IN THE UPPER TRIBUNAL **Appeal No.** HS/260/2021
ADMINISTRATIVE APPEALS CHAMBER

On appeal from First-tier Tribunal (HESC Chamber)

Between:

NN

Appellant

- v –

Cheshire East Council

Respondent

Before: Upper Tribunal Judge Rowley

Decision date: 24 August 2021

Representation:
Appellant: In person
Respondent: Lucinda Leeming (counsel)

ANONYMITY ORDER

By consent, the Upper Tribunal orders, pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, that it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the child who is the subject of these proceedings.

This order does not apply to: (a) the child's parent(s); (b) any person to whom the child's parent(s) discloses such a matter or who learns of it through publication by the parent(s), for reasons bona fide aimed at promoting the child's best interests; or (c) any person exercising statutory (including judicial) functions in relation to the child where knowledge of the matter is reasonably necessary for the proper exercise of the functions.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 5 November 2020 under number EH895/19/00036 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

Directions

1. This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.

2. The new First-tier Tribunal should not involve any judge or other member who has previously been a member of a tribunal involved in this appeal.
3. **Before listing, and as soon as possible, the matter is to be referred to a Judge of the First-tier Tribunal to consider what, if any, case management directions are required, including the provision of further written evidence and/or argument.**
4. Whilst the new First-tier Tribunal will need to address the grounds on which I have set aside the decision, it should not limit itself to those, but must consider all aspects of the case entirely afresh.
5. The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunal.

REASONS FOR DECISION

Cases frequently referred to in this decision

1. I refer to the following three cases on a number of times in this decision. For ease of reference, I set out their citations here:

   Derbyshire County Council v EM and DM (SEN) [2019] UKUT 240 (AAC); [2020] ELR 27.

   East Sussex County Council v TW [2016] UKUT 528 (AAC).

   TM v London Borough of Hounslow [2009] EWCA Civ 859; [2011] ELR 137.

Introduction

2. The appellant brings this appeal with the permission of First-tier Tribunal Judge Eden. The appeal concerns how the issue of bespoke provision of education outside a conventional classroom setting should be dealt with by a tribunal. It also involves some consideration of education otherwise than at school.[1]
3. I held an oral hearing of the appeal in Manchester on 3 August 2021. The appellant represented herself at the hearing. She was assisted by Ms. Fiona Nicholson. The respondent ('LA') was represented by Ms. Lucinda Leeming of counsel. Ms. Leeming had not appeared before the First-tier Tribunal. I am grateful to all involved for their focussed and careful submissions. That said, it should be noted that only the respondent was legally represented, and so this appeal has been decided in the absence of contested legal argument.

The context

4. At the heart of this case is the appellant's son, a thirteen year old whom I shall refer to as William. William lives with his mother and maternal grandmother. He has been diagnosed with Autism Spectrum Disorder and has also been

[1] The relevant provisions of the Children and Families Act 2014 also refer to education otherwise than at a post-16 institution but for reasons of clarity this decision will focus on education of a child otherwise than at school.

described as having a profile suggestive of Pathological Demand Avoidance. He has significant sensory difficulties. William has never attended school. Rather, he has been educated at home by his mother and grandmother in a way that does not appear to have followed an organised pattern. Although his literacy and numeracy levels are below those expected for his age, William has many talents, including electronic and computer skills, and he enjoys building Go-Karts. He is a talented pianist and swimmer, and enjoys outdoor pursuits including cycling.

5. William was referred to CAMHS in April 2018 for extreme anger, concerns over obsessive and compulsive behaviour, and severe anxiety. The latter gives him an overriding need to be in control. William's mother and grandmother are finding it increasingly difficult to manage his behaviour. As he has grown in stature he has become physically aggressive to such an extent that on occasion the police have been called.

6. William's extreme controlling behaviour was observed by Dr. Prescott, an Educational Psychologist who met him on four occasions. Whilst William engaged well at times, he found it difficult if he perceived that he had a reduced sense of control. Being very distrusting of professionals, he sought to control the assessments, going to lengths to ensure that he had an accurate record of things said to him and things he said. This included CCTV and tape recording of the assessment meetings.

