IN THE UPPER TRIBUNAL **UT ref: UA-2021-000606-HS**

ADMINISTRATIVE APPEALS CHAMBER

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

Between:

DM

Appellant

- v –

Cornwall County Council

Respondent

Before: Upper Tribunal Judge Wright

Decision date: 12 August 2022
Decided after an oral hearing on 7 June 2022

Representation:
Appellant: Leon Glenister of counsel
Respondent: Zoe Gannon of counsel

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 6 September 2021 under case number EH908/20/00002 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 that decision is set aside and remitted to be redecided by a fresh tribunal, at an oral hearing, and in accordance with the law as set out below.

REASONS FOR DECISION

1. This is an appeal to the Upper Tribunal made in respect of a boy, who I will not name, pursuant to permission to appeal that was given by the First-tier Tribunal on 22 November 2021 against a decision of the First-tier Tribunal given on 6 September 2021 ("the tribunal").

2. There was some debate at and before the hearing before me about whether the appellant had permission to appeal on all the grounds she ended up advancing. The

answer to that debate, in my judgment, is that the First-tier Tribunal did not limit its grant of permission to appeal and it gave the appellant permission to appeal on all of her grounds of appeal. Those grounds encompass the grounds which were argued before me by Mr Glenister. I therefore do not consider that there was any need for the appellant to be given permission to advance any of the grounds of appeal on which she relied before me at the hearing. I should add that Cornwall County Council ("the Council") has had notice of the appellant's 'restructured and refocussed' grounds of appeal since Mr Glenister's skeleton argument of 19 May 2022 and Ms Gannon did not seek to argue before me that the Council was not in a position to address those grounds fully and properly at the hearing.

3. The child with which this appeal is concerned was aged 10 years and 11 months at the date of the tribunal's decision. He has diagnoses of foetal alcohol spectrum disorder, autistic spectrum disorder, organic brain damage secondary to prenatal exposure to drugs and alcohol, executive functioning disorder, chronic spontaneous urticaria, angioedema and sensory processing/modulation disorder. He was and remains subject to special guardianship order to his grandmother, who is the appellant.

4. An important and agreed factual background to the appeal before the tribunal was that it had been agreed by the parties that it was necessary for the child to be educated otherwise than in a school.

5. The appeal before the tribunal concerned an Education, Health and Care Plan ("EHCP") for the child which the Council had issued on 6 September 2019. Some 19 months passed before tribunal heard and decided the appeal against the contents of that EHCP. Despite the further time that has passed since the tribunal's decision, I was assured by both parties at the hearing before me that the annual review of the education, health and care provision in respect of the child was still to take place. In other words, the EHCP of 6 September 2019, as amended in parts by the tribunal when allowing (in part) the appeal before it, remains in place.

6. The appellant's five grounds of appeal are as follows. First, it is contended that the tribunal acted unlawfully in ordering termly reviews of the provision of education otherwise than in school. Second, it acted unlawfully in agreeing production of an "All You need to Know about [the child]" document. Third, it is argued that aspects of the EHCP ordered by the tribunal which are concerned with (a) the knowledge, skills and training of those delivering the plan and (b) the plan itself, lacked specificity to such an extent as to be unenforceable. Fourth, it is said that the tribunal failed to consider the impact where the specified educational provision it ordered would require the appellant to transport the child to places outside the family home. Fifth, it is contended that the tribunal failed to sufficiently specify health care provision in the EHCP. I will take each ground in turn, insofar as it is necessary for me to do so.

7. However, before turning to the appeal grounds I should say a little about what may be termed an overarching argument. I was told that this was the first time that the

Upper Tribunal had been tasked with addressing 'specificity' in an EHCP in the context of 'education otherwise than in school'. I do not know if that is the case but will proceed as if it is. The appellant contended that in that context the need for specificity would be greater than where a child was being educated in a school. I am doubtful about the utility of ruling on such a general submission without taking account of the facts of the individual case. I can see that 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. However, 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.

Termly reviews

8. The tribunal ordered that the key adults working with the child should meet half-termly to consider his provision as part of a review meeting. In addition, however, the appellant argues that the tribunal ordered that there should be a termly review of the educational provision otherwise than in school in its entirety and this included whether provision otherwise than in school should continue at all.

