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Special Educational Needs: Principles & Practice conference

Thursday 05 June 2025

Your speakers for today

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Carine Patry KC
(Morning Chair)

Sections B and F, Needs, Provision and Specificity

Galina Ward KC

Responsibilities for 18-25 year olds

Leon Glenister
(Afternoon Chair)

Katharine Elliot

The wisdom to know the difference: Health and social care provision in SEN hearings

Harriet Wakeman

Education otherwise than at school or college

Siân McGibbon

Judicial Review: Challenges in special educational needs

Georgina Fenton

Dealing with Discrimination

Joe Thomas

The Law on Placement: request, mainstream provisions, and other issues

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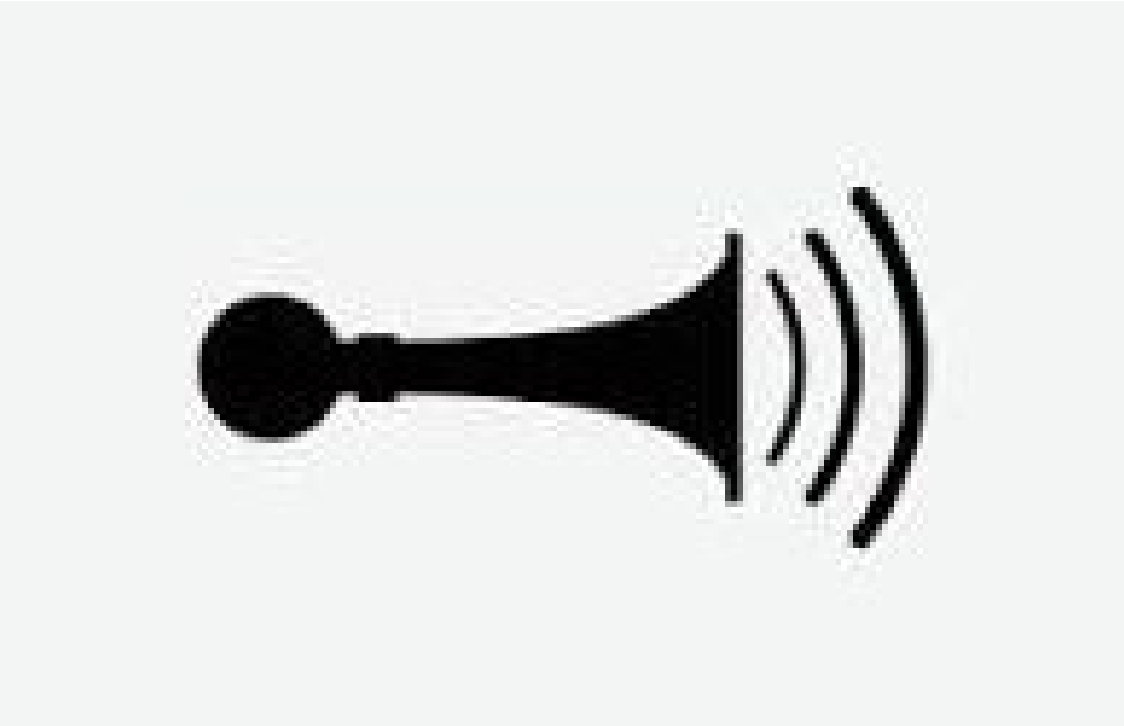
Sections B and F, Needs, Provision and Specificity

Carine Patry KC (Morning Chair)

New Important Case Alert!

This case has nothing to do with sections B and F, but if you ever appeal in the FTT (HESC) on SEN matters, then you need to know about it.



It is **RP v Barnsley** [2025] UKUT 046 (AAC) and is about BUNDLES. UTJ Jacobs set aside the decision of the FTT on the basis of procedural irregularity because the mother in the case had been provided with bundles with different pagination from the Tribunal and the LA. Minor issues – not an issue. Beware!

Section B: A General Overview

- Section B of an EHCP must specify all of the child or young person's identified SEN [Code 9.69]
- SEN may also include needs which require health and/or social care provision that is treated as SEP because it educates or trains a young person.
- Generally, SEN are thought of in the following four broad areas of need, and corresponding support:

  - Communication and Interaction
  - Cognition and Learning
  - Social, Emotional and Mental Health
  - Sensory/Physical Needs

Section F: A General Overview

Section F contains the special educational provision (SEP) which corresponds to the SEN in section B.

Section 21(1) of the CFA 2014 defines SEP as 'educational or training provision that is additional to, or different from, that made generally for others of the same age' in mainstream schools/nurseries/post 16 institutions.

The definition of SEP is different to that of health provision (section 21(3)) and social care provision (section 21(4)) unless it educates or trains.

Cases on definition of SEP: Bromley v SEN Tribunal [1999] ELR 260 and DC & DC v Hertfordshire [2016] UKUT 379 (AAC): "grey area" is always a question of fact.

What Must Section F Contain?

As set out previously, section F will need to specify any SEP that differs from provision ordinarily to be expected in a mainstream school.

Paragraph 9.69 of the SEN Code sets out what *must* be included:

- Provision MUST be detailed and specific and should normally be quantified (will come back)

- Provision MUST be specified for each and every need in section B/relate to outcomes (come back)

- Where health or social care provision educates or trains, it must be included in section F

…Continued.

- The Plan should specify any appropriate facilities and equipment, staffing arrangements and curriculum

- It should include any appropriate modifications to the National Curriculum, if relevant

- Where residential accommodation is appropriate, that fact.

What must Section F NOT contain?

Section F of an EHCP must NOT:

- Purport to place a duty on parents to make special educational provision (in either sections F, or I), see A v Cambridgeshire [2002] EWHC 2391

- Purport to place obligations on other public authorities, see JD v South Tyneside [2016] UKUT 9, for example a health authority.

