

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. HS/226/2016

Before Judge S M Lane

The appeal is dismissed.

This decision of the First-tier Tribunal did not involve the making of a material error of law.

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 A First-tier Tribunal Judge granted the appellants permission to appeal. The appellants, Mr and Mrs C, are the parents of L, who is the subject of this special educational needs case ('SEN'). The respondent is the Local Authority.

2 The appeal was heard on 22 April 2016 at Field House, London. The parents were represented by Mr John Friel, of counsel, instructed by SEN Legal. The Local Authority were represented by Mr Paul Greatorex, of counsel. Neither of these counsel appeared at the F-tT. At that stage, the parents were represented by Mr Clive Rawlings, of counsel and the Local Authority was represented by a solicitor, Ms G Gillan.

3 I apologise for the delay in issuing this decision.

4 The appeal concerns a single point, but one of surprising complexity. The point is whether the F-tT erred in law by seemingly finding that L needed 'psychiatric input' but failing to make provision for it in Part 3 of his SSEN (Statement of Special Educational Needs). The parents submit that at least three errors emerge from the two sentences in which the F-tT's decision on this point is encapsulated:

[66](vii) 'We readily appreciate that L needs input from a psychiatrist – such as his current CAMHS doctor. Whilst we trust that the medical services will support the school, we do not accept that we can order the proposed amendment in part 3'

5 The amendment to the SSEN that the parents sought in relation to psychiatric input was this:

'a programme devised and monitored by psychological and psychiatric support to address his self esteem and self confidence and minimise the risk of mental health breakdown.'

6 Statements of Special Educational Needs are being replaced by Education, Health and Care Plans, but that should not make any difference in principle to the issue I have to decide since the words 'special educational provision' are common to the Education Act 1996 and the Children and Families Act 2014.

7 The parents' argue that

- (i) the F-tT found that L required psychiatric input;
- (ii) psychiatric provision is capable of being special educational provision (*H v A London Borough* [2015] UKUT 316 (AAC), so
- (iii) the F-tT should have made provision for it in Part 3 of the SSEN.

They argue that 3 errors of law are involved:

- (i) misunderstanding its power in law to make this provision
- (ii) failing to make the appropriate provision, and
- (iii) failing to give any or any adequate reasons for its decision on why they came to this conclusion.

A fourth point is an alternative to (ii): if the F-tT did not think that psychiatric input was an educational provision, it did not make give reasons for its conclusion.

8 The Local Authority's response is that there was no error of law; if there was an error of law, it was either immaterial, no remedy should be granted, or the case should be remitted to the same Tribunal on this point only. Mr Greatorex argues that the words 'psychiatric support' in this case related solely to the proposed amendment which the F-tT rejected. 'Psychiatric support' was not to be understood here as a form of general psychiatric support for L. The amendment was in any event too vague to be enforceable.

The Background

9 The Local Authority maintain a Statement of Special Educational Needs for L. He has complex special educational needs including challenging defiant behaviour, emotional difficulties (including anger management issues), ADHD and specific learning difficulties/dyslexia. His parents are pursuing further investigations to see whether L also suffers with ASD. This diagnoses has not been accepted for him in the past even though some of his behaviour has autistic features. He was regularly seen at CAMHS (Children and Adolescent Mental Health Services) by a psychotherapist and has input from a CAMHS psychiatrist as and when necessary. There is not much from the CAMHS psychiatrist on file, but the letter of file shows an intervention where a deterioration in L's behaviour required reappraisal of his medication. L is also in contact with a youth social worker.

10 L had previously been permanently excluded from H Primary School because of his behavioural problems. At the time the appeal was registered, L attended a mainstream secondary school, B School from which he had been temporarily

excluded on several occasions because of his behavioural problems. B School felt that it was no longer able to meet his needs. The parents thought that L needed a school with specialist dyslexia and/or specific learning difficulties provision, but they were having difficulty finding a school willing to take L owing to L's emotional and behavioural problems. The parties eventually agreed that L needed to be placed at a special school. The parents were finally able to find independent school, A School, which was prepared to take L whilst the Local Authority considered that a local special school, F School, could meet L's needs. The F-tT found that A School would not be able to meet L's needs, and that point is not under appeal.

Can the 'support of a psychiatrist' be categorised as special educational provision?

