



OO and BO v London Borough Bexley
[2023] UKUT 223 (AAC)

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No. UA-2023-000184-HS

On appeal from the First-tier Tribunal (HESC Chamber)

Between:

OO and BO

Appellants

- v -

London Borough of Bexley

Respondent

Before: Upper Tribunal Judge Zachary Citron

Hearing date: 13 July 2023

Representation:

Appellants: Jack Anderson of counsel, instructed by Sinclairs law

Respondent: Tom Wilding of counsel, instructed by Legal Services,
London Borough of Bexley

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 25 October 2022 under number EH303/22/00010 involved the making of an error on a point of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set the decision aside and remit the case to a fresh panel of the First-tier Tribunal (HESC Chamber) (SEND). I direct that the file be placed before a salaried judge of that tribunal for case management directions to be given.

REASONS FOR THE DECISION

1. In what follows

- a. references to the “tribunal” and to the “decision” are to the First-tier Tribunal and its decision as referred to immediately above;

- b. numbers in square brackets are references to paragraphs of the tribunal's decision (unless otherwise indicated); and
 - c. references to "s" or "section" are to sections of Children and Families Act 2014.
2. This appeal concerns a boy of 5 (at the time of the decision), whom I will refer to as "Q". Q is the son of the Appellants.
 3. As the decision recorded, Q has a diagnosis of autism spectrum disorder with global developmental delay and sensory processing difficulties. The decision found that Q has difficulty in communication and interaction, sensory needs and social, emotional and mental health. It found that his complex needs and severe learning difficulties affect his ability to learn.
 4. The appeal to the tribunal was made under s51, which gives a right of appeal against, amongst other things,
 - a. the special educational provision specified in an EHC plan; and
 - b. the school named in the plan.

The tribunal allowed the appeal in the sense that Sections B (special educational needs) and F (required special educational provision) of Q's EHC plan were amended; the appeal in respect of Section I (named school) was dismissed.

The grounds on which permission to appeal was given

5. On 1 May 2023 the Upper Tribunal issued Upper Tribunal Judge Ward's decision granting permission to appeal limited to the matters in the following paragraphs of his decision:
 - 11. The focus therefore needs to be on the [tribunal]'s application of the limb (i) [of s39(4)(b)] test. I have a concern, not articulated in the original grounds of appeal but contained within [OO]'s "additional submission" prepared for the hearing before me, which I consider is potentially germane. A very strong factor in the [Respondent]'s case and the [decision] were the difficulties that would be caused by a lack of space for Q, particularly in the context of his needs and those of the existing pupils who as a result of their ASD "require space and limitations on disturbance and activities present" (decision, paras 59 and 60). Ms Freame's evidence (see e.g. D95/p570 at [19] and D100/p575) clearly envisages that Q will need 1:1 and in some instances 2:1 provision, something which is clearly highly relevant to the feasibility of accommodating a pupil where space is limited. However, that is not what the EHCP, as ordered by the [tribunal], says. Without reciting all the references, an example may be found in Section F under "Targeted Intervention": "Interventions... may be

delivered in a 1:1, small group or as a small class.” Clearly Ms Freame was of the view that Q needed a level of provision that was more than her school was willing or able to provide, but going on the terms of its order, that was not also the [tribunal]’s view.

12. It is arguable with a realistic prospect of success – which is all [OO] needs to show at this point – that the [tribunal], particularly in its finding in [60] that “the quality of provision for existing pupils will be materially affected” (my emphasis) was not applying the statutory test, as interpreted in paras 32-36 of *NA v LB Barnet (SEN)* [2010] UKUT 180 (AAC) (though it would be a mistake to latch on to one particular statement within those paragraphs in isolation).

13. Even if it was applying the statutory test, so interpreted, it is also arguable that in doing so the [tribunal] took into account irrelevant matters (namely the provision considered by Ms Freame to be necessary but which the [tribunal] itself did not order – thus a form of “gold-plating” – see [11] above) and/or that there were insufficient findings of fact and/or reasons given to explain to the reader the basis on which the test in limb (i) was made out.