Section F Specificity - Quantification

Provision in section F must be detailed and specific so that there should be no room for doubt as to what has been decided in any particular case, see for example JD v South Tyneside [2016] UKUT 9 (duty on LA and the FTT)

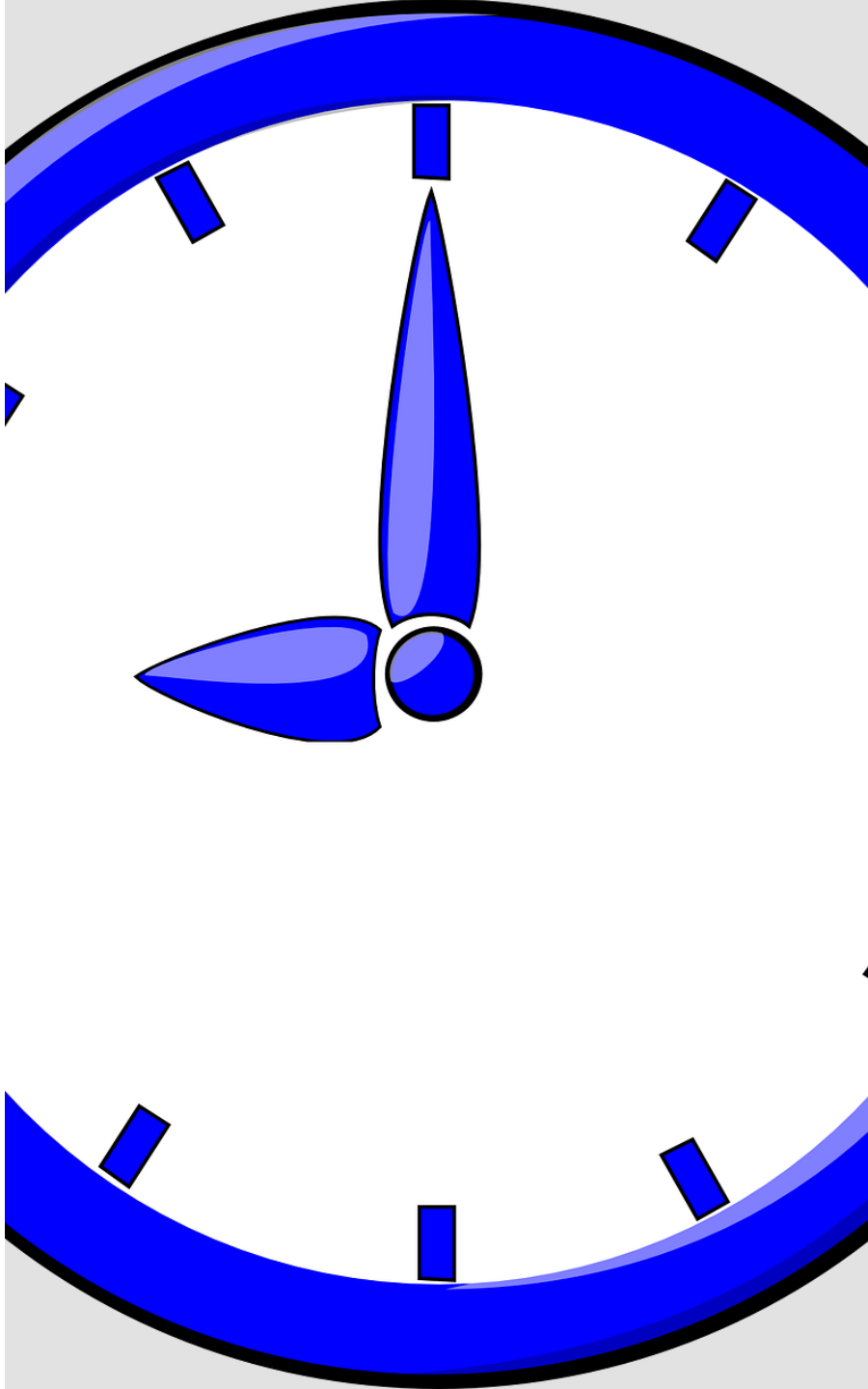
Further, the local authority should not delegate its duty to specify the provision to any other person (for example, a therapist or member of teaching staff) however well qualified, see E v Newham [2003] ELR 286 9CA).

Quantification Continued…

SEN Regs 2014 reg 12(f) requires section F to set out “the special education provision required by the child or young person”. The provision should *normally* be quantified: i.e. type, hours and frequency of support and level of expertise [Code 9.69].

The courts have considered when and to what extent this principle applies:

- It does not extend to requiring the FTT to specify every single detail of the SEP to be made, see E v Newham [2003] ELR 286 at 64. The decision as to how much detail is one for the Tribunal, very much on the facts of each case. Sometimes, specifying minimum hours with a provision for amendment following review is fine
- Quantification will not be required if it is not in the best interests of the child; R (IPSEA) v SSE [2003] ELR 393
- Words like “as appropriate”, “as required”, “regular”, “periodic”, “subject to review” are all likely to be indicative of illegality.



Quantification Contined…

What does that mean?

- It was argued that hours had to be specified unless an exception applied, but the CA said that was too onerous.
- Much would depend on the facts of the case, including the fluctuating needs of the child, and for example exactly the same numerical input but in a different peer group or from different people may be actively damaging
- Rule of thumb? Specify as much as possible unless facts dictate otherwise. More need for specificity in mainstream (more to come). More specifics to follow…

Recent Case Law

In limited and specific circumstances, the need for specificity must be balanced against the need for flexibility and pragmatism. In London Borough of Redbridge v HO (SEN) [2020] UKUT 323 (AAC) at16: “The devil resides in the level of detail that the plan must contain. The EHCP is a legal document of an unusual type. Insofar as the FTT has made an order, the order must have sufficient certainty to be enforced in case of dispute. On the other hand, the plan is a living document for a developing pupil. The tension is between the certainty the parties, in particular the LA, need to comply with or enforce their respective duties and rights and the need for sufficient flexibility for the plan to remain relevant until the next review of the plan takes place. The child [will] develop or deteriorate considerably during that period.” In this case provision that the child “required extracurricular support at home for one hour a week from a trusted and familiar psychologist” was unlawful as it (i) was too vague in respect of content; (ii) impermissibly retrofitted to require, in practice, only one psychologist (a reminder that provision cannot be tied to a named provider or individual, see further DM v Cornwall CC [2022] UKUT 230 (AAC) at 27); (iii) contained selection criteria entirely subjective to the pupil; which (iv) may make compliance by the LA practical impossibility; and (v) was in any event unjustified on the evidence or based on insufficient reasons.

How to Quantify

Staff qualifications/experience: e.g. “teacher who is experienced in working with pupils who have significant learning difficulties and autism/communication disorders”: R v Wandsworth ex parte M [1998] ELR 424

Where small group work is involved, the size of the group, the length and frequency of the sessions: L v Clarke and Somerset [1998] ELR 129.

The need for and amount of 1:1 work: L v Clarke and Somerset [1998] ELR 129.

Input from other professionals, such as sessions of speech therapy: R v Harrow ex parte M [1997] FCR 761.

Key Guidance on Specificity

For a useful summary on the law on specificity and quantification of SEP, see Worcestershire County Council v SE [2020] UKUT 217 (AAC) at 74.