9. This last contention was based on the following passage from changes ordered by the tribunal to the EHCP.

> "Under the heading "Cognition and Learning, Executive and adaptive functioning" the following wording shall be inserted;
>
> > "[The child] will initially be educated otherwise than in school, subject to termly review, and until such time as it is no longer necessary for [him] to be educated in this way due to it being inappropriate for provision to be made in a school."

10. The appellant argues that by the above change to the EHCP the tribunal unlawfully enabled the educational provision otherwise than in school to be brought to an end during the course of the ECHP and allowed for Section I of the Plan and placement to be brought into account.

11. I do not consider that the above passage, when it is read with the rest of the tribunal's decision, has the effect for which the appellant contends. It is a legal truism that the decision of the tribunal, including what it ordered, has to be read as a whole. So read in my judgment the phrase "subject to termly review" is plainly intended to refer to termly reviews of the provision <u>while</u> the child is being educated otherwise than in school and does not encompass termly reviews of whether the education should continue to be otherwise than in school. This may be said to follow just from reading the closing words quoted above from the tribunal's order without regard to the rest of what the tribunal said about this issue. If the termly reviews were intended to cover whether the child should continue to be educated out of school it is difficult to

understand what the closing words of the quoted change to the EHCP - beginning "until such time…" - would add.

12. However, the position is made clearer still by the tribunal's decision. Most notably, in paragraph 8 of its decision the tribunal said:

> "…it was agreed between [the appellant] and the LA that it is necessary for [the child] to be educated otherwise than at school…..There was a difference of opinion as to the length of time for which this would be necessary, but the Tribunal is settling the EHC plan for the coming year and does not need to resolve that issue as both parties agreed that it is not likely that it will be appropriate for [the child] to be educated at school during the currency of this EHC plan and it is therefore necessary for him to be educated otherwise than at school. The EHC Plan will also be subject to an Annual Review which will provide the opportunity for the parties to decide on the most appropriate provision at the time and into the future."

I cannot see on what basis this passage can be said to be consistent with the tribunal having ordered that the need for the child to be educated otherwise than in school should be reviewed on a termly basis during the currency of the EHCP it had settled on the appeal.

13. A separate aspect of this first ground of appeal is that the above termly review and separate half-termly reviews are argued to be unlawful as (a) they were unspecific as to how the reviews would be conducted and who would participate in them, and (b) being non-statutory reviews, they would allow for the provision to change with no mechanism for that change to be challenged. It was argued that *E v Rotherham MBC* [2001] EWHC Admin 432 supported the arguments here.

14. I do not consider this second aspect of the first ground of appeal is made out either.

15. It is important to first identify the other reviews which are now being said to be unlawful and what the tribunal meant by reviews.

16. The tribunal addressed the need for reviews in the context of 'education otherwise then in school' at paragraphs 60-78 of its decision. The tribunal was plainly alive to the fact that because the child was not being educated in a school it would be necessary for up to date feedback to be provided about his progress and experience of education. The tribunal go on to record, in paragraph 61 of its decision, that both parties agreed that it was important for activities to be kept under constant review. It continues in paragraph 69 of the decision to say that the tribunal agreed that a half termly review of progress was necessary for the coming year (the period the tribunal considered it was addressing) "as the package is very fluid and both successes and difficulties can reasonably be expected, including the need for planned progression. This is in accordance with the evidence about it being unhelpful to persist with interventions that [the child] cannot tolerate". The tribunal further said in paragraph 75d of its decision that it did not consider that

change should only occur after a review because "[t]utors need flexibility to progress interventions as they go along…this does not need to wait for a review as this is something appropriately left to an educator's discretion. With [education otherwise than in school], this is a proper aspect of discretion given that it must be a dynamic and ongoing process". The tribunal also said in this part of its decision that neither a bespoke curriculum nor SEN review meetings were required as this would amount to duplication. It concluded this part of its decision by saying, in paragraph 78, that half-termly reviews were necessary.

