IN THE UPPER TRIBUNAL **Appeal No: HS/520/2019**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

ORDER

Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the children in these proceedings. This order does not apply to: (a) the child's parents, (b) any person to whom the children's parents, in due exercise of their parental responsibility, discloses such a matter or who learns of it through publication by either parent, where such publication is a due exercise of parental responsibility; (c) any person exercising statutory (including judicial) functions in relation to the children where knowledge of the matter is reasonably necessary for the proper exercise of the functions.

DECISION

The Upper Tribunal dismisses the appeal of the appellant local authority.

The decision of the First-tier Tribunal made on 10 December 2018 under the reference EH891/18/00053 did not involve any error on a material point of law and is not set aside.

The order of 22 February 2019 suspending the effect of the First-tier Tribunal's decision cease to have any effect from the date of this decision.

Representation: Andrew Hogan of counsel for Nottinghamshire CC.
Mark Small solicitor for the parents.

REASONS FOR DECISION

1. This appeal concerns a young boy, who I will refer to as HD, and whether it was "necessary for special educational provision to be made for [him] in accordance with an EHC plan" under section 37(1) of the Children and Families Act 2014 ("the CFA"). More particularly, the issue before me is whether the First-tier Tribunal ("the tribunal"), presided over by

the Deputy President of the Chamber of that tribunal, committed any material error of law in deciding, as it did, on 10 December 2018, that it was necessary for special educational provision to be made for HD in accordance with an EHC Plan.

2. HD was six years of age at the time of the tribunal's decision and had at that time diagnoses of Autism Spectrum Disorder, Developmental Co-ordination Disorder (dyspraxia) and hypermobility. He also had difficulties sleeping, asthma and eczema, and was under investigation to see if he had Attention Deficit Hyperactivity Disorder. He was attending what I will call the 'AG' school, which is a maintained mainstream primary school.

3. Although the decision of the tribunal must, of course, be read as a whole, the material parts of the tribunal's decision can I consider be taken as follows from its reasoning:

> "33. We accepted the school's evidence that [HD] is making progress with the current provision in place despite the seemingly out of kilter end of term report. We accepted.....that [HD]'s work had been moderated externally three times in Year 1 and that his end of term report had been prepared by a new teacher who was unfamiliar with the school's scoring system and that the report may not be an accurate reflection of [HD]'s attainments over the year. He has, however, made progress in important areas such as reading and phonics, where he has attained within the age expected range on a national Phonics Screening Test and is demonstrating improvement in his social play with peers. These are important areas for [HD] to develop given the complexity of his difficulties.
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> 34. Whilst we can understand [HD's mother's] concerns, the evidence before the tribunal did not lead to the conclusion that he requires additional provision over and above what he is currently receiving. We can understand concerns about his language and vocabulary and especially his writing, but these are likely to be areas where [HD]'s performance will be weaker, and alternative strategies rather than additional provision may be required when the academic work becomes more difficult for him in Year 3. We accepted [the] evidence that that the school is consistently monitoring and adapting their provision to meet [HD]'s needs and this was evidenced by small changes such as the time when he arrives in school in the morning, and the organised play intervention and [the] acknowledgment that [HD] has for the first time demonstrated anxiety in school during the last three weeks.

35. We therefore considered whether it was necessary for [HD]'s provision to be delivered through an EHC Plan. The test which the Children and Families Act 2014 sets is as set out in section 37(1) and is very simply stated: "Where in the light of an EHC needs assessment it is necessary for special educational provision to be made for a child or young person in accordance with an EHC Plan the local authority must secure that an EHC Plan is prepared for the child or young person and once an EHC Plan has ben prepared it must maintain the plan. That bare statutory provision is supplemented by the Code of Practice 2015 at paragraph 9.54 and 55. The latter is quoted as being of particular relevance in this case:

> "Where despite appropriate assessment and provision the child is not progressing or not progressing sufficiently well, the LA should consider what further provision may be needed. The LA should take into account whether the special educational provision required to meet the child or YP's needs can reasonably be provided from within the resources normally available to mainstream…schools…or whether it may be necessary for a LA to make special educational provision in accordance with an EHC Plan."

