**IN THE UPPER TRIBUNAL** **Appeal No.** HS/688/2016
**ADMINISTRATIVE APPEALS CHAMBER**

**Before Judge S M Lane**

**1. The appeal by the appellant Local Authority is dismissed.**

**The decision of the Special Educational Needs Tribunal heard on 22 December 2015 under reference EH919/15/00029 did not involve the making of any material error on a point of law.**

**2. The stay on preparing an Education, Health and Care Plan is lifted.**

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

## REASONS FOR DECISION

1. The appellant Local Authority ('the Local Authority') brought this appeal with the permission of the First-tier Tribunal (Education and Disability) ('the F-tT'). An oral hearing was held at the Rolls Building on 26 July 2016. Mr M Small, of Baker Small, represented the Local Authority. Mr J Friel, of counsel, represented the parents, MC and KC. Mr Friel also represented the appellants at F-tT hearing. He is instructed by SEN Legal. I thank the representatives for their careful submissions.

2. The F-tT gave permission to appeal the F-tT's decision requiring the Local Authority to issue an Education, Health and Care Plan ('EHC Plan') in respect of Mr and Mrs C son, J, on three grounds:

    1) The F-tT arguably failed to consider whether J had a learning difficulty within the meaning of 'section 20 of the Children and Families Act 2014 ('CFA 2014').

    2) The F-tT arguably failed to provide adequate reasons for its conclusion at [33] of its decision that an EHC Plan was necessary, and arguably failed to explain why the parents' witnesses were preferred to the Local Authority's witnesses;

    3) The F-tT arguably erred by considering that the availability of provision within the resources of the school were irrelevant.

**The background**

3. J is an 8 ½ year old boy who has a diagnosis of high functioning Autistic Spectrum Disorder ('ASD'). He has social communication difficulties, significant sensory processing difficulties impacting on his functional abilities, difficulties with sequencing, planning and organisation, and a number of physical problems including dyspraxia. His main problems, however, are behavioural, including aggression (especially in unstructured time at school and in after school activities), challenging behaviour and non-compliance with instructions from his teachers, difficulties keeping 'on task', and in keeping still. Despite his serious behavioural problems, he has achieved average and high average levels in Maths (2a) and Writing (2b/a) but a lower level in Reading (3c) of the national curriculum. By the time the appeal reached the Upper Tribunal, J had been withdrawn from the independent school he was attending ('R School') as he was facing expulsion.

4. The Local Authority carried out an assessment of J's educational, health care and social care needs pursuant to section 36 of the CFA 2014 but decided that it was not necessary to issue an EHC Plan under section 37(1).

## The legislation:

5. The provisions, as relevant to this appeal, are: -

> **20 When a child or young person has special educational needs**
>
> (1) 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.
>
> (2) A child of compulsory school age or 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.
>
> …
> (5) This section applies for the purposes of this Part.
>
> **21 Special educational provision, health care provision and social care provision**
>
> (1) "Special educational provision", for a child aged two or more or 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—
>
> (a) mainstream schools in England,
> …
>
> **33 Children and young people with EHC plans**
>
> (1) This section applies where a local authority is securing the preparation of an EHC plan for a child or young person who is to be educated in a school or post-16 institution.

(2) In a case within section 39(5) or 40(2)[1], the local authority must secure that the plan provides for the child or young person to be educated in a maintained nursery school, mainstream school or mainstream post-16 institution, unless that is incompatible with—

(a) the wishes of the child's parent or the young person, or
(b) the provision of efficient education for others.

**34 Children and young people with special educational needs but no EHC plan**

(1)This section applies to a child or young person in England who has special educational needs but for whom no EHC plan is maintained, if he or she is to be educated in a school or post-16 institution.

(2) The child or young person must be educated in a maintained nursery school, mainstream school or mainstream post-16 institution, subject to subsections (3) and (4).

**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 child or 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 child or young person.

…

(8) The local authority must secure an EHC needs assessment for the child or young person if, after having regard to any views expressed and evidence submitted under subsection (7), the authority is of the opinion that—

(a) the child or young person has or may have special educational needs, and
(b) it may be necessary for special educational provision to be made for the child or 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 child or young person in accordance with an EHC plan—

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

(2)For the purposes of this Part, an EHC plan is a plan specifying—

[1] Section 39(5) permits a Local Authority to name a school or type of school in an EHC Plan other than that chosen by the parents where the parents' choice is unsuitable for the child in specified ways or where it would be incompatible with the provision of efficient education for others or be incompatible with the efficient use of resources. Section 40(2) allows a Local Authority to name a school in an EHC Plan where the parents have not named their choice.

