IN THE UPPER TRIBUNAL **Appeal Nos: HS/571/2019**
HS/572/2019

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

ORDER

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

DECISION

The Upper Tribunal dismisses both appeals of the appellant local authority.

The decision of the First-tier Tribunal made on 30 November 2018 under the references EH830/18/00034 and EH830/18/00035 did not involve any error on a material point of law and is not set aside.

REASONS FOR DECISION

1. These combined appeals concern the special educational needs provision for two sisters, who I will refer to as EJ and TJ, who are now aged 11 and 9. The First-tier Tribunal ("the tribunal") heard consolidated appeals brought by the sisters' parents on 6 September and 9 November 2018. The sisters have very significant disabling conditions. For the purposes of this appeal I need not describe those conditions any further. In its decision of 30 November 2018 the

tribunal decided that as it had made provision for 'education otherwise than in school' under section F of the sisters' education and health care plans (EHC Plan), no school or other institution (or type of either) could be named in section I of the EHC Plans.

2. The sole remaining issue on these appeals by Derbyshire County Council from the tribunal's consolidated decision is whether the tribunal was entitled as a matter of law to leave section I of the EHC Plans blank. That in turn requires me to decide whether the decision in *M & M v West Sussex County Council* (SEN) [2018] UKUT 347 (AAC) was correctly decided in holding that all EHC Plans must specify a school or institution (or type of either) in section I, including where the educational provision is to be otherwise than in school.

3. The appeal proceedings before the Upper Tribunal have taken a somewhat unusual course in that both parties now agree that *M & M* was wrong on the above point and that the tribunal did not therefore err in law in leaving the section I in each EHC Plan blank. However, given the disagreement with *M & M* and the importance of the point, rather than Derbyshire seeking my consent to its withdrawing the appeals, it (along with the respondent parents) asks me to decide the point[1], and decide it without an oral hearing.

4. One disadvantage of my deciding the appeal on this important issue is that I am doing so without the benefit of contested legal argument. On the other hand, both parties are now represented by leading counsel with significant experience in the field of special educational needs law, and the final argument of Derbyshire has sought to identify arguments in favour of a contrary reading of the law and in favour of *M & M* on this point.

[1] Derbyshire had one other ground of appeal, concerning whether certain activities that the tribunal ordered to be included in section F of each of the sisters' EHC Plans constituted 'special educational provision' and, even if it did so, had been identified with sufficient specificity. However, Derbyshire now accepts the tribunal did not err in either of these respects and no longer wishes to pursue this ground of appeal. I therefore say no more about this ground.

5. The material parts of the tribunal's decision appear as follows in its reasoning:

> "33. The next question to consider is whether the Tribunal is satisfied that it would be inappropriate for the girls' provision to be in a school, as the parents argue. On the one hand, the LA accepted that the girls could not attend school in their present conditions – indeed in [TJ]'s case, her consultant has pronounced her unfit to attend school – and that any transition into school for either girl would be a long drawn-out process. On the other hand, the LA asked the Tribunal to find that it would not be inappropriate for the girls to be educated in a school, on the basis that Trinity was an example of the type of school which could meet the needs of the girls.
>
> 34. [Counsel for the local authority] invited the Tribunal to find that, even if Trinity is unable to meet the girls' needs (presumably both now and in the future) that does not mean that no school could meet them. The Tribunal sees why that submission was made: section 61 stipulates that the LA/Tribunal has to be satisfied that it would be inappropriate for provision to be made in **a** school (emphasis added). Even using its own expertise, however, the Tribunal does not know every possible setting in the country. It cannot have been Parliament's intention that, absent evidence of a named institution, the Tribunal has to speculate that there is some school (or type of school) somewhere at which it would not be inappropriate for provision to be made. The Tribunal therefore has difficulty in accepting [counsel for the LA]'s submission.
>
> 35. Furthermore, on the generally accepted view, the Tribunal only looks ahead for a limited period – perhaps to the next Annual Review – and there was no evidence that either girl was predicted to be ready to go to school by then, particularly insofar as working in a group is concerned. It was unclear why the LA is fighting the battle now, when it concedes that neither girl is ready for school. The Tribunal finds that the criteria for [education otherwise than in a school] are satisfied at the present time.
>
> 36. In *East Sussex CC v TW* [2016] UKUT 0528 (AAC) it was held that a child's home cannot properly be entered as a placement in Section I of an EHCP. It does not fit into the language of para 12(1)(i) of the SEND Regulations 2014. Accordingly, even though the Tribunal has decided that the provision in section F shall be named as [education otherwise than in a school], home and other external non-institutional providers cannot be named in Section I since they are not a school or other institution. That will consequently be left blank."