11 Yes, it is possible.

12 Whether something is special educational provision is generally a question of fact for the specialist Tribunal: *London Borough of Bromley v Special Educational Needs Tribunal and Others* [1999] EWCA Civ 3038. The OED's definition of education, accepted by the Court of Appeal in *London Borough of Bromley v Special Educational Needs Tribunal*, is 'systematic instruction, schooling or training given to the young ... in preparation for life'. This definition is broad enough to allow a wide range of therapies to be educational subject, of course, to the circumstances of the case. Speech and language therapy is a classic example of a therapy that may be (and is generally accepted as falling within the ambit of) special educational provision: *R v Lancashire CC ex parte M* [1989] 2 FLR 279.

13 The parents' submission emphasised that a form of provision which might be seen as medical did not automatically mean that it could not qualify as educational provision. They relied on *H v A London Borough* [2015] UKUT 316. In that case Upper Tribunal Judge Ward found an F-tT to have erred in law in two main respects. The F-tT's first error was to find that special educational provision could only be made for a pupil's learning difficulty where the learning difficulty was inherent, and not learned. Judge Ward held that was wrong. The question is not whether the behaviour is learned, but whether the provision required to address it is directly related to the pupil's learning difficulty [25] (see also *Bromley v SENT*, supra at 294). The second error, and the one which is relevant to the parents' argument here, was the F-tT's refusal to consider a form of provision because it was 'at the medical end of the spectrum'. Judge Ward made it clear that the question was not whether the provision was medical, but whether the learning difficulty called for that provision. The provision in that case was of specialist sex and relationship education for a pupil whose autism may have prevented him from understanding that the distorted behaviour he had learned regarding sexual activity was wrong. Sex education forms part of the national curriculum. The extended input that the child needed to understand why his behaviour was wrong might have been directly related to his learning difficulty.

14 Following *H v A London Borough*, with which I respectfully agree, the F-tT could not simply have dismissed the appeal on the basis that the psychiatric provision was medical. This was an error. Its effect will be discussed in due course.

15The question of how tribunals are to decide whether a particular provision is, or is not, educational is a vexed one. It is plain that that there is no bright line test to determine whether provision is educational or not. But if one goes back to the definition of education as 'systematic instruction, schooling or training', it may be possible to see some light.

16If a form of provision relates to a matter within the curriculum, there will probably be little doubt that provision is educational. Education is clearly not confined to the acquisition of knowledge such as the principles of physics or French verbs (*H v A London Borough* [24]), and even provision requiring the adaptation of a school's physical environment may constitute educational provision. An example would be the provision of a low noise or low distraction environment for a pupil with a sensory disorder.

17Education, although it may be very wide ranging in concept, is about instruction, schooling or training, so one or more of these factors is likely to be discernible in provision which is asserted to be educational. The provision should, of course, be directly related to the pupil's learning difficulty or disability (*H v A London Borough*). There is no suggestion that the F-tT thought this connection to be missing. The provision should relate to a specified educational objective and it should be possible to see what the provision is trying to instil, teach or train the pupil to do. There may be teaching strategies or learning strategies built into the provision. Where the provision directly requires pupil participation, the provision may indicate how it will be encouraged, rewarded or otherwise. One would expect some outcomes to be built in.

18A few examples may be contrasted. (i) A SEN provides mindfulness training for a pupil with an anxiety disorder. The objective is to enable the pupil to remain calm, keep focussed in class and relate to other children at playtime. Mindfulness is based on principles and practice to secure what is learned. (ii) The same pupil is also provided with cognitive behavioural therapy to teach him how to deal with anxiety that pops up suddenly. (iii) The pupil also undergoes hypnosis regularly to help him stop self-harming. In the first two examples, the child is receiving systematic training and learning coping strategies to help him learn in the classroom and learn to get along with fellow pupils, as a member of the school community. Both appear to be educational. In the third examples the child is being practiced upon in order to change his behaviour. His behaviour is affected subliminally. It may be thought unlikely that this would be educational provision any more than taking an anti-biotic for a sore throat.

19The defects of the parents' amendment can be seen when contrasted with the provision ordered by the F-tT. Their common factors are the educational markers they display, such as identification of the input that is needed, what is appropriate when an intervention is necessary, identification of what a programme is meant to develop in the pupil and how it is to be achieved.