(a) the child's or young person's special educational needs;
(b) the outcomes sought for him or her;
(c) the special educational provision required by him or her;
(d) any health care provision reasonably required by the learning difficulties and disabilities which result in him or her having special educational needs;
(e) …
(f) any social care provision reasonably required by the learning difficulties and disabilities which result in the child or young person having special educational needs, to the extent that the provision is not already specified in the plan [under paragraph (e)].

…

**66 Using best endeavours to secure special educational provision**

(1) This section imposes duties on the appropriate authorities for the following schools and other institutions in England—

(a) mainstream schools;
…

(2) If a registered pupil or a student at a school or other institution has special educational needs, the appropriate authority must, in exercising its functions in relation to the school or other institution, use its best endeavours to secure that the special educational provision called for by the pupil's or student's special educational needs is made.

(3) The "appropriate authority" for a school or other institution is—
(a) in the case of a maintained school, … the governing body

A mainstream school is defined in section 83 (Interpretation) as a maintained school that is not a special school; and a maintained school is defined as a community, foundation or voluntary school, or a community or foundation special school not established in a hospital.

**83 Interpretation**

(3) A child or young person has a disability for the purposes of this Part if he or she has a disability for the purposes of the Equality Act 2010.

**Equality Act 2010**

**6(1)** A person (P) has a disability if

(a)P has a physical or mental impairment, and
(b) the impairment has a substantial and long term adverse effect on P's ability to carry out normal day-to-day activities.

## Ground 1 – the learning difficulty.

6 Mr Small contends that the F-tT did not find facts to establish that J had a learning difficulty within section 20 and therefore failed to show that the difficulty was significantly greater than demonstrated by the majority of others of the same age.

7 Mr Friel contends that this (i) this was not a live issue before the F-tT and (ii) in any event, it is an argument which showed a misunderstanding of the definition in section 20(1), which refers to a learning difficulty *or* a disability which has particular results. He submitted that (2)(a) related generally to cognitive difficulties while 'disabilities' would include physical problems such as blindness and deafness, but also cover mental health problems such as ASD. It followed that if a child had ASD (as did J) which hindered or prevented him from making use of facilities of a kind generally provided for others of the same age in mainstream schools, he had special educational needs within s. 20. Mr Friel argued that both parts of s. 20(2) were in play for J. This, he says, is what was argued before the F-tT though the F-tT did not deal with this issue in its written decision.

8 It seems to me that this issue can be disposed of on Mr Friel's first submission. It was not a live issue.

9 The Assessment Feedback (pp26ff) and the Local Authority's resistance to the appeal point reasonably clearly to this conclusion. In Section B of the Feedback, the Local Authority discusses J's 'special educational needs'. The Local Authority may used those words loosely in the Feedback, since educational needs only amount to *special* educational needs if the child's learning difficulty or disability *calls for special educational provision* to be made [s. 20(1)]. However, their intent is clear from their express statement in the Resistance to the appeal (p117 [6]) that it *'does not dispute that J has special educational needs* but is of the opinion that his educational needs can be met through the resources ordinarily available to mainstream schools'. I note that Upper Tribunal Judge Jacobs came to the same conclusion in respect of a Local Authority's similarly worded refusal to assess a child in *Buckinghamshire County Council v HW* [2013] ELR 519 at p524.

10 It is also notable in this appeal that the 'extra' provision for J set out by the Local Authority in the Feedback covered several pages. In all of these circumstances, I conclude that the question for the F-tT was *not* whether there were 'special educational needs', but whether J's needs had crossed the line between provision that could reasonably be met from the resources normally available in mainstream schools (paragraph 9.55 of the Code of Practice) or was intervention and support over and above that which is usually so provided.

11 My conclusion is that I do not see any material error of law in the F-tT's omission to deal with this issue.

12 This conclusion makes it unnecessary to decide the point of interpretation of s. 20(2) raised by Mr Friel. It may, however, be useful to flag up a number of points for the future:

- Under s. 83(3) of the CFA 2014, the question of whether a child or young person has a disability is determined by reference to whether he has a

disability for the purposes of the Equality Act 2010. Section 6(1) of that Act is accordingly relevant.

