IN THE UPPER TRIBUNAL **Appeal No.** UA-2021-000081-HS
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (HESC Chamber)

Between:

Mr M.S and Mrs N.S.

Appellants

- v –

Hertfordshire County Council

Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 6 April 2022
Decided on consideration of the papers

Representation:

Appellants: Ms Emma Waldron of Counsel, *pro bono*, and IPSEA
Respondent: Ms Laura Thompson of EMW Law LLP

DECISION

The decision of the Upper Tribunal is to dismiss the appeal. The decision of the First-tier Tribunal made following the hearing on 14 June 2021 under file number EH919/20/00192 was not in error of law (section 11 of the Tribunals, Courts and Enforcement Act 2007).

REASONS FOR DECISION

This appeal to the Upper Tribunal: the result in a sentence

1. The Upper Tribunal dismisses the Appellants' appeal.

The background to this appeal

2. The Appellants are the parents of Michael. They appealed to the First-tier Tribunal ('the Tribunal'), under section 51 of the Children and Families Act 2014, against the contents of the Education Health and Care ('EHC') Plan made by Hertfordshire County Council ('the Council') for their son. The appeal was against Section F (special educational provision) of the EHC Plan. The parents were not represented at the hearing before the Tribunal.

3. The Tribunal summarised the issues arising on the appeal before it in these terms:

> 2 … The main issue is the method of delivery of provision in Section F. The parents want the provision for Michael to be delivered using intensive ABA [Applied Behaviour Analysis] of 32.5 hours per week which is opposed by the local authority [the LA]. The LA accepts that Michael requires a one to one TA for 32.5 hours per week.
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> 3. There is a disagreement between the LA and the parents regarding the delivery of speech and language therapy. It appears from working document Version 8 that this was not in dispute however at the hearing the parents made it clear that they wanted the delivery of speech and language therapy to be by a qualified speech and language therapist rather than a class teacher or key adult(s) who has experience of working with similar needs and/or has received specific support/training from the Speech and Language Therapist.

4. The decision of the Tribunal was partially to refuse the appeal. The Tribunal agreed to the naming of a specific primary school in Part I of the EHC Plan. This was effectively an Order by consent. However, on the two principal issues in dispute, the Tribunal directed that all references to ABA should be removed from version 8 of the working document. It also ordered that paragraph 19 of the working document should be amended so as to "remove individual direct SALT under the provision column and to remove for 30 minutes per school day under frequency and quantity". In other words, on both of the principal issues in dispute the Tribunal accepted the Council's submissions over those of the parents.

The grounds of appeal to the Upper Tribunal

5. The Appellants advance two grounds of appeal against the Tribunal's decision:

   Ground 1: The Tribunal failed to consider material evidence relating to:

   (i) the fact that Michael had been excluded from his Infant & Nursery School; and

   (ii) the time ABA was in place, which demonstrated his abilities had subsequently regressed.

Ground 2: The Tribunal's order relating to the provision of indirect speech and language therapy was impermissibly vague.

6. Tribunal Judge McCarthy refused permission to appeal on behalf of the Tribunal in his ruling dated 17 August 2021.

The proceedings before the Upper Tribunal

7. However, Upper Tribunal Judge Markus QC gave the Appellants permission to appeal in her ruling dated 26 October 2021. The material passage in her reasoning in the grant of permission was as follows:

> 2. This appeal had been listed for hearing before the FTT on 26 April 2021. The FTT adjourned that hearing. In the order dated 5 May 2021 it gave the reasons for doing so: that it was not possible to hear the appeal without further information and "We do not know the reason for exclusion or have any minutes from the Governors' meeting held on 22.4.21. The tribunal has no picture of Michael's current functioning within a mainstream environment…". The FTT directed the local authority to provide evidence addressing these and other matters, by 20 May.
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> 3. Arguably the FTT should have addressed the reasons for the exclusion, having identified such evidence as essential and having directed the local authority to provide evidence in that regard. The Appellants' case was that Michael had regressed since ABA was withdrawn. It is arguable that the reasons for his exclusion could have supported their case in that regard. The FTT referred only to the fact that the Appellant had been excluded but not the reasons for the exclusion nor its potential relevance to the question of regression.
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> 4. It is also arguable that, without further explanation, the FTT's conclusion that there was no evidence that Michael had regressed since ABA was stopped (paragraph 26) is irrational in the light of the evidence of his behaviours and abilities from around December 2020 to his exclusion as compared to the evidence of his behaviour and abilities in the first year at the school.
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> 5. It is also arguable that the provision of SALT was insufficiently specific. Although it was to be integrated into the school day, it seems that the FTT could have specified a minimum amount of provision which was to be made on an integrated basis as, indeed, it had been in the earlier reports of 11 June and 1 July 2020.

8. Both parties have made detailed and helpful written submissions in accordance with Judge Markus QC's case management directions. Neither party has requested an oral hearing of the appeal. Given the quality of the written submissions, for which I am grateful to all concerned, I am satisfied it is fair and just to determine this appeal 'on the papers' and so without an oral hearing.

