IN THE UPPER TRIBUNAL **Upper Tribunal case No.** HSW/3172/2015

ADMINISTRATIVE APPEALS CHAMBER

Before: Mr E Mitchell, Judge of the Upper Tribunal

DECISION

Under section 336ZB of the Education Act 1996, the Upper Tribunal SETS ASIDE for error of law the decision of the Special Educational Needs Tribunal for Wales of 15th September 2015 (case no. *S00840614*). The Upper Tribunal directs that the appeal is REMITTED to the SEN Tribunal for Wales for re-hearing before a differently-constituted tribunal panel. Remittal directions are given at the end of these reasons.

Under rule 14(1) of the Upper Tribunal (Tribunal Procedure) Rules 2008 it is ORDERED that no person may disclose or publish any matter likely to lead to a member of the public identifying child E. This order does not apply to (a) the child's parents, (b) any person to whom any parent discloses such a matter or who learns of it through parental publication (and this includes any onward disclosure or publication), (c) any person exercising statutory (including judicial) functions in relation E.

REASONS FOR DECISION

Introduction

1. I am sure this was an especially challenging case for the Special Educational Needs Tribunal for Wales (SENTW). Parents could not agree on which of two suitable maintained schools should be named in their child's statement of Special Educational Needs (SEN). The SENTW decided that, in selecting a school, the question whether one would provide a better education than the other was not relevant. I decide that was an error of law.

2. These reasons give some general guidance to tribunals about dealing with cases where parents cannot agree on the maintained school to be specified in their child's statement of SEN. In particular, a type of school might appropriately be specified rather than a particular school. I also consider what role concurrent family court proceedings might play in the resolution of these disputes. I identify certain considerations tribunals might usefully take into account if they are considering adjourning so that an underlying parental responsibility dispute may be put before the family court.

Background

The Upper Tribunal permission hearing

3. Mr S appealed to the SENTW against the contents of a statement of SEN prepared for his daughter E by Denbighshire County Council. SENTW dismissed the appeal. Mr S applied to the Upper Tribunal for permission to appeal against SENTW's decision.

4. At the hearing of Mr S's application on 23rd February 2016 at Manchester Magistrates' Court, the venue requested by Mr S, he represented himself. The local authority were not represented but were notified of the hearing.

5. The hearing was, at times, difficult. Mr S became agitated when asked to explain his argument that E's joint residence order meant he must in law be treated as having as much day-to-day care of E as her mother (regardless of arrangements on the ground). I am grateful to Mr S's partner for her assistance in keeping Mr S calm and focussed. Despite all that, from the way Mr S brightened-up when talking about E my impression was that he cared deeply about her and her education.

The local authority's decision

6. E was due to start secondary school in September 2015. A transition review meeting on 16th March 2015 (attended by Mr S and E's mother) heard that Mr S was moving to Town R within the authority's area. I shall refer to its maintained mainstream secondary school as School R. Mr S disagreed with E's proposed attendance at a maintained mainstream secondary school in a different town, Town P. I shall refer to this as P School. Mr S said he could take E to and from R School but not P School.

7. On 12th March 2015 E completed a form designed to obtain her views. She answered the question "What do you like doing most at school?" with "doing lots of cooking at [P School]" and her response to "What makes you happy?" was "my friends and excited about going to [P School]".

8. Mr S emailed the council on 26th March 2015 expressing doubt as to whether P School could provide the 27.5 hours per week teaching assistant provision E needed, and concern that she would be placed in a mixed Year 7/8 'nurture group'. Mr S sent a similar email on 2nd April 2015. In response, a council official's email of 15th April stated that at P School 'nurture group' pupils "have small group support for 50% of their timetable".

9. By letter received on 26th March 2015, E's mother wrote to the council that, in her view, P School would greatly benefit E. Given her other daughter's positive experience there, she was sure E would have a better education at P School.

10. E's statement of SEN, dated 20th April 2015, included within Part 3 (educational provision) "access to support from a Teaching Assistant for 27 ½ hours a week" (i.e. the full school week) and "opportunities for one to one or small group work". The meaning of "access to support" was not explained although Part 2 (SEN) said "[E] has one to one teaching assistant support…the teaching assistant supports [E] in the class".

11. Part 4 of the statement named "[P School] (as long as parents pay for transport)".

12. The SEN Co-ordinator (SENCO) at P School wrote in an April 2015 email that "for the majority of mainstream lessons Year 7 pupils have a Teaching Assistant to support pupils who have additional learning needs" and "this year the support in Y7 classes has been on average 80%". Mr S's emailed response stated that 80% of school time does not equate to 27.5 hours per week.

13. On 13th May 2015, Mr S emailed the council: "[E's] 1 to 1 pulls things together" and "if [E's] 1 to 1 is not there to help [E] for the full amount of time in [E's] statement then I expect an explanation as to why she is employed for this full amount yet failing to give [E] the help she requires". The council's emailed response of 4th June 2015 stated that "[E] is to receive 27 ½ hours per week and that this will be honoured by the school".

