) The local authority must secure that the EHC plan names the school or other institution specified in the request, unless subsection (4) applies.
>
> (4) This subsection applies where—
>
> (a) the school or other institution requested is unsuitable for the age, ability, aptitude or special educational needs of the child or young person concerned, or
> (b) the attendance of the child or young person at the requested school or other institution would be incompatible with—
>
> (i) the provision of efficient education for others, or
> (ii) the efficient use of resources.

44 The similarity of section 39(4) to paragraph 3(3) of Schedule 27 of the Education Act 1996 is inescapable and Tribunals have had no difficulty applying these sections. What sometimes escapes their attention is the continuing application of section 9 of the Education Act 1996. This enshrines the 'general principle' that those who are charged with applying the Education Acts (which includes the CFA 2014) must have regard to the general principle that pupils are to be educated in accordance with parents' wishes.

> 9 In exercising or performing all their respective powers and duties under the Education Acts, local authorities shall have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure.

45 The need to read the special educational needs provisions of the CFA 2014 into the Education Act 1996 arises from section 83(7) of the CFA 2014.

> (7) EA 1996 and the preceding provisions of this Part (except so far as they amend other Acts) are to be read as if those provisions were contained in EA 1996.

46 Part 3 of the CFA 2014 is, of course, the new regime for children and young people with special educational needs or disabilities.

47 The long and the short of this is that there is a two-stage process for deciding whether parental choice is to prevail. If a Tribunal comes to the conclusion that an exception in 39(4) so that the parental choice need not be named in the EHC plan, it must nevertheless go on to consider whether the result is the same under the test in section 9.

48 It has long been decided in both the courts and Upper Tribunal that the tests under the old Schedule 27 paragraph 3(3) (which has now morphed into section 39(4)) and section 9 are different. It is not necessary to extend the length of this

decision by a detailed exposition of the well-known case law since the facts of this appeal admit of only one answer. It is enough to say that section 39(4) requires the LA or the Tribunal standing in its shoes to look at the resources of the LA itself whereas section 9 requires the Tribunal to take a 'holistic' look and take a wide view of public expenditure rather than just the resources of the LA.

49 The F-tT found that the exception in section 39(4)(b)(ii) applied: the child's attendance would be incompatible with the efficient use of resources on the basis of the very large difference of costs between the schools. The difference was some £30 or £40,000 in the cost of BHA and ATA, including the cost of home-to-school transport . It had some difficulty pinning down the figures, but [18] and [19] make findings on the evidence produced to it.

50 There was no dispute about the funding received by BHA. This was base funding of £10,000 and top up funding of £15,453. Transportation costs to BHA, which were not disputed, amounted to £24,677. The total was £50,130, or £40,130 if the base place cost was discounted.

51 ATA received top-up funding of £6500 and £10,000 for the base place. There was agreement that, for the remainder of the academic year, the cost would be a base cost of £4471 and a top of cost of £6500, totalling £10,971. Transportation costs of £562 had to be added, with a total of £11533. As explained earlier, the £562 was the figure for transportation in the table presented to the F-tT and UT as explained by Ms Pilgrim on the run-on bus. I have explained my reasons for accepting that figure earlier.

52 There was at the very minimum a £30,000 difference between the Academies. The appellants disbelieved that the funding available to ATA was sufficient to meet CD's needs, but I am unable to see any suggestion that there has been any fabrication of ATA's funding; and even if a SALT therapist had to be brought in several times a week, the cost gap would not begin to be closed. The only way the cost of ATA could begin to approach that of BHA depended on the submission that CD required a taxi and escort to get to ATA. I have explained why that cannot be accepted.

53 We are left with a vast disparity in cost. Although the F-tT did not refer to section 9 consciously, or use the words 'holistic', or 'public expenditure', or 'unreasonable' it may have applied the correct test. It does, after all, refer to a balancing exercise at [37], which is the hallmark of section 9, and it weighed the parental preference and CD's current attendance at BHA in the scales in her favour. It also weighed in the balance the parents' views on mainstream peers and the possibility of hydrotherapy more than once a week. Its approach was holistic within the evidence that was presented. It was unable to find that any of these factors provided sufficient ballast to justify the extra cost. I have decided that although the F-tT did not advert to the correct law, it carried out the correct weighing exercise. Any error is immaterial.

54 I do not recommend this as a way for Tribunals to make decisions. It is fraught with danger. Tribunals may easily go badly astray if they do not have the

relevant law in mind. The Tribunal in this case have managed to avoid falling into an abyss.

55 I would add finally that, it is in any event inconceivable that any reasonable Tribunal applying section 9 consciously could have come to any other decision other than that the additional public expenditure was unreasonable.

[Signed on original]

S M Lane
Judge of the Upper Tribunal

[Date]

14 February 2019