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

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

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

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.

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

(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)

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 inappropriate 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).

---

would, inter alia, mean naming a school that would be unsuitable 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.

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."