IN THE UPPER TRIBUNAL **Case No** HS/3337/2015
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD

Attendances:

For the Appellant: Mr Jack Anderson, instructed by County Solicitor

For the Respondent Mr Eric Metcalfe, instructed by Maxwell Gillott

Decision: The appeal is allowed. The decision of the First-tier Tribunal sitting at Exeter on 20 August 2015 under reference EH878/15/00004 involved the making of an error of law.

Each party may, within 14 days of the date of the letter issuing this decision, file and serve representations as to whether or not the decision of the First-tier Tribunal should be set aside and if so, what directions, if any, should be given.

REASONS FOR DECISION

1. This appeal concerns the Education Health and Care Plan ("EHC Plan") of O, a young woman aged 19 at the time it was made on 1 May 2015. The key issue in dispute was whether O should be placed at a local FE college, P College, or at F Centre, an independent specialist college which it is common ground is, and was at the material time, a "special post 16 institution" approved by the Secretary of State under section 41 of the Children and Families Act 2014 ("the 2014 Act"). O, nominally the appellant but in practice acting by her parents, appealed to the First-tier Tribunal and on 27 August 2015 was successful. No order for suspension was applied for and so far as I am aware the order of the tribunal is being complied with.

2. Permission to appeal was refused by the First-tier Tribunal by a decision communicated on 12 October 2015 and the local authority in due course renewed its application to the Upper Tribunal, which on 26 November I granted. The case came before me at an oral hearing in London on 29 February 2016, following which further written submissions were directed. I am grateful to both counsel for their oral and written submissions.

3. In the course of the Upper Tribunal proceedings, a witness statement by a Ms D, Head of Education at the F Centre, was submitted on behalf of O. This was not evidence which had been before the First-tier Tribunal and in deciding whether or not the tribunal erred in law, I disregard it.

4. O has (among other things) severe learning difficulties with significant speech, communication and language needs, significant social communication difficulties, global delay and emotional immaturity.

5. O was described by a witness as "mad about horses" and it is this that lies at the heart of the dispute. According to a witness, whose evidence the

tribunal appears to have implicitly accepted, O had wanted to work with horses for many years and had shown great dedication in travelling long distances to help in stables and to compete. Her CV indicated that she had been very actively involved in riding, competing successfully at national level for a number of years.

6. At P College, a programme for O would include one day involving land-based studies, which would include work with equines but other things besides; one day involved with animal care; one day of work experience perhaps with an organisation that provided horses, albeit quietly behaved ones to meet the needs of young people with disabilities; one day of personal and social development including health, independent living and employment; and participation in the activities of a local not-for-profit organisation focussed on production of crops and associated arts and crafts. There are no horses on site at P College.

7. At the F Centre however, the course would be "Further Education through Horsemastership". Evidence was given that this was an accredited equivalent to an NVQ in Horse Care Level 2. In particular, students were responsible for the daily care of horses. Evidence was given that at the end of the course O would be in a position where she "should be able to obtain employment (perhaps paid employment)." In cross-examination however, it was established that the number of students of the F Centre who had progressed to employment in the field over the last three years was one.

8. The local authority's position was and is that whilst the F Centre is accepted to be a suitable placement, a placement there would be an inefficient use of resources, because O's needs could be met at P College, which would be an appropriate placement.

9. The tribunal had only limited evidence on costs, but in general terms it appears that attendance at F Centre would work out at around £30,000 (I assume per annum) more expensive than attendance at P College.

10. The tribunal's conclusion was that whereas F Centre would be an appropriate placement for O, P College would not be and so, not needing to conduct a balancing exercise, it did not go on to consider costs in more detail.

The law

11. Section 37 of the 2014 Act creates the duty to prepare and maintain an EHC Plan and sets out, in outline, what must, and what may, be included in such a Plan. Sub-section (2) explains that an EHC Plan is a plan specifying (among other matters) "(a) the …young person's special educational needs; (b) the outcomes sought for…her; (c) the special educational provision required by…her." Sub-section (4) confers a power to "make provision about the preparation, content, maintenance, amendment and disclosure of EHC plans." Pursuant to that sub-section, regulation 12 of the Special Educational Needs and Disability Regulations 2014/1530 ("the Regulations") provides as follows:

"12. Form of EHC plan

(1) When preparing an EHC plan a local authority must set out—
(a) the views, interests and aspirations of the child and his parents or the young person (section A);
(b) the child or young person's special educational needs (section B);
(c) the child or young person's health care needs which relate to their special educational needs (section C);
(d) the child or young person's social care needs which relate to their special educational needs or to a disability (section D);
(e) the outcomes sought for him or her (section E);
(f) the special educational provision required by the child or young person (section F);
(g) any health care provision reasonably required by the learning difficulties or disabilities which result in the child or young person having special educational needs (section G);
(h)
(i) any social care provision which must be made for the child or young person as a result of section 2 of the Chronically Sick and Disabled Persons Act 1970 (section H1);
(ii) any other social care provision reasonably required by the learning difficulties or disabilities which result in the child or young person having special educational needs (section H2);
(i) the name of the school, maintained nursery school, post-16 institution or other institution to be attended by the child or young person and the type of that institution or, where the name of a school or other institution is not specified in the EHC plan, the type of school or other institution to be attended by the child or young person (section I); and
(j) where any special educational provision is to be secured by a direct payment, the special educational needs and outcomes to be met by the direct payment (section J),
and each section must be separately identified.