- S. 20 of the CFA 2014 says that a child has a learning difficulty *or* disability if (a) he has significantly greater difficulty in learning (…) or (b) has a disability which prevents or hinders him from making use of facilities (…).

- The Equality Act 2010 does not require a strict line to be drawn between a learning difficulty and a disability. Annex A of the Guidance issued by the Equality and Human Rights Commission under the Equality Act 2010 ('What Equality Law Means to you as an Education Provider') shows this fluidity:

'A person is a disabled person (someone who has the protected characteristic of disability) if they have a physical and/or mental impairment which has what the law calls 'a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities'.

There is no need for a person to have a medically diagnosed cause for their impairment; what matters is the effect of the impairment not the cause.

In relation to physical impairment:

Conditions that affect the body such as arthritis, hearing or sight impairment (unless this is correctable by glasses or contact lenses), diabetes, asthma, epilepsy, conditions such as HIV infection, cancer and multiple sclerosis, as well as loss of limbs or the use of limbs are covered.

(…)

Mental impairment includes conditions such as dyslexia and autism as well as learning disabilities such as Down's syndrome and mental health conditions such as depression and schizophrenia…

(…)

**For example:** Someone who has ADHD might be considered to have a disability even if their medication controls their condition so well that they rarely experience any symptoms, if without the medication the ADHD would have long-term adverse effects.

13 There is likely to be an overlap between a learning difficulty and a disability by virtue of the definition in the Equality Act 2010. Although 'disability' requires 'impairment', that term appears to bear a very wide meaning.

14 However, section 20(2)(b) of the CFA 2014 applies only to a disability which prevents or hinders the child from making use of *facilities.* 'Facilities' are likely to refer to physical facilities such as the playground, lunch hall, toilets, corridors, and classroom, but seems inapt to cover the way in which the school provides education for the pupil.

**Ground 2 - Adequacy of Reasons** for the conclusion that an EHC Plan was necessary; adequacy of reasons relating to preference of parents' witnesses to those of the Local Authority.

15 Mr Small pointed out that there was an overlap between his 3 grounds. It seems to me that the points he made under ground 1 in relation to the evaluation of evidence are relevant in ground 2 and that the issue of when an EHC Plan is necessary is better dealt with in ground 3.

16 The basic principles relating to adequacy of a decision are summed up by Waller LJ in *H v East Sussex CC* [2009] EWCA (Civ) 249 [16] - [18]: Paragraphs [14] and [15] are, however, useful warnings against elevating into general principles what are statements by judges made by reference to particular facts and circumstances, and I include them here.

> 14. In my view furthermore the submission on which Ward LJ was persuaded to grant permission to appeal in what was a second appeal was flawed. The submission, as I understand it, has elevated statements of Grigson J and Wilkie J taken on their own into propositions of law applicable in all cases and on that basis suggested there is an inconsistency. That, in my view, is an entirely wrong approach and it is right to deal with what I suggest is the proper approach at the outset. I would in so doing also suggest that despite its good intentions there are dangers in summarising what are suggested to be "requirements" identified in the authorities, as Beatson J was persuaded to do in *R(L) v London Borough of Waltham Forest and Another* [2004] ELR 161 at paragraph 14. There he suggested he was summarising the "requirements" central to the appeal before him and he did so in these words:-
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> > "14. Reasons must, first, deal with the substantial points that have been raised so that the parties can understand why a decision has been reached. This is seen from *S (A Minor) v Special Educational Needs Tribunal and Another* [1995] 1 WLR 1627, sub nom *S v special Educational Needs Tribunal and City of Westminster* [1996] ELR 102 and *M v Worcestershire County Council and Evans* [2002] EWHC 1292 (Admin), [2003] ELR 31. In *H v Kent County council and the Special Educational Needs Tribunal* [2000] ELR 660, Grigson J stated that what was necessary was that the aggrieved party should be able to identify the basis of the decision. Secondly, a specialist tribunal, such as SENDIST, can use its expertise in deciding issues, but if it rejects expert evidence before it, it should state so specifically. In certain circumstances it may be required to say why it rejects it: see *H v Kent County Council*, per Grigson J, at para [50]. Thirdly, mere recitation of evidence is no substitute for giving reasons: see *L v Devon County Council* [2001] EWHC Admin 958, [2001] All ER (D) 155 (Nov), per Gibbs J, at para [50]. Fourthly, and linked to the second point, where the specialist tribunal uses its expertise to decide an issue, it should give the parties an opportunity to comment on its thinking and to challenge it. That is established in the Mental Health Review Tribunal context by *R v Mental Health Review Tribunal ex parte Clatworthy* [1985] 3 All ER 699, and in the context of this tribunal in *M v Worcestershire County Council and Evans.*"
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> 15. The trouble with such a summary is that it risks elevating into general principles what are statements by judges made by reference to the facts and circumstances of particular cases but taken out of context. That summary, for example, and indeed the mere quote from Grigson J's judgment, does not reveal that the situation in the case before Grigson J was that his comment was made where there was certain unchallenged expert evidence which the Tribunal's decision did not deal with at all. Furthermore a full citation from Grigson J's judgment would show that he was approaching the challenge in that case by reference to the general principles, to which I shall refer, and not because he thought he was laying down a rule of general application. I should add that the position before Wilkie J was that there was competing evidence and the case was one in which the Tribunal had to decide which it preferred. His comment, too, must be read in its context and not as laying down some general rule applicable in all cases.
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> 16. The requirement to give reasons is concerned with fairness and as far as guiding principles are concerned I agree with what Wall LJ said in *W v Leeds City Council and SENDIST* [2006] ELR 617. After referring to four first instance decisions specifically relating to Special Educational Needs Tribunals and the giving of reasons, including

