HS/3212/2015

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Before: Mr E. Mitchell, Judge of the Upper Tribunal

Hearing: 25 July 2016, Field House, Bream's Buildings, London

Attendances: For the Appellant Gloucestershire County Council, Mr Mark Small (solicitor) of Baker Small Solicitors, instructed by the local authority's legal department

For the Respondent Miss G, Mr Tom Tabori (counsel), instructed by the Coram Children's Legal Centre

DECISION

Under section 12 of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal decides as follows:

This appeal is DISMISSED. The decision of the First-tier Tribunal (ref. EH 916/15/00013), taken on 1 October 2015, did not involve the making of an error on a point of law.

Under rule 14(1) of the Upper Tribunal (Tribunal Procedure) Rules 2008 I hereby make an order prohibiting the disclosure or publication of any matter likely to lead to a member of the public identifying the young person who is the Respondent to this appeal. This order does not apply to (a) any person to whom the young person discloses such a matter (and this includes any permitted onward disclosure or publication), and (b) any person exercising statutory (including judicial) functions in relation to the young person.

REASONS FOR DECISION

Terminology

1. In these reasons:

- "2014 Regulations" means the Special Educational Needs and Disability Regulations 2014;

- "CFA 2014" means the Children & Families Act 2014;

- "EA 1996" means the Education Act 1996;

- "EHC", as in EHC plan or EHC assessment, refers to education, health and care;

- "SEN" means special educational needs;

- "transitional order" means the Children and Families Act 2014 (Transitional and Savings Provisions) (No. 2) Order 2014 (S.I. 2014/2270).

Introduction

2. This appeal concerns the obligations of local authorities in England under the CFA 2014 towards young people (aged under 25 and over compulsory school age) with special educational needs.

3. It has not proven necessary, as at one stage seemed likely, for the Upper Tribunal to make findings about the application of the CFA 2014 to young people who are in, or intend to pursue, higher education. This is because the young person concerned did not, by the time the appeal came before the First-tier Tribunal, intend to pursue a course of higher education. The main point of law concerns the task of the First-tier Tribunal on a CFA 2014 appeal, in particular whether or not it should consider a young person's current circumstances. I decide that it must (and did so in this case).

Background

The 'transfer review' assessment

4. In July 2014 the local authority issued a statement of SEN for Miss H, who was born in June 1997. The statement recorded that Miss H had not attended school since November 2013 "because of high anxiety levels" although the evidence before the First-tier Tribunal showed that she subsequently returned to school but stopped attending again in March 2015. The required educational provision in Part 3 of the statement included "a gradual and sympathetic reintegration into school". Part 4 of the statement (placement) specified "mainstream secondary school; High School for Girls, age range 11-18 years".

5. In anticipation of Miss H's eighteenth birthday, the local authority carried out a "transfer review" to determine whether she was entitled to an EHC plan under the CFA 2014. A number of assessments were carried out and reports obtained.

6. A report from the local authority's advisory teaching service, undated but which seems to have been produced in March 2015 since it was prompted by Miss H's withdrawal from school in that month (p.81 of the First-tier Tribunal appeal papers), stated that she was "very undecided about her [educational] future". The report also stated that Miss H "experiences extremely high levels of anxiety with all kinds of communication, including written

communication such as emails and texts". Within the report's outcomes section, there was no mention that Miss H wished to follow an Open University course.

7. The local authority's Children and Young People Service produced a report dated 7 April 2015 (p.79) which stated Miss H had no social contacts outside the family home, suffered from significant levels of anxiety, at times resulting in selective mutism, and low mood. So far as Miss H's educational future was concerned, the report stated "we are currently discussing further options in terms of support for [Miss H] as support from CYPS will stop on her eighteenth birthday".

8. A NHS speech and language therapy report, dated 10 April 2015 (p. 77) recorded that "[Miss H's] anxieties around speaking increase outside of the home and she finds that she is unable to speak to most individuals in the school setting". The report identified a form of therapy ("sliding-in therapy") which might benefit Miss H but not at the moment due to "her increased levels of anxiety and changes in her educational situation".

9. The local authority's Youth Support team assessed Miss H. Their report of 30 April 2015 (p.74) included a single outcome which was that, with support, Miss H "will begin to explore [her] future options around training and education".

