

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Before:

Mr E. Mitchell, Judge of the Upper Tribunal

Representation:

Appellant: Coram Children's Legal Centre and Mr L Dilaimi (of counsel).

Respondent: Browne Jacobson Solicitors (LLP)

DECISION

Under section 12(2) of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal decides that the First-tier Tribunal's decision of 1 March 2018 (ref. EH/919/17/00119) involved an error on a point of law and sets aside the decision. The appeal is remitted to the First-tier Tribunal for re-hearing. The constitution of the tribunal is a matter to be determined by the First-tier Tribunal.

Under rule 14(1) of the Upper Tribunal (Tribunal Procedure) Rules 2008 I hereby make an order prohibiting the disclosure or publication of 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 any parent discloses such a matter in the due exercise of parental responsibility, (c) any person exercising statutory (including judicial) functions in relation to the young person.

REASONS FOR DECISION

Introduction

1. This appeal involved a child whose school-related anxiety was, I suspect, more severe than most cases of that condition. The evidence indicated that the child's anxiety was such that it could trigger vomiting. The child had also been diagnosed with rumination disorder, an eating disorder that, as I understand it, involves regurgitation of food rather than vomiting, as well as autism.

2. The First-tier Tribunal dismissed the mother's appeal against the contents of the child's Education, Health and Care (EHC) Plan. The principal issue was whether the child was medically unfit to attend school so that he should instead be educated at home. The Tribunal decided that the evidence did not support a finding that the child was medically unfit to attend

school. However, the Tribunal did not take into account the child's school-related anxiety and associated vomiting, only the possible effect of school attendance on his rumination disorder. In failing to take into account relevant circumstances, the Tribunal erred in law and its decision is set aside.

Background

The appeal to the First-tier Tribunal

3. In these reasons, I refer to the child as A and his mother, the appellant, as Ms M. A started attending St E's School in early 2017. The evidence indicates that A's previous educational placements had broken down against a background of school-related anxiety.

4. St E's School is a non-maintained independent special school. It specialises in educating children and young people with epilepsy; the local authority say it also has expertise in educating children and young people with autism. By around March 2017, Ms M had begun to educate A at home. In her view, attending St E's School caused A such anxiety that he could no longer attend.

5. An EHC Plan specified St E's School as A's educational placement. Following a statutory review, the local authority decided in September 2017 to continue to specify St E's School as A's educational placement in section I of the EHC Plan. Ms M had wanted the EHC Plan to provide for a package of home-based tuition. Ms M appealed to the First-tier Tribunal against the contents of A's EHC Plan. In March 2018, the Tribunal dismissed her appeal because there was, in its judgment, no "evidence that [A] is medically unfit to attend school as there is no current opinion based on a proper assessment of him by a suitably qualified professional".

The grounds of appeal

6. The First-tier Tribunal granted Ms M permission to appeal to the Upper Tribunal against its decision. The ground on which permission to appeal was granted was that, arguably, the Tribunal did not have "requisite up to date medical evidence to reach an informed conclusion" as to whether A had a medical condition that prevented him from attending school.

7. Ms M's subsequent notice of appeal to the Upper Tribunal advanced additional grounds. In summary, the notice argued that the First-tier Tribunal arguably erred in law by:

(1) failing of its own motion to adjourn in order to obtain up-to-date medical evidence (i.e. the ground on which the First-tier Tribunal granted permission to appeal):

- The Tribunal observed that Ms M's son, A, had "a diagnosis of rumination disorder, in addition to autism and learning difficulties" and went on to state that "the evidence before us did not contain a medical report diagnosing the disorder, a description of the disorder or details as to its management or treatment from a suitably qualified professional";
- The evidence before the Tribunal included two letters from a Consultant Community Paediatrician. A letter of 13 April 2017 stated that A should not attend

school, or at least his current school. The Tribunal found that the doctor's opinion was based on neither a detailed assessment nor information about A's presentation in school. The Tribunal also noted that the doctor's opinion had not been reviewed since April 2017;

- The Tribunal found that the medical evidence did not show that A was medically unfit to attend school since there was no current supporting medical opinion and, therefore, no "persuasive evidence" that the condition in section 61(2) of the Children and Families Act 2014 (education otherwise than at school) was met;
- The Tribunal should have adjourned of its own motion in order to give the parties the opportunity to obtain up-to-date medical evidence. The Tribunal failed to discharge its inquisitorial obligation (*DH & GH v Staffordshire CC* [2018] UKUT 49 (AAC); *W v Gloucestershire CC* [2001] EWHC Admin 481; *MW v Halton BC* [2010] UKUT 34 (AAC));

(2) in deciding whether it would be inappropriate for A to be educated in a school (the section 61(2) Children and Families Act 2014 test), the Tribunal failed to take into account all the circumstances as required by *TM v London Borough of Hounslow* [2009] EWCA Civ (859)). In *Hounslow*, which concerned section 319 of the Education Act 1996, the Court of Appeal held that a tribunal is required to take into account all the circumstances in determining whether a child is to be educated otherwise than at school. The Court identified a number of potentially relevant matters. In the present case, the only circumstance taken into account was the extent to which A's rumination disorder prevented him from attending school but not "[A's] reported reaction to education provisions at school and at home";

(3) contrary to *MS v London Borough of Brent* [2011] UKUT 50 (AAC), the Tribunal failed to consider whether it was inappropriate for any part of A's special educational provision to be made in a school. The Tribunal failed to deal separately with the two separate issues arising under section 319 of the Education Act 1996, as identified in *MS*. Firstly whether it is inappropriate for any provision to be made in a school and, secondly, whether it is inappropriate for any part of the provision to be made in a school. Ms M's notice of appeal acknowledges that section 319 and section 61 of the Children and Families Act 2014 are not analogues. However, she argues that, since section 61 refers to "any special educational provision", *Brent* remains "good law".