6. Derbyshire sought permission to appeal on the basis that the tribunal in this part of its decision had erred in law, relying on *M & M*. In giving

permission to appeal Judge Lewis of the First-tier Tribunal said the following of relevance:

> "Section 61 of the Children and Families Act 2014 is essentially a re-enactment of section 319 of the Education Act 1996 but there is no equivalent section 324(4)(c) Education Act 1996: to specify any provision they make for the child to be 'Education otherwise than at School'(EOTAS).
>
> I grant permission on to appeal on both grounds but primarily on Ground 1: Whether the Tribunal on the facts as found and the concession by the LA that neither child was ready for school at this point, was required, following [*M & M*] to name a type of school.
>
> ....this is an area of the law that requires clarification in the public interest, following changes in the law. Whilst on the findings of the FtT the instant case was at the high-end of EOTAS, it is an issue of real practical importance."

7. In his summary of what he had decided in *M & M*, Upper Tribunal Judge Mitchell said the following (in paragraphs [1] to [2]):

> "1. That it is desirable for the First-tier Tribunal to consider a child's views, wishes and feelings must be close to a universally accepted truth. Therefore, the absence of an express statutory requirement to do so is surprising. This decision holds that, despite the absence of an express requirement, the tribunal is required to consider a child's view's, wishes and feelings. It also discusses, but I am afraid does not resolve, the difficult question whether, in addressing a parental case that is aligned with a child's views, wishes and feeling, a tribunal will inevitably discharge its obligation to take into account a child's views, wishes and feelings.
> 2. This decision also considers whether home-schooling or, more accurately, education otherwise than in a school, may be specified in Part I (placement) of an EHC Plan. This decision agrees with existing case law that 'education otherwise than in a school' may not be specified in Part I of an EHC Plan. While the predecessor legislation about statements of SEN, contained in Part IV of the Education Act 1996, expressly provided for a placement of 'education otherwise than in a school', the Children and Families Act 2014 ("2014 Act") does not. However, the 2014 Act regime is not blind to the possibility that a child with an EHC Plan might not always be appropriately educated in a school. This decision addresses the potential for Part F of an EHC plan, which sets out required special educational provision, to reflect that, in an appropriate case, provision for education otherwise than in a school might be made."

It may be noteworthy that in this summary Judge Mitchell did not refer to also having decided that there is an absolute requirement that all EHC Plans must specify a school or institution or type of school or institution.

8. Judge Mitchell addressed in substance his reasoning on 'education otherwise than in school' and its place in an EHC Plan in paragraphs 63 to 70 of his decision. Given their importance, I set those paragraphs out in full:

> "*Ground 2 – whether the tribunal misdirected itself in law in relation to section 61 of the 2014 Act*
> 63. I am hampered in determining ground 2 because the local authority failed adequately to address the ground in its appeal response. That I proceed nevertheless to decide this appeal does not mean I condone the local authority's failure. In many cases, I would require a supplementary submission but, being aware of the need to avoid further delay in resolving a dispute about a child's education, I have not done so in this case.
> 64. Section 61(2) of the 2014 Act prevents a local authority from arranging for any necessary special educational provision to be made otherwise than in a school unless it is satisfied that "it would be inappropriate for the provision to be made in a school...". I have doubts whether the tribunal was correct to proceed directly from a parental concession that L 'could be educated' at a school (in fact, the reasons say the parents "did not contend that [L] could not be educated in a school) to a finding that section 61 was irrelevant. 'Could' may bear a range of meanings. In the present context, its meanings could have included (a) 'should be educated at a school', (b) 'could in theory be educated at a school but with attendant safety risks' or (c) 'could safely be educated at a school at some point in the future'. Meaning (a) would certainly shut out section 61, if the tribunal agreed that L should be educated at a school. Meaning (b) might or might not have shut out section 61, depending on the nature and gravity of any risks. Meaning (c) might have satisfied section 61(2).
> 65. However, before proceeding further I need to consider whether, in law, it would have been open to the First-tier Tribunal to specify 'education otherwise than in a school' in section I of L's EHC Plan, which the parents say it should have done. I do so even though both parties submit it would have been open to the tribunal to specify 'education otherwise than in a school' in Part I, had it considered the section 61(2) condition met. If the law does not permit this, I would not want the tribunal that re-determines L's parents' appeal to assume it did.
> 66. I agree with Upper Tribunal Judge Jacobs' decision in *East Sussex CC v TW* [2016] UKUT 528 (AAC). Comparing the 2014 Act with the predecessor legislation in Part IV of the Education Act 1996 shows that Parliament decided no longer to make express provision for education otherwise than in a school in the formal document that specifies a

