[2019] AACR 9
(LB Hillingdon v SS and others (SEN)
[2017] UKUT 0250 (AAC))

Judge Ward **HS/1164/2017**
12 June 2017

The Children and Families Act 2014 − Special Educational Needs and Disability Regulations 2014 − Education Health and Care ('EHC') plan – Naming school or other institution in EHC Plan – Education Act 1996 – Powers of the First-tier Tribunal

The appeal concerned the education of E, aged 19 at the date of the First-tier Tribunal's (F-tT) decision. It concerned sections B, F and I of E's Education, Health and Care (EHC) plan. The local authority had decided that a particular school (O School), an independent school which had not been approved under section 41(g)of the 2014 Act, could not be named in the EHC plan. On 12 January 2017 the F-tT decided that section I of the plan should be amended so as to read 'Full time placement at an education setting offering a personalised curriculum, namely O School' and (b) that 4 identified bullet points from the working document should be moved from section B to section
A of the plan. The appellant local authority appealed to the Upper Tribunal (UT).

The issues before the UT were, whether the F-tT had power to name O School and power to make the amendment to the working document it did which touched upon section A of the EHC Plan, a matter over which the FtT has no jurisdiction.

Held, dismissing the appeal, that:

1. section 38 of the 2014 Act concerns the process under which a preference for a particular school or institution maybe expressed and receive a degree of statutory support. Section 38 does not limit the range of schools and institutions which maybe named in an EHC plan albeit a preference for those not within section 38(3) will not receive that statutory support. Consequently, an independent school such as School O could be named under section 40 (2)

2. the amendments made were "consequential amendments" permitted by regulation 43(2) (f) of the 2014 regulations.

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Mr Mark Small, solicitor appeared for the appellant

Mr David Wolfe QC appeared for the respondents

Decision: The appeal is dismissed. The decision of the First-tier Tribunal sitting at London dated 12 January 2017 under reference EH312/15/00014 did not involve the making of a material error of law.

REASONS FOR DECISION

1. The appeal concerns the education of E, born in July 1997 and so aged 19 at the date of the First-tier Tribunal's ("F-tT's") decision.

2. In an appeal which had concerned sections B, F and I of E's Education, Health and Care ("EHC") plan, the F-tT decided inter alia:

(a) that Section I of the plan should be amended so as to read "Full time placement at an education setting offering a personalised curriculum, namely [O School];"and

(b) that four identified "bullet points" from the working document should be moved from section B to section A of the plan.

3. Following the F-tT's decision, the appellant local authority sought permission to appeal. A judge of the F-tT considered exercising the F-tT's powers of review but, having sought the views of the solicitors acting for the respondents, on 27 March 2017 gave permission to appeal and requested the Upper Tribunal to expedite the case.

4. The judge also suspended the effect of the F-tT's decision but, as evidence about alternative provision pending resolution of the appeal was not available, envisaged that the suspension would be reviewed by the Upper Tribunal once the grounds of appeal were lodged. Grounds of appeal were lodged on 10 April and the suspension was lifted by the Upper Tribunal on 28 April following representations by the parties.

5. A number of the grounds of appeal have now been dropped. Those that remain are, in barest outline:

(a) that the F-tT had no power to name O School; and

(b) that the F-tT had no power to make the amendment to the working document it did which touched upon section A of the EHC Plan, a matter over which the F-tT has no jurisdiction.

The law

6. The Children and Families Act 2014 ("the 2014 Act") has gradually been replacing, in England, the Education Act 1996 ("the 1996 Act") as the legislative basis of provision for those with special educational needs ("SEN"). Among other things, the 2014 Act extended coverage to those up to the age of 25 ("young persons") who had previously been outside the scope of the 1996 Act.

7. To place the submissions to me in context, it is necessary to refer to the position under the 1996 Act. In outline, where a statement of SEN was required, section 324(4)(b) required the local authority to

> "(b) if they are not required under Schedule 27 to specify the name of any school in the statement, specify the name of any school or institution (whether in the United Kingdom or elsewhere) which they consider would be appropriate for the child and should be specified in the statement."

