**IN THE UPPER TRIBUNAL** **Appeal No: HS/1654/2018**

**ADMINISTRATIVE APPEALS CHAMBER**

**Before: Upper Tribunal Judge Wright**

# ORDER

**Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the children in these proceedings. This order does not apply to: (a) the child's parents, (b) any person to whom the children's parents, in due exercise of their parental responsibility, discloses such a matter or who learns of it through publication by either parent, where such publication is a due exercise of parental responsibility; and (c) any person exercising statutory (including judicial) functions in relation to the children where knowledge of the matter is reasonably necessary for the proper exercise of the functions.**

# DECISION

**The Upper Tribunal dismisses the appeal of the appellant father.**

**The strike out decision of the First-tier Tribunal made on 11 April 2018 under reference EH393/18/00001 did not involve any error on a material point of law and is not set aside.**

**Representation: The father represented himself.**

**Sarah Brewis of counsel represented South Tyneside Council.**

# REASONS FOR DECISION

1. This is an appeal by the father of a boy, AR, who was aged twelve at the date of the First-tier Tribunal's decision under challenge in these proceedings. At that time AR had a diagnosis of autistic spectrum disorder, low oxygen levels, asthma, anaemia, Mannan binding lectin deficiency and hay fever in the summer, as well, perhaps, as enuresis.

The decision was made by the First-tier Tribunal on 11 April 2018 ('the tribunal') and it was a decision to strike out the father's appeal to the tribunal on the basis that it had no reasonable prospects of success. That decision was made under rule 8(4)(c) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 ("the HESC Rules").

2. Prior to striking out the appeal the tribunal judge, Judge Brayne, as he was required to do under rule 8(5) of the HESC Rules, had made an order on 27 March 2018 explaining why he considered the appeal had no reasonable prospect of succeeding and seeking representations from the father as to why the proposed appeal did have reasonable prospects of success and so should not be struck out. The material parts of the Judge' Brayne's order of 27 March 2018 read as follows:

> "I have......concluded that, on the only outstanding issue between the parties, the appeal has no reasonable prospect of succeeding and should be struck out under Rule 8(4)(c).
>
> In the working document the only issue in dispute is the parents' wish that in section E the following wording should replace the wording currently proposed for liaison with the school: "Parents require at least two face to face meetings per term with a teacher who teaches [AR] on a regular basis".
>
> The Tribunal has no jurisdiction in relation to section E of an EHC Plan, but can make amendments to section F, educational provision. I therefore approach the issues on the basis that the parents want this wording inserted into Section F.
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> There are two reasons for identifying this proposed amendment as having no reasonable prospects of being ordered. The first is that such liaison is not educational provision; the means by which a school liaises with parents will vary according to the circumstances and is ultimately a management issue for the school, not an educational need for which an EHC Plan can make provision.......The second reason is that, even if such liaison was capable of being seen as a special educational need there is no evidence that [AR]'s needs, as set out in the agreed content of Section B of his Plan, require special provision to be specified in relation to such liaison. There is no other evidence which demonstrates that this amendment is needed to meet [AR]'s special educational needs, over and above such mechanisms for liaison which the school named in section I must normally arrange for liaising with parents."

3. The father was given until 10 April 2018 to file a response explaining why the appeal did have reasonable prospects of succeeding. He made his response in a letter dated 1 April 2018. This letter was not, unfortunately, on the First-tier Tribunal's file put before me nor did I have it available to me by the time of the hearing of this appeal in August of this year. However, the letter has subsequently been provided to me both by the father and the First-tier Tribunal. It is date stamped as having been received by the First-tier Tribunal on 4 April 2018.