The Upper Tribunal has interpreted has interpreted the statutory provisions further, and the question of "necessary is not defined but is to be deduced rather than defined. Its determination will vary according to the circumstances of a particular case and may well involve a considerable degree of judgment (Hertfordshire CC v MC and KC [2016] UKUT 385 (AAC)).

36. We considered very carefully the provision currently made for [HD]: we had the benefit of…detailed evidence about the amount of provision made for him and our calculation is that he received in the range of 14.5 hours to 17 hours of support individually or in a small group each week….

37. We have accepted [the] evidence that despite the support in place, for the first time [HD] has been demonstrating his anxiety in school and that his provision will need to be adapted as he develops and matures. He is also subject to ongoing investigation and there may be further diagnoses which will be made in the future. The need to constantly monitor and adapt his provision is also an additional resource, not currently covered by the provision map and will require close liaison and discussion both with school staff and family on an ongoing basis.

38. The statutory position now is that the relevant comparator is not whether the provision could be made from within the resources of mainstream schools in the area but nationally in England. Those present at the hearing acknowledged that they were not in a position to make that comparison, and perhaps

> the tribunal as a national jurisdiction is better placed to use its specialism to do so. We have concluded that the level and quality of provision currently made at [AG school] for [HD] is unlikely to be replicated in other local authority area mainstream schools, and would require an EHC Plan to ensure its delivery and monitoring. We put on record that on the evidence presented to the tribunal, [HD] is unlikely to require any additional provision immediately, over and above what is in place, but his provision will require constant monitoring and adapting to manage his anxieties and to develop his skills and for these reasons we have concluded that it is necessary for the LA to make and maintain and EHC Plan for him."

4. Nottinghamshire sought permission to appeal on the basis that (a) the tribunal had misunderstood and wrongly construed section 37 of the Children and Families Act 2014 and erred in its construction of the necessity of making a statement, and (b) the tribunal had wrongly failed to correctly apply section 37 and erred in its reasoning as to the necessity of making an EHC Plan in this case. In giving permission to appeal Upper Tribunal Judge Plimmer (sitting as a First-tier Tribunal Judge), said that all grounds were arguable and commented as follows:

> "The decision demonstrates that the Tribunal has carefully and comprehensively considered the evidence before it and made clear findings of fact entirely open to it.
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> In the LA's grounds of appeal, it is submitted that the Tribunal erred in law in its construction of section 37 of the Children and Families Act 2014 and in particular the approach to whether and EHC Plan "is necessary" for [HD]. It is arguable the Tribunal has erred in law in its approach to this issue, given its factual findings.
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> It is also arguable that 9.55 of the Code of Practice has been misconstrued by the Tribunal given the contents of the first sentence."

5. Before turning to the reasons why I consider the tribunal did not err in law, I must first set out the relevant parts of the statutory scheme and the Code of Practice. These are contained, in the statute, in sections 20-21, 27(1)-(2), 30(1)-(2), 36(1)-(3), 37, 44 and 77 of the Children and Families Act 2014 ("the CFA"), which provide as follows.

> "**Section 20**

20(1)A child or young person has special educational needs if he or she has a learning difficulty or disability which calls for special educational provision to be made for him or her.

(2)A child of compulsory school age or a young person has a learning difficulty or disability if he or she—

(a)has a significantly greater difficulty in learning than the majority of others of the same age, or

(b)has a disability which prevents or hinders him or her from making use of facilities of a kind generally provided for others of the same age in mainstream schools or mainstream post-16 institutions.

(3)A child under compulsory school age has a learning difficulty or disability if he or she is likely to be within subsection (2) when of compulsory school age (or would be likely, if no special educational provision were made).

(4)A child or young person does not have a learning difficulty or disability solely because the language (or form of language) in which he or she is or will be taught is different from a language (or form of language) which is or has been spoken at home.

(5)This section applies for the purposes of this Part.

Section 21
21 (1)"Special educational provision", for a child aged two or more or a young person, means educational or training provision that is additional to, or different from, that made generally for others of the same age in—

(a)mainstream schools in England,

(b)maintained nursery schools in England,

(c)mainstream post-16 institutions in England, or

(d)places in England at which relevant early years education is provided.