8. Ms M's notice of appeal acknowledges that she was not granted permission to appeal by the First-tier Tribunal on grounds (2) and (3). I granted Ms M permission to appeal on the additional grounds.

The arguments

The local authority

9. The local authority resists this appeal. On the first ground of appeal, the local authority submits:

- Ms M was represented throughout the Tribunal proceedings. She argued that A had been unable to attend St E's School since March 2017 due to his school-related

anxiety and associated vomiting, and there was no recent medical evidence to suggest that A was medically ready to return to full-time schooling. The evidence, including medical evidence, relied on by Ms M was substantial (it is described below in these reasons);

- Ms M’s argument that A required a full-time home education programme until medically fit to attend school full-time was contradicted by her agreement to explore “a gradual return to a therapeutic school environment”;
- Ms M’s grounds of appeal to the First-tier Tribunal stated that she was seeking further evidence and would seek permission to submit late evidence, with which the local authority agreed. The late evidence included evidence from clinical psychologists at an Eating Disorder Clinic;
- The medical evidence before the First-tier Tribunal included: evidence from the school nurse at St E’s (that A had only vomited twice at school); Dr C’s (consultant community paediatrician) February 2017 letter that the child’s weight had “gone from an extremely dangerous low point to normal”; letter from a Dr H which mentioned no eating concerns, emphasised the importance of structure and routines and the importance of facilitating access to education and social activities; Dr F’s letter of December 2017 that the child’s anxiety could be reduced by avoiding stress including the stress of going to school;
- Recent evidence from the Positive Behaviour, Autism, Learning Disability and Mental Health Service was not available because Ms M had decided to cease using their service;
- In total, the First-tier Tribunal had before it seven opinions from six different medical professionals. However, it found that this medical evidence was based on reports given by Ms M “without consideration of the medical or professional basis of the information” and therefore, in the local authority’s words, the Tribunal “did not...accept the quality of the medical evidence presented”;
- The First-tier Tribunal carried out a thorough assessment of the medical evidence, much of which was very up-to-date. It was open to the Tribunal to conclude, despite the medical evidence, that making special educational provision in school was appropriate. The Tribunal’s approach was supported by the Upper Tribunal’s decision in *MW v Halton BC* [2010] UKUT 34 (AAC), in which Upper Tribunal Judge Ward said:

“38...In the event that undue stress were to be found to result from particular aspects of attendance at school, it may be either that the factor(s) causing the stress can be removed or worked round, or that the pupil can be given extra assistance to cope with the difficulty...If on the other hand such remedial or supporting measures cannot be taken and the stressors are an unavoidable part of attending a given school, then that in my view would be highly relevant to determining whether a particular school was ‘appropriate’”;

- None of the medical evidence concluded that it was inappropriate for provision to be made for A in school. The Tribunal provided detailed reasoning for its conclusion that the medical evidence, as analysed by the Tribunal, did not demonstrate that A was medically unfit to attend school. It was open to the Tribunal to assess the medical evidence as it did and, further, it had the necessary information in order to decide the appeal;
- There was no evidence to suggest that, had the Tribunal adjourned for further medical evidence, it would have generated new medical evidence that was qualitatively different to the existing evidence. Furthermore, in *W v Gloucestershire CC* [2001] EWHC Admin 481 the High Court said “primary responsibility was on the appellant to ensure that the Tribunal had the relevant information”;
- The only evidence to indicate that A was medically unable to attend school was from a Dr W (autism consultant), but she was neither a qualified medical professional nor a qualified teacher;
- Evidence from the educational psychologist Mr G noted “that rumination symptoms have been present in home context, as well as in school”. Mr G also advised on the need to introduce routines in the school context and that A should attend school regularly;
- The Tribunal took into account professional evidence (Mr G’s) about remedial or supporting measures to reduce anxiety on A’s transition / return to school;
- Despite the Tribunal having referred at the hearing to a lack of medical evidence, no application was made for an adjournment even though Ms M was represented throughout;
- Given A’s history of poor school attendance, the Tribunal’s management of the case was in accordance with the overriding objective set out in its procedural rules, in particular avoiding delay so far as is compatible with proper consideration of the issues;
- It would be beyond the remit of the Tribunal to direct, as suggested by Ms M, how a medical professional should carry out their assessment;
- Ms M has not subsequently supplied fresh medical evidence in support of her argument that A was / is medically unfit to attend school.

10. In relation to ground 2, the local authority submits that the First-tier Tribunal’s section 61 Children and Families Act 2014 analysis gave due consideration to all the circumstances of the case. Its 15 page statement of reasons shows that it took into account: A’s school history and his reaction to being in school; educational psychology evidence about his presentation at home and likely presentation on a reintroduction to school; the package of home educational provision, which included four reports of Dr W (home programme supervisor); the St E’s package and A’s reaction to being educated at St E’s; a wide range of professional recommendations about the special educational provision required; a schedule of comparative placement costs.