14. On 1st June 2015, Mr S appealed to SENTW. In summary, his grounds of appeal were:

> (a) the council wrongly treated E as if she lived solely with her mother, since he had a joint residence order (made in 2006 a copy of which he supplied). The order meant he had to be treated as having equal day-to-day care of E;
>
> (b) being unable to drive, he was unable to take E to P School without incurring significant expenditure which was not feasible given his low income;
>
> (c) the council failed to take into account his daughter's fear of getting lost at P School (referred to in an educational psychologist's report);
>
> (d) when E's views were sought, she was not informed that R School was an alternative to P School; documents about a meeting with E were falsified; any supposed wish of E to attend P School was due to her mother's manipulation. A subsequent case statement of 25th July 2015 said E's mother had prevented him from speaking to E about her schooling wishes;
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> (e) it was simply assumed his daughter would attend P School because her sister did;
>
> (f) unlike R School, P School would not provide the additional educational support E needed. Mr S complained it had never been explained to him why P School was thought more suitable;
>
> (g) R School was closer to both his and E's mother's home so that she could walk or cycle to and from school. Given E's weight problem, this would have health benefits.

15. Mr S's notice of appeal stated his desired outcome was "to be able to take my daughter to school and for [R School] to be named as it is the best provision for my daughter".

16. In response, the council argued:

> (a) both schools were in their view suitable schools;
>
> (b) at P School E would have full time Teaching Assistant support "when she is in mainstream", 40% of her timetable would be "nurture support" and "it is likely that she will require Learning Support small group provision for English and maths";
>
> (c) at R School E would be placed in either a "small nurture group with…1:1 in place" or a "less nurture based [group]" with "an opportunity for smaller/group support";
>
> (d) P School was named because it was E's mother's preference and she had day-to-day care.

17. On 27th July 2015 the SENTW issued directions requiring E's mother to allow an educational psychologist to speak to E about her wishes. It seems this did not happen but I have not found an explanation why in the appeal papers.

18. On 15th September 2015 the SENTW dismissed Mr S's appeal, giving the following reasons for its decision:

> (a) the SENTW refused to permit the SENCO for either school to give evidence although both were in attendance at the hearing venue;
>
> (b) the local authority gave an "assurance" that both schools could deliver the provision required by E's statement. The SENTW was "supplied with evidence that the provision in both schools was very similar" although, since both schools met the suitability threshold, any differences were not in fact relevant;
>
> (c) the SENTW found that E lived with her mother full-time. The SENTW was not responsible for enforcing the joint residence order so that "[Mr S's] difficulty in transporting E to school is not relevant";
>
> (d) the SENTW gave "little weight" to a E's mother's statement "as she chose not to take part in the appeal";
>
> (e) the teaching assistant provision in E's statement was unclear. Did "access" to teaching assistant provision mean 1:1 provision or not? The Tribunal construed the statement as requiring a teaching assistant to be "available" but not "dedicated" to E for 27.5 hours per week. Clarificatory amendments to E's statement were not ordered;
>
> (f) the SENTW found that E preferred P School although her up-to-date views had not been obtained due to unspecified "difficulties over parental consent";
>
> (g) the SENTW named P School in E's statement since it was preferred by her mother, with whom she lived, E preferred P School and her sister also attended the school. To name R School would "fly in the face of commensense". The SENTW was aware both parents had duly expressed statutory preferences that, ordinarily, would require their preferred maintained school to be named.

19. Having been refused permission to appeal to the Upper Tribunal by SENTW, Mr S renewed his application before the Upper Tribunal. I granted him permission to appeal on the grounds set out from paragraph 47 below.

20. I did not grant Mr S permission to appeal on the ground that, in the light of the joint residence order, SENTW should have proceeded on the basis that E lived with both her parents. A residence order (and, now, a child arrangements order) is enforceable (in the sense that an application to the court for enforcement may be made) only by those persons upon whom the Children Act 1989 confers the right to apply to the court. That does not include SENTW. In my view, the tribunal was not required to ignore the reality of E's day-today care arrangements.

21. E's mother declined the Upper Tribunal's invitation to become a party to the proceedings (subsequently she was made a party by direction). But she supplied a written statement which disputed that E was unhappy at P School and alleged Mr S was pursuing a vendetta against her. Of course, by this time E had begun attending P School.

Legal framework

Education legislation

22. Section 324(5)(b) of the Education Act 1996 ("the EA 1996") requires the governing body of a maintained school named in a statement of SEN to admit the child to the school. Section 324(5)(a) EA 1996 requires the local authority to arrange the special educational provision specified in the child's statement.

23. The EA 1996 confers rights on a child's parent, defined in section 576 as follows:

> "In this Act, unless the context otherwise requires, "parent", in relation to a child…includes any person:
>
> (a) who is not a parent of his but who has parental responsibility for him; or
>
> (b) who has care of him".