7. The appellant told the tribunal of recent improvements in William's presentation. They appeared to have coincided with his having begun to ride his bicycle. Before then, William had found it difficult to leave home. Furthermore, although he found it difficult to be in the company of others, he had started to engage with an electronics tutor (over Zoom) and a cycling teacher.

8. The predominant issue before the tribunal was what, if anything, should be included in Section I of William's Education, Health and Care ('EHC') plan. The LA's case was that a particular school should be named in Section I. I will refer to that establishment as 'the school'. It was the appellant's case that William was implacably opposed to attending the school in any form, and was distrustful of it. The appellant said that although she wanted William to be able to access an educational setting in the future when he was ready to do so, nonetheless given, in particular, his controlling behaviour and Pathological Demand Avoidance, it would not be possible to achieve this in the foreseeable future. Accordingly, the appellant requested that Section I be left blank and that William's provision should be delivered by education otherwise than at school.

9. The school, an Academy Converter which has been rated by Ofsted as outstanding, offers a broad spectrum of support for children with social, emotional and mental health needs. In addition to what may be described as the typical special school provision, it is also able to offer a varied school curriculum outside a conventional classroom setting.

10. The LA proposed bespoke provision, tailored entirely to William's needs. That provision would consist of a gradual, collaborative programme, initially being based in William's home but subject to review every four weeks. At the same

time, it would always be open to William to go onto the school site to access activities of his choice and of interest to him. They may have included the school's Forest School, dog therapy or Design and Technology sessions.

11. The tribunal accepted the evidence of Dr. Prescott that it was important that an aspiration that William would attend school should be retained, as he needed to develop communication skills. She thought that there would be no reason for him not to do so if he wanted to. For example, she thought that if there was a computer or science activity that he wanted to do in a 1:1 setting it might be detrimental to him to rule this out altogether. The tribunal also accepted the evidence of Ms. Gould (Case Manager and Therapist with CAMHS) that William may choose to access a school placement just as he had recently decided to leave his home to go cycling after remaining at home for a prolonged period of time.

12. Furthermore, the tribunal accepted the school's SENCo's evidence that the Social, Emotional and Mental Health provision in the EHC plan could not be delivered unless William accessed the Forest School, canoeing or rock climbing, which it was hoped he might feel ready to do by Easter 2020 (some five months or so beyond the date of the tribunal hearing). Even though it was not envisaged that William would be able to access a classroom environment, the evidence was that he would have to be registered with the school in order to be covered by the school's insurance policy for times when he was able to access provision at any of the school's facilities.

13. I will set out in full the tribunal's findings in relation to Section I of William's EHC plan:

> 24. Section I: we considered [the appellant's] argument that this should be left blank and considered the case of Derbyshire CC v. EM and DM (SEN) [2019] UKUT 240 (AAC) helpfully provided by [the appellant]. We also took into account the evidence of [the school's SENCo]. Whilst we accept that legally it is possible to leave Section I blank, in this case we have concluded that it was appropriate to name [the school], Bespoke provision. We are satisfied that it is not intended by this that [William] should physically attend the school although we hope that in due course he will be able to take advantage of the activities available on the school site. However, the evidence shows that this provision is highly skilled at meeting supporting pupils with complex needs in a flexible and responsive manner.
>
> 25. We are unable to find that it would be inappropriate for [William] to be educated in a school. Whilst it is not in dispute that initially his programme of education will not be delivered on a school site, over time, he needs the opportunity to access provision available on the site of [the school], although not in a classroom setting.

14. Seemingly at the LA's request, the tribunal ordered that the following words appear in Section I of William's EHC plan:

> Specialist Provision: [the school], Bespoke provision.

The statutory framework

Section 9 of the Education Act 1996

15. Section 9 of the Education Act 1996 provides as follows:

> 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.

16. Thus, a local authority (and tribunal) must 'have regard' to the general principle that pupils are to be educated in accordance with their parents' wishes, within the parameters set by section 9.

Sections 36 – 40 CFA 2014

17. To provide a context for the issues which arise on this appeal I will summarise the relevant provisions of sections 36 - 38 of CFA 2014 before setting out the relevant provisions of sections 39 and 40.