4. By the letter the father objected in the 'strongest terms' to the appeal being struck out. He relied on the Human Rights Act 1998 as requiring the First-tier Tribunal to determine his appeal in conformity with his rights under Article 6 of the European Convention on Human Rights and Article 2 to the First Protocol of that Convention. The father asserted that the latter enabled him to have his son educated in conformity with the father's philosophical convictions, and the EHC Plan had to fulfil his (the father's) rights under the Convention. Further, provision for answering urgent telephone calls needed to be inserted in section C or D of the EHC Plan, and "the appellant further asked for requirement for face to face meetings with teachers to be inserted into Section B [of the EHC Plan] as an educational need". The letter continued:

> "in response [to the father's request for face to face meetings], the council forwarded to the tribunal a working document those legality is unknown. In this document, the council has made alterations as required except urgent phone calls, and provisions for face to face meetings has been placed under Section E,
>
> it is not the parent's fault that face to face meeting has been classed as special educational need and placed under section E. In other words, the LA has made alterations without parental agreement and has placed this under Section E. This is not done or required by parents,
>
> the tribunal is not entitled to refuse an appeal because LA has shifted text to a different section,
>
> the appellant is entitled to ask for the text to be placed under Section B as an educational need,

> the enclosed evidence, a letter for the deputy head teacher, proves that the child is not paying much attention to his lessons and needs further attention form teachers and parents,
>
> face to face meeting is not a special educational need. However, by virtue of section 21.1 of the Children [and Families] Act 2014, special education provision means educational provision that is additional to that made generally for other children."[1]

5. I would make three observations at this stage. First, these representations of the father on their face do not explain <u>on the evidence</u> what it was about his son's educational needs that required his parents to meet face to face with the school. Second, and perhaps putting the first point another way, although I do not quibble with the father's summary of section 21(1) of the Children and Families Act 2014, it is still necessary for a special educational need (in this case asserted to be the face to face meeting between the parents and the school) under that section to be an educational or training need <u>of the child</u>; a wish or demand for such meetings because of the parent's belief that the same should be held is not on its own determinative.

6. The third observation concerns some of the sections in an EHC Plan (I deal with other sections in paragraph 11 below). Section B of an EHC Plan is intended to contain a description of the child's special educational needs. Sections C and D of an EHC Plan are intended to cover, respectively, the child's health care needs that relate to his special educational needs and his social care needs which relate to his special educational needs. Sections G and H of the EHC Plan then, correspondingly, deal with the health and social care provision reasonably required by the learning difficulties or disabilities which result in the child having special educational needs. The case as put by

[1] I should add that a further, unsigned 'copy' of this 1 April 2018 letter, which the father provided to me at a yet later point, has one, not necessarily immaterial, amendment in the text of the letter. This alters the last sub-paragraph cited at the top of this page to read "face to face meeting ought to be special educational need. By virtue of section 21.1 of the Children Act 2014, special education provision means educational provision that is additional to that made generally for other children". The version of the father's letter received by the First-tier Tribunal is that set out in paragraph 4 in the decision above.

the father above was that answering urgent telephone calls made by the parents to the school was part of AR's health needs which related to his special education needs. Even assuming, however, that the facility of answering urgent telephone calls about AR's health amounted to health care *provision* reasonably required by AR's respiratory problems, as we shall see under section 21(5) of the Children and Families Act 2014, it is only health care provision which educates or trains a child (or young person) that may count as special educational provision. The father's objection to Judge Brayne's proposed strike out order, again, does not explain on the evidence how the telephone calls which he said were needed in relation to AR's health either educated or trained AR.

7. Having received and considered the father's representations, Judge Brayne struck out the appeal on the basis that it had no reasonable prospects of succeeding on 11 April 2018. In so doing he said this of material relevance:

> "[The father] refers to telling the LA of a change he wanted in the EHC Plan which was not reflected in the working document which I considered when making the previous directions. An example is wording requiring phone contact between the parents and the school if respiratory problems arose. I accept that the LA had not shown these as areas of disputed wording in the working document. However the analysis in my direction of 27 March applies equally to those proposed amendments: they do not relate to educational provision.
>
> [The father] queries the legal status of the working document. A working document has no formal legal status, but is used by the Tribunal and the parties to identify the issues in dispute. The reasons for deciding this appeal had no reasonable prospect of succeeding was in relation to those issues, and not the working document as such. The issues in dispute relate to parental contact with the school; these are matter which [the father] agrees in his submissions are not matters of educational need, and which I have explained in the previous directions are not matters of educational provision. [The father] submits that the proposed new wording is educational provision because it is additional to that generally made for other children. Even if I were to agree that face to face and phone contact with parents is educational provision, I would not see it as being more than is generally made for other children.
>
> [The father] refers to evidence of a need for further support, but this has no relevance unless the tribunal was being asked (which it was not) to make changes reflecting that claimed need for provision.