17. The following are examples of the reviews the tribunal then ordered in Section F of the EHCP. It said the words "[The child's education otherwise than in school] package will be reviewed every half-term and adjusted according to progress and need" were to be inserted as was the phrase "Key adults should liaise half-termly as part of a review meeting".

18. In the circumstances of this case I do not consider the tribunal acted unlawfully either in ordering such reviews or in the detail it provided for how those reviews were to be conducted. (A separate ground of appeal focuses on the detail (or lack, it is argued) of the educational provision to in fact be provided under the EHCP.)

19. The Upper Tribunal recent decision in *Worcestershire CC v SE* [2020] UKUT 217 (AAC) has provided a comprehensive review of all relevant case law and, having done so, did not find provision of termly reviews in EHCP's to be unlawful *per se*: see paragraphs [82]-[83] of *SE*. Those paragraphs also answer, in large part at least, the appellant's reliance on *E v Rotherham MBC*. Furthermore, insofar as paragraph [33] of *E v Rotherham MBC* retains legal relevance, I do not consider that anything the tribunal ordered in this case could have the effect of allowing the provision in the EHCP to be altered such as to fundamentally change that provision. I bear in mind here particularly that it was not disputed by the parties before the tribunal that some form of review was needed. I further take account of the plain focus of what the tribunal ordered being in respect of the reviews leading to "adjustments" according to the progress (or lack of progress) the child may have made and his potentially changed needs. None of that speaks of removing or otherwise altering fundamentally, and by the back door, any fixed educational provision found in the EHCP.

20. This then leaves the argument that detail of the termly or half-termly reviews lacked sufficient specificity as to how they were to be conducted and by whom they were to be conducted. I do not accept this. The reviews were to be half-termly and were to involve the key adults (the latter including the appellant). That was sufficient in the circumstances of this case given the evolving nature of the child's needs and his educational provision and how he may have reacted to certain educational provision that may have been provided to him in the first half of the term falling before the half-termly review.

All you need to know about [the child] document

21. I am satisfied, however, that the second ground of appeal should succeed. To explain why I need first to set out the material parts of the tribunal's decision concerning this document.

22. In the body of its decision when dealing with educational provision under section F of the EHCP the tribunal said the following (at paragraphs 73 and 74):

> "73. The parties could not agree wording regarding how best to approach interactions with [the child]. It was recommended by Dr Bailey that there be an 'All About [the child]' document which will be made available to persons working with [the child]. This would incorporate input from a range of professionals and is preferable than reference to a particular model. [The appellant] preferred the neuro-sequential model but it was not well evidenced within the reports or evidence heard by the Tribunal that this particular approach was required as opposed to some alternative approach.
>
> 74. Dr Bailey's evidence, which was clear and supported by sound analysis when pressed, was that a neuro-sequential model was one of a range of valid approaches and that she was in a position to give bespoke advice in relation to this aspect of [the child's] provision. We prefer the approach suggested by Dr Bailey whose expert evidence was compelling; she demonstrated clear understanding of [the child] and was supported by clear rationale."

23. Later in the decision the tribunal said the following about this document, but still in respect of educational provision under section F of the EHCP.

> "79. In the following paragraph[1] there is a helpful description of teaching styles that should be adopted. This is a direct quote from the expert evidence and was not subject to significant challenge within the hearing. There is also expression of the need for adults to accept and understand the nature and extent of [the child's] special educational needs. This was an issue previously, and we note the particular difficulties experienced by [the child] when this was not the case, so we agree this should be incorporated in the EHC plan. The Tribunal has added reference to the 'All about [the child]' document as use of the document was agreed by both parties during the hearing.
>
> 90. The 'All About [the child] document will help inform and advise [the training and expertise of those working with the child], as will the EHC Plan and the many reports commissioned to inform the plan. There may be a requirement for additional training for some persons working with [the child] and the LA confirmed there was a commitment to fund such training where it is necessary. The tribunal therefore alters the wording of this paragraph to reflect:-
>
> a. The agreed wording from the working document;
>
> b. The need for adults who can appreciate [the child's] needs (given the problems in this area historically);

[1] The tribunal's decision in large part was drafted so as to provide a commentary and reasons on the changes it made to paragraphs in the EHCP. Its reference here to "the following paragraph", and later in paragraph 90 to altering "this paragraph", has to be read in this light.

c. The role of the 'All about [the child]' document; and

d. Appropriate provision for training where required."