UTJ West set out 11 principles summarising the case law above. The UT gave further guidance, in summary: (i) a primary consideration in relation to specificity are the statutory duties of the LA, (ii) the EHCP is a free standing legal document which parties are entitled to rely upon if a question arises about provision being made, (iii) where there is a need for flexibility it should not be an excuse for lack of specificity where detail could reasonably have been provided, (iv) the nature of the provision will often point towards the necessary level of detail, (v) vague words like “support”, “input”, “interventions” and “opportunities” are unlikely to be sufficient, (vi) if a SEN pupil is to attend a mainstream school the FTT is likely to need more detail than if the pupil were at a special school, (vii) the FTT can be pragmatic if the evidence does not enable the FTT to set out the detail but it would be inappropriate to adjourn, (viii) the FTT can use its expertise as a specialist panel.

Section F Specificity: Corresponding Needs

A child or young person has SEN if he or she has a learning difficulty or disability which calls for SEP to be made for him or her. Accordingly, if a need is identified in section B, corresponding provision must be made in section F: “Provision must be specified for each and every need specified in Section B”: Code at 9.69(F).

EOTAS/EOTIS: Specificity

As you will know, EOTIS should be in section F of an EHCP and not section I.

DM v Cornwall County Council [2022] UKUT 230 (AAC) is said to be first case in which the UT has ever considered specificity in the context of EOTIS.

The UT approved Worcestershire as a comprehensive review of all the relevant case law. It agreed that as a matter of principle that the fact that a child is being educated outside of school *may* mean there is an even greater need for specificity, but that it depends on the facts of each case.

Concluding Thoughts

BE AS SPECIFIC AS POSSIBLE

Less need if in specialist school but “even for children in specialist provision, the requirement of specificity cannot be abandoned where detail could reasonably be provided”: BM and BM v Oxfordshire CC (SEN) [2018] UKUT 35 (AAC) at 5.

More need if EOTIS, but depends on the facts.

General rule of thumb: be as specific as possible unless detail cannot reasonably be provided given the nature of the needs set out in section B.

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The Law on Placement: request, mainstream provisions, and other issues

Joe Thomas (with assistance from Edward Arash Abedian)

What we will cover

- Section I – general points
- Dealing with requests (maintained/academy, independent, EOTAS)
- Practical points for FTT hearings
- Where no request made
- Key takeaways

Section I – general points

- Section F (SEP) is a prior consideration to Section I (Placement): *R v Kingston upon Thames and Hunter* [1997] ELR 223, 233C
- Must set out the ”type” of school: SEND Regs 2014, reg.12(1)(i)
- Decision *must* be based on:
  - proper evidence – prospectus, statement from school, Ofsted report
  - particular CYP and their particular needs
- Placements without all the required facilities not necessarily precluded: *Lawrence v LB Southwark* [2005] EWHC 1210, [14]
- Consultation required: CFA 2014, s.39(2) and 40(3)

Request: maintained school/academy

- CFA 2014, s.38(2) and (3)

"(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)"

Request: maintained school/academy

- CFA 2014, s.39
- Following request, LA required to consult on placement and must secure it *unless* s.39(4) applies: s.39(2) and (3)

"(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 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"

Naming a school

The LA must then finalise the EHCP. When they do so, they MUST name the parental preference unless…

(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.

Unsuitable

Full test is important:

Unsuitable for the age, ability, aptitude or special educational needs

In practice, this means even if a school did have space they could not provide the specified provision.

IF you want to argue that the school is unsuitable you must specify exactly why without reference to the impact on other children (that comes later).

You must explain why you cannot teach the pupil because of either their age, ability and aptitude or special educational needs.

You may be able to argue that the school is unsuitable because even though the school could still teach them, they will be miserable. For example, a school may be able to teach a deaf pupil by hiring a translator but they will not have a suitable peer group to socialise with outside of lesson.

This needs to be assessed after considering whether reasonable adjustments could be made.

Evidence to deal with common challenges

"The school cannot meet need"

Again, a very challenging argument to make. The tribunal will assume that any additional provision can be funded and arranged.

Need to explain in detail why even with funding and other services school is still unsuitable for that special educational need.

Incompatible with the efficient education of others

What does incompatible with efficient education mean:

Code of practice describes efficient education as ‘suitable education’.

“Efficient education" indicates a standard, not the very highest desirable standard or the very basic minimum, but something in between.

It was not enough for the purposes of paragraph 3(3)(b) that the quality of education provided for other children would be reduced from the very highest standard to something a little lower. But, on the other hand, he submitted, it did not have to be shown that no meaningful education at all would be provided for some other child.

Although "incompatible" is indeed a very strong word, indicating that there is no way of avoiding the admission of the single child involved reducing the quality of education provided to some other children with whom he would be educated below that standard, its force must be applied in the context of that standard.

[NA v LB Barnet (SEN) [2010] UKUT 180 (AAC)]

Citron Test

In *OO and BO v London Borough Bexley* [2023] UKUT 223 (AAC), Upper Tribunal Judge Citron explained how the test should be approached:

which other children's education would be affected by Q's attending Woodside Academy?

was the standard of those other children's education currently at, or above, the "efficient education" standard?

what effect would Q's attendance have on the standard of those other children's education?

if the effect was to reduce the standard below that of "efficient education", was that unavoidable or, for example, could adjustments reasonably be made to avoid that effect?

Advice when resisting placement and appearing at tribunal

Think very carefully before stating that you resist a placement.

Can the make reasonable adjustments to meet the needs of the child?

Recall the positive obligations you are under as a school under the equality act.

If you are certain that the impact of the pupil attending is unacceptable or you're unable to make the provision, do not say any of the following:

- **We're full / We don't have room**
- **We can't fund it**
- **The pupil has too many needs**
- You must be precise as to why you're unsuitable and why you're unsuitable after making reasonable adjustments.
- If the impact is unacceptable, you must apply the citron test methodically.

Evidence to deal with common challenges

"We're full"

You must be precise as to what you mean by full. Why cannot you operate within your health and safety regulations? Could you perform a fire drill safely? Could you access a pupil who is dysregulated safely?

FLOORPLANS – The tribunal simply won't believe you unless you can demonstrate the size of the classrooms. Photographs help, but floorplans are the strongest evidence.

Converting other classrooms – This is often used by tribunals to justify admission. You will need to explain why other classrooms (such as science labs, libraries, cooking rooms) are essential to the efficient education of other children.

Evidence to deal with common challenges

"The other children will be impacted"

Be precise: which children? (present anonymised list of the children and their presentations). Link the pupil's seeking admission's presentation with the needs of the present pupil and explain why that child's presentation prevents efficient education.

The quality of the education will be compromised: yes, but why will it fall below the standard of efficient education. The tribunal will just say use the money to hire more staff. You'll need to explain why the education will be compromised even if more staff are hired.