24. Schedule 27(3)(3) to the EA 1996 requires a local authority to specify in a child's statement a maintained school for which a child's parent has duly expressed a preference. There are exceptions to this where:

> "(a) the school is unsuitable to the child's age, ability or aptitude or to his special educational needs, or
>
> (b) the attendance of the child at the school would be incompatible with the provision of efficient education for the children with whom he would be educated or the efficient use of resources."

Below, I refer to a duly expressed parental preference, which is not excluded on suitability or efficiency grounds, as an operative parental preference.

25. Neither Schedule 27(3) exception was relied on in this case and I believe it is accepted that both P School and R School were schools which, but for the parental dispute, Schedule 27 would have required to be named in E's statement. The EA 1996 does not provide for cases where a child's parents express opposing preferences. And I have not been directed to any relevant guidance in the current SEN Code of Practice for Wales.

26. Section 324(4) of EA 1996 provides:

> "The statement shall –
>
> (a) specify the type of school or other institution which the local authority considers would be appropriate for the child;
>
> (b) if they are not required under Schedule 27 to specify the name of any school in the statement, specify the name of any school…which they consider would be appropriate for the child and should be specified in the statement…".

27. Section 326(1) of the EA 1996 confers a right of appeal to the SENTW on "the parent of a child for whom the authority maintain a statement". By section 326(1A), this includes an

appeal against "the special educational provision specified in the statement (including the name of a school so specified". Section 326ZB provides for an onward right of appeal to the Upper Tribunal "on any point of law arising from a decision".

Children Act 1989 and parental disputes

28. Residence orders were replaced by child arrangements orders in April 2014, as a result of amendments to the Children Act 1989 made by the Children & Families Act 2014. E's joint residence order now has effect as a child arrangements order (article 6(3) of the Children and Families Act 2014 (Transitional Provisions) Order 2014, S.I. 2014/1042).

29. Mr S is a "parent" for the purposes of section 576(1) EA 1996. He must also have parental responsibility for E. If for no other reason, this is because a residence / child arrangements order has been made which names him. Section 12(1) of the Children Act 1989 requires the court, when making such an order in favour of a father without parental responsibility, also to make an order conferring parental responsibility on him. E's mother also has parental responsibility for her (all mothers have parental responsibility).

30. Section 2(7) of the Children Act 1989 provides:

> "Where more than one person has parental responsibility for a child, each of them may act alone and without the other (or others) in meeting that responsibility; but nothing in this Part shall be taken to affect the operation of any enactment which requires the consent of more than one person in a matter affecting the child."

31. Section 3(1) of the Children Act 1989 defines "parental responsibility" for the purposes of that Act as:

> "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property."

32. "The Children Act 1989 does not set out what rights or responsibilities are comprised in that definition, and in order to determine the scope of the powers normally included within parental responsibility reference must be made to case law" (para. 151, Volume 9 *Halsbury's Laws, Children and Young Persons*, (2002)". For many years, it has been accepted that a parent has the right to determine a child's education (see, for example, *Tremain's Case* (1719) 1 Stra 167).

33. Part 2 of the Children Act 1989 provides for prohibited steps orders and specific issue orders. Section 8(1) describes these as follows:

> " "a prohibited steps order" means an order that no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court…

> "a specific issue order" means an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child".

34. I am sure the family court is regularly asked to make section 8 orders to resolve parental disputes about a child's schooling (see, for example, *Re P (Parental Dispute: Judicial Determination*) [2002] EWCA Civ 1627).

35. I have not been referred to any domestic case law about the use of prohibited steps or specific issue orders in order to resolve a dispute between parents (with parental responsibility) over the school to be specified in a statement of SEN.

36. The local authority argue the Court of Appeal's decision in *Richardson v Solihull, White v Ealing* [1998] ELR 319 holds that "the LA is entitled to describe a type of school only, or even name more than one school and let the parents determine which school the child attends".

37. I accept the Court in *Richardson* held a statement might properly specify only a type of school in the absence of an operative parental preference for a maintained school. I deal with this further below but I do not accept the decision also holds that (a) an authority is entitled to name two opposing maintained schools both of which are the subject of operative parental preferences, or (b) a local authority may refuse to give effect to an operative parental preference by instead specifying a type of school. None of the *Richardson* cases involved parents with operative parental preferences for maintained schools. Two parents sought a school in the USA, the other a non-maintained special school.

38. There is also the decision of the Family Division of the High Court of Northern Ireland (Morgan J) in *Re AB (specific issue; education)* [2008] NI Fam 2 (which is not a binding authority on the Upper Tribunal). This was not cited to me but it merits description. A child's statement of SEN (under Northern Ireland legislation modelled on the SEN provisions of the Education Act 1996) named a special school. The mother wanted her child to attend a different school but the father disagreed. A re-assessment of the child was underway but, before it was finished, the father applied for a specific issue order (under legislation modelled on the Children Act 1989). In response, the mother also asked the Court to make a specific issue order directing that her daughter be educated at a different school.

