IN THE UPPER TRIBUNAL **Case Nos** HS/3206/2017
ADMINISTRATIVE APPEALS CHAMBER HS/3207/2017

Before UPPER TRIBUNAL JUDGE WARD

Attendances:

For the Appellants: The father of E and S, in person

For the Respondent: Ms J Clement, Counsel

Decision: The appeals are dismissed. The decisions of the First-tier Tribunal sitting at the Royal Courts of Justice on 9 December 2016 and 21 March and 22 May 2017 under references SE213/16/00007 and SE/213/16/00008, as issued on 18 September 2017 following an earlier review, did not involve the making of a material error of law.

REASONS FOR DECISION

1. This case concerns twin girls, E and S, born in July 2004. Both have considerable special educational needs, the detail of which is not necessary for this decision, and have been working at extremely low levels, far removed from those of the vast majority of pupils in mainstream education. E was described by the First-tier Tribunal ("the FtT") as "marginally more able" than S. However, the issues in the present appeal apply equally to both girls. Unless otherwise indicated, I refer to the papers in E's case. The FtT issued separate decisions in respect of each in virtually identical form. Where the decisions are identical I have adapted quotations so as to refer to both girls where this improves the readability of the present decision.

2. The girls' parents wanted them to continue to be educated at school A, a maintained mainstream school, which they had been attending for the previous two years. The local authority, having concluded that school A could not meet the girls' needs, proposed school C, a maintained special school.

3. Following a series of hearings dating back to December 2016 the tribunal by a decision dated 14 June 2017 found for the local authority on placement. On 1 August 2017 that decision was reviewed by a salaried judge of the FtT. On 18 September 2017 the FtT issued an amended decision. On 3 November 2017 the Deputy Chamber President granted permission to appeal. On 14 November I directed that the appeals were to be expedited as far as possible, with a view to resolving the appeal before, or at least not far into, the next school term. I am grateful to the parents and to the local authority's representatives for their work in progressing the case, so that an oral hearing of the appeal could be held on 19 December. This decision has been issued as soon as possible after various documents, identified during the hearing as missing, were provided to the Upper Tribunal.

4. The effect of the Children and Families Act 2014 (Transitional and Saving Provisions)(No.2) Order 2014 was that the cases were subject to the relevant provisions of the Education Act 1996 ("the 1996 Act") and not those of the Children and Families Act 2014 ("the 2014 Act").

5. The FtT found (in summary) :

a. school A was not suitable to their aptitude or for their special educational needs (decision para 31);

b. placement at school A would be incompatible with the efficient education of other children and the efficient use of resources because of the significant amount of time the staff would have to spend managing their behaviours and trying to meet their SEN (para 32);

c. school A took all reasonable steps to try to prevent the incompatibility but those steps were not successful (para 32);

d. it would be unreasonable to require the creation of a "school within a school" to meet the needs of the girls. The cost of doing so would be "unreasonable and excessive in the circumstances" (para 33). Further, it would result in the girls being withdrawn from their existing class and taught in isolation, either alone or with each other. There are no other pupils with such low attainment levels so there would be no peer group except each other. As they are at different attainment levels they do not necessarily provide an appropriate peer group for each other. Differentiation would continue to be necessary. Their needs would be better met by attending a special school (para 34);

e. a placement in mainstream would be incompatible with the efficient education of other children. there were no reasonable steps that the LA could take to prevent that incompatibility (para 35);

f. school C is suitable and can meet the girls' SEN. The girls' parents had not suggested otherwise (para 36).

6. Judge Tudur in granting permission to appeal identified a number of potential errors of law, as follows:

(a) the tribunal had not "set out clearly" the way in which it dealt with the legal tests concerning ss 316, 316A and 9 of the 1996 Act;

(b) the tribunal did not explain why school A should not be named;

(c) contrary to the FtT's position, the girls' parents did raise concerns concerning school C and the FtT did not consider them nor adequately explain their conclusions regarding its suitability.

She observed that she had not dealt with all of the grounds on which the application for permission to appeal was made as the points above, of themselves, justified giving permission. There was no express limitation of the permission to appeal.