"The straw that will break the camel's back" – This is the hardest argument to make, particularly when you're not arguing about the physical constraints of a classroom. Be precise and say that the school is teetering of the edge of providing efficient education and that one more child would be incompatible with that provision. Very hard to make when parents can point to other children with the same presentation or a good Ofsted report.

Incompatible with the use of resources

What does incompatible with efficient use of resources mean?

“The Noddy Guide” -- The LA/FTT must balance the statutory weight given to the parental/young person preference against the extra cost in deciding whether the extra cost is “inefficient”, and even if it is found to be “inefficient” the FTT must still then, as a second stage, balance the extra cost against any extra benefit it is claimed to bring for the child/young person (i.e. an “inefficient use”)

Evidence to deal with common challenges

"It costs more"

Not going to work.

"It costs too much!"

First, make sure you are proposing to name an appropriate placement! The alternative provision does not have to provide Rolls-Royce education, but it must be appropriate provision

Second, how much? It must be a significant amount such that it gives rise to a prima facie case it is inefficient.

Third, you must argue successfully that the educational benefit of the preferred placement is not justified by the cost bearing in mind the LA only has to provide appropriate provision. (i.e. we're paying £30k for marginal benefits)

Strong Alternative

Whilst strictly not relevant to the statutory tests; tribunals will feel much more comfortable turning down a parental placement if there is a strong placement waiting as an alternative.

Request: independent placement

- Not within s.38(2)
- EA 1996, s.9 applies:

"(9) In exercising or performing all their respective powers and duties under the Education Acts … local authorities shall have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure"

- LA must take into account the parental request
- No obligation to give effect to parental preference: *C v Buckinghamshire* [1999] ELR 179

Request: independent placement

- 3 stages:

(1) Are both schools appropriate?

(2) If so, which is the parental preference?

(3) Would naming parental preference be incompatible with (a) the provision of efficient instruction and training or (b) avoidance of unreasonable public expenditure

IM v LB Croydon [2010] UKUT 205 (AAC), [9]

[presently seeking permission from CofA, on whether Croydon three part test is sufficient to deal with situation when only one school is appropriate (i.e. not suitable) and should you revisit the test of appropriateness when all other alternatives are too costly or full]

Request: independent placement

- *"Provision of efficient instruction and training"* – impact on education of other children, not just the CYP in question
- *"Public expenditure"* – impact on public purse generally: e.g. social services, respite care, (positive) financial impact on another LA
- Only marginal (i.e. additional) costs are relevant: *Oxfordshire v GB* [2001] EWCA 1358, [16]
- All benefits (e.g. health, social etc.) and not just educational must be taken into account: *LB Croydon v K-A (SEN)* [2022] UKUT 135 (AAC), [51]

Request: independent placement

- No hard rules on how much extra expenditure counts as *"unreasonable"*
- Even if FTT finds school proposed by LA is not suitable, does not automatically mean parental preference should be named if extra cost is due to overprovision
- FTT can specify "type" or consider adjourning
- LA may be given opportunity to suggest less expensive alternatives: *Rhondda Cynon Taff County Borough Council v SENDIST* [2001] EWHC Admin 823, [14]
- Caution – LA expected to bring its full case forward to the FTT, and prepare for/conduct its case with greater care if considerable amount of money involved: see *LB Bromley v SENT* [1999] ELR 260 and *H&F v Pivcevic & SENDIST* [2006] EWHC 1709 (Admin), [62]

No request

- Specific rules apply → CFA 2014, s.40

"(1) This section applies where no request is made to a LA 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."*

- Also applies where request falls away because it is too expensive or too impactful on others
- Where no request made → LA not limited to s.40 process of naming placement listed in s.38(3)

Key takeaways

- Section 38(2) maintained school/academy → duty to name parental preference unless exception applies
- EA 1996, s.9 (e.g. independent placement) → no duty to name parental preference (but make sure you have a credible alternative).
- Extra cost not an automatic barrier – no threshold, case specific, holistic assessment
- Decision must be based on proper (up to date) evidence and following consultation
- **LA's choice must be suitable and capable of meeting need. Prepare a fallback**

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Education otherwise than at school or college

Harriet Wakeman

Introduction

- What is EOTAS? How is it different from Elective Home Education?
- Key provision: s61 of the Children and Families Act 2014
- Key case: *NN v Cheshire East Council* [2021] UKUT 220

Overview:

1. **What SEP is necessary?**
2. **Is it inappropriate to provide that provision in a school or college?**
3. **Duty to consult**
4. **Is there a duty or discretion to provide EOTAS?**
5. **Where does EOTAS provision go in the EHC Plan?**
6. **Contents of Section I**

Children and Families Act 2014

S.61 Special educational provision otherwise than in schools, post-16 institutions etc

(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.

Q1: What SEP is necessary?

- Applies to SEP that the LA has decided is necessary for a child or young person
- Therefore, EOTAS question arises AFTER the question of what SEP is necessary to meet the child or young person's SEN: *S v Bracknell Forest* [1999] ELR 51

Q2: inappropriateness: “a school” or “any school”

- Means “any” school or post 16 institution, not just that it is inappropriate for the LA proposed placement to make the provision: *Derbyshire CC v EM and DM* [2019] UKUT 240 (AAC).
- This means factors will usually centre on the child or young person (e.g. anxiety) or the nature of the special educational provision (e.g. specific equipment).

Q2: inappropriateness: “a school” or “any school”

The question is “*whether, in general, it would be inappropriate for the provision required…to be made in a school*”: AA & BB v Bristol City Council [2023] UKUT 52 (AAC) at [48].

LA / Tribunal is not just asking if school “can” provide the provision, but whether it “would not be suitable” or “would not be proper”: *TM v Hounslow* [2009] EWCA Civ 859 paragraph 26, *NN* paragraph 32

This includes evaluation of circumstances of case including: the child’s background and medical history, the particular educational needs of the child, facilities that can be provided by a school and otherwise than at a school, the comparative costs of alternative provisions, the child’s reaction to the provisions, the parents’ wishes and any other particular circumstances that might apply.

Parental wishes also relevant by section 9 EA 1996, but not determinative.

Q2: inappropriateness: “a school” or “any school”

Examples:

- **A child’s “school related anxiety“ may lead for it to be “inappropriate” for provision to be made at a school: *M v Hertfordshire CC* [2019] UKUT 37**
- **A child’s “firm views”, in the context of “extreme controlling behaviour” should have been taken into account: *NN*.**

Overall, wide discretion for LA / Tribunal

Q2: inappropriateness: part of SEP being EOTAS

It is possible for a specific part of SEP to be provided out of school, e.g. a particular therapy: *NN* paragraph 30.

Q3: Has there been consultation?

