



**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No. HS/217/2020**

**Before Judge S M Lane**

**DECISION**

**The appeal is allowed.**

This decision is made under section 12(1) and (2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

The decision of the First-tier Tribunal heard on 5 November 2019 under reference EH317/19/00011 involved the making of an error on a point of law.

**The appeal is SET ASIDE and REMADE as follows**

The First-tier Tribunal's amendment made to the working document that ordered:

'AK (the pupil) requires extracurricular support for one hour a week at home from a trusted and familiar psychologist'

is **DELETED**.

The remainder of the document is confirmed.

**DIRECTIONS**

I direct that there is to be no publication of any matter likely to lead members of the public directly or indirectly to identify any person who has been involved in the circumstances giving rise to this appeal, pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

## REASONS FOR DECISION

### Introductory matters

1. The Appellant, whom I shall refer to as the Local Authority brings this appeal with my permission. It concerns a First-tier Tribunal's decision regarding the contents of an Education Health and Care Plan for AK, the Respondent's son. The Respondent is HO, the child's mother.
2. The LA was represented by Mr Rhys Haddon and the Respondent parent by Mr Lachland Wilson, both of Counsel. I shall refer to the Appellant as 'the mother' or 'the parent'. It was unnecessary for the LA or the mother to attend the remote hearing and they did not do so.
3. As required, I record that:
  - (a) the form of remote hearing was V (video by Skype). A face to face hearing was not held because it was not practicable in the light of Government guidance on urgent matters of public health and the case was also suitable for remote hearing. Further delay would not have been in the interests of justice;
  - (b) the documents that I was referred to were contained in the Upper Tribunal bundle. The documents of significance in that bundle included the LA's submission and HO's response. I also had the First-tier Tribunal paper file (and a batch of duplicates) containing 351 paginated documents plus an additional 40 further pages mainly comprised of the EHC plan working document, version 8 (22/10/2019). A signed-off copy of the final EHC plan was before me.
4. I did not put the parties to the expense of providing a bundle of authorities. They are generally familiar to those in the field. I did, however, bring the very recent decision by Upper Tribunal Judge West in *Worcestershire County Council v SE* [2020] UKUT 217 (AAC) to the parties' attention as it dealt with the case law relating to specificity in EHC plans in depth.
5. Although the parties were, at the outset, significantly at odds in relation to a number of areas in the EHC plan, by the time of the First-tier Tribunal (the Tribunal) hearing, the sole question was whether AK required extracurricular support at home for one hour a week from a trusted and familiar psychologist.
6. **Suspension of the Tribunal's Order:** By previous directions, I suspended the Tribunal's order to provide an hour of a psychologist's input at AK's home.

In light of the Covid-19 pandemic, it was inappropriate to enforce this order on health grounds. As have come to the conclusion that this provision is, in any event, unlawful because it lacks sufficient detail to enable the LA to comply with it.

## **The background**

7. As described by the Tribunal, AK was approximately 11 years old at the time the disputed EHC plan that made special educational provision for his special educational needs. He was diagnosed as having ADHD and ASD, is under the care of the Specialist Community Health Services for Children and Young People and is a child in need with the Children disabilities team. He lives with his mother, who has her own complex health needs.
8. AK joined his present school, 'the Academy' (a mainstream secondary school), on **5 September 2019** ([9], F-tT's Decision). At his previous primary school, AK had been excluded on several occasions for fighting. This led his mother to pay for weekly sessions with a Dr Holland, a chartered psychologist specialising in ASD, ADHD and challenging behaviour between September 2018 and March 2019. AK had deficiencies communication skills, social and emotional skills expected of a child his age, was highly anxious and stressed, 'very absorbed by his play station', and aggressive and very upset when disturbed while playing with it.
9. It was the evidence of a Dr Holland's, as interpreted by Dr Abdel-Mannen, which created the dilemma over whether the ordered provision be made at home. They were both instructed by the mother. The Tribunal's analysis on this comprised two short sentences. I struggle to see how the Tribunal's reasoning could reflect the report read carefully as a whole and how Dr Abdel Mannen's brief support for it could legitimately be read as providing justification for the Tribunal's view that the provision was necessary.
10. There were important aspects of the mother's credibility that the Tribunal did not deal with, but which clearly impacted on Dr Abdel-Mannen's support. The mother originally said in a written statement that AK's behaviour and concentration had *improved* with Dr Holland's input. Notably, Dr Holland had reported this himself, as did Dr Hoyne (also instructed by the mother), the primary school and the Academy where AK started as a new boy. The mother gave significantly different evidence to Dr Abdel-Mannen. AK's aunt went further in giving evidence stating that AK had deteriorated on *all* levels since Dr Holland stopped seeing him. The Tribunal cites this evidence specifically at [17] of its decision. It did not find this as a fact, but it is almost impossible to see why it was cited unless they accepted in support of the mother's