18. Pursuant to section 36, following an EHC needs assessment, a local authority must determine whether to secure that an EHC plan is prepared for the child or young person. It must notify the child's parent, or the young person, of its decision and the reasons behind it. 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 local authority must secure than an EHC plan is prepared and maintained (section 37).

19. Under section 38, a local authority must consult the child's parent or the young person about the content of the EHC plan during the preparation of a draft of the plan, and it must then send to the child's parent or the young person the draft plan (which must not, at that stage, name a school or other institution, or specify a type of school or other institution). The local authority must give to the child's parent or the young person notice of their rights, within a specified period, to make representations about the plan's contents and to request the authority to secure that a particular school or other institution is named in the plan.

20. Sections 39 and 40 address finalising EHC plans. Section 39 provides that where the parent or young person requests the local authority to name a particular school or other institution in the EHC plan then, subject to certain other conditions which are not relevant for the purposes of this decision, the local authority must secure that the plan names that school or other institution unless the criteria of section 39(4) apply. Those criteria are: (a) the school or other institution is unsuitable for the age, ability, aptitude or special educational needs of the child or young person, or (b) the attendance of the child or young person at the requested school or other institution would be incompatible with the provision of efficient education for others or the efficient use of resources.

21. Where these section 39(4) criteria do apply, then pursuant to section 39(5) (and again subject to conditions which are not relevant to this decision):

> … the local authority must secure that the plan -
>
> (a) names a school or other institution which the local authority thinks would be appropriate for the child or young person, or

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

22. Section 40 applies where, as in this case, no request is made to a local authority before the end of the period specified in the section 38 notice to secure that a particular school or other institution is named in an EHC plan. Mirroring section 39(5), section 40(2) provides that:

> The local authority must secure that the plan –
>
> (a) names a school or other institution which the local authority thinks would be appropriate for the child or young person concerned, or
>
> (b) specifies the type of school or other institution which the local authority thinks would be appropriate for the child or young person.

Regulation 12 of the Special Educational Needs and Disability Regulations 2014 ('the 2014 Regulations')

23. Section 37(4) CFA 2014 provides that regulations may make provision about (amongst other things) the content of EHC plans. Regulation 12 of the 2014 Regulations was made under that provision. It specifies what an EHC plan must set out. This includes, under regulation 12(1)(i):

> the name of the school, maintained nursery school, post-16 institution or other institution to be attended by the child or young person and the type of that institution or, where the name of the school or other institution is not specified in the EHC plan, the type of school or other institution to be attended by the child or young person (section I).

Section 61 Children and Families Act 2014 ('CFA 2014')

24. Section 61 gives a local authority in England the power to arrange for special educational provision to be made otherwise than in a school. It is in the following terms:

> (1) A local authority in England may arrange for any special educational provision that it has decided is necessary for a child or young person for whom it is responsible to be made otherwise than in a school or post-16 institution or a place at which relevant early years education is provided.
>
> (2) An authority may do so only if satisfied that it would be inappropriate for the provision to be made in a school or post-16 institution or at such a place.
>
> (3) Before doing so, the authority must consult the child's parent or the young person.

Discussion

What is a 'school'?

25. Before considering the legislative provisions set out above, I will address the definition of a 'school'. By section 4 of the Education Act 1996 a 'school' is defined as:

> An educational institution which is outside the further education sector and the higher education sector and is an institution for providing (a) primary education; (b) secondary education; or (c) both primary and secondary education.

26. In *MA v Borough of Kensington and Chelsea (SEN)* [2015] UKUT 0186 (AAC) Upper Tribunal Judge Levenson decided that whether an entity is an educational institution of one of the types listed in section 4 is a question of fact for the specialist tribunal, taking account of all the relevant evidence including, where relevant, those factors set out by Upper Tribunal Judge Lane in paragraph 33 of *TB v Essex County Council (SEN)* [2013] UKUT 0534 (AAC), namely: regulation, governance, financing and administration.

27. In the case I am considering, the school offered both conventional special school provision and a varied curriculum outside of the school building, both on site and at community based locations. There was no dispute before me that this school fell within the statutory definition of a 'school', irrespective of whether the provision it provided was based in a classroom setting, on the school's site or at a community based location.