11. While the parties agreed at the hearing that “[A’s] medical condition, rumination, should be dealt with as the primary issue and the FtT therefore focussed, as invited to do, on this issue”, the Tribunal nevertheless gave detailed consideration to the wider context of A’s case. I observe that this is not in fact what is said at paragraph 28 of the Tribunal’s statement of reasons: “we were asked to consider the medical issues first in order to consider whether there was evidence that [A] had a medical condition that prevented him from attending school”. Paragraph 28 does not limit the medical ‘issues’ to rumination disorder.

12. The local authority submits that ground 3 is not made out. *MS v London Borough of Brent* is not applicable to section 61 of the Children and Families Act 2014. It concerned a differently-worded statutory provision. Under section 61(2), the single question that arises is whether it would be inappropriate for any of the required special educational provision to be made in a school. It is not clear on what basis Ms M argued that certain provision would be inappropriately made in a school. In any event, it is clear that the First-tier Tribunal were satisfied that the section 61 threshold conditions were not satisfied and, in doing so, applied its mind to the correct statutory test.

Ms M’s reply

13. Ms M’s representative (who did not represent her before the First-tier Tribunal) argues that the local authority’s response contains various “factual errors and other matters of concern”:

- The First-tier Tribunal did not find that the entirety of the medical evidence was based on reports by Ms M. It found that “much of the professional evidence was based on the report of [Ms M] without consideration of the medical or professional basis of the information”. If the local authority argue that Ms M has herself to blame for the quality of the medical evidence provided, the argument is erroneous;
- The “seven reports from six different medical professionals” did not constitute expert evidence. In fact, neither party instructed a medical expert to provide an expert report on the rumination issue. Further, the ‘reports’ were not reports as such; they were medical correspondence. The Tribunal itself noted that it had no medical report diagnosing rumination disorder;
- The authority’s argument that there was no medical opinion that it was inappropriate for provision to be made for A in school is factually incorrect. Both Dr C and Dr F expressed the opinion that A should not attend school for the time being, although it is conceded that the Tribunal was entitled to find that neither doctor’s opinion constituted a “current opinion based on a proper assessment... by a suitably qualified professional”;
- Implicitly, the Tribunal accepted that it did not have the necessary basic information on which to decide the issues arising on the appeal by identifying the information required namely “a medical report diagnosing the disorder, a description of the disorder or details as to its management or treatment from a suitably qualified professional”;

- The authority’s argument that it would be beyond the remit of the Tribunal to direct how a medical professional should carry out their assessment was flawed. The Tribunal had power under its procedural rules, which it should have exercised, to direct that a medical expert be instructed and examine or assess A;
- The authority’s description of Dr C’s evidence – that he did not recommend that A was medically unfit to attend school – may be contrasted with his actual evidence: “[he] should not attend school, or at least his present school because of this problem” (letter dated 13 April 2017);
- The authority incorrectly argue that only Dr W indicated that A should not attend school. Dr C, Dr F and Mrs D (educational psychologist) all indicated that he was unable to attend school;
- While Ms M accepts that the primary responsibility for obtaining relevant information fell on her, the local authority selectively cite the judgment in *W v Gloucestershire CC*. They omit to mention that the judge in that case went on to hold that, despite the appellant’s primary responsibility, the absent information was so crucial that the tribunal “should, if necessary, have adjourned in order to obtain it”.

14. In relation to ground 1, Ms M’s written reply submits:

- On the First-tier Tribunal’s approach, none of the medical evidence was appropriate nor, therefore, relevant. The result was that the Tribunal had no relevant medical evidence before it. It erred in law by proceeding to make a decision based on a lack of relevant medical evidence;
- The quantity of medical evidence that the Tribunal ‘put to one side’ should have given it pause and, had it reflected on the state of the evidence, would have determined that an adjournment was necessary especially when so much of the evidence already submitted indicated that A was not fit to attend school. Ms M also argues that “since the FTT was so concerned by the lack of relevant medical evidence as to mention it a number of times at the hearing, it should have adjourned the hearing so that relevant medical evidence could be obtained”;
- While Ms M was represented before the First-tier Tribunal, her representative was not legally qualified (a SEN advocate) and this should have been taken into account. Tribunals “may be required to recognise that [a non-legally qualified representative] may not be as familiar with...the concept of requesting an adjournment”;
- Ms M’s representation did not absolve the Tribunal of its inquisitorial obligation. If a party is unrepresented, the Tribunal “will be expected to be a little bit more proactive” but, even if both parties are represented, a Tribunal must adjourn of its own motion if it considers that it does not have the evidence that would be crucial to its decision;
- The local authority’s stance was inappropriately partisan, effectively contending that an authority may “sit back” and await evidential flaws in a parental case. Where a parent argues that a child is medically unfit to attend school, the local authority should

actively consider whether it should adduce medical evidence “including whether it should suggest that both parties jointly instruct a medical expert”;

- The absence or otherwise of fresh medical evidence is irrelevant since Ms M does not submit that the Upper Tribunal should re-make the First-tier Tribunal’s decision in the event that her appeal succeeds;
- The authority argues that the First-tier Tribunal’s findings were not tantamount to it accepting that it lacked the necessary basic information on which to decide the issues. Ms M disputes this. The Tribunal identified the form of medical evidence it felt was required so that, inevitably, it based its decision upon a lack of evidence.

15. In relation to ground 2, Ms M submits

- The First-tier Tribunal’s section 61 analysis did not take into account all the circumstances. While the wider circumstances were mentioned in the Tribunal’s statement of reasons, when it came to consider section 61 it only took into account the extent to which the child rumination disorder prevented him from attending school;
- Even if it was agreed that rumination disorder was the primary issue this did not permit the Tribunal to decide the appeal in contravention of *TM v London Borough of Hounslow*. Alternatively, any concession does not bind the Tribunal in the light of its inquisitorial function (*GK v Essex CC* [2017] UKUT 0355 (AAC)).

16. Ms M replies to the authority’s ground 3 submissions as follows:

- She maintains her argument that *MS v London Borough of Brent* applies to section 61 of the Children and Families Act 2014;
- Where a parent argues before the First-tier Tribunal that it would be inappropriate for any special educational provision to be made in school, the Tribunal does not need to be told which forms of provision would be particularly inappropriate. *MS* calls for the Tribunal to turn its mind to this point, in the discharge of its inquisitorial obligation, even in the absence of specific parental submissions, if and when it decides it would be inappropriate for any part of the provision to be made in school.

The professional evidence before the First-tier Tribunal

17. Since this appeal is largely concerned with the Tribunal’s treatment of the evidence of various professionals involved with A’s education and care, I must consider that evidence in some detail, in particular that which concerns A’s school-related anxiety and the question of a rumination disorder.

Dr W (described as independent autism consultant)

18. Dr W, whose C.V. states she has a Ph.D in Health and Social Welfare and which also describes significant experience in advising and supporting organisations who provide services to people with autism, provided an undated report with an ‘initial assessment date’ of 2 December 2016 (the report must have been written around that date). The report’s contents included:

- “attending the [previous] school was making [A] quite ill, both emotionally and physically. He is due to start at [St E’s School] in the New Year”;
- “[A] does not like to be hurried and gets very stressed if this happens. [A] also needs to stick to a routine and needs preparation for events and activities”;
- “[A] has quite a high level of general anxiety and this can be exacerbated by many things although preparation and routine help”;
- “[A] has a history of eating issues, which were exacerbated by his recent unhappy experiences at school. He tends to eat food very quickly indeed and does not chew well. Partly as a result of this, he has a rumination disorder, which clearly has significant implications for his health. Currently, if [A] eats fairly small portions of food which have few lumps, his digestive health is better, but this is affected by stress”;
- “[A] needs significant processing time when changes to activities, routines etc are envisaged. His typical response to a request is to refuse, but he will comply once given time to process the request”;
- “I think that we can support any more formal, school based education [A was then being educated at home] which [A] can access by addressing the following areas”, followed by a number of recommendations about communication, socialisation, academics, self-care and behaviour.

19. On 10 March 2017, Dr W wrote to Dr C (A’s consultant community paediatrician). The letter’s contents included:

- “Despite a calm start to school attendance [at St E’s School], his anxiety has increased exponentially this term and I write to express my concern for his physical and mental health”;
- “The current situation is that A is...shouting and screaming in the mornings as he does not want to go to school...being sick in the evenings before a school day and in mornings before the transport for school arrives”;
- “...these are clearly worrying indications of extreme anxiety. However, [A] has a history of rumination disorder and was very ill indeed in the spring and summer of 2015, having lost a dangerous amount of his body weight. Whilst the rumination disorder has not yet recurred, [A] is being sick in the evenings and mornings before school: we need to pay attention to this very clear communication of his distress”;
- “it would appear [given A’s history of school placement breakdowns and the current situation] that [A’s] anxiety is such that, at the moment, he is unable to attend a place of education without endangering his emotional welfare and physical health. Perhaps this may be the appropriate moment to consider other arrangements for [A’s] education, based on his health needs?”

20. Dr W supplied an undated report, which was probably written in mid-2017, whose contents included:

- “[A] has been unable to attend school recently, as preparation for leaving the house to go to school has caused him to vomit. This is unfortunate as the reports from school were that [A] was doing well with his studies, despite some incidents of challenging behaviour. This different presentation of emotional states in different environments is not uncommon and can cause some confusion”;
- “I would suggest that in order to safeguard [A’s] physical and emotional health, a home education programme would be the most suitable way forward”.

21. Dr W supplied a further undated report, which appears to have been written towards the end of 2017, whose contents included:

- “over the course of the past year, [A] has suffered from extreme anxiety, which has been a recurrent theme through his life. Recently, this has been largely and most acutely related to school attendance, with the result that [A] has been unable to attend school since the Spring term”;
- “Whilst [A’s] anxiety manifests in a number of ways, the most worrying is that he will vomit when he is acutely anxious and previously this has led to dangerous weight loss and hospitalization”;
- “It is noticeable that he did not vomit whilst he was in receipt of education at home and this behaviour started again alongside his attendance at [St E’s]. Again this is a repeating pattern and had occurred during [A’s] attendance at the two schools he attended prior to [St E’s]”;
- “Given the persistence of behavioural traits in individuals with autism and related conditions, it seems very unlikely that this behaviour will change in the near future, or even in the much longer-term future without ongoing, specialist, therapeutic support”;
- “I would suggest that any attempt to return [A] to school or a school environment will result in the same health-endangering reaction...if [A] is to receive an education at all, this needs to be delivered in his home, where he is more comfortable and relaxed and may be able to access the opportunities on offer”.

School nurse

22. The school nurse at St E’s School provided a report dated 22 February 2017 which stated “[A] has had a two of [*sic*] episodes of vomiting post lunch probably anxiety triggered as no obvious illness or high temperature detected”.

Occupational therapy (OT)

23. The contents of an OT report produced by St E’s School, undated but probably written in early 2017, included:

- “He also has rumination syndrome and has experienced episodes of high levels rumination, vomiting and severe weight loss”;
- “Prior to starting his placement, [A] was being schooled at home, due to his high levels of anxiety relating to his previous school”;

- “[A] started his placement at [St E’s School] with shorter school days to help him cope with the change of going to a new school and to try to alleviate any anxiety. [A] has been gradually increasing the time spent at school”;
- “At the start of [A’s] placement the OT focussed on strategies to help [A] with sensory modulation and to help reduce his anxiety. [A] had a ‘Sensory Diet’ prior to joining [St E’s School]; therefore this was made available to the team whilst the OT was in the process of assessing [A]”.

Behaviour support report

24. The contents of a behaviour support report produced by St E’s School, dated 22 February 2017, included:

- “[A] has also received medical investigations for Rumination Syndrome. [A] has had periods of vomiting which have led to hospitalisations both in the UK and Spain. [A’s] rumination and vomiting have been linked to anxiety with swallowing difficulties and sensory needs previously ruled out”;
- [A’s] time in school has increased gradually over the previous few weeks and it is hoped in the near future he will be able to access the full school day and integrate fully into [St E’s]”;
- “During the first 6 weeks of [A’s] time at [St E’s] he has been seen to find it difficult in overcrowded areas and in loud environments and at these times [A’s] echoialia can be observed to increase in frequency. [A’s] anxieties have been seen to increase during less structured periods such as outdoor play and lunchtimes, as well as when noise levels are high”;
- “An...MDT meeting was held for [A] on the 9th February 2017 to discuss concerns of [A’s] attendance and participation in the current classroom setting. Discussions took place regarding [A’s] anxieties and strategies to be attempted in reducing these. Several sensory breaks were identified and incorporated into a proposed individual timetable during the meeting. It was recognised that [A] would benefit from time spent in a calming environment and that he works well with 1:1 support to keep him on task and focussed”.

Consultant community paediatrician

25. Dr C, A’s consultant community paediatrician, wrote a letter dated 24 February 2017 (the same day that Dr C saw A in clinic). Its contents included:

- “[A] is now attending [St E’s School], a specialist school for children with epilepsy which claims to have experience with autism. He has been there since January. The first week wasn’t too bad but then he increasingly began vomiting and sometimes over the weekend. His mother told me that during the first half term he lost 1.5 kg”;

- “It is very noticeable over the last 18 months to 2 years how...his weight has gone from an extremely dangerous low point to normal. This is approximately over the period he has not been at school”;
- “His weight gain and vomiting is a measure of his distress and inability to function at school. There may well come a point when it will be medically unacceptable for him to be at school if he continues to lose weight. In the long term the only options might be home tuition or possibly a trial of a specialist school for autism”;
- “I am very concerned about the idea that his mother or his teachers should “show him who is boss”. It may be possible to work through his personality or with the grain of his autism to persuade him to take part, or interest him in work, but not otherwise. It may be possible to achieve some short term results but if it causes him distress and makes him vomit because he doesn’t want to go back to school, then this will be unacceptable and fairly soon affect his health”;
- “I am not convinced that medication for anxiety is at all appropriate, but I will discuss it with my colleague”;
- “I will put him down for a six month review, but his mother will contact me at the end of term to keep me up to date and I will decide whether any action on my part is required”.

26. A letter from Dr C to Ms M, dated 13 April 2017, stated:

“I understand from your report that [A] has been vomiting at school and at home, and losing weight. Since he has been off school he has gained weight again. In my opinion his physical health takes precedence over everything. [A] should not attend school, or at least his present school because of this problem. Home tuition may be necessary.”

Child in need review report

27. The contents of a child in need review report dated 3 March 2017 included:

- “[A] is now accessing [St E’s] although [Ms M] is not happy with this provision so far. She has given accounts of increased remuneration [‘rumination’ must have been intended] and stated that [A] wants to stay at home”
- “[Ms M] has not been able to get [A] to school until lunch time as she cannot get him ready for school”;
- “...a home video...showed a computer at the end of [A’s] bed which he was playing from his bed whilst she was encouraging him to get ready. [Ms M] has consistently disregarded professionals advice that [A] should not have access to his computer as this clearly is more of a motivator for [A] than school is”;
- “Reports from [St E’s] have been very positive. [A] is a bright student who requires extra work. He has in their opinion settled well and is clearly making some positive steps forward”;

- “[Ms M] stated that she felt the journey to school was upsetting [A] as he is anxious in the car...[Ms M] stated that she feels he doesn’t want to come into school, but this point was not agreed by a number of school staff. There [have] been times when he hasn’t been keen to get out of school transport but on these occasions [staff member] has gone out to see him and upon seeing [staff member] [A] is reported to be happy to get out of the taxi. [Ms M] disagreed, she felt he did not want to come to school as he is not settled and does not comfortable with the environment”;
- “[Ms M] described how [A’s] behaviour had become worse because of school, he is waking up at 1 am consistently and he has lost his appetite”;
- “[staff member] advised that within school he is presenting as very happy, he is accessing the outside willingly...[Ms M] did not agree with this report”;
- “[Ms M] feels that all expectations should be removed from [A] within school upon advice from her ABA specialist and that he should attend school on his own terms. Once he is settled then the curriculum should be introduced”.

Placement meeting notes

28. The notes of a placement meeting on 21 June 2017 included:

- “Mum confirmed [A] was in fine health, regained weight and appeared happy”;
- “Initially [A] had been unable to access the work sent home from class, however with the help of...adaptation in breaking the tasks in small bites he was now able to access and engage in, for most part of each day. This approach allowed him to relax which was good for him. This had taken time to achieve”;
- “[St E’s School headteacher] pointed out that in terms of schooling [St E’s] is able to meet his needs and feels confident in the school’s ability to provide a suitable curriculum. Broken down in small stages to allow his reintegration. The school had not witnesses any behaviours, as witnessed at home, here in school”;
- “His need for high therapy input was recognised [by therapy professionals at St E’s School] leading to building sensory snacks with positive affect [*sic*]. Progress was shown”;
- “Dr W [the autism consultant] compared the difficulties in his previous schools with stress anxiety causing him to vomit which he can’t handle. However, he has shown that over time he has come to trust [carers] at home avoiding any stressful car travel who can, if necessary, pull the activity if he appears under any stress. With the demands of any school – he can’t do”;
- “[class teacher at St E’s] stated that whilst at school he had only been sick on one occasion”;
- “[local authority SEN official] still felt his needs could be met at school, appreciates alternative programme but stressed the need to provide evidence of costings for August panel meeting in order to amend statement evidence of an alternative programme needs to be seen. The Local Authority are offering a school

place. The Local Authority do not fund alternative programmes as previously advised and reinforced that they do not fund programmes provided by parents”.

29. The notes of a further meeting held on 6 December 2017 included:

- “[speech and language therapist] reported that during the time [A] was here he was in a quiet and protected environment. He was working 1:1 with dedicated LSA...to manage his anxiety levels, with students occasionally coming into the room. He seemed to be coping, and had a good working relationship with [LSA], who understood him well”;
- “[head teacher] stated that [St E’s] is an appropriate placement as it provides personalised learning”;
- “It was stated that [St E’s] can meet [A’s] educational needs, but not his social and emotional needs, as he was being sick on the journey to school”;
- “[A] is OK at the home at the moment, he has anxiety but is not being sick so often; he will be sick if he is given work he perceives to be difficult, or anything challenging”.

Consultant paediatrician

30. A letter written by a consultant paediatrician, dated 15 November 2017, discussed whether A might have epilepsy but concluded this was unlikely. Its contents also included:

- “[A] has always had anxiety in school refusal and while getting ready he’s had an episode of eyes rolling back becoming stiff for 3 to 4 seconds but there was no postical phase, he vomited and was quite unsettled for a while longer. His family stopped his schooling afterwards as [A] has had this school anxiety for at least 3 schools he has attended”;
- “He doesn’t tolerate schooling as previously mentioned and since stopping his anxiety has improved”.

Educational psychology

31. A report of the local authority’s educational psychology service, dated March 2016, included:

- “[A] has ongoing issues around ‘rumination syndrome’ and associated regurgitation and intolerance to eating. It is presumed that this is linked to if not explicitly caused by stress. It is clear that this is less of an issue when [A] is calm, and less anxious, although symptoms have persisted over time in school and home contexts”;
- “[A] has had periods of being settled at school. This was most noticeable at [M School] where he was offered significant oversight and direction when vulnerable...Even so, throughout this time there were episodes of over-reaction, and verbal and occasional physical outbursts...More telling was that with suitable care and focus these tendencies were managed and moderated”.

Other professional evidence

32. A number of pieces of late documentary evidence were admitted by the First-tier Tribunal at the hearing of Ms M's appeal. However, these are not included in the First-tier Tribunal appeal file and so I have not seen them. Parts of these documents were however, referred to in a number of places in the Tribunal's statement of reasons:

- Ms D, educational psychologist, assessed A on 7 January 2018 on Ms M's instruction and also gave oral evidence at the hearing. The Tribunal found that Ms D "set out an opinion [in writing] on the effects of [A's] medical condition which was not within her professional expertise". Ms D gave oral evidence that "it was her understanding that school was a trigger to [A's] eating disorder";
- A Dr H wrote a letter (date not specified) which, according to the statement of reasons, said A "was eating a good varied diet and there were no concerns from her perspective regarding eating". The statement of reasons also included a verbatim quote from this letter: "I wanted to emphasise the importance of structure and routine...and how important it is that he is facilitated to access education and social activities. The change in his routine will be unsettling and this may have led to the increase in his recent period of rumination";
- A Dr F wrote a letter dated 23 December 2017. The Tribunal's statement of reasons says the letter "set out the history given to her by [Ms M]" before quoting from the letter:

"It must be understood that the anxiety causing the severe nausea and vomiting will remain but if it can be reduced as much as possible by avoiding the stress that [A] is put under and the stresses going to school or attending other relevant appointments and meetings, which did not help him";
- A Ms R, speech and language therapist, wrote a report following an assessment of A on 27 November 2017. The statement of reasons says that Ms R recommended education otherwise than at school (para. 23) and "asserted that [A] had not been able to cope in even highly specialist school tailored to meet the needs of young people with complex needs and therefore pursuing education within a school-based environment was therefore not suitable for him".

The First-tier Tribunal's decision

33. The Tribunal's statement of reasons says it was asked to "consider the medical issues first in order to consider whether there was evidence that [A] had a medical condition that prevented him from attending school", and this was the "essence of the appeal".

34. The Tribunal's statement of reasons includes the following findings and other conclusions:

- "A has a diagnosis of Rumination Disorder, in addition to autism and learning difficulties" (para. 29);

- Despite that finding, the Tribunal also found that the evidence did not contain a “medical report diagnosing the disorder or details as to its management or treatment from a suitably qualified professional” (para. 29);
- The opinion of Dr C, consultant community paediatrician, that A should not attend school, or at least not attend St E’s School, due to his vomiting “was not based on a detailed assessment of [A] or information in relation to [A’s] presentation at school and had not been reviewed since that time”;
- Despite the school reporting only a single vomiting incident, the Tribunal accepted that “he may do so more frequently at home”. This is not really a finding of fact or, at least, not a useful one. It does not make it clear whether or not the Tribunal accepted the evidence of vomiting at home;
- Dr H had no concerns about [A’s] eating although the Tribunal also stated that Dr H’s opinion that changes in routine could lead to an increase in rumination was, presumably, intended as a reference to him attending (in fact, re-attending) St E’s School;
- “It was unfortunate that so many medical professionals have been involved with [A] without one suitably qualified medical professional providing effective intervention and support to [Ms M]”. While this finding is not challenged in this appeal, it was arguably a surprising finding. It applies to treatment from a community consultant paediatrician, a consultant paediatrician and a consultant child psychiatrist even though the evidence does not indicate that Ms M raised any concerns with any of these consultants about their treatment nor, indeed, does it identify how their involvement (‘intervention and support’) was considered deficient;
- The Tribunal was “impressed” by the evidence of Mr G, local authority educational psychologist, who assessed A in 2016 and also gave oral evidence at the hearing. The Tribunal agreed with Mr G’s opinion that A would resist “change to following a new regime” but that “following a routine and receiving support for his needs is what he requires”;
- The Tribunal was not impressed by the evidence of Ms D (educational psychologist instructed by Ms M) which it considered to be based on inadequate investigations;
- “Much of the professional evidence was based on the report of [Ms M] without consideration of the medical or professional basis of the information”. I should say I have struggled to understand what this really means. Does it mean that Ms M provided inaccurate information to professionals? If so, what was the basis for that finding? And if a consultant provides a medical opinion about a child what does it mean for the doctor to consider the ‘medical basis’ for a parental report of a child’s symptoms? Surely the reliability of the information provided is analysed as part of the normal application of medical skill. I would find it very hard to accept that NHS consultants, as a rule, accept everything a parent says, and in consequence deploy limited NHS resources, without being alert to the provision of inaccurate information;

- “we do not accept that [A] is medically unfit to attend school as there is no current opinion based on a proper assessment of him by a suitably qualified professional”. Flowing from that, the Tribunal “do not find that there is persuasive evidence that it is inappropriate for [A’s] provision to be made in a school”;
- The Tribunal was “extremely concerned” at the lack of clarity as regards the home education programme proposed by Ms M.

Conclusions

35. Both parties submit that it is not necessary to hold a hearing before deciding this appeal. I agree.

36. I have not found the determination of this appeal entirely straightforward. Had I read the First-tier Tribunal appeal papers before Ms M’s notice of appeal, I would probably have expected a challenge on the ground that the Tribunal gave inadequate reasons for rejecting the medical evidence. As mentioned above, I find it difficult to understand why the evidence contained within the NHS consultants’ letters was, so it seems, considered unreliable because it was based on reports from Ms M about A’s symptoms. But Ms M’s representative is quite clear that the Tribunal’s decision is not challenged on the ground that inadequate reasons were given for rejecting the medical evidence.

37. I have also found it difficult to understand why the supposed flaw in the Tribunal’s decision, as described in the First-tier Tribunal’s grant of permission to appeal and, in turn, Ms M’s notice of appeal, was a failure to adjourn in order to obtain up-to-date medical evidence. I have been unable to identify evidence that A’s medical conditions were thought to have got inherently better or worse during the relevant period. Rather, the variable factor seems to have been the environment/s in which A finds himself. Up-to-date medical evidence may be called for where the existing evidence has become stale, i.e. does not speak to present circumstances. But it is not obvious to me why the medical evidence in this case might be considered to have that unreliability. On that footing, I would have expected to be presented with the argument that the Tribunal, once it had found that the medical evidence was not reliable, proceeded to decide the appeal on inadequate evidence. In fact, this is the argument subsequently put in Ms M’s reply to the local authority’s appeal response.

38. Another aspect of this case that has puzzled me is the prominence given in the arguments to rumination disorder although I accept that this may be due to the way in which the First-tier Tribunal reasoned its decision.

39. According to the Diagnostic and Statistical Manual of Mental Disorder (DSM-5), rumination disorder is a condition that involves “repeated regurgitation of food for a period of at least one month. Regurgitated food may be re-chewed, re-swallowed, or spit out”. Since it involves undigested food, and possibly for other reasons, I do not understand this to be the same thing as simple vomiting. On my reading, the evidence indicated that A, while he appears to have been diagnosed with rumination disorder, had not exhibited symptoms of that disorder during his attendance at St E’s School. Dr W’s March 2017 letter stated “whilst the rumination disorder has not yet recurred, [A] is being sick in the evenings and mornings”. This letter, supplied by an autism consultant instructed by Ms M, appears to illustrate two

points: (a) symptoms of rumination disorder were not present during A's period of attendance at St E's School, and (b) rumination disorder is not the same thing as anxiety-related vomiting. If rumination disorder was a relevant issue, the evidence suggests it was on the basis that school-related anxiety might trigger a recurrence of rumination disorder symptoms.

40. It seems to me that, rather than rumination disorder, the more pertinent issue on the evidence was simply the extent and nature of A's school-related anxiety, one aspect of which was said to be anxiety-related vomiting. And, in fact, the written grounds set out in Ms M's appeal to the First-tier Tribunal did not isolate rumination disorder as a discrete issue. Instead, they principally focussed on the issue of anxiety-related vomiting. For example, paragraph 5 of the grounds asserted that Dr C had advised that A "was not medically fit to return to school due to his vomiting".

41. Despite being somewhat puzzled by the course taken by the arguments in this case, I allow this appeal. I am satisfied that ground 2 is made out. For this reason, I need not decide whether to permit amendment of Ms M's notice of appeal to include the modified ground 1 advanced in her written reply to the local authority's appeal response.

42. Paragraph 33 of the First-tier Tribunal's statement of reasons includes the following findings:

"We do not underestimate the difficulties faced by [Ms M] when [A's] anxiety and resistance to attend school manifests itself as an increase in rumination, with potential risks to his health, but we do not accept that there is evidence that [A] is medically unfit to attend school as there is no current opinion based on a proper assessment of him by a suitably qualified professional."

43. On that basis, the First-tier Tribunal held that section 61(1) of the Children and Families Act 2014 could not apply because the condition in section 61(2) was not satisfied. Section 61 is concerned with education otherwise than at school and provides as follows:

"(1) A local authority in England may arrange for any special educational provision that it has decided is necessary for a child or young person for whom it is responsible to be made otherwise than in a school or post-16 institution or a place at which relevant early years education is provided.

(2) An authority may do so only if satisfied that it would be inappropriate for the provision to be made in a school or post-16 institution or at such a place."

44. I am satisfied that the First-tier Tribunal, in its approach to section 61, failed to take into account the wider school-related anxiety case advanced by Ms M. Instead, it based its conclusions on the potential for school-related anxiety to manifest as an increase in rumination. This was the only manifestation of school-related anxiety incorporated within the Tribunal's section 61 reasoning. But the relevant circumstances included the wider school-related anxiety associated with vomiting relied on by Ms M.

45. While there may have been a dispute as to the extent of A's school-related anxiety, the local authority accepted that he suffered from that condition. The Tribunal's rejection of the medical evidence did not, therefore, permit it to reject Ms M's case insofar as it relied on

school-related anxiety. In failing to take this circumstance into account, the Tribunal's decision involved a material error on a point of law. I set aside the Tribunal's decision. I am not in a position to re-make the Tribunal's decision and so this matter is remitted to the First-tier Tribunal for re-determination of Ms M's appeal against the contents of her son's EHC Plan. I should point out that the various observations I have made about the First-tier Tribunal's analysis of the medical and other professional evidence are just that – observations. They do not bind the First-tier Tribunal to whom this matter is remitted.

46. I add that the Tribunal's statement of reasons does not support the local authority's contention that the parties agreed that 'rumination disorder' was the key issue on the appeal. Paragraph 28 of the Tribunal's statement of reasons recites that the Tribunal was asked to consider "the medical issues first" in order to determine whether there was evidence that A had a medical condition that prevented him from attending school. The statement of reasons does not indicate that the parties agreed that the only relevant medical issue concerned rumination disorder.

47. I do not find that ground 1, as argued in Ms M's notice of appeal, is made out. As I have already alluded to, if the Tribunal's decision to proceed without considering whether to seek further medical evidence involved an error of law, it was not in my judgment the error of failing to obtain, or considering whether it needed to obtain, up-to-date medical evidence.

48. I shall not address ground 3. This is because it appears to me to be based on an inaccurate assumption about the nature of the First-tier Tribunal's powers to order provision of a section 61 nature. That will not have been apparent to the parties, nor the Tribunal, since it flows from a recent Upper Tribunal decision about the scope of the First-tier Tribunal's powers to order provision of a section 61 nature. The Upper Tribunal decision in question is *M & M v West Sussex County Council* [2018] UKUT 347 (AAC) and I would strongly suggest that both parties consider that decision before the present appeal is re-heard by the First-tier Tribunal.

(Signed on the Original)

E Mitchell
Judge of the Upper Tribunal
9 January 2019