- LA must consult with the child's parents or young person on EOTAS.
- Where there is a duty to consult under s61(3), the general legal requirements applicable to all consultations will apply:

(1) The consultation must be undertaken when the proposals are still at a formative stage,

(2) The LA must give sufficient reasons for the proposal of EOTAS to enable a response,

(3) Adequate time must be given for response and

(4) The response to the consultation must be taken into account in the decision: *R (Moseley) v LB Haringey* [2014] UKSC 56.

Q4: Discretion or duty to provide EOTAS?

- S.61(1): The LA “may arrange” for any provision to be provided otherwise than at a school/institution
- However: effectively a duty with reference to s.42 CFA 2014.

Q5: Where does EOTAS provision go in the EHCP?

- Short answer: Section F: *NN* para 47(i)
- If there is EOTIS provision, does that mean that the provision in Section F needs to be more specific? See: *DM v Cornwall CC* [2022] UKUT 230 (AAC):

"In some very general sense that educational provision which is bounded by a school building and the provision and rules that may apply to all pupils in that school may to an extent be assumed and not need to be stated whereas that provision may need to appear more explicitly in a case where the EHCP concerns a child being educated at home and otherwise than in school, but "the degree of specificity that is required for an individual child in their EHCP will always have to depend on the facts of that child's case".

Q6: What goes in Section I?

~~"EOTAS", "Bespoke Provision", "School + Bespoke Provision", "Home"~~

Not attending any school/placement at all	Leave Section I blank
Attending a school/placement at least some of the time	Name of the School/Placement in Section I
Not attending any school/placement to begin with but it is anticipated that there will be a long transition into school	See LC and RC v Hampshire County Council [2023] UKUT 281 (AAC)

Q6: What goes in Section I?

- A “school” is an educational institution outside FE and HE sector that provides primary and/or secondary education: s4 EA 1996.

- Whether something is a school is a question of fact for the Tribunal: *TB v Essex CC (SEN)* [2013] UKUT 0534.

- A “post 16 institution” is an institution which provides education or training for those over compulsory school age but is not a school or HE institution: CFA 2014 s83(2).

Some misc. points to finish

- Can parents agree to provide some EOTAS? See also LB Camden v KT [2023] UKUT 225 (AAC).
- If an EOTAS package includes elements of SEP at different locations, can the LA require the parents to transport them between locations?
- Is education from a virtual education provider EOTAS?

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The wisdom to know the difference:

Health and social care provision in SEN hearings

Katharine Elliot

Topics

- Relevance of health and social care in SEN cases
- To ‘SEP’ or not to ‘SEP’
- Impact on First-tier Tribunal (‘FtT’) appeals
- Assessment requirements
- Questions of funding

Q: Why do I need to know about health and social care in an education case?

Answer:

- S.21(5) Children and Families Act 2014 (‘CFA 2014’)
- If it educates or trains it can be deemed special educational provision and must be recorded as such in an Education Health and Care Plan (‘EHCP’) (s.37 CFA 2014).
- Otherwise included as separate provision in Sections G, H1 and H2 (reg.12, SEND Regs 2014).
- Determines obligations of the local authority (‘LA’) and powers of the FtT on appeal.
- Also s.25, CFA 2014 and Code of Practice emphasis on integration.

Q: What is the difference between health and social care provision and special educational provision ('SEP')? (1)

Answer:

- Education or training in wider context of educational provision (e.g., SALT, independent living skills etc…) but educational benefit is not enough in and of itself.
- A question to be determined on the facts of the case with reference to case law guidance, and it's not always clear!
- E.g., *LB Bromley v SENT* [1999] ELR 260, *A v Herts CC* [2006] EWHC 3428, *DC v Herts CC* [2016] UKUT 379 (AAC), *DC v Herts CC* [2016] UKUT 379 (AAC), *East Sussex CC v KS* [2017] UKUT 273 (AAC), *East Sussex CC v JC* [2018] UKUT 81 (AAC), *EM v East Sussex* [2022] UKUT 193 (AAC), *Westminster CC v FtT* [2023] UKUT 177 (AAC).

Q: What difference does it make in an FtT appeal?

Answer:

- Determines the FtT's powers on appeal.
- Not a 'National Trial' case? Can only discern between deemed special educational provision (s.21(5) CFA 2014) and 'pure' health and social care (i.e., to say where it should be in EHCP). Cannot add, amend or remove: *East Sussex CC v TW* [2016] UKUT 528 (AAC), *KS*, *R (LS) v Merton BC* [2024] EWHC 584 (Admin).
- A 'National Trial' case (SEND Regs 2017)? Can do the above plus make recommendations as to Sections C, D, G, H1 and H2 (inclusion and amendment) to which LA/NHS body have to respond within 5 weeks: *VS v Hampshire CC* [2021] UKUT 187 (AAC).

Q: What must an LA do to assess health and social care needs?

Answer:

- EHCP assessment under s.36 CFA 2014.
- Minimum 12-month EHCP review under s.44 CFA 2014 and reg.24 2014 Regs.
- Discretionary assessment under s.44 CFA 2014.
- Separate from any social care obligations to assess!

Q: What about the overlap with health and social care funding?

Answer:

- LA has duty to secure and fund SEP, including deemed SEP (s.42 CFA 2014).
- Cannot be left to relevant social services or NHS body to secure / fund SEP although they can be used to secure / fund provision if they agree: *N v North Tyneside BC* [2010] EWCA Civ 135; s.26 CFA 2014.
- See also *JD v South Tyneside* [2016] UKUT 9 (AAC) on not leaving provision formulation to them either!
- LA not obliged to fund health care provision. It is the responsibility of the relevant NHS body: *KS*; s.42 CFA 2014.
- LA may be responsible for funding educational placement via adult social care plan under the Care Act 2014 if does not maintain EHCP separately: *CP v NE Lincolnshire* [2019] EWCA Civ 1614.

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Responsibilities for 18-25 year olds

Galina Ward KC

Issues arising for 18-25 year olds with EHCPs

- Entitlement to EHCP
- Ceasing to maintain
- Adult social care
- Appeals

Key documents: Guidance

- DfE Guidance – SEND: 19- to 25-year-olds' entitlement to EHC plans

SEND: 19- to 25-year-olds' entitlement to EHC plans - GOV.UK (www.gov.uk)

1. Managing 19- to 25-year-olds' EHC plans
2. Education, training and benefits
3. Funding
4. Considering health and social care needs
5. Including young people in decision-making

Key documents: Code of Practice

- *Special educational needs and disability code of practice: 0 to 25 years*

SEND_Code_of_Practice_January_2015.pdf

- 8.49-8.78: local offer, funding, transition to adult health and social care services
- During transition planning process, the local authority must continue to maintain the EHC plan for as long as the young person needs it and remains in education or training
- 9.150-9.156: turning 19, ceasing to maintain, reviewing and re-assessing and new requests for assessment
- 9.199-9.210: ceasing to maintain – note that if 18 or over and in receipt of adult services, they should be involved in and made aware of decision to cease to maintain, and care plan will remain in place when other elements of EHCP cease

Entitlement to EHCP

- CFA section 36(3): it is necessary for special educational provision to be made for the child or young person in accordance with an EHC plan?
- From the Guidance:

" The majority of young people with EHC plans complete further education with their peers by age 19… However, we recognise that some young people with SEND need longer to complete and consolidate their education and training."