'inappropriate' (section 61(2) CFA)

28. It will be recalled that under section 61 CFA 2014 a local authority may arrange for any special educational provision that it has decided is necessary for a child or young person for whom it is responsible to be made otherwise than in a school only if satisfied that it would be 'inappropriate' for the provision to be made in 'a' school. In passing, I agree with Upper Tribunal Judge Wright's observation (at paragraph 18 of *Derbyshire County Council v EM and DM (SEN)* (above)) that 'a' in section 61(2) is in effect to be read as 'any'.

29. The term 'inappropriate' was considered by the Court of Appeal in *TM v London Borough of Hounslow* (above). That case concerned section 319 of the Education Act 1996, the statutory predecessor to section 61 CFA 2014. Section 319 provided as follows:

> (1) Where a local education authority are satisfied that it would be inappropriate for-
>
> (a) the special educational provision which a learning difficulty of a child in their area calls for, or
>
> (b) any part of any such provision
>
> to be made in a school, they may arrange for the provision (or, as the case may be, for that part of it) to be made otherwise than in a school.
>
> (2) Before making arrangements under this section, a local education authority shall consult the child's parent.

30. It will be seen that the wording of sections 319 and 61 is not identical. For example, section 319 specifically permits a local authority to arrange for any *part* of special educational provision to be made otherwise than in a school. There is no such explicit empowerment in section 61. Nonetheless, I accept Ms. Leeming's submission that there is nothing to suggest that such a power should not be inferred in section 61 and, indeed, the reference to 'any' in section 61(1) implies that the power does still exist.

31. Another way in which the two sections differ is that under section 61 a local authority must decide that it is *necessary* for the special educational provision for the child or young person to be made otherwise than in a school, but section 319 does not contain a similar provision. However, the authority may

only arrange for such special educational provision to be made otherwise than in a school if it is satisfied that it would be *inappropriate* for the provision to be made in or at such a place, a pre-condition which is also contained in section 319. In those circumstances, the parties agreed that the Court of Appeal's decision regarding what must be addressed under section 319 when a local authority (and tribunal) is determining the question of 'inappropriateness' applies equally under section 61. I turn now to what the Court of Appeal said.

32. Aikens LJ (with whom Patten and Thomas LJJ agreed) stated as follows:

> [26] The question that the LEA has to address is, therefore, is it satisfied that it would be 'inappropriate' for the special educational provisions of the particular child to be made in a school or not? In answering that question, it seems to me that it is not enough for the LEA to ask simply 'can' the school meet the statement of needs set out in Part 3 of the s 324 statement, as Mr Oldham submitted. To confine the question thus does not, in my view, give proper scope to the words in s 319(1), in particular the words 'are satisfied that it would be inappropriate for … the special educational provision which a learning difficulty of a child in their area calls for … or any part of [it] … to be made in a school'. It seems to me that in conducting that exercise, or answering that question, if a LEA is to give full effect to the word 'inappropriate', it has to see if a school would 'not be suitable' or 'would not be proper'. To do that, in my view, the LEA has to take into account all the circumstances of the case in hand. These circumstances might include, without giving any exhaustive list, (which must depend on the facts of the case) consideration of the following matters: the child's background and medical history; the particular educational needs of the child; the facilities that can be provided by a school; the facilities that could be provided other than in a school; the comparative cost of the possible alternatives to the child's educational provisions; the child's reaction to education provisions, either at a school or elsewhere; the parents' wishes; and any other particular circumstances that apply to a particular child.
>
> **Consideration: parents' wishes**
>
> [27] That this exercise must include a consideration of the parents' wishes (under s 9 of the Act) is clear from the decision of Laws J, as he then was, in *Catchpole v Buckinghamshire County Council and the Special Educational Needs Tribunal* [1998] ELR 463, at 471F–472C. That statement was not questioned on appeal. The passages referred to were followed by Scott-Baker J, as he then was, in *S and S v Bracknell Forest Borough Council and the Special Educational Needs Tribunal* [1999] ELR 51, at 55. Those cases make clear that parental wishes cannot be determinative, except in the very rare case where there are otherwise equally balanced alternatives for the child's special educational needs. Then, as Laws J put it at 437A of the *Catchpole* case, 'At most, s 9 [of the 1996 Act] creates a bias in favour of parental choice where more than one school is under consideration and where, to put it in very crude terms, everything else is equal'.

