

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Upper Tribunal case No. HS/1103/2017

Before: Mr E Mitchell, Judge of the Upper Tribunal

Hearing: 4 January 2018, Field House, Bream's Buildings, Central London.

Attendances:

For the Appellants: Mr David Wolfe Q.C. instructed by Simpson Millar Solicitors LLP.

For the Respondent: Mr Paul Greatorex, instructed by Cheshire East Council Legal Services Department.

DECISION

This appeal is allowed. The decision of the First-tier Tribunal (11 January 2017, First-tier Tribunal file reference *EH/895/16/00020*) involved an error on a point of law. The Upper Tribunal sets the decision aside under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. The Upper Tribunal remits the Appellants' appeal against the local authority's decision to cease to maintain their daughter's EHC Plan to the First-tier Tribunal for re-determination in accordance with the directions given at the end of the reasons for this decision.

Under rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 it is ordered that no person may disclose or publish any matter likely to lead to a member of the public identifying the young person with whom this appeal is concerned. This order does not apply to (a) the young person's parents, (b) any person to whom a parent discloses such a matter where disclosure is in the best interests of the young person, (c) any person exercising statutory (including judicial) functions in relation to the young person.

REASONS FOR DECISION

Summary

1. This case concerns a local authority's decision to cease to maintain an Education, Health and Care Plan (EHC Plan) for a severely disabled young person. The authority's decision was upheld by the First-tier Tribunal. The parents' appeal against the First-tier Tribunal's decision succeeds. The First-tier Tribunal's approach to the question whether a day care placement, funded by the authority's adult social care department, would deliver the special educational provision required by the young person involved errors on points of law.

Background

2. This case concerns a young person Ms M. According to the statement of reasons given by the First-tier Tribunal, Ms M "has athetoid quadriplegic cerebral palsy and has significant learning difficulties". The tribunal determined that Ms M did not have mental capacity to conduct proceedings. The appeal was therefore made by her parents, as the "alternative person/s" for the purposes of regulation 64 of the Special Educational Needs and Disability Regulations 2014 and section 55(1) of the Children and Families Act 2014 (rights of appeal).

3. At the date of the First-tier Tribunal's decision, Ms M was aged 19 and attending the sixth form at P School, a special school described by the tribunal as "a specialist school for communication and interaction". The tribunal's statement of reasons says that "her education should have ceased at the end of the summer term 2016 as she had completed her sixth form at [P School]" but the local authority agreed that Ms M could remain at P School pending resolution of the tribunal proceedings.

Events before the parents' appealed to the First-tier Tribunal

4. An EHC Plan review report, dated November 2015, described Ms M's informal job at P School, which involved collecting waste paper for recycling. The report also stated:

"the above vocational work continues to provide important evidence that [Ms M] needs to achieve the ASDAN unit of work 'Developing skills for the work place – Following instructions for the work place'".

5. The review report also stated that ASDAN qualifications are "ongoing and can be built upon when [Ms M] leaves P School".

6. On 18 December 2015, DL College made Ms M a provisional offer of a day placement from September 2016. At this stage, I should point out that the organisation that runs DL College also provides a service known as DL Footsteps.

7. On 19 February 2016, the local authority wrote to Ms M's parents:

"You will remember the local authority wrote to you recently enclosing a draft Education, Health and Care Plan...As we have not heard from you, we assume that you are in agreement with the draft EHCP and the final EHCP is now enclosed".

8. The EHC Plan contained a profile of Ms M, which included:

- "she continues to work on a life skills based curriculum, working towards a qualification in Personal Progress";
- "she is making good progress with her termly targets with the continued emphasis on her communication and self help skills";
- "[Ms M] receives music therapy. This is important to develop her communication skills and to enable her to use her voice in a positive way"
- "she needs support to be able to follow instructions in the workplace".

9. Within the section for describing Ms M's special educational needs, the EHC Plan included:

- "[Ms M's] speech is improving and parents would like her communication to remain a focus"

- “[Ms M] would benefit from a curriculum of activities that would allow her the opportunity to develop her independence skills”;
- “[Ms M] requires opportunity to experience different activities that stimulate her, preferably in a group environment as she enjoys being part of a group, whether these be educationally or socially based”;
- “[Ms M] needs people working with her to promote and encourage her independence as much as possible – i.e. by encouraging her to make choices”.

10. The EHC Plan named Ms M's then current school, P School but did not deal with the question of educational placement for the next academic year.

11. On 7 March 2016, the local authority's Integrated Assessment Manager wrote to Ms M to inform her that an Independent Specialist Placement Panel had not approved her application to attend DL College from September 2016. The letter went on:

“However, the panel did recommend that your assessed support needs can be met through the development of a personalised package funded through the local authority's adult social care service and health service with the [DL] Footsteps Programme.

You have been allocated a social care assessor from Cheshire East Council who will work jointly with health colleagues to assess your specialist health and social care needs and ensure that a package of support, based on your assessed needs, will inform referrals to appropriate adult services and a funding application to the Learning Disability Authorisation Panel”.

12. On 20 May 2016, the local authority informed Ms M by letter that the local authority had again decided not to approve her application to attend DL College from September 2016. The letter gave the following reasons

“the panel felt a placement at an Independent Specialist College would not ensure progression into one of the following three outcomes:

- Further education or training;

- Independent or supported living;
- Work or supported employment”.

13. This letter added:

“the local authority cannot re-open the right of appeal against the recently issued final EHC Plan for [Ms M], as an alternative right of appeal will become effective when the local authority ceases her EHC Plan.

As [Ms M] turns 19 during this academic year, it is Cheshire East Council’s view that [Ms M] does not need to stay in formal education or training therefore she does not require special educational provision to be made for her through an EHC Plan”.

14. The letter of 20 May 2016 went on to explain that Ms M would be “formally consulted shortly” and, if she disagreed, would have a right of appeal to a tribunal. While the present proceedings are concerned with the First-tier Tribunal’s decision, rather than the local authority’s, I should note that I found this letter surprising. It gave the impression that the local authority would cease to maintain Ms M’s EHC Plan regardless of any representations made during the consultation process.