7. I have re-read the grounds of appeal. I deal briefly with other issues to which they give rise:

(a) it is not an error of law for the tribunal to fail to obtain the views of E. It is for the parties to a case to ensure that relevant evidence is put before the tribunal;

(b) Part 3 of the 2014 Act does not apply to this case: see [4] above;

(c) the FtT did not err by relying on oral evidence from the SENCO rather than seeking a written breakdown of costs. The evaluation of the weight to be given to evidence is a matter for the FtT as the tribunal of fact;

(d) findings about handling E's behaviour were a matter for the tribunal of fact. It is not appropriate to construe its reasons as if they were a statute;

(e) the girls' father, who is a teacher, appears to have perceived that his daughters were being criticised for their behaviour (see also FtT decision para 30). That is to misread the FtT's statement of reasons, which includes a finding of fact that school A

> "had attempted to handle concerns about E's behaviours sensitively and in a way which was appropriate to her understanding and we find that they cannot be criticised for this. We accept that her behaviours are seen by the school in the context of her frustration and/or her inability to express what she is feeling when she recognises the differences between herself and her peers."

That was a finding of fact which cannot be challenged in this jurisdiction in the absence of a total lack of evidence or perversity, neither of which is alleged.

I conclude that there is no other point, additional to those identified by Judge Tudur, which is arguable as an error of law with a realistic prospect of success.

8. At the oral hearing the parties concentrated on the matters raised by Judge Tudur's determination.

9. Sch 27 para 3 of the 1996 Act provides:

> "(3) Where a local authority make a statement in a case where the parent of the child concerned has expressed a preference in pursuance of such arrangements as to the school at which he wishes education to be provided for his child, they shall specify the name of that school in the statement unless—

(a) the school is unsuitable to the child's age, ability or aptitude or to his special educational needs, or
(b) the attendance of the child at the school would be incompatible with the provision of efficient education for the children with whom he would be educated or the efficient use of resources."

10. Sections 316 and 316A provide (in their application to this appeal):

"316 Duty to educate children with special educational needs in mainstream schools

(1) This section applies to a child with special educational needs who should be educated in a school.

(2) If no statement is maintained under section 324 for the child, he must be educated in a mainstream school.

(3) If a statement is maintained under section 324 for the child, he must be educated in a mainstream school unless that is incompatible with–
(a) the wishes of his parent, or
(b) the provision of efficient education for other children.

(4) In this section and section 316A*"mainstream school"* means any school other than–
(a) a special school, or
(b) an independent school which is not–
(i) a city technology college,
(ii) a city college for the technology of the arts, or
(iii) an Academy.

316A Education otherwise than in mainstream schools

(1) Section 316 does not prevent a child from being educated in–
(a) an independent school which is not a mainstream school, or
(b) a school approved under section 342,
if the cost is met otherwise than by a local authority.

(2) Section 316(2) does not require a child to be educated in a mainstream school during any period in which–
(a) he is admitted to a special school for the purposes of an assessment under section 323 of his educational needs and his admission to that school is with the agreement of–
(i) the local authority,
(ii) the governing body of the school or, if the school is in England, its head teacher,
(iii) his parent, and
(iv) any person whose advice is to be sought in accordance with regulations made under paragraph 2 of Schedule 26;
(b) he remains admitted to a special school, in prescribed circumstances, following an assessment under section 323 at that school;
(c) he is admitted to a special school, following a change in his circumstances, with the agreement of–
(i) the local authority,
(ii) the governing body of the school or, if the school is in England, its head teacher, and
(iii) his parent;
(d) he is admitted to a community or foundation special school which is established in a hospital.

(3) Section 316 does not affect the operation of–

(a) section 348, or
(b) paragraph 3 of Schedule 27.

(4) If a local authority decide–
(a) to make a statement for a child under section 324, but
(b) not to name in the statement the school for which a parent has expressed a preference under paragraph 3 of Schedule 27,
they shall, in making the statement, comply with section 316(3).

(5) A local authority may, in relation to their mainstream schools taken as a whole, rely on the exception in section 316(3)(b) only if they show that there are no reasonable steps that they could take to prevent the incompatibility.

(6) An authority in relation to a particular mainstream school may rely on the exception in section 316(3)(b) only if it shows that there are no reasonable steps that it or another authority in relation to the school could take to prevent the incompatibility.

(7) The exception in section 316(3)(b) does not permit a governing body to fail to comply with the duty imposed by section 324(5)(b).

(8) An authority must have regard to guidance about section 316 and this section issued (a) for England, by the Secretary of State
… .

(9) That guidance shall, in particular, relate to steps which may, or may not, be regarded as reasonable for the purposes of subsections (5) and (6).
…

(11) *"Authority"* –
(a) in relation to a maintained school or maintained nursery school, means each of the following–
(i) the local authority,
(ii) the school's governing body, and
(b) in relation to a pupil referral unit, means the local authority."

11. Section 9 provides:

9. Pupils to be educated in accordance with parents' wishes.

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

12. I take the grounds which led Judge Tudur to give permission to appeal in reverse order.

13. In para 36 the FtT noted that:

"the parents did not seek to suggest that [School C] is unsuitable for [the girls] or point to anything about the school that would make it unsuitable for [them]."

On the original appeal form the parents had (a) eloquently articulated their preference for a "mainstream school with inclusive settings"; and (b) indicated their disagreement with the authority's choice of school in the following terms:

> "We visited [school C] before and we had the opportunity to observe in a classroom during our tour. We looked at students were not engaged at all – it look chaotic and noisy with small groups of children Pretending doing diferent activities throughout the room. Upon close inspection, we were not able to see any child is participating in his or her learning. We also saw during our visit Violent and unsafe behaviours such as head banging in the classroom. As a direct result of our visit and carefully considering SAFE GUARDING ISSUES, we concluded that [school C] does not creating a positive climate for our daughters' learning." *(sic)*

14. As noted in [3], the FtT proceedings were spread over a long period. In the course of them, in a written submission on placement, the girls' father developed at length and with passion his

> "submission for consideration in the determination of an appropriate judgment for **Equal and Inclusive Education for ALL.** I present this full submission in respect of my fight against **segregation."** (emphasis in original).

15. The head teacher of school C had provided a witness statement and attended on one of the hearing days. Ms Clement, who appeared below, says (and it was not disputed) that he was not asked questions about behaviour issues at the school.

16. The SENCO of school A gave evidence on two days of the efforts made to include the girls.

17. Ms Clement submits, correctly in my view, that the course of the evidence and submissions indicates that the focus had moved on so as to be dominated by the question of inclusive education and in particular the practicability of otherwise of continuing to provide it at school A. Nonetheless, there is no indication that the parents' criticism of school C had been expressly abandoned. I am reluctant to infer from the fact that no questions were put to the head teacher of school C about behaviour that the point had been impliedly abandoned. The FtT might have been well advised to have asked the parents if in the light of the terms of their original appeal they wanted to ask any questions about behaviour at school C: the jurisdiction is essentially inquisitorial and there was something of an imbalance of representation, with a parent, whose first language is not English, on the one hand and experienced counsel on the other.

18. I cannot conclude that, even accepting the shift in focus of the parents' argument, that para 36 of the decision was open to the FtT on the material it had, thus it was, subject to materiality, in error of law. But what difference would it have made, had the mistake not been made?

19. C school's most recent OFSTED report (dated 13-14 May 2015) was in evidence. It found (amongst other things) (pp 327-328) that the behaviour of students is "good", that student's behaviour is "managed well" and that "the

school's organisation of safeguarding arrangements is secure and fulfils statutory requirements." It noted that "a small proportion of parents reported that they still had concerns over behaviour, but these concerns were not borne out by inspection findings."

20. In my judgment the FtT would inevitably have said (a) though they had expressed concerns about behaviour at school C, it was not a topic the parents pursued across three days of oral hearing; (b) it is unrealistic to expect that there will not be individual instances of what may be perceived as poor behaviour in any school; (c) what matters is the school's ability to manage, and success in managing, such behaviours more generally; and as to that the most reliable evidence was that provided by the OFSTED report, which was objective, had been amply satisfied on behaviour management and safeguarding issues, following necessarily wider-ranging scrutiny of the school than had been open to the parents of E and S, and which had tackled head-on such criticism of the school on behaviour as parents had made and found it to be unjustified. I conclude therefore that, though this was an error on the part of the FtT, it was not a material one and so not an error of law at all.

21. I should add that at the Upper Tribunal hearing, the girl's father made a further criticism of school C: that it does not offer what Part 3 of the girls' statements requires, namely "access to a broad and balanced curriculum including the National Curriculum. The materials used, presentation and content of tasks will need to be differentiated to take account of their difficulties." This was a point which needed to be made, if at all, to the First-tier Tribunal to allow proper evidence to be taken and to benefit from evaluation by the specialist tribunal, but it was not. I do not allow it to be raised, for the first time, on appeal. In any event, the point goes nowhere: the OFSTED report at p327 indicates that subjects in Years 7 to 9 "are based on National Curriculum programmes, but which are adapted for [pupils'] learning needs and abilities," which appears an appropriate to meet the requirement.

22. As to whether the FtT sufficiently explained why school A could not meet the girls' SEN and in particular (as the father complained), what adverse impact there would be on which pupils, the FtT had received written statements from the school's SENCO and as noted she also gave oral evidence at considerable length. Her evidence addressed, in detail, the impact. In summary, there was an adverse impact on class teachers, who were required not to differentiate their lessons but to plan and prepare entirely new ones additional to what the class required, for learning levels for which as secondary teachers they were not trained, to devote disproportionate amounts of time to the girls to explain things repeatedly and to manage their behaviour, all to the detriment of other pupils in the class and beyond. The intense use made by the girls of SEN staff, both in direct teaching and indirectly, drew resources away from the many other children in school A with SEN. The FtT made clear at para 27 that it did not consider the parents' criticisms of the SENCO well-founded and it considered her to be a "credible balanced witness who was well qualified and experienced". The SENCO gave evidence about

the attempts made to provide for the girls and that they had proved largely unsuccessful. She also gave evidence as to what provision in her view would be needed in order to cater for them and as to the cost if such provision were to be made.

23. The FtT found at para 31 that school A was unsuitable for the girls' aptitude or their SEN, referring back to the SENCO's evidence, which it accepted. It found there was no peer group and that, despite school A's efforts, the girls were not making progress. The girl's father had made a number of suggestion as to things which school A should try, which the FtT considered and rejected at paras 17 - 22 and a number of criticisms of school A which the FtT considered and dismissed at paras 26 – 28. The girl's father continues to disagree with the FtT's conclusion that reasonable steps had been taken, for the reasons which he articulated before the FtT and repeated before me, but the FtT addressed those arguments and dismissed them, and disagreement with the FtT does not of itself mean that it was in error of law. The FtT then went on to consider, put simply, whether school A should be required to do more in order to make the placements work. I set out its reasoning in full as it is also relevant to the third ground of appeal.

> "32. We are also satisfied that placement in [school A] would be incompatible with the efficient education of other children and the efficient use of resources because of the significant amount of time the staff would have to spend in managing [their] behaviours and trying to meet [their] special educational needs. The tribunal finds that [school A] took all reasonable steps to prevent the incompatibility but that these steps were not successful.
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> 33. We do not accept that it would be reasonable to expect [school A] to create a school within a school to meet the needs of [the girls]. The LA's evidence was that the cost of employing a special educational needs teacher or a primary school teacher specially trained in meeting the needs of those with the extensive language/cognitive delay shown by [the girls] to teach [E and S] would be in the order of £60,000 pa and we accept that such expenditure would be unreasonable and excessive in the circumstances."

24. It went on to note that such an arrangement would result in the girls being withdrawn from their existing classes and taught in isolation, whether alone or with each other. As the two girls are at different attainment levels they do not necessarily provide an appropriate peer group for ach other and that differentiation would continue to be needed. For such reasons, the education of each girl would be prejudiced.

25. When seen against the background of the evidence given and the parties' submissions, including as to the impact of the girls attending school A on that school's resources for teaching others, and applying the conventional tests for adequacy of reasons in this context, such as that in *H v East Sussex CC* [2009] EWCA Civ 249, I consider it is clear why the FtT considered school A was unsuitable (and could not be made to be suitable). I appreciate that I have had the luxury of spending time with the evidence and submissions, but the FtT was writing for the benefit of the parties to the litigation who would have been familiar with that material and has done enough to demonstrate to the Upper Tribunal whether or not it was in error of law on this aspect.

26. The remaining issue identified by Judge Tudur was whether the FtT had sufficiently set out clearly how it had dealt with the relative legal tests under ss. 316, 316A and 9 of the 1996 Act. As a preliminary, the FtT was required to apply the test in sch 27,para 3, as the parents had expressed a preference for a maintained school. I note that the FtT erroneously referred to school A as being "non-maintained" : see its para 3. Nonetheless, while it does not identify the legal provision concerned, the FtT's conclusions at paras 31 and 32 were sufficient to defeat the school of parental preference under sch 27, para 3. It was then required to apply ss.316 and 316A: its concerns were with the excessive demands on staff time (para 32) and what it regarded as the unreasonable and excessive cost (para 32) with ineffective results (para 33).

27. The local authority also had to meet the tests in s316(3)(b)A(5) across their mainstream schools, taken as a whole, to which s.316A(5) applied. At [35] they record:

> "We find that a placement in mainstream would be incompatible with the efficient education of other children. We accept the LA's evidence on this point[.] [We]are satisfied that there are no reasonable steps that the LA can take to prevent that incompatibility and that there are no reasonable steps that another authority could take to prevent the incompatibility. The only measures would be similar to those outlined above and we accept that in the case of any mainstream school these measures would involve a similar level of unreasonable expenditure and it would still not produce a satisfactory outcome."

This somewhat brief paragraph in my judgment means a lot more to a reader who has had the benefit of the evidence than might at first sight appear to one who has not. Following the January 2017 hearing, the local authority approached three other mainstream schools or academies in its area. The responses indicate that none was better placed than school A to meet the girls' SEN and that in some respects some were worse placed, not offering facilities that were already being deployed at school A, yet without being sufficient to meet the girls' needs.

28. As noted, the legal tests refers to the authority's schools, taken as a whole. In my judgment, that is what the FtT addressed in [35]. It may have been extrapolating from what it knew about the 3 schools (plus school A) from whom there was evidence but it appears to me that that can in principle be a legitimate way of making the finding that s316A(5) requires.

29. Turning to s.9, the FtT makes no mention of it. But this was a case where (a) the school of parental preference had been rejected as unsuitable on grounds which I consider unchallengeable in these proceedings; (b) the very evident parental preference for mainstream as a type of education was not capable of being implemented, given the FtT's conclusion that the local authority had discharged its obligations under s.316A(5); and (c) the school named by the authority had been found to be suitable on a basis which, for the reasons I have given, though flawed, was not fatally flawed. The FtT was clearly mindful of the parental preference, but the duty under s.9 is only to have regard to the general principle of parental preference and is subject to

qualifications ("so far as…) and in my judgment the FtT 's decision explains clearly why parental preference could not and did not succeed.

30. The FtT's decision is short on black-letter law and to a degree adopts a more relaxed structure than a decision more closely structured around the statutory tests might have adopted and it was perhaps this which led Judge Tudur to give permission to appeal on this point. However, the FtT had had the benefit of clear written submissions on the law from Ms Clement and I have no reason to doubt that the relevant provisions were properly applied. Its decision does address the statutory tests so far as necessary. Writing a decision is more of an art than a science and if the FtT chose to emphasise educational and financial management matters rather than the legal tests, that in my view does not put the decision in error of law if the decision as a whole shows the relevant law was properly applied to the facts.

31. As noted at [10], there is statutory guidance on inclusion[1]: both parties can find things in it which to a degree support their case before the FtT, but there is nothing in it which renders the FtT's conclusions not open to it.

32. Consequently, my view is that the FtT did not materially err in law. If I were to be wrong in that, whether because of my view on the non-materiality of the FtT's error in relation to school C or otherwise, I would exercise my discretion against setting the FtT's decision aside. I say this principally because the passage of time during the FtT proceedings, coupled with the subsequent appeal to the Upper Tribunal, has been such that we are fast approaching the long-stop date (1 April 2018) [2]when the girls will have to be assessed under the regime created by the 2014 Act, and an EHC plan, rather than a statement of special educational needs, prepared. That process will result in the parents' having fresh appeal rights to the FtT if they disagree with it. As an ancillary consideration, there is some evidence before me that the girls have settled well at school C and have made progress in identifiable respects. There may well be more to be said on that issue and I do not base the exercise of my discretion upon it, beyond saying that it is not contra-indicated by it.

C.G.Ward
Judge of the Upper Tribunal
9 February 2018

[1] DfeS/0774/2001 Inclusive Schooling –Children with Special Educational Needs
[2] Created by article 17 of the Children and Families Act 2014 (Transitional and Saving Provisions) (No.2) Order 2014/2270