39. The father in *Re AB* argued that "the [Education] Board were the competent authority under the statute to make the statement and that the statement should thereafter prevail unless varied under the relevant appeal provisions or the reassessment procedure". In my view, the High Court did not accept this. At paragraph 12 of the decision, Morgan J said "the question for me is whether the alternative arrangements made by the mother are on the evidence either suitable or preferable to those proposed by the Board". If Morgan J had accepted the father's legal argument, he would neither have expressed himself in those terms nor gone on to reject the mother's application because her proposed school was not suitable.

40. I am not aware of any statutory power of SENTW to transfer SEN proceedings to the family court with a view to it making a section 8 order to resolve a parental education dispute.

The court may make a section 8 order on application or in ongoing family proceedings (section 10(1) Children Act 1989). However, that is not to discount the possibility that may be appropriate for a tribunal to adjourn pending resolution of family proceedings concerned with the exercise of parental responsibility in relation to a child's education.

41. If a tribunal is considering such a step, it should take into account that the family court does not have power to direct a local authority to make changes to a statement of SEN or to require a tribunal to exercise its functions in any particular way.

42. A tribunal should also note that, where parents disagree over two suitable maintained schools (both of which are the subject of what would normally be an operative parental preference), the family court might think a specialist tribunal is better placed to determine which school is best for the child. However, that potential sticking-point would not arise were a tribunal simply to name a type of school. The Tribunal's naming function would then be complete and it would not be within the Tribunal's remit to deal with any subsequent dispute as to the actual school to be attended. Further on this point, see paragraph 99 below.

43. Tribunals should also be aware that, not infrequently, fathers do not have parental responsibility for their children (e.g. if they were not married to the mother at the child's birth, have not been registered as the father after a certain date and have not acquired parental responsibility by agreement or court order: see section 4 of the Children Act 1989). However, fathers do have rights as 'parents' under the education legislation whether or not they have parental responsibility. If a father does not have parental responsibility, a section 8 order may not assist a tribunal in its task of deciding which school to specify in Part 4 of a statement of SEN.

Transport

44. Section 3 of the Learner Travel (Wales) Measure imposes certain obligations on a local authority in Wales to make transport arrangements for a child of compulsory school age.

45. Section 3 operates where a child is ordinarily resident in a local authority's area and specified circumstances and conditions apply to the child (subsection (1)). One specified circumstance is that a child is "receiving secondary education at a maintained school" and one specified condition is that a child is "ordinarily resident at a place 3 miles (4.828032 kilometres) or more from the school".

46. If section 3 applies, a Welsh local authority is normally required to "make suitable transport arrangements to facilitate the attendance of the child each day at the relevant places where the child receives education". However, that duty does not apply if arrangements "have been made by the local authority for enabling the child to become a registered pupil at (i) a suitable maintained school…nearer to the place where the child is ordinarily resident".

The grounds on which permission to appeal were granted

46. I granted Mr S permission to appeal to the Upper Tribunal on the following grounds.

47. Firstly, the SENTW arguably erred in law in finding that P and R Schools offered similar educational provision. The basis for the "assurance" given to the SENTW that the schools would offer a similar education was not clear. The SENTW refused to hear from either

school's SENCO yet the documentary evidence arguably did not support a finding of similarity. The local authority's response to the SENTW appeal could have been read as suggesting that, at P School, full-time teaching assistant provision would not be available.

48. Secondly, if SENTW proceeded on the basis that the local authority promised to make available additional funds, so that the provision at both schools matched, arguably the tribunal erred in law since there was no evidence of such an undertaking.

49. The third ground of appeal related to the SENTW's interpretation of the teaching assistant provision specified in E's statement of SEN. It construed "access" to full-time teaching assistant provision as requiring an assistant simply to be "available". In the light of the documentary evidence, the basis for that finding was not clear, nor was it clear what "available" meant. The Tribunal may have erred in law by failing to give adequate reasons for this finding.

50. In granting permission to appeal, I observed the case also raised more general questions about how a tribunal should proceed when parents disagree over which of two suitable maintained school should be specified in a statement of SEN. The Tribunal did not explain what test it applied and arguably that was an error of law for which permission to appeal was granted. Linked to that, arguably the Tribunal erred in law by giving inadequate reasons for its finding that Mr S's travel distance concerns (including his health-related concerns) were irrelevant.

51. In granting permission to appeal, I also observed it was not clear why the local authority declined to fund E's transport to P School in the light of their obligations under the Learner Travel (Wales) Measure 2008 (it was more than three miles from her home). Since this was linked to one of Mr S's arguments (impact of the decision to specify P School on household finances), my directions said that I expected the local authority to address this in their response to this appeal.

52. I also directed that E's mother be made a party to this appeal. It was essential that the Upper Tribunal heard her views as to the lawfulness of SENTW's decision.