evidence. But there were obvious conflicts between their evidence and that of their own psychologists' evidence which the Tribunal failed to consider even though the credibility of the mother's evidence and the soundness of Dr Abdel-Mannen's evidence were critical to the issue the Tribunal had to decide. It had to be analysed with the other professional evidence keeping the home/school context in mind.

11. I shall deal with the adequacy of the Tribunal's reasons as a subsidiary matter as I have come to the conclusion that, whatever view one takes on adequacy, the Local Authority is entitled to succeed on the insufficiency of the order the Tribunal made to amend the EHC plan.

## **Discussion**

12. Education Health and Care Plans are made under the Children and Families Act 2014 and replace the previous regime of Statements of Special Educational Needs made under the Education Act 1996. The definitions of 'special educational needs' and 'special educational provision' are set out in ss 20 and 21 of the Children and Families Act 2014. It was not in dispute that AK had special educational needs and required special educational provision, but the relevant sections are set out at the end of the decision for completeness.

13. The meaning of special educational need and special educational provision are materially the Education Act 1996 and Children and Families Act 2014 (CFA 2014), and by virtue of s 83(7) of the Children and Families Act 2014, it is necessary to read the Education Act 1996 and the provisions of Part 3 of the CFA 2014 (which deals with special educational needs or disabilities) as if the provisions of the CFA 2014 were contained in the Education Act 1996. In the circumstances, I take the previous case law relating to these terms to remain applicable to CFA 2014.

14. **Rights and duties:** Education Health and Care Plans are made by local authorities under section 37 of the Children and Families Act 2014 ('the Act'). This is set out at the end of the decision.

15. The LA must maintain the plan once it is in place [s 37(1)(b)] and is under a duty to secure the special educational provision made under it [s 42(2)]. The educational institution a pupil attends also has a duty with regard to an EHC plan. Its appropriate body must 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 [s. 66(2)]. The appropriate person in the case of an Academy is the proprietor. The person responsible for the pupil (the

parent, for our purposes) must also be able to ascertain what the LA is required to provide in order to ensure that the plan is correctly implemented.

16. The devil resides in the level of detail that the plan must contain. The EHC plan is a legal document of an unusual type. Insofar as the Tribunal has made an order, the order must have sufficient certainty to be enforced in case of dispute. On the other hand, the plan is a living document for a developing pupil. The tension is between the certainty the parties, in particular the LA, need to comply with or enforce their respective duties and rights and the need for sufficient flexibility for the plan to remain relevant until the next review of the plan takes place. The child develop or deteriorate considerably during that period.

17. Any number of cases involving old-style Statements of Special Educational Needs and new EHC plans demonstrate the struggle courts and tribunals have had in finding the balance between the specificity necessary for compliance and flexibility.

18. In ***Worcestershire County Council v SE*** [2020] UKUT 217 (AAC) at [74] Upper Tribunal Judge West distilled a multitude of conflicting cases into eleven principles concerning the detail to be included in a plan.