(2)"Special educational provision", for a child aged under two, means educational provision of any kind.

(3)"Health care provision" means the provision of health care services as part of the comprehensive health service in England continued under section 1(1) of the National Health Service Act 2006.

(4)"Social care provision" means the provision made by a local authority in the exercise of its social services functions.

(5)Health care provision or social care provision which educates or trains a child or young person is to be treated as special educational provision (instead of health care provision or social care provision).

(6)This section applies for the purposes of this Part.

Section 27
27(1) A local authority in England must keep under review—

(a)the educational provision, training provision and social care provision made in its area for children and young people who have special educational needs or a disability, and

(b)the educational provision, training provision and social care provision made outside its area for—

(i)children and young people for whom it is responsible who have special educational needs, and

(ii)children and young people in its area who have a disability.

(2)The authority must consider the extent to which the provision referred to in subsection (1)(a) and (b) is sufficient to meet the educational needs, training needs and social care needs of the children and young people concerned.....

Section 30
30(1) A local authority in England must publish information about—

(a)the provision within subsection (2) it expects to be available in its area at the time of publication for children and young people who have special educational needs or a disability, and

(b)the provision within subsection (2) it expects to be available outside its area at that time for—

(i)children and young people for whom it is responsible, and

(ii)children and young people in its area who have a disability.

(2)The provision for children and young people referred to in subsection (1) is—

(a)education, health and care provision;

(b)other educational provision;

(c)other training provision;

(d)arrangements for travel to and from schools and post-16 institutions and places at which relevant early years education is provided;

(e)provision to assist in preparing children and young people for adulthood and independent living.

Section 36

36(1) A request for a local authority in England to secure an EHC needs assessment for a child or young person may be made to the authority by the child's parent, the young person or a person acting on behalf of a school or post-16 institution.

(2)An "EHC needs assessment" is an assessment of the educational, health care and social care needs of a child or young person.

(3)When a request is made to a local authority under subsection (1), or a local authority otherwise becomes responsible for a child or young person, the authority must determine whether it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.

Section 37
37(1) Where, in the light of an EHC needs assessment, it is necessary for special educational provision to be made for a child or young person in accordance with an EHC plan—

(a)the local authority must secure that an EHC plan is prepared for the child or young person, and

(b)once an EHC plan has been prepared, it must maintain the plan.

(2)For the purposes of this Part, an EHC plan is a plan specifying—

(a)the child's or young person's special educational needs;

(b)the outcomes sought for him or her;

(c)the special educational provision required by him or her;

(d)any health care provision reasonably required by the learning difficulties and disabilities which result in him or her having special educational needs;

(e)in the case of a child or a young person aged under 18, any social care provision which must be made for him or her by the local authority as a result of section 2 of the Chronically Sick and Disabled Persons Act 1970 (as it applies by virtue of section 28A of that Act);

(f)any social care provision reasonably required by the learning difficulties and disabilities which result in the child or young person having special educational needs, to the extent that the provision is not already specified in the plan under paragraph (e).

(3)An EHC plan may also specify other health care and social care provision reasonably required by the child or young person.

(4)Regulations may make provision about the preparation, content, maintenance, amendment and disclosure of EHC plans.

(5)Regulations under subsection (4) about amendments of EHC plans must include provision applying section 33 (mainstream education for

children and young people with EHC plans) to a case where an EHC plan is to be amended under those regulations.

Section 44

44(1) A local authority must review an EHC plan that it maintains—

(a)in the period of 12 months starting with the date on which the plan was first made, and

(b)in each subsequent period of 12 months starting with the date on which the plan was last reviewed under this section.

(2)A local authority must secure a re-assessment of the educational, health care and social care needs of a child or young person for whom it maintains an EHC plan if a request is made to it by—

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

(b)the governing body, proprietor or principal of the school, post-16 institution or other institution which the child or young person attends.

(3)A local authority may also secure a re-assessment of those needs at any other time if it thinks it necessary.

(4)Subsections (1) and (2) are subject to any contrary provision in regulations made under subsection (7)(b).

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

(6)During a review or re-assessment, a local authority must consult the parent of the child, or the young person, for whom it maintains the EHC plan.