> child's educational placement. Neither the 2014 Act, nor the 2014 Regulations, permit anything other than a school or other institution, or type of school or other institution, to be specified in section I of an EHC Plan. The First-tier Tribunal could not therefore have materially erred in law by failing to address whether 'education otherwise than at school' should have been specified in section I of L's EHC Plan.
> 67. However, that is not the end of the matter. Since section 61 is contained within a Part of the 2014 Act devoted to children and young persons with special educational needs, I cannot accept that Parliament intended that children with an EHC Plan should never have the option of education otherwise than in a school. While all such Plans must specify a school/institution or type of school/institution, it is in my judgment open to a local authority or tribunal, in an appropriate case, also to make section 61 provision within section F of an EHC Plan (the section setting out the required special educational provision) if, of course, it is satisfied that the section 61(2) condition is met. However, some squaring of the statutory circle is needed.
> 68. Applying domestic law principles of statutory interpretation, the absolute requirement for an EHC Plan to specify either a school or type of school means that any section 61 provision for a child with an EHC Plan needs to be framed either:
> (a) with the ultimate aim of making it appropriate for a child to be educated in a school. I say that because one cannot ignore the absolute requirement for an EHC Plan to name either the school selected by a parent in the exercise of statutory rights or, if no such selection is made, the school or type of school which the local authority considers appropriate for the child. As it happens, this approach may match L's recorded views. She reportedly told the educational psychologist that she wanted to return to school but did not yet feel ready to do so; or
> (b) as part of an educational package involving elements of attendance at a school and education otherwise than in a school. While I have not heard argument on this point, my view is that section 61 provision and school attendance are not necessarily mutually exclusive. Section 61(1) confers power on a local authority to arrange for "any special educational provision" that is has decided is necessary to be made otherwise than in a school, rather than "the special educational provision".
> 69. In my judgment, the above interpretation accords is consistent with the review provisions of the 2014 Regulations which, as I have noted, anticipate that some children with an EHC Plan might not be receiving education in a school.
> 70. For the above reasons, I decide that the First-tier Tribunal erred in law. In the absence of further enquiry into, and explanation of what the parents meant when they reportedly agreed that L "could be educated in a school" (or their not contending she could not), the tribunal gave inadequate reasons for failing to address whether some sort of provision ought to have been made in section F of L's EHC Plan for education otherwise than in a school."

9. I have underlined the passages in the above reasoning in *M & M* because on their face it is they which give rise to the argument that the tribunal in the appeal before me erred in law in leaving section I blank.

10. I would observe at this point that there is no explanation provided in the above passages for why as a matter of law a school or other institution must always be named in section I an EHC Plan. It appears to be an assumption, though earlier parts of the decision may be thought to provide the reasoning behind that assumption[2].

11. Earlier passages (at paragraphs [45] to [49]) of *M & M* appear to found on sections 39 and 40 of the Children and Families Act 2014 as requiring, without qualification, the EHC plan to specify a school or type of school, and regulation 12(i) of the Special Educational Needs and Disability Regulations 2014 as requiring the EHC Plan to set out in section I the name or type of educational establishment to be attended by the child. *M & M* then comments (in paragraph [48]) that "The Act does not disapply this requirement if the most appropriate provision is considered to be 'education otherwise then in a school'". If the words "this requirement" in this passage are referring to the Children and Families Act 2014, the analysis leaves out of account the nature of the requirement imposed by sections 39 and 40; because it will be unnecessary for the Act to disapply the requirement if it is not a universal one and does not extend to section 61 in any event. On the other hand, if the words are referring to the requirement (that is, the 'must') in regulation 12 (1)(i), that too leaves out of account the nature of the requirement under that regulation (see the *TW* case below). But it is also in my view a curious approach to statutory construction to look to an Act to identify provisions in delegated legislation which it disapplies but which are yet to be made under the Act. It seems to me that the starting point must be the terms of the parent Act under which the regulations were made.