74. On the basis of this survey of the decided cases, it seems to me that a number of principles can be distilled from them:

- (i) ‘the test of the required degree of specificity is that laid down by Laws J in ***L v Clarke and Somerset and Somerset*** ([2007] EWHC 1139) at p.137B-C as approved by the Court of Appeal in ***E v Newham LBC*** ([2003] ELR 286) , namely -

“The real question ... in relation to any particular statement is whether it is so specific and so clear as to leave no room for doubt as to what has been decided is necessary in the individual case. Very often a specification of hours per week will no doubt be necessary and there will be a need for that to be done.”<sup>1</sup>

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<sup>1</sup> In *Bromley*, Sedley LJ approved Laws J's decision in *L v Clarke and Somerset* on the both the main issue in *Bromley*, which is not relevant here, and on the specificity issue. The form of Order made by the Tribunal in *Bromley* was, however, that case was hopelessly defective. Schiemann LJ in *E* did not necessarily consider that the Court of Appeal were bound by *Bromley* on the issue of specificity (probably on the basis that, in the circumstances, it was *obiter dictum*.) Neither did it expressly approve Laws J formulation on specificity though considered the result to be correct.

19. Given the vast disparity between the *ratio decidendi* in **E** and the Laws J's statement in *L v Clarke and Somerset and Somerset*, it is preferable in my view to rely on the Court of Appeal's decision in **Bromley LEA v SENT** [1999] ELR 260 for express approval (albeit somewhat off the cuff) of Laws J's statement in **L**.

(ii) but as Judge Jacobs said in **BB** (*BB v Barnet LBC* [2019] UKUT 285 (AAC) at [22]

“ ... the whole paragraph is carefully worded to depend on what is appropriate in the particular: so specific, so clear, necessary in the *individual case*, and *Very often*.”

(and see too Judge Mesher in relation to the Code of Practice in **CL** (*CL v Hampshire County Council (SEN)* [2011] UKUT 468) at [13]).

(iii) moreover, as Sullivan J explained in **S v City of Swansea** ([2000] ELR 315) at p.327H

“The question identified by Laws J has ... to be answered not in the abstract, but against the background of the matters in dispute between the parties.”

Lack of particularity may allow less specific provision; a more detailed case may require more detailed provision.

(iv) a requirement that the help to be given should be specified in a statement in terms of hours per week is nevertheless not an absolute and universal precondition of the legality of any statement: see Laws J in **L v Clarke and Somerset** at p.136H and **E v Rotherham MBC** ([2001] EWHC Admin 432) at [25].

(v) the statutory duty plainly cannot extend to requiring a tribunal to specify (in the sense of identify or particularise) every last detail of the special educational provision to be made: see **E v. Newham LBC** at [64(ii)].

(vi) failure to specify a level of support after a particular date may lack the required degree of specificity: see **E v. Rotherham MBC** at [31-32].

(vii) provision cast in the form of recommendations as opposed to requirements may lack the requisite degree of specificity: see **JD** (*JD v*

*South Tyneside Council* [2016] UKUT 9) at [8]; likewise the inclusion of “programmes tailored to need”: see **JD** at [9], **B-M** (*B-M v Oxfordshire County Council (SEN)* [2018] UKUT 35 (AAC) at [5]; or “opportunities”: see **JD** at [11], **B-M** at [5], but that must be read in the light of the following principles (viii) to (xi).

(viii) there will nevertheless be some cases where flexibility should be retained: see Laws J in **L v Clarke and Somerset** at p.136H. The degree of flexibility which is appropriate in specifying the special educational provision to be made in any particular case is essentially a matter for the tribunal, taking into account all relevant factors. In some cases a high degree of flexibility may be appropriate, in others not: see **E v Newham LBC** at [64(iii)].

(ix) in distinguishing between cases where provision is sufficiently specific and those where it is not, it is important that the plan should not be counter-productive or hamper rather than help the provision which is appropriate for a child. The plan has to provide not just for the moment it is made, but for the future as well. If absolute precision is required, it can only be obtained by a continual process of revision of the plan, and the time involved in investigating and decision-making on exactly what is now required, with possible appeals, could disrupt the professional’s ability to provide what the child requires and disrupt the child’s progress. A plan must allow professionals sufficient freedom to use their judgment on what to do in the circumstances as they are at the time. A tribunal is entitled to use its expertise to decide on the proper balance between precision and flexibility: see Judge Jacobs in **BB** at [23].

