

**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007:

The decision of the First-tier Tribunal under reference EH873/15/00019, made on 8 December 2015, did not involve the making of an error on a point of law.

The suspension on the effect of the First-tier Tribunal's decision, which I imposed in my grant of permission to appeal, is removed.

REASONS FOR DECISION

A. The parties

1. The issue for the First-tier Tribunal in this case was whether the local authority should make an education, health and care needs assessment for FLJ. As he was born in 1998, the appeal was (at the local authority's suggestion) registered in his name. The Upper Tribunal's file in this case was registered in the name of his father. That was a mistake. Rather than delay matters by having the registration changed, I have treated FLJ as the respondent. This does not affect my reasoning in any way.

B. The legislation

2. The relevant provisions of the Children and Families Act 2014 provide:

20 When a child or young person has special educational needs

(1) A ... 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.

(2) ... a young person has a learning difficulty or disability if he or she-

(a) has a significantly greater difficulty in learning than the majority of others of the same age, or

(b) has a disability which prevents or hinders him or her from making use of facilities of a kind generally provided for others of the same age in mainstream schools or mainstream post-16 institutions.

21 Special educational provision, health care provision and social care provision

(1) 'Special educational provision', for ... a young person, means educational or training provision that is additional to, or different from, that made generally for others of the same age in—

...

- (c) mainstream post-16 institutions in England ...

36 Assessment of education, health and care needs

(1) A request for a local authority in England to secure an EHC needs assessment for a ... young person may be made to the authority by the child's parent, the young person or a person acting on behalf of a school or post-16 institution.

(2) An 'EHC needs assessment' is an assessment of the educational, health care and social care needs of a ... young person.

(3) When a request is made to a local authority under subsection (1), or a local authority otherwise becomes responsible for a ... young person, the authority must determine whether it may be necessary for special educational provision to be made for the ... young person in accordance with an EHC plan.

37 Education, health and care plans

(1) Where, in the light of an EHC needs assessment, it is necessary for special educational provision to be made for a ... young person in accordance with an EHC plan—

- (a) the local authority must secure that an EHC plan is prepared for the ... young person, and
- (b) once an EHC plan has been prepared, it must maintain the plan.

51 Appeals

(1) A child's parent or a young person may appeal to the First-tier Tribunal against the matters set out in subsection (2), subject to section 55 (mediation).

(2) The matters are—

- (a) a decision of a local authority not to secure an EHC needs assessment for the child or young person;
- (b) a decision of a local authority, following an EHC needs assessment, that it is not necessary for special educational provision to be made for the child or young person in accordance with an EHC plan; ...

C. How the legislation works

3. The process began with a request under section 36(1). The local authority then had to decide whether or not it 'may be necessary' to make special educational provision for FLJ under section 36(3). In order to this, section 36(3) operates to impose a duty to decide whether he 'has' a learning difficulty within the meaning of section 20(2), which 'calls for' special educational provision within the meaning of section 21. That duty arose as a result of the request; it was preliminary to any decision on whether an assessment should be secured under section 36(1) as requested. In this case, the authority decided that an assessment should not be secured. If it had decided to secure an assessment, it would have had to decide whether special educational provision 'is necessary' for FLJ under

section 37(1) and, if so, to secure a plan for him under section 37(1)(a). The different rights of appeal in section 51(2)(a) and (b) reflect those two stages: (a) deals with a decision not to make an assessment and (b) deals with a decision on an assessment that special educational provision is not necessary.

4. The legislation language is important to the local authority's duties at each stage and to the powers of the First-tier Tribunal on an appeal. At the initial stage, when the authority or the tribunal is deciding whether an assessment should be secured, two different questions arise. One is a question of present fact: 'has' the young person a learning difficulty or disability? The other is a prediction: is it one that 'calls for' special educational provision (section 20(1)) or for which such provision 'may be necessary' (section 36(3))? Those different expressions are both framed according to the stage of the process. The authority or tribunal does not have to decide at this initial stage whether special educational provision 'is necessary' (section 37(1)); that question only arises when an assessment has been made. To put it loosely and without intending to rewrite or gloss the language of the legislation, the issue at the initial stage is a provisional and predictive one; it is only when an assessment has been made that a definitive decision has to be made.

D. The appeal to the First-tier Tribunal

5. The local authority decided not to secure an assessment for FLJ and the case came before the First-tier Tribunal on appeal. The tribunal decided that the local authority should secure an assessment in respect of him.

6. In summary, the tribunal's reasoning was as follows. FLJ has a severe specific learning difficulties (dyslexia). This causes him greater difficulty in learning than the majority of persons of his age. He is a high achiever, but his progress in reading, writing and spelling is slow. Any progress he has made is a result of intervention and support beyond what is usually provided. He requires extensive help in his post-16 education. His needs exceed that normally available to a student in a Sixth Form College, which is where he is studying. He becomes anxious and flustered. He wants to remove his dependence on a scribe, but cannot see how to manage this before his A Levels. This would be a long process. An immediate change to independence by relying on technology was not feasible. He still has a need for well-qualified assistance from a scribe. Despite delegation of funds, it appeared unlikely that appropriate provision could be funded from the College's resources.

E. The appeal to the Upper Tribunal

7. I gave permission to appeal and suspended the effect of the decision pending this decision.

The first ground of appeal

8. The First-tier Tribunal said that it was accepted that FLJ had a significantly greater difficulty in learning than the majority of his age group. This ground argues that that was not accepted and was put in issue by the authority. His needs were not at a level that called for an assessment. There was

no psychological evidence to show that he had significantly greater difficulties than his age group. I reject this argument.

9. In part, this is an argument about words. The tribunal's language refers to section 20(2)(a). It is right that the authority argued that he did not have special educational needs. But section 20(2)(a) is only part of that issue: the factual issue of the nature and extent of FLJ's learning difficulty. The other part is whether that calls for special educational provision, which is what the tribunal went on to say was in dispute.

10. In any event, there was ample evidence for the tribunal to decide as it did. It was not necessary to have psychological evidence on the point. The tribunal was entitled to rely on any evidence provided that it was sufficiently probative of the issue. In this case, the difficulties that FLJ experienced were with reading, writing and spelling. There was evidence that he was functioning at the level of a child of eight. It is beside the point that he was able to achieve as much as he had, because that was only achieved with the benefit of the assistance that he had been given. The fact that the Educational Psychologist considered that he did not meet the threshold for an assessment did not prevent the tribunal from forming its own, contrary opinion. Its reasons are clear on why it found that an assessment was needed. They were supported by evidence before the tribunal.

The second ground of appeal

11. This divides into two parts, both relating to the issue of necessity. One concerns to the forms of support available to help FLJ. The other concerns funding. I reject this ground. Both parts miss the point. The tribunal was hearing an appeal against a decision not to secure an assessment. It decided that an assessment should be secured. At the stage with which it was concerned, it had to make a provisional predictive judgment about the likely need for special educational provision. It did not have to make a definitive decision. The factual issues that have been argued out by the parties in their response and reply on this appeal may well be relevant to, if not determinative of, the final decision under section 37. But that was not within the tribunal's jurisdiction to decide under section 51(2)(a). It only had to decide whether the threshold questions for the making of an assessment were satisfied and that did not need to be done with so great a degree of certainty. Its findings and reasons are entitled at that initial stage to reflect the degree of uncertainty that is inherently likely before an assessment is actually made. Its findings were sufficiently precise to allow the appeal and require the local authority to secure an assessment.

**Signed on original
on 26 April 2016**

**Edward Jacobs
Upper Tribunal Judge**