- The right to request an assessment under section 36 applies to young people aged 19-25 in same way as to under 19s.

Ceasing to maintain

- A local authority must not cease an EHC plan simply because a young person is aged 19 or over.
- When determining whether a young person aged 18 or over no longer requires a plan, a local authority must consider whether the educational or training outcomes specified in the plan have been achieved (Guidance and section 45(3) CFA).
- Where a young person aged 18 or over leaves education or training before the end of their course, the local authority must not end the EHC plan without a review. The review should determine whether the young person wishes to return to education or training, either at the educational institution specified in the EHC plan or somewhere else.

Ceasing to maintain #2

- CFA section 45(2): The circumstances in which it is no longer necessary for an EHC plan to be maintained for a child or young person include where the child or young person no longer require the special educational provision specified in the plan.
- *B & M v Cheshire East Council* [2018] UKUT 232 (AAC) at [84]: "*It does not follow that, where outcomes have been achieved, it is no longer necessary to maintain the Plan*".
- "Affinity" between test for deciding whether to cease to maintain and whether to prepare and maintain EHCP in the first place: "*In deciding whether to cease to maintain an EHC plan, a local authority should ask itself whether a young person would meet the test for preparing and maintaining an EHC plan in the first instance.*"

Adult services

Each local authority's local offer must set out:

- The relationship between the Children and Families Act 2014 and the Care Act 2014
- How the requirement of both acts are being implemented locally

The statutory adult care and support plan should form the 'care' element of the young person's EHC plan

ICBs should use the *National framework for NHS continuing healthcare* to determine what ongoing care services young people should receive

Rights of appeal

- CFA section 51: the child's parent or young person may appeal
- This means the right of appeal passes to young person once they are no longer of compulsory school age
- If they lack capacity, parent will be "alternative person" for purposes of statutory scheme, and entitled to bring appeal, if there is no deputy/donee/attorney
- *MM (as alternative person for C) v London Borough of Greenwich* [2024] UKUT 179 (AAC)

Dealing with discrimination

Georgina Fenton

Topics we will cover

- Discrimination arising from disability (s.15 EA 2010)
- Indirect discrimination (s.19 EA 2010)
- Failure to make reasonable adjustments (ss.20 and 21 EA 2010)
- Relationship between claims under EA 2010 and claims under CFA 2014

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Discrimination arising from disability (s.15 EA 2010)

Discrimination arising from disability (s.15 EA 2010)

(1) A person (A) discriminates against a disabled person (B) if—

a) A treats B unfavourably because of something arising in consequence of B's disability, and

b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

Discrimination arising from disability (s.15 EA 2010)

In these claims therefore, FTT will consider:

a) Whether the disabled person has been treated unfavourably;

b) The reason for the unfavourable treatment;

c) Whether that reason is something arising in consequence of the disabled person's disability;

d) Whether the school knew, or could reasonably have been expected to know, that the person had the disability relied on;

e) If so, whether the school has shown that the treatment is a proportionate means of achieving a legitimate aim.

Unfavourable treatment

- *SS v Proprietor of an Independent School* [2024] UKUT 29 (AAC)
  - Approach in *Williams v The Trustees of Swansea University Pension and Assurance Scheme* [2018] UKSC 65 (EAT ([2015] ICR 1197; [2017] EWCA Civ 1008) should be followed; not *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337.
  - Objective test determined by Tribunal taking a "*broad view*" and considering whether the claimant is "*not in as good a position as others generally would be*" [42].
  - "*Relatively low threshold*" [46].
  - Does not require comparison with an identifiable comparator [41].
  - Question of fact for Tribunal only susceptible to appeal if conclusion perverse [47].
  - Treatment which is advantageous cannot be "unfavorable" merely because it could have been more advantageous [38].

Reason for unfavourable treatment

- *Pnaiser v NHS England and Coventry City Council* [2016] IRLR 170
  - Subjective stage of analysis.
  - Focus on the reason in the mind of the person responsible for the alleged unfavourable treatment.
  - Can be conscious or unconscious reason.
  - May be more than one reason.
  - Need not be the main or sole reason but must have "*at least a significant (or more than trivial) influence on the unfavourable treatment and so amount to an effective reason for it.*" [31(b)]

Whether that reason is something arising in consequence of the disabled person's disability

- *Pnaiser v NHS England and Coventry City Council* [2016] IRLR 170
  - Objective question – not focused on mind of alleged discriminator or concerned with reasons or motive for behavior leading to unfavoruable (*Mrs and Mrs B v Proprietor of St Dominic's Grammar School* [2025] UKUT 048 (AAC) at [40]).
  - Requires causal link but could be a range of these.
  - More than one relevant consequence of disability may need to be considered.
  - More links in the causal chain, harder to establish requisite connection.
  - "*Question of fact assessed robustly in each case*" [31(d)].

Whether the school knew, or could reasonably have been expected to know, that the person had the disability relied on

- Usually least controversial part of test
- Focused on knowledge of *disability*
- Not relevant whether the school had knowledge that the behaviour/ action that led to the unfavourable treatment was in consequence of disability (*Pnaiser* [31(h)]).

Was the treatment a proportionate means of achieving a legitimate aim?

- FTT must ask itself the following questions:
  - What objective did the school pursue and is it sufficiently important?
  - Are the measures taken rationally connected to the objective?
  - Are they "*no more than necessary*" to achieve that objective?
  - When balancing all the factors together, is the impact on the child/ person disproportionate to the likely benefits?
- Treatment cannot be justified under s 15 if there has been a (relevant) prior failure to comply with the duty to make reasonable adjustments (SS at [83], citing Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265 at [26]).