(7)Regulations may make provision about reviews and re-assessments, in particular—

(a)about other circumstances in which a local authority must or may review an EHC plan or secure a re-assessment (including before the end of a specified phase of a child's or young person's education);

(b)about circumstances in which it is not necessary for a local authority to review an EHC plan or secure a re-assessment;

(c)about amending or replacing an EHC plan following a review or re-assessment.

(8)Regulations under subsection (7) about re-assessments may in particular apply provisions of or made under this Part that are applicable to EHC needs assessments, with or without modifications.

(9)Regulations under subsection (7)(c) must include provision applying section 33 (mainstream education for children and young people with EHC plans) to a case where an EHC plan is to be amended following a review.

Section 66
66 (1)This section imposes duties on the appropriate authorities for the following schools and other institutions in England—

(a)mainstream schools;

(b)maintained nursery schools;

(c)16 to 19 Academies;

(d)alternative provision Academies;

(e)institutions within the further education sector;

(f)pupil referral units.

(2)If a registered pupil or a student at a school or other institution has special educational needs, the appropriate authority must, in exercising its functions in relation to the school or other institution, use its best endeavours to secure that the special educational provision called for by the pupil's or student's special educational needs is made.

(3)The "appropriate authority" for a school or other institution is—

(a)in the case of a maintained school, maintained nursery school or institution within the further education sector, the governing body;

(b)in the case of an Academy, the proprietor;

(c)in the case of a pupil referral unit, the management committee.

Section 77
77(1) The Secretary of State must issue a code of practice giving guidance about the exercise of their functions under this Part to—

(a)local authorities in England;

(b)the governing bodies of schools;….

(2)The Secretary of State may revise the code from time to time.

(3)The Secretary of State must publish the current version of the code.

(4)The persons listed in subsection (1) must have regard to the code in exercising their functions under this Part.

(5)Those who exercise functions for the purpose of the exercise by those persons of functions under this Part must also have regard to the code.

> (6)The First-tier Tribunal must have regard to any provision of the code that appears to it to be relevant to a question arising on an appeal under this Part."

6. The relevant parts of the Code of Practice, issued under section 77 of the CFA, are found in paragraphs 9.53 to 9.55 of that Code. These provide as follows:

> "9.53 Where, in the light of an EHC needs assessment, it is necessary for special educational provision to be made in accordance with an EHC plan, the local authority must prepare a plan. Where a local authority decides it is necessary to issue an EHC plan, it must notify the child's parent or the young person and give the reasons for its decision. The local authority should ensure it allows enough time to prepare the draft plan and complete the remaining steps in the process within the 20-week overall time limit within which it must issue the finalised EHC plan.
>
> 9.54 In deciding whether to make special educational provision in accordance with an EHC plan, the local authority should consider all the information gathered during the EHC needs assessment and set it alongside that available to the local authority prior to the assessment. Local authorities should consider both the child or young person's SEN and the special educational provision made for the child or young person and whether:
> • the information from the EHC needs assessment confirms the information available on the nature and extent of the child or young person's SEN prior to the EHC needs assessment, and whether
> • the special educational provision made prior to the EHC needs assessment was well matched to the SEN of the child or young person
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> 9.55 <u>Where, despite appropriate assessment and provision, the child or young person is not progressing, or not progressing sufficiently well, the local authority should consider what further provision may be needed</u>. The local authority should take into account:
> • whether the special educational provision required to meet the child or young person's needs can reasonably be provided from within the resources normally available to mainstream early years providers, schools and post-16 institutions, or
> • whether it may be necessary for the local authority to make special educational provision in accordance with an EHC plan."

The underlining is mine and has been added to highlight the part of the Code Judge Plimmer considered the tribunal may have misconstrued.

7. The argument for Nottinghamshire in a nutshell is that given the tribunal's findings to the effect that HD's educational needs were being met by the provision he was currently receiving within the AG school,

the opening sentence in paragraph 9.55 of the Code of Practice simply had nothing to bite on (as HD was progressing). Without that, so Nottinghamshire argue, there was no need to consider what further provision may be needed, and in those circumstances it could not be said, per section 37(1) of the CFA, that it was necessary for special educational provision to be made for HD in accordance with an EHC Plan. As it was put in oral argument, if the child's progress is satisfactory on the basis of provision made within a mainstream school, on what basis could it be said to be necessary to make provision in an EHC Plan.

