**IN THE UPPER TRIBUNAL** **Case No.** HS/2241/2016
**ADMINISTRATIVE APPEALS CHAMBER**

**Before: A. Rowley, Judge of the Upper Tribunal**

**Decision:** The appeal is dismissed. The decision of the tribunal issued on 6 June 2016 under reference EH312/15/00013 did not involve the making of a material error of law.

## REASONS FOR DECISION

1. This case has had a relatively long procedural history in the Upper Tribunal. It is summarised in my Ruling dated 7 December 2016 and it is not necessary to repeat it here. Reference is made to that Ruling for the reasons why I have decided not to hold an oral hearing of the appeal.
2. The respondent is the father of the child in this case ("A"), a boy who was born in 2008. In 2014 A was diagnosed with autistic spectrum disorder. He attended a mainstream nursery and infant school, with specialist support provided by an outreach autism service. However, it was agreed that his educational needs could no longer be met in a mainstream school.
3. The appeal to the First-tier Tribunal arose out of the respondent's disagreement with the contents of an EHC Plan made by the appellant for A. As the appellant before the First-tier Tribunal is the respondent in the Upper Tribunal, and vice versa, to avoid confusion I will refer to the appellant in the Upper Tribunal as "the local authority" and to the respondent in the Upper Tribunal as "the father."
4. Both parties were professionally represented at the First-tier Tribunal. Prior to the hearing the parties had reached agreement on a number of issues, with appropriate amendments being set out in the Working Document.
5. The following issues were before the tribunal:

   *Under Section B*: whether A's language acquisition was due to his being taught through his home Applied Behaviour Analysis ("ABA") programme.

   *Under Section F*: whether A's provision should be delivered through an ABA programme or through an eclectic approach.

   *Under Section I*: whether A should attend a school which I shall call X School or one which I shall call Y School. X School is a primary special academy for pupils with severe learning difficulties. Y School is a non-maintained special school for pupils with autism. It adopts an ABA approach. It admits children who have severe or moderate learning difficulties.
6. It was the father's case that A would only make progress if he attended a school that followed an ABA programme. He was of the view that A had acquired the limited words that he was able to use through use of the ABA programme at home and during two sessions with ABA tutors in 2015. The father contended that A should attend Y School.

7. The tribunal recorded the local authority's submission that ABA was not the only approach that could meet A's needs, and that they could be met by an eclectic approach such as the TEACCH approach. The tribunal also recorded that the local authority's case was that Y School was unsuitable because A would not have a suitable peer group and the local authority was concerned as to how inclusive it would be for him; and the local authority was also concerned about the qualifications of staff, as A would only have a qualified teacher for three hours a day. The local authority further submitted that placement at Y School would represent unreasonable public expenditure.

8. On the issue of whether A's language acquisition was due to his being taught through ABA the tribunal said that it did not find that there was "evidence to assert how [A] learned the words that he knows as it is likely that he has learned from a variety of sources."

9. As to ABA, the tribunal found as follows:

> *"… We were unable to find that [A] needs to be educated following an ABA programme. His exposure to ABA has been very limited. There is no evidence to support the contention of [the father] that this is the only way he can be educated. We agree that there is evidence that [A] needs intensive ASD teaching but it does not follow that this can only be delivered through ABA."*

10. On the issue of placement this was the tribunal's finding:

> "…*[X] School is an outstanding school for pupils with severe learning difficulties. [The Senior Teacher and ASD co-ordinator of X School] was an impressive witness. However, we do not find that [X] School is a suitable school for [A]. As set out above, we concluded that there was evidence that he was unlikely to be a pupil who has severe learning difficulties. Although at [X] School he would be in a class of children of his age, only half of the pupils have autism and only one other pupil is verbal. Neither teacher nor the TAs have specific training in teaching autistic pupils. The other pupils are functioning at a level lower than [A] and the most able pupil in the school is only achieving at level P8. Although we do not consider that [A] specifically needs teaching using an ABA programme, we do conclude that he does need to be educated in a school which offers intensive specialist autism teaching and this is available at [Y] School. We do not agree that [A] will not have an appropriate peer group since there will be other pupils of his age and at his level of attainment. In relation to the qualification of staff at [Y] School, the tutors have a high level of autism specific training and, on balance, we fell that this will meet [A]'s current needs."*

11. In the light of its findings the tribunal made consequential amendments to the Working Document which included attendance at "an ASD specific school" which was named as Y School. I should add that, given the tribunal's findings that whereas Y School would be a suitable placement for A, X School would not, there was no need to conduct a balancing exercise and thus no need to consider issues of unreasonable public expenditure.