(x) the broad general principles laid down by the Court of Appeal in **E v Newham LBC** must be applied to the particular circumstances of each case as they arise. The contents of an EHCP have to be as specific and quantified as is necessary and appropriate in any particular case or in any particular aspect of a case, but the emphasis is on the EHCP being a realistic and practical document which in its nature must allow for a balancing out and adjustment of the various forms of provision specified as knowledge and experience develops on all sides. Wisdom lies also in leaving a wide scope to the expert judgment of the members of the First-tier Tribunal and not subjecting matters which fall rather uneasily within the framework of a judicial process to inappropriately technical standards: see Judge Mesher in **CL** at [15].

(xi) the fact that provision is being made at a special school or college is a factor to be taken into account which may in an appropriate case permit more flexibility than when a mainstream school is involved: see **S v SENDIST** at [36], **East Sussex** at [41], **B-M** at [3]. Greater specificity might well be appropriate in the case of a mainstream school

where staff have to be brought in, whereas in the context of a special school such staff may well in principle be available: see ***E v Newham LBCLBC*** at [65(ii)].

20. Judge West's thorough examination of the major cases on this topic demonstrates how judges moved away from the high-water mark in *L v Clarke and Somerset* and arrived at principle (x). The rationale for the change is in principle (ix). Principle (x) is a good summary of the position judges eventually reached for deciding 'how much detail is enough' but it leaves outstanding the question: 'when is enough enough?'

21. Since every case is different, there can be no definitive answer. That much is plain. But tribunals should be able to achieve the appropriate level of specificity in the EHC plans they bear the following practical considerations in mind. These are largely derived from the principles in the *Worcestershire* case:

- a) the statutory duties of the LA. The Court of Appeal refers repeatedly in *E v Newham LBC* at [64]. The plan must provide must give the LA a clear picture of what it is required to provide. In my view, this remains a primary consideration in assessing whether, when and what details must be specified.
- b) the EHC plan is a free-standing legal document setting out the LA's duties. That is what the parties are entitled to rely on if a question arises about the provision being made.
- c) None of the cases endorse the wholesale abandonment of detail. Whilst there may be a need for some flexibility, it should not be used as an excuse for lack of specificity where detail could reasonably have been provided: ***S v Swansea CC*** [2000] ELR 315 at pp 327-8, per Sullivan J.
- d) The nature of the provision ordered will often point towards the necessary level of detail. In the great majority of cases, the professionals involved in the case set out their stalls with the types of provision they consider necessary, how often it should occur, how long the session should be, and whether a specialist, teacher, counsellor, mentor, or a teaching or learning support assistant is to deliver the provision.
- e) Using vague words such as 'support' 'input' 'interventions' and 'opportunities', when unadorned by specifics, is unlikely to be sufficient. This is more so where the type of provision, as in this case, is itself a cypher.



- f) If a SEN pupil is to attend a mainstream school the Tribunal is likely to need more detail than if the pupil were at a special school. Mainstream schools normally have a SENCO and staff trained to deal with SEN pupils whose needs fall short of provision in a special setting. The provision put in place of more complex needs will, as a matter of common sense, require more detail. Where a pupil is to attend a special school, the school will have experience with implementing provision for complex educational, social and health care needs.
- g) Where the evidence does not enable the Tribunal to set out the detail itself but it would be inappropriate to adjourn, or where the provision will need to be reviewed periodically to see that it remains relevant to the pupil's needs, the Tribunal may be pragmatic in its approach and set out a method by which the details of a particular type of provision is to be made<sup>2</sup> – *E*.
- h) The Tribunal is entitled to use its expertise as a specialist panel.

### **How does this apply to the amended order?**

22. The disputed provision is that AK 'requires extracurricular support at home for one hour a week from a trusted and familiar psychologist'.

