



**THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

**UPPER TRIBUNAL CASE No: UA-2022-000328-HS
[2022] UKUT 193 (AAC)**

EAM v EAST SUSSEX COUNTY COUNCIL

Decided following an oral hearing on 11 July 2022

Representatives

Appellants	Spoke on their own behalf, relying in part on the grounds of appeal settled by Stephen Broach of counsel
The local authority	Amelia Walker of counsel

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

On appeal from the First-tier Tribunal (Health, Education and Social Care Chamber)

Reference:	EH925/19/00026
Decision date:	8 November 2021
Venue:	Online

As the decision of the First-tier Tribunal involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and the decision is RE-MADE.

The decision is: the local authority must secure that an EHC plan is prepared and maintained for the child.

REASONS FOR DECISION

A. A short history

1. The parents who are the appellants in this case have been before me in two cases raising different but related issues. Both cases arise from their concern that their daughter has electromagnetic hypersensitivity, particularly associated with wifi signals, with the result that she needs a low electro-magnetic environment for her schooling. I am going to refer to 'the child' or 'their daughter' in order to reduce the chances of her

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being identified. This case concerns her need for an Education, Health and Care Plan, which has been an issue since 2017. It has involved decisions by two local authorities, three hearings before the First-tier Tribunal, and two appeals to the Upper Tribunal.

B. A longer history

2. As far as I can tell, the parents requested an Education, Health and Care Plan for their daughter in August 2017. In July 2018, the First-tier Tribunal allowed an appeal against the local authority's refusal to secure an EHC needs assessment for the child. It directed the authority to secure an assessment. In February 2019, the authority completed the assessment, but decided that a plan was not necessary on the ground that: 'it is felt the identified needs can be met by provision which is routinely available at the educational setting through existing support mechanisms and without the need for an EHC plan.' That decision came before the First-tier Tribunal in November 2019. It was the decision of this tribunal that I set aside under reference *HS/0395/2020*. I directed a rehearing, which was held in November 2021, this time with a new local authority as respondent. I am now deciding the appeal against the decision of that tribunal.

3. If I have unravelled the history of the case correctly, it concerns an appeal to the First-tier Tribunal against a decision, following an assessment, that it was not necessary for special educational provision to be made for the child.

C. The legislation

4. These are the relevant provisions of the Children and Families Act 2014. All statutory references in this decision are to that Act unless otherwise stated.

20 When a child or young person has special educational needs

(1) A child or young person has special educational needs if he or she has a learning difficulty or disability which calls for special educational provision to be made for him or her.

(2) A child of compulsory school age or a young person has a learning difficulty or disability if he or she-

(a) has a significantly greater difficulty in learning than the majority of others of the same age, or

(b) has a disability which prevents or hinders him or her from making use of facilities of a kind generally provided for others of the same age in mainstream schools or mainstream post-16 institutions.

...

21 Special educational provision, health care provision and social care provision

(1) 'Special educational provision', for a child aged two or more or a young person, means educational or training provision that is additional to, or different from, that made generally for others of the same age in—

(a) mainstream schools in England,

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- (b) maintained nursery schools in England,
 - (c) mainstream post-16 institutions in England, or
 - (d) places in England at which relevant early years education is provided.
- (2) ‘Special educational provision’, for a child aged under two, means educational provision of any kind.
- (3) ‘Health care provision’ means the provision of health care services as part of the comprehensive health service in England continued under section 1(1) of the National Health Service Act 2006.
- (4) ‘Social care provision’ means the provision made by a local authority in the exercise of its social services functions.
- (5) Health care provision or social care provision which educates or trains a child or young person is to be treated as special educational provision (instead of health care provision or social care provision).