12. The local authority relies upon five grounds of appeal. They were drafted by Mr. Small, solicitor. The father relies upon written submissions in response which were settled by Mr David Wolfe QC. In turn, Mr Small has responded to these submissions.

13. The first ground of appeal is that the tribunal "erred in law in determining that [X] School did not have the required expertise to meet [A]'s needs in respect of his Autism (ASD), and has failed to specify the level of expertise that it determined was necessary and which [X School] could not provide."

14. Mr Small submits that there is no mention within Section F of the EHC Plan of the type or level of qualifications in ASD that members of staff were required to have in respect of working with A, and that the tribunal gave no indication of what its expectations were in respect of the level of expertise it considered was necessary to meet his needs. Mr Small also submits that it is unclear why the tribunal failed to record the evidence of the ASD Co-ordinator of X School which was to the effect that all staff at X School had received basic training in ASD (including TEACCH, PECs and Intensive Interaction) in addition to their teaching experience.

15. Mr. Small further argues that there is no specific training qualification which staff must have in order to support children with autism, and so if the tribunal determined that in-house training was insufficient, the local authority is entitled to know what training it determined was necessary.

16. Mr. Wolfe points out that the tribunal did in fact record the evidence of X School's ASD Co-ordinator on staff experience and qualifications at paragraph 20 of its Decision. Moreover, he contends that the tribunal properly exercised its expert judgment on the basis of the evidence before it, including that from the ASD Co-ordinator, and that it properly concluded, as part of its evaluation that X School would not be an appropriate placement for A, that the lack of specific autism training among the staff at X School was not sufficient. That, submits Mr. Wolfe, was plainly a lawful conclusion for it to reach, and one which was properly explained.

17. I remind myself that the First-tier Tribunal is an expert tribunal with specialist members. I also remind myself that the purpose of a tribunal's reasons is to tell the parties in broad terms why they lose or win. It is not necessary for a tribunal's reasons to deal with each and every piece of evidence or every conceivable detail of a case.

18. I am of the view that paragraphs 11 and 12 of the Decision lay the basis for the tribunal's finding that A needed to be taught by specialist staff who were trained and experienced in teaching pupils with autism. Reading the decision as a whole it was not, in my judgment, necessary for the tribunal to specify further what training it had in mind. It made findings that it was entitled to make on the evidence before it, and its explanation for those findings was adequate. There was no error of law.

19. The second ground of appeal is that the tribunal "identified that [A] did not have severe learning difficulties based on P Level scores and anecdotal evidence from the [father]. However, references to P Levels are not to be taken as a reference to a child's underlying level of cognitive ability and the First-tier Tribunal has failed to consider the evidence from professionals which identifies that [A] has a severe level of disability."

20. The tribunal observed that no assessment of A's cognitive ability had been possible because of his inability to concentrate and to access standardised

testing. It went on to say that, in spite of this, it had been stated that he had severe learning difficulties, although it noted that the EHC Plan stated that he had "significant learning difficulties." Taking into account the evidence that A had achieved levels P4 and P5 and some levels of P6, that he was able to use 30 words, that he was adept at doing puzzles, knew his colours and sometimes was able to count to 10, was able to share books and to mark make, the tribunal concluded that A "cannot be described as a child with severe learning difficulties." That finding was one of the reasons why the tribunal found that X School (which, as I have already said was a school for pupils with "severe" learning difficulties) was not a suitable school for A.

21. I agree with Mr. Small's submission that learning disabilities are categorised as profound, severe, moderate or mild. There is no category of "significant" learning difficulty. At no stage does it seem to have been suggested by anyone that A's learning difficulties were "moderate" i.e. less than "severe." In those circumstances, it seems to me that it was not open to the tribunal to find that X School was not suitable for A because he only had "significant" learning difficulties.

22. Thus, in my judgment the tribunal made an error of law. However, its decision that X School was not suitable for A was based upon a number of factors in addition to its classification of his learning difficulties. Its reasons on this issue are set out at paragraph 34 of its Decision. They were reasons which it was open to the tribunal to make on the basis of the evidence before it. Because the classification of A's learning difficulties was only one of the reasons for its decision as to the suitability of X School for A, and because the other reasons were in themselves significant and sustainable, I find that the tribunal's error of law which I have identified was not a material one, and does not justify setting aside the tribunal's decision.

23. The third ground of appeal is that the tribunal erred in finding that A did not require an ABA approach yet still named Y School, a school which only provides an approach based on ABA.