8. Nottinghamshire prayed in support of its argument paragraphs 26-30 of the decision of Upper Tribunal Judge Lane in *Hertfordshire CC v MC and KC* (SEN) [2016] UKUT 0385 (AAC), where she said the following:

> "**Ground 3 – The necessity for an EHC Plan must be assessed against the availability of provision within the resources of a mainstream school**
>
> **Necessary**
>
> 26 A Local Authority or Tribunal must find that it is necessary for special educational provision to be made for a child before EHC Plan can be issued: section 37 of the CFA 2014. 'Necessary' is not defined in the CFA 2014, nor was it defined under the Education Act 1996 where the word was used for the same purpose. Upper Tribunal Judge Jacobs pointed out in *Buckinghamshire CC v HW*, [2013] ELR 519, paragraph 16 (decided under the Education Act 1996) that 'necessary' has a spectrum of meanings, 'somewhere between indispensible and useful'. He emphasised that it is a word in common usage, and it is that that a Tribunal must apply. Upper Tribunal Judge Mark makes the further point in *Manchester City Council v JW* [2014] UKUT 168 [14] this what is necessary may involve a value judgment.
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> 27 The Code envisages that the majority of children with additional educational needs will not require EHC Plans. Their needs will be met in a mainstream setting from resources normally available at mainstream schools [paragraph 9.1]. Local authorities are required to have, and to publish, a 'local offer' (section 30 of the CFA 2014) which tells the public the provision they expect to be available across education, health and social care for children and young people who have special educational needs or are disabled, including those who do not have EHC Plans [paragraph 4.1]. Schools have a set amount of additional funds per pupil to meet additional educational needs caused by learning difficulties and disability falling short of requiring

> an EHC Plan. They also have access to exceptional needs funding and specialist advice and training from the Local Authority.
>
> 28 The Code suggests that, in making a decision on whether it is necessary to issue an EHC Plan, the Local Authority will, in essence, have to look at the information it has about a child's needs and any provision made for him both before and after the assessment [paragraph 9.54]. If the information continues to be well matched to the child's needs and provision already being made, then an EHC Plan is probably not necessary. But, if 'despite appropriate assessment and provision, the child is not progressing or not progressing sufficiently well' it should take into account of: -
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> > whether the special educational provision required to meet the child or young person's needs can reasonably be provided from within the resources normally available to mainstream … schools…or whether it may be necessary for the Local Authority to make special educational provision in accordance with an EHC Plan.' [paragraph 9.55],
>
> 29 The steps boil down to this: -
> (a) What did we know before?
> (b) What do we know now?
> (c) If (a) and (b) are well matched, an EHC Plan is probably not necessary; but
> (d) If the child is not making progress/sufficient progress despite (a) and (b) being well matched, can appropriate provision be made from normal mainstream resources? Or may the Local Authority have to go further and issue a plan. In other words, which side of the line does the case fall on.
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> 30 Point (d) is no more than a restatement of the question 'is an EHC Plan necessary'."

9. I was also taken to paragraph's 9, 16 and 17 of Judge Lane's later decision in *CB v Birmingham City Council* [2018] UKUT 13 (AAC), which state:

> "9 A Local Authority or Tribunal must find that it is necessary for special educational provision to be made for a child before EHC plan can be issued: section 37 of the CFA 2014. 'Necessary' is not defined in the CFA 2014, nor was it defined under the Education Act 1996 where the word was used for the same purpose. The case law on the meaning of that word under the Education Act 1996, however, remains relevant both for that reason and because section 83(7) of the CFA 2014 requires Part 3 on special educational needs to be read as if its provisions were contained in the Education Act 1996.
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> "16 In my view, there is a clear, albeit rough and ready resource line to be crossed before an EHC plan is considered to be necessary. It is based on the kinds of provision a school could make from its own notional SEN budget.