Grigson J's decision in *R(M) v Brighton and Hove City,* he said at paragraph 53 to 54 as follows:-

> "53. I do not think it necessary for this court to add to the already substantial jurisprudence on this topic. Speaking for myself, I have always regarded the judgment of Sir Thomas Bingham MR (as he then was) in this court in Meek v Birmingham City Council [1987] IRLR 250 (even though it substantially antedates the incorporation into English Law of ECHR) as the definitive exposition of the attitude superior courts should adopt to the reasons given by Tribunals. Whilst, of course, some aspects of the reasoning processes of different specialist tribunals are unique to the particular speciality which is engaged, I see no reason, in this context, to distinguish between Employment Tribunals and what are now SENDISTs. Sir Thomas said:
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> "It has on a number of occasions been made plain that the decision of an Industrial Tribunal is not required to be an elaborate formalistic product of refined legal draftsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises . . ."
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> 54. The Master of the Rolls added:
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> "Nothing that I have said is, as I believe, in any way inconsistent with previous authority on t his subject. In UCATT v Brain [1981] IRLR 225, Lord Justice Donaldson (as he then was) said at p 227:
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> "Industrial Tribunals' reasons are not intended to include a comprehensive and detailed analysis of the case, either in terms of fact or in law . . . their purpose remains what it has always been, which is to tell the parties in broad terms why they lose or, as the case may be, win. I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to be brought based upon any such analysis. This, to my mind, is to misuse the purpose for which the reasons are given.

17 What emerges from the case law is that there are basics that need to be present, but these basics may require supplementation by greater analysis and explanation depending on the issues before the Tribunal and the extent to which the evidence is disputed.

18 To this, I would only add that the decision under scrutiny must be looked at as a whole. In the course of a complex decision, a Tribunal may be dealing with many hundreds of pages of written evidence and extensive oral evidence. It is not expected to deal with everything, but it must address the legal issues relevant to the decision and resolve the significant evidential disputes. The Tribunal may make legal errors along the way, but if these do not detract from the overall sense of the decision they should not result in a decision being set aside. The Upper Tribunal may treat the error as immaterial (so that there is no error (*R (Iran) v Secretary of State for the Home Department* [2005] EWCA 605 at [14] – [16]) or choose not to exercise its discretion to set aside under 12(2)(a) of the Tribunals Courts and Enforcement Act 2007.

19 Mr Small submitted that the F-tT focussed only on the negative evidence thereby failing to deal with evidence showing that J was making reasonable progress. Whether a child is making progress is, as will be seen in the discussion of when it is 'necessary' to issue an EHC Plan, *one* of the factors mentioned in paragraph 9.55 of the Special Educational Needs and Disability Code 2015 to which local authorities and tribunals must have regard. The Code is not, however, binding law. Where there is a difference between the law as set out in statutes, regulations and case law, and the Code, the Tribunal must follow the law.