"School" was a widely defined term (by section 4 of the 1996 Act). "Institution" was not a defined term. Section 326 of the 1996 Act enabled the F-tT to consider appeals against decisions taken under section 324(4)(b).

8. Schedule 27 contains in paragraph 3 provisions conferring on a child's parents a qualified right to require a preference for a school falling within a defined category (maintained schools) to be complied with. In cases where the preferred school did not fall within schedule 27 paragraph 3, it was still possible for a child's parents to express a preference for it. That preference would then be considered under section 9 of the 1996 Act (see [9] below) and might come to be specified in the statement under section 324(4). Among the categories of school falling outside schedule 27 paragraph 3 which came to be specified in this way under the 1996 Act were independent schools: see eg the Court of Appeal's decision in *C v Buckinghamshire CC* [1999] ELR 179.

9. Section 9 of the 1996 Act continues in force even in cases where the 1996 Act's SEN regime has been replaced by that of the 2014 Act. It has, however, not been amended following, in particular, the bringing of "young persons" within the scope of SEN provision by the 2014 Act. It provides:

> **"9. Pupils to be educated in accordance with parents' wishes.**
>
> In exercising or performing all their respective powers and duties under the Education Acts, the Secretary of State and local authorities shall have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure."

It is important to note that the "general principle" is that "pupils" are to be educated in accordance with the wishes of their parents. It is not in dispute that E is not a "pupil": see the definition of "pupil" in section 3 of the 1996 Act and, through it, the definition of "further education" in section 2(3) and (5).

10. Turning to the 2014 Act, section 37(1) sets out when the duty to secure that an EHC plan is prepared arises. By sub-section (2) an EHC plan is a plan specifying (inter alia) the special educational provision required by the child or young person. Sub-section (4) creates a power to make provision by regulation about the "preparation, content, maintenance, amendment and disclosure of EHC plans". That power (with others) was exercised in making the Special Educational Needs and Disability Regulations 2014/1530 ("the Regulations"), considered at [18-19] below.

11. The role of section 38(3) is central to this appeal. Section 38 provides:

> **"38 Preparation of EHC plans: draft plan**
>
> (1) Where a local authority is required to secure that an EHC plan is prepared for a child or young person, it must consult the child's parent or the young person about the content of the plan during the preparation of a draft of the plan.
>
> (2) The local authority must then—
>
> (a) send the draft plan to the child's parent or the young person, and
>
> (b) give the parent or young person notice of his or her right to—
>
> (i) make representations about the content of the draft plan, and

(ii) request the authority to secure that a particular school or other institution within subsection (3) is named in the plan.

(3) A school or other institution is within this subsection if it is—

(a) a maintained school;

(b) a maintained nursery school;

(c) an Academy;

(d) an institution within the further education sector in England;

(e) a non-maintained special school;

(f) an institution approved by the Secretary of State under section 41 (independent special schools and special post-16 institutions: approval).

(4) A notice under subsection (2)(b) must specify a period before the end of which any representations or requests must be made.

(5) The draft EHC plan sent to the child's parent or the young person must not—

(a) name a school or other institution, or

(b) specify a type of school or other institution."

12. O School is an independent school (and not an Academy). It is not a "special school" as defined. Nor is it a school approved under section 41. Nor is O School "an institution within the further education sector in England" for the purposes of the 2014 Act, even when, as here, it is making provision for a 19 year old: section 4(3) of the 1996 Act contains a definition which restricts the term to certain categories of other institution and applies to part 3 of the 2014 Act by virtue of section 83(7) of the latter. Consequently, O School does not fall within section 38(3).

13. Sections 39 to 41 provide as follows:

"39 Finalising EHC plans: request for particular school or other institution

(1) This section applies where, before the end of the period specified in a notice under section 38(2)(b), a request is made to a local authority to secure that a particular school or other institution is named in an EHC plan.

(2) The local authority must consult—

(a) the governing body, proprietor or principal of the school or other institution,

(b) the governing body, proprietor or principal of any other school or other institution the authority is considering having named in the plan, and

(c) if a school or other institution is within paragraph (a) or (b) and is maintained by another local authority, that authority.