10. A psychologist, Dr Stevens of the local authority's education psychology service, carried out an assessment on 3 June 2015. The psychologist's report (p.69) recorded Miss H's view that "she was not sure what she would like to do next" but that her mother informed the psychologist that Miss H "has considered applying for an Open University course [although] communicating with course providers through email could be difficult for her, but this is a possibility for the future". The report also stated that Miss H "has experienced very high levels of anxiety at school which has significantly impacted on her ability to attend school". Within the outcome section, the report stated "[Miss H] attends an educational course and gains qualifications" but made no mention of Miss H pursuing an Open University course.

11. An independent psychologist, Ms Bliss, assessed Miss H for the purposes of her transfer review. Her report (p.58), dated 8 June 2015, recorded that Miss H "is upset by the fact that she is not receiving any education and at the moment she is unable to access the jobs market" and "wants to continue with her 'A' level studies". The psychologist's opinion was that, if an appropriate school could not be found, the local authority should pay for Miss H to be home-educated using the sum of approximately £20,000 that Miss H's statement of SEN had earmarked to secure the special educational provision she required. The report also stated that Ms Bliss had seen Miss H a number of time previously but her clinical impression was that, on this occasion, "her mental health and ability to cope in social situations has decreased considerably".

12. On 17 June 2015 the local authority carried out an assessment, described as a "FACE core assessment". While this was carried out by the authority's adult social care department it was

described as "request for assessment due to a transfer to an [EHC] plan". The report of this assessment (p.54) recorded that due to her condition Miss H "had not fulfilled her higher educational aspirations" and recorded her need for "support to find, engage and participate in work, training and education".

13. On 20 July 2015 (after the local authority refused to prepare and maintain an EHC plan) Miss H's Consultant Child and Adolescent Psychiatrist, Dr Gowda, wrote a letter in support of her attempts to secure an EHC plan:

> "her mood and anxiety are compounded by the uncertainty about her future career goals from an educational, training or vocational basis. Given her significant mental health difficulties, she will require extensive support and consideration of a part time approach given her significant anticipatory anxiety as well as social phobia. The latter has restricted her access to higher education as there is also a requirement to interact in a group".

12. To sum-up, all the assessment reports, as well as other documentary evidence within the First-tier Tribunal appeal papers, can fairly be described as painting a clear picture of the devastating effect on Miss H of her high levels of general and education-related anxiety. I am not an expert in psychology or psychiatry but rarely have I dealt with a case before the Upper Tribunal involving a child or young person with a documented history of such significant education-related anxiety.

The local authority's decision not to prepare and maintain an EHC plan

13. On 15 July 2015 the local authority notified Miss H that they had decided not to 'transform' her statement of SEN into an EHC plan, giving the following reasons:

(a) Miss H's parents, whom she had authorised to act on her behalf, confirmed at a meeting on 18 June 2015 that Miss H intended to undertake a higher education course, through the Open University, starting in Autumn 2015;

(b) "an EHC [plan] can only be issued where a young person is intending to remain in a school or plan to attend a Further Education College" and "EHC [plans] do not apply to students undertaking courses in the higher education sector".

Proceedings before the First-tier Tribunal

14. Miss H appealed to the First-tier Tribunal against the local authority's decision and she authorised her mother to act as her representative. In Miss H's notice of appeal, dated 24 July 2015, it was argued:

(a) the authority failed to take account of the reasons why Miss H became home-educated, in particular that her school placement broke down in March 2015 before she took her AS-Level examinations because the authority failed to provide the special educational support to which she was entitled;

(b) it was unclear what the authority had decided about the nature of Miss H's SEN;

(c) Miss H had not committed herself to pursuing an Open University course and the authority were "fully aware that all education/training options are still under consideration";

(d) the authority ignored Miss H's inability to cope with transition to college, or in starting an apprenticeship, "without substantial and well planned support", and her coping problems were in part due to the authority's previous failure to meet her special educational needs.

15. The local authority's written response to the appeal, dated 21 August 2015, argued:

(a) in June 2015, when the authority carried out a 'transfer review' they were advised that Miss H had been offered a place to study a course of higher education at the Open University starting in Autumn 2015;

(b) Miss H, through her parents, now claimed to be unable to "access" an Open University course and wished to consider alternative courses although none were identified: "as a result, it is not clear why an EHC plan is required";

(c) Miss H's parents failed to respond to the authority's attempts to obtain clarity as to her educational intentions;

(d) in the event that Miss H did not study with the Open University the authority was "willing to review its decision not to issue an EHC plan" but, while her stated intention remained to study with the Open University, the CFA 2014 precluded the authority from issuing an EHC plan;

(e) Miss H's statement of SEN ceased when she attained 18 so that the present appeal had to be a challenge to the authority's decision not to issue an EHC plan.