The Upper Tribunal hearing

6. I am grateful to both counsel for their very helpful submissions, in writing and orally.

Why I have found that the decision erred in law

Section 39 – what happens when a parent requests a particular school

7. Section 39 is engaged in this case because Q’s parent had requested the Respondent to secure that a particular school – Woodside Academy – was named in Q’s EHC plan. Under s39(3), the Respondent had to secure that Woodside Academy was so named, unless s39(4) applied.
8. Section 39(4) applies in three different circumstances (applied to the facts of this case)
 - a. where Woodside Academy was unsuitable for the age, ability, aptitude or special educational needs of Q; or
 - b. where Q’s attendance at Woodside Academy would be incompatible with
 - i. the provision of efficient education for others; or
 - ii. the efficient use of resources.

The decision's reasoning

9. The decision dismissed the appeal against the school named in Q's EHC plan – Shenstone School – on the basis of s39(4)(b)(i) above.
10. The decision's reasoning as to why Q's attendance at Woodside Academy would be incompatible with the provision of efficient education for others, set out at [55-61], proceeded as follows:
 - a. it first set out the parties' submissions and referred to their key evidence. In particular, as regards the evidence of Mrs Freame – the head teacher of Woodside Academy (and the Respondent's witness) – the decision noted that this was to the effect that
 - i. Q has needs beyond those that can be met in Woodside Academy
 - ii. Q requires continuous adult support
 - iii. there is limited space for "probably necessary" individual learning assistance and "possible" 2:1 assistance during the transition period (as Q requires a play-based curriculum (not available at Woodside Academy) and constant supervision;
 - b. the decision then said that the tribunal panel were impressed with Mrs Freame's evidence (and explained this (at least in part) by saying that Mrs Freame had
 - i. significant knowledge of pupils with ASD, based on experience and training; and
 - ii. knowledge of the different curricula in Woodside Academy and Shenstone School);
 - c. the decision then said that the tribunal panel were satisfied that both schools could devise, and have the knowledge to deliver, an appropriate curriculum; and both were potentially suitable;
 - d. at [59], the decision said that
 - i. the tribunal had detailed evidence of Woodside Academy's pupil numbers and organisation;
 - ii. evidence from Woodside Academy and from Mrs Freame stated that the academy was "full" and did not have the space to admit another pupil without affecting the provision for existing pupils;

- iii. Mrs Freame’s oral evidence spoke of the particular difficulties of accommodating additional dedicated teaching assistants that Q would require.
- e. then, at [60], the decision made two main points:
- i. it first explained its view that Q *would* (contrary to OO’s view) require “additional support”. This is because
 1. even if within the range of needs in his class, Q would be at an extreme; he could not easily fit in with the teaching described;
 2. Section F of Q’s EHC plan is “particularly full”; it emphasises input for speech and language and sensory difficulties;
 3. the tribunal panel accepted Mrs Freame’s expertise and experience and attached weight to her views;
 - ii. it then stated that the quality of provision for existing pupils would be materially affected. It explained this by saying that
 1. the other children involved had ASD and required space and limitations on disturbance and activities present;
 2. the provision (at Woodside Academy) had been carefully designed and staffed; and so there was little leeway at Woodside Academy;
 3. consideration such as those above are even more significant for a pupil with Q’s requirements;
 - iii. it concluded that Q’s attendance at Woodside Academy would lead to the inefficient education of others; and then stated the Woodside Academy was “effectively full”.

The parts of Section F to which the decision was alluding re: Q’s requiring “additional support”, etc

11. When the decision at [60] expressed that view that Q *would* require “additional support”, and stated that Section F of Q’s EHC plan was “particularly full”, it was to the following extracts from Section F of that plan (as amended by dint of the decision) that, in my view, the decision was alluding (with underlinings by me to bring out the relevant aspects):

Targeted Intervention

Interventions offered in the education setting to support [Q's] identified areas of need which may be delivered in a 1:1, small group or as a small class. This is to be delivered by designated education staff trained with working with a child with ASD, language and learning needs. Any intervention offered will be delivered throughout the academic year and included in class lessons, where possible. Communication targets linked to this intervention will be monitored by the teacher.