(3) The local authority must secure that the EHC plan names the school or other institution specified in the request, unless subsection (4) applies.

(4) This subsection applies where—

(a) the school or other institution requested is unsuitable for the age, ability, aptitude or special educational needs of the child or young person concerned, or

(b) the attendance of the child or young person at the requested school or other institution would be incompatible with—

(i) the provision of efficient education for others, or

(ii) the efficient use of resources.

(5) Where subsection (4) applies, the local authority must secure that the plan—

(a) names a school or other institution which the local authority thinks would be appropriate for the child or young person, or

(b) specifies the type of school or other institution which the local authority thinks would be appropriate for the child or young person.

(6) Before securing that the plan names a school or other institution under subsection (5)(a), the local authority must (if it has not already done so) consult—

(a) the governing body, proprietor or principal of any school or other institution the authority is considering having named in the plan, and

(b) if that school or other institution is maintained by another local authority, that authority.

(7) The local authority must, at the end of the period specified in the notice under section 38(2)(b), secure that any changes it thinks necessary are made to the draft EHC plan.

(8) The local authority must send a copy of the finalised EHC plan to—

(a) the child's parent or the young person, and

(b) the governing body, proprietor or principal of any school or other institution named in the plan.

40 Finalising EHC plans: no request for particular school or other institution

(1) This section applies where no request is made to a local authority before the end of the period specified in a notice under section 38(2)(b) to secure that a particular school or other institution is named in an EHC plan.

(2) The local authority must secure that the plan—

(a) names a school or other institution which the local authority thinks would be appropriate for the child or young person concerned, or

(b) specifies the type of school or other institution which the local authority thinks would be appropriate for the child or young person.

(3) Before securing that the plan names a school or other institution under subsection (2)(a), the local authority must consult—

(a) the governing body, proprietor or principal of any school or other institution the authority is considering having named in the plan, and

(b) if that school or other institution is maintained by another local authority, that authority.

(4) The local authority must also secure that any changes it thinks necessary are made to the draft EHC plan.

(5) The local authority must send a copy of the finalised EHC plan to—

(a) the child's parent or the young person, and

(b) the governing body, proprietor or principal of any school or other institution named in the plan.

41 Independent special schools and special post-16 institutions: approval

(1) The Secretary of State may approve an institution within subsection (2) for the purpose of enabling the institution to be the subject of a request for it to be named in an EHC plan.

(2) An institution is within this subsection if it is—

(a) an independent educational institution (within the meaning of Chapter 1 of Part 4 of ESA 2008) —

(i) which has been entered on the register of independent educational institutions in England (kept under section 95 of that Act), and

(ii) which is specially organised to make special educational provision for students with special educational needs,

(b) an independent school—

(i) which has been entered on the register of independent schools in Wales (kept under section 158 of the Education Act 2002), and

(ii) which is specially organised to make special educational provision for pupils with special educational needs, or

(c) a special post-16 institution which is not an institution within the further education sector or a 16 to 19 Academy.

(3) The Secretary of State may approve an institution under subsection (1) only if its proprietor consents.

(4) The Secretary of State may withdraw approval given under subsection (1).

[Paragraph (5) provides a regulation-making power]."

14. Section 19 provides:

"In exercising a function under this Part in the case of a child or young person, a local authority in England must have regard to the following matters in particular-

(a) the views, wishes and feelings of the child and his or her parent, or the young person…".

15. Section 51(2)(c) of the 2014 Act lists the relevant matters in respect of which a child's parent or a young person has a right of appeal:

"(c) where an EHC plan is maintained for the child or young person—

(i) the child's or young person's special educational needs as specified in the plan;

(ii) the special educational provision specified in the plan;

(iii) the school or other institution named in the plan, or the type of school or other institution specified in the plan;

(iv) if no school or other institution is named in the plan, that fact."

16. Subsections (4) and (5) confer (or define the scope of) a regulation-making power:

"(4) Regulations may make provision about appeals to the First-tier Tribunal in respect of EHC needs assessments and EHC plans, in particular about—

(a) other matters relating to EHC plans against which appeals may be brought;

(b) making and determining appeals;

(c) the powers of the First-tier Tribunal on determining an appeal;

(d) unopposed appeals.