16. On 7 September 2015, the local authority applied to the First-tier Tribunal for a direction requiring Miss H's parents to clarify her educational intentions. The authority also requested that, if Miss H no longer wished to study at the Open University, they be given further time in which to reconsider whether to issue an EHC plan.

17. Miss H's mother responded by email:

> "[Miss H's] position remains unchanged, i.e. that she has and continues to request an EHC [plan] to reflect her need for a bespoke package of SEN, taking account of her personal difficulty in accessing any conventional educational course or training pathway ordinarily afforded to young people.
>
> We consider the position to be quite clear i.e. [Miss H] requires a bespoke package of special educational support as defined by an EHC [plan] to enable her to access education".

The First-tier Tribunal's decision

18. The First-tier Tribunal heard Miss H's appeal on 1 October 2015 and gave its decision on 6 October 2015. The Tribunal allowed Miss H's appeal and ordered the local authority to prepare and maintain an EHC plan for Miss H.

19. The Tribunal found that in June 2015 Miss H expressed a wish to undertake an Open University course but "during the summer of 2015 it became clear to [Miss H] that she was not ready to study at the Open University, not least because she did not have the necessary skills to undertake online learning". University study remained Miss H's long-term goal but for the time being she wanted her home tuition to continue (the local authority were, at the date of the hearing, funding two hours home tuition per week).

20. The Tribunal decided that the legal test in section 37(1) CFA 2014 was met. An EHC plan was necessary for the following reasons:

(a) there was no evidence that any of Miss H's SEN "had ameliorated" since her statement of SEN was issued in 2014 and "in order to support its case that an EHC [plan] is not necessary [the local authority] needed to produce some evidence of change which it did not do". Examples of the evidence the authority could have produced included evidence to show how Miss H could be supported without an EHC plan in school, at a college of further education or by way of home study;

(b) since Miss H had no immediate plans to attend the Open University an EHC plan was "back on the agenda";

(c) the evidence showed that "substantial and specialised provision will be required in future if [Miss H] is to re-engage with education";

(d) "the argument that the [authority] is not in a position to issue an EHC [plan] because it does not know what [Miss H] wishes to do is without merit" because "the test is one of necessity and not one of placement".

Legislative Framework

The transitional order accompanying the commencement of the Children & Families Act 2014

21. The local authority's decision refusing to prepare and maintain an EHC plan for Miss H could not have been taken under the main provisions of the CFA 2014. Described as a "transfer review" decision, it must have been taken under the transitional order that links the 2014 Act with the predecessor SEN legislation in Part IV of the EA 1996. Other than in certain limited cases, the order does not provide for statements of SEN to be transformed into EHC plans. Instead, the transitional scheme provides for a phased programme of re-assessment involving case-by-case decisions as to whether or not a child or young person satisfies the statutory test for an EHC plan.

22. The principal commencement date for the CFA 2014 was 1 September 2014 (S.I. 2014/889). On that date, the main EHC provisions of the Act came into force. That included section 81 which disapplies Chapter 1 of Part 4 of EA 1996 in relation to "children in the area of a local authority in England".

23. The transitional order provides for a phased transition from the old to new law. Article 11 of the order saves the old law in cases which include that of a "child or young person in the area of a local authority in England if (a) immediately before the commencement date, a statement was maintained for the child or young person under section 324 or 331 of EA 1996". That saving ceases to apply, so that the CFA 2014 applies, once a decision is taken under Part 5 of the transitional order as to whether it is necessary to maintain an EHC plan for a child or young person. Before such a decision may be taken, an assessment must be carried out under article 20 of the transitional order (which applies and modifies the assessment provisions of the CFA 2014 and the 2014 Regulations).

24. Various assessment trigger points are identified by the transitional order for different categories of child or young person. They result in a local authority coming under a duty to carry out an EHC assessment (articles 12-14A of the order). Local authorities also have the power to assess before the relevant assessment trigger point in a particular case (article 15).