20So, for example, to improve L's communication including social communication skills, the F-tT accepted that: -

- The school will devise and implement a programme in conjunction with advice from the speech and language therapist to provide the pupil with input and direction from adults in order to develop a more secure understanding of developing positive relationships with his peers. This will include looking at issues of sharing, taking turns and collaborative work within the classroom. Activities will also include social stories to enable the pupil to find out more about behaving appropriately and making desirable responses. It shall be delivered in a small group setting.
- The speech and language therapist will offer training on further developing the pupil's social communication skills and use of strategies to support his working memory and processing skills to enable school staff to use skills and strategies to meet his SLCN in the classroom. The training may be for the whole school, small groups or individuals supporting the pupil at school. These sessions would include supporting school staff to identify opportunities to further develop the pupils social communication skills in everyday situations and the implementation of strategies such as visual support and repetition to enhance his understanding of verbal instructions, questions and repetitions in the classroom ...

To enable L to understand and manage his behaviour so that L was able to function effectively in the classroom and engage in learning opportunities, the F-tT accepted that -

- The pupil will receive support from a psychologist or counsellor who will design and monitor a programme for him and work with him and other school staff in supporting him. The programme should reinforce positive coping behaviours with input from a specialised therapist.

To promote the development of the pupil's ability to engage in learning: -

- Provision of holistic and comprehensive package that promotes academic self-esteem and targets, the pupils organisational skills deficit and social anxiety with a whole school approach offering multi-sensory teaching, small classes and the expertise of teachers additionally trained and experienced to teach children with ADHD difficulties with average abilities and therapeutic support integrated across the curriculum to address the pupil's associated learning and emotional difficulties.
- The pupil is to have daily support for his self-esteem and consideration of counselling on site [this adopted a recommendation of a particular psychiatrist who wrote a report on L].

What provision were the parents asking for?

21 If Mr Greatorex is right, the only provision the parents asked for was 'a programme devised and monitored by psychological and psychiatric support to address L's self esteem and self confidence and minimise the risk of mental health breakdown.' He pointed out that there was little or no evidence to support any such need.

22The grounds upon which the First-tier Tribunal Judge granted permission to appeal were that (i) it was arguable that the Tribunal provided no or inadequate reasons for its finding that it did not accept it could order support from a psychiatrist to be included in Part 3 having correctly identified support from psychiatrist as an issue in dispute ... and in light of its finding that L 'needs input from a psychiatrist' and the on-going involvement of CAMHS is 'critical' and (ii) it is arguable, as submitted in the grounds of appeal, that the Tribunal failed to consider whether psychiatric provision is required to address L's behaviour on the basis that such behaviour is directly related to his learning disability (*H v A London Borough*).

23The original grounds sent to the First-tier Tribunal Judge are not on file, but SEN Legal's expanded submission is expressly stated to build on that earlier submission. In it, the representative makes no mention of the actual amendment to the SSEN that the parents sought, which was plainly restricted to the devising and monitoring of a programme. Not only does paragraph [13] of the expanded submission suggest that the Tribunal made a finding that supports a need for general psychiatric input, but proceeds in paragraph [18] to submit that the question is whether L needed input from a psychiatrist and/or other members of CAMHS staff as a special educational provision.

24There is plainly a gulf between the general psychiatric input the parents identified in grounds of appeal to the Upper Tribunal and the restricted view of the significance of psychiatric input understood by the Local Authority.

25The terms on which the First-tier Tribunal Judge granted permission would seem to suggest that the First-tier Tribunal Judge thought that the case was argued on the basis that a general need for psychiatric input was in issue and, indeed, that the F-tT had actually made a finding of fact to that effect. The First-tier Tribunal Judge's views are not, of course, binding upon me.

26I am unable to accept that either (i) that there was a finding of fact that L had a special educational need for psychiatric input or (ii) that the case argued before the F-tT on that basis that he needed such psychiatric help; or (iii) that the F-tT's Statement of Reasons should be read as identifying that such need or provision should be made. I accept Mr Greatorex's submission that the Tribunal was dealing only with the amendment before it.