(5) Regulations under subsection (4)(c) may include provision conferring power on the First-tier Tribunal, on determining an appeal against a matter, to make recommendations in respect of other matters (including matters against which no appeal may be brought)."

17. It is appropriate to record a number of other matters. It is common ground that the provisions of section 61 of the 2014 Act concerning what is colloquially known as "education otherwise" have no application to the present case. Nor, while section 33 applies in accordance with its terms to create a presumption in favour of mainstream education, is it suggested that it (and in particular section 33(6)) has any bearing on the matters I have to decide. Section 63 creates a duty on a local authority to pay any fees payable in respect of education or training provided at a "school" or "post-16 institution" (defined in section 83) which is named in an EHC plan. Section 63 is thus parasitic on what can be named in an EHC plan in the first place.

18. Turning to the Regulations, regulation 12 provides for the form of an EHC plan:

> "(1) When preparing an EHC plan a local authority must set out—
>
> (a) the views, interests and aspirations of the child and his parents or the young person (section A);
>
> (b) the child or young person's special educational needs (section B);
>
> (c) the child or young person's health care needs which relate to their special educational needs (section C);
>
> (d) the child or young person's social care needs which relate to their special educational needs or to a disability (section D);
>
> (e) the outcomes sought for him or her (section E);
>
> (f) the special educational provision required by the child or young person (section F);
>
> (g) any health care provision reasonably required by the learning difficulties or disabilities which result in the child or young person having special educational needs (section G);
>
> (h) (i) any social care provision which must be made for the child or young person as a result of section 2 of the Chronically Sick and Disabled Persons Act 1970 (section H1);
>
> (ii) any other social care provision reasonably required by the learning difficulties or disabilities which result in the child or young person having special educational needs (section H2);
>
> (i) the name of the school, maintained nursery school, post-16 institution or other institution to be attended by the child or young person and the type of that institution or, where the name of a school or other institution is not specified in the EHC plan, the type of school or other institution to be attended by the child or young person (section I); and
>
> (j) where any special educational provision is to be secured by a direct payment, the special educational needs and outcomes to be met by the direct payment (section J), and each section must be separately identified.
>
> (2) The health care provision specified in the EHC Plan in accordance with paragraph (1)(g) must be agreed by the responsible commissioning body.
> …"

19. Regulation 43 deals with the powers of the F-tT. So far as material to this appeal, it provides:

> "(1) Before determining any appeal, the First-tier Tribunal may, with the agreement of the parties, correct any deficiencies in the EHC Plan which relate to the special educational needs or special educational provision for the child or the young person.
>
> (2) When determining an appeal the powers of the First-tier Tribunal include the power to—
> …
>
> (f) order the local authority to continue to maintain the EHC Plan with amendments where the appeal is made under section 51(2)(c), (e) or (f) so far as that relates to either the assessment of special educational needs or the special educational provision and make any other consequential amendments as the First-tier Tribunal thinks fit;
>
> (g) order the local authority to substitute in the EHC Plan the school or other institution or the type of school or other institution specified in the EHC plan, where the appeal is made under section 51(2)(c)(iii) or (iv), (e) or (f);
>
> (h) where appropriate, when making an order in accordance with paragraph (g) this may include naming—
>
> (i) a special school or institution approved under section 41 where a mainstream school or mainstream post-16 institution is specified in the EHC Plan; or
>
> (ii) a mainstream school or mainstream post-16 institution where a special school or institution approved under section 41 is specified in the EHC Plan."

20. In *S v Worcestershire CC (SEN)* [2017] UKUT 92(AAC) Upper Tribunal Judge Mitchell considered somewhat similar issues to those in the present appeal. In that case, the person concerned, R, was aged 17. He remained within section 9 as a "pupil" but was a "young person" for the purposes of the SEN legislation.

21. At [75] Judge Mitchell dealt with one of the grounds of appeal before him, that the F-tT had erred in law in finding that the independent school sought was not appropriate. The judge observed that:

> "Since this was not a case in which the section 39 [of the 2014 Act] presumption in favour of a young person's preferred placement applied, section 40(2)…required the Tribunal to specify the institution (or type of institution) it considered appropriate."

