IN THE UPPER TRIBUNAL **Case No** HS/1797/2016
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD

Attendances:

For the Appellant: Mr John Friel of Counsel

For the Respondent: Mr Paul Greatorex of Counsel

Decision: The appeal is allowed. The decision of the First-tier Tribunal sitting on 18 June 2015 and 18 April 2016 under reference SE305/15/00005 involved the making of an error of law and is set aside. The case is referred to the First-tier Tribunal (HESC) for a complete rehearing before a differently constituted tribunal as soon as reasonably practicable on or after 1 October 2016. The file is to be referred to a salaried judge of the First-tier Tribunal for case management directions to be given.

REASONS FOR DECISION

1. The appeal concerns the education of C, a boy aged 9. Both parties have commendably adopted an approach characterised by a degree of pragmatism, acknowledging that the priority is the education going forward of C, who has a number of special educational needs, has been in difficult family circumstances and who has been out of education for a considerable time.

2. The First-tier Tribunal directed that a school be named as day provision which is some 2 ½ hours travel time each way from C's home. Some pupils at the school do live in children's homes nearby but, for reasons I need not go into, this was not what the tribunal ordered. There is conflicting evidence as to how day provision at the school came to be named, in particular as to whether C's mother made a commitment to the necessary logistical support to enable such an arrangement to work and, if so, what that commitment consisted of. It is common ground between the parties that the tribunal erred in law by failing to record with sufficient specificity what it considered C's mother had agreed and thus that its reasons for ordering a placement which, by virtue of its distance from C's home, was at first sight a surprising one, fell below the legally required standard. I agree, in that the reasons are insufficient to enable the Upper Tribunal to assess whether or not the First-tier Tribunal made an error of law in this regard and I set its decision aside.

3. What then follows? Mr Friel invites me:

(a) to conclude that section 517 of the Education Act 1996 empowers a tribunal, standing in the shoes of a local authority, to order boarding provision at a children's home and to remake the decision so as to name the same school plus the relevant children's home; or

(b) failing that, to make a decision substantially in the terms set out above (as proposed by Mr Greatorex on behalf of the authority).

4. Section 517, so far as material, provides (emphasis added):

> "(1) Where, in pursuance of arrangements made under section 18, Part 4 (special educational needs) or Part 3 of the Children and Families Act 2014 (children and young people in England with special educational needs or disabilities), primary or secondary education is provided for a pupil at a school not maintained by them or another local authority, the local authority by whom the arrangements are made shall—
> (a) if subsection (2), (3) or (4) applies, pay the whole of the fees payable in respect of the education provided in pursuance of the arrangements; and
> (b) if board and lodging are provided for the pupil **at the school** and subsection (5) applies, pay the whole of the fees payable in respect of the board and lodging.
> …
> (5) This subsection applies where the authority are satisfied that education suitable—
> (a) to the pupil's age, ability and aptitude, and
> (b) to any special educational needs he may have,
> cannot be provided by them for him **at any school** unless board and lodging are also provided for him **(either at school or elsewhere)."**

5. It is not disputed that one of subsections (2)(3) or (4) applies. The area of dispute is subsection (1)(b). Mr Greatorex submits that the subsection creates two conditions and the first one requires board and lodging to be provided "at the school". The board and lodging proposed in the present case is not "at" the school but at a separate children's home. Mr Friel counters by submitting that such a view would make the words in parentheses at the end of subsection 5(b) otiose.

6. I was not taken back behind the 1996 Act, but when the statutory history is traced back, I consider it provides the answer. While acknowledging that I have not had the benefit of full argument and, as will be seen, the point provides merely an alternative basis for my decision, it may be useful to record that s517 has its origin in section 6(2)(b) of the Education (Miscellaneous Provisions) Act 1953, which provided that a local authority which had made arrangements for education to be provided at a non-maintained school

> "shall, where board and lodging are provided for the pupil at the school and the authority are satisfied that education suitable to his age, ability and aptitude cannot be provided by them for him at any school unless board and lodging are also provided for him (either at school or

> elsewhere), pay the whole of the fees payable in respect of the board and lodging."

7. From this, in my view it is clear from the contrast between "at school" and "elsewhere" that the word "at" is intended – as one would expect - to refer to the geographical location of the provision. Their origin as one continuous sub-section indicates that "at" in sub-section 1(b) and in sub-section 5(b) are intended to have the same meaning. I do not regard the subsequent reordering of the statutory material as significant. Sub-section (5) effectively creates a further condition before boarding fees can be paid under this section – that suitable education cannot be provided "at **any** school" without some form of boarding arrangement. It does not in my view justify reading the reference in sub-section (1)(b) of s517 to provision "at the school" as encompassing provision which is not "at" the school.

8. In any event, even if (contrary to my view) when remaking the decision I had the power to name the relevant children's home pursuant to s517, I should not exercise it in the circumstances of this case. Mr Friel very properly submitted recent Ofsted reports in respect of the establishment concerned. While it is clear that Ofsted viewed much of the provision in a positive light, even on a quick read of the material there are real issues around the age profile of the (very small number of) residents, a number of whom at least face challenges to overcome which are very different from those faced by a 9 year old, and so whether there would be an appropriate peer group. Other issues arise also, but it suffices to observe that the evidence is certainly not such that, sitting alone, without the specialist input available on the First-tier Tribunal, I would consider it appropriate to substitute a decision naming the children's home, even if I had power to do so.

9. While further legal issues arose, somewhat tangentially, in the course of the First-tier Tribunal proceedings and decision, both Counsel are agreed that they do not require to be addressed in the present decision and I am content not to do so.

10. The local authority continues to seek provision which it regards as suitable for C. It has identified a possible school, which is about to open. It is to allow the authority and C's mother the opportunity to inform themselves further as to the provision offered by that school that a direction has been made for a remitted hearing on or after 1 October. Meanwhile, pending the fresh decision of the First-tier Tribunal, the authority has indicated that it is prepared to continue paying the fees for the school named by the First-tier Tribunal's

decision which is now being set aside. Whether C's mother is in a position to take advantage of that offer depends on practical matters which are beyond the scope of the present decision.

CG Ward
Judge of the Upper Tribunal
25 August 2016