(2) The health care provision specified in the EHC Plan in accordance with paragraph (1)(g) must be agreed by the responsible commissioning body.

(3) Where the child or young person is in or beyond year 9, the EHC plan must include within the special educational provision, health care provision and social care provision specified, provision to assist the child or young person in preparation for adulthood and independent living.

(4) The advice and information obtained in accordance with regulation 6(1) must be set out in appendices to the EHC plan (section K)."

The right of appeal against the content of an EHC Plan is conferred by section 51(2)(c) and exists only in respect of certain matters: in essence, the content of sections B, F and I.

12. The naming of a school or other institution where a request has been made for this is dealt with in section 39. The local authority is required to consult with those with responsibility for the school or other institution concerned and then is required to secure that the EHC Plan names the school or other institution requested unless (by sub-section (4)):

> "(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."

This, for present purposes, is in materially identical terms to the predecessor provision, para 3(3) of schedule 27 to the Education Act 1996 ("the 1996 Act").

If sub-section (4) applies, the authority is required to name a school or institution or specify a type thereof which it thinks would be appropriate: sub-section (5).

13. Relevant duties of a more general nature are created by section 19 of the 2014 Act, which does not have an equivalent in the 1996 Act, and which provides as follows:

> "19 Local authority functions: supporting and involving children and young people
>
> In exercising a function under this Part in the case of a child or young person, a local authority in England must have regard to the following matters in particular—
> (a) the views, wishes and feelings of the child and his or her parent, or the young person;
> (b) the importance of the child and his or her parent, or the young person, participating as fully as possible in decisions relating to the exercise of the function concerned;
> (c) the importance of the child and his or her parent, or the young person, being provided with the information and support necessary to enable participation in those decisions;
> (d) the need to support the child and his or her parent, or the young person, in order to facilitate the development of the child or young person and to help him or her achieve the best possible educational and other outcomes."

14. Section 77 provides for the Secretary of State to issue a Code of Practice. Local authorities (among others) must have regard to the Code when exercising their functions under Part 3 of the 2014 Act, while by sub-section (6):

> "The First-tier Tribunal must have regard to any provision of the code that appears to it to be relevant to a question arising on an appeal under this Part."

15. It is convenient to set out at this point the extracts from the Code of Practice to which the tribunal indicated it had given particular consideration:

> "8.1 Local authorities **must** place children, young people and families at the centre of their planning, and work with them to develop co-ordinated approaches to securing better outcomes, as should clinical commissioning groups (CCGs). They should develop a shared vision and strategy which focuses on aspirations and outcomes, using information from EHC plans and other planning to anticipate the needs of children and young people with SEN and ensure there are pathways into employment, independent living, participation in society and good health…."

> "8.2 This planning and support will bring enormous benefits to individuals. The National Audit Office report '*Oversight of special education for young people aged 16-25*' published in November 2011, estimates that supporting one person with a learning disability into employment could, in addition to improving their independence and self-esteem, increase that person's income by between 55 and 95 per cent. The National Audit Office also estimates that equipping a young person with the skills to live in semi-independent rather than fully supported housing could, in addition to quality of life improvements, reduce lifetime support costs to the public purse by around £1 million."

> "8.30 All students aged 16 to 19 (and, where they will have an EHC plan, up to the age of 25) should follow a coherent study programme which provides stretch and progression and enables them to achieve the best possible outcomes in adult life. Schools and colleges are expected to design study programmes which enable students to progress to a higher level of study than their prior attainment, take rigorous, substantial qualifications, study English and maths, participate in meaningful work experience and non-qualification activity. They should not be repeating learning they have already completed successfully…"

> "8.31 All young people should be helped to develop the skills and experience, and achieve the qualifications they need, to succeed in their careers…"

> "9.65 Long-term aspirations are not outcomes in themselves – aspirations **must** be specified in Section A of the EHC plan. A local authority cannot be held accountable for the aspirations of a child or young person. For example, a local authority cannot be required to continue to maintain an EHC plan until a young person secures employment. However, the EHC

> plan should continue to be maintained where the young person wants to remain in education and clear evidence shows that special educational provision is needed to enable them to achieve the education and training outcomes required for a course or programme that moves them closer to employment. For example, by accessing a supported internship or apprenticeship."