[Q] will need all adults to regularly use clear, explicit, unambiguous language when communicating with him. When explaining a task to [Q], all adults will need to use simple words combined with visual cues (e.g. pictures, objects, signs, symbols, and gesture, touch and actions) and simplified sentences that are broken down into manageable steps. [Q] will need daily practical experiences to reinforce language in teaching situations. For example, visuals can be worn on lanyards by all Teaching Staff working with [Q] to enable easy access and offer additional opportunities for him to understand information that is being shared with him. Adults will need to provide instructions to [Q] one at a time; gradually increasing the demands in terms of length and complexity. Adults will need to ensure understanding through, asking him to repeat instructions back where necessary / appropriate and/or checking that he understands e.g. asking him "what are you going to do?" after an explanation has been provided.

Through a range of play situations, adults will need to continue to make a commentary on [Q]'s actions and those of others to model the use of simple language, gestures and signs. Adults will need to repeat instructions or directions frequently and allow [Q] enough time to develop an understanding of what he is being told. Adults will need to support [Q] with increasing his vocabulary and develop his understanding of language with practical experience to reinforce language in teaching situations through using objects such as small world toys to model language.

...

Say [Q]'s name to gain his attention, and give instructions to [Q] one at a time (chunking).

...

[Q] also requires access to small group and 1-1 work to develop his play skills and early learning skills through modelling and direct teaching.

...

[Q] will need a highly structured transition plan to support his move into school. A staggered entry into school, the use of visual cues / a transition book, and careful monitoring of his response to situations in the early term will be highly important. Adult supervision and support would be helpful initially to enable him to navigate his new

environment and provide opportunities for teaching of the skills needed.

[Q] will need adult support to access a foundation stage curriculum with the continuous use of a range of differentiated techniques, with an emphasis on using visual prompts. The foundation stage curriculum will need to be personalised for [Q]. For example, he will need ongoing individual and group support to develop his skills in all areas of development. [Q] will also continue to need access to tasks that are short in duration and are clearly explained, modelled, scaffolded and broken into short, manageable chunks. ...

[Q] needs access to individual adult modelling, repetition and overlearning throughout the school day to support his learning and retention of skills. It will be important for [Q] to continue to build relationships with key adults who can base learning and direction around his strengths and interests, develop his confidence and continue to promote his independence.

[Q] will need daily structured sessions, away from the main classroom environment if needed, to engage in adult-led differentiated structured activities. Adults will need to continue to use techniques such as the now and next approach, with visuals, where [Q] does an adult-led activity and then engages in a highly motivating activity for him. The adult-directed activities will need to initially incorporate his interests and be very brief, with a view to extending the time that he is expected to engage before doing his 'next' activity. ... In addition, to promoting [Q]'s sustained attention on one task, the backward chaining strategy will need to be used by a key adult daily. Backward chaining involves initially presenting an almost-complete task for [Q] to finish and gain a sense of achievement. As [Q] gains confidence, more and more of the task will need to be left for him to do without adult support. ...

Once [Q] is more secure in his choice-making and engagement in his structured sessions, consider the introduction of a visual choice board (displaying pictures of a range of activities where [Q] has to select one) or the use of colour coding in conjunction with a choice board. Brief but regular opportunities for an adult to join [Q] in his play and attempt to model skills to extend his play will need to be woven into his daily schedule.

[Q] will need daily guidance and modelling/hand over hand support with the development of his early play skills and focus. For example, messy play activities will need to be introduced gradually with the consideration of his sensory sensitivities in mind. The use of a treasure basket may help to develop [Q]'s focus on an individual 1:1 basis. It will be important, when focusing on [Q]'s attention skills that he is in a calm, quiet environment with minimal distractions. ...

Due to [Q]'s developmental stage and current attention levels, he will initially need adults to engage him in daily short activities of five minutes or less that are achievable, and the duration of the activity will then need to be gradually increased. ...