24. By its Order the tribunal inserted the following sets of wording in section F of the EHCP:

> "An 'All You Need to Know About [the child]' document shall be prepared within four weeks of the commencement of the plan. Dr Bailey will co-ordinate the preparation and drafting of this document. This will provide guidance about how interactions should best take place with [the child] and will be contributed by the different professionals involved. This will include guidance drafted by Dr Bailey regarding the implications of [the child's] neurological presentation on how best to interact with him"
>
> "All adults who teach [the child] should accept and understand the nature and extent of [the child's] special educational needs as set out in the 'all about [the child]' document"
>
> "[The child] requires a team of adults who have considered this plan and the 'All About [the child']' document who can appreciate his diagnoses and needs and who attend his half termly reviews"

25. I put to one side whether or not, per paragraph 79 of its decision, the parties had agreed to the use of this document. The appellant sought to argue before me that she did not but has not taken any of the appropriate steps that might have allowed me to properly resolve this point (for example, by seeking the judge's notes of the hearing). In the circumstances I do not consider there is any proper basis for me to go behind what the tribunal said about this.

26. The starting point for my analysis of why the tribunal erred in law in ordering the 'All About [the child]' document to be put together is that on the face of the tribunal's decision this was an area where the parties could not agree the educational provision in section F of the EHCP. In those circumstances, on the appeal it was for the tribunal, standing in the shoes of the Council, to determine that aspect of educational provision for the child. This follows from the wording of sections 36(3), 37(1) and 51(2)(c) of the Children and Families Act 2014. However, on this aspect of the appeal the tribunal in effect passed this responsibility to someone else and, importantly, where that someone else was not even an employee of the respondent. It is in this respect that what the tribunal did in this case stands on the other side of the line from the Individual Education Plan which the Court of Appeal considered was lawful in *E v Newham* (at paragraph [64(iv)] in particular). In that case the Individual Education Plan was to be determined by the school in conjunction with therapists and it was lawful for the SENT to have so worded the statement of special educational needs to that effect. But in this case the key material difference in my judgment is that the responsibility for organising the educational provision vested, in the EHCP ordered by the tribunal, in Dr Bailey alone.

27. This is not on this specific point an issue about the provision being too vague. It is about it being too uncertain. The naming of one specific individual to take responsibility for drafting a part of the special educational provision cannot be said to lack precision on that point. However, the problem is the other way around. Putting the responsibility for part of section F of the EHCP on one named individual, and where that individual is not a lawful delegate or proxy for the local authority, may carry a serious risk of the local authority being in breach of its duty under section 42(2) of the Children and Families Act 2014 "to secure the specified special educational provision for the child or young person". This is what, as I see it, informed the concern in paragraphs 23(b) and 27(iii) of *LB Redbridge v HO* (SEN) [2020] UKUT 323 (AAC).

28. That uncertainty has in fact played out in this case. I take account of this not because I am exercising a fact-finding jurisdiction but because it informs the uncertainty and unenforceability of this provision. I was informed by both parties during the hearing that Dr Bailey had never been able draw up about the 'All About [the child]' document and has now retired. The effect of this is that what was seen by the tribunal as an important aspect of the special educational provision it considered that the child needed is not part, and cannot be part, of that provision as the sole actor identified by the tribunal who was to coordinate and compile that provision was not, and is no longer, able to do so.

29. I do not see, as the Council sought to argue before me, how the provision for review of existing EHCPs found in section 44 of the Children and Families Act 2014, can assist so as to make lawful that which is unlawful in an EHCP. The review is of an existing EHCP and will usually, if not always, take effect from a later date. Any change after a review has taken place (and I remind myself that no review of the EHCP in issue before me has yet been put in play) cannot as a matter of law effect the legality of the EHCP before it is reviewed.