> For all these reasons the issues in dispute relate to proposed amendments which fall outside the description of special educational provision, and therefore there is no realistic prospect of the Tribunal ordering those amendments. I therefore strike out the appeal under Rule 8(4)(c)."

8. Upper Tribunal Judge Plimmer (sitting as a First-tier Tribunal Judge) refused the father permission to appeal on 23 May 2018. She said that "close liaison of the type and nature envisaged by [the father] is not an educational need for [his son], and the contrary claim would have been bound to fail" and "the Tribunal was entitled to conclude that the proposed amendments fall outside special educational provision in this particular case".

9. The father's renewed application for permission to appeal was heard by Upper Tribunal Judge Ward at a contested oral hearing on 12 September 2018. Judge Ward refused the father permission to appeal. In summary, his reasons for so doing were: (i) that Judge Brayne may have been wrong to strike out the appeal because a factual investigation would have been required to identify the intended purpose of the face to face meetings and whether they were to do with the son's health or education, but (ii) that even if the meetings were on investigation held to amount to 'educational provision', Judge Brayne had been correct in concluding that the such provision would not amount to special educational provision under section 21(1) of the Children and Families Act 2014.

10. Undaunted by those setbacks, the father successfully sought a judicial review of Judge Ward's refusal of permission to appeal. Mr Justice Ouseley gave him permission to seek judicial review of Judge Ward's decision on 28 January 2019. Permission was given on ground three set out in the statement of grounds but it was refused to argue any human rights arguments. Mr Justice Ouseley observed:

> "I found the decision of Judge Brayne persuasive. But it was accepted by UT Judge Ward that it was arguable that the question of parental/school face to face contact was a matter of educational provision. I think it must also be arguable, contrary to UT Judge Ward, that it may therefore be special provision in relation to a child

> with special educational needs, where it goes beyond that which a child without such needs would receive. It is arguable that it does here, whether it is primarily health related when the child is at school, or not. I think that the scope of section F and E in that respect raises an important issue of principle or practice. That issue is merely muddled by the addition of spurious and not well understood human rights arguments."

11. To put these observations in context, the father's ground three in his statement of grounds in the judicial review claim form was that "[t]he tribunal judge erred in law when he considered that meeting with teachers did not amount to educational provision, nor that close liaison and urgent phone calls to school regarding respiratory problem, amounted to a health provision". Section F and E are references to different parts of an EHC Plan. Section F is to contain the special education provision for the child. Section E is concerned with the 'outcomes' sought for the child or young person. Moreover, it would appear that the references to Sections E and F were made by Mr Justice Ouseley because the father had included the first EHC Plan for AR in the documents he put before the High Court on his application for judicial review. I do not have a complete copy of that EHC Plan before me. However, a copy of that first EHC Plan, comprising pages 1, 9, 11 and 13 of that Plan, was before the First-tier Tribunal. Page 13 of that Plan is part of Section E of the Plan and sets out as one of the 'outcomes' under Section E that "Parents require at least two face to face meetings per term with a teacher who teaches [AR] on a regular basis".