16. The tribunal's reasons for regarding the provision made by P College as inappropriate are set out at paras 20-22 of its decision, which I summarise here:

(a) It noted the provisions of, in particular, paras 8.1, 8.2, 8.30, 8.31 and 9.65 of the Code of Practice (see above).

(b) It noted that the predecessor version of the Code of Practice (issued in July 2014) had provoked some discussion around the use of the word "best" but that, when in January 2015 the Code was re-issued no change was made and thus that the references to "best" were intended.

(c) It noted that para 8.30 provides that all students of the relevant age should "follow a coherent study programme which provides stretch and progression and enables them to achieve the best possible outcomes in adult life".

(d) It observed that, similarly, section 19(d) of the 2014 Act requires a local authority to have regard to

> "the need to support the …young person, in order to facilitate the development of the …young person and to help …her achieve the best possible outcomes".

(e) It said: "It has long been established case law in connection with special educational provision that students are not entitled to "best provision" but, rather, to "appropriate provision" see *R v Surrey CC ex parte H* 1984 83 LGR 219. It is often referred to as students not being entitled to Rolls Royce provision. However, the use of the word "best" in this area is in connection with achieving the best possible outcome in adult life. In these circumstances, we have concluded that the course available at [P College]…will not achieve the best possible outcomes in adult life."

(f) It observed that at least part of what was on offer at P College related to work at a level to which O was regarded by the tribunal as already qualified, so that she would be repeating learning and would not be helped by the course to develop the skills and experience, and achieve the qualifications needed for her chosen career.

(g) It remarked that, by contrast, if she could do those things, that would not just bring greater benefit to O, but might also be of (sc. more general) financial advantage. (This was a reference to para 8.2 of the Code (see [15] above), which referred to a report by the National Audit Office demonstrating the potential effects of supporting a person with a learning disability into

employment not only in terns of that person's income but also in terms of reducing the lifetime support costs to the public purse.)

(h) In a key section, it acknowledged that para 9.65 of the Code does refer to "aspirations" (a matter for Part A of an EHC Plan, over which the tribunal had no jurisdiction) but concluded that it needed to give effect to paras 8.1 and 8.30 of the Code.

Grounds of appeal

17. There are four grounds of appeal.

Ground 1: failure to identify the legal test applied

18. The local authority submits that it is unclear what test the tribunal applied in concluding that P College cannot offer suitable provision or in the words of section 39(5)(b), "appropriate" provision. Was the tribunal saying that the provisions of the Code of Practice on which it relied meant that *R v Surrey CC ex p H* (1984) 83 LGR 219 was no longer good law? Was it saying that although students are not entitled to the "best" provision, they are entitled to provision that will achieve the "best possible outcomes" in adult life"? What was the relevance of financial advantage (cf.[16g])?

19. Counsel for O submits that far from failing to identify the relevant test, the tribunal made it clear that what amounts to "appropriate provision" must take into account the need to achieve the best possible outcomes for the young person, as section 19(d) requires. As to the reference to financial advantage, it is clearly relevant in assessing whether provision would be "appropriate" to have regard to enabling a young person to obtain employment in her chosen field, with longer term financial advantages to both her and the public purse.

Ground 2: failure to apply the correct legal test (there are three sub-grounds)

<u>(a) Failure to apply the test of provision that is "reasonably required</u>"

20. The local authority submits that the principle that a young person is entitled not to best provision (*Surrey*) but to "appropriate" provision" or to that which is reasonably required to meet her needs (*A v Hertfordshire CC* [2006] EWHC 3428) continues to hold good and in particular is not displaced by anything in the 2014 Act, the Regulations or the Code of Practice.

21. More specifically:

(a) the only reference in the 2014 Act to achievement of the best possible educational and other outcomes is in section 19(d). That creates no duty to secure the best possible outcomes, nor to secure the provision that is most likely to result in such outcomes being obtained. It is simply a duty to have regard to them, a relatively weak duty, which Parliament must be taken to

have chosen advisedly, and one which requires no particular weight to be assigned to that consideration;
(b) a local authority also must have regard to other matters, including the efficient use of resources (cf. the duty in section 39(4)(b)(ii));
(c) even less is there a duty to provide such provision as will best enable a young person to achieve their aspirations;
(d) it is the legal framework enacted by Parliament which is determinative and in the light of which the Code must be construed, not the other way round;
(e) in any event, section 8 of the Code, substantially relied upon by the tribunal, is concerned with matters of strategic planning, as both the title of that section and its opening paragraphs 8.1.and 8.2 make clear, and not with individual entitlements under an EHC Plan;
(f) again in any event, para 8.30 of the Code must be read in the light of a local authority's ability under section 39(4)(b)(ii) to decline a request for provision where it would be incompatible with the efficient use of resources.