> 17 It is also plain, in my view, that the provision the LA expects to make available as published in its local offer is a relevant consideration in working out what will, on balance, be available from a school's internal resources. It is open to a parent who disbelieves the local offer to provide evidence showing that it does not represent what is expected to be available, or that a particular school will not be able to make the provision expected under the local offer. Neither may be easy for a parent to establish, not least because of the SEN budget available to each school. Of course, if such evidence were adduced, a tribunal would have to decide its weight."

10. However, I would make two observations about these decisions. The first observation arises from paragraph 8 of *CB*. This valuably sets out the pre-CFA Code of Practice as it related to what was the test in section 324(1)[1] of the Education Act 1996 for making a statement of special educational needs.

> "11 Neither the extracts Ms Tkaczynska selected from these cases nor the broadly worded test in the previous *Code of Practice* at paragraph 8.2 identify *which* resources are 'normally available' to mainstream schools. Paragraph 8.2 states: -
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> > 'The [LA] will make this decision [viz. to issue a Statement] when it considers that the special educational provision necessary to meet the child's needs cannot reasonably be provided within the resources normally available to mainstream schools … <u>in the area</u>'" (my underlining added for emphasis)

The words I have underlined reflect the terms of section 312(4)(a) of the Education Act 1996 which defined "special educational provision" as meaning:

> "(a) in relation to a child who has attained the age of two, educational provision which is additional to, or otherwise different from, the educational provision made generally for children of his age in schools maintained by the local education authority (other than special schools) or grant-maintained schools <u>in their area</u>," (again, the underlining is mine)

[1] This provided as follows: "324(1)If, in the light of an assessment under section 323 of any child's educational needs and of any representations made by the child's parent in pursuance of Schedule 27, it is necessary for the local education authority to determine the special educational provision which any learning difficulty he may have calls for, the authority shall make and maintain a statement of his special educational needs."

This, as we shall see, contrasts with the definition of "special educational provision" found in section 21 of the CFA. It was this *change* which in my judgment the tribunal was (correctly) referring to in the opening sentence of paragraph 38 of its decision.

11. The second observation is that Judge lane went on to say the following in paragraphs 31-37 of *Hertfordshire CC v MC and KC*, which rightly in my view emphasises that the Code of Practice does not oust the statute nor does it exhaustively define when an EHC Plan may be 'necessary'.

> "31. All three parts contain elements which may not be amenable to easy analysis. There may, for example, be considerable room for argument not only over what the local offer really includes, but what can reasonably be provided in the mainstream context and, of course, whether that is enough to meet the child's needs. For example, in a case where a child requires a very high level of input from the class teacher, the Local Authority may conclude that the needs cannot reasonably met without causing considerable harm to the education of twenty or more other pupils in the class.
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> 32 Judge Mark summarised case law on 'necessary' in the *Manchester CC v DW* [2014] UKUT 168 (AAC). The case was decided under the Education Act 1996. Judge Mark says at paragraphs [15] and [17].
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> > 15 Further guidance as to when a statement is necessary is to be found in *LB of Islington v LAO* [2008] EWHC 2297 (Admin) and in *NC and DC v Leicestershire CC* [2012] ELR 365. In *Islington v LAO*, Judge Waksman QC stated at para.5 that a decision to make a statement came "at one end of a spectrum of need with which the local authority concerns itself. There are many children within the remit of a local authority who may have learning difficulties and require some form of educational provision, but this does not in and of itself mean that a statement will be required. Hence, of course, the word "necessary" in section 324(1)." He went on in paragraph 6 to describe the conditions in section 324 as being in somewhat stark form and to refer to the further guidance in the Code of Practice. He identified from the Code of Practice three steps that needed to be taken. The first was to ascertain the degree of the child's learning difficulties and the special educational needs that resulted. The second was to determine what provision was required and the third was to determine whether that provision was available in what he paraphrased as the normal resources available to the education authority.
> >
> > ....