12. Focusing just for the moment on the judicial review proceedings, the relevance of this first EHC Plan, at least as far as the father was concerned, is that it included the above 'face to face meeting' requirement in Section E, which was said by the father in the judicial review to be a continuation of the position under the last Statement of Special Educational Needs that had been in place for AR[2]. It was the

[2] The Statement of Special Educational Needs was, as far as I can tell, never in evidence before Judge Brayne, Judge Ward or Mr Justice Ouseley. A copy of it has been provided to me by the father, after the August 2019 hearing. In these circumstances, I simply note that the Statement is dated 18 December 2015 and it appears to include under **Part 3- Special Educational Provision**, but under 'Monitoring', "At least two face-to-face meetings per term with a teacher who teaches [AR] on a regular basis".

*removal* of this 'close liaison' requirement from the EHC Plan in July 2017 that lies at the heart of the father's appeal to the First-tier Tribunal about that Plan.

13. Upper Tribunal Judge Ward's refusal of permission to appeal decision was quashed by Master Gidden on 25 February 2019, pursuant to CPR Part 54.7A(9). Upper Tribunal Judge Jacobs then gave the father permission to appeal against Judge Brayne's strike out decision on 19 March 2019. The point of law on which Judge Jacobs gave the father permission to appeal was the ground on which Mr Justice Ouseley had given the father permission to judicially review Judge Ward's refusal of permission to appeal.

14. Accordingly, the father has permission to appeal Judge Brayne's strike out decision on the basis that Judge Brayne erred in law in concluding that face to face meetings with teachers did not amount to educational provision and also erred in law in the view that close liaison and urgent phone calls to school regarding respiratory problems was not educational provision.

15. Before turning to the reasons why I consider the tribunal did not err in law on these grounds, I must first set out the relevant parts of the statutory scheme. These are contained in sections 20, 21, 27, 36, 37 and 51 of the Children and Families Act 2014 ("the CFA"), which provide, insofar as relevant, as follows.

> "**Section 20**
> 20(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
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> (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.

(3)A child under compulsory school age has a learning difficulty or disability if he or she is likely to be within subsection (2) when of compulsory school age (or would be likely, if no special educational provision were made).

(4)A child or young person does not have a learning difficulty or disability solely because the language (or form of language) in which he or she is or will be taught is different from a language (or form of language) which is or has been spoken at home.

(5)This section applies for the purposes of this Part.

**Section 21**
21 (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,

(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).

(6)This section applies for the purposes of this Part.

**Section 27**
27(1) A local authority in England must keep under review—

(a)the educational provision, training provision and social care provision made in its area for children and young people who have special educational needs or a disability, and

(b)the educational provision, training provision and social care provision made outside its area for—

(i)children and young people for whom it is responsible who have special educational needs, and

(ii)children and young people in its area who have a disability.

(2)The authority must consider the extent to which the provision referred to in subsection (1)(a) and (b) is sufficient to meet the educational needs, training needs and social care needs of the children and young people concerned………

**Section 36**
36(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.

**Section 37**
37(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—

(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.

(2)For the purposes of this Part, an EHC plan is a plan specifying—

(a)the child's or young person's special educational needs;

(b)the outcomes sought for him or her;

(c)the special educational provision required by him or her;

(d)any health care provision reasonably required by the learning difficulties and disabilities which result in him or her having special educational needs;

(e)in the case of a child or a young person aged under 18, any social care provision which must be made for him or her by the local authority as a result of section 2 of the Chronically Sick and Disabled Persons Act 1970 (as it applies by virtue of section 28A of that Act);

(f)any social care provision reasonably required by the learning difficulties and disabilities which result in the child or young person

having special educational needs, to the extent that the provision is not already specified in the plan under paragraph (e).

(3)An EHC plan may also specify other health care and social care provision reasonably required by the child or young person.

(4)Regulations may make provision about the preparation, content, maintenance, amendment and disclosure of EHC plans.

(5)Regulations under subsection (4) about amendments of EHC plans must include provision applying section 33 (mainstream education for children and young people with EHC plans) to a case where an EHC plan is to be amended under those regulations.