22. O submits that the local authority's interpretation of section 19(d) is unsupported by authority and conflicts with the guidance provided by the Code, which repeatedly stresses the need to secure the best possible educational and other outcomes. The tribunal did not apply a principle that a placement could not be appropriate or suitable unless it was the placement that achieved the best possible outcomes or aspirations, but rather took proper account of the matters it was required to, including pursuant to section 19(d) and para 6.1 of the Code, which provides:

> "All children and young people are entitled to an appropriate education, one that is appropriate to their needs, promotes high standards and the fulfilment of potential. This should enable them to:
>
> • achieve their best
>
> • become confident individuals living fulfilling lives, and
>
> • make a successful transition into adulthood, whether into employment, further or higher education or training ."

The tribunal's failure to express its conclusion by reference to the "reasonable requirement" test of *A v Hertfordshire* is immaterial; its conclusions are readily explicable by reference to that test and rephrasing them would have made little material difference.

(b) Error in relation to the treatment of outcome and aspirations

23. The local authority submits that there is a clear distinction between section A of an EHC Plan which is to deal with, inter alia, "aspirations" and section E, which is to deal with "outcomes" : see reg 12 of the Regulations, quoted at [11]. The tribunal erred by categorising working with horses as an outcome, not an aspiration. The inconsistency perceived by the tribunal between para 9.65 and section 8 of the Code and relied on to justify its position was illusory: the tribunal failed to heed that section 8 is concerned with strategic planning. The parties had largely agreed the outcomes and the tribunal does not explain

why it went behind that. Even if O does wish to work with horses, the evidence showed that development of O's literacy, numeracy, attention and organisational skills was required, all of which – even though not specifically concerned with horses –were outcomes which could facilitate her desired career. Her wish to work with horses does not mean that she is entitled to a course with a focus on horses.

24. For O, it is submitted that it can be seen from the passages of the Code cited by the tribunal that there was no such confusion. Para 9.65 of the Code, which the tribunal recited, plainly indicates that "long-term aspirations are not outcomes in themselves" and are not something for which a local authority can be held accountable. Further, while section 8 of the Code does concern strategic planning, it is of equal relevance to the making of EHC Plans: cf. para 8.1:

> "This strategic planning will contribute to [local authorities'] preparation of EHC plans and support for children and young people to achieve the outcomes in their plan."

Further, para 9.65 in its terms notes that while aspirations are not outcomes in themselves, it is submitted that they may nonetheless inform what are "best possible outcomes". In the context of the evidence in this case, the tribunal's conclusion that P College could not make appropriate provision because it would involve repeated learning and not allow O to develop the skills, experience and qualifications she needs for a career involving horse care was a sustainable one.

(c) Error in relation to treatment of putative financial benefit

25. The local authority submits that this is not relevant to questions of suitability (or appropriateness) but to the question of resources. In that context , the "resources" are those of the local authority: *B v Harrow LBC(No.1)* 2000 1 WLR 223; *WH v Warrington BC* [2014] EWCA 398. if , contrary to the authority's primary position, public resources more generally are relevant, para 8.2 of the Code has been applied outside its proper context of strategic planning and, moreover, on the evidence the tribunal's conclusion on the point was a matter of speculation.

26. For O it is submitted that the financial benefit of O receiving an education relevant to her chosen field was a consideration going to the broader benefit to the national economy and as such was a factor to which the tribunal was lawfully entitled to have regard.

Grounds 3 and 4: Failure to have regard to relevant considerations and/or failure to give adequate reasons

27. The local authority submits that:

(a) given the emphasis placed on O's wish to work in horse care, the tribunal needed to take into account the evidence that only one student of F Centre in

the last three years had secured employment in horse care, but failed to do so;

(b) the tribunal failed to take into account the evidence that F Centre's own assessments of O indicated that it was essential that she develop basic literacy and numeracy skills, which she could do at P College and that the targets O would be working towards at the two placements had a "clear similarity";

(c) the tribunal failed to take into account that while there was a focus on horses at F Centre, the proposed placement at P College "involved aspects of equine care and other animal care" as well as development of basic skills;

(d) while the tribunal refers to qualifications O had competed some time previously, it fails to address the evidence that, despite having obtained those qualifications, she was assessed as working below the level those qualifications demonstrated; and

(e) the tribunal failed to engage with the evidence from P College as to how O's learning would progress.

28. The authority submits that these can be seen either as failures to have regard to material factors or as an inadequacy of reasons. They are material because they are relevant to the tribunal's conclusion that O would be repeating learning at P College and to the conclusion that P College would not be suitable.

29. For O, it is submitted that:

(a) the tribunal was not obliged to refer explicitly to the evidence on employment outcomes of students from the F Centre and it was sufficient to consider all relevant factors why F Centre was appropriate and P College was not;

(b) the evidence showed that animal care at P College involves only small animals and that the horse care on offer (see [6]) would be an inadequate preparation for a career because of the docile nature of the horses used by the organisation concerned. The tribunal was aware of this and no material consideration in this regard was overlooked; and

(c) the tribunal's reasons were adequate, applying *South Bucks District Council v Porter (No 2)* [2004[UKHL 33 and *R (Bahrami) v Immigration Appeal Tribunal* [2003] EWHC 1453 (Admin).