[2] There was a something of an argument before me about whether this part of the decision in *M & M* was *obiter* or not (that is, not necessary to the decision arrived at). Resolving this argument would be an empty exercise as whether all EHC Plans must, as a matter of law, name a school or other institution (or type of either) falls squarely to be resolved in these appeals.

12. Before turning to the reasons why I consider the tribunal did not err in law and why there is, in my judgment, no absolute requirement that all EHC Plans must specify a school or other institution (or type of either) in Section I of an EHC Plan, I must first set out the relevant parts of the statutory scheme. These are contained, in the statute, in sections 37-40 and section 61 of the Children and Families Act 2014 ("the CFA"), which provide as follows.

> "37(1) Where, in the light of an EHC needs assessment, it is necessary for special educational provision to be made for a child or young person in accordance with an EHC plan—
>
> (a)the local authority must secure that an EHC plan is prepared for the child or young person, and
>
> (b)once an EHC plan has been prepared, it must maintain the plan.
>
> (2)For the purposes of this Part, an EHC plan is a plan specifying—
>
> (a)the child's or young person's special educational needs;
>
> (b)the outcomes sought for him or her;
>
> (c)the special educational provision required by him or her;
>
> (d)any health care provision reasonably required by the learning difficulties and disabilities which result in him or her having special educational needs;
>
> (e)in the case of a child or a young person aged under 18, any social care provision which must be made for him or her by the local authority as a result of section 2 of the Chronically Sick and Disabled Persons Act 1970 (as it applies by virtue of section 28A of that Act);
>
> (f)any social care provision reasonably required by the learning difficulties and disabilities which result in the child or young person having special educational needs, to the extent that the provision is not already specified in the plan under paragraph (e).
>
> (3)An EHC plan may also specify other health care and social care provision reasonably required by the child or young person.
>
> (4)Regulations may make provision about the preparation, content, maintenance, amendment and disclosure of EHC plans.
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> (5)Regulations under subsection (4) about amendments of EHC plans must include provision applying section 33 (mainstream education for children and young people with EHC plans) to a case where an EHC plan is to be amended under those regulations.

38(1) Where a local authority is required to secure that an EHC plan is prepared for a child or young person, it must consult the child's parent or the young person about the content of the plan during the preparation of a draft of the plan.

(2)The local authority must then—

(a)send the draft plan to the child's parent or the young person, and

(b)give the parent or young person notice of his or her right to—

(i)make representations about the content of the draft plan, and

(ii)request the authority to secure that a particular school or other institution within subsection (3) is named in the plan.

(3)A school or other institution is within this subsection if it is—

(a)a maintained school;

(b)a maintained nursery school;

(c)an Academy;

(d)an institution within the further education sector in England;

(e)a non-maintained special school;

(f)an institution approved by the Secretary of State under section 41 (independent special schools and special post-16 institutions: approval).

(4)A notice under subsection (2)(b) must specify a period before the end of which any representations or requests must be made.

(5)The draft EHC plan sent to the child's parent or the young person must not—

(a)name a school or other institution, or

(b)specify a type of school or other institution.

39 (1)This section applies where, before the end of the period specified in a notice under section 38(2)(b), a request is made to a local authority to secure that a particular school or other institution is named in an EHC plan.

(2)The local authority must consult—

(a)the governing body, proprietor or principal of the school or other institution,

(b)the governing body, proprietor or principal of any other school or other institution the authority is considering having named in the plan, and

(c)if a school or other institution is within paragraph (a) or (b) and is maintained by another local authority, that authority.

(3)The local authority must secure that the EHC plan names the school or other institution specified in the request, unless subsection (4) applies.

(4)This subsection applies where—

(a)the school or other institution requested is unsuitable for the age, ability, aptitude or special educational needs of the child or young person concerned, or

(b)the attendance of the child or young person at the requested school or other institution would be incompatible with—

(i)the provision of efficient education for others, or

(ii)the efficient use of resources.

(5)Where subsection (4) applies, 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.

(6)Before securing that the plan names a school or other institution under subsection (5)(a), the local authority must (if it has not already done so) consult—

(a)the governing body, proprietor or principal of any school or other institution the authority is considering having named in the plan, and

(b)if that school or other institution is maintained by another local authority, that authority.

(7)The local authority must, at the end of the period specified in the notice under section 38(2)(b), secure that any changes it thinks necessary are made to the draft EHC plan.