15. On 8 July 2016, the local authority’s adult social care department carried out an assessment of Ms M’s needs for care and support. I think this must have been an assessment under the Care Act 2014. The assessment report:

- States it was carried out at P School;
- Includes the views of Ms M’s teacher:

“Class Teacher feels that [Ms M] needs to be in an environment where there is 1:1 support in order to meet her needs adequately [and] would like the progress that [Ms M] has made in sixth form to continue in her next placement. She feels that a structured placement is required where [Ms M] can benefit from a variety of activities including art, music and physical activity. [Teacher] feels that [Ms M] will need reassurance in a new environment and that

staff will need to pre-empt her needs through becoming familiar with her communication and behaviour”;

- Within the summary of needs section states “you need regular support with work, training, education, or volunteering”;
- “parents felt that the most appropriate placement would be at the [D L] College, however, as [Ms M] is not assessed as being eligible for this provision, they would like to proceed with a place at the Footsteps Provision, [D L] Centre”. It is not clear from the assessment report when Ms M’s parents were said to have agreed to the Footsteps Provision although the report does state “mother and father also contributed to the assessment during the past few weeks”;
- “[DL Footsteps have] assessed that the Footsteps provision would be able to meet [Ms M’s] needs by providing daily activities both on site and trips out in the community, by meeting her care needs through 1:1 support and to continue to try and maximise independence”;
- “As the school provision is due to end on Thursday 21 July 2016, alternative arrangements need to be made through Adult Services. An application for funding for a placement at Footsteps...is now required in order to ensure that [Ms M’s] physical needs are met, that her psychological and emotional needs are met and that she [is] enabled to enjoy attending activities that she gains a sense of achievement from”;
- “[Ms M] does not have the ability to improve her communication skills and be able to participate in activities of interest unless she is provided with an appropriate level of support. Without this support, there would be a significant impact on her well-being”. While this passage is drafted as an answer to a question posed to Ms M – if your needs were not being met would this have a significant impact on your wellbeing? – I suspect it describes the views of the assessing social worker. I say that because in a later section of the report the social worker writes “[Ms M] is unable to express a view about her future”;
- The ‘assessor’s views’ section includes: “[Ms M] has benefitted greatly from her place at [P School] and from attending the sixth form college. She now

requires provision from Adult Services to give her ongoing opportunities to develop and ensure that her needs are met”.

16. On 14 July 2016, the local authority’s adult social care department prepared a care and support plan under the Care Act 2014. The plan:

- Included within Ms M’s needs “Footsteps provision at the [D L] Centre, five days per week” (I note this is not in fact a need but provision to meet a need);
- Included within Ms M’s personal outcomes “accessing and engaging in work, education or volunteering”. The corresponding need was described as “[Ms M] is dependent upon others for arranging activities for her to attend that she would enjoy and benefit from” and the corresponding provision as “the proposed option of attending the Footsteps provision at the [D L] Centre on completion of her education at [P School]”;

17. Apart from that, the care and support plan was mainly concerned with Ms M’s personal care needs.

18. By letter of 18 July 2016, the local authority informed Ms M’s parents that they had decided to cease to maintain her EHC Plan from the end of the 2015/16 academic year. The reasons given were:

“As [Ms M] turns 19 during this academic year...and the Local Authority cannot support your request for [Ms M] to remain at [P School] for the academic year 2016/17, as [P School] is not a registered post-16 institution, it is the Local Authority’s view that [Ms M] no longer requires the additionality provided via an EHCP”.

19. On 19 July 2016, a local authority Integrated Assessment Manager emailed the parents’ solicitor stating a “package of support” has yet to be finalised because the parents would not allow assessments to be conducted. The Manager wrote that this was because the parents wanted a tribunal to “determine against [D L College] before engaging in any of the other offers the LA was making”. I note that the assertion that the parents would not permit assessments is arguably inconsistent with statements made in the care and support needs assessment document.

20. Even though the 18 July 2016 letter did not require any response, on 2 August 2016 the local authority wrote to Ms M stating "as the local authority has not heard from you, we assume that you are happy with the proposal. The EHCP will cease with immediate effect". As the parents' solicitor informed the local authority at the time, this letter overlooked section 45(4)(a) of the 2014 Act which prevents a local authority from ceasing to maintain an EHC Plan until after the end of the period allowed for bringing an appeal against an authority's decision to cease to maintain an EHC Plan.

21. On 29 July 2016, DL College prepared a detailed educational plan for Ms M, were she to attend the college.

22. In early August 2016 (I cannot make out the exact date from the tribunal papers), the parents' solicitor emailed the local authority. The solicitor noted the authority's view that Ms M could not continue to attend P School, due to her age, and requested an urgent explanation as to how the authority intended to deliver the special educational provision in Ms M's EHC Plan. The solicitor suggested that the local authority approach DL College since they had already assessed Ms M.

23. In response, the Integrated Assessment Manager wrote:

"I will provide [Ms M] and her parents with a letter as to how the LA intend to meet her identified needs through a non-formal route of preparing for adulthood activities in due course

...It is the LA's view that [Ms M] does not need to remain in education to achieve her outcomes but that access to non-formal provision will help to prepare her for adult [*sic*] sufficiently (Code of Practice 9.152)".

24. By email of 11 August 2016, the local authority conceded that section 45(4)(a) of the 2014 Act required them to continue to maintain Ms M's EHC Plan until the time for appealing had expired, and, if an appeal were made, pending its determination.

25. The local authority's email of 11 August 2016 explained why they thought Ms M should attend the DL Footsteps programme rather than DL College:

“the local authority does not accept that the placement requested for [Ms M] at [DL College] is necessary to meet her ongoing needs and amounts to unreasonable public expenditure and an inefficient use of the local authority’s resources. The local authority is of the view, and it is confirmed by [DL Footsteps] themselves, that the special educational provision identified in the plan can be provided through the [DL Footsteps] programme.

[Ms M] is able to attend the Footsteps programme as soon as a meeting can be arranged with her parents.

The local authority intends to amend [Ms M’s] plan section I to reflect this.”

26. I have been unable to identify any document within the appeal bundle in which DL Footsteps staff express the view that its programme would allow the special educational provision specified in Ms M’s plan to be delivered at Footsteps.

27. On 18 August 2016, the local authority purported to amend section I of Ms M’s EHC Plan to read:

“On 2.8.16 the LA took the decision to cease to maintain the EHCP. [Ms M’s] parents are appealing that decision. In order to comply with the LA’s obligations under section 45(4) of the Children and Families Act 2014 the LA identifies that a vocational training placement is appropriate for [Ms M], until such time as the appeal is resolved and the EHCP ceases”.

Events after the parents’ made their appeal to the First-tier Tribunal

28. Ms M’s parents commissioned an occupational therapy assessment. Ms M was assessed at home. Dated 17 November 2016, the therapist’s report included:

- “[Ms M] is currently unable to write, she does not have the fine motor skills required to successfully control a pen or pencil. [Ms M] also has not developed the visual or motor memory skills required to recognise letters of the alphabet. [Ms M] uses symbols and picture cards to make choices and communicate with others”;

- "P School] stated in their end of year report that [Ms M] is able to follow simple instructions, such as 'take it' when required to pick something up. They also document that she is able to communicate what she likes...";
- "In her end of year report, [class teacher] advises that [Ms M] chooses between two options using her switches. She reports that [Ms M] understands that when she presses a switch to make a choice she receives the snack of her choosing";
- "As [Ms M] does not have access to switches at home this is potentially a skill that she will lose if she does not have access to switches within a further education setting. [Ms M's] ability to make appropriate choices and gain independence during her day to day activities will be at risk and this will prevent her from developing and continuing to learn";
- [P School sixth form college] state in their report that [Ms M] loves to be out in the community and engages in a number of activities whilst on trips, she has been working towards the ASDAN personal progress units for which she had already achieved 'certificate' level and was working towards the 'diploma'. The report demonstrates the progress that [Ms M] was making and there was particular reference to how this qualification had helped [Ms M] to improve her communication skills. As part of this qualification [Ms M] has engaged in a number of occupations including shopping and using money to pay for her own items, she is able to use a symbol shopping list and pick the correct item for an option of two. She is progressing her level of independence in this occupation by reaching new goals such as placing the items on the conveyor belt and also unpacking the items once she has returned";
- In summary, "[Ms M] demonstrates a great drive to learn, interact and develop her skills in various settings whilst completing a variety of occupations. There is evidence provided by her mother and her current sixth form college, that demonstrates how she has blossomed and gained multiple achievements. I have found no evidence that [Ms M] does not have the potential to continue to develop new skills and engage with increasing independence in a range of occupations, however, [Ms M] will require access to the relevant skilled professionals and access to specialist features that can enable her to reach her potential...Access to and

engagement in a further education curriculum will allow [Ms M] the opportunity to achieve the goal of engaging in vocational work and the occupations of her choosing”.

29. A local authority occupational therapist commented on the report, arguing:

- it did not accurately reflect Ms M’s “profound cognitive impairment and levels of learning disability”;
- “it was unrealistic to suggest that she could live independently and work, as she has very high needs even in basic activities of daily living such as toileting and feeding”;
- The report was based largely on Ms M’s mother’s views, which were not impartial;
- The report failed to address Ms M’s challenging behaviour and incorrectly stated that she might have autism.

30. A local authority educational psychologist wrote a report dated 1 December 2016, which followed observations of Ms M in the school canteen on 30 November 2016 and discussions with the headteacher of P School. The report’s contents included:

- “[Headteacher] reports that [Ms M] has always been non-verbal in school. She does however use a range of vocalisations, gesture and facial expression to get her needs met”;
- “[Ms M] is able to reliably use [switches to choose between two symbols] but has not moved on significantly, however she has been able to extend the range of symbols that she recognises”;
- “[Ms M’s] cognitive skills can best be characterised by the terminology global developmental delay”;
- “She enjoys using a touch screen on a computer to operate familiar programmes with a degree of accuracy”;

- “[headteacher] reported that [Ms M] is very receptive to new activities and experiences and gains most from structured routines. The school have observed that she has learned the routines and environments of familiar events over time and can anticipate routines to a degree”;
- [headteacher] commented that she is aware that “[Ms M] enjoys art activities and that in school art has been used as a vehicle to promote cognitive understanding”;
- “[headteacher] commented that [Ms M] is totally reliant on adults to meet all her personal needs however she is an active participant in the process. It is felt that moving forwards this is an area in which [Ms M] would benefit from receiving some targeted support to enhance her skills”;
- “[headteacher] reported that [Ms M] has never shown any challenging behaviour and in all situations responds to the best of her ability”;
- “[headteacher] feels that future placements should provide [Ms M] with a wide variety of stimulating activities in particular focussing on the continued development of her independence skills and mobility”;
- “[headteacher] feels that, given her experiences of other children with a similar cognitive profile, it would be unrealistic to expect [Ms M] to engage in any form of supported employment that she could fully engage in and that would be of value to her in the long term. [headteacher] feels that a social care programme would be able to meet her outcomes”.

31. The local authority argued that their educational psychologist’s report “confirms that [Ms M’s] formal education has appropriately come to an end”.

32. A local authority speech and language therapist wrote a report dated 1 December 2016. The report followed observations of Ms M at P School and discussions with school staff. The report’s contents included:

- “[Ms M] benefits from a Total Communication Environment to aid her receptive language skills...[Ms M] demonstrates an understanding of situational cues and routine based understanding”;

- “[Ms M] uses a range of means to communicate with others which include vocalisations, body language, eye contact, reaching and pointing, pushing items away, using facial expression and some low technology AAC (Augmentative or Alternative Communication)”;
- “[Ms M] uses a single message switch to make a simple choice...is able to make a choice between two objects/pictures but this remains inconsistent. [Ms M] is unable to make choices between more than 2 items. [Ms M] relies upon others to interpret her communication means on occasions”;
- “[Ms M] is provided with a range of opportunities in which to interact with a range of communication partners throughout her activities within her life skills curriculum. [Ms M] continues to require opportunities to make basic choices and communicate her likes and dislikes throughout the day within life skills activities such as shopping, going to the café etc”.

33. Ms M's parents also commissioned an educational psychology assessment. The assessment involved direct observation of Ms M at P School and consultation with her mother and the Assistant Principal of DL College. Dated 4 December 2016, the psychologist's report included:

- “[Ms M] was unable to access formal testing and assessment of her cognitive function was made through direct observation and triangulation of relevant and specialist opinion. [Ms M] can perform tasks with direct adult support, discriminating and making choices between two objects or activities. The practical application of this activity is practised, for example, while shopping or during cooking. [Ms M] requires a high level of direct and hand-over-hand support. She accesses an interactive, experiential and sensory curriculum at college. She can be identified as having severe learning difficulties”;
- “[Ms M's] language and communication skills are discrepant between home and 6th form college. Recent admissions assessment conducted by [speech and language therapist] at [DL College] identifies that [Ms M] 'appears to understand single words and familiar phrases when supported by gesture, objects, symbols and facial expression'. It is noted that she 'needs constant access to a variety of visual supports'. [Ms M] was identified in this assessment as using single words to communicate, and needing access to

devices that further developed her capacity to communicate. [Ms M] will benefit from further assessment and review to determine her requirement for access to augmentative communication and to progress her skills in this area”;

- “[Ms M] has made recent progress in all developmental domains. It will be important to review augmentative communicative devices that she uses and to ensure that her communication skills are optimised. She continues to actively enjoy and participate in social and learning activities which have improved her levels of awareness and attention. [Ms M] is now walking further and developing core strength and postural stability. She is also developing self-care skills and actively participates in her personal care routine at college”;
- “[Ms M] requires access to a specialised educational setting with favourable pupil-teacher ratio and a high level of adult care and support provided by a trained staff group who are familiar with the resources and provisions necessary to meet her Special Educational Needs”;
- “[Ms M] would benefit from attending a specialised post-19 environment in which she is enabled to improve her communication skills through access to augmentative communication systems that work best for her, support to improve mobility, self-care, life and social skills, and from an enriching curriculum she can access with other young learners”;
- “She should receive multi-disciplinary supports including Speech and Language Therapy, Physiotherapy and specialised medical and educational advice. She should be supported by a trained staff group who have access to resources and provisions necessary to meet her needs. These are educational needs, which should be met in an appropriately resourced educational setting”;
- “[Ms M’s] Special Educational Needs determines that she needs ongoing access to special educational provisions in addition to those which would ordinarily be available to schools / colleges, and these should be coordinated between relevant education, health and care professionals as part of her ongoing access to an Education, Health and Care Plan”;

- “[Ms M] will become distressed if unable to access a structured learning environment in which she is enabled to develop communication, life and social skills and in which she has access to enriching curricular and extra-curricular activities. This level of specialised care and support is optimally delivered in an appropriately resourced educational setting”.

34. Commenting on the report, the local authority argued:

- There was no benefit to Ms M “accessing formal education”;
- There was no likelihood that attending a college course would allow Ms M to live independently or obtain employment;
- Ms M’s needs no longer require educational input but instead she needed support in an adult services placement.

35. Ms M’s parents also commissioned a speech and language therapy report. The therapist observed Ms M at P School and sought the views of staff at DL College. Dated 15 December 2016, the reports contents included:

- “[Ms M] presents as a young lady with severe communication difficulties who requires high levels of support and prompting to engage with her environment and to use communication strategies”;
- “She has limited verbal understanding and does not use speech to communicate...Her communication skills are impacted on by her physical and cognitive impairments”;
- “The type of communication approach used in the sixth form college is well suited to [Ms M’s] needs i.e. consistent use and availability of visual support, signs and switches. However I think that to progress her communication skills that she requires more 1:1 support to assist her in focussing her attention on communication aids and symbols and to encourage [Ms M] to access opportunities to communicate and interact with others. I consider that this could be achieved in the College setting at [DL] but not in the day care setting [i.e. DL Footsteps]”;

- "The day care setting does not provide 1:1 support of [*sic*] the level of speech and language therapy support that she needs. The view that [Ms M] needs to move to an educational setting is supported by [the parents' occupational therapist]".

36. A local authority occupational therapist provided a report dated 19 December 2016 (but which followed a home visit over six months earlier on 25 May 2016). The report's contents included:

- "[Ms M] is unable to verbally communicate or via sign language due to having a severe learning disability. She does communicate through noises sometimes and points to items that she wants";
- "A severe learning disability is evident, OT observed significant cognitive impairment relating to memory, recall, attention, language skills and executive functioning";
- "During the OT assessment, [Ms M] constantly grabbed to pull people's hair...[Ms M] needed to have her fingers physically peeled back by her brother to release her grip";
- "[Ms M] did not engage in the assessment during the OT visit, for example following any verbal or physical instructions. She did not appear to have enough level of understanding to fully participate".

The First-tier Tribunal's decision

Arguments put to the First-tier Tribunal

37. The parents' notice of appeal to the First-tier Tribunal argued:

- the local authority's decision was unlawful since it relied not on Ms M's special educational needs but the age-restrictions at P School. Furthermore, Ms M's parents did not want her to remain at P School. They wanted her to be a day student at DL College. The local authority were aware of this because on 7 March 2016 they refused to fund a placement at the college, a decision which was also involved a flawed finding that Ms M did not

need to remain in 'formal' education and training so that an EHC Plan was unnecessary;

- the local authority's decision-making disclosed a failure to act in accordance with the SEN Code of Practice because "the outcomes specified in the [decision] letters wrongly narrow the wider outcomes outlined in the Code and set the threshold higher than the legal framework envisages by, for example, removing community participation";
- The local authority wrongly decided that a placement at DL College would not provide expected benefits for Ms M in relation to education, training and independence. This was inconsistent with the college's assessment, overlooked that at the college Ms M could build on the qualifications obtained at P School and failed to consider Ms M's longer term aims;
- The local authority failed to take into account that, to date, Ms M's educational progress had depended on the specialist educational provision in her EHC Plan;
- The local authority's argument that Ms M's participation in the DL Footsteps programme, to be funded by their adult social care department, would allow Ms M to achieve the outcomes in her most recent EHC Plan was based on no evidence.

38. The parents went on to argue that Ms M's EHC Plan should be amended to name DL College in section I. Since the First-tier Tribunal dismissed the appeal against the authority's decision to cease to maintain Ms M's EHC Plan, the amendment issue fell away.

39. The local authority's written grounds of resistance argued:

- Adult social care day services, provided at DL Footsteps, were "entirely suitable to meet [Ms M's] needs". While this would not involve any formal education, it would involve "suitable activities and learning opportunities", such activities and opportunities to be identified following an assessment;
- The EHC Plan outcome of 'increase social interaction outside of the school setting' would continue at Footsteps;

- While one part of the grounds of resistance stated that Ms M's views were awaited, a later section said "[Ms M] is unable to express a view as to whether she wishes to remain in education";
- Ms M no longer needed to remain in formal education and the proposed adult social care provision could meet all her needs;
- "there is no evidence that [Ms M] has not met the outcomes specified in her EHCP".

The First-tier Tribunal's decision

40. The First-tier Tribunal made the following findings:

- Ms M had achieved the outcomes specified in her EHC Plan. The tribunal rejected the parents' representative's submission that she had not;
- The tribunal rejected the argument that the EHC Plan outcomes were unambitious and did not reflect what Ms M could achieve. The EHC Plan outcomes were appropriate;
- The parents' experts "were providing evidence about what her needs were and what was the appropriate placement, rather than whether her outcomes had been achieved";
- "staying in a formal education [*sic*] would not help her complete or consolidate her learning or help her prepare further for adulthood. [P School] has prepared her for adulthood as far as she is able, and she has met the outcomes set";
- While it had not been possible to obtain Ms M's views, the tribunal accepted the evidence of the local authority's Senior Young Person Advisor that Ms M "is ready for a different challenge, within a less structured, less formal environment with opportunities to interact with peers to give her the opportunity to move to the next stage of her life";

- The parents' expectation that Ms M may one day progress to further education and then paid work was not realistic given her "very high level of need and requires considerable support to make even basic choices such as pointing to a drink".

41. The tribunal concluded that "an educational setting was not required or beneficial at this stage in her life" and dismissed the appeal against the local's authority's decision to cease to maintain Ms M's EHC Plan.

42. The parents applied to the Upper Tribunal for permission to appeal against the First-tier Tribunal's decision, that tribunal having refused permission to appeal. The parents also applied, under rule 5(3)(m) of the Tribunal Procedure (Upper Tribunal) Rules 2008, for the effect of the First-tier Tribunal's decision to be suspended pending determination of the appeal. I granted that application, giving the following reasons for doing so:

"An order may not in fact be necessary in the light of section 45(4) of the 2014 Act [see below]. This depends on whether an appeal [made to the First-tier Tribunal] has not been finally determined while Upper Tribunal proceedings are extant. For the avoidance of doubt, I make an order.

I make an order suspending the effect of the First-tier Tribunal's decision because of my provisional (and I stress the word provisional) view of the merits of the appeal and in the light of the submissions made about the possible impact of the authority ceasing to maintain [Ms M's] EHC Plan. I also take into account the legislative policy embodied in section 45(4). The local authority are entitled to apply for the suspension order to be varied (and set aside)."

43. The rule 5(3)(m) order falls away now that I have set aside the First-tier Tribunal's decision.

Legal framework

Relevant definitions

44. "Special educational provision" is defined by section 21(1) of the Children and Families Act 2014 ("2014 Act"):

“Special educational provision”, for 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; [or]...

(c) mainstream post-16 institutions in England”.

45. Section 21(5) of the 2014 Act provides that “health care provision or social care provision which educates or trains a child or young person is to be treated as special educational provision (instead of health care provision or social care provision)”.

46. Section 83(7) of the 2014 Act provides that the Education Act 1996 “and the preceding provisions of this Part...are to be read as if those provisions were contained in [the Education Act 1996]”. Accordingly, subject to any contrary intention, a term used in Part 3 of the 2014 Act (sections 19 to 83), which is defined in the 1996 Act, bears that definition for 2014 Act purposes. Furthermore, section 83(2) of the 2014 Act provides that “training” has the same meaning as in section 15ZA of the 1996 Act.

47. Section 2 of the Education Act 1996 defines primary, secondary and further education. The definition of further education is:

“(3)...in this Act “further education” means –

(a) full-time and part-time education suitable to the requirements of persons who are over compulsory school age, and

(b) organised leisure-time occupation provided in connection with the provision of such education,

except that it does not include secondary education or...higher education”.

48. “Organised leisure-time occupation” means

“leisure-time occupation, in such organised cultural training and recreative activities as are suited to their requirements, for any persons over

compulsory school age who are able and willing to profit by facilities provided for that purpose" (section 2(6) of the Education Act 1996).

49. Section 2(6A) of the Education Act 1996 also provides:

"In the context of the definitions of...further education, references in this section to education include vocational, social, physical and recreational training."

50. Section 15ZA(8) of the Education Act 1996 provides that "training" includes:

"(a) full-time and part-time training;

(b) vocational, social, physical and recreational training;

(c) apprenticeship training."

EHC Plans

51. Section 42(2) of the 2014 Act requires a local authority, where it maintains an EHC Plan, to "secure the specified educational provision for the...young person" unless "the young person has made suitable alternative arrangements" (section 42(5)).

52. On the face of the 2014 Act, a local authority is permitted to cease to maintain a young person's EHC plan in only two cases. One is where the authority is no longer responsible for the young person, which is not relevant in this case. The other is where the authority determines that it is "no longer necessary for the plan to be maintained" (section 45(1)).

53. Section 45(2) of the 2014 Act provides:

"The circumstances in which it is no longer necessary for an EHC plan to be maintained for a child or young person include where the child or young person no longer requires the special educational provision specified in the plan."

54. The use of "includes", in section 45(2), shows that the cases in which maintenance of an EHC Plan is no longer necessary are not restricted to the case where the specified special educational provision is no longer required.

55. In the case of a young person aged over 18, section 45(3) of the 2014 Act provides:

“When determining whether a young person aged over 18 no longer requires the special educational provision specified in his or her EHC plan, a local authority must have regard to whether the educational or training outcomes specified in the plan have been achieved.”

56. Section 45(3) is complemented by section 44(5) of the 2014 Act, which provides:

“In reviewing an EHC plan maintained for a young person aged over 18, or deciding whether to secure a re-assessment of the needs of such a young person, a local authority must have regard to whether the educational or training outcomes specified in the plan have been achieved.”

57. The Special Educational Needs and Disability Regulations 2014 prescribe another case in which a local authority may not cease to maintain an EHC Plan for a young person aged over 18. Regulation 30(1) provides:

“When a young person aged 18 or over ceases to attend the educational institution specified in his or her EHC plan, so is no longer receiving education or training, a local authority may not cease to maintain that EHC plan, unless it has reviewed that EHC plan in accordance with regulations 18 and 19 and ascertained that the young person does not wish to return to education or training, either at the educational institution specified in the EHC plan, or otherwise, or determined that returning to education or training would not be appropriate for the young person.”

58. Section 45(4) of the 2014 Act effectively suspends a local authority’s decision to cease to maintain a statement while an appeal to the First-tier Tribunal against the decision is being pursued. If an appeal is duly made, the authority may not cease to maintain the plan until “the appeal has been finally determined”.

59. An EHC Plan must specify either a particular school or institution or a type of school or institution (sections 39(5) and 40(2) of the 2014 Act).

Powers of the First-tier Tribunal

60. Under regulation 43 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Regulations 2014, in determining an appeal against a local authority's decision to cease to maintain an EHC Plan, the tribunal's powers include power to:

- (a) dismiss the appeal;
- (b) order the local authority to continue to maintain the Plan in its existing form;
- (c) order the local authority to continue to maintain the Plan with amendments;
- (d) order the local authority to substitute in the plan the school or other institution or type of school or other institution specified in the Plan.

Code of Practice

61. The Code of Practice issued by the Secretary of State under section 77 of the 2014 Act provides:

"8.78...transition should be planned with timescales and clear responsibilities and the young person should know what will happen when their EHC plan ceases. During this planning process, the local authority **must** continue to maintain the young person's EHC plan as long as the young person needs it and remains in education or training.

...9.151 In line with preparing young people for adulthood, a local authority **must** not cease an EHC plan simply because a young person is aged 19 or over. Young people with EHC plans may need longer in education or training in order to achieve their outcomes and make an effective transition into adulthood. However, this position does not mean that there is an automatic entitlement to continued support at age 19 or an expectation that those with an EHC plan should all remain in education until age 25. A local authority may cease a plan for a 19- to 25-year-old if it decides that it is no longer necessary for the EHC plan to be maintained. Such circumstances include where the young person no longer requires the

special educational provision specified in their EHC plan. In deciding that the special educational provision is no longer required, the local authority **must** have regard to whether the educational or training outcomes specified in the plan have been achieved...”.

...9.185 As the young person is nearing the end of their time in formal education and the plan is likely to be ceased within the next 12 months, the annual review should consider good exit planning. Support, provision and outcomes should be agreed that will ensure the young person is supported to make a smooth transition to whatever they will be doing next – for example, moving on to higher education, employment, independent living or adult care.

...9.199 A local authority may cease to maintain an EHC plan only if it determines that it is no longer necessary for the plan to be maintained, or if it is no longer responsible for the child or young person...the legal definition of when a child or young person requires an EHC plan remains the same as that for a statement under the Education Act 1996. The circumstances in which a statement can be ceased or not replaced with an EHC plan during the transition period are the same as that for ceasing an EHC plan.

9.200 The circumstances where a local authority may determine that it is no longer necessary for the EHC plan to be maintained include where the child or young person no longer requires the special educational provision specified in the EHC plan. When deciding whether a young person aged 19 or over no longer needs the special educational provision specified in the EHC plan, a local authority **must** take account of whether the education or training outcomes specified in the EHC plan have been achieved. Local authorities **must not** cease to maintain the EHC plan simply because the young person is aged 19 or over.

...9.208 Where a young person aged 18 or over is in receipt of adult services, the local authority should ensure that adult services are involved in and made aware of the decision to cease the young person’s EHC plan.”

62. Although it does not say so, paragraph 9.203 of the Code must relate to regulation 30 of the 2014 Regulations:

"9.203 Where a young person aged 18 or over leaves education or training before the end of their course, the local authority **must not** cease to maintain the EHC plan unless it has reviewed the young person's EHC plan to determine whether the young person wishes to return to education or training, either at the educational institution specified in the EHC plan or somewhere else. If the young person does wish to return to education or training, and the local authority thinks it is appropriate, then the local authority **must** amend the EHC plan as necessary and it **must** maintain the plan."

63. Section 77(6) of the 2014 Act provides:

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

Grounds of appeal

64. I granted Ms M's parents permission to appeal to the Upper Tribunal on each ground advanced. I summarised the grounds of appeal as follows in my determination of their application for permission to appeal:

- (1) The First-tier Tribunal's finding that the EHC plan outcomes had been achieved was inconsistent with "its own account of the case that had been put to it" or the evidence before the tribunal;
- (2) The tribunal failed to address whether revised EHC plan outcomes were appropriate;
- (3) The tribunal failed adequately to address whether Ms M could achieve more in relation to her independence, communication and self-help skills;
- (4) The tribunal failed to give reasons for the implicit finding that Ms M could not make further progress and any such finding was "entirely unsupported" by the evidence;

- (5) The tribunal gave “no reasons” for rejecting the expert evidence that Ms M could make further progress;
- (6) The tribunal’s finding that there was no benefit to Ms M remaining in ‘formal education’ was not relevant to the question whether the EHC plan should continue to be maintained. The tribunal started its analysis in the wrong place.

65. I also decided to grant permission to appeal on an additional ground, concerning regulation 30(1) of the 2014 Regulations. I said why in my determination of the application for permission to appeal:

“I also grant permission to appeal on the ground that the First-tier Tribunal may have erred in law by failing to consider whether regulation 30(1) of the 2014 Regulations was relevant on this appeal.

It seems that [Ms M] had not ceased to attend the institution specified in her EHC Plan. But, if she had so ceased to attend, arguably regulation 30(1) would have prevented the local authority from ceasing to maintain her plan unless, following a review, it had ascertained she did not wish to return to education or training or determined that returning to education or training would not be appropriate. Should a young person, especially a very disabled young person, have to go through the formality of leaving his or her educational institution in order to obtain the benefit of regulation 30(1)? Could that really have been the legislative intention?

I am satisfied that it is right to introduce a new ground of appeal since this case concerns relatively new and important legislation and I do not think the Upper Tribunal has previously had the opportunity to consider regulation 30(1) of the 2014 Regulations.”

The arguments

Mr Wolfe Q.C. for the parents

66. Mr Wolfe argues the First-tier Tribunal misunderstood the purpose of EHC Plan outcomes. The fact that a Plan outcome has been achieved does not necessarily mean further outcomes are unnecessary or unachievable. In fact, the

evidence clearly suggested that Ms M was capable of progressing further so that revised outcomes could meaningfully be set. There was no evidence, nor did the tribunal identify such evidence, that improvements in communication, independence and self-help skills could not be achieved. Indeed, the local authority's own educational psychologist indicate that Ms M was capable of achieving more. The tribunal erred in law by failing to consider whether Ms M could progress such that revised outcomes would be appropriate.

67. Mr Wolfe argues that, where EHC Plan outcomes are not achieved, it is difficult to see how a local authority could legitimately cease to maintain an EHC Plan but section 45(3) did not work the other way around. Achievement of outcomes does not inevitably call for cessation of an EHC Plan. Mr Wolfe argues that the test for ceasing to maintain should be aligned with the initial duty to prepare and maintain an EHC Plan. To rely simply on achievement of outcomes as the test for ceasing to maintain risks creating a 'revolving door' of EHC Plan provision. Accordingly, the case law on the duty to prepare an EHC Plan (and a statement of special educational needs under the predecessor legislation) is relevant.

68. The tribunal also erred in law, argues Mr Wolfe, by failing to recognise that the 2014 Act is concerned not only with education but also with training.

69. Mr Wolfe argues the tribunal mistakenly considered that relatively small degrees of educational progress rendered an EHC Plan unnecessary. He relied on the decision in *Buckinghamshire CC v SJ* [2016] UKUT 254 (AAC) where Upper Tribunal Judge Jacobs said:

"It is true that Ryan was functioning at a pre-school level. That meant, no doubt, that any further achievements would be small. That does not mean that they would not be valuable for Ryan in his adult life. The tribunal found as fact that it would and there was no evidence to support that conclusion."

70. Mr Wolfe submits that the tribunal needed to consider whether Ms M could make further progress. Mr Wolfe accepts that an ability to make further progress does not in all cases prevent a local authority from deciding to cease to maintain an EHC Plan. However, such an ability does give rise to further questions, which need to be answered. In this case, these were: did Ms M require special

educational provision in order to make progress and, if so, would she get that provision without an EHC Plan? The First-tier Tribunal's truncated analysis, which stopped once it had decided that a 'formal education setting', whatever that meant, was not required, meant those questions were not addressed. To the extent that the tribunal considered that Ms M's parents' aspirations for her were unrealistic, this was not of itself a legitimate ground for ceasing to maintain her EHC Plan.

71. Mr Wolfe argues the tribunal mistakenly considered attainment of formal qualifications to be an integral part of 'education'. The decision of Upper Tribunal Judge Jacobs in *Buckinghamshire CC v SJ* shows this approach to be flawed. The local authority and, in turn, the tribunal became fixated on some concept of formal education and, in doing so, overlooked the breadth of the meaning of education and training that applies for the purposes of the 2014 Act.

72. Mr Wolfe drew attention to the special educational needs identified in Ms M's EHC Plan none of which could properly be said to have disappeared simply because she attained the age of 19. He also submits it was effectively agreed in evidence before the First-tier Tribunal that Ms M was capable of making progress.

73. Mr Wolfe argues there is no evidence that, in the first half of 2016, the local authority asked itself whether the DL Footsteps programme would enable Ms M to achieve any particular education-related outcome. The reality was that the local authority decided that Ms M was to become an adult social care responsibility without properly considering the effect this would have on her education. In doing so, the authority overlooked section 21(5) of the 2014 Act.

74. As to disposal of the appeal, Mr Wolfe said his client did not ask the Upper Tribunal to re-make the First-tier Tribunal's decision. He did, however, argue that the appeal should be remitted to a 'fresh tribunal'.

Mr Greatorex for the local authority

75. Mr Greatorex emphasises that that the question whether an EHC Plan continues to be necessary involves an exercise of judgement. He argues Mr Wolfe does not identify any true error on a point of law in the First-tier Tribunal's decision. Mr Greatorex warns against expecting perfection in a tribunal's reasons.

He also argues many of the arguments put by Mr Wolfe at the hearing strayed beyond the grounds of appeal.

76. Mr Greatorex argues Mr Wolfe's submissions really describe an alternative way in which the First-tier Tribunal could have dealt with the appeal, not any error in law in the way in which it did deal with it. Mr Wolfe's lengthy description of the background, given at the hearing, might be described as an attempt to induce the Upper Tribunal to consider the merits of the appeal made to the First-tier Tribunal. That approach would be fundamentally wrong.

77. Some of the case law relied on by Mr Wolfe concerned failed challenges by local authorities to tribunal decisions that relied on small degrees of anticipated progress. It was held that tribunals were entitled to take this into account, not that an EHC Plan had to be maintained where only minimal progress was likely. An ability to make further progress does not inevitably require an EHC Plan to be continued. Mr Greatorex disagrees that a 'key issue' before the First-tier Tribunal was whether Ms M was capable of making further progress. And, even if it was an issue, he also disagrees that the burden was on the local authority to adduce evidence to disprove the possibility of progress, such an assertion being implicit in Mr Wolfe's arguments. If the issue needed to be addressed, the tribunal did so adequately.

78. Mr Greatorex does not 'necessarily disagree', as he said at the hearing, that case law about the duty to prepare and maintain an EHC Plan is relevant in 'ceasing to maintain' cases but asked how this helped in the present case. Both at the initial stage, and when a local authority was considering whether to cease to maintain an EHC Plan, the issues arising are matters of judgement. An important factor is a comparison with the likely position in the absence of an EHC Plan. None of the grounds of appeal argue that without an EHC Plan such and such a provision would not be available to Ms M. The local authority's stance was not 'we're ceasing the plan, go away'. The authority acknowledged M's needs but did not accept that an EHC Plan was necessary to meet them.

79. To say the tribunal found that Ms M would never make progress is a misrepresentation of its findings, according to Mr Greatorex. What the tribunal found was that any further progress would be small. The tribunal's finding that the parents' aspirations were unrealistic needed to be considered in the light of the case as put to the tribunal. The parents thought further education would

assist Ms M one day to earn a living. The tribunal did not find that continuing to pursue education-related activities was pointless. Mr Wolfe incorrectly argues that a local authority is bound to continue an EHC Plan whenever a young person is capable of making further progress.

80. Mr Greatorex disputes that the tribunal was required to consider whether revised EHC Plan outcomes might be appropriate. Firstly, 'outcomes' are outside the First-tier Tribunal's jurisdiction. Secondly, the question of revised outcomes was irrelevant. Thirdly, if revised outcomes needed to be considered, they were in fact considered and the tribunal's approach was adequate.

81. Mr Greatorex points out that the concept of 'formal education' is referred to by the Code of Practice albeit without definition. Nevertheless, its meaning is clear. It refers to education with a degree of formality and for which an EHC Plan is necessary. The tribunal should not be criticised for using terminology found in the Code.

82. Mr Greatorex agrees that, if the appeal succeeds, the matter should be remitted to the First-tier Tribunal, ideally to the same panel that made the present decision.

Conclusions

Achievement of specified outcomes

83. I shall begin by addressing the relevance of a young person's achievement of EHC Plan outcomes when a local authority is considering whether to continue to maintain a Plan.

84. Section 45(3) of the 2014 Act requires a local authority to "have regard to whether the educational or training outcomes in a young person's plan have been achieved". In this respect, the Act influences the local authority's thought processes rather than mandating a particular result. It does not follow that, where outcomes have been achieved, it is no longer necessary to maintain the Plan. Had that been Parliament's intention, it would have said so.

85. I accept that achievement of outcomes may indicate that a young person no longer requires the special educational provision specified in an EHC Plan and

that it is no longer necessary to maintain the Plan. However, this will depend on a range of considerations, including for example the young person's educational and training aspirations, the reasons why outcomes were achieved and whether the young person's special educational needs profile has altered as s/he has matured. By the same token, a failure to achieve outcomes does not inevitably render it necessary to maintain a young person's EHC Plan. For one thing, the young person may not wish to remain in education or training. But, even if s/he does, the reasons why one or more outcomes were not achieved, the type of education or training proposed and the young person's current special educational needs profile are all examples of factors that may, in a particular case, tend to show that, despite outcomes not being achieved, it is no longer necessary to maintain an EHC Plan.

86. Turning to the present case, Ms M's achievement of her specified EHC Plan outcomes was, in my judgment, an important factor in the First-tier Tribunal's determination that it was no longer necessary to maintain her EHC Plan. In my view, that is shown by the tribunal's treatment of the expert evidence supplied by Ms M's parents. Paragraph 15 of the tribunal's statement of reasons says:

"We noted the reports obtained by the parents...which supported an EHC Plan and detailed what provision was required...However, these experts were providing evidence about what her needs were and what was the appropriate placement, rather than whether her outcomes had been achieved".

87. Subsequently, the statement of reasons makes no findings about the parents' expert evidence other than to explain why it preferred the local authority's occupational therapy evidence over that supplied by the parents. However, as I am about to explain, I do not allow this appeal on the ground that the First-tier Tribunal erred in law by upholding the local authority's decision simply because Ms M had achieved her specified outcomes.

Why this appeal succeeds

88. The First-tier Tribunal did not simply rely on Ms M's achievement of her specified EHC Plan outcomes:

(a) The tribunal agreed with the local authority's submission that "there was no benefit to [Ms M] remaining in formal education". The tribunal's statement of

reasons does not explain what that submission was but it did accept the evidence of the authority's 'Senior Young Person's Adviser', Ms W, which the statement of reasons described as:

"[Ms W] feels that [Ms M] is ready for a different challenge. She felt that a less structured, and less formal environment with opportunities to react with peers will give her the opportunity to move to the next stage of her life."

(b) "staying in a formal education would not help her complete or consolidate her learning or help prepare her for adulthood as far as she is able, and she has met the outcomes set";

(c) "Parents understandably want her to undertake further education with the hope that she may be able one day to earn her own living, but this was not a realistic expectation";

(d) "[Ms M] has a very high level of need and requires considerable support to make even basic choices such as pointing to a drink...We found she will need a high level of care for the rest of her life and support to enjoy community activities with opportunities for social interaction. We found an educational setting was not required or beneficial at this stage in her life".

89. In essence, the tribunal found that a less structured and less formal day time environment was a more suitable learning environment for Ms M. Presumably, the comparison being made was with the environment at P School although it is possible that the comparator was DL College (or both).

90. Apart from Ms M having achieved her specified educational and training outcomes, the First-tier Tribunal relied on findings that a 'formal' educational setting would not help Ms M complete or consolidate her learning nor help prepare her for adulthood. A less formal and less structured setting, by contrast, would. I agree with Mr Greatorex, for the local authority, that the tribunal made an implicit finding that Ms M was capable of making further progress in an educational or training sense. The tribunal found that a particular setting would allow Ms M to 'complete' her learning and aid her in preparing for adulthood. The tribunal must therefore have considered that Ms M had more to learn and was capable of gaining some skills that would be of benefit to her in adult life. In

other words, the tribunal must have accepted that Ms M continued to require special educational provision. But a difficulty I have with the tribunal's reasons is that it is largely unclear what, in the tribunal's determination, Ms M should be learning and what skills she needed to attain.

91. I agree with counsel that there is an affinity between the test for deciding whether to cease to maintain an EHC Plan and the test for deciding whether an EHC Plan is to be prepared and maintained in the first place. Under section 37(1) of the 2014 Act, the test for deciding whether to prepare and maintain a plan is whether it is necessary for special educational provision to be made in accordance with an EHC Plan. It would serve no one's interests for children and young people to lose their EHC Plans only to regain them following a fresh request for an assessment and the carrying out of an assessment. In deciding whether to cease to maintain an EHC Plan, a local authority should ask itself whether a young person would meet the test for preparing and maintaining an EHC Plan in the first instance. If the answer is 'yes', I do not see how a local authority could properly decide that it is no longer necessary for an EHC Plan to be maintained.

92. Any decision as to whether to prepare and maintain an EHC Plan will be preceded by the detailed statutory assessment required by section 36 of the 2014 Act. In the present case, by contrast, in the months preceding the local authority's decision to cease to maintain Ms M's EHC Plan, the only assessment carried out was of Ms M's needs for care and support under the Care Act 2014. Given what I said in the preceding paragraph, local authorities should carefully consider whether they have sufficient up-to-date information about a young person before deciding to cease to maintain an EHC Plan.

93. Ms M's Care Act 2014 assessment was not, and could not have been, an assessment of her educational needs. It was not an assessment of educational needs in fact since it only considered Ms M's needs in relation to *accessing* and *engaging* in work, education or volunteering rather than her actual special educational or training needs (and, in any event, the assessor would have been a social care professional, not an education professional). The reason why the assessment of Ms M's needs for care and support could not have been an assessment of her special educational and training needs is because the purpose of such an assessment is to assess needs for care and support (section 9(1) of the Care Act 2014). Under the Care Act 2014, there is an educational dimension to an assessment of needs for care and support. This is because the assessment must

assess the impact of needs for care and support on the aspects of “well-being” specified in section 1(2) of the Care Act 2014, which include “participation in work, education, training or recreation”. But this does not mean that a purpose of an assessment is to identify special educational or training needs. Instead, it considers a person’s ability to participate in education, training or recreation.

94. While the local authority had not carried out an assessment of Ms M’s educational and training needs in the months preceding their decision to cease to maintain her EHC Plan, during the tribunal proceedings a number of expert reports were produced. The reports supplied by, in particular, Ms M’s parents, set out in some detail the authors’ views about her educational needs and the provision required to meet them. The tribunal’s statement of reasons shows that it scarcely considered the reports largely, it seems, because they did not address whether Ms M had achieved the outcomes specified in her EHC Plan.

95. I decide that the First-tier Tribunal’s decision involved an error on a point of law because it made inadequate findings about the special educational provision required to meet Ms M’s special educational needs or, alternatively, gave inadequate reasons for the findings it did make. The tribunal simply found that Ms M needed a less structured and less formal ‘setting’. It made no findings about the actual educational provision required, as opposed to the setting in which Ms M was to be educated / take part in learning activities. At the date of the tribunal’s decision, it had sufficient evidence on which to base findings about the special educational provision she required yet did not do so. As a result, the tribunal was not in a position properly to answer the statutory question posed by section 45(1) – was it no longer necessary for Ms M’s EHC Plan to be maintained? Without more detailed findings about the special educational provision required, the tribunal could not be confident that the DL Footsteps programme would deliver what she required so that an EHC Plan was not necessary.

96. At the hearing of this appeal, there was some discussion about the scope of the grounds of appeal. Whatever their precise scope, I am satisfied that the reason why I allow this appeal falls within the scope of the grounds of appeal. While not expressed in precisely the same terms, that reason corresponds to Mr Wolfe’s argument about the approach that the First-tier Tribunal should have taken.

97. So far as the remaining grounds of appeal are concerned, I shall not address them. This is because this case now goes back to the First-tier Tribunal and, apart from the regulation 30(1) ground, the remaining grounds largely relate to the present tribunal's treatment of the evidence. The evidence will need to be evaluated afresh by the next First-tier Tribunal panel. I do, however, observe that the present tribunal may have made an incorrect qualitative assumption about the nature of further education. As the Education Act 1996 definition shows, further education is not defined by reference to content but by reference to the age of learners (see paragraph 47 above).

Regulation 30(1) of the SEN and Disability Regulations 2014

98. I have found regulation 30(1) something of a puzzle. A curious feature is that it presupposes the education or training of a young person with an EHC Plan has stopped, as is shown by its references to a young person who "is no longer receiving education or training" and wishes to "return". I say this is curious because (a) the whole purpose of an EHC Plan is to ensure that a young person receives education or training, and (b) if the statutory review process has been followed, one would normally expect the Plan to cease upon a young person's planned departure from an educational institution without transferring to another institution.

99. It might be thought that regulation 30(1) is intended to deal with sudden departures from education, not anticipated by the statutory review process and, in fact, the Code of Practice suggests that may be so. But, even then, why would it follow that the young person "is no longer receiving education or training"? One would necessarily be dealing with a young person whose EHC plan specifies either a particular institution or a type of institution. In the latter case, the local authority clearly remains under a duty to secure the education or training specified in the plan. In the former, while some parts of the provision specified may not work, once the young person has left the specified institution, I doubt that a local authority would be permitted in such circumstances to deny that the young person has educational entitlements derived from the plan.

100. Since regulation 30(1) was not relied on before the First-tier Tribunal, and the drafting puzzles it poses, I restrict myself to making the above observations.

Disposal of the appeal

101. The First-tier Tribunal's decision involved an error on a point of law. I set aside its decision. Ms M's parents' appeal against the local authority's decision is remitted to the First-tier Tribunal for re-determination.

102. I make no direction as to the composition of the panel that re-determines the appeal. In my judgment, this matter should be decided by the Deputy President of the Health, Education and Social Care Chamber or another salaried judge assigned to that Chamber. I do however draw attention to the fact that the next tribunal panel cannot, in its reasoning, take into account the findings of fact and conclusions of the panel whose decision I have set aside (they fall away with the decision). That might favour a different panel composition.

103. Finally, I apologise for the time taken to give this decision. This is partly due to the volume of my current SEN caseload, which is greater than it has been for some years. Additional delay was caused by my absence from work with a fractured wrist and I.T. related problems which caused a near-final draft simply to disappear.

DIRECTIONS

I direct as follows:

- (1) The parents' appeal against the local authority's decision to cease to maintain their daughter's EHC Plan is remitted to the First-tier Tribunal for re-determination;
- (2) The First-tier Tribunal is to hold a hearing before re-determining the appeal (this direction may be varied by the First-tier Tribunal);
- (3) The case file is to be placed before the Deputy President of, or a salaried judge assigned to, the Health, Education and Social Care Chamber of the First-tier Tribunal to consider (a) the composition of the panel that is to re-determine the parents' appeal, and (b) whether any further case management directions are required.

(Signed on the Original)

E Mitchell
Judge of the Upper Tribunal
2 July 2018