30. Nor do I consider that any of what the High Court said in paragraph [58]-59] of *R(A) v Cambridgeshire County Council and Lom* [2002] EWHC 2391; [2003] ELR 464 really touches or assists on the point about the provision being unlawful because it is too uncertain. What is said in paragraph [58] of *A v Cambridgeshire* is *obiter*. Furthermore, insofar as what is said in that paragraph [58] may be said to have a parallel application in respect of the exemption from the section 42(2) Children and Families Act 2014 duty provided for by section 42(5) of the same Act, I do not agree with *A* that the wording in section 42(5) includes a person *other* than "the child's parent or young person". I also do not see how it may be said that the special educational provision specified by the tribunal in the EHCP (per section 42(6) of the same Act), in respect of the 'All About [the child]' document to be compiled by Dr Bailey, can be said to amount to suitable alternative arrangements made by the appellant or Dr Bailey. In the context of section 42(2) and 42(5) of the Children and Families Act 2014, the "suitable alternative arrangements" in s.42(5) must be alternatives to that which is in section F of the EHCP.

31. The final argument the Council made in relation to this aspect of this second ground of appeal was that if I found the tribunal's decision to be in error of law on this point, I should set the tribunals' decision aside but remake it in the same terms save for removing Dr Bailey's name as the person responsible for compiling the 'All About [the child]' document. There are two fundamental difficulties with this submission. First, given the importance the tribunal attached to Dr Bailey's role, I am not clear what role that document should, or should not, have in section F; and I heard no argument on this. Second, and more fundamentally, on setting aside the tribunal's decision the whole of the appeal would need to be redecided **and** that would need to be on the basis of the child's needs and the special educational provision he requires now, in 2022, rather than redeciding what the tribunal ought to have decided in September 2021: see, for example, *Essex CC v DH* (SEN) [2016] UKUT 463 (AAC) at para. [16]. Redeciding the appeal would not, therefore, just be about excising Dr Bailey's name. The Council's reliance on *LB Redbridge v HO* here is misplaced. That decision does not refer to *Essex CC v DH*. More importantly, however, the matter the Upper Tribunal there redecided was the only matter in dispute before the First-tier Tribunal (see para. [5] of Upper Tribunal's decision) and it seemingly remained the only matter in dispute by the time the Upper Tribunal redecided the appeal. That is not the case here.

32. I also consider the appellant is entitled to succeed under this ground of appeal on the basis that the special education provision made in the EHCP by refence to the 'All About [the child]' document lacks specificity. Even if Dr Bailey had not been named as the author of that document, given its centrality in answering the dispute between the parties about how best to approach interactions with the child I consider the tribunal, as the arbiter of that dispute, had to say more about how it intended that document was to be compiled and what it should contain. For example, the provision as set out by the tribunal leaves it unclear and uncertain which professionals were to be involved and, more particularly, whether the appellant, given her role in educating her grandson at home and her being a qualified and experienced teacher (as the tribunal was aware), was to be included as one of the "different professionals involved". I do not agree with the Council that so to hold would run contrary to *E v Newham*. I am always cautious about arguing by way of analogy with other cases, as each will turn on its own facts, but if anything *E v Newham* would support this aspect of the appellant's second ground of appeal. As paragraph [6] *E v Newham* shows the Individual Education Plan approved by the Court of Appeal in that case specified the three different types of therapist whose assessments were to precede the development of that plan. In this case by contrast the EHCP fails to make clear which professionals the tribunal considered should be involved.

33. As I have allowed the appeal under ground two, I can take the remaining grounds of appeal more briefly. The issues arising under each of the grounds will in any event now be subsumed in the issues the new First-tier Tribunal may need to consider in redeciding the appeal.

Lack of specificity as to the knowledge, skills and training of those delivering the plan and the plan itself

34. The appellant focused her argument under this third ground on four main areas: tutors; communication and interaction, occupational therapy and speech and language therapy. I will take each area in turn.

35. **Tutors**. The training, experience and expertise of those working with the child was a matter the appellant had directly raised with the tribunal. Her concern was that those working with the child "would not have sufficient experience, training and expertise to be able to properly implement the [EHCP]" (para. 85 of the decision). The provision set out in the EHCP does not expressly address the training, expertise or the experience of the child's tutors. However, in my judgment why that is so is sufficiently explained by the tribunal, in the context of this case, in paragraphs 85-89 of its decision. That reasoning explains why the training and expertise of those working with the child did not need to be specified.