33. Thus, a local authority (and tribunal) must ask itself if it is satisfied that it would be 'inappropriate' for the special educational provision to be made in a school. It has to see if a school would 'not be suitable' or would 'not be proper'. In order to do that, it must take account of all the circumstances of the particular case it is considering. Aikens LJ listed what those circumstances might

include, whilst at the same time stressing that the list was non-exhaustive, and that in any case the circumstances must depend on the facts of the particular case.

34. It should also be noted that whilst Aikens LJ recognised the section 9 Education Act 1996 duty to have regard to parents' wishes, he emphasised that they cannot generally be determinative.

Education otherwise than at school – Section I of an EHC plan

35. In *Derbyshire County Council v EM and DM (SEN)* (above) the First-tier Tribunal had decided that as it had made provision for education otherwise than in school under Section F of the EHC plan, no school or other institution (or type of either) could be named in Section I. Upper Tribunal Judge Wright upheld the tribunal's decision. He decided that there is no absolute requirement that all EHC plans must specify a school or other institution (or type of either). It was common ground in that case that *East Sussex County Council v TW* (above) had correctly decided that 'education otherwise than at school' in a child's home could not be named in Section I of an EHC plan.

36. Upper Tribunal Judge Wright reasoned that the duty imposed on a local authority under sections 39(5) and 40(2) CFA 2014 is to secure that the EHC plan names a school or other institution (or type of either) which the local authority thinks would be 'appropriate' for the child or young person. On the other hand, if the local authority thinks that no school or other institution (or type of either) would be appropriate for the child or young person, the 'naming' duty under sections 39(5) and 40(2), and thus in Section I of an EHC plan, cannot as a matter of law arise.

37. Then, said Upper Tribunal Judge Wright:

> 16… section 61 makes the provision that sections 39(5) and 40(2) of the CFA deliberately leave out of account, namely the special educational provision that cannot be made appropriately in a school or other institution (or type of either). That in my judgment is the force of the wording in section 61(2) that a local authority may only arrange for special educational provision to be made otherwise than in a school or other institution if it is satisfied "that it would be inappropriate for that provision to be made in school [or other institution]". If a local authority is so satisfied then it could not rationally think that a particular school or other institution (or type of either) would be appropriate for the child or young person under section 39(5) or section 40(2).

38. Upper Tribunal Judge Wright said that in coming to his decision that a tribunal was entitled as a matter of law to leave Section I of an EHC plan blank he had been assisted by two examples provided in argument:

> 17… First, there might be a case where, although it is hoped that the child will at some point in the future be able to attend school, it is impossible to predict what type of school would eventually be appropriate for the child. Secondly, there might be a case where everyone is agreed that the child will never be able to attend school. It would be at the very least pointless to name a school or a type of school in section I of a child's EHCP in circumstances where no one knows whether that school or type of school will ever be appropriate for him or her, and it would be absurd to name a school or type of school when everyone agrees that the child will never be able to attend it or any other school. Parliament cannot have intended such pointless or absurd outcomes,

> particularly as such outcomes would risk EHCPs becoming divorced from the reality.

39. Before me, Ms. Nicholson submitted that these were extreme examples which had been chosen to illustrate the lack of sense in requiring an EHC plan always to name a school or other institution (or type of either). However, less striking examples could and should also lead to Section I being left blank in particular cases. Ms. Leeming did not contest this submission and I accept it.

40. I should add that Upper Tribunal Judge Wright decided that an earlier Upper Tribunal decision (*M & M v West Sussex County Council (SEN)* [2018] UKUT 347 (AAC)) was not correctly decided. I follow Upper Tribunal Judge Wright's reasoning and share his view.