> 17[*Both] these cases were concerned with issues that involved consideration of the application of the guidance in the Code of Practice to the facts in those cases. I bear in mind that the Code of Practice is precisely what it is said to be – guidance to which the local authority and the tribunal must have regard. It does not affect the generality of section 324 so as to exclude any possibility that a statement may be necessary for some other reason than those indicated in the guidance. For example, if it was the case that a school or local authority, despite having the necessary resources, simply refused to use their best endeavours to provide the requisite special educational provision, a tribunal may well consider it necessary to direct a statement.* [italics added]
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> 33 As I have already said, the steps in paragraph 9.54 of the Code 2015 are expressed differently but this is not important in this case.
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> 34 In my view, the importance of Judge Mark's decision is in paragraph [17] which emphasises that the relevant statutory provision, s. 324 of the Education Act 1996, is drafted in general terms. The same is true for s. 37 of the CFA 2014. Its generality allows for flexibility and is *not* overridden by the Code. Judge Mark decides that there may be situations in which a Statement or an EHC Plan may be necessary for reasons which are not expressed in the Code.
>
> 35 The *Manchester* case and *H v East Sussex CC* are also salutary reminders that an approach commended in case law may be no more than an extra-statutory construct and may well be fact sensitive. The approach may have to give way where the facts in a particular case do not fit neatly within them, or where the Tribunal's specialist knowledge and experience lead it to a different result, as in the *Manchester* case itself. For that reason, I do not accept Mr Small's argument that the F-tT 'infringed' (and presumably automatically erred in law) by not following the 3 step approach in *Islington v LAO* as set out in the *Manchester* case. This would concretise the case law approach without regard to the generality of the underlying statutory provision (or, indeed, the change in wording in the Code).
>
> 36 In my view, what is 'necessary' is a matter to be deduced rather than defined. Its determination will vary according to the circumstances of a particular case and may well involve a considerable degree of judgment.
> 37 Having explored the tolerances in the meaning of 'necessary', we must look at what the F-tT did to evaluate the evidence before it. That exercise ties in with the discussion on adequacy in decision writing. In other words, we are still trying to decide whether the F-tT has dealt adequately with a fluid concept."

12. Having set out the relevant legislation, guidance in the Code of Practice and caselaw, I can now revert to Nottinghamshire's primary argument. The flaw in the argument, in my judgment, is that it seeks to give the guidance in the Code of Practice determinative force whilst at the same

time downplaying, or failing sufficiently to appreciate, the *changed* landscape brought about by the definition of 'special educational provision' now found in section 21(1) of the CFA. Section 21(1) requires consideration to be given to educational or training provision made generally for a child of the same age in mainstream schools (etc) in England when identifying whether the educational or training provision the individual child requires is additional to, or different from, the generally available provision in England, and thus amounts to "special education provision". It thus differs from the definition of 'special educational provision' found in section 312(4)(a) of the Education Act 1996, where the educational provision that is 'additional to, or different from' was to be gauged by comparison with educational provision generally available in the local education authority's area: it was a not an England wide comparison[2]. The tribunal therefore directed itself correctly as a matter of law when it relied on this changed comparator in paragraph 38 of its decision

13. Moreover, it seems to me that this change to what may be termed an 'England wide' comparison was a deliberate step by Parliament, both in terms of the language of section 21(1) of the CFA (and its change from the geographically narrower language in section 312(4)(a) of the Education Act 1996), but also in terms of the language used elsewhere in Part 3 of the CFA. Looking at the other sections from the CFA set out above demonstrates that Parliament was alive to when it needed to focus the reach of the statutory provision to a narrower geographical area: see, for example, sections 27(1)(a) and 30(1)(a) of the CFA. I appreciate that it may be said that these two sections are concerned with the exercise by a local authority of its powers or duties and so necessarily require a focus on the local authority's area. That may be so, however:

[2] Insofar as the penultimate sentence in paragraph 24 of *GB* may suggest that the test remains one of comparison only with schools within the local authority area, I respectfully disagree.

(i) the simple point here is one about Parliament's use of language in the CFA and, given the language that was used in section 312(4)(a) of the Education Act 1996 when dealing with the same comparator area, the use of "in its area" elsewhere in the CFA shows that the use of "in England" in section 21(1) was not accidental but deliberate; and

(ii) sections 27(1)(b) and 30(1)(b) of the CFA show that a local authority must be outward facing as well in its consideration of, inter alia, educational and training provision, which provides support for the argument that the CFA's approach to educational, and special educational, provision does not have a 'within the local authority' focus.