25. The task for a local authority on a 'transfer review' is set out in article 21(1) of the transitional order. The authority must decide whether "in the light of an EHC needs assessment under this Part…it is necessary for special educational provision to be made for a child or young person in accordance with an EHC plan". Clearly, that analysis of necessity needs to take account of the nature and legal effects of EHC plans – what they are capable of achieving – as provided for by the CFA 2014.

26. The statutory Code of Practice issued under the CFA 2014 provides at p.13 that:

> "it is expected that all those who have a statement and who would have continued to have one under the current system, will be transferred to an EHC plan – no-one should lose their statement and not have it replaced with an EHC plan simply because the system is changing."

27. Although the First-tier Tribunal did not refer to the Code, it might be argued it applied the spirit of p.13 of the Code of Practice.

28. If a local authority decides the above test is not met (i.e. they decide a child or young person is not entitled to an EHC plan), article 22 of the transitional order requires notice of the decision to be given to various interested persons. The statement of SEN will then cease to have effect at the "relevant time" which is defined by reference to the period allowed for appealing against the authority's decision and, if an appeal is made, the currency of the appeal.

29. Article 22(7) of the transitional order identifies the powers of the First-tier Tribunal on an appeal against a transfer review decision. It can do one of three things:

(a) dismiss the appeal;

(b) order the authority to make and maintain an EHC plan;

(c) refer the case back to the local authority to determine whether it is necessary for it to determine whether it is necessary to determine the special educational provision for the child.

30. These powers are similar to those of the First-tier Tribunal on an appeal against a local authority's decision under the mainstream provisions of the CFA 2014 refusing to prepare and maintain an EHC plan (regulation 43 of the 2014 Regulations).

The Children and Families Act 2014

31. I shall only refer to those provisions of the CFA 2014 that are of particular relevance to this appeal. Part 3 of the CFA 2014 is concerned with identifying and meeting the special educational needs of children and young people. It creates, through the EHC plan mechanism, entitlements to special educational provision.

32. "Special educational needs" is defined by section 20(1) CFA 2014: a "child or young person has special educational needs if he or she has a learning difficulty or disability which calls for special educational provision to be made for him or her". Section 21(1) defines "special educational provision", in relation to a person aged two or more, as:

> "educational or training provision that is additional to, or different from, that made generally for others of the same age in—
>
> (a) mainstream schools in England,
>
> (b) maintained nursery schools in England,
>
> (c) mainstream post-16 institutions in England, or
>
> (d) places in England at which relevant early years education is provided."

33. "Young person" is defined by section 82(2) CFA 2014 as "a person over compulsory school age but under 25". That section also defines "post-16 institution" as an institution which "(a) provides education or training for those over compulsory school age, but (b) is not a school or other institution which is within the higher education sector or which provides only higher education". Section 82(4) also provides that a reference to "education" in the EHC provisions "does not include a reference to higher education".

34. If a local authority decides that it is necessary for special educational provision to be so made, section 37(1) CFA 2014 requires it to prepare and maintain an EHC plan. Amongst the matters to be specified in the EHC plan are "the special educational provision required by him or her". The CFA 2014 also makes provision for the final EHC plan to specify a "school or other institution" although in certain cases a type of institution may be specified. By section 42(2), the local authority is obliged to "secure the specified educational provision for the child

or young person". If an institution within the further education section in England is specified in an EHC plan, those responsible for the institution must admit the young person (section 43).

35. Section 61(1) CFA 2014 confers power on a local authority to arrange for any necessary special educational provision to be made otherwise than in a school or post-16 institution but only if it is satisfied that "it would be inappropriate for the provision to be made in a school or post-16 institution" (section 61(2)).

The arguments before the Upper Tribunal

36. I granted the local authority permission to appeal to the Upper Tribunal against the First-tier Tribunal. The authority's grounds of appeal argued the First-tier Tribunal erred in law in the following respects:

(A) By determining that an EHC plan was necessary when it had received no evidence about the education Miss H wished to pursue, in particular the Tribunal had no evidence on the critical issue of placement and the nature of the home tuition sought by Miss H;

(B) By failing to identify the special educational provision required by Miss H as provision which could not be provided from within "the resources available to the educational setting". This error was revealed by the Tribunal's failure to "look at the reasons and purpose of the EHC plan for [Miss H]", its irrational reliance on Miss H's earlier statement of SEN and the finding, unsupported by evidence, that Miss H needed substantial, specialised support;

(C) By irrationally suggesting that the authority failed to "outline how [Miss H's] needs would be met on a further education course", a finding that betrayed the Tribunal's failure to understand that there is no duty on a local authority to provide education for young persons over compulsory school age;

(D) By concluding that an EHC plan was necessary for a young person over compulsory school age when local authorities have no duties to educate such young persons.