[Q] will need adult support during group work/whole class work to develop his attention and focus, and build his understanding. Those leading the group will need to use a total communication approach to support [Q], and he requires physical/visual cues to support his understanding of what is happening. For example, during stories, [Q] could have his own copy of the book to look at and/or props which are used by the adult to support his attention. ...

The use of visual prompts (e.g. visual timetable and a waiting sign) will need to be provided for building [Q]'s understanding of routines and expectations rather than just using spoken or written words during interactions. Also, [Q] will need to be provided with visual aids by a key adult to support with transitioning from one activity to another. For example, the use of a sand timer and counting down towards the end of activities can be used to help [Q] with the understanding of when to transition from one task to the other. This will also provide [Q] with an understanding of task duration and completion. Constant prompting will be needed for [Q] to understand the duration of the task. ...

Give daily opportunities for [Q] to experience a Special Times approach, where the adult follows his lead; observes what he is doing or showing interest in and imitates his actions and sounds. Use the strategy of 'intrude' to get in on his act, give a running commentary on his play, copy his actions – it may be easier initially to have a duplicate set of toys to copy with to work towards sharing. Gently insist on a go, but finish the games before he gets too frustrated and move him onto something else if he is getting angry or distressed. Keep trying briefly and opportunistically through the day. ...

In a structured learning and predictable environment, [Q] will need a high level of support on a daily basis from adults who have experience of, or access to, training and understanding of children with Autism Spectrum Disorder (ASD), Global Developmental Delay, speech and language difficulties and sensory processing needs.

...

Daily, adults will need to continuously make use of the Intensive Interaction approach to support [Q]'s understanding.

...

[Q] will need adults to model appropriate play skills (e.g. cooperative play) with one or two children and encourage him to participate effectively in small group learning activities on a daily basis. For example, reciprocal play could be used as part of group activity where [Q] can be encouraged to take turns when interacting with one or two other children and adults in various contexts. [Q] may find it easier to understand the world and his environment through engaging in role play facilitated by an adult with the use of visual support. Role play could be used to promote the development of [Q]'s play, where adults could demonstrate turn-taking (e.g. building train tracks and pretending to feed a doll) and encouraging [Q] to do the same. Adults will need to describe on their actions and make use of language such

as “your turn” and “my turn” which will help [Q] to follow his own agenda as well as being led by others (children and adults). Adults will need to use visuals (e.g. wait card) and or an object of reference (coloured cloth) that symbolises when it is [Q]’s turn during an activity.

...

To demonstrate a graduated approach to developing [Q]’s interaction skills, he will need adult support (from a qualified teaching professional) to help him to verbally communicate with other children and respond to their initiation. This can be done by adults scaffolding and modelling appropriate simple language and non-verbal approaches to [Q] that he can use in social situations on a daily basis. When required, adults will need to also intervene in situations where [Q] requires support to initiate and respond to play and peer work with other children. [Q] will need adults to help other children understand how he communicates best with others. Ready, Steady, Go games will need to be implemented by an adult to contribute to supporting [Q]’s engagement with others. Once [Q] is confidently engaging in play with adults, he could be encouraged to interact with one peer, this could then be extended to two and then three peers. ...

When encouraging [Q] to follow adults directed and chosen activities, he will need adults to model out loud ‘their thinking’ when engaging with him, e.g. “I do this when I... and I think this when I do”. For example, when [Q] is playing with kitchen toys, adults could join in by pretending to bake a cake and showing him the steps while demonstrating their thinking aloud. The use of sand timers and counting down will need to be used to help [Q] understand and cope with the ending of tasks. ...

Education staff will support [Q]’s Occupational Therapy needs as part of daily curriculum and school life, using universal strategies, including trial of general sensory strategies to support regulation.

...

[Q] to receive targeted intervention. Interventions offered in the education setting to support identified areas of need which may be delivered in a 1:1, small group or as a small class, for example fine motor and pre-writing activities.

[Q] requires individualised sensory circuits based on needs and engagement.

Interventions will be delivered by designated education staff trained with working with a child with ASD and receiving support from OT.

...

[Q] requires adult support to implement the OT’s recommendations. He would benefit from small group working/class sizes where there is less noise and fewer distractions.