Ground 1

9. The first ground of appeal is that the Tribunal failed to consider material evidence. This challenge is made in two inter-related contexts. The first context concerns Michael's exclusion from school. The second relates to Michael's ability as demonstrated during the time ABA provision was in place.

10. As to the first challenge, the Appellants argue that the Tribunal's failure to consider evidence relating to Michael's exclusion in March 2021 amounts to an error of law. They point to the terms of the previous Tribunal order (of 5 May 2021, referred to by Judge Markus QC when giving permission to appeal) to provide information about the reasons for this exclusion. They also refer to the limited passages in which the Tribunal deal with Michael's exclusion, which amount to little more than recognition of the fact that exclusion had occurred. They seek to highlight the difference between Michael's reported performance at age 4, when ABA was in place, and his behaviour at age 5, when ABA was not in place. Thus, it is argued that the evidence about Michael's exclusion may have helped in demonstrating regression following the ending of the ABA provision. They accordingly argue that the Tribunal should have explained why it did not explore the reasons for Michael's exclusion further.

11. There are, on closer scrutiny, several difficulties with this challenge. As Tribunal Judge McCarthy observed, the Tribunal's directions were part of its case management powers and not part of its decision-making function. At the final hearing the Tribunal had to decide whether it had sufficient information and evidence to make a fair and just decision. In that context, the caravan had moved on – the Tribunal had sought information about the exclusion for the purpose of considering Section I of the appeal (placement), but that issue had been resolved by the time of the final hearing. In any event, it is clear from the Tribunal's reasons that it had considered the evidence about Michael's exclusion insofar as it was relevant to do so. The real issue before the Tribunal was whether provision for Michael should be by way of ABA (as sought by the Appellants) or the SCERTS approach (advocated by the Council). Ms Parkin's evidence, which the Tribunal accepted, was that Michael had not regressed without an ABA approach (or at all), but that the school had failed to meet his needs. That being so, and given that some late evidence about the exclusion had been properly excluded, there was no need for the Tribunal to delve any further into the evidence about reasons for the exclusion. It was not necessary for the Tribunal to refer to the exclusion in any more detail because on the Tribunal's findings it could not be linked to the claimed need for Michael to receive ABA provision, which was the key issue in the appeal.

12. As to the second challenge under Ground 1, the Appellants contend that the Tribunal failed to consider relevant evidence about Michael's performance and progress when ABA provision was in place compared to his ability (and claimed regression) after it was withdrawn. The notice of appeal seeks to review the evidence before the Tribunal in this regard in some detail.

13. This head of challenge fares no better. The Tribunal had clear evidence from Ms Parkin (see paragraph 16 of the Tribunal's decision), who was found to be an impressive witness (see paragraph 25) that Michael had made progress between September 2020 and March 2021 (and I note that 1:1 ABA support had ceased by March 2020, namely some six months before the start of the period with which Ms Parkin was concerned). I therefore do not share Judge Markus QC's concern (paragraph 4 of her grant of permission to appeal) that the Tribunal's finding may have been irrational – on the contrary, it was supported by the evidence. The Appellants, in contrast, had primarily relied upon the evidence of Dr Hyams, but the Tribunal explained in some detail why his evidence was not considered to be satisfactory (paragraphs 23 and 24). In

terms of the adequacy of the reasoning in the Tribunal's decision, there can be no effective challenge to the Tribunal's decision: it has identified the issue for determination, reviewed the competing evidence and explained, clearly and cogently, which evidence it has preferred and why. Despite submissions to the contrary, the grounds of appeal amount to an attempt to re-argue the factual merits of the appeal, which is not permissible in an error of law jurisdiction.

Ground 2

14. The second ground of appeal was that the Tribunal's order relating to the provision of speech and language therapy was impermissibly vague. The Tribunal addressed this issue compendiously at paragraph 22 of its decision:

> 22. Regarding provision in the working document version 8, occupational therapy and speech and language therapy have been agreed between the parties except for who delivers speech and language therapy. Within the working document it appeared that there was agreement between the parties regarding all the SALT provision however at the hearing the parents stated that a qualified SALT should deliver all the speech and language therapy see paragraph 19 of the working document version 8. The tribunal can find no evidence in the bundle to substantiate the need for a qualified speech and language therapist to deliver the provision. The recommendations for SALT have been agreed and these come from the NHS therapists Lindsay Wood and Karen Clarke. They do not specify that the provision needs to be delivered by a qualified therapist. The LA have agreed that the speech and language therapy would be embedded in the school day as previously agreed and as specified in the daily planning grid. There is nothing in the bundle to justify this. It is also clear to the tribunal from the evidence we have seen and heard that Michael has made progress even without all the provision specified within his EHCP. At paragraph 19 of the working document this should be amended to remove individual direct SALT under the provision column and to remove for 30 minutes per school day under frequency and quantity.