He went on to conclude that the F-tT had been entitled to conclude that it was not appropriate, for reasons which need not concern us.

22. A further ground of appeal before him was that the F-tT had erred in applying section 39(3) and (4) because the school concerned was not a school approved under section 41. It was conceded in the appeal that that had been an error, albeit not a material one, since the effect of it was to give R the benefit of the preference provisions of section 39 when he was

not entitled to them: see [65]. It further appears that, notwithstanding that concession, Judge Mitchell was invited to give guidance on "the application of the [2014 Act's] preference provisions where a young person seeks a placement at an independent school."

23. When at [88] he did so, he observed:

> "The section 39 presumption in favour of a young person's preferred placement does not apply where he seeks an independent school that is not approved under section 41 CFA 2014. The test to be applied under the CFA 2014 is one of appropriateness – which school or other institution, or type of school or other institution, is it considered appropriate to specify. Where the terms of section 9 of the Education Act 1996 apply, the First-tier Tribunal must also act in accordance with the requirements of that section (see the summary of the law in *Hammersmith & Fulham LBC v L* [2015] UKUT 0523(AAC))."

Submissions for the appellant local authority

24. Mr Small's submission on the first ground pursued was in essence that section 38(3) contained a list of schools or other institutions of certain types. Where a compliant request was made, then section 39(3) conferred a right, subject to section 39(4), to require that school or other institution to be named. Where no compliant request was made, section 40(2) required the local authority to specify a school or other institution, whose nature likewise fell within the section 38(3) list, or a type of such schools or other institutions. That ruled out school O from being named, for the reasons at [12]. Sections 37 to 41 had to be construed as a whole. Across the provisions of the 2014 Act concerning SEN, references to "school or other institution" fell to be construed in the same way, namely consistently with the section 38(3) list. Schools or other institutions not falling within section 38(3) could, he submitted, only be named if the case fell within section 9, which because that provision did not apply to E, not being a "pupil", the present case did not. He referred me to various ancillary provisions of or under the 2014 Act and the Regulations which so far as necessary I deal with below. He invited me to conclude that because the placement fell outside both section 38 of the 2014 Act and section 9 of the 1996 Act, there was no power to make it.

25. It would be fair to say that Mr Small's position evolved during argument. Initially he suggested that section 9 provided a power to make placements at non-section 41 independent schools or other institutions, so that "pupils", in respect of whom section 9 has continuing application, could attend such schools, but those who were not "pupils", such as would be the case for many "young persons", could not do so. He was not able to suggest why a measure such as the 2014 Act, which was in substantial degree about extending the scope of existing entitlements to people with SEN up to the age of 25, should have sought to exclude such persons from the ability to take advantage of independent provision. I asked whether, if one were to take the view that there was sufficient ambiguity in the 2014 Act to permit recourse to Hansard, there was anything there which suggested that such a radical change formed part of the intended purposes of the 2014 Act. Mr Small told me there was not.

26. In reply, he retreated somewhat from his previous position, saying that he was no longer suggesting that section 9 conferred powers but, somewhat vaguely, that it would "be remiss if section 9 had no application at all".

27. As to *S v Worcestershire*, Mr Small submits that the decision can be distinguished on the basis that it was, unlike the present, a case to which section 9 applied. He submits that the third sentence quoted at [23] above is not to be read as suggesting that the local authority and, on appeal, the F-tT has a wider power under the 2014 Act to specify a school or other institution that is "appropriate" if it fell outside section 38(3); or that, if that is what the decision is saying, it is wrong and should not be followed.

28. As to the second ground now pursued, Mr Small submits that the relevant right of appeal is that conferred by section 51(2)(c). Using the categories envisaged by regulation 12, it extends to sections B, F and I of the plan, but not to other sections. Without limitation, it does not extend to the sections dealing with health care (over which, via regulation 12(2), the relevant clinical commissioning group has a right of veto). Leaving aside what may be done with the agreement of the parties under regulation 43(1), the relevant powers of the F-tT are those of sub-paragraphs (f) and (g) of paragraph (2). The amendment whose vires are in question was to shift four bullet points concerning E from section B (needs) to section A (aspirations), along with introducing additional wording into section B.

