IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

HS/1389/2017

Appellant: **Lincolnshire County Council**

Respondent: **Anna HORTON**

DECISION OF THE UPPER TRIBUNAL
ON AN APPLICATION FOR PERMISSION TO APPEAL
FROM A DECISION OF THE FIRST-TIER TRIBUNAL
(HEALTH, EDUCATION AND SOCIAL CARE CHAMBER)

Upper Tribunal Judge H. Levenson

ON APPEAL FROM:

Tribunal:	The First-tier Tribunal (HESC Chamber)
Tribunal Case No:	EH925/16/00051
Hearing Dates:	8th March 2017
Decision Date:	21st March 2017 (written reasons)
Venue:	Nottingham
Appeal to UT:	8th May 2017

HS/1389/2017

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)
ON AN APPLICATION FOR PERMISSION TO APPEAL

Decision and Hearing

1. **I refuse permission to appeal** to the Upper Tribunal against the decision of the First-tier Tribunal (Health, Education and Social Care Chamber) made after a hearing in Nottingham on 8th March 2017 with written reasons dated 21st March 2017 and made under reference EH925/16/00051, allowing an appeal in respect of the educational, health care and social care ("EHC") plan issued by the appellant local authority ("the authority") on 31st August 2016.

2. I held an oral hearing of this application on 15th June 2017. The authority was represented by Paul Greatorex of counsel (who also appeared below). The respondent mother and the father of the child in question attended and were represented by Ed Duff, a solicitor of HBC. I am grateful to them all for their assistance. I shall refer to the child as "Simon" (not his actual name).

The Law

3. The area of dispute in this appeal, although important, is fairly narrowly focussed and concerns the appropriate school placement for Simon. Section 9 of the Education Act 1996 provides that in exercising or performing all their relevant powers and duties local education authorities must 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. Section 39 of the Children and Families Act 2014 requires the authority to name in an EHC plan the school which has been specified by the parents unless (section 39(4)) it is unsuitable or attendance would be incompatible with the provision of efficient education for others or the efficient use of resources.

4. In many cases which come before the Upper Tribunal there is more than one appropriate school which could be named in the EHC plan and the issue in dispute relates to the avoidance of unreasonable public expenditure. In the present case the First-tier Tribunal decided that the school nominated by the authority was not appropriate but that the school nominated by the parents was appropriate and should be named in the plan. The authority seeks leave to appeal effectively against the decision that the school nominated by the authority was not appropriate.

Background and Procedure

5. Simon is a boy who was born on 29th October 2007. The First-tier Tribunal found that (paragraph 6 of its written reasons):

> "In September 2014 [Simon] was diagnosed with high functioning autism. He experiences difficulties with high levels of anxiety and with sensory processing. He also exhibits demand avoidant behaviour and hyperactivity.

> His specific language and social communication difficulties are exacerbated by his sensory processing difficulties, and the current state of his mental health. None of this is in dispute".

6. Simon had been attending a mainstream primary school but this was or became unsuitable. On 31st August 2016 his parents appealed to the First-tier Tribunal against the contents of the EHC plan. They wanted him to attend school A, an independent special school for pupils with high functioning autism and communication difficulties, which he would attend for 38 weeks a year as a weekly boarder from Sunday to Friday. The authority initially opposed a residential school setting and in January 2017 it accepted that there might be evidence to support the need for a special school but not for a residential placement. Two days before the First-tier Tribunal hearing the authority proposed a day placement at school S, a specialist school for pupils with autism spectrum conditions. The authority accepted that school A is suitable but opposed it being named on the basis that this would be incompatible with the avoidance of unreasonable public expenditure.

7. The First-tier Tribunal heard the appeal on 9th March 2017 and issued its written decision with reasons on 21st March 2017. Both parties were legally represented. Both parties called witnesses who gave oral evidence and there was, of course, a great deal of documentary evidence. Most of the issues in dispute were eventually resolved but the First-tier Tribunal found that school S was not suitable and named school A. On 31st March 2017 the authority applied for permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal. On 26th April 2017 a judge of the First-tier Tribunal refused permission and the application was renewed direct to the Upper Tribunal on 8th May 2017. On 15th May 2017 I refused the authority's application to suspend the implementation of the effects of the decision made by the First-tier Tribunal, and directed an oral hearing of the application.

8. Although it is not relevant to the legal argument I note that Simon started attending school A on 7th June 2017.

The First Tier Tribunal

9. The First-tier Tribunal recorded the following evidence from the appellant about school S (references are to paragraph numbers of the written reasons):

> 15. [The appellant] said that she had visited [school S] in November 2016, and concluded that 'it just didn't fit for [Simon]'. [The appellant] had formed the impression that behavioural issues were significant in the school and pointed to the staff's wearing of gauntlets …

10. The head teacher of school S gave evidence and said that this was in case they were called to an incident involving pupils who bite or scratch. He had been brought in a year ago after an Ofsted inspection had judged the school as requiring improvement. He believed that the school could meet Simon's needs but this was based on reading the papers and consulting colleagues. He had not met Simon and it had not yet been possible to assess him in his current setting, although this would need to be done. He could not be sure but thought that Simon would fit into what they called tier 3 in a class with two other high functioning pupils. Tier 1 consisted of non-

verbal pupils with a tendency to self-harm. Tier 2 were verbal but low functioning students. The other pupils in tier 3 could exhibit challenging behaviour, such as sitting under the table, but had not needed to be restrained. Simon would be able to access specialist IT and art teaching. The head teacher assessed school S as still requiring improvement and it was too early for Ofsted to award a good rating (paragraphs 11 to 15).