The arguments

The local authority's case: allegations about Mr S; E's asserted need for an independent advocate; fresh evidence

53. The local authority's written response to this appeal, drafted by Mr Rawlings of counsel, began with a number of assertions about Mr S including:

> (a) his "abrasive approach" was "well recorded" within the appeal papers;
>
> (b) his evidence "must be treated with a certain amount of caution and scrutiny as it is made with a robust and fixed perspective which does not always match the evidence";
>
> (c) in presenting his case to the Upper Tribunal, Mr S made assertions that "may indeed be false" about his role in taking E to school. These were contradicted by her mother. The response said "false submissions" may have been put to the Upper Tribunal "which is of significant concern";

(d) evidence Mr S supplied about E's time at P School was contradicted by her mother. As a result, "the LA is of the view that [E] urgently requires an independent advocate to obtain and express her views as it is her education and welfare that is being caught in the middle of her parents' dispute" (emphasis in the original). The authority also informed the Upper Tribunal that, prior to the hearing of this appeal, it would supply further witness statements;

(e) Mr S thwarted the "FtT's" attempts to obtain E's up-to-date schooling views before the hearing. I have not found support for that assertion in the appeal papers.

54. E's mother wrote to the Upper Tribunal disputing Mr S's "blatant lies". E settled in well at P School, was making good progress and had never missed a day's school (which Mr S subsequently disputed). Mr S had never taken E to school and in fact lived in England (again, that was subsequently disputed by Mr S).

55. I shall deal with these points here. They overlook the Upper Tribunal's function which is to determine whether the SENTW made an error on a point of law. And I do not consider them to be particularly helpful in a case with a background of parental conflict where emotions are liable to become inflamed. Unsurprisingly, the authority's assertions were vigorously disputed at length in Mr S's written reply.

56. Evidence or written assertions are only pertinent to this appeal if they say something relevant about the lawfulness of the SENTW's decision. If Mr S has made false statements during these proceedings (on which I express no view, I should point out), that would be a matter of significant concern. However, the allegations made are not relevant to the question whether the SENTW erred in law. In deciding this appeal, I am not adjudicating on the merits of the parties' cases as to the SEN provision that E requires. The authority's request that the Upper Tribunal takes "steps to confirm information which it is being given by Mr [S]" was mystifying. If the authority considered that Mr S's submissions were relevantly misleading, it was up to it to set out its case.

57. I am also at a loss to understand what the Upper Tribunal was supposed to do in response to the assertions made about Mr S's personality. Do the authority seriously expect me to make a finding about his personality as part of my evaluation of the merits of his case that the SENTW erred in law?

58. So far as the proposal for an independent advocate is concerned, I am again unclear as to what the local authority expected the Upper Tribunal to do. However, I do agree it is of vital importance that steps are taken to try and obtain E's views about her education. This is addressed in the directions I give on remission of the appeal to the SENTW.

59. The authority's response included a range of fresh evidential assertions (spread throughout the response). The authority also informed the Upper Tribunal they intended to rely on new evidence in the form of witness statements. It was not made clear whether the evidence was connected to the appeal itself or whether it was relied on in the event that the Upper Tribunal, if it set aside the SENTW's decisions, was minded to re-make its decision. Mr S questioned

why fresh witness statements were required, given that the focus of the appeal was a SENTW decision taken in September 2015.

60. On 4th August 2016, the Upper Tribunal wrote to the parties that it was minded to decide the appeal without holding a hearing. The letter also informed the authority that, within two weeks, the Upper Tribunal was to receive an explanation as to why, in their view, their fresh evidence should be admitted. No explanation was received. The letter was copied to Mr S whose emailed response requested that the Upper Tribunal hold a hearing before deciding this appeal.

Grounds 1-3: the local authority's arguments

61. These grounds were taken together in the authority's response to the appeal. Throughout the authority's response, it tends to refer to the tribunal as the First-tier Tribunal although it must have intended to refer to SENTW.

62. The authority dispute Mr S's argument that the SENTW made a flawed finding that both schools offered similar provision. It submitted that "SENTW did not make an error of law as there were no material differences in what the schools could offer to [E]". The SENTW, with its specialist expertise, "understood fully the similarities offered by these two mainstream schools and were able to evaluate both the written and oral evidence given". The authority also argue the tribunal's analysis must be judged in the light of a secondary school curriculum rather than a primary school context "where pupils primarily stay with one teacher delivering many subjects". The authority point out that E's statement did not prescribe how her special educational provision was to be delivered. That was "up to the school".

63. According to the authority, the argument that the schools were dissimilar "is not to understand what each school was proposing to so". Regarding P School, the authority's case to SENTW was that E would spend 40% of her time in a "small nurture group", 25% receiving "small group learning support from teachers for English and Maths" and "full time teaching assistant support at all other times". This satisfied the requirements of her statement. At R School, E would have followed a "thematic curriculum with opportunities for small group support although there was another small nurture group class with 1-1 in place". Each school "had a slightly different model of delivering high levels of individual, group and 1-1 support for [E] using the resources available to them".