Discussion of the law

30. The request that O attend the F Centre fell within section 38 of the 2014 Act, the F Centre being approved under section 41. Accordingly, by section 39(3), the local authority was required to name it, unless the matter fell within section 39(4). It was not the local authority's case that F Centre was

unsuitable: no question of sub-section (4)(a) arose. Nor was it suggested that O's attendance would be incompatible with the provision of efficient education for others (sub-section (4)(b)(i)). What it did argue was that it would be incompatible with the efficient use of resources (sub-section (4)(b)(ii)). Because that was its position, sub-section (5) required it either to name "a school or other institution which the local authority thinks would be appropriate for the child or young person" or to specify a type of school or other institution which it considered appropriate. Hence, on appeal, it was for the tribunal to consider whether P College was indeed "appropriate"; if it concluded it was not, then unless an opportunity was given (whether at the authority's request or otherwise) to name an alternative institution which was said to be "appropriate" or to specify an appropriate "type", that was the end of the matter, in a case such as this where the suitability of O's choice was not in issue. It was, therefore, on the "appropriateness " of P College that scrutiny properly fell.

31. The 1996 Act provided a similar mechanism, albeit in relation to a smaller range of schools (etc) and for children only. In particular schedule 27, para 3(3) allowed a local authority to refuse to specify the school or institution of preference on grounds which for present purposes are the same as those in section 39(4) of the 2014 Act. Equally, where an authority could rely on the exemption in para 3(3) of schedule 27, it was required by section 324(4)(b) to "specify the name of any school or institution…which they consider would be appropriate for the child and should be specified in the statement." The test in such circumstances was under the 1996 Act, and remains under the 2014 Act, one of "appropriateness".

32. Also common so far as material to both Acts (once one allows for the upward extension of the age range covered by the 2014 Act) are the definitions of "special educational needs" (1996 Act s312(1); 2014 Act, s20(1)) and "learning difficulty" (the 2014 Act adds "disability" but that was already to be found in the substantive part of the definition under the 1996 Act). The definition of "special educational provision" is (subject as above) materially identical: 1996 Act, s312(4); 2014 Act, s21(1). Under both Acts, the driver for making a plan is the necessity for special educational provision, determined in the light of a needs assessment: 1996 Act, s324(1); 2014 Act, s37(1).

33. In the light of these substantially common features around the very building blocks of the special educational needs regime, I proceed on the basis that the legislative intention was in general terms for a continuity of approach, except where the 2014 Act provides a specific reason to conclude otherwise. Subject to that note of caution, authorities on concepts common to both regimes will continue to be relevant. This includes *A v Hertfordshire* where at para 25 HHJ Gilbart QC (as he then was) (sitting as a Deputy Judge of the High Court) observed:

> "It was common ground between Mr Grodzinski and Mr Sheldon that the phrase "special educational needs" did not encompass every form of activity or therapy which could achieve some benefit. As it was put in argument, a child is not entitled to "Rolls Royce" provision. But I have

> found limited assistance from counsel's arguments on how one applies that sensible precept. That is not their fault. The difficulty is caused by the use of, if I may say so, the very slippery word "need" in the Act. What is "needed" depends on the question one asks. Is what is to be sought for D that she achieves the maximum degree of progress that is attainable or a lesser but still substantial one? If the former, then the "need" will require the provision to meet the maximum. If the latter – i.e. the lesser but still substantial degree of progress - then the "need" may require less provision. Suppose that the evidence were that a child with special educational needs had development objectives which required speech and language therapy. The evidence showed that 16 hours per month would achieve little, whereas 25 hours would achieve a great deal. What if 27 hours per month would achieve a better result? Would there be a failure then within the meaning of section 324 if the Local Education Authority provided for 25 as opposed to 27 hours? In my judgment, the way in which this issue must be addressed is to interpret the section on the basis that when it refers to "needs" it is referring to "what is reasonably required". That means that a decision can and must be made on whether what is being proposed for inclusion in a Statement of Educational Needs is reasonably required or goes beyond that. That is pre-eminently a matter for the expert judgment of the Tribunal."

In relation to the 1996 Act, I respectfully agree, and would apply the same approach to the 2014 Act unless a reason to do otherwise can be established.