That 'England wide' comparison is precisely what the tribunal in this case carried out.

14. If this appeal had arisen under the Education Act 1996, I can see that Nottinghamshire's argument would have had considerably greater force, and the terms of paragraph 9.55 of the Guidance in the Code of Practice may have better reflected that statutory scheme. In those circumstances it may have been difficult for a First-tier Tribunal to have concluded, on the facts as found here, that, even though the child was progressing under the generally available educational provision in the local (education) authority's area, it was necessary (per section 324(1) of the Education Act 1996) for a statement of special educational needs to be made and maintained. In the statutory context of the Education Act 1996 it may well have been difficult to maintain such a decision in circumstances where the educational provision for the child may not have been 'in addition to, or different from, the educational provision made generally available for children of the same age in their area'. However, the Code of Practice is only guidance and, for the reasons given above, I am satisfied that there has been a material change in the statutory test to be applied.

15. The statutory test the tribunal had to apply under section 37(1) of the CFA was whether it was 'necessary' for 'special education provision' to be made for HD in accordance with an EHC Plan. This section 37(1) test must be read with the definition of 'special educational provision' in section 21(1) of the CFA read-in. So doing, the tribunal in my judgment was entitled to conclude, using its specialist expertise, that, notwithstanding the extensive educational provision Nottinghamshire was providing to HD and his 'progress', this was not educational provision that would be made generally for children of HD's age in mainstream schools in England, and for this reason it was 'necessary' for an EHC Plan to be made for him.

16. The fact that this analysis may appear contrary to the guidance in the Code of Practice is neither here nor there (it is only guidance, and the tribunal had regard to it) if, as I have found it was entitled to do, the tribunal applied the test(s) in the statute to the evidence before it. Nor does this approach contradict or otherwise subvert the longstanding view (see paragraph 27 of *Hertfordshire CC v MC and KC*) that the majority of children with special educational needs will not require EHC Plans. An evaluative judgment still has to be made as to the *extent to which* the educational (or training) provision the child needs is additional to, or different from, the educational (or training) provision made generally for others of the same age, and thus needs to be made in accordance with an EHC Plan. It is just that the comparator is with provision made generally available for children of the same in mainstream schools in England and not just within the local authority's area.

17. I should add that I do not consider that anything set out in section 66 of the CFA alters or affects the above analysis. This is because the duty this section imposes on, amongst others, the governing body of a school is for it to use its best endeavours to secure that the *special educational provision* called for by the child's special educational needs is made, which does not affect the answer to the logically prior question of what "special educational provision" is called for.

18. For these reasons, in my judgment neither of Nottinghamshire's grounds of appeal (in paragraph 4 above) are sustainable. The tribunal correctly construed and applied section 37 of the CFA to the evidence before it and was entitled to conclude that a EHC Plan was necessary. Nor do I consider there is any merit in Judge Plimmer's concern about the tribunal having misconstrued the first sentence of paragraph 9.55 of the Code of Practice. That sentence was not determinative of the issue before the tribunal and it was entitled to conclude under the law in the CFA, for the reasons I have given, that it was necessary for an EHC Plan to be made notwithstanding that the opening sentence of paragraph 9.55 of the Code of Practice was not satisfied.

19. Nottinghamshire had a secondary or supplementary argument concerning the tribunal's reliance on HD's recent anxiety in school, his need to be constantly monitored and educational provision to be adapted to manage, his anxieties and develop his skills. This argument, however, was very much contingent on the first argument that as HD's educational needs were being met by the school's general educational provision, no EHC Plan was necessary. As such it must fail as the first argument has not succeeded, and I am not clear that the second argument had any life separate from Nottinghamshire's first and main argument concerning the correct construction of section 37 of the CFA. I am therefore cautious about analysing the second argument any further outwith the section 37 construction context. Seen from that context, however, it seems to me that what the tribunal was doing was identifying an *additional* need HD had at the time of the tribunal's decision and which would require additional educational provision not generally available in schools in England. In this context, arguments about the review provisions under section 44 of the CFA enabling future changes to be addressed at a later stage are irrelevant.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal

Dated 31st July 2019
(Order Corrected Date:
13 August 2019)