36. **Communication and Interaction**. The argument advanced here by the appellant concerns the part of the tribunals order which says:

> "[The child] will take part in planned learning activities such as, forest school, football, swimming, surfing, diving – a wide variety of education and social groups and activities to support [his] interaction skills and physical/mental wellbeing and health. These activities are to build [the child's] confidence and will need to be kept under review as to whether or not [the child] is benefitting from the activity. Advice will be sought from [the child's] psychiatrist in the event that there is a concern about whether or not the activity should be persisted with."

37. It is argued that this provision lacks specificity as to what activities are to occur and the number of hours to be spent each week on them, and how that provision is to be reviewed. I do not accept this argument. The activities to occur are sufficiently described in the activities set out after the "such as". Further, the use of the word "review" was plainly not intended, in my judgement, to be read as some form of formal assessment mechanism. It is saying no more than whether the activities are building the child's confidence will need to be kept any eye on so as to ensure they are benefitting the child. That was sufficiently specific in the context of the child's evolving circumstances. As for there being a minimum or maximum time for such activities each week, the tribunal in paragraphs 60-62 of its decision has provided a sufficient explanation for why such fixed times or timetables for the activities was not to be written into the EHCP.

38. **Occupational therapy**. The tribunal dealt with occupational therapy in its decision as follows ('EOTAS' is the tribunal's shorthand for education otherwise than in school'):

> "97.Occupational therapy – there was disagreement as to the wording of the provision regarding a sensory diet. There was discussion regarding how this should follow other interventions and whether such recommendation was out of date. This came from [the appellant's] instructed occupational therapist in her

> report from February 2020. In the Tribunal's specialist view, the observation that [the child] requires a sensory diet is unlikely to be something that has changed since the assessment. With adapted wording to reflect the context of EOTAS, this paragraph is included in the EHC 17 plan.
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> 98.After this initial paragraph, there is an agreed paragraph about gross motor skills but then discussion regarding environment, movement breaks etc. which would not be applicable to an EOTAS programme and which is deleted. There are also provisions regarding, for example, handwriting skills which are already incorporated elsewhere within the EHC plan.
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> 99.After some agreed amendments, there is a proposed section regarding a block of occupational therapy. This is worded to be "at an appropriate stage of the implementation of this plan". It is very difficult in the Tribunal's finding to be more specific about when the occupational therapy can be implemented. Initially, the priority is to gain [the child's] engagement in education, building on the success of educational activities identified by [the appellant]. Given [the appellant's] descriptions about the difficulties of gaining [the child's] engagement in interventions, it would not meet [the child's] need for a staged progression for occupational therapy to be implemented from the outset. Structured sessions, such as are envisaged, may be difficult to achieve.
>
> 100. It may be that [the child] is open to this at a relatively early stage or that this takes some time to be in a position to attempt. To set down a clear timescale at this stage would not be appropriate therefore. Given that the EOTAS package is to reviewed half termly, it is more appropriate for the timing and specificity of any OT intervention to be deferred until at least then.
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> 101. Overall, the need for this provision was well evidenced within the occupational therapy report which was not challenged within the hearing. The only exception is the provision for a three hour observation and review by an occupational therapist on a monthly basis. This may not be necessary at all if the occupational therapy has not commenced and / or if the occupational therapy is limited to a sensory diet. Much will depend on the progress of the implementation and this can be left to the annual review in the specialist view of the Tribunal."

39. The tribunal's Order in relation to the provision for occupational therapy inserted the following into section F of the EHCP, and removed (see para. 101 of the tribunal's decision immediately above) three hours of monthly input from an occupational therapist):

> "An Occupational Therapist will review targets as part of an Occupational Therapy programme in the form of a sensory diet to be carried out in order to maintain emotional regulation levels throughout the day to avoid shutting down, and to reduce any anxiety and allow for optimal learning opportunities.
>
> At an appropriate stage of the implementation of this plan, as identified within the regular reviews, occupational therapy. In order to establish a therapeutic relationship with his OT and build trust an initial block of weekly input is required for 8 weeks. Following this and once programmes are set up it is thought that methods can be taught to Bailey's grandmother/person teaching him, and daily programmes can then be carried out without OT present."