34. Turning to the *Surrey* case, in my view it is possible to overstate its significance. This was an appeal against a refusal of judicial review, brought under the Education Act 1981. There was a reasons challenge, which Slade LJ dealt with at some length before turning "very briefly" to a further challenge, based on perversity. It is within a further section thereafter of "short observations" which are at least arguably obiter dicta that Slade LJ said:

> "I have much sympathy with [the boy's] parents in their desire to do their utmost to procure the education for their son which is the best fitted of all to help him over this particular educational handicap. I also have much sympathy with their desire to see him educated at [their school of preference], having regard to the advice which they have received, that this would be the best possible solution to his problems.
>
> On the other hand Miss Appleby was, in my opinion, right in her submission on behalf of the council that there is no question of Parliament having placed the local authority under an obligation to provide a child with the best possible education. There is no duty on the authority to provide such a Utopian system, or to educate him or her to his or her maximum potential. With great respect to [the] parents, I am not sure that they have fully appreciated the constraints under which the county council themselves operate under the relevant legislation.

> Under section 7(2) of the Act of 1981, it will remain the county council's duty, while they maintain a statement under that section in respect of [the boy concerned], to arrange that the special educational provision specified in the statement is made for him, unless his parents have been able to make other suitable arrangements. But, in fulfilling this duty, the county council are subject to constraints imposed by section 2(2) and (3) of the Act of 1981, which contemplate that education in an ordinary school, rather than a special school, will be the norm if it is practicable, even for a child with special educational needs."

35. The reason why the parents could not have for their son what they had been advised was the best possible solution was therefore that the legislation then in force – and in particular its provisions with regard to inclusion in section 2 of the 1981 Act – meant that there were other matters which had to carry the day. It would I think be a temptation to take Slade LJ's words regarding the lack of an obligation to provide the "best possible education" out of their context and one which I consider should be resisted.

36. Properly understood, it was in my view directed to the need to consider the relevant legislation in the round and not to attempting to define a standard of provision required (or not required) in the abstract.

37. So understood, it likewise remains good law in my view, but of course we are now two sets of special educational needs legislation down the line. Slade LJ's remarks therefore direct us to consider the 2014 Act and Regulations and to work out what they require, rather than offering an easy answer.

38. Section 37(2) of the 2014 Act does in sub-section (2)(c) refer to the "special educational provision required", but when in sub-sections (d) and (f) it is referring to health care and social care provision respectively, it refers to what is "reasonably required". I do not interpret this as meaning that special educational provision is not subject to a limitation that it be "reasonably " required. An EHC Plan is only prepared in the first place to respond to special educational needs, not to those for health care or social care; and as regards special educational provision, as noted at [32] above, the driver is what is necessary in the light of assessed need. I do not see s 37 as providing any reason not to follow *A v Hertfordshire*.

39. What then of section 19? It clearly applies as the local authority is "exercising a function under this Part in the case of a…young person". The section, by requiring regard to be had to specified matters "in particular" is requiring those matters to be considered, with some thoroughness, but is not excluding consideration of other matters. In terms of its grammar, the punctuation indicates that s19(d) requires a local authority to have regard to "the need to support the child and his or her parent, or the young person,… ." The remainder of the sub-section is concerned with the purpose of the support: "in order to facilitate the development of the child and young person and to help him or her achieve the best possible educational and other outcomes." "Achiev[ing] the best possible educational and other outcomes" is

thus not a duty which the section imposes directly on the local authority nor even directly forms a mandatory consideration.

40. As noted above, regulation 12 of the Regulations requires an EHC Plan to be in a number of sections. "Aspirations" belong in section A and "outcomes" in section E. By section 51(2)(c) there is no right of appeal against either of those things. Appeals are limited to (put shortly) the special educational needs, special educational provision and the school or other institution, in each case as specified in the Plan. The lack of such a right of appeal against the specification of "aspirations" and "outcomes" is clearly deliberate. What is meant by these terms? Neither is defined in the 2014 Act or the Regulations, but in my view some indication can be derived from the latter.

41. As to "outcomes", regulation 6 imposes a duty on local authorities to seek advice and information from a number of specified sources "on the needs of the child or young person, and what provision may be required to meet such needs and the outcomes that are intended to be achieved by the child or young person receiving that provision". The provision, therefore, is (uncontroversially) provision required to meet the needs; the "outcomes" are the intended consequences of the provision for the particular person receiving it. Further, by regulation 11:

> "When preparing [an] EHC Plan a local authority must –
> …
> (b) consider how best to achieve the outcomes to be sought for the child or young person."

I observe that that is a duty to consider; and in my view it is one which in considering "how best to achieve" the outcomes is not requiring the local authority to ignore other factors bearing upon it, such as resources.

42. Further guidance as to "outcomes" is provided by the Code. Para 9.64 provides that:

> "EHC plans **must** specify the outcomes sought for the child or young person in Section E. EHC plans should be focused on education and training, health and care outcomes that will enable children and young people to progress in their learning and, as they get older, to be well prepared for adulthood. EHC plans can also include wider outcomes such as positive social relationships and emotional resilience and stability. Outcomes should always enable children and young people to move towards the long-term aspirations of employment or higher education, independent living and community participation."

Para 9.66 provides:

> "An outcome can be defined as the benefit or difference made to an individual as a result of an intervention. It should be personal and not expressed from a service perspective; it should be something that those involved have control and influence over, and while it does not

> always have to be formal or accredited, it should be specific, measurable, achievable, realistic and time bound (SMART)."