(8)The local authority must send a copy of the finalised EHC plan to—

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

(b)the governing body, proprietor or principal of any school or other institution named in the plan.

40(1) This section applies where no request is made to a local authority before the end of the period specified in a notice under section 38(2)(b) to secure that a particular school or other institution is named in an EHC plan.

(2)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.

(3)Before securing that the plan names a school or other institution under subsection (2)(a), the local authority must consult—

(a)the governing body, proprietor or principal of any school or other institution the authority is considering having named in the plan, and

(b)if that school or other institution is maintained by another local authority, that authority.

(4)The local authority must also secure that any changes it thinks necessary are made to the draft EHC plan.

(5)The local authority must send a copy of the finalised EHC plan to—

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

(b)the governing body, proprietor or principal of any school or other institution named in the plan.

61 (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."

13. It was common ground before me that *East Sussex CC v TW* [2016] UKUT 528 (AAC) had correctly decided that 'education otherwise than at school' under section 61 CFA (for example, the child's home), cannot be named in section I if an EHC Plan. I agree, as did Judge Mitchell in *M & M*. That is so for the reasons Upper Tribunal Judge Jacobs gave in paragraph 32 of *TW*, where he founded on the language used in regulation 12(1)(i) of the Special Educational Needs and Disability Regulations 2014 (made under section 37(4) of the CFA above)

requiring the local authority to set out in the EHC Plan "the name of the school.....or other institution to be attended by the child.....or the type of school or other institution to be attended by the child....". In Judge Jacobs' view, a child could not 'attend' her home nor could her home be described as an 'institution'. Accordingly, if there is no school or other institution to be attended, there is nothing to be set out in the EHC Plan under regulation 12(1)(i).

14. However, in paragraph 33 of *TW* Judge Jacobs identified another argument in favour of the conclusion he reached on this point, and it is this argument which touches on the central thesis underpinning my conclusion in this appeal. Paragraph 33 of *TW* reads as follows (I quote also from the end of paragraph 32 to put what follows in paragraph 33 in context):

> ".....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. Nor is it a proper use of the word to describe his home as an institution, whatever the specific meaning of that word.
>
> Section 61
> 33. The tribunal tried to avoid this by adopting an argument put by Mr Friel. He argued that a local authority may approve home tuition under section 61. That may be so, but it does not follow that the home can properly be entered into Section I. It does not fit into the language used by regulation 12(1)(i), which deals with just the type of school or institution that must be <u>inappropriate</u> in order for section 61 to apply."

It is the underlined word (correctly) used by Judge Jacobs, together with the need for any school or institution to be *appropriate* for the child, that lies at the heart of my decision in this appeal.

15. As can be seen from a consideration of sections 39(5) and 40(2) of the CFA above, the duty imposed on the local authority is to secure that the EHC Plan names a school or other institution, or type of school or other institution, which the local authority thinks <u>would be appropriate</u> for the child or young person[3]. However, if the local authority thinks that

[3] The duties in sections 39(5) and 40(2) sit outwith the right of the child's parent or the young person under section 39(1) of the CFA to request that a particular school or other institution is named in the EHC Plan. However, such a specified school need not be named if to do so

no school or other institution (or type of either) would be appropriate for the child, in my judgment the 'naming' duty under these sections, and thus in section I of an EHC Plan, cannot as a matter of law arise. To contend otherwise would produce the absurd result that the local authority is legally obliged to name, say, a school even though it thinks, having exercised its specialist expertise and on the evidence before it, that no school, other institution (or type of either) would be appropriate for the child or young person. As it is put by Mr Moffett QC for Derbyshire County Council:

> "...the identification of an appropriate school or an appropriate type of school is a prerequisite to the relevant duty arising: if the local authority does not think that there is an appropriate school or an appropriate type of school, there is nothing to be named or specified."

16. It may be a legitimate concern if the statutory scheme did not then deal with how such a child or young person was to be educated. But in my judgment it does, in section 61. Reading Part 3 of the CFA as a whole, and sections 39, 40 and 61 together, reveals in effect what is intended as a unified code. This shows that 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 <u>inappropriate</u> for that provision to be made in school [or other institution]". If a local authority is so satisfied then it could not also 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).

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would, inter alia, mean naming a school that would be <u>unsuitable</u> for the child or young person, in which case the duty under section 39(5) arises. Again, therefore, the statutory focus is on a school or institution (or type of either) which is suitable (or appropriate) for the child or young person.