20 Mr Small went through the evidence given by teachers and experts with care, but the main points are these: He pointed out that the parents' own educational psychologist, Ms P, described J as a very good student working at or beyond the schools expectations. He noted that the F-tT recorded agreement between the parties that J could access the curriculum. Those, of course, are relevant to whether he has special educational needs which require special educational provision beyond those reasonably available at mainstream schools. He pointed to a lack of explanation of why the Local Authority's speech and language therapist, Ms C's, report was not accepted, noting her opinion that J's expression and understanding was within the average to high average range. He made the same criticism with regard to the way the F-tT dealt with Dr Robertson's written report for the Local Authority. Dr Robertson disputed the assertion that J had significantly greater difficulty in learning than the majority of others of the same age. Mr Small noted evidence that J's behavioural problems occurred mainly at unstructured times, such as lunch, in the playground and at after school activities such social clubs. He submitted that as regards classroom behaviour, the evidence was mainly that J did *not* require adult support; observations which showed otherwise were not typical. He referred to Ms P's report for the parents in which she noted that his class had no additional TA support, and two other reports indicating that J could keep on task. The F-tT did not say why it gave little or no weight to the Local Authority's witnesses, Ms C and Ms S, who stated J participated in class activities unsupported by a TA. It did not deal with the Local Authority's occupational therapist's evidence whilst it dealt with the parents' occupational therapist report in detail. It did not say why it preferred the expert evidence it accepted.

21 Mr Small expanded on difficulties with the F-tT's reasoning in deciding that an EHC Plan was necessary. He dealt with inconsistencies and contradictions in the decision. So, for example, he submitted the F-tT was inconsistent in stating at [29] that 'the real dispute appeared to be how J's identified special educational needs should be met and if the provision of support exceeded that available within the mainstream setting' but then stating at [33] 'We were not persuaded by the Local Authority position that availability of provision within a mainstream setting was the correct approach in determining whether an EHC Plan should be issued. He submitted that this approach was wrong since local authorities *must* secure that an EHC Plan provides for a mainstream setting unless one of two incompatibilities is shown (section 33, Children and Families Act 2014). He pointed to an inconsistency whereby the F-tT acknowledged in its decision that the level of provision required was available in a mainstream school [22] but then concluded that the level of support required was greater than that available without an EHC Plan. He drew attention to Ms P's (the parents' educational psychologist's) view

that J's needs *could* be met in a mainstream environment though he unsurprisingly he did not place any weight on the caveats Ms P added to this.

22 Mr Friel made two main points in response: (i) the collection of defects identified by Mr Small (who did not represent the Local Authority below) did not represent the state of the evidence by the end of the hearing. The evidence had changed quite a lot by then and the written decision reflected this; and (ii) it was important to look at the decision as a whole.

23 As to (i), Mr Friel submitted that the F-tT recorded that both parties' professional witnesses agreed that J had special educational needs. Paragraphs 16, 17 and 33 demonstrate that the occupational therapists for the parents and Local Authority were not only agreed, but the parents' occupational therapist's evidence was unchallenged. Witnesses at R School confirmed that J had to be supported to remain on task both during classes and unstructured periods [30]. Even in respect of speech and language therapy where the experts disagreed on the way in which J's difficulties should be handled, they agreed that he had significant pragmatic speech and language difficulties. Dr Robertson (for the Local Authority) agreed at the end of the day that J's 'significant language difficulties adversely impacted on his social communicative ability', that he needed support in his emotional and behavioural skills and that 'his need for ongoing speech and language therapy was apparent'. She considered that, although his class teacher was supportive, it was not sufficiently targeted.

24 Having examined the evidence and looked very carefully at the written reasons, I have come to the conclusion that Mr Friel is right. The F-tT was long on recitation of the evidence and short on explicit resolution of conflicts but when the decision is read is a whole one can see what the F-tT accepted and rejected, and why.

25 I have concluded that the F-tT's decision was adequate. It engaged with the evidence on both sides as it panned out at the hearing. The provision J needed was plain enough. The extent of agreement among the witnesses was, by the end of the hearing, such that it would have served no useful purpose to deal with minutiae. In my view, the F-tT was correct in saying that their task came down to deciding whether the provision for J fell on the right side of the line for issuing an EHC Plan.