37. In granting permission to appeal, I made the following observations on the local authority's grounds of appeal:

> "It seems to me, therefore, that key issues include:
>
> … whether, assuming that the young person at the point of the transfer review decision did in fact intend to proceed to higher education, the First-tier Tribunal was bound to

dismiss her appeal even if, by the date of the tribunal hearing, her intentions had changed.

…Resolving issue (b) may require a finding of law to be made about the scope of an appeal to the First-tier Tribunal; that is whether the Tribunal considers the current circumstances or those applicable when the transfer review decision was taken. I note that in the case of SEN statement appeals, it is I believe settled law that the Tribunal is "bound at that stage to look at the overall picture as to the particular special needs of the child at that time. It is not for the tribunal simply to address the issues as at the stage when the statement is drawn or when the appellant lodges her appeal" (*Wilkin v Goldthorpe (Chair of the SEN Tribunal)* CO/1251/97).

My provisional view is that the local authority's grounds (a) and (b) are bound up with an issue that is not raised in the application for permission to appeal and which I therefore include within those grounds. Ground (a) is that the Tribunal erred in law by deciding an EHC plan was necessary when it had no details (so it is alleged) about the young person's educational wishes. Ground (b) is that the Tribunal erred in law by failing to identify the SEN provision required that "could not be provided from within the resources available to an educational setting".

That additional issue is whether the Tribunal, given the alleged absence of evidence about the young person's educational intentions, should have considered if the more appropriate disposal was to refer the matter back to the local authority to re-determine whether it was necessary to determine special educational provision.

Grounds (c) and (d) include the assertion that the First-tier Tribunal erred in law by overlooking the absence of any obligation on the part of the local authority to make educational provision for children over compulsory school age. On the face of it, this argument is hard to square with the purpose of the EHC provisions of the 2014 Act and the obligations imposed on a local authority to make the educational provision specified in a young person's EHC plan (section 42 of the 2014 Act)."

38. In Miss H's written response, drafted by the Coram Children's Legal Centre, who became her representative part-way through the Upper Tribunal proceedings, she argued:

(a) under the CFA 2014, by analogy with case law under the SEN provisions of the EA 1996, the First-tier Tribunal correctly considered Miss H's circumstances as they stood when it heard Miss H's appeal;

(b) in deciding whether an EHC plan was required, the First-tier Tribunal correctly focussed on the question of necessity rather than placement. The question whether the provision

required to meet Miss H's needs could reasonably be expected to be provided from within the resources normally available to mainstream providers (see para. 9.55 of the current SEN Code of Practice) is not the only consideration (*Manchester City Council v JW* [2014] UKUT 0168). Miss H also relied on the decision in *Buckinghamshire CC v HW* [2013] ELR 519 that "necessary" fell somewhere between "indispensable and useful". In any event, the evidence about Miss H's education-related anxiety justified the First-tier Tribunal's conclusion that she would need substantial, specialised support to access education;

(c) the local authority's case suggested the provision of far more evidence on refusal to issue EHC plan appeals than was appropriate (as compared with appeals against the contents of a plan, once prepared);

(d) the authority made misconceived criticisms of the First-tier Tribunal for both failing to consider whether Miss H's needs could be met within the resources available at a mainstream placement and failing to explain why Miss H's needs could not be met within such a setting;

(e) the authority's argument that the First-tier Tribunal overlooked the absence of a statutory duty on a local authority to educate a young person aged over compulsory school age betrayed a lack of understanding of the purpose of the CFA 2014.

39. At the hearing, Mr Small for the local authority further argued that the First-tier Tribunal should never have admitted Miss H's appeal because, when it was made, her intention was to pursue a course of higher education; the Tribunal completely failed to investigate the crucial issue of the educational programme sought by Miss H; the Tribunal should have considered whether to order the authority to reconsider their decision rather than order an EHC plan; and modified, it seemed to me, the ground of appeal concerning local authority duties to educate young persons by relying on section 61 CFA 2014 which confers power on a local authority to provide for special educational provision otherwise than in a school or post-16 institution.