36 Assessment of education, health and care needs

- (1) A request for a local authority in England to secure an EHC needs assessment for a child or young person may be made to the authority by the child's parent, the young person or a person acting on behalf of a school or post-16 institution.
- (2) An ‘*EHC needs assessment*’ is an assessment of the educational, health care and social care needs of a child or young person.
- (3) When a request is made to a local authority under subsection (1), or a local authority otherwise becomes responsible for a child or young person, the authority must determine whether it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.
- (4) In making a determination under subsection (3), the local authority must consult the child's parent or the young person.
- (5) Where the local authority determines that it is not necessary for special educational provision to be made for the child or young person in accordance with an EHC plan it must notify the child's parent or the young person—
- (a) of the reasons for that determination, and
 - (b) that accordingly it has decided not to secure an EHC needs assessment for the child or young person.

...

37 Education, health and care plans

- (1) Where, in the light of an EHC needs assessment, it is necessary for special educational provision to be made for a child or young person in accordance with an EHC plan—

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- (a) the local authority must secure that an EHC plan is prepared for the child or young person, and
- (b) once an EHC plan has been prepared, it must maintain the plan.

...

51 Appeals

(1) A child or young person may appeal to the First-tier Tribunal against the matters set out in subsection (2), subject to section 55 (mediation).

(2) The matters are—

...

- (b) a decision of a local authority, following an EHC needs assessment, that it is not necessary for special educational provision to be made for the child or young person in accordance with an EHC plan; ...

83 Interpretation of Part 3

...

(3) A child or young person has a disability for the purposes of this Part if he or she has a disability for the purposes of the Equality Act 2010.

Section 6 of the Equality Act defines ‘disability’:

6 Disability

(1) A person (P) has a disability if—

- (a) P has a physical or mental impairment, and
- (b) the impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.

D. The First-tier Tribunal’s reasons

5. The tribunal identified three issues that it had to decide. First, whether the child had a disability under section 20(2)(b). Second, whether she required special educational provision under section 21(1). Third, whether it was necessary for special educational provision to be made in accordance with a plan under section 37(1).

6. On the first issue, the tribunal decided that the child was disabled under section 6 of the Equality Act and under section 20(2)(b). On the second issue, it decided that she did not require special educational provision under section 21(1). That rendered it unnecessary to deal with the third issue. However, the tribunal went on to deal with it, so that the Upper Tribunal could re-make the decision if necessary. It gave the view that if a low electro-magnetic environment was special educational provision, then it was necessary for provision to be made in accordance with a plan under section 37(1). The tribunal refused to take account of the difficulty that the local authority would have

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in identifying a school and the cost involved on the ground that those matters were irrelevant.

E. The First-tier Tribunal confused ‘educational provision’ and ‘educates’

7. I have decided that the tribunal went wrong in law and that I should re-make its decision. I will first explain why I have set the tribunal’s decision aside and then explain how I have re-made the decision.

8. Section 21(1) defines ‘educational provision’. Section 21(5) refers to ‘health care provision ... which educates or trains a child’. Those expressions are different, but the First-tier Tribunal’s reasons used the terms as interchangeable and treated authorities on the latter as relevant to the former. That was wrong.

9. A provision may be educational without itself educating a child. The word means ‘of, pertaining to, or concerned with education’ to quote the Oxford Shorter English Dictionary (fifth edition). The difference is easy to demonstrate. Suppose a teacher is giving a lesson to a class. One pupil in the class has impaired hearing and wears a hearing aid. The school has installed a loop system and the teacher uses a microphone. With the hearing aid on the T setting, the pupil can hear the lesson. The microphone and the loop system are both educational provision. But they do not themselves educate the pupil. The hearing aid may be both an educational provision and a health care provision, but again it does not educate the pupil. The teacher and the contents of the lesson educate the pupil.

10. In this case, the correct term for the tribunal to use was ‘educational provision’. It is only relevant to decide whether a provision ‘educates a child’ if it is also health or social care provision.

11. Accusing a specialist tribunal of making the kind of mistake I have requires me to justify doing so. Here is a sequence of passages that show the tribunal muddling the two expressions and the authorities. This is the beginning of paragraph 54:

There are several Upper Tribunal decisions on the definition of ‘education or training’ under the Children and Families Act and the previous statutory framework. Although these are in the context of health or social care provision which educates or trains within section 21(5) of the 2014 Act, we consider them to be equally applicable to the definition in section 21(1).