40. I am not persuaded by the appellant's argument here that the occupational therapy provision is so vague as to be unenforceable. The tribunal in paragraph 99

of its decision has explained why setting down rigid structures for the occupational therapy was not appropriate at the stage of the child's development. It is clear that it considered that flexibility in the special educational provision was required because of the child's difficulties in engaging with others and in education. *Worcestershire CC v SE* makes plain that flexibility in an EHCP does not necessarily render it unlawful and that is evidently what the tribunal judged was needed here.

41. In so far as a separate argument was being maintained about the appellant not having had an opportunity at the hearing to contest the conclusion reached by the tribunal in paragraph 101, this is contrary to what the tribunal say on page two of its decision that neither party had any complaints at the end of the hearing about how it had been conducted. I am not in a position to go behind what the tribunal have said about that.

42. I am more troubled, however, as to the adequacy of the provision made by the tribunal for **Speech and Language Therapy**. It ordered that a "speech and language therapist will provide a concise document setting out guidance for what to do in instances when [the child] is not speaking during interactions". The particular omission in this provision is the time by which the document is to be provided. I do not consider it is any answer to this to say, as the Council sought to argue, that a test of within a reasonable period of time can be implied. That still lacks sufficient specificity as to when the document would be available. If this document has no timescale in which it is to be provided, and it is not provided, then the provision the tribunal anticipated would be found in it is left lacking in the EHCP. Such an omission means the speech and language therapy has not been sufficiently specified in the EHCP.

Educational impact of transporting the child outside this home

43. The argument is put under this ground on the basis that the tribunal failed to consider the chid would be transported to his educational provision such as the planned learning activities referred to in paragraph 36 above. In certain circumstances transport can be a relevant consideration: see *MM and DM v Harrow Council* [2010] UKUT 395 (at para. [27]).

44. The short answer to this argument is that there was no need for the tribunal to consider this because the appellant had not raised any issue before the tribunal about having difficulties (cost or logistical) in transporting the child to his educational provision. This ground of appeal is therefore not made out.

Sufficient specification of health care provision

45. The appellant's final argument is that the tribunal's recommendation for health care provision was not sufficiently specific. The test of specificity here is a lesser one, or less rigid, than the test for educational provision: *VS and RS v Hampshire CC* [2021] UKUT 187 (AAC) (at paras [46]-[48]).

46. What the tribunal ordered on health care provision was as follows:

> "A health care plan will be prepared and updated as clinically required. This will include all key health information for [the child] including medications, potential side effects, con[t]ra-indications / warnings (including in relation to any potentiating effects) in relation to the medication and advice as to what to do in emergency circumstances (including anaphylaxis). This will be a concise and accessible to non-health professionals.
>
> [The child's] child and adolescent psychiatrist will provide a point of contact to review the complexities of [the child's] presentation."

47. This has to be read with paragraphs 107-121 of the tribunal's decision, where it addressed the child's health care needs and health care provision.

48. I note that in paragraph 117 in particular, which is where the tribunal begins its consideration of health care provision, it says that "at the commencement of this section the Tribunal has inserted provision for a health care plan. <u>This was agreed through discussion and evidence at the hearing</u>" (the underlining is mine and has been added for emphasis). Bearing this agreement in mind and taking account of paragraph [74](iii) of *Worcestershire CC v SE*, and taking account of the lower test for specificity which is applicable in this context, I consider I need say no more than that the health care provision was sufficiently specific given the circumstances of this case.

49. For the reasons given above, the appeal succeeds. The Upper Tribunal is not able to re-decide the first instance appeal. The appeal will therefore have to be re-decided afresh by a completely differently constituted First-tier Tribunal (Social Entitlement Chamber), at a hearing.

50. The appellant's success on this appeal to the Upper Tribunal on error of law says nothing one way or the other about whether her appeal will succeed on the facts before the First-tier Tribunal, as that will be for that tribunal to assess in accordance with the law and once it has properly considered all the relevant evidence.

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

On 12 August 2022