24. Mr. Small is right to note that all references to ABA were deleted in the EHC Plan on the basis that ABA was not (in itself) a necessary provision for A. He goes on to submit that to name a school which only offered the ABA model was an irrational decision.

25. I agree with Mr. Wolfe's submission that the local authority's case to the tribunal was that there was no educational reason why A could "only" be supported via an ABA approach. The local authority had not sought to argue that the provision of ABA made Y School *unsuitable*. It had simply said that ABA was *not required*, and the tribunal had agreed. There is a crucial distinction between those two stances.

26. The tribunal followed the correct approach. Mindful of the high threshold for a submission of irrationality to be established, I find that Mr Small's contention that the tribunal's decision was irrational cannot be sustained.

27. The fourth ground of appeal is that the tribunal erred in failing to explore alternative schools. Mr. Small submits that it was open to the tribunal to adjourn or name a type of school, rather than automatically naming Y School

on the basis it had found X School unsuitable. He relies upon *Hereford and Worcester County Council v Lane* [1998] ELR 319. In that case the tribunal was not satisfied that the school proposed by the local authority could deliver the provision required. Whilst the tribunal was also not convinced that the child needed a 24-hour curriculum which was what was provided by the residential school proposed by the child's mother, nevertheless it ordered the latter school to be named, as it was of the view that that was the only alternative open to it . The Court of Appeal held that the tribunal had misdirected itself, and it should at least have considered ordering the type of school or provision which needed to be made and which the local authority's school did not provide. It had not been, as it thought it had, forced into the situation of ordering the authority to specify the name of the residential school.

28. Mr. Wolfe submits that a conclusion that ABA was not required did not preclude Y School, even on the local authority's case. I agree with that submission for the reasons set out above. In itself this provides an answer to the fourth ground of appeal.

29. In any case, Mr. Wolfe relies on the decision of Newman J in *Rhondda Cynon Taff County Borough Council v Special Educational Needs Tribunal and V* [2002] ELR 290, in which *Lane* was considered. The following passage is of particular significance:

> "*14… As the argument was developed by Mr Wolfe it became more and more apparent that he was close to submitting that at the conclusion of every tribunal hearing, where the school named in Part 4 is held to be inappropriate, an LEA should be given an opportunity to suggest alternatives which might be less expensive than an independent school preferred by the parent. In my judgment the case of Richardson v Solihull Metropolitan Borough Council and the Special Educational Needs Tribunal; White and Another v London Borough of Ealing and the Special Educational Needs Tribunal; Hereford and Worcester County Council v Lane [1998] ELR 319 manifestly fails to support such a principle. Further, to allow it to do so would go against the priority to be given to expedition in the resolution of these disputes, tend to give undue prominence to resource considerations, which are one important factor, at the expense of the interests of the child, which are also an important consideration, and to relieve an LEA of the duty to put forward its case as fully and comprehensively as it can at the outset…"*

30. In my judgment this accurately describes the situation in this case. I do not accept Mr. Small's attempts to distinguish it. I agree with Mr. Wolfe's submission that the local authority was, or should have been, aware that there was a risk that the tribunal might decide that A did not require ABA and that X School was not suitable. As discussed above, the tribunal gave a number of reasons as to why it found that X School was not suitable. Only one of these was the severity of A's learning difficulties. Another was that X School did not have specialist ASD training, a factor relied upon by the father before the tribunal and recorded in paragraph 23 of its Decision. If the local authority wanted to offer a fall-back position it could and should have been done at the time. There was no error of law.

31. The fifth ground of appeal is that the tribunal failed properly to consider the local authority's objections to Y School, and failed to provide reasons why those concerns were not accepted.

32. Mr. Small submits that the local authority had challenged the suitability of Y School to be able to meet A's needs, raising concerns in respect of the peer group and the amount of time that he would spend with unqualified teaching staff. He goes on to submit that the tribunal does not appear to have dealt with the issues, and made no findings on them.

33. In response, Mr Wolfe points out that the tribunal did identify the local authority's concerns, at paragraph 22 of its Decision. Further, the tribunal had set out (at paragraph 18) the evidence before it on these issues, and had set out and explained its conclusions at paragraph 34. I agree. This ground of appeal has no merit.

Conclusion

34. For the reasons set out above the decision of the tribunal did not involve the making of a material error of law, and I dismiss the local authority's appeal.

**A. Rowley, Judge of the Upper Tribunal**

**(Signed on the original)**

**Dated:** 4 January 2017