After citing the cases, the tribunal went on in paragraph 55:

We draw the following principles from these cases. We need to decide as a question of fact whether the provision of environment with low electro-magnetic fields amounts to education or training. ...

And if there is any doubt, here is the closing sentence in paragraph 58:

The question is whether the low-electro-magnetic environment educates or trains, whether it is looked at under section 21(1) or 21(5).

12. On the plus side, the tribunal did set out section 21 and there are places in which it used the correct expression, as it did in paragraph 52 when identifying the issue the tribunal had to decide. And it used the correct expression later in that paragraph: ‘a low

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arousal environment ... would usually be considered to be special educational provision'. There are also instances where the language used was probably a slip, as in paragraph 53: 'any modification to the school environment ... did not amount to education or training provision.'

13. Overall, there are unmistakable signs of confusion in important parts of the tribunal's reasoning. They cannot be excused or explained, in the context of the reasons as a whole, as infelicitous expressions of the correct test; they are too clear for that. The tribunal misdirected itself on law and did so in a way that affected its reasoning on one of the issues it had to decide. Here is the proof in paragraph 56:

We were not persuaded by the parents' argument that, because the internet is used to deliver education, then a hard wired internet connection would be educational in nature. We consider that it is the online learning programmes themselves which amount to education and training. The parents are asking for a particular way of delivering online learning, rather than for online learning itself. Their argument confuses the means of delivery with the provision itself.

The tribunal is saying that what matters is whether the requested provision educates. There is no other way to read this paragraph and it is based on a misdirection.

F. The tribunal's approach to the nature of educational provision was flawed

14. There is another problem with the tribunal's reasoning. At the start of the final hearing, the tribunal presented the parties with two examples for comment. It recorded them in paragraph 52:

The first was that of a child with a severe nut allergy. In such as case, adjustments might be made, such as preventing any nuts from being brought on to the school premises. However, these adjustments would not amount to special educational provision. The second example was that of a child with sensory processing difficulties who requires a low arousal environment. Such an environment would usually be considered to be special educational provision and a low arousal environment is routinely specified in Section F of EHC Plans.

15. It can be useful to think of a range of examples, some clearly educational and others clearly not, in order to identify the characteristics of each category. It can also be useful to adjust the examples to make them less clear cut, in order to sharpen the focus on the factors that are decisive. That is how I have approach this case as I worked out by reasoning.

16. What the tribunal did was different. It set up two examples as the framework for analysis. That may have had the effect of limiting the way that the parties thought about the case and presented their arguments or it may not. But it is clear that the tribunal expressed itself by reference to the examples when it explained its decision in paragraph 57:

We do not consider that a low electro-magnetic environment is similar to a low arousal environment. A child with sensory processing difficulties needs a low arousal environment in order to be in the right mental state in order to learn. There is a direct link between the child learning and the environment. [The child] needs a low electro-magnetic environment or she will become unwell. If she is unwell,

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she will not be able to learn. However, it is her medical needs which will prevent her from learning. We consider [the child's] case to be more in affinity with that of a child with a nut allergy or a wheelchair using child who needs ramps fitted in a school in order to access the classroom. In both those cases, the child needs adjustments in order to access education but the adjustments are about the child's health, rather than their ability to learn.

17. The tribunal was right that there were similarities and differences between the low electro-magnetic environment and the examples it was using. But that did not necessarily mean that those similarities and differences were decisive. The tribunal's approach led it to take too narrow a view of what was and was not educational provision. In particular, it concentrated, perhaps without realising it, on the cognitive aspects of learning.

18. Education involves learning knowledge and acquiring skills. A variety of factors may impede different elements of that process. The Special Educational Needs and Disability Code of Practice: 0 to 25 Years of 2015 was made under section 77. It sets out four broad areas of need that conveniently bring together and classify the factors that can hinder a child's education.