...

[Q] will require an ongoing systematic toilet training programme until he has fully developed this skill (e.g. using the toilet independently without adult prompts:

- a. regular reminders “do you want the toilet”, perhaps reinforcing this with the use of the visual cues; regularly placing him on the toilet and encouraging him to take a favourite toy with him to the toilet.
- b. frequent checking that he is dry/clean with positive feedback (praise, sticker on jumper, star on chart, etc) if clean/dry; similarly praise and rewards for when he indicates he needs the toilet or uses the potty. Adults will need to look out for the times [Q] often urinates or releases his bowels in his nappy and encourage him to use the toilet during these occasions.
- c. ensuring that he receives a high level of positive feedback and attention for actions other than toileting (i.e. trying to make toileting one of many things in the day, trying to avoid making it a high-level issue) ...

Continue to give [Q] daily access to a variety of different sensory experiences and activities. ... [Q] may respond best to adults modelling and scaffolding activities for him initially before the expectations upon him are gradually increased (e.g. starting with touching the items indirectly, building up to adults allowing [Q] to repeat the modelled actions independently following practice with an adult).

Staff will need to consider the physical environment carefully, particularly on transition between year groups and ensure that [Q] has adequate supervision in new environments, e.g. on school trips, given his reduced danger awareness and reduced attention to his environment.

Adult will need to facilitate the use of visuals and role play with [Q] to help him identify and develop his understanding of safe and unsafe behaviours. [Q] will need adults to give him plenty of processing time to develop an awareness of danger and increase his awareness of danger for himself and for others: for example, take care when climbing on the climbing frame. [Q] will need constant daily adult supervision during structured and unstructured times of the school day due to his limited sense of safety. ...

[Q] will need monitoring in the playground, at least initially at school to ensure his safety – this will be best accomplished by creating a ‘circle for friends’ or a number of buddies, who take turns to play with him to ensure he is safe. ...

Discussion

12. Although it states that the quality of provision for existing pupils at Woodside Academy would be “materially affected” by Q’s attendance there, the decision does not, in terms, explain why that “material effect”

on the quality of provision *would unavoidably result in the quality of education provided to those other pupils falling below the threshold standard of "efficient education"*. That this is the statutory test is clear enough from the words of s39(4)(b)(i); but it was also so articulated by the Upper Tribunal in *NA v LB Barnet (SEN)* [2010] UKUT 180 (AAC) at [32-34] (with key passages underlined, by me):

32. Mr Lawson for the parent relied on the statement of Gibbs J in *Essex County Council v SENDIST and S* [2006] ELR 452 at paragraph [29] that the word 'incompatible' is a strong term, with a suggestion that it has a stronger meaning than "prejudicial to". Essentially the same point was picked up in *[R (Hampshire CC) v R]* [2009] EWHC 626 (Admin)] in paragraph [57], set out in paragraph 29 above, and paragraph [56]:

"In considering ... whether J's attendance at Dove House School would be incompatible with the provision of efficient education for the children with whom he would be educated, [the new tribunal] should consider not just the question which they appear to have considered, whether it would have an impact on the efficiency of the education of those children, but whether that impact is so great that his attendance would be incompatible with the efficiency of their education."

33. Mr McKendrick for the local authority did not dissent from those propositions of law. However, he submitted, picking up on a point raised during the hearing on 31 March 2010, that the central issue was the efficiency of education. He accepted that it was not enough for the purposes of paragraph 3(3)(b) that the quality of education provided for other children would be reduced from the very highest standard to something a little lower. But, on the other hand, he submitted, it did not have to be shown that no meaningful education at all would be provided for some other child or, as the head teacher had put it in his statement, the admission of the child in question would tip the school into failure.

34. I agree with Mr McKendrick in that respect, which is not in any way inconsistent with the propositions in paragraph 32 above. "Efficient education" indicates a standard, not the very highest desirable standard or the very basic minimum, but something in between that I suggest that the members of the First-tier Tribunal are uniquely qualified by their expertise and experience to recognise in particular cases. Although "incompatible" is indeed a very strong word, indicating that there is no way of avoiding the admission of the single child involved reducing the quality of education provided to some other children with whom he would be educated below that standard, its force must be applied in the context of that standard.