64. The authority's response says that "prior to the UT hearing the LA intends to submit the latest information from [each school] which will clarify the support arrangements and provide comfort to the UT that the schools both met the test of suitability and no error of law occurred". In reply, Mr S asserts that E was not getting the educational provision described in the authority's response to the appeal. In the event, that information has not been supplied to the Upper Tribunal (see paragraph 60 above).

65. The authority also argue the SENTW legitimately relied on its specialist expertise to construe the statement requirement for "access" to a teaching assistant for 27.5 hours per week to mean an assistant would be "available" for that period of time. The authority point out that E's statement "specifically countenances against an over dependence on 1-1 adult

support for [E] which the specialist SENTW panel will have noted when taking its view on defining 'access to 27.5 hours teaching assistant support'" (I observe that I cannot identify any part of the Statement that supports this description). In reply, Mr S argues the statement was unclear and this was one of his reasons for appealing to the SENTW.

66. The authority address Mr S's point that, at R School, E would have been one of only four pupils in an 'Inclusion Centre'. Mr Rawlings, who appeared before the SENTW, writes in the council's response that this issue was raised at the hearing by Mr S but the council could not rebut it by direct evidence (since they were not permitted to adduce late evidence). On instructions, he informed the SENTW at the hearing that E "would not have been receiving support in this group". Mr S disputes this in his written reply.

67. The authority argue they gave no undertaking as to additional financial support. This was unnecessary since no enhancement to P School's funding was required in order to deliver the educational provision specified in E's statement.

68. Mr S's reply also re-argues the merits of the case at length. And he questions the independence of the SENTW chair, an allegation which I should note is entirely unsupported by the evidence.

Ground 4 – the SENTW's approach to parental disagreement

69. The authority argue "the FTT" gave more than adequate reasons for naming the school preferred by E's mother. It identified and adopted the factors relied on by the authority, which were all legitimate, and rightly thought there was no time for the underlying parental responsibility dispute to go before the family court (E was to start secondary school in a matter of days). The authority ask "what else should the FTT have done?" The relevant factors were taken into account and the final decision was a rational one.

70. In relation to the SENTW's treatment of Mr S's travel-to-school concerns, the authority argue the SENTW gave adequate reasons for giving little weight to "the issue". It was entitled to take into account the reality of E's day-today living arrangements (with her mother) and the prospect of Mr S ever taking E to school was in reality remote. Mr S disagrees, arguing his concerns were not properly taken into account. He further argues that any named school must be accessible to both of a child's parents.

Transport funding

71. The authority argue that, even though P School was more than 3 miles from E's home, they complied with their obligations under the Learner Travel (Wales) Measure 2009. They were not required to arrange transport since P School was not the nearest suitable school (R School was). I note the Measure refers to the case where "no arrangements have been made by the local authority for enabling the child to become a registered pupil at (i) a suitable maintained school…nearer to the place where the child is ordinarily resident". In other words, absent such arrangements the local authority is required to arrange transport for a child attending school more than three miles from home.

Disposal

72. The authority made detailed submissions that, even if the appeal were allowed, it would be pointless to remit to "the FTT" because the result was bound to be the same. It was "highly likely" that, if E's views were obtained, she would resist any move to R School. No tribunal would be likely to go against the wishes of a child in these circumstances. Mr S disputes this at length. But, in any event, the authority also argue the Upper Tribunal should "send this matter to the Family Court where it properly belongs".

74. The authority's disposal arguments were part of a wider complaint that it was caught in the middle of a parental dispute and they argue "it is not the LA's responsibility to decide where a pupil should attend school in these circumstances only to make suitable schools available which they have done". They cited the Court of Appeal's decision in *Richardson v Solihull* in support of this argument.

E's mother

75. E's mother wrote to the Upper Tribunal. She stated that Mr S's written submissions contained lies, E was settled and doing well at P School and Mr S had not had contact with E "for a long time".

Conclusions

76. I have decided not to hold a hearing before deciding this appeal. The parties have set out their positions in detailed written submissions and I do not consider a hearing is necessary fairly to decide the appeal.

The similarity issue (ground 1) and the test to be applied (ground 4)

77. The SENTW refused to allow the SENCO for either school to give oral evidence although both attended at the hearing venue. The SENTW's reasons state neither SENCO had been notified to them as intended witnesses. The SENTW was concerned that Mr S might be disadvantaged by having to deal with unanticipated witnesses. Additionally, further evidence was not necessary because:

> "the LA would have to ensure that the provision set out in Part 3 of [E's] statement would be provided whichever of the schools she attended…and took into account the LA's assurance that the provision could be made at either school".

78. In the authority's response to this appeal, Mr Rawlings give a description of the assurance given (it was indeed simply an assurance).