27Apart from Mr Rawlings' closing statement, I have not been able to find any document in some 1800 pages in the bundles to indicate that the parents were arguing that L's problems with self-esteem, self-confidence and behaviour required general psychiatric input. I highlight the following documents:

- The case statement (p121ff) settled by Mr Rawlings, an experienced practitioner in SEN cases, submitted that L needed a dyslexia specialist school with a waking day curriculum to address his academic, social and emotional needs (p122 [8] – [11], [13]). It cites expert reports on his behaviour, emotional and social difficulties [50] but under the heading Special Educational Provision in [53] 'Expert recommendations', there is no mention of psychologist/psychiatrist input. Mr Rawlings mentions only that a school SENCO (SEN coordinator) and school

pastoral manager thought that L needs psychological input [6]. Neither of these people have expertise on this matter.

- Dr Lall (educational psychologist) does not consider that anything other than adult support with behaviour is required;
- None of the schools the parents canvassed for L had this kind of input but the A School had 2 *psychotherapists* on its mental health team. Psychotherapists are not psychiatrists.
- Dr Soppitt (the private psychiatrist for the parents), who wrote the most expansive report, does not mention this kind of support in the recommendations in his initial report (p135 – 157 at 154 [3.9].) In his later report (666 – 670), written when L was offered a place at A School, Dr Soppitt opines that the school would be good for L because they have a strong *psychotherapy team* that could take over therapeutic work, leaving 'longer term work' to L's CAMHS psychotherapist. As already mentioned, a psychotherapist is not a psychiatrist, and Dr Soppitt does not mention a need for psychologist/psychiatrist input at school. Dr Soppitt himself draws a distinction between psychotherapy work that might be done at work and longer term therapy.
- Dr Peer (an educational psychologist for the parents) adopts Dr Soppitt's initial conclusions, and does not mention psychologist/psychiatrist input.
- A School's assessment of L (1515ff) does not recommend psychiatric or psychological input in the provision it would offer L (p1520) though its prospectus does say that it has psychotherapists on its mental health team (p1568).
- The working document amended by the parents (p575ff) suggests that for his behavioural problems, L should have access to a psychologist who will design and monitor a programme for him and work with L and staff in supporting him with input from a specialist therapist (p581(a)). The F-tT did *not* accept that only a psychologist was necessary to deliver this programme.
- In the same working document at 582, the parents first raise the suggestion of 'a programme devised and monitored by psychological and psychiatric support to address his self-esteem and self-confidence and minimise risk of mental health breakdown'. This form of provision is limited to devising and monitoring a programme.

28The obvious conclusion from these documents is that there was no expert support for general psychiatric input.

29The only source which raises the suggestion of a broadly based need for 'psychological and psychiatric' intervention' is Mr Rawlings' closing statement to the F-tT (pp 1815 – 1821 at 1818 [16]). In it, he suggests suggests that Dr V (who had previously been L's psychotherapist at CAMHS) 'broadly supported a therapeutic school approach.' Mr Rawlings did not give a page number for that evidence, but from a trawl of the papers, he is probably referring to a paragraph in a letter at pp 1649-50. All Dr V says is that A School offers therapy for children who attend the

school so that it is well suited for L, his specialist needs, and his mental health. A School, of course, does not offer psychiatric intervention. This submission appears to have overstated.

30 Therapies for self-esteem, self-confidence and behavioural problems are typically addressed by the provision of occupational therapy, speech and language therapy and counselling. These are precisely the kinds of provision made by the F-tT in the Statement of Special Educational Needs. The F-tT does not even allude to an argument that L needed general psychiatric support in its detailed and cogently analysed decision. Had the F-tT understood Mr Rawlings to be raising an argument for general psychiatric support unsupported by the parents' own evidence at the last minute of the proceedings, it is inconceivable that it would not have been dealt with in the Statement of Reasons .

31 That leaves two slender threads on which to base the parents' argument: the F-tT's 'readily' appreciating that 'L needs input from a psychiatrist' such as that provided by his CAMHS doctor' and the heading 'Support from a psychiatrist' in the paragraph rejecting the parents' amendment.

32 The F-tT's 'ready appreciation that L needed psychiatric input must be read in conjunction with the words 'such as that given by his CAMHS doctor. The CAMHS doctor who led L's treatment was a psychotherapist, Dr V. She did not suggest that L needed general psychiatric support at school in the few documents we have from them in the bundle.