## Ground 3 – The necessity for an EHC Plan must be assessed against the availability of provision within the resources of a mainstream school

### *Necessary*

26 A Local Authority or Tribunal must find that it is necessary for special educational provision to be made for a child before EHC Plan can be issued: section 37 of the CFA 2014. 'Necessary' is not defined in the CFA 2014, nor was it defined under the Education Act 1996 where the word was used for the same purpose. Upper Tribunal Judge Jacobs pointed out in *Buckinghamshire CC v HW*, [2013] ELR 519, paragraph 16 (decided under the Education Act 1996) that 'necessary' has a spectrum of meanings, 'somewhere between indispensible and useful'. He

emphasised that it is a word in common usage, and it is that that a Tribunal must apply. Upper Tribunal Judge Mark makes the further point in *Manchester City Council v JW* [2014] UKUT 168 [14] this what is necessary may involve a value judgment.

27 The Code envisages that the majority of children with additional educational needs will not require EHC Plans. Their needs will be met in a mainstream setting from resources normally available at mainstream schools [paragraph 9.1]. Local authorities are required to have, and to publish, a 'local offer' (section 30 of the CFA 2014) which tells the public the provision they expect to be available across education, health and social care for children and young people who have special educational needs or are disabled, including those who do not have EHC Plans [paragraph 4.1]. Schools have a set amount of additional funds per pupil to meet additional educational needs caused by learning difficulties and disability falling short of requiring an EHC Plan. They also have access to exceptional needs funding and specialist advice and training from the Local Authority.

28 The Code suggests that, in making a decision on whether it is necessary to issue an EHC Plan, the Local Authority will, in essence, have to look at the information it has about a child's needs and any provision made for him both before and after the assessment [paragraph 9.54]. If the information continues to be well matched to the child's needs and provision already being made, then an EHC Plan is probably not necessary. But, if 'despite appropriate assessment and provision, the child is not progressing or not progressing sufficiently well' it should take into account of: -

> whether the special educational provision required to meet the child or young person's needs can reasonably be provided from within the resources normally available to mainstream … schools…or
>
> whether it may be necessary for the Local Authority to make special educational provision in accordance with an EHC Plan.' [paragraph 9.55],

29 The steps boil down to this: -

(a) What did we know before?
(b) What do we know now?
(c) If (a) and (b) are well matched, an EHC Plan is probably not necessary; but
(d) If the child is not making progress/sufficient progress despite (a) and (b) being well matched, can appropriate provision be made from normal mainstream resources? Or may the Local Authority have to go further and issue a plan. In other words, which side of the line does the case fall on.

30 Point (d) is no more than a restatement of the question 'is an EHC Plan necessary'.

31 All three parts contain elements which may not be amenable to easy analysis. There may, for example, be considerable room for argument not only over what the local offer really includes, but what can *reasonably* be provided in the mainstream context and, of course, whether that is enough to meet the child's needs. For example, in a case where a child requires a very high level of input from the class teacher, the Local Authority may conclude that the needs cannot reasonably met

without causing considerable harm to the education of twenty or more other pupils in the class.

32 Judge Mark summarised case law on 'necessary' in the *Manchester CC v DW* [2014] UKUT 168 (AAC). The case was decided under the Education Act 1996. Judge Mark says at paragraphs [15] and [17].

> 15 Further guidance as to when a statement is necessary is to be found in *LB of Islington v LAO* [2008] EWHC 2297 (Admin) and in *NC and DC v Leicestershire CC* [2012] ELR 365. In *Islington v LAO*, Judge Waksman QC stated at para.5 that a decision to make a statement came "at one end of a spectrum of need with which the local authority concerns itself. There are many children within the remit of a local authority who may have learning difficulties and require some form of educational provision, but this does not in and of itself mean that a statement will be required. Hence, of course, the word "necessary" in section 324(1)." He went on in paragraph 6 to describe the conditions in section 324 as being in somewhat stark form and to refer to the further guidance in the Code of Practice. He identified from the Code of Practice three steps that needed to be taken. The first was to ascertain the degree of the child's learning difficulties and the special educational needs that resulted. The second was to determine what provision was required and the third was to determine whether that provision was available in what he paraphrased as the normal resources available to the education authority.
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> ….
>
> *17[Both] these cases were concerned with issues that involved consideration of the application of the guidance in the Code of Practice to the facts in those cases. I bear in mind that the Code of Practice is precisely what it is said to be – guidance to which the local authority and the tribunal must have regard. It does not affect the generality of section 324 so as to exclude any possibility that a statement may be necessary for some other reason than those indicated in the guidance. For example, if it was the case that a school or local authority, despite having the necessary resources, simply refused to use their best endeavours to provide the requisite special educational provision, a tribunal may well consider it necessary to direct a statement.* [italics added]

33 As I have already said, the steps in paragraph 9.54 of the Code 2015 are expressed differently but this is not important in this case.