79. The SENTW rejected Mr S's argument that R School was better suited to meet E's needs because she would be educated in a class of four children. The tribunal's reasons say that it accepted the authority's evidence that this would not be the case. But, in any event, both schools could deliver the requirements of Part 3 of E's statement so that "any apparent differences in provision between the schools does not therefore assist us in making a decision about which school [E] should attend. They can both meet her needs adequately".

80. In my view, there are flaws in the SENTW's reasoning.

81. The local authority do not in terms seek to uphold the SENTW's decision on the basis that it correctly held that, since both schools could adequately meet E's needs, any apparent differences in provision were immaterial when it came to deciding which one to name. I can understand why because, in my view, the SENTW in this respect misdirected itself in law.

82. I appreciate the difficulties faced by tribunals in cases such as this involving a parental dispute over which suitable maintained school to name in a statement of SEN. Parliament cannot have intended for the Schedule 27 requirement to specify a parent's preferred maintained school to operate in such cases. It would be nonsensical for two maintained secondary schools to be named in the statement of SEN both of whom would be statutorily required to admit the child (and, in a case such as this, would both probably be called upon to do so). As Lord Millett said in *R (Edison First Power Ltd) v Central Valuation Officer* [2003] UKHL 20, 4 All ER 209:

> "The courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable, or absurd or unworkable…".

83. Since Schedule 27 did not require a school to be named in E's statement, once the SENTW had decided to name a school (rather than a type of school), section 324(4)(b) of the EA 1996 required it to specify the school it considered "appropriate".

84. There is no single model of maintained school. Different schools will have different strengths and weaknesses. Even if two maintained schools are both capable of providing a suitable education for a child, it is open to a parent, in cases such as this, to argue that one school would provide a better education than the other. The statutory scheme does not prevent such an argument. The statutory requirement in section 324(4) is to specify the school (or type of school) considered "appropriate". It is clearly legitimate to take into account which school is better suited to a child's needs in deciding which school would be appropriate to name. And so it was open to Mr S to argue that E should attend R School because, in his view, it would provide her with a better education.

85. The local authority argue that, in reality, there was no material difference in the provision offered by the two schools. An initial problem with that argument is that the SENTW hardly considered the issue. The SENTW thought that, provided the minimum standard of adequacy was met, there was no need to compare the quality of the provision at the two schools. The only positive finding made was that Mr S wrongly believed that E would be educated in a class of four pupils at R School. It is true that the SENTW also said it accepted the authority's evidence that the provision at the two schools was "very similar" but its reasons shed no real light on that evidence was.

86. As I understand it, the authority argue the evidence before the SENTW was such that, even if the tribunal's treatment of the similarity issue was flawed, had it considered the issue properly it was bound to decide the schools were in material respects similar. However, I am not prepared to engage in a comparative evaluation of the two schools. That is a task which the SENTW, with its specialist educational expertise, is far better placed than I to decide. Suffice to say, I am satisfied that the evidence does not show it is obvious that the educational

provision was materially similar. For example, the local authority's written case to the SENTW suggested that a teaching assistant would only be available to E at P School for 80% of the time.

87. I therefore decide that the SENTW erred in law. It misdirected itself in law because it thought the question whether one school would provide a better education than the other was not relevant. Flowing from that, the SENTW erred in law by failing adequately to deal with Mr S's argument that R School should be named because it was better placed to meet E's needs. Given the arguments put to the SENTW by Mr S, it was not sufficient to rely on an unidentified evidence and an unspecified "assurance" that the provision at the two schools was in material respects the same.

The other grounds

88. Since this appeal will be remitted to the SENTW, there is no need for me to decide whether the SENTW erred in law in its interpretation of the statement's requirement for "access" to 27.5 hours teaching assistant provision. However, I shall make some observations on how the issue was dealt with.

89. The SENTW correctly recorded that, in his notice of appeal, Mr S stated he was appealing against the authority's decision to name P School. However, he had raised concerns about the availability of teaching assistant provision at P School. It was clearly open to the SENTW to treat this as a live issue on the appeal. Rather than try to deduce what "access" to teaching assistant provision meant, I think the SENTW could instead have addressed E's requirements in this respect and ordered clarificatory amendments to Part 3 of her Statement of SEN.

90. I do not need to deal with the other grounds of appeal but I will point out that, in my view, any educationally relevant matter may be taken into account in deciding which school is appropriate to specify. That could include transport matters and a child's practical living arrangements. I shall not offer any view as to the local authority's interpretation of the Learner Travel (Wales) Measure 2008. I do not need to do so in order to determine this appeal and the key issue – whether "arrangements" have been made to enable E to attend R School (the closer school) – has not been fully argued.

Disposal

91. The local authority have not identified any power by which the Upper Tribunal could transfer this matter to the family court. Section 8 orders under the Children Act 1989 are made on application or on the court's initiative in ongoing family proceedings. The Upper Tribunal has no power to make an application and it cannot conjure family proceedings out of thin air. I decline to attempt to transfer this matter to the family court.