43. The key to understanding the reference to the "views, interests and aspirations of the child and his parents or of the young person", which are required to form section A, is in my view (shared by Code, para 8.3) to be found in a local authority's duty under regulation 7:

> "When securing an EHC needs assessment a local authority must –
> (a) consult the child and the child's parent, or the young person and take into account their views, wishes and feelings;
> …"

Section A ensures that as regards (among other things) aspirations, those "wishes and feelings" are recorded and inform the process.

In O's case the EHC Plan includes in Section A:

> "I want to work with horses for the rest of my life".

44. As to section E (and the associated parts of section F), her EHC Plan (as ordered by the tribunal in the version entitled "OH3") provides, so far as material:

Section E: Cognition and Learning Outcomes	Section F: Special Educational Provision Cognition and Learning
Desired Outcome	What will be done to achieve this?
During her time in college [O] will ● participate in work experience relevant to her aspirations for future supported employment … ●[O] will achieve the necessary qualifications and experience so that she is able to seek meaningful employment in an area she wishes to work	Accredited skills and work experience, to enable future employment prospects [O] requires a safe environment that can accommodate the needs of young adults with complex additional needs

45. The Code of Practice is a substantial document, running to almost 300 pages. Much of it is couched in the language of aspiration and exhortation (that is not to be seen as a criticism). It is axiomatic that the Code cannot override the statute (or indeed a relevant statutory instrument). As noted above, section 77(6) of the 2014 Act provides that:

> "The First-tier Tribunal must have regard to any provision of the code that appears to it to be relevant to a question arising on an appeal under this Part."

46. It is however clear that, even in a judicial context (see *Ward v James* [1966] 1 QB 273) subjectivity of language does not exclude scrutiny on public law grounds.

47. Paragraphs 8.1 and 8.2 appear under a cross-heading "Strategic planning for the best outcomes in adult life." That this is indeed their concern, rather than with what is undertaken on the level of an individual case, may be seen from such matters as (a) the use of information from EHC Plans (i.e. those already compiled and generally, rather than one that is in the course of compilation) (b) references to "anticipating needs" and "securing pathways" are the language of devising future provision and (c) that similar tasks are said to fall on clinical commissioning groups, who do not have direct responsibility for the compilation of EHC Plans. In that context, para 8.2, which makes generalised points based on studies rather than those by reference to the costs and benefits of an individual case, is emphasising the value of what para 8.1 is commending. While, as Mr Metcalfe notes, para 8.1 then goes on to acknowledge that

> "this strategic planning will contribute to their …preparation of EHC plans and support for children and young people to achieve the outcomes in their plan,"

I agree with Mr Anderson that that does not change the scope and application of that section of the Code but simply sets out the hoped-for consequence of the strategic planning which the Code encourages.

48. Paragraph 8.30 is indeed, as the tribunal noted, the first paragraph of a section headed "High Quality Study Programmes for Students with SEN". What, if anything, follows from that is considered in relation to repeated learning at [60]-[61] below.

49. Chapter 9 covers "all the key stages in statutory assessment and planning and preparing the Education, Health and Care (EHC) plan, and guidance on related topics." Para 9.65 forms part of a section on outcomes. As noted above,

> "Outcomes should always enable children and young people to move towards the long-term aspirations of employment or higher education, independent living and community participation."

50. What use does the tribunal make of these extracts? The tribunal refers to paragraph 8.2 to support the view that "this" (by which I think was meant "achiev[ing] the qualification which [O] needs to succeed in her proposed career" "is not just about bringing greater benefit to [O], it may also be of financial advantage." While that may be so on a macro level, that paragraph of the Code cannot for the reasons in [47] above provide a warrant for ordering provision that would not otherwise fall to be made.

51. Paragraph 8.1 is referred to in that, with para 8.30, it is said to appear to be in conflict with para 9.65. It is worth setting out verbatim the tribunal's approach:

> "In resolving this potential conflict, it seems to us that paragraph 9.65 appears, at least in part, to be directed to the issue of how long an EHC Plan should be maintained for a young person. However, in a case such as [O's] case where her aspiration to work in horse care has been long-standing and consistent and achievable, we consider that we should apply the paragraphs set out in Chapter 8 above."

52. I am not satisfied that the tribunal did comply with the legal obligation upon it to have regard to paragraph 9.65 (once it had appeared to it to be relevant). The example given in that paragraph (and it is only an example) is where the young person has an aspiration to enter into employment. The. local authority cannot be held accountable for the achievement of that aspiration, says the Code, only for the special educational provision that is needed to move them closer to employment. That paragraph in my judgment faithfully reflects the distinctions between "aspirations" "outcomes" and "special educational provision" reflected in the 2014 Act and Regulations. While the tribunal has latched on to the example to that the paragraph is concerned say – albeit only, as it acknowledges, in part – with how long an EHC Plan must be maintained, the paragraph has much wider application than that. A tribunal is not required to follow the Code, but to have regard to it; but here it has not adequately explained why it is not following paragraph 9.65 as a provision which "appears to it to be relevant".