40. For Miss H, Mr Tabori argued the First-tier Tribunal could not be faulted for accepting Miss H's appeal; Mr Small's arguments overlooked the authority's failure to provide the First-tier Tribunal with sufficient evidence in support of its case; the argument that a detailed educational programme had to be identified before a decision could be made that an EHC plan was necessary was an unwarranted gloss on the provisions of the CFA 2014; stressed that this case was not about the contents of an EHC plan and the evidence as to special education provision required did not need to be as detailed as on a 'contents' appeal.

Conclusions

41. I am quite satisfied that, in the circumstances of this case, Miss H's initial desire to pursue a course provided by the Open University, as found by the First-tier Tribunal, did not require

the Tribunal to refuse to admit her appeal. I do not think the evidence, as it stood when she lodged her appeal, would have permitted any other finding than that Miss H had an aspiration to pursue an Open University course, rather than a clear intention that was likely to materialise.

42. The evidence described above in these reasons shows that Miss H was contemplating an Open University course in June 2015 but it also reveals two further points. First, Miss H expressed an interest in an Open University course (via her mother) to only one of the many professionals who assessed her between March and July 2015. Second, throughout this period she continued to experience education-related anxiety and was generally uncertain about her precise educational future. In my view, therefore, the only fair finding that could be made, when Miss H lodged her appeal, was that she did not have a realistic expectation of pursuing an Open University course in the near future. The evidence would not have permitted a sound finding that Miss H had a realistic expectation of pursuing a course of higher education which, as section 83(4) CFA 2014 provides, falls outside the meaning of "education" as it applies for the purposes of the CFA 2014.

43. There is a separate point not argued before me but which I should at least acknowledge. It was by no means certain, on the evidence I have seen, that the course initially envisaged by Miss H would have amounted to a course of higher education even though it would have been provided by an institution within the higher education sector (see the definition of "higher education" provided for by Schedule 6 to the Education Reform Act 1988).

44. Finally on this topic, I should observe that I have struggled to find documentary evidence to support the local authority's argument that, in June 2015, Miss H intended to pursue an Open University course. Her wishes in this respect were mentioned in only one report produced by the local authority's educational psychologist, but in a most conditional manner and indirectly via Miss H's mother. What that report said was that Miss H "has considered applying" for an Open University course but, since she found email communication difficult, "this is a possibility for the future", Further, there was no mention of an Open University course in the outcomes section of Dr Stevens' report. All the other professional evidence was to the effect that Miss H wanted to continue her education but was simply uncertain how to do so in the light of her health problems and previous educational experiences. But I make no finding on this point because it was not relied on by Miss H's representative.

45. I agree with both parties that, by the time Miss H's appeal came on for hearing before the First-tier Tribunal, it was required to consider her current circumstances. The logic of the High Court's decision in *Wilkin v Goldthorpe (Chair of the SEN Tribunal)* CO/1251/97), while concerned with the SEN provisions of the EA 1996, applies equally to the CFA 2014. There is no reason why Parliament would have intended a different result under the CFA 2014. Accordingly, the First-tier Tribunal correctly considered Miss H's situation at the date of the hearing before it rather than her position when she made her appeal.

46. In considering the local authority's other arguments, I need to take stock of how the case was presented to the First-tier Tribunal. The Tribunal had before it a number of reports that documented Miss H's history of significant education-related anxiety. So far as her intentions were concerned, the clear tenor of the evidence was that she wished to continue her education but, in the light of her condition and educational experiences to date, was simply uncertain about how to achieve that aim. There was no clear educational proposal 'on the table' from either party.

47. The local authority's reliance on Miss H's asserted failure to identify an 'educational programme' seems to me to overlook this young person's particular situation. It also comes close to placing her in a Catch-22 situation. The First-tier Tribunal was dealing with a case in which the evidence described a person whose recent education had been marked by debilitating levels of anxiety and more than one failed attempt to pursue education in a conventional setting. The documentary evidence, and I have no doubt the First-tier Tribunal given its specialist expertise appreciated this point, suggested that even thinking about education raised Miss H's anxiety levels. Despite that, she was expected to work up a clear educational programme. In other words, the very thing that had caused Miss H's educational difficulties was relied on against her.