92. The authority's argument that remission to the SENTW would be pointless because E is bound to resist would have significant force if there was some evidence in support. But there is only an assertion to that effect in the authority's written submission. However, it is of vital importance that E's views are obtained and I deal with this in my directions below.

93. This is an appropriate point at which to deal more fully with the local authority's arguments as to the effect of the Court of Appeal's decision in *Richardson v Solihull*. The authority assert this would have permitted the SENTW to name a type of school rather than a specific school. Even though that assertion is unreasoned, in fact I agree with it.

94. However, the local authority's general argument about the effect of *Richardson* is in my view flawed. They argue it confers an at-large discretion on a local authority (or tribunal) in any case to decline to name a specific school.

95. *Richardson* does not permit a local authority or tribunal to ignore an operative parental preference for a specific maintained school. There were three cases before the Court of Appeal in *Richardson* but none of them involved operative parental preferences for specific maintained schools. In two cases, a parent sought a school in the USA and, in the other, a non-maintained special school. In other words, the Court was not dealing with parents with the right under Schedule 27 to require a specific maintained school to be named in a statement of SEN.

96. The Court of Appeal's decision did not purport to interfere with the parental right (within the terms of Schedule 27) to require a specific maintained school to be named in a statement of SEN. That is made clear by the following passage from the judgment of Peter Gibson LJ:

> "In a case where the LEA is not required under Sch.27 to specify the name of a school, the wording of para.(b) of s.324(4) makes clear that the duty on the LEA to specify the name of a school is subject to two qualifications: one is that the LEA must consider the school appropriate for the child and the other is that the school "should be specified in the statement"…in a case governed by para.3 of Sch.27 the duty placed on the LEA to name a school where the parental preference is for a maintained, grant-maintained or grant-maintained special school is qualified by two conditions, one as to suitability and the other as to compatibility with the education of the other children at the school and the efficient use of resources."

97. The *ratio* of the decision was that, where Schedule 27 to the EA 1996 does not require a specific maintained school to be named, a local authority or tribunal is not required in every case to name a specific school. It is open to it simply to name a type of school. The decision does, I accept, state that parents do not have an untrammelled right to have named any particular school, maintained or otherwise. But, if the whole decision is read, it is clear that, in relation to maintained schools, these statements were simply a reflection of the statutory fact that Schedule 27 sets out two cases in which a parental preference for a maintained school may be denied (the suitability and efficiency cases). The decision did not purport to water down or in some way avoid the rights of parents under Schedule 27.

98. I shall now explain why I agree with the result contended for by the authority.

99. Where there are opposing operative parental preferences for maintained schools, I have held that Schedule 27 does not require both schools to be named. In those circumstances, *Richardson* permits a local authority or tribunal to name a type of school rather than a specific school. In fact, this may provide a solution of sorts in difficult cases such as this where

parents with opposing preferences, that would otherwise result in the preferred maintained school being named in a statement of SEN, cannot come to an agreement. It may be open to a tribunal to specify a type of school and thereby avoid becoming unduly enmeshed in a fraught parental dispute as to which school a child should attend. If parents still cannot agree, the family court may need to have the final say but at least it will be assisted by an expert tribunal's identification of the characteristics required of a school in order for it to provide a suitable education for the child.

100. In this case, however, the plain fact is that the SENTW did not name a type of school. It named a specific maintained school and so the above analysis cannot be relied on to support its decision.

101. To conclude, I set aside the SENTW's decision for an error on a point of law. I remit the appeal to a differently-constituted panel of the SENTW for re-determination. That must be an entirely fresh determination of all the issues arising in this case. The SENTW is not bound to approach the case on the basis that it has to choose between P School and R School. Provided the parties are given a fair opportunity to make submissions on the point, it may be open to the SENTW simply to specify an appropriate type of school.

Directions on remission to the SENTW

I direct that Mr S's appeal is remitted to the SENTW for re-hearing. I also make the following directions:

(1) The tribunal panel must not include any person who was a member of the panel whose decision I have set aside;

(2) The local authority must promptly make arrangements for an appropriate person of its choosing to obtain E's views as to her education. The person chosen may not be an employee of the local authority unless that person is employed by the local authority as an educational psychologist or for the purpose of promoting children's rights. If E does not wish to express a view as to the school she would prefer to attend, or on any other matter, that must be respected;

(3) Mr S and E's mother must not do anything to obstruct the local authority in making those arrangements, or obstruct the person charged with obtaining E's views;

(4) Both SENTW and the local authority are at liberty to refer the matter to the Upper Tribunal if they have reasonable grounds for believing that direction 3 has been breached.

These directions are without prejudice to the SENTW's power to make such case management directions as it sees fit for the efficient and fair disposal of Mr S's appeal.

(Signed on the Original)

E Mitchell

Judge of the Upper Tribunal

6th October 2016