13. The question in this appeal (relevant to whether the decision erred in law), is whether, despite the decision not explaining, "in terms", its reasoning on this key issue, it is, nevertheless, adequately clear from the decision as a whole, why Q's attendance at Woodside Academy (including the "material effect" that would have on the quality of provision for existing pupils, per the decision) would result in the

education of those other pupils falling below the “efficient education” standard.

14. In terms of understanding the “efficient education” standard, I note that the SEND code of practice (to which, under s77, the tribunal must have regard) states at 9.79 that efficient education means providing for each child a suitable, appropriate education in terms of their age, ability, aptitude and any special educational needs they may have.

15. Mr Wilding argued that it *is* adequately clear from

- a. the decision as a whole and/or
- b. Mrs Freame’s evidence (to which the decision referred, favourably, and which the decision, at least in part, recorded)

why the *material effect* of Q’s attendance on the quality of provision to existing Woodside Academy pupils, as expressly found by the decision, was an effect that reduced the quality of that education to below the “efficient education” standard.

16. I cannot accept this submission on the basis of express findings made in the decision itself: whilst the decision

- a. expressly found that Woodside Academy was “full” and had “little leeway”, and
- b. did, in the extracts from Section F set out at paragraph 11 above, clearly require adult support for Q in numerous ways,

this was, in itself, inadequate to explain why Q’s attendance would, unavoidably, reduce the standard of education for other pupils below the “efficient education” standard. The test now at s39(4)(b)(i) is, as was noted in *NA v Barnet* at [31], [36] and again at [39], a “sophisticated” one, in that it requires, in the circumstances of this case, a degree of precision and/or detail as to

- i. which other children’s education would be affected by Q’s attending Woodside Academy?
- ii. was the standard of those other children’s education currently at, or above, the “efficient education” standard?
- iii. what effect would Q’s attendance have on the standard of those other children’s education?
- iv. if the effect was to reduce the standard below that of “efficient education”, was that unavoidable or, for example, could adjustments reasonably be made to avoid that effect?

17. I now consider Mr Wilding's proposition taking account, in addition to express findings made in the decision, evidence of Mrs Freame which is expressly referred to in the decision as *evidence* (rather than incorporated into *findings of fact* expressly made in the decision). In general, I accept the proposition that where the decision has expressly referred to Mrs Freame's evidence, then, given the decision's references to the tribunal being *impressed* by her evidence and *attaching weight* to her views, it is appropriate to treat that evidence as part of the decision's "explanation" of its conclusions. However, in my view, the evidence of Mrs Freame as expressly referred to in the decision, does not take matters further as regards Mr Wilding's proposition (that it is adequately clear that the *material effect* of Q's attendance on the quality of provision to existing Woodside Academy pupils, as found in the decision, met the test of s39(4)(b)(i): the evidence referred to says that Woodside Academy was "full" and Q's attendance would "affect" provision for existing pupils, but these statements suffer the same weakness as I identify at paragraph 16 above. The same can be said of evidence of Mrs Freame referred to in the decision as saying that there was "limited space" for "probable" and "possible" individual learning assistance – and this has the additional weakness, in terms of providing "adequate" reasons, of being uncertain about whether the assistance in question was *required* special educational provision as *determined by the tribunal* (more is said about this latter aspect at paragraph 21 below).

18. I now cast the net yet more widely and consider Mr Wilding's proposition in the light not just of findings expressly made, or evidence expressly referred to, in the decision, but also of relevant parts of the witness statement of Mrs Freame dated 15 September 2022 (in other words, in the light of arguably relevant evidence before the tribunal).