Communication and interaction

6.28 Children and young people with speech, language and communication needs (SLCN) have difficulty in communicating with others. This may be because they have difficulty saying what they want to, understanding what is being said to them or they do not understand or use social rules of communication. The profile for every child with SLCN is different and their needs may change over time. They may have difficulty with one, some or all of the different aspects of speech, language or social communication at different times of their lives.

6.29 Children and young people with ASD, including Asperger's Syndrome and Autism, are likely to have particular difficulties with social interaction. They may also experience difficulties with language, communication and imagination, which can impact on how they relate to others.

Cognition and learning

6.30 Support for learning difficulties may be required when children and young people learn at a slower pace than their peers, even with appropriate differentiation. Learning difficulties cover a wide range of needs, including moderate learning difficulties (MLD), severe learning difficulties (SLD), where children are likely to need support in all areas of the curriculum and associated difficulties with mobility and communication, through to profound and multiple learning difficulties (PMLD), where children are likely to have severe and complex learning difficulties as well as a physical disability or sensory impairment.

6.31 Specific learning difficulties (SpLD), affect one or more specific aspects of learning. This encompasses a range of conditions such as dyslexia, dyscalculia and dyspraxia.

Social, emotional and mental health difficulties

- 6.32 Children and young people may experience a wide range of social and emotional difficulties which manifest themselves in many ways. These may include becoming withdrawn or isolated, as well as displaying challenging, disruptive or disturbing behaviour. These behaviours may reflect underlying mental health difficulties such as anxiety or depression, self-harming, substance misuse, eating disorders or physical symptoms that are medically unexplained. Other children and young people may have disorders such as attention deficit disorder, attention deficit hyperactive disorder or attachment disorder.
- 6.33 Schools and colleges should have clear processes to support children and young people, including how they will manage the effect of any disruptive behaviour so it does not adversely affect other pupils. The Department for Education publishes guidance on managing pupils' mental health and behaviour difficulties in schools – see the References section under Chapter 6 for a link.

Sensory and/or physical needs

- 6.34 Some children and young people require special educational provision because they have a disability which prevents or hinders them from making use of the educational facilities generally provided. These difficulties can be age related and may fluctuate over time. Many children and young people with vision impairment (VI), hearing impairment (HI) or a multi-sensory impairment (MSI) will require specialist support and/or equipment to access their learning, or habilitation support. Children and young people with an MSI have a combination of vision and hearing difficulties. Information on how to provide services for deafblind children and young people is available through the Social Care for Deafblind Children and Adults guidance published by the Department of Health (see the References section under Chapter 6 for a link).
- 6.35 Some children and young people with a physical disability (PD) require additional ongoing support and equipment to access all the opportunities available to their peers.

19. The tribunal said that it had taken account of the Code (paragraph 17), as it was required to do so under section 77(6), which provides that the First-tier Tribunal 'must have regard to any provision of the code that appears to it to be relevant to a question arising on an appeal'. It would have been useful if it had discussed those paragraphs.

G. Health care provision

20. As I turn to re-make the decision, I can put aside the possibility of an overlap between special educational provision and health care provision. Section 21 deals with this by providing for health care provision to be treated as special educational provision. But there is a proviso: this only applies to health care provision that 'educates or trains a child'. Ms Walker expressed concerns about the potential impact on a local

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authority if section 21(5) were applied. Those concerns are misplaced in view of the provision sought in this case and the proviso.

21. The proviso is an important limitation on section 21(5). That subsection does not apply just because health care provision involves educational provision. It only applies if health care provision itself educates a child. That is a general point. Coming to this particular case, the provision sought is a wired internet connection. That will not be health care provision as defined in section 21(3), because the NHS does not recognise the child's condition as a medical one. And the provision of a wired connection does not of itself educate her. The result is that section 21(5) is irrelevant.