'to be attended by' (regulation 12 of the 2014 Regulations)

41. Regulation 12(1)(i) of the 2014 Regulations requires the EHC plan to set out, in Section I, the name or type of school 'to be attended by' the child. This phrase was touched on by Upper Tribunal Judge Jacobs in *East Sussex County Council v TW* (above):

> 32…there must be something that is 'attended by' the person… [I]n so far as the tribunal's version envisages that the supported living will be provided in Theo's home, that is not permissible within regulation 12(1)(i). Theo's home is where he lives. It is not a proper use of language to say that his home is somewhere 'to be attended by' him…

42. Referring to this case, in *Derbyshire County Council v EM and DM (SEN)* (above) Upper Tribunal Judge Wright said that:

> 20…an EHC Plan need only name a school or specify a type of school (or other institution or type of institution) if the child is actually going to attend the relevant school or type of school (or other institution). But where the child is to receive all of her education by way of 'education otherwise than in school', that would not be the case.

43. Before me the parties agreed that 'attend' at the very least connotes 'presence at'. Although there was some discussion during the hearing as to whether any sense of frequency or regularity was required, neither party put forward a firm definition or cited any authority. I have concluded that there is nothing in the context of regulation 12 which indicates that 'to be attended by' means anything other than its clear and unambiguous meaning of 'to be present at'.

Can any information lawfully be added to Section I?

44. In *East Sussex County Council v TW* (above) the tribunal had specified that the type of placement in Section I should be:

> An independent specialist day college working together with an off college site residential setting.

For the name of the placement it had specified:

> A day placement at … College …, together with supported living provided by Brighton and Sussex Care Ltd.

45. Upper Tribunal Judge Jacobs gave this wording short shrift:

> 32…First, a tribunal may not add information to Section I in order to avoid the risk of a placement breaking down. That is not permitted under regulation

12(1)(i). Second, there must be something that is 'attended by' the person. The phrase 'supported living provided by Brighton and Sussex Care Ltd.' identifies the form of provision that is to be made for Theo and the body that is to provide it. It does not identify something that Theo can attend.

46. Thus, Section I must be limited to what is provided by regulation 12(1)(i), i.e. the name of the school and type of school to be attended by the child, or where the name of the school is not specified, the type of school to be attended by the child. Anything which is added to that, for whatever reason, is likely to be classified as an error of law.

Summary and guidance

47. Against this background, I give the following guidance to tribunals considering cases such as this where bespoke provision of education outside a conventional classroom setting and education otherwise than at school are proposed by the parties.

    a. The tribunal must consider section 61 CFA 2014. It must separately ask whether it is satisfied that it would be inappropriate for (i) *any* special educational provision that it has decided is necessary for the child to be made in any school and (ii) any *part* of the provision to be made in any school.

    b. In considering these questions, the tribunal must ask if a school would 'not be suitable' or would 'not be proper'. To do that, it has to take into account all the circumstances of the case. Without being an exhaustive list, those circumstances might include:

        i. the child's background and medical history;
        ii. the particular educational needs of the child;
        iii. the facilities that can be provided by a school;
        iv. the facilities that could be provided other than in a school;
        v. the comparative cost of the possible alternatives to the child's educational provisions, either at school or elsewhere;
        vi. the parents' wishes (although they are not generally determinative); and
        vii. any other particular circumstances that apply to a particular child (*TM v London Borough of Hounslow* (above)).

    c. If the tribunal is satisfied that it would be inappropriate for *any* such special educational provision to be made in any school, then Section I must be left blank.

    d. Conversely, if the tribunal is not satisfied that it would be inappropriate for any such special educational provision to be made in any school, it follows that a particular school or type of school would be appropriate for the child (*Derbyshire County Council v EM and DM (SEN)* (above)) in relation to at least part of the provision to be made. This will lead to consideration of what should be specified in Section I of the EHC plan. That, in turn, will involve consideration of regulation 12 of the 2014 Regulations.

    e. If a particular educational institution is proposed, and if it is in issue as to whether or not that institution is a 'school', the tribunal must consider

whether it falls within the definition of a 'school' as set out section 4 of the Education Act 1996. This is a question of fact to be determined in the light of all the evidence including, where relevant, matters such as regulation governance, financing and administration (*MA v Borough of Kensington and Chelsea (SEN)* (above)*, TB v Essex County Council (SEN)* (above)).