33 The obvious meaning of the F-tT's words is that it acknowledged that L needed the treatment he was already getting. That was treatment by CAMHS outside of school. I do not see why – or how, having regard to the evidence before the Tribunal as set out earlier - the statement can be read to mean that he should have general psychiatric input as part of his special educational provision in school.

34 In these circumstances, I can only conclude that the could not have made the finding asserted by the parents, i.e. that L had a special educational needs for general psychiatric input. I am also unable to accept that Mr Rawlings was permitted to enlarge the scope of the amendment put by the parents. It was confined to whether a programme should be devised and monitored by a psychologist/psychiatrist to address L's self-esteem, self-confidence and minimise the risk of mental breakdown.

35 Had I accepted that the parents had, indeed, raised the issue of the need for general psychiatric input, they would inevitably have failed to establish that this provision could amount to special educational provision. It comprised no more than vague 'well-being' sessions without any elements of instruction or training. A weekly session, with a psychiatrist may provide an opportunity to explore emotions and behaviour, but it does not provide instruction or training, in other words, there is no 'how to do it' or 'what to do'..

36 This leaves the way the F-tT dealt with the original amendment put forward by the parents as discussed in the next section.

Did the Tribunal fail to give adequate reasons for its decision when refusing to accept the parents' amendment requiring a program to be devised by a psychologist and psychiatrist to address L's self-esteem, self-confidence and minimise the risk of mental breakdown.

37The F-tT did not give any reasons on this issue. It just said it cannot make the order the parents wanted.

38I do not propose to rehearse the large body of case law which requires a Tribunal to give adequate reasons for its decision. To be brief, reasons must obviously resolve material disputes of fact and explain why the F-tT made its findings on the evidence before it. It must deal with the substantial points that have been raised so that the parties can understand why a decision has been reached. 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] and in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA 605. The only further point I would wish to make is that the decision under scrutiny must be looked at as a whole.

39I acknowledge Mr Greatorex's submission that this was a massively documented case covering nearly 1800 pages. I have read through them, and it is clear from the careful way in which the F-tT dealt with this case, that it did so too. Apart from this single point, its decision is of very high quality. I accept that this was a complex case which required the F-tT to resolve a large number of disputed points. I also accept that the formulation of the grounds of appeal by the First-tier Tribunal Judge who gave permission to appeal were problematic. I note that *H v A London Borough* had only recently been promulgated, but it is taken to state the law as it always was.

40On the face of it, the Tribunal erred by failing to consider a relevant authority and by failing to give any reasons for rejecting the parents' amendment. The parties could not tell whether the F-tT thought that it did not have the power to make this kind of provision, or whether it did not consider that the provision was educational, or whether it failed for some other reason.

41At the end of the day, however, the error in respect of *H v A London Borough* is immaterial (*R (Iran) v Secretary of State for the Home Department* [2005] EWCA 605 at [14] – [16]). Although the F-tT failed to consider it, it came to the right conclusion by rejecting the amendment in dispute. The 'expanded' ground requiring special educational provision comprising 'psychiatric support' was doomed to failure, and the restricted form of the amendment requested by the parents would not have fared any better.

42The failure to give reasons is also immaterial since the F-tT reached the only conclusion that reasonable Tribunal could have reached in the circumstances.

43Even if I were wrong, I would not have granted relief under section 12(2) of the Tribunals Courts and Enforcement Act 2007 which gives the UT the discretion not to set aside a decision for error of law. The same reasons as given in the previous two paragraphs would apply with equal force to a decision, had it been necessary, not to give relief.

44 In addition, the provision made by the F-tT for L's various mental health problems is exemplary. It is supported by the evidence, comprehensive and thoughtfully and carefully planned. The therapists are well qualified to provide systematic therapy from which L will hopefully come to understand the triggers for his various problems and the strategies for controlling or coping with them.

45 In these circumstances, it is not necessary to address the arguments Mr Greatorex put to me about directions he did not like. Suffice it to say that my directions complied with the Upper Tribunal Rules and the law and practice in SEN cases.

46 The appeal is accordingly dismissed.

[Signed on original] S M Lane
[Date] Judge of the Upper Tribunal
12 August 2016