29. Mr Small submits that section A "has no bearing" on sections B, F and I and that it "cannot be sensibly stated" that the F-tT should be able to amend the non-education parts of the plan, otherwise it could amend the health care and social care parts.

30. In *S v Worcestershire*, the Upper Tribunal had held that the outcomes specified in section E (likewise a non-appealable section) could be amended relying on the power in regulation 43(2)(f):

> "84. What, then, of the specified outcomes? It is true there is no right of appeal against the specified outcomes. But there is a right of appeal against the specified special educational provision and the school or institution (or type) named in an EHC plan. The outcomes are a function of the special educational provision. They describe what the provision is designed to achieve. It is also conceivable that a child's placement might have an influence on which outcomes should be specified or how they should be described. In any event, it is obvious that a child or young person's special educational needs will influence the desired outcomes of his or her special educational provision.
>
> 85. It would be absurd if a Tribunal, having allowed an appeal and re-cast the specified special educational provision in an EHC plan, or the specified special educational needs, was unable to alter outcomes that no longer related to the provision or needs determined by the Tribunal. That is surely why regulation 43(2)(f) confers power on the Tribunal to make "any other consequential amendments" to the EHC plan as it thinks fit. This power allows the Tribunal to modify the outcomes section of an EHC plan to fit with any amendments it has ordered to an EHC plan. The EHC plan should not be left with outcomes that are pointless and confusing artefacts."

31. Mr Small submits that while there may have been a link in that case between outcome and educational needs and provision, no such link exists in the present case between aspirations and educational needs and provision.

32. He also submits that it was not appropriate to include the bullet points in section A either, but that (correctly) did not form part of his grounds of appeal in an appeal limited to error of law.

Submissions for the respondents

33. Mr Wolfe QC submits that section 9 is not a power-giving provision. Rather, it goes to whether an ability to express a preference arises, and, if it does, to what weight should be given to that preference. He accepts that the section is inapplicable to E.

34. In terms of the source of the power to name a school or other institution not on the section 38(3) list, he relies first on there being a statutory duty under regulation 12(1)(i) of the Regulations to name a school in the EHC plan. This duty would suffice even if Mr Small's view as to the interpretation (in particular of sections 38 to 40) were to prove correct.

35. However, Mr Wolfe submits that it is not correct. Section 38 should be understood as being not about the content of the plan but about the process under which a preference attracting statutory support can be made. Section 38(3) limits the range of institutions by reference to which such a preference may be expressed; but it does not preclude other preferences being expressed, albeit they will not attract the statutory support for which section 39 provides where a request, compliant as to timescale and as to the content of the preference, has been made.

36. Section 40, he submits, applies either where no request is made at all or where one is made but is not compliant (as above) and (via section 40(2)) allows any school (as defined) or "other institution" to be named. It is wrong to take what under section 38(3) constitutes a "school or other institution" as applying outside its intended purpose of specifying the categories of body which attract the qualified preference. Section 38(2)(b)(ii) expressly indicates the limited statutory purpose which the section 38(3) list is intended to fulfil.

37. The section 41 mechanism is to be understood as giving a choice to those schools which fall within it. If a school is approved under section 41, it means that if named by a parent of a young person, it potentially stands to benefit from the section 39 preference provisions. Against that, if named in a plan, it becomes (via section 43) under a duty to admit the person concerned. The existence of that mechanism (and, I add for completeness, according to Mr Small, certain funding advantages) for the school) in no way compromises the freedom of the local authority and, on appeal the F-tT, to name a school not on the section 41(2) list.

38. If Mr Small is right, there would be no power to name any independent school. Section 9 does not provide an escape route from this consequence as it is not a power-giving provision. The boundary for which Mr Small was contending, defined as it is by whether or not a person is a "pupil" and so within section 9, is an inexplicable one.

39. *S v Worcestershire* is to be read as saying that there is a power under the 2014 Act to name a school or other institution not on the section 38(3) list, not arising from section 9, and is correct.