Burden of proof

- S.136 EA 2010:

  "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

  (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

- Creates a shifting burden of proof from C to R

  - Applies to both question of reason for unfavourable treatment and whether reason is objectively causally connected to C's disability (*South Warwickshire NHS Foundation Trust v Lee and ors* (UKEAT/0287/17/DA))

  - When burden shifts, R must show treatment had "*nothing whatsoever*" to do with C's disability (*B v St Dominic's Grammar School* [2025] UKUT 048 (AAC) at [30], citing *South Warwickshire*)

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Indirect discrimination (s.19 EA 2010)

Indirect discrimination (s.19 EA 2010)

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice ("PCP") which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a PCP is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

Indirect discrimination (s.19 EA 2010)

- Typically raises questions of wider application than ss.15 or 20/21.
- Focus on group of people who share the characteristic and the group disadvantage - means proportionality question likely to be answered by ref to wide "*macro*" considerations than effect on specific individual (*University of Bristol v Abrahart* [2024] EWHC 299 (KB) at [255])
- If win under s.19, likely also to win under ss.15 and 20/21 but converse not true so s.19 less often pursued (*Abrahart* at [256]*).*
- *"Particular disadvantage" = "relative"* disadvantage
  - Does not connote a disadvantage which is "*serious, obvious and particularly significant*" (*R. (on the application of TTT) v Michaela Community Schools Trust* [2024] EWHC 843 (Admin) at [220])
  - Not necessary to show all members of protected group are disadvantaged.

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Failure to make reasonable adjustments (ss.20 and 21 EA 2010)

S.20 – Duty to make reasonable adjustments

- Where a PCP of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, A must take reasonable steps to avoid the disadvantage (s.20(3)) ("*the first requirement*").
- Where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, A must take reasonable steps to provide the auxiliary aid (s.20(5)) ("*the third requirement*").
- A cannot charge for the cost of complying with the duty (s.20(7)).
- Where a duty is imposed ss.21, 22 and the applicable schedule apply (s.20(1))
- Applicable schedule in the case of schools/ education providers is Schedule 13 (s.20(13)).

s.21 – Failure to make reasonable adjustments

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

Other relevant provisions

- Duty to make reasonable adjustments applies to the RB of a school (s.85(6)).
- PCP can be applied "*by or on behalf of*" the RB i.e. can be applied by Headteacher of school (Schedule 13, para 2(3)(a)).
- "*Substantial*" disadvantage means "*more than minor or trivial*" (s.212(1)). Test for substantial disadvantage = whether the PCP (or absence of an auxiliary aid) "*bites harder*" on the disabled, than it does on those who are not disabled. (*SS v Proprietor of an Independent School* [2024] UKUT 29 (AAC) at [67]-[69]).
- Reference to "*disabled person*" (when dealing with PCP or auxiliary aid claim) means:
  - "*disabled persons generally*" when dealing with decisions about who is offered admission as a pupil, and
  - "*disabled pupils generally*" when dealing with decisions about provision of education or access to a benefit, facility or service (schedule 13(2)).

Key elements of claim

1. Did the RB know or could it reasonably have been expected to know that the child had the disability?
2. What is the PCP or auxiliary aid?
3. Has the PCP, or absence of an auxiliary aid, has placed the disabled person at a substantial (i.e. more than minor or trivial) disadvantage in comparison to those who are not disabled?
4. Did the RB know or could it reasonably have been expected to know that the child was likely to be placed at the disadvantage?
5. What steps could have been taken to avoid the disadvantage?
6. Was it reasonable for the RB to have to take those steps and, if so, when?
7. Did the RB fail to take those steps at the relevant time?

Key elements of claim (2)

- It is "*critical*" that there is "*clarity* […] *on each of the elements of the reasonable adjustment claim*". This means must identify and define:
  - Relevant PCP
  - The "*nature and extent of the specific disadvantage*" and
  - The "*specific reasonable adjustment sought*".

(*KTS v Governing Body of a Community Primary School* [2024] UKUT 139 (AAC) at [51]; Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265 at [44]).

Assessing reasonableness

1. Tribunal will make an "*objective assessment*" of the reasonableness of the adjustment sought (*KTS* at [31])).
2. In principle, irrelevant whether RB thinks step is reasonable or not (*KTS* at [31])).
3. The fact a particular adjustment will not wholly remove the disadvantage does not itself mean that it is not a reasonable adjustment – may be reasonable to take steps which "*reduce*" the disadvantage or have "*at least a real prospect*" of making a difference (*KTS* at [31])).
4. The fact some adjustments have already been made does not mean further or different adjustments are not required (*KTS* at [33])).
5. Not a duty to provide "*best possible education*" although may be hoped that compliance with the duty will achieve this (*KTS* at [36])).

Assessing reasonableness

EHRC Guidance on 'Reasonable Adjustments for Disabled Pupils in England' identifies relevant (not exhaustive) factors in assessment of reasonableness:

- The extent to which SEP will be provided to the disabled pupil under Part 3 CFA 2014
- The resources of the school and the availability of financial or other assistance
- The financial and other costs of making the adjustment
- The extent to which taking any particular step would be effective in overcoming the substantial disadvantage suffered by a disabled pupil
- The practicability of the adjustment
- The effect of the disability on the individual
- Health and safety requirements
- The need to maintain academic, musical, sporting and other standards
- The interests of other pupils and prospective pupils

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Relationship between claims under EA 2010 and claims under CFA 2014

Errors to avoid

Two cases recently that set out approach to be taken in EA cases where child has EHCP under CFA and/ or where a child attends an independent school:

- *SS v Proprietor of an Independent School* [2024] UKUT 29 (AAC) at [77(a)-(l)]
- *KTS v Governing Body of a Community Primary School* [2024] UKUT 139 (AAC) at [38(m)-(o)]

Errors made by FTT which led to the UT setting out extensive list of principles:

- Because the child has an EHCP and the RB's school was not named in Section I, the RB was relived of its duty to make reasonable adjustments.
- Adjustments sought are unreasonable because the school is not a special school but an independent school with a mainstream ethos.
- Because adjustment requires provision which is not specified in the child's EHCP, the claimant (not the RB or LA) is responsible for funding it.

SS and *KTS* principles (1)

a) EA 2010 contains no exception for RB to comply with s.20 duty where pupil has EHCP.

b) EA 2010 contains no exception for RB to comply with s.20 duty where RB is independent school, whatever the size/ nature of curriculum.

c) Duty applies to special school as it does to mainstream schools, even though special schools may not have non-disabled pupils; comparison in such cases is to hypothetical non-disabled pupils.

d) If parent sends child to independent school (when another school is named on EHCP and available for child), the reasonable adjustment duty still applies to the independent school.

e) The provision outlined in section F EHCP will be relevant in the consideration of what is reasonable by way of adjustments under the EA 2010 – but is only one factor, carries no special weight.