23. I have come to the conclusion that this provision

- a. is too vague in respect of content,
- b. impermissibly retrofitted to require, in practice, only one psychologist; or
- c. contains selection criteria entirely subjective to the pupil; which
- d. may make compliance by the LA a practical impossibility;
- e. was in any event unjustified on the evidence or based on insufficient reasons.

### **The content of the provision**

24. **Is it too vague?** I have come to the conclusion that it is. It is not possible to tell what the psychologist is to provide during the hour-long weekly visits to

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<sup>2</sup> In *E*, it was sufficient to specify that an occupational therapist, physiotherapist and speech and language therapist to develop an Individual Education Plan (IEP) for the pupil after assessment in order to formulate a fully integrated teaching and therapy programme. The evidence before the tribunal did not enable it to make detailed provision itself. The Tribunal was justified in leaving the workings to the relevant professionals, but notably set out the personnel, objective and format of the provision to be made.

AK's home. Dr Holland made detailed recommendations relating to provision for AK's executive skill development pertain to the *school setting* (p.65-66) . They do not translate to the home environment which lacks the structure of school discipline and regime.

25. Psychological input covers a vast range of individualised therapies, some of which may be educational, others not. Even assuming that I am wrong about the need for the EHC plan to stand independently of further documentation to establish its meaning, it would be not be possible to tell from the evidence produced to the Tribunal what the psychologist was to do. There are no session plans or notes showing what had already been done, which therapies were successful, and what was to be done in the home context. We are left in the dark.
26. The word support is inherently vague. I am unable to see how the LA would be able to know if it was fulfilling its obligations towards AK.
27. **'Trusted and familiar'**: The amendment specifies a psychologist who is 'trusted and familiar'. There are obvious uncertainties in this formula, such as:
- (i) The criteria are entirely subjective and dependent AK and his mother.
  - (ii) Hobson's choice: Although the Tribunal does not specify that Dr Holland must be the psychologist providing the weekly one-hour session at home, the practical reality is that Dr Holland is the only practitioner who fits the bill.
  - (iii) There is, however, no guarantee that Dr Holland would accept the position or remain in it. It is not, in addition, hard to envisage a situation in which a youngster with AK's behavioural problems rejects a psychologist who is introducing changes he finds unpalatable.
  - (iv) The formula adopted by the Tribunal gives the LA no control, oversight of or right to objective assessment of the psychologist or the content and progress of the sessions.
28. For these reasons, the amendment was made in error of law. That is sufficient for me to allow the appeal. There was, however, inadequacy in the written decision which amounted to a material errors of law.

### **The adequacy of the Tribunal's reasons**

29. The 'Conclusions and Reasons' ran to 12 very short paragraphs. Four of these were introductory 'common stock' paragraphs which took us no further. Three (amounting to 3 short sentences) repeated the issue and stated a stark conclusion that AK needed home intervention because he had only been at

the Academy a very short time and had previously been at risk of exclusion. One might ask 'so what?' AK had maintained his behavioural changes for a prolonged period when he had no input at all, and continued in for two further months in a brand new school, with all the stressors that accompany a transition. Four further paragraphs accepted reports, including those of the two big hitters acting for the mother, which pointed to a conclusion opposite to the one to which the Tribunal came. The final paragraph expressed pleasure that a social care assessment would be undertaken but that made no difference to the help he needed.