40. Mr Wolfe made a number of submissions about the weight to be given to preference in non section 9 cases. That is not the issue in this case (there was only one option on the table) and I do not dwell on them.

41. As to the second ground, Mr Wolfe submits that the regulation-making power under section 51(4) is a broad one, as subsection (5) attests. Regulation 43(2)(f) only applies where

it is an appeal concerning section B and/or section F but is cast in broad terms, allowing any consequential amendments in such a case. In *S v Worcestershire* it appears that only placement was in issue, yet at [85] Judge Mitchell still held that consequential amendment to section E (outcomes) was permissible. To permit the amendments in the present case, where the issues before the F-tT are wider in scope, does not require one to go as far as in that case.

42. It is the same regulations which include both the requirements as to the form of the EHC plan and the powers of the F-tT: the draftsman would thus have been well aware of the structure of an EHC plan and, if he had wished to limit the parts of the plan to which consequential amendments could be made, he could readily have done so.

Conclusions

43. I entirely agree with Mr Wolfe that section 9 cannot be relied upon as a source of power. Its very wording indicates that it is a provision regulating how powers and duties are to be exercised or performed, rather than itself a source of power.

44. Turning to the wording of, in particular, sections 38 to 40, I accept that they are drafted in ways which contain a number of similarities. Thus, "school or other institution" is used in, for instance, section 38(2) and section 40(2). The obligations of the local authority in section 39(5) where a qualifying request has been made but one of the get-outs applies are expressed in materially identical terms to those "where no request is made" (section 40(2)).

45. Section 40 is said to apply "where no request is made to a local authority before the end of the period specified in a notice under section 38(2)(b) to secure that a particular school or other institution is named in an EHC plan." Clearly it covers the situation where no request is made in time. However, is the word "request" to be understood as referring to a request falling within section 38(2)(b)(ii) so that a request, non-compliant in that regard, attracts the operation of section 40? The task is to identify a placement for the child or young person; if an expression of preference is made but is non-compliant, it does not detract from the need for it to be done.

46. Once a case is within section 40, does the similarity of language lead one to conclude that "school or other institution" in section 40(2) refers to the section 38(3) list? "School", though defined, is defined very widely. It and "other institution" are not uncommon words or concepts. There are only so many words in the English language capable of being used to describe, in general terms, the appropriate object of a placement for a person with SEN. It is unsurprising that they fall to be used, repeatedly, within legislation on that topic.

47. Further, as Mr Wolfe submits, there is an indication from the wording of section 38(2) and (3) itself that the purpose of the section 38(3) list is intended to be a limited one.

48. However, if Mr Wolfe is correct, section 38 is not entirely happily drafted. On his interpretation, a young person has the right to request that a "school or other institution" be named, whether or not it falls within the section 38(3) list, albeit there will only be a qualified right to the preference if it does; yet section 38(2)(b) requires notice to be given to the young person in more limited terms which, being confined to the section 38(3) right, would verge on the actively misleading.

49. Looking at the consequences of the competing interpretations, as in my judgment section 9 is of no relevance to whether a power exists, there is no need to consider further whether there are any indications that Parliament had intended to draw a distinction as to the availability of provision by a body not on the section 38(3) list, according to whether a person was a "pupil" or not.

50. However, the problems with Mr Small's argument are more radical if one takes the view that section 9 does not confer a power at all. In that situation, where the 2014 Act is in force, there would be no power to include an independent school etc. as a person's special educational provision, not only in the case of those who are not "pupils" but also of those who are. In *Devon CC v OH (SEN)* [2016] UKUT 0292 (AAC) at [33] I expressed the view, for the reasons I gave there, that the legislative intention was in general terms for a continuity of approach between the 1996 and 2014 Acts, except where the 2014 Act provides a specific reason to conclude otherwise. It would be a startling consequence if a power to name independent schools which had previously existed in respect of children under the 1996 Act had been taken away by the 2014 Act, without any express statutory indication that this was the intention and without transitional provision to protect those already embarked on such education under the 1996 Act and I have been taken to none.

