It's all so quiet… "Low arousal" environments examined by the Upper Tribunal (JI and SP v Hertfordshire CC)

By Emma Waldron

JI and SP v Hertfordshire County Council (SEN) (Special educational needs) [2020] UKUT 200 (AAC) (17 June 2020)

Summary

The Upper Tribunal examined whether sufficient reasons had been given by the First Tier Tribunal for rejecting expert evidence and for finding that a school could provide a "low arousal environment". It had already been agreed between the parties that the child ("PI") required a "low arousal environment" and this formed part of Section F of PI's EHC Plan. The Tribunal also discussed (albeit obiter comments only) whether it is possible to require a specialist unit within a mainstream school to be identified in Section F of an EHC Plan.

What are the practical implications of this case?

This case serves as a useful reminder to education law practitioners of the importance of ensuring that what has been agreed in Section F of a child's EHC Plan is capable of being delivered in the competing placements on offer within Tribunal proceedings. In this particular case, it had been agreed between the parties that the child in question required a "low arousal environment". Whether this could be delivered at the LA's preferred placement was in dispute.

This case also provides useful *obiter* comments as to whether a specialist unit within a mainstream school should be identified in Section F of a plan: does it amount to special educational provision?

Practitioners will already be aware of the decision of *MA v Kensington and Chelsea* [2015] UKUT 186 (AAC) in which it was held that a "unit" or "base" should not be named in Section I of a plan as it did not form a separate school. The question, therefore, was whether such a

unit ought reasonably to be referred to in Section F of a plan. Reflecting on section 21 of the Children and Families Act 2014, Upper Tribunal Judge Wright considered that *"it is not the specialist unit in the mainstream school (here, 'the Base') which itself is the provision for section 21 purposes, but rather what it in fact provides in terms of education or training that may amount to special educational provision. It is the latter that needs to be described in Section F of the EHC Plan, not the former".*

The learned Judge's comments in relation to the level of specificity which may be required in Section F of an EHC Plan where a "unit" or "base" is required will be of interest to LA and parental representatives alike as it may no longer be sufficient merely to state in Section F that a child will attend such provision within a mainstream setting.

What was the background?

PI - an 8 year old boy - was the Appellants' son. He had a developmental language disorder in the areas of syntax, semantics, wording finding and narrative, and difficulties with cognition and learning, speech, language and communication skills, and fine and gross motor skills. PI's parents brought an appeal against the contents of his Education, Health and Care Plan ("EHC Plan"). The decision of the First Tier Tribunal was made on 12 June 2019. On 24 September 2019, the parents were granted permission to appeal. On appeal, the parents advanced four grounds:

1. The First Tier Tribunal failed to address the expert evidence in respect of suitability of a mainstream setting for PI;
2. The First Tier Tribunal erred in law by finding that the [Central Primary School] could not provide PI with a "low arousal environment";
3. The First Tier Tribunal erred in law by failing to properly describe the specialist provision it felt was required for PI at [Central Primary School];
4. The First Tier Tribunal failed to properly calculate the different in costs between the different placements [at Central Primary School and ERS].

Upper Tribunal determined that the four grounds were, on proper analysis, separate reasons challenges to the adequacy of the stated basis for the Tribunal's decision.

What did the court decide?

The appeal succeeded on the second and fourth ground but not the first. The Judge did not need to form a view as to the third ground of appeal but nevertheless provided useful obiter comments.

In respect of the second ground, the foundation of this part of the appeal was that Section F of the EHC Plan specified that PI required *"A low arousal environment where distractions are minimised".* This had been agreed by the parties prior to the hearing. Whilst the Tribunal could have brought the need for a "low arousal environment" into issue on appeal if it did not consider that such provision was needed by PI, it did not do so. In circumstances where the parents had argued that the LA's preferred placement could not provide a low arousal environment, this issue (to quote Upper Tribunal Judge Wright) *"needed to be properly and appropriately addressed by the Tribunal in its consideration of Section I of the EHC Plan. In my judgment, the Tribunal failed to do this".*

The First Tier Tribunal had heard evidence from the LA's preferred placement via the School's SENCO, Ms Perry. During evidence, she had been challenged on whether her school could provide a "low arousal environment" and conceded that whilst noise could be contained if it needed to be, the school was "*probably not a 'low arousal environment'".*

Upper Tribunal Judge Wright held that (paragraph 21):

"There is an unfortunate ambiguity in the last sentence in paragraph 48 of the Tribunal's decision. This is that it is unclear whether Ms Perry's evidence was that even with noise containment the school would not be a "low arousal environment" or that it would be with such containment. The former may be the more natural reading of the flow of the evidence given at the hearing. However, that ambiguity cannot assist the tribunal. It ought to have established and made clear what the true position was in terms of Ms Perry's evidence… In a balance of probabilities jurisdiction, "probably not a 'low arousal environment'", absent evidence pointing the other way, on the face of it should lead to a finding of fact that the school was not and could not provide the 'low arousal environment' that section F of the EHC Plan required. However, there is no evidence to which the Tribunal refers in its decision on this issue. Moreover, this was evidence, so to speak, from Central Primary School about its (in)ability to meet this part of Section F of the EHC Plan".

The learned Judge went on to state (at paragraph 27) that *"there is a lack of detail or specificity (in other words, findings of fact) in the tribunal's decision about exactly what it was that that school would need to do, and could do, to meet this educational need of PI and thus be suitable for him".*

In terms of non-binding comments made in relation to the third ground of appeal, the Judge reminded himself that educational provision in Section F should stand independent of any particular school and it is by that independent assessment of educational need that the suitability of educational settings is then determined. A specialist unit or base cannot be named in Section I of an EHC Plan. Reflecting on section 21 of the Children and Families Act 2014, Upper Tribunal Judge Wright considered that *"it is not the specialist unit in the mainstream school (here, 'the Base') which itself is the provision for section 21 purposes, but rather what it in fact provides in terms of education or training that may amount to special educational provision. It is the latter that needs to be described in Section F of the EHC Plan, not the former".*

In conclusion, the Judge held that the parents had succeeded on two grounds of their appeal. The Upper Tribunal was not in a position to re-decide the appeal. It therefore referred the appeal back to the First Tier Tribunal to be decided afresh by a completely differently constituted panel.

9 September 2020

Emma Waldron

Barrister
3PB

0330 332 2633
emma.waldron@3pb.co.uk

3pb.co.uk