30. The first issue to focus on was the Tribunal's decision that it was necessary for the provision to be delivered by a psychologist. I do not consider that this was a decision that any reasonable Tribunal could have come to on the evidence before them.
31. The Tribunal stated at [29] that it was *greatly* assisted by the report of Dr Hoyne and accepted her conclusions which were consistent with the other evidence before them. In particular, it accepted that AK used a great deal of energy every day coping with the school environment and that could be detrimental to his mental health with a high level of individualised support and targeted interventions. It similarly accepted Dr Holland's conclusions and recommendations particularly that AK needed intervention from a specialist in ADHD and ASD. It accepted Mrs Tobe's report but appears to think, wrongly, she recommended he have trusted and familiar psychologist input on a weekly basis at home.
32. Dr Holland does not recommend that a psychologist is necessary for the support AK needed at home. In the report of March 2019 he states that a *specialist* is necessary at school and at home (see p103 for the latter).
33. Dr Hoyne, a child adolescent and educational psychologist, reported (p. 250 – 286, **17/6/19**) on AK's high levels of anxiety and stress, his need for a high level of individualised support, targeted interventions to develop his skills, coping mechanism, his progress at school, and to maintain his social and emotional well-being. AK's behaviours at school had been significantly helped both by ADHD medication and behaviour therapy sessions with Dr Holland. (p252, § 2.6). It is instructive that she identifies his needs as *behaviour* sessions.
34. Dr Hoyne reported 2 months after the sessions with Dr Holland stopped. There is *no* suggestion in this report that AK's behaviour had deteriorated since his sessions with Dr Holland ended. Indeed, Dr Hoyne's reported a comment from the SENCO at AK's previous Primary School that, and at the tail end of his time there, AK was 'like a different child' and had made

significant progress (§ 2.5), see also 4.1.2.2 - .6). This report casts light on a major change in AK's behaviour.

35. A recurrent theme in Dr Hoyne's report is that AK's behaviour deteriorates *when he has not taken his medicine correctly, but deterioration had **not** occurred at school* (5.3.2.2). The implication must be that compliance at home is not as good as on school days. Dr Hoyne plainly states that *at home* AK can be quite aggressive with his mother (5.3.2.3). She mentions significant, specific stressors at home regarding housing, the forthcoming change of school (5.3.2.7), personal organisation and hygiene (5.5.1.1 and 5.5.1.2).

36. Dr Hoyne considered that AK's needs could *certainly* be met within a mainstream provision. The 'metacognitive'<sup>3</sup> strategies' mentioned are contained within paragraphs pointing squarely to in-school provision (7.3.3.7) The backup she recommended was regular, consistent therapeutic support for his coping skills and emotional and social self-regulation *from CAMHS* (child and adolescent mental health service) *or similar* who can work closely with his new school. *He should have intervention once a week for at least 1 hour or 'advised by CAMHS with suggested strategies implemented across the school day by school staff for at least 10 minutes a day.* He should also have a key adult on site, a mentor at school, and someone to meet weekly with his mother. There is no mention that any such input should take place at home or that a psychologist was necessary. Finally there is no mention in her recommendations of a resumption of provision at home; CAMHS support is normally by appointment at CAMHS premises.

37. Mrs Tobe, an educational psychologist instructed by the LA reported on **9/7/19** that AK's needed weekly, individual sessions from an emotionally available adult in the form of counselling, ELSA (Emotional Literacy Support Assistant), mentoring, EWMHS etc, but *did not require a psychologist* to assist him with the needs identified by Dr Holland. She considered that teachers were experienced in assisting with such issues, including establishing good relationships, being able to reflect, building on executive function, developing self-control and problem solving. ELSA, as the Tribunal will have known, is a popular form of intervention by which schools are enabled to support from

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<sup>3</sup> Metacognition refers to a student's ability to be aware of what they are thinking about and choose a helpful thought process. It captures a student's ability to analyse how they think, have high self-awareness and control of their thoughts and choose an appropriate and helpful strategy for the task at hand. Metacognitive regulation refers to the different strategies that students may use to manage their thoughts and emotions. This includes how well they plan, monitor and evaluate their performance. 'Inner Drive' website.

their own resources the emotional needs of their pupils. It is a programme developed and supported by educational psychologists, who provide ongoing professional supervision and training for the programme. EWMHS is the equivalent of CAMHS. Mrs Tobe expressly disputes the need for a psychologist and gives alternatives from other types of professionals.