15. As the Appellants' application for permission to appeal recognises (at §47), the evidence and recommendations of Ms Wood and Ms Clarke in their NHS reports were in the following terms:

> a. Report of Ms Wood, 1 July 2020 [392] – "*Michael should receive daily sessions per week of no less than 30 minutes from a teacher or LSA, who has experience of working with similar needs or has received specific support/training from the Therapist, working from programmes or advice from the Therapist. The programme may be delivered within the classroom, embedded into the curriculum, or separately as appropriate.*" (An earlier report of 11 June 2020 [155] uses the same wording but recommends a shorter period of 15 minutes.)
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> b. Report of Ms Clarke, SALT, 30 November 2020 [393]: "*[Michael] should receive input in class as specified in the SCERTS daily planning grid from a teacher or LSA, who has experience of working with similar needs or has received specific support/training from the Therapist, working from programmes or advice from the Therapist. The programme should be delivered within the classroom and should be embedded into the curriculum.*"

16. Further, as Tribunal Judge McCarthy recognised in his earlier ruling, the effect of the Tribunal's order was to leave paragraph 19 of Section F to read as follows:

Outcome Number	Provision needed to support outcome	To be provided by	Frequency and Quantity
1	19. Michael will receive input in class as specified in the SCERTS daily planning grid from a teacher or Learning Support Assistant who has experience of working with similar needs and/or has received specific support/training from the Speech and Language Therapist, working from programmes or advice from the Therapist. The programme will be embedded into the curriculum.	Class teacher / Key adult(s) who has experience of working with similar needs and/or has received specific support/training from the Speech and Language Therapist.	

17. The Appellants rely on well-known authorities such as *EC v North East Lincolnshire Local Authority (SEN)* [2015] UKUT 648 (AAC), *Worcestershire County Council v SE (SEN)* [2020] UKUT 217 (AAC) and *London Borough of Redbridge v HO (SEN)* [2020] UKUT 323 (AAC) in support of their contention that the Tribunal's specification of SALT provision is impermissibly vague. They point out that up until V5 of the Working Document, the '30 minutes per school day' was included in the Council's suggested wording and agreed by the Appellants, but this was later deleted by the Council. They argue that the wording proposed by the Council and accepted by the Tribunal does not adequately cover when, and for how long, this provision should take place, an omission highlighted by the absence of any detail in the final column in the grid above. Ms Waldron for the Appellants submits that the wording amounts to little more than delivery of an SLT "programme" (and *BM and BM v Oxfordshire County Council (SEN)* [2018] UKUT 35 (AAC) confirms that the bare provision of programmes is inadequate as a specification of provision).

18. The Council accepts that the provision in an EHC Plan must be "detailed and specific and should normally be quantified" (to quote the Code of Practice). However, the Council contends that the *Worcestershire* and *Redbridge* cases recognise that detail and specificity are key requirements but that flexibility must be retained to a certain extent in order to ensure that EHC Plans are realistic, workable and practical documents. The Council makes three specific points in this context: (1) the provision of 30 minutes was not needed as the provision was required to be embedded on a daily basis and in accordance with the SCERTS daily planning grid; (2) the reference to the SCERTS daily planning grid ensured specificity but also enabled professionals to consider Michael's changing needs, without requiring the EHC Plan to be constantly under review; (3) there was no wholesale abandonment of detail - the working document also specified that Michael should receive 15 hours per year of direct 1:1 speech and

language therapy, delivered by a SALT, and so where a greater level of specificity (i.e. in terms of time) was required it was included.

19. This ground of appeal, although arguable, is not on balance made out. Ms Clarke's NHS report, which was the most recent available such report, did not recommend specifically that provision should be delivered for 30 minutes per day. Rather, her view was that it should be delivered in accordance with the SCERTS daily planning grid, in the classroom, and should be embedded in the curriculum. In the absence of contrary or more recent evidence, the Tribunal's decision to that effect was wholly sustainable. As Tribunal Judge McCarthy noted, it might have been better for the phrase "The programme will be embedded into the curriculum" to have been moved from the second column to the final column. But the failure to do so does not amount to an error of law. That would truly be a triumph of formalism over substance. I agree with the Council that the very nature of 'embedding' something means that it should be a part of the everyday curriculum. Any attempt to quantify something (particularly in terms of time) that is embedded in the curriculum is potentially problematic. I also remind myself that the Code of Practice says "normally" and not "invariably". Paragraphs 74(ix) and (x) of Upper Tribunal Judge West's decision in *Worcestershire* are especially in point here:

> (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].
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> (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].

20. Accordingly the Appellants' submissions, which are pitched more at the level of general principle rather than the granular detail evidenced by paragraph 17 above, do not persuade me that the Tribunal was other than entitled to use its expertise to decide on the proper balance between precision and flexibility. The rationale behind the Tribunal's decision is clear, crisply and cogently argued

and in accordance with the principles identified in the relevant case law. There is, therefore, no error of law.

Conclusion

21. I therefore conclude that the decision of the First-tier Tribunal does not involve any material error of law and its decision stands. The appeal is accordingly refused.

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised for issue on 6 April 2022