11. An educational psychologist, Dr S was called by the local authority and said that she had not visited either school but "from what she had learnt at the hearing" her judgment was that that both schools offered a peer group that would potentially be suitable (paragraph 16).

12. A different educational psychologist, Mr L, was called by the parents and told the tribunal that he had visited school A on two or three occasions but had not visited school S. The peer group at school S would not be totally inappropriate but he was concerned that the school still required improvement, that the curriculum was still changing, that suitable trained staff were not yet in place and that new recruits would need to be trained (paragraph 17).

13. The First-tier Tribunal noted that it appeared that schools A and S could both provide the therapies and "any necessary 1:1 provision" within a small group model, but that at school S "there is no ready trained 1:1" (paragraph 28). It rejected a submission by Mr Greatorex (which he repeated before me) that no point could be made about the shortcomings of the peer group at school S which could not also be made about school A. This was on the basis of its analysis of the respective cohorts. The head teacher of school S had offered to put Simon in an older group if that was more suitable but "this also leaves his peer group there uncertain and vague" (paragraphs 29 to 30).

14. The First-tier Tribunal concluded:

> 31. For [Simon] to have a suitable peer group is crucial. He finds it difficult to initiate and maintain positive interactions with his peers. He is desperate for interaction with peers, but he is increasingly isolated. The Tribunal can be certain on the evidence that he would have a suitable peer group at [school A] as well as … appropriate role models, but it can have no such confidence about [school S]. Indeed the other two pupils in his proposed Tier 3 class have behavioural issues, albeit not at a level which requires them to be restrained.

The Grounds of Appeal and the Arguments

15. The arguments on both sides kept addressing issues in relation to school A. Such issues are not relevant to this application. There was never any dispute that school A was suitable. This issue is whether the First-tier Tribunal was in error of law in finding that school S was not suitable.

16. I am bound to say that I do not find any of the arguments put forward by Mr Greatorex to be persuasive or likely to succeed if permission to appeal were granted. He pointed out that, given the short notice of the authority's preference for school S, it would not have opposed an adjournment so that further information could be

obtained. However, it is clearly understandable why the parents would not have wanted to delay matters further, and if the authority thought that the matter should be adjourned it could have made its own application. He was also exercised by the use of the phrase "high functioning" and whether it has a precise meaning but I really can see no arguable error of law in the way that this concept or phrase was used in the present case. He suggested that a finding that a special school for autistic children, especially in the independent sector, is unsuitable for a relevant child is surprising and requires a special detailed explanation. There is no authority for this proposition and no reason why it should be accepted. He argued that this is especially the case (on the basis of proportionality) where there is such a substantial cost differential. This argument is illogical. If a school in unsuitable for a particular child, it does not come into the cost comparison at all. He argued that the First-tier Tribunal did not identify any provision in section F which could not be delivered at school S. I agree with Mr Duff that other factors can inform suitability but that in any event the tribunal noted the lack of any ready trained "1:1" (paragraph 28).

17. Mr Greatorex produced a fresh witness statement from the head teacher apparently signed on 31st March 2017. The head teacher stated that he had sought to withdraw his use of the word "challenging" as giving a misleading impression because the behavioural problems were no different from those of Simon himself. "Challenging" is an everyday word, not a technical description, and I see no relevance of this to the tribunal's final decision. The head teacher stated that he had indicated no uncertainty as to whether Simon would be in tier 3. Mr Duff accepted this but I agree with Mr Duff that in the event there is no doubt that the decision was based on the assumption that Simon would be in tier 3. The head teacher stated that he had also drawn attention to the fact (unrecorded in the statement of reasons) that there were some exceptionally able students at school S. Even if this is the case I really do not see how it goes to the issue of whether or not the decision of the First-tier Tribunal was made in error of law.

18. Mr Greatorex also relied on a new witness statement from Dr S, apparently signed on 30th March 2017. This adds nothing, being mainly about school A and confirming the contents of the head teacher's statement.

19. The rest of the grounds put forward on behalf of the authority, although dressed up very elegantly as purported points of law, really amount to little more than assertions of inadequate reasoning, which I do not accept, and attempts to reargue the facts. I can only interfere with the decision of the First-tier Tribunal if it got the law or procedure wrong. I cannot substitute my own view of the facts (still less that of the authority) for that taken by the tribunal. The First-tier Tribunal had the opportunity of considering the expert and other evidence and I am not persuaded that it is reasonably arguable that its decision involved the making of any error of law or that there was any significant inadequacy in its reasoning, or that any Upper Tribunal Judge would grant a remedy in the particular circumstances of this case. For these and the above reasons I refuse this application for permission to appeal.

H. Levenson
Judge of the Upper Tribunal
26th June 2017