22. I now come to the other issues.

H. The child is disabled

23. The tribunal found that the child was disabled within the definition in section 6 of the Equality Act and section 20(2)(b). I accept and adopt its analysis. I have some concern in doing so because of the nature of its reasoning. In part, its analysis was an unexceptional assessment of the evidence before it. What concerns me is that the remainder of the analysis was based on the failure of the local authority to produce evidence of its own or to challenge evidence given by the parents. It is always preferable to base a decision on the fullest evidence that can be provided, but the local authority was legally represented and was given the chance to do more than it did. For whatever reason, it did not do so. And it did not challenge the tribunal's reasoning on disability before me, despite knowing of the tribunal's suggestion that the Upper Tribunal should, if necessary, re-make the decision rather than remit the case for another hearing.

I. The provision of a wired internet connection is educational provision

24. A useful starting point is with the findings on the child's disablement. The parents did not argue that she had any intellectual or cognitive impairment that caused her difficulty in learning, so she did not satisfy section 20(2)(a). The tribunal accepted that she satisfied section 20(2)(b). By finding that she was disabled, the tribunal found that her condition prevented or hindered her making use of facilities generally provides for others of her age. Those facilities were the computers operating by wifi and the programmes running on those computers.

25. Coming to the Code, the child's problems lie with: (a) communication (paragraph 6.28) that now takes place through the programmes rather than with the teacher; and (b) sensory needs (paragraph 6.34) that prevent or hinder her using the computers. The use of the computers and their programmes is now an integral feature of how education takes place in schools. Their use is no longer marginal or peripheral.

26. Just to be clear, I am not saying that the list from the Code is necessarily comprehensive and I am not using it as a definition of 'educational provision'. I am merely using the list as a way of thinking about what may and may not amount to educational provision to help in applying that expression. The First-tier Tribunal had to have regard to the Code. In re-making the tribunal's decision, I am doing what it was required to do.

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27. The child's problem with electro-magnetic radiation affects her life generally and limits her normal day-to-day activities – the Equality Act test. It applies at school, at home, and when she is out in the world. When at school, her problems with communication and making use of the computers are a direct result of the use of wifi in schools. The only solution available has to be provided in the school. It is not transferable to any other location, although it may need to be replicated elsewhere. I cannot see what other provision would be effective to avoid the problem or overcome its consequences.

28. This is not simply a case of a child being unwell and finding it difficult to concentrate. There was evidence from two educational psychologists both of whom found her and her parents credible in describing her symptoms. The tribunal (paragraph 47) accepted their evidence too and described her symptoms as 'debilitating when they occur', which they did to such an extent that she 'was out of education for a whole academic year.' Those symptoms were not unique to a school environment. But when they occurred in that environment they arose from the school's choice of the medium for providing education. In those circumstances, some provision is required to render the education effective.

29. For those reasons in combination, I find that the child requires special educational provision. No one factor has been decisive in my analysis and I have not attached any particular significance to the factors individually. Rather, I have considered the effect of the factors taken as a whole, each in the context of all the others.

J. Special educational provision is necessary in accordance with an EHC plan

30. The tribunal gave its opinion that a plan should be prepared and maintained. It explained why. I agree with its reasoning and its conclusion. Indeed, I consider that the conclusion is unavoidable.

31. Ms Walker invited the Upper Tribunal to remit the case for rehearing if it allowed the appeal. I have re-made the decision, as the tribunal anticipated. Ms Walker did not present any direct argument against the tribunal's reasoning or conclusion on this issue.

32. In coming to the decision I have on disposal, I have taken into account in particular these two factors. First, there is certainty and finality. That is important because (a) this case has already been going on for five years and (b) it will not be long before the child will be studying for her GCSEs. Second, the First-tier Tribunal provided the foundation for me to re-make its decision, thereby giving notice to the local authority. Despite this, the local authority did not address that foundation directly. Nothing I heard at the oral hearing undermined the tribunal's reasoning on the need for a plan.

**Authorised for issue
on 18 July 2022**

**Edward Jacobs
Upper Tribunal Judge**