51. Mr Small has very properly taken me to a variety of provisions, including regulation 12, 20 and 21 of the Regulations and a number of the provisions of the Code of Practice which are not entirely consistent with his submissions. In my view they are consistent with those drafting the Regulations and the Code of Practice holding an understanding of the effect of the 2014 Act which is wider than that for which Mr Small submits and which tends to support a conclusion that Mr Wolfe's submission is fundamentally correct.

52. There is no indication that Judge Mitchell relied on section 9 in *S v Worcestershire* in order to conclude that power to name an independent school existed. Indeed, he makes clear at [88] that compliance with section 9 is an additional factor where it is required. I reject Mr Small's attempted distinction. I do consider though, that Judge Mitchell's remarks on the point may arguably be viewed as obiter as one of the grounds to which they were relevant was conceded and the other one failed on another aspect, but they are nonetheless entitled to respect.

53. Consequently, while the wording of the 2014 Act is not wholly clear on its face, the consequences of the interpretation for which Mr Small contends, coupled with the express limitation on the purposes for which the section 38(3) list is said to be subject, lead me to conclude that that cannot have been the drafter's intention. Such a view appears consistent with that held by the drafter of the Code and the Regulations and with Judge Mitchell's remarks.

54. I do not agree with Mr Wolfe that regulation 12 provides an independent source of the power to name a school or other institution which is not on the section 38(3) list. Broad the list in regulation 12(1)(i) may be, but in my judgment it is cast widely in order to make clear that where a body of any of the types enumerated is involved, it must be named in section I. Many if not all such bodies could come to be involved if they happened to fall within one of the section 38(3) categories and if they did, they would have to go in section I. The provision is concerned with the format of the plan, not the scope of powers. However, Mr Wolfe does not need this point in order to succeed. In my judgment he succeeds on the basis of the interpretation of the primary legislation, for the reasons I have given.

55. As to the second ground, where the power is triggered, the first requirement is that what is involved is truly a "consequential amendment". Whether an amendment is a "consequential amendment" may need to be looked at in other cases, as may the particular position of amendments which impact upon what is said in an EHC plan about health care needs, which may require procedural care on the part of an F-tT to ensure that, even if the amendments otherwise be genuinely "consequential", the interests of the clinical commissioning group under regulation 12(2) are properly addressed. However, such issues do not lead me to conclude that the parts of the EHC plan where consequential amendments may be made are necessarily to be limited. In the present case, wording had been included in section B which the F-tT concluded did not belong there; it determined to put in what it thought was appropriate and to move the wording it regarded as wrongly included in that section to the section to where it considered it properly belonged. That was an amendment consequential upon addressing section B, one of the matters in the appeal. That in my view is sufficient.

56. However, if I am wrong in that and some sort of link between the amended section and sections B or F is required, one can approach the matter on the basis that, as in *S v Worcestershire*, just as the outcomes in that case were linked to provision, so (though perhaps more loosely) are the aspirations, particularly when, as noted above, section 9(a) of the 2014 Act provides that

> "In exercising a function under this Part in the case of a …young person, a local authority in England must have regard to the following matters in particular-
> (a) the views, wishes and feelings of the…young person".

Though the connection may at times be tenuous I consider therefore that to say that the content of section A has no connection with sections B or F would be mistaken. It is hard to see otherwise what useful purpose would be served by requiring section A to form part of the EHC plan and I derive further support for this from the drafter having included (via regulation 7) an express duty on a local authority when securing an EHC needs assessment to consult the young person and take into account their views.

57. It follows that I consider that in the result the F-tT's decision was correct. Submissions were put to it that the F-tT had no power to name school O. Its reasons in paragraph 29 of its decision were directed to material received from the Department for Education concerning the basis of school O's registration which, although an issue, was not determinative of whether or not the F-tT had the power to order the placement it did. Nor did the reasons answer the argument that had been put to it by the local authority and identify the source of the power to do what it did. While its conclusion that it had the power was right, the correct source of the power, in the face of the local authority's submissions, was not identified and an erroneous source relied upon. Had the F-tT considered the matter correctly, it would have reached exactly the same conclusion and I therefore conclude that if these shortcomings would otherwise have amounted to errors of law they do not do so, for lack of materiality.