34 In my view, the importance of Judge Mark's decision is in paragraph [17] which emphasises that the relevant statutory provision, s. 324 of the Education Act 1996, is drafted in general terms. The same is true for s. 37 of the CFA 2014. Its generality allows for flexibility and is *not* overridden by the Code. Judge Mark decides that there may be situations in which a Statement or an EHC Plan may be necessary for reasons which are not expressed in the Code.

35 The *Manchester* case and *H v East Sussex CC* are also salutary reminders that an approach commended in case law may be no more than an extra-statutory construct and may well be fact sensitive. The approach may have to give way where the facts in a particular case do not fit neatly within them, or where the Tribunal's specialist knowledge and experience lead it to a different result, as in the *Manchester* case itself. For that reason, I do not accept Mr Small's argument that the F-tT 'infringed' (and presumably automatically erred in law) by not following the 3 step approach in *Islington v LAO* as set out in the *Manchester* case. This would concretise the case law approach without regard to the generality of the underlying statutory provision (or, indeed, the change in wording in the Code).

36 In my view, what is 'necessary' is a matter to be deduced rather than defined. Its determination will vary according to the circumstances of a particular case and may well involve a considerable degree of judgment.

37 Having explored the tolerances in the meaning of 'necessary', we must look at what the F-tT did to evaluate the evidence before it. That exercise ties in with the discussion on adequacy in decision writing. In other words, we are still trying to decide whether the F-tT has dealt adequately with a fluid concept.

**The evaluation**

38 Mr Small's main contention was that the test of whether an EHC Plan was necessary required an assessment of the provision required by the child set against the provision that could reasonably be made for the child from the resources normally available in a mainstream school. Next, he submitted that the F-tT had to identify the child's needs with some specificity so that those needs could be evaluated against what a mainstream school could normally offer

39 Mr Small supported his submission by reference to (i) the presumption in section 34 of the CFA 2014 that children with special educational needs for whom an EHC Plan is not maintained will be educated in a mainstream school, (ii) the Code, which indicates that local authorities should take into account what may reasonably be provided within a mainstream school's resources (paragraph 9.55) and (iii) the above case law under the Education Act 1996.

40 The first issue is the extent to which the child's needs must be identified. In the *Manchester* case at [19], Judge Mark was of the view that it

> '…while a Tribunal must make findings as to the child's needs and the required provision sufficient to enable it to come to a conclusion as to the need for a statement, those findings do not have to be in the same detail as would be expected in a statement. Otherwise, when directing a statement the Tribunal would effectively have to write it.

41 I respectfully agree. The F-tT is required at this stage to decide if an EHC Plan should be issued. It is not tasked to draft the document.

42 Mr Small argued that this was not done sufficiently. The F-tT did not, for example, settle which of the variants of provision put forward by its own experts was

required. For example, did J need the package of OT support envisaged by Ms W? This included support with executive skills by weekly OT and a full assessment of his sensory needs, a suitable seat, a handwriting programme, liaison with speech and language therapy and adaptation of his PE curriculum [17]. What about his speech and language therapy? Ms H considered ongoing speech and language provision with one hour per week of direct intervention to be necessary. Dr R did not put any figure on it. Ms P (educational psychologist) considered that he needed more than 15 hours per week of support *including* 1:1 TA support, OT, speech and language therapy.

43 Looking at the F-tT's comments overall, it appears to me that the F-tT accepted at least one hour each of OT and speech and language therapy per week with the remainder of 15 hours support coming from a TA. This may not have been the F-tT's finest fact-finding hour, but in my view, what it said was adequate given the limited nature of the task the F-tT had to carry out.