48. I can now deal with the remaining grounds of appeal:

(a) the absence of evidence from Miss H about the educational programme she wished to pursue did not prevent the First-tier Tribunal from lawfully concluding that an EHC plan was necessary. Its absence was explained by Miss H's circumstances during 2015 as shown by the evidence before the Tribunal. It cannot be right that, in all refusal to prepare EHC plan appeals, an Appellant must supply a fully-worked up educational proposal. While the statutory sequence of events means an EHC plan decision will follow an EHC assessment – whose purpose in part is to identify the required special educational provision – it does not follow that a fully worked-up educational plan is required in order for any 'refusal to make an EHC plan' appeal to succeed (*Manchester City Council v JW* [2014] UKUT 0168). That would undermine much of the rationale for EHC plans. The First-tier Tribunal did not err in law by proceeding to decide the appeal on the evidence before it;

(b) given the state of the evidence before the First-tier Tribunal, it did not err in law by not determining whether the special educational provision required by Miss H could be provided from within the resources normally available to a mainstream setting. As Mr Tabori argued, a number of features of this case justified the Tribunal's approach, including Miss H's documented need for significant support in order to access any form of conventional education, her need for support even if she were to pursue on-line courses of study, the documented devastating impact of her anxiety disorder on her recent education and her latent

potential as shown by cognitive assessments. This was not a case where a finding as to whether the whether the required provision would be made from within mainstream resources was necessary for a lawful decision that an EHC plan was necessary;

(c) the argument that there was no evidence to support the First-tier Tribunal's finding that Miss H needed significant, substantial educational support is undermined by the briefest perusal of the documentary evidence before the Tribunal;

(d) the First-tier Tribunal did not err in law by taking into account the contents of Miss H's previous statement of SEN. I do not read the Tribunal's decision as including a finding that, in all cases, the default position is that young people who previously had statements are entitled to EHC plans (although the Code of Practice might arguably be read in that way). On a sensible reading, the First-tier Tribunal simply found that the high levels of need reflected in Miss H's statement of SEN, if they persisted, were likely to generate an ongoing need for special educational provision. It was entitled to make that finding;

(e) in the circumstances, the First-tier Tribunal did not err in law by relying on the local authority's failure to "outline" how Miss H's needs would be met on a further education course. In this respect, what the Tribunal actually did was rely on the authority's failure to set out how Miss H's needs would be met in any educational setting. That was a legitimate consideration on this appeal against a refusal to prepare and maintain an EHC plan. I do not accept that the First-tier Tribunal was expecting the impossible of the authority in this respect. The evidence showed that Miss H experienced heightened anxiety whenever she communicated with an unfamiliar educator, be that face-to-face or online. There was sufficient material here to have allowed the authority to advance a more focussed case than it did about the special educational provision Miss H required;

(f) I agree with Mr Tabori that the local authority's argument that councils have no duty to educate young people over compulsory school age misunderstands the purpose of the CFA 2014 and its extension of SEN-related rights to young people (as compared with the SEN provisions of the EA 1996). Authorities do have such a duty, as and when an EHC plan is issued specifying the special educational provision required by a young person (section 42(2) CFA 2014). To ignore that would nullify one of the main purposes of the CFA 2014. The modified argument, relying on section 61 CFA 2014, with respect goes nowhere. This provision's presumption in favour of mainstream education for young people does not apply where the authority is satisfied that mainstream education would be "inappropriate". In this case, the First-tier Tribunal was not required to determine whether or not mainstream education would be inappropriate in order to decide whether an EHC plan was necessary. The argument was not run before the Tribunal and, given the state of the evidence, there is a respectable argument that any such determination would have been premature;

(g) The First-tier Tribunal's disposal of the appeal involved no error of law. By the date of the hearing, Miss H did not intend to pursue higher education in the immediate future (as the Tribunal found). The documentary evidence was of one piece in that it all described Miss H's very real barriers to accessing formal education and her history of anxiety-related educational disruption. In those circumstances, the Tribunal was entitled to decide that an EHC plan was necessary rather than sending the issue back to the local authority for it to re-decide the matter.

49. Finally, I mention that, at one stage, an issue arose as to whether the fact that Miss H attained adulthood before the First-tier Tribunal heard her appeal affected her appeal rights. Neither party argues that it did and I agree.

Conclusion

50. For the above reasons, this appeal is dismissed. I must end these reasons with an apology for the delay in deciding this appeal. As I understand the parties were informed, I was away from work with an illness for a significant period of time after the hearing which has delayed the giving of my decision.

(Signed on the Original)
E Mitchell
Judge of the Upper Tribunal
11 February 2017