**Section 51**
51(1) A child's parent or a 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—
(a) a decision of a local authority not to secure an EHC needs assessment for the child or young person;
(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;
(c) where an EHC plan is maintained for the child or young person—

(i) the child's or young person's special educational needs as specified in the plan;
(ii)the special educational provision specified in the plan;
(iii) the school or other institution named in the plan, or the type of school or other institution specified in the plan;
(iv) if no school or other institution is named in the plan, that fact;

(d) a decision of a local authority not to secure a re-assessment of the needs of the child or young person under section 44 following a request to do so;
(e) a decision of a local authority not to secure the amendment or replacement of an EHC plan it maintains for the child or young person following a review or re-assessment under section 44;
(f) a decision of a local authority under section 45 to cease to maintain an EHC plan for the child or young person.

(3) A child's parent or a young person may appeal to the First-tier Tribunal under subsection (2)(c)—
(a) when an EHC plan is first finalised for the child or young person, and
(b) following an amendment or replacement of the plan.

(4) Regulations may make provision about appeals to the First-tier Tribunal in respect of EHC needs assessments and EHC plans, in particular about—
(a) other matters relating to EHC plans against which appeals may be brought;
(b) making and determining appeals;

> (c) the powers of the First-tier Tribunal on determining an appeal;
> (d) unopposed appeals.
>
> (5) Regulations under subsection (4)(c) may include provision conferring power on the First-tier Tribunal, on determining an appeal against a matter, to make recommendations in respect of other matters (including matters against which no appeal may be brought).

16. As can be seen from section 51(2)(c) of the CFA, the right of appeal to the First-tier Tribunal in respect of the contents of an EHC Plan is, translating those statutory provisions to the sections in an EHC Plan, limited to challenging the contents of sections B, F and I (the last of these does not arise on this appeal). Further, in respect of Mr Justice Ouseley's seeming *Cart* basis for giving permission for judicial review[3] – the scope of sections F and E in the EHC Plan in respect of health-related needs when a child is at school – the 'outcomes' section of the EHC Plan (section E), which corresponds to section 37(2)(b) of the CFA, is <u>not</u> itself appealable as it does not fall under any part of section 51(2) of the CFA. Both as a matter of the structure of the EHC Plan and as a matter of law under section 37(2) of the CFA, properly identified the 'outcomes' are analytically separate from the special educational provision the child requires. The 'outcomes' are the intended *consequences* of the provision (*Devon CC v OH* [2016] UKUT 292 (AAC) at paragraph [41]) not the provision itself, and may range wider than educational outcomes. Nor is health care provision, as properly identified under sections 21(3) and 37(2) of the CFA, appealable under section 51(2) of the CFA; though under section 21(5) of the CFA health care provision <u>which educates or trains a child</u> is to be treated as special educational provision.

17. Judge Brayne was therefore correct, in my judgment, in his 'minded to strike out' order of 27 March 2018 when he identified that the issue was whether either form of provision sought by the father could on the facts and as a matter of law fall within section F because they amounted to

[3] See *R (on the application of Cart) (Appellant) v The Upper Tribunal (Respondent)* [2011] UKSC 28, [2012] 1 AC 663 and [2011] AACR 38.

special educational provision. It follows from this that whether there was an appealable issue in this case under section 51(2) of the CFA that had a reasonable prospect of success had to translate into whether the father had a reasonable prospect of showing that the two forms of provision he was seeking (the twice termly face to face contact and the urgent phone calls with the school) amounted to special educational provision.

18. The interface between sections E and F in an EHC Plan in this case therefore comes down to whether the father, on the law and on the evidence which was before Judge Brayne, had an argument with a reasonable prospect of success that the twice termly face to face meetings and the facility for urgent telephone contact with the school amounted to special educational provision. I should add that no argument was presented to me by either party about any wider issue of law as to the scope of sections E and F. To that extent, any wider concerns as to the structure and scope of the statutory scheme under the CFA which Mr Justice Ouseley may have had will not be answered in this decision.

19. The respondent's case on the appeal to the Upper Tribunal was that Judge Brayne has been correct in his analysis when he struck out the appeal. It argued further and in the alternative that the school/parental liaison of the type sought - by which it must mean the twice termly face to face meetings and the urgent telephone contact – did not amount to educational provision or special educational provision under section 21(1) of the CFA. Moreover, it argued that there was no special educational need of AR identified in Section B of the EHC Plan to warrant the inclusion of the provision of the type sought in Section F of the EHC Plan.

20. I am not sure the last point advanced by the respondent is entirely a good one because, as Judge Brayne recognised, the father has not necessarily recognised the significance of the demarcation lines drawn by the sections within an EHC Plan. Moreover, by the time of his

objection to Judge Brayne's proposed strike out order the father was arguing in terms of the face to face contact being an educational need under Section B of the Plan. Where, however, the last argument put forward by the respondent has value is in highlighting the need to examine whether on the evidence before Judge Brayne such provision was even arguably made out on the evidence relating to AR's educational and health care needs.

21. In his reply on the appeal before me, the father argued that the AR's statement of special educational needs had required close liaison between the school and the parents. He said that in September 2015 the respondent's Head of Education had recommended that there be two face-to-face meetings per terms between AR's parents and one of his teachers and in 2016 these requirements had been transferred into AR's EHC Plan. However, in 2017 this requirement had been removed from the Plan. (This history has already been touched on in paragraphs 11 and 12, and footnote 2, above.) So to do, the father argued, was an unfair process in "breach of parental rights in that parents were entitled to an annual meeting with school official before amending the Plan". The reply argued further that AR's special needs required effective communication with the school because when AR's hay fever returned in the summer the "parents are worried about his breathing at PE lessons and need to phone the school for information". It also emphasised the father's view that parents had parental rights such as attending parent teacher meetings.

22. Further, the father said in this reply that there was no ambiguity in the law: special educational provision is what is additional to and different from that made for others in mainstream schools. Given AR's "special education and health needs, as listed in his plan, it was obvious that such provisions for him would have amounted to special educational provisions. There is no other logical conclusion". Moreover, there was nothing in sections 20 or 21 of the CFA to suggest that the close liaison asked for by the father could not have been considered to be special educational provision given AR's educational needs. Common sense should prevail

and it was AR's best interests[4] given his special needs that his parents should be able to liaise closely with the school "as required by the Plan up to June 2017". It was arguable within the meaning of sections 20 and 21 of the CFA that the parental contact sought was a matter of special educational provision for AR given his special educational needs as listed in the Plan[5].

23. As well as the previous EHC Plan and Statement of Special Educational Needs ("the Statement"), the details of which are addressed in paragraphs 11 and 12 above, the father also put at the forefront of his case a letter to him from the respondent dated 8 September 2015. This letter provided the outcome of a complaint made to the respondent by the father about what he perceived as a lack of communication between the school and AR's parents concerning his education at school. Without ascribing blame (because it is unnecessary for this appeal to do so), it would appear that relations had broken down between AR's parents and his school, and this was manifested in the father's then view that the requirement in AR's Statement for 'close liaison' between the school and the parents had not been met. The conclusion of the panel on this aspect of the complaint was as follows.

> "The panel recognises that there is a limited opportunity for parents to have contact with the staff in special schools as pupils are normally transported to school by taxi. It is acknowledged that it would be helpful to have some regular face-to-face meetings, given the requirements of your son's statement of SEN. We consider that a reasonable level of contact would be suggested as 2 meetings per term, although, if there was a particular concern, additional meetings could be arranged by either party, to meet the need."

It would appear that it was after this decision on the complaint that the Statement referred to in footnote 2 above was amended.

[4] The child's 'best interests' test under the Children Act 1989 does not, however, apply in this area of the law: see *LB Richmond upon Thames v AC* [2017] UKUT 173.

[5] I have left out of this summary of the father's arguments those he made relying on the European Convention on Human Rights, as he does not have permission to make such arguments on this appeal.

24. Contrary to Judge Ward's view when he refused the father permission to appeal, this letter was seemingly before Judge Brayne, in the form of an exhibit to the witness statement of Kim Nicholl for the respondent (see pages 227-228 of the First-tier Tribunal's bundle); though the Statement that followed it was not. However, on its face the letter's language of it being *helpful* for face to face meetings to take place given the already existing requirements of the Statement does not evidence or explain why such provision was needed to meet AR's special educational needs. Nor do I consider that the letter on its face ought to have led Judge Brayne to take a different view as to the likely merits of the father's appeal because nothing in the letter would reasonably have led him to conclude that the Statement would necessarily have been amended to make the face to face meetings part of the special educational provision to be made and provide the explanation for why that was so. In addition, nothing in Ms Nicholl's witness statement links the complaint result with the Statement then being amended. In fact, based on paragraph 27 of the witness statement the letter was only being exhibited to it as evidence of an alleged threats made by the father to a school governor which was said to be evidenced in the letter.

25. Even if I am wrong in the above, however, I am quite satisfied that no material error of law arose from any failure by Judge Brayne to look behind the letter because, having looked at the Statement the father has supplied to me, I can see nothing under AR's special educational needs in that Statement that would on the evidence have reasonably required face to face meetings with the parents to meet those needs: that is, a need for such meetings as special educational provision in order to meet AR's special educational needs. (Nothing in the letter could conceivably have raised any issue about telephone contact.) Part 2 of that Statement sets out what were then AR's "special education needs". It refers to there being ongoing concerns about his social and language skills but says he coped well in the classroom and did not present any significant issues. Nor did his educational needs, or speech, language and communication needs, or emotional and behavioural needs suggest

any need in the form of face to face contact by AR's parents with his teachers in order to assist or enable AR to address his special educational needs. Nowhere does the evidence show, for example, difficulties with integration of a child into the classroom that might have required one to one meetings between the teacher and the parents so that they could assist with strategies to ease the child's integration into the school or the classroom from home.

26. Nor do I consider that the evidence before Judge Brayne about matters relating to AR's education in April 2018 advanced the father's case any further in terms of AR reasonably requiring his parents to have face to face meetings twice termly with the school (or having an urgent phone call facility with the school) so as to address his special educational needs. The fact that such meetings might previously have appeared in AR's Statement or in Section E of an earlier iteration of the EHC Plan could not in and of themselves be determinative. As Judge Brayne correctly directed himself, the issue was whether in April 2018, on the evidence and as a matter of law, what was being argued for by the father could arguably amount to special educational provision.

27. Speaking for myself, notwithstanding the opening words of section 21(1) of the CFA I harbour considerable doubts about the legal utility of seeking to parse the statutory term 'special educational provision'. The phrase 'educational provision' does not have a useful meaning of its own in the CFA (see section 83(2) of the CFA), and absent provision for those under the age of two (see section 21(2) of the CFA), does not have a statutory effect under the CFA. Moreover, taking this approach can lead to conceptual problems that may have troubled this case. As we have seen, Judge Brayne first consideration was that the face-to-face meetings between parents and the school could not amount to educational provision. That rightly in my view troubled Judge Ward, particularly in a context where the respondent was arguing before Judge Ward that it was not known whether the meetings would relate to AR's education or his health. I can well see in that context why

striking out the appeal for no reasonable prospects of success would have been troubling given the implication that if, on factual investigation, it was accepted the meetings were relating to AR's education they may have amounted to 'educational provision'. That, I think, was what Judge Ward was driving at when he said the following on this aspect of Judge Brayne's decision:

> "In practice it is unlikely that there would not have been a significant part of [the meetings] devoted to matters concerned with [AR's] education. School staff are teachers, not doctors"

28. However, the danger in seeking first to decide whether some aspect of a child's relationship with, or time at, school may amount to the wider and more general 'educational provision' is that it may tend to obscure rather than illuminate. For the reasons I have quoted from Judge Ward, many such meetings and phone calls concerning a child's time at school may in some sense be said to be to do with his or her education and so, perhaps, on that basis may be said to amount to educational provision as opposed to health provision. However, even here I would be cautious about any suggestion that such liaison necessarily would amount to educational provision. The question would remain to be addressed and answered: what is it in the face to face contact or telephone that *provides* something of educational worth to the child?

29. But dividing up the statutory test in the above manner may lead to a misleading result if, say, the face to face contact is said to amount to educational provision simply because it is 'to do' with the child's education and then, as a result, might be said to amount to 'special educational provision' on no more a basis than that (per section 21(1) of the CFA) there are more such meetings for the child than there are for other children in the school. This in my judgment would be to downplay the necessary statutory linkage found in section 20(1) of the CFA between the special educational provision and the child's special educational needs. What needs to be shown on the evidence is that the

child's learning difficulties or disabilities 'call for' special educational provision to be made for him or her.

30. In this appeal that means whether the father had a reasonably arguable case that AR's learning difficulties and/or disabilities called for his parents to meet face to face with the teacher twice termly and for an urgent phone contact facility to be put in place. Despite the father's argument at one stage that the meetings and urgent phone facility should be in Section B of the EHC Plan (in other words, they amounted to AR's special educational needs), it seems to me that they more rightly are a form of provision rather than the need itself. In any event, as can be seen from paragraph 21 above the father's case before me was concerned with showing that the face to face meetings and facility for urgent telephone contact amounted to 'special educational provision' within section 21 of the CFA. Therefore, another way of describing the focus of this appeal is whether the father had a reasonably arguable case that the two forms of provision for which he was arguing could on the evidence have met AR's needs as set out in Section B of the EHC Plan (*R v Secretary of State for Education ex parte E* [1992] 1 FLR 377) in the sense of being provision that would educate or train AR: see *DC and DC v Hertfordshire CC* [2016] UKUT 379 (AAC); [2017] ELR 27 and section 21(5) of the CFA.

31. I would be inclined to accept that meetings between parent and teacher *might*, on the correct set of facts, amount to special educational provision, if the child's difficulties, arising from their disabilities or learning difficulties, in attending and integrating into the school or class on school days were such that they needed very close and regular liaison between the child's parents and class teacher - for example, in the form of daily discussions about strategies the parents could put in place at home or on the journey to school - in order to enable the child to access their education. Such cases where this nexus exists and which gives rise to special educational provision being made for the child through the parent/teacher meetings are likely to be rare if not very

rare. However, that rarity can be no basis for an *a priori* ruling out of parent and school meetings as special educational provision simply because they are meetings.

32. But the difficulty for the father, in my judgment, is that he had no such case on the evidence about why the meetings were needed for AR and no properly arguable basis on the evidence to make out a case that the two forms of provision he sought to be included in section F of his son's EHC Plan would educate or train AR by addressing his educational needs as set out under Section B of that Plan. Accordingly, although Judge Brayne erred in law in determining the issues before him in terms of whether the provision sought could in theory amount to 'educational provision', in my judgment he committed no <u>material</u> error of law in coming to the decision which he did. I say this for these reasons.

33. To start with, like AR's Statement which I have analysed in paragraph 25 above, Section B of the EHC Plan in issue sets out no special educational needs in respect AR that could conceivably 'call for' or require face to face meetings between the parents and the school. At highest, under 'Emotional, Social and Behavioural' needs there is reference to AR having difficulty in understanding social rules which could lead to him using inappropriate language and behaviour. There is nothing in this that evidences a need for parental face to face meetings with the school to meet this need. On the face of it this special educational need could reasonably be met by the school's own provision. Moreover, even if these face to face meetings might be to do with AR's education in a broad sense: (i) there is nothing in the evidence to show how such meetings would educate AR in respect of his language or behaviour in the classroom, and (ii) there is nothing in this need that begins to suggest a need for face to face meetings with AR's parents that was additional to or different from meeting provision generally made for parents of other children in the school.

34. Nor, notably, was the father able to explain to me what in ARs special educational needs called for him