SS and *KTS* principles (2)

f) In all cases, question of considering what is reasonable in all circumstances.

g) Relevant circumstances include: the cost of the adjustments, how effective they will be, the school's resources, the reasons why the child is at the school, the nature and availability of support from a LA through an EHCP.

h) Tribunal may conclude it is reasonable for a school to make no, or limited, adjustments because they are not affordable or not likely to be effective or because the substantial disadvantage could potentially be avoided by securing LA-funded provision through an EHCP or by the child moving to the school named in the EHCP.

i) Focus is on the reality. Even if more/ better provision ought to be made for the child by the LA under the EHCP, if that is not happening, Tribunal will consider if it is reasonable for the school to put that support in place.

SS and *KTS* principles (3)

j) It is only if appropriate support is already in place in the school in question through an EHCP, so that the child is no longer under a substantial disadvantage, that the RB is relieved of its duty to make reasonable adjustments.

k) If it is found that the RB must make the reasonable adjustment, then they must fund this. If parent volunteers to pay all/ part of cost, this will be factored into the reasonableness assessment.

l) In considering costs/resources, it is for the Tribunal to assess objectively what is reasonable, though the Tribunal should give careful consideration to the school's evidence about its budget and how it allocates its resources.

m) The section 20 duty is separate and distinct from the duty under s.66 CFA 2014 (best endeavors) and s.42 CFA 2014 (implementation of EHCP). It is not a duty to achieve a particular goal/ objective/ result.

SS and *KTS* principles (4)

n) Often, provision properly specified in Section F of an EHCP will also be provision that the duty to make reasonable adjustments under EA 2010 will require a school to provide.

- Therefore, if school fails to implement teaching strategies specified in EHCP as being required, it will likely be failing in its duty under s.20.
- But this does not mean, as stated, if child has EHCP and provision in section F is being provided, there can be no claim under s.20 EA 2010 i.e. if EHCP is out-of-date.

o) Crucially, this does not mean a claim for failure to make reasonable adjustments under the EA 2010 will be an appropriate way of enforcing a failure to make the provision specified in the EHCP.

- Appeal against EHCP (s.51 CFA 2014) or JR against LA and/or school may be more appropriate, particularly the latter if joint responsibility for failure.

SS and *KTS* principles – some additional takeaways!

- School is entitled to take time to exercise discretion and professional judgment as to the steps that it takes and the adjustments that it makes for pupils (*KTS* at [56]).
- The Tribunal will need – and should be invited to – make careful findings of fact about the adjustments and provision already in place (*KTS* at [63] and [67 (c)]).
- If Tribunal finds there is evidence to show child is making "little or no progress" in an area, then unless there is also evidence to show the children is not capable of making any progress, there is likely to be a strong case that that some further adjustment is required (*KTS* at [67(b)]).
- Must only take into account reasonable adjustments made in the period of time relevant to the claim (i.e. not adjustments made after the claim commenced) (*KTS* at [67 (e)]).

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Judicial Review:

Challenges in special educational needs

Siân McGibbon

Overview of topics

(1) Challenges by schools to being named in EHCP

(2) Non-implementation of FTT social care recommendations

(3) Compliance with orders

Challenges by schools

- Key provisions – sections 33, 39 and 43 CFA 2014
- No alternative remedy to JR – section 496 EA 1996
- Consultation requirements - R (Moseley) v London Borough of Haringey [2014] UKSC 56
- R (An Academy Trust) v Medway Council [2019] EWHC 156 (Admin)
- R (Swalcliffe Park School) v Wokingham Borough Council [2023] EWHC 1451

Non-implementation of social care recommendations

- Reg 5 of the 2017 Regs – FTT's power to make recommendations in relation to social care
- Reg 7(1) of the 2017 Regs – 5 weeks for LA's response following recommendation by FTT
- Reg 7(3) of the 2017 Regs – content of LA's response
- Common law cases – adequacy of reasons
- AT and BT (by their father and litigation friend CT) v London Borough of Barnet [2019] EWHC 3404 (Admin)
- R (LS) v London Borough of Merton [2024] EWHC 584 (Admin)

Compliance with Orders

- Orders of the FTT / Upper Tribunal – no "best endeavours" defence!

"…even if the defendant is entitled to a reasonable time to implement the provision and even in the context of a pandemic, one year is not a reasonable period of time…the five week period built into the statutory scheme is to allow preparation for implementation, and the bulk of the programme at least should have been in place within that five week period": R (BA) v. Nottinghamshire County Council [2021] EWHC 1348

"*…a local authority bears the burden of proving that it is doing all it can to meet its legal duty… Unless the local authority can so prove, it is likely to find itself 'rowing against a very strong current' if it is nonetheless seeking to persuade a court that no relief should be granted in respect of a prolonged failure to comply with the duty*": R (HXN) v. Redbridge [2024] EWHC 442 (Admin)

- Orders of the High Court

"The contents of this judgment shame Cardiff City Council. Whether any further penalty is appropriate in this case is likely to depend, amongst other matters, on whether an apology is forthcoming and on the strenuousness of the efforts the Council now makes to comply with the mandatory order which remains in effect": JS v. Cardiff City Council [2022] EWHC 707 (Admin)

Resources and Compliance

How to approach resource issues and challenges with compliance…

- Before a mandatory order is granted:

"…the onus is on the authority to explain to the court why a mandatory order should not be made to ensure that it complies with its duty. In order to provide the court with reasons to justify the exercise of its discretion not to make such an order, the authority has to provide a detailed explanation of the situation *in which it finds itself and why this would make it impossible to comply with an order"*: R (Imam) v. London Borough of Croydon [2023] UKSC 45

- After a mandatory order is granted:

"…the Defendant ought to have come before the Court in time to allow the Court to consider the issue before the expiry of time to fulfil the obligation*, and the Defendant should have* explained in evidence *that compliance with the Order was proving impossible and invited the Court to rescind it and make an appropriate new Order":* R (ZOS) v. SSHD [2022] EWHC 3527 (Admin)

Resources and Compliance

And how not to approach challenges with compliance…

- Before a mandatory order is granted:

"…the Council had not sufficiently explained its situation in its evidence…[the Council witness] spoke only in generalities on the critical question of what [resources were available to meet its statutory duty]…": R (Imam) v. London Borough of Croydon [2023] UKSC 45 at [59]

" *The Council has not presented any credible plan for bringing its breach of duty to an end…There is little to suggest the Council is taking serious its statutory duty, rather than seeking effectively to delegate it to the School":* R (TXM) v. London Borough of Redbridge [2024] EWHC 443 (Admin) at [95]

- After a mandatory order is granted:

"The Council has failed to take the urgency of the situation, or the vital importance of complying with court orders, seriously. The strong impression is that that is so is powerfully reinforced by the failure to file and serve an affidavit made by the Director…it is frankly astonishing…that no senior officer of the Council has come forward to give evidence": JS v. Cardiff City Council [2022] EWHC 707 (Admin) at [92]

Thank you

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