19. The more relevant passages from that witness statement were as follows (with my underlining of those parts which appear to address the question of the impact on provision for existing pupils of Q's attending Woodside Academy):

a. at paragraph 11, Mrs Freame said that Woodside Academy had significantly exceeded its capacity in its current reception to Year 2 cohort in September 2022. There were 8 children in reception and 12 children in Year 1 and in Year 2.

b. at paragraph 12, Mrs Freame said:

"To exceed numbers in any of these class groups will severely compromise the current effectiveness of [the academy's educational] provision by increasing maximum capacity causing negative impact upon staff-pupil ratios, available space, resources and developmental progress & outcomes for all pupils. Our pupil numbers have been carefully planned in order to enable us to deliver the

statutorily required educational provision for Early Years to high standards.”

- c. at paragraph 13, Mrs Freame said that all classes were full to capacity and said:

“Any increase in numbers beyond this number compromises the available space, our high quality provision and the efficient education of the other pupils in this phase.”

She further said:

“The addition of a further pupil and linked adult support would impact significantly upon the quality of provision we can offer the other pupils. Should Q be placed at Woodside Academy, this would have an adverse effect on the quality of resources and provision offered for each of the current pupils and indeed for him. It is therefore not possible to admit a further child to this phase or Y1, as the degree of detrimental impact on all children, including Q, would be too great. To proceed to do so would be irresponsible on our part as we would knowingly be placing the cohort in a more anxiety-inducing environment and crucially this would negatively impact on the progress that the children can make Admitting Q would therefore be incompatible with the provision for the efficient education of others and would compromise the effective use of resources”.

20. Although the underlined phrases above contain some noticeably strong language (“severely” compromise; a degree of detrimental impact that would be “too great”; to proceed would be “irresponsible”), it cannot be said that these statements address the question posed by s39(4)(b)(i) in the “sophisticated” (i.e. careful and precise) way required. For example, they speak forcefully of “compromise” to the educational provision to existing pupils, but do not explain whether or how the effect of that compromise would be to reduce the standard below that of “efficient education.” Mrs Freame does, of course, use that phrase in the extracts above, but what her statement does not provide is a detailed and/or precise explanation along the lines I set out in paragraph 16 above. That is, of course, entirely unsurprising: Mrs Freame is an educator and a witness in the proceedings; the methodical explanation along the lines set out at paragraph 16 above is for the *tribunal* to undertake. The difficulty here is that the decision does not, on its face, reflect such an approach having been taken; in my view, that failing cannot be made good by incorporating passages from a witness’ statement – even a witness whom the tribunal clearly found to be credible and reliable – as they do not approach, and

explain, matters to the standard of adequacy required of a decision of the tribunal.

21. A further difficulty in relying on Mrs Freame's evidence to "plug the gaps" in the decision's reasons as to the effect on provision for existing pupils of Q's attendance at Woodside Academy, is that Mrs Freame, for obvious reasons, did not know the special educational provision required by Q, *as determined by the tribunal*. I accept that, in broad terms, the decision's finding that Q would require "additional support" was in line with Mrs Freame's view of matters; but a broad-brush approach is inadequate for the "sophisticated" test of s39(4)(b)(i) i.e. the test must be approached with the precise special educational provision required by the newly-attending child in mind.

Conclusion

22. I conclude that the ground of appeal, to the effect that there were insufficient findings of fact and/or reasons given to explain the basis on which the test in s39(4)(b)(i) was satisfied, has been made out.

Why I have decided to set aside the decision and remit the case to a fresh tribunal

23. The error of law identified is clearly material and so it is right that I set the decision aside. It is also right that I remit the case to a fresh tribunal, rather than re-make the decision, as detailed findings of fact must be made in order to apply the statutory test correctly, and the fact-finding tribunal is best placed to do that. Mr Wilding submitted that, if I were to take this course, I direct that the tribunal only consider the appeal against the school named in Q's EHC plan (i.e. preserve the (set-aside) decision so far as Sections B and F of that plan are concerned). I have not thought right it to do that largely because about a year will have passed (since the hearing of the tribunal whose decision I have set aside) by the time the remitted case is heard: this is a significant period, particularly in the life of a young child, and there may well be changes that should be reflected in those sections of Q's EHC plan (which may in turn impact on the tribunal's consideration of Section I (the named school)).

Zachary Citron
Judge of the Upper Tribunal

Authorised for issue 2 August 2023