53. Nor does the tribunal appear to have had regard to the provisions of the Code in seeking to apply paras 8.1 and 8.2 outside the context of the strategic planning to which they refer.

54. The matter may be seen therefore, either as one of inadequacy of reasons, or as a failure to apply section 77(6) correctly. Further, the tribunal's approach effectively used the Code to undermine the legislative intention of regulation 12 and in particular the exclusion from justiciability of aspirations and outcomes, understood in accordance with [40] –[44]. Each is an error of law.

55. I have thus far focussed on the tribunal's use of the Code, as that played such a prominent part in its reasoning.

56. Reviewing the Grounds put forward, I do consider Ground 1 is made out. Admittedly, towards the end of para 20 of its reasons, the tribunal expressly states: "In these circumstances, we have concluded that P College cannot make appropriate provision to meet O's needs." While it will be evident from [34]-[37] that I would not summarise the *Surrey* decision quite as the tribunal did, I do not think its summary deflected it to the local authority's disadvantage in how it applied the correct test of appropriateness. While I can also accept that the tribunal was entitled to consider what "the best possible educational and other outcomes" might be, in order to ensure that regard was had to the

need to support the young person in the terms properly required by s19(d) (see [39]), the tribunal, though it recites section 19(d), does not apply it in accordance with its terms and that, coupled with what I have held to be misplaced reliance on the Code, is sufficient to call into question whether the tribunal was in fact applying the test of appropriateness.

57. As to Ground 2(a), I consider that *Surrey* (as discussed at [34]-[37]) and *Hertfordshire* do, correctly understood, remain good law. Consideration of what is "appropriate" (as mandated by, inter alia, *Hertfordshire*) may well be capable of being affected by "soft" law, such as the Code, but the argument for O goes too far, in that it wrongly subordinates section 19(d) to the Code. For the reasons in Ground 1, it is not evident that appropriateness was the test that was being applied. If it was, the tribunal's consideration of it was legally flawed by its reliance on the Code in ways which, for the reasons at [47]-[54], was not legally permissible

58. I consider Ground 2(b) is well-founded, for the reasons at [40] to [44] and [54]..

59. As to Ground 2(c), I agree with the authority's position, inasmuch as that the tribunal has erred in applying para 8.2 of the Code in a way which it cannot bear. The 2014 Act and Regulations create a framework within which the responsibilities of local authorities for the development of a young person with special educational needs are defined. To the extent that it is to be hoped in appropriate cases that this results in young people moving near to employment that is of course a good thing and if economic benefits on a national level flow from that, that too is one of a number of positives to be derived, but it cannot of itself provide a basis for overturning the finely balanced legislative framework.

60. Turning to Ground 3, it appears to me that the tribunal further erred in law in relation to its reliance on para 8.30 of the Code, by overlooking material evidence. The tribunal, in concluding that provision at P College was unsuitable, observed:

> "It is evident that at least part of the course relates to work at Entry Level 1 in which [O] is already qualified. In this regard, O's qualifications already include Level 1 NVQ in Horse Care and City and Guilds Level 2 Certificate in Horse Care - Merit. The Code of Practice specifically says that students should not be repeating learning they have already completed successfully. In our view, the course on offer at P College will do little to develop the skills and experience and achieve the qualification which [O] needs to succeed in her proposed career."

61. However, there was evidence from the F Centre's assessment of O in 2015 that

> "her equine ability …is not demonstrating the level required for the EQL Level One Diploma in Work Based Horse Care, which is equivalent to

> the NVQ Level 2 in Horse Care which she previously achieved in 2011."

The F Centre proposed provisional targets for year one and for further years. It was the latter (i.e. not immediate targets) which included "to work towards and achieve units of the EQL Level One Diploma in Work Based Horse Care." If it was going to rely on repeated learning as a ground for dismissing the suitability of P College, the tribunal needed to address that evidence.

62. I do not consider it necessary to burden this already long decision with consideration of the remaining points under Grounds 3 and 4 which are not of general application beyond this case and which, if the case does come to be reheard, will be subsumed in the rehearing. Nor do I need to rule on other aspects of the adequacy of the tribunal's reasons beyond those I have already covered in relation to the legal test applied and the tribunal's approach to the Code of Practice.

63. As the tribunal's decision has been acted upon and as presumably O's EHC Plan will now be, or have been, under review in any event, I am unclear whether any useful purpose will be served by setting the First-tier Tribunal's decision aside and remitting the matter to the First-tier Tribunal, hence the direction for further representations in that regard.

C.G. Ward
Judge of the Upper Tribunal
17 June 2016