44 Did the F-tT deal adequately with what could reasonably be provided from resources normally available to a mainstream school? The F-tT may not have excelled itself, but excellence is not the test. Although the evaluation was not altogether clear, the F-tT had to work with the evidence the Local Authority gave it. This largely comprised the Local Authority Feedback (especially pp 34 – 42). This document accepted that J had some learning difficulties but did not find that external assistance was necessary, nor that a TA was required to deal with J's noises, interruptions, demands, temper outbursts, challenges, aggression, lack of concentration and so on. Indeed, out of approximately 60 types of input listed in the Feedback, approximately 45 fell primarily on the class teacher. The evidence given by the head teacher of the paradigm school, Ms L, did not take things much further. The TA support she thought would be available in either of the classes that J might join was low. She envisaged him joining a class of 26, which had several SEN children and had 1.5 full time equivalent assistants. The other class he might join was a split year class (which brings problems of its own). It had fewer SEN children and two experienced teachers, but they had a job-share arrangement (which is also problematic) and only 0.5 full time assistants.

45 The F-tT was rightly concerned that this paradigm could not meet J's needs. The F-tT accepted that J could access the curriculum in a broadly average way. But it was entitled to accept Ms P's professional opinion that to learn properly, he needed to have teachers and therapists with ASD training, with targeted OT and speech and language therapy to meet his behavioural and ASD difficulties. The Local Authority had not shown that mainstream resources could meet these considerable needs.

46 The F-tT did not resolve any of these models with any particularity. However, its task at this stage was not to draft and EHC Plan but to decide whether it was necessary for the Local Authority to draft one. It is reasonably clear from the way the evidence was discussed and the conclusions from [29] onward that the F-tT preferred the solutions offered by the parents' witnesses regarding what J actually needed. At [32], for example, they identify his OT, speech and language therapy needs and the need for a full assessment of his sensory needs plus the need for staff training in the implementation of the therapies designed to meet his needs. It

is sufficiently clear that the evidence from the parents' witnesses in respect of OT and speech and language therapy must have been accepted. The F-tT certainly and specifically accepted that J required a high level of intervention to remain on task and that his anxiety impacted on his functioning, working memory and ability to be attentive. The Local Authority's solutions did not accept these. Although infelicitously expressed, this is likely to be the explanation of the F-tT's statement that it was not persuaded by the Local Authority position that availability of provision within a mainstream setting was the correct approach in determining whether an EHC Plan should be issued.

47 A First-tier Tribunal's decision should be respected unless it was manifestly in error, as stated by Baroness Hale of Richmond in *Secretary of State for the Home Department v AH (Sudan) and Others* [2008] 1 AC 678,.:

> 'Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently. I cannot believe that this eminent Tribunal had indeed confused the three tests or neglected to apply the correct relocation test."

Unless it erred in the manner raised in ground 3, I do not consider that to be the case.

48 The issue that the F-tT had to decide was one on which reasonable tribunals could reasonably differ, but at the end of the day, I have come to the conclusion that the F-tT's conclusion was open to it on the evidence.

**Best Endeavours**

49 This leaves Mr Small's final point on best endeavours. Under section 66 of the CFA 2014, the appropriate authority for a mainstream school is under a duty to use its best endeavours to secure that the special educational provision called for by a pupil's special educational needs is made. The appropriate authority for a mainstream school is the governing body. Mr Small pointed out that this duty did not apply to an independent school.

50 I do not consider that this argument takes things any further. I have no reason to think that the paradigm school, or another school suggested by the Local Authority, would fail in its duty to use its best endeavours.

51 The problem may lie in the ambiguous use of terminology. A child has special educational needs if he has a learning difficulty or disability which calls for special educational provision (s. 20, CFA 2014). Special educational provision means provision different from that made generally for others of the same age in mainstream schools in England (s. 21).

52 The Local Authority's case was that the provision required to meet J's needs was *not* different from needs additional to, or different from, that made *generally* for others in the same age group. In their view, his needs were of the type that *would* generally be met for children with behavioural difficulties from resources normally available to mainstream schools. Otherwise, it would have issued an EHC Plan.

53 Once an EHC Plan is in place, a mainstream school named by either of the parties would be required to use its best endeavours to meet J's needs. That, however, is not an issue in this appeal. It would be a matter for a future F-tT to decide if there were to be a further appeal on the EHC Plan under section 51 of the CFA 2014.

54 Mr Small may have been suggesting that, because an independent school was not under the same duty, it might not meet J's needs. That, too, is a matter for another day.

55 The appeal is accordingly dismissed.

**[Signed on original]** **S M Lane**
**Judge of the Upper Tribunal**

**[Date]** **24 August 2016**