17. Mr Moffett sought to illustrate the sense of the above reading of the statutory scheme, and the lack of sense in requiring the EHC Plan to always name a school or other institution (or type of either) by way of two examples. As I have found them helpful in deciding this appeal and agree with the points made on those two examples, I set out the passage in full of Mr Moffett's argument for Derbyshire.

> "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."

18. I note that the tribunal in its reasoning emphasised the use of the word 'a' in section 61(2). However, in context and again read with sections 39(5) and 40(2), it seems to me that this is in effect to be read as *any* school, type of school, other institution or type of institution. I say this to make the Act read sensibly as a whole. It cannot be the case that section 61(2) of the CFA is satisfied, and special educational provision is made otherwise than in school simply if it would be inappropriate for the necessary special educational provision to be made in one school alone but where provision could be appropriately made in another school. Such a reading of the CFA would allow sections 39(5) or 40(2) of that Act to apply at the same time as section 61, which would be an irrational reading of the Act. The heading for section 61 is "Special educational provision otherwise than in schools, post-16 institutions etc" (my underlining added for emphasis). That heading can be used as an aid to interpretation of that sections place in the CFA (*R v Montilla* [2004] UKHL 50; [2004] 1 WLR 3141, at paragraphs [34]-[36]). So read, in my judgment the heading to section 61 adds to the perspective that it is dealing with situations where sections 39(5) and 40(2) do not apply.

19. Two other considerations support the conclusion that the CFA does not require a school or other institution (or type of either) always to be named in section I of any EHC Plan.

20. First, the language of "to be attended by" in regulation 12(1)(i) of the Special Educational Needs and Disability Regulations 2014, following *TW*, shows that an EHC Plan need only name a school or specify a type of school (or other institution of 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.

21. Second, the definition of an EHC Plan in section 37(2) of the CFA, which is for the whole of Part 3 of that Act, does not provide that an EHC Plan is a plan naming the school or specifying the type of school that the child is to attend. Insofar as is relevant, the definition simply provides that an EHC Plan is a plan specifying "the special educational provision required by [the relevant child]". It does not add, "and, shall identify where that provision is to be made".

22. Very fairly, Derbyshire has sought to advance arguments that may provide a contrary reading of the statutory scheme. These are:

> ".....it might be argued that ss 39(5) and 40(2) impose a binary choice on a local authority, in that by the use of the imperative "must" they each impose a mandatory duty either to name a particular school or to specify a type of school. On this interpretation of ss 39(5) and 40(2), there would be no room for a local authority both to decline to name a school and to decline to specify a type of school. Such an interpretation of ss 39(5) and 40(2) would find some support in s 51, which provides for the matters against which a parent may appeal to the FTT. Section 51(2)(c)(iii) and (iv) provides that, where an EHCP is maintained for a child, his or her parent may appeal against the school named in the EHCP, the type of school named in the EHCP, or the fact that no school is named in the EHCP. However, there is no provision for a parent to appeal against the fact that no type of school is specified in the EHCP. This omission might be taken to suggest that the 2014 Act does not contemplate a situation where an EHCP does not as a minimum specify a type of school, which in turn suggests that an EHCP will always as a minimum specify a type of school."

23. However, I agree with Derbyshire that these possible contraindications are insufficient to oust what seems to me a reasonably clear reading of the statutory scheme and section 39(5), 40(2) and 61 in particular. It seems to me that so read, the imperative 'must' in sections 39(5) and 40(2) has to be read with, and cannot be divorced from, the words "..which the local authority thinks would be appropriate for the child...", which appear in both subsections. What is it that must be named if there is no school or other institution (or type thereof) which would be appropriate for the child? Moreover, to read the statutory scheme as requiring that a school or other institution (or type of either) must always be named in section I of the EHC Plan leaves the absurd examples set out in the quotation in paragraph 17 above in place, with no obvious rationale for such a requirement applying in such cases or even on what evidence such a requirement could rationally be based in such cases.

24. Furthermore, the concern based on the appeal rights in section 51 is probably more theoretical than real as a parent will not be left without an effective right of appeal in circumstances where section I of an EHC Plan is left blank. If no school or other institution (or type of either) is named in section I, the parent will have a right of appeal under section 51(2)(c)(iv) of the CFA and, on such an appeal, in my judgment it would be open to the First-tier Tribunal to order the local authority to name a school or specify a type of school in section I of the EHC Plan.

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

Dated 30th July 2019