38. Counsel for the Respondent submitted that Mrs Tobe's report looked toward out-of-school provision, but I do not accept that. The extracurricular activities she mentioned were school based, as is ELSA, and CAMHS intervention is usually delivered at their clinics.
39. Mr Byrne, the team manager of the LA's Children and Disabilities team, said in his statement of **30 October 2019** that *the family* told him that AK would benefit from input from a private psychologist to support his emotional self-regulation and that *AK had been referred to CAMHS for this purpose*. AK's family reassessment was due and his care plan was to be reviewed. He was currently receiving 10 hours of care a week. The assessment would explore support for AK to attend extracurricular activities, transport to and from school, after-school clubs, addressing his obsession with computer games and increasing his care package. This plainly does not envisage a need for home treatment.
40. The school SENCO, Mr Wilson, reported on **28 October 2019** that AK made a very good start at the Academy and continued to demonstrate the positive attributes expected of all students at school, and that this continued to be the case. He had *not* demonstrated a pattern of behavioural problems and there were only two incidents of poor behaviour which the child had been able to reflect on. I pause here to note that the ability to reflect is part of executive functioning. The SENCO reported that the school was working with the child in particular ways to help him re-engage, focus, and enter dialogues. He thought AK trusted him. The school's educational psychologist agreed to work with AK at least once a term and give advice to the school. Work with a psychologist at home is plainly not envisaged.
41. These experts' and professionals' evidence simply do not support the Tribunal's finding. They acknowledge, rather, that range of specialists are commonly engaged to treat ADHD and ASD children for behavioural and educational problems. It is common in SEN cases for children with ASD and ADHD to be referred not only to the services of CAMS but to those mentioned by Mrs Tobe, not to mention ABA and PSB practitioners, and to a specialists – with a variety of further educational qualifications in dealing with children with challenging behaviours.

42. This leaves the report of Dr Abdel-Mannen. He is the only professional amongst the many in the case who considered not only that a psychologist, but a clinical psychologist, preferably Dr Holland, should be engaged.
43. It is clear from Dr Abdel-Mannen's report that the account he was given of AK's continuing problems was out of line with every other report, including those of the mother's own clinical and educational psychologists. It should have been apparent to the Tribunal that there was a discrepancy between the mother's account, as relied on by Dr Abdel-Mannen, and the others. The Tribunal should have asked itself whether there was an important flaw in the basis of the report and whether it could be accepted as reliable in the face of the body of professional evidence to the contrary. It did not, however, do so. The only reason it gave for rejecting all these reports was that AK had only been at the new Academy a short time.
44. That was plainly not a sufficient reason in the circumstances. Dr Abdel-Mannen's report was written more or less contemporaneously with the end of Dr Holland sessions with AK. Dr Abdel-Mannen therefore could not have known that AK spent a further 5 months, two of which were at home during school holidays in what the evidence stated to be a stressful home environment. During that time, AK did not have any psychological input. He then started as a new boy at the Academy with no more than 2 minor lapses in behaviour upon which he had time to reflect and adjust his behaviour. Dr Abdel-Mannen had not been given an accurate account of AK's progress and was also out of date. In these circumstances, I do not see how any reasonable Tribunal could have accepted Dr Abdel-Mannen's opinion as a foundation for the mother's amendment to the EHC plan to require a psychologist's support. The Tribunal was, of course, entitled to exercise its specialist knowledge and experience, but it was not entitled to go on a frolic of its own on a ground not supported by any of the evidence.
45. This was also a sufficient error on which to overturn the decision. It does, however, leave the question of whether AK required an hour of input from someone at home. I am required to make relevant findings of fact in remaking the decision under section 12(2)(b)(ii). Having weighed the reports, I am driven to the conclusion that there is insufficient evidence to warrant provision to be for AK at home. His needs will be amply met at school.

### **Miscellaneous matters**

46. Executive functions are of key importance to effective thinking and, depending on the circumstances, treatment to improve deficits in such functioning can be considered educational. But that depends on the circumstances. Where the executive function deficits to be treated manifests themselves only in

unacceptable behaviour at home, their treatment may have lost their educational overtone.

47. At the end of the day, I did not consider it necessary to remit the case to the F-tT for a fresh hearing. The amendment needed no more than blue lining.

**[Signed on original]**

**[Date]**

**S M Lane  
Judge of the Upper Tribunal  
19 November 2020**

APPENDIX

Children and Families Act 2014

**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.

...

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

**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,

**37** Education, health and care plans

(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) ...

(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;

...



(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.

...