f. If it is in issue, the tribunal must consider whether the school or type of school will be 'attended by' the child. If it is satisfied that the child will be present at a school or type of school for at least part of the time, that is sufficient and so the school or type of school must be specified in Section I. Attending provision provided by the school as part of a bespoke package outside a conventional classroom setting will nonetheless mean that the school is to be attended by the child within the meaning of regulation 12(1)(i).

g. What is specified in Section I must be strictly limited to the of name the school and type of school to be attended by the child, or where the name of the school is not specified, the type of school to be attended by the child. No more and no less.

h. For the avoidance of doubt, education in a child's home cannot be named in Section I (*East Sussex County Council v TW* (above)).

i. Any special educational provision which will be made otherwise than in a school or type of school will be set out in Section F.

Did the tribunal err in law?

48. The tribunal's consideration of Section I is set out at paragraph 13 above.

49. The appellant submitted that the tribunal erred in law in its consideration of whether it would be inappropriate for William to be educated in a school under section 61(2) CFA 2014. Ms. Leeming properly referred to *TM v London Borough of Hounslow* (above) in her response, and she conceded that there was no indication that the tribunal gave any, or any real consideration of what was said in that case. Perhaps that is not surprising, given that the appellant told me, and I accept, that *TM* was not brought to the tribunal's attention.

50. Whilst within the body of its decision the tribunal referred to some of the circumstances contained in Aikens LJ's (non-exhaustive) list, it did not address them in the context of section 61(2), nor did it address all of them. Self-evidently, being unaware of *TM,* it did not seek to explain why it did not do so. In any case, both parties agreed that William's firm views should have been taken into account, or the tribunal should have explained why it considered they were not relevant. Ms. Leeming conceded that the tribunal had thereby erred in law, but she submitted that the error was not a material one. I disagree. Had the tribunal approached the issue in the way set out in *TM* the outcome may have been different, and the error was, therefore, a material one.

51. The appellant's second submission was that the tribunal erred in law because it said that was satisfied that it was not intended that William 'should physically attend the school' yet it still named the school in Section I.

52. Ms. Leeming responded that it was clear from its reasons that the tribunal concluded that even though William's provision would not initially be delivered on the school site, nonetheless he needed the opportunity to access provision available on the school site albeit not in a classroom setting. It was open to the tribunal to specify a school in Section I even if with an extended transition programme. In reaching its conclusion, the tribunal had accepted the school's SENCo's evidence that it was hoped that William might feel ready to access some provision on the school site by Easter 2020, and Ms Gould's evidence that he may choose at any time to access a school placement, just as he had recently decided to leave his home to go cycling. Provision on the school site but outside the classroom setting was sufficient for the purposes of section 12(1)(i) of the 2014 Regulations. Thus, whilst conceding that the tribunal had not specifically addressed whether the school was 'to be attended by' William within the meaning of regulation 12(1)(i), Ms. Leeming submitted that there was no basis for saying that the tribunal had made a *material* error of law.

53. There is some force in Ms. Leeming's submissions, and had this been the only ground of appeal I may well have concluded that the tribunal did not make a material error of law. However, given my other findings, the matter is somewhat academic.

54. The appellant's third ground of appeal was that the tribunal erred in law in the wording it chose to put in Section I, namely:

> Specialist Provision: [the school], Bespoke provision.

55. The appellant submitted that it was not open to the tribunal to add anything to the name of the school. In view of *East Sussex County Council v TW* (above) Ms. Leeming rightly did not oppose this ground of appeal. There was a clear error of law on the part of the tribunal.

Conclusion

56. For the reasons set out above, the tribunal erred in law and I set aside its decision. The parties agreed that if I decided that the tribunal erred in law I should remit the matter to be re-heard by a new tribunal. Ms. Leeming requested that I should make case management directions for any further evidence to be provided for the new hearing. On reflection, I have decided that that is a matter for a Judge of the First-tier Tribunal and I have accordingly made direction 3 above.

A. **Rowley**
Judge of the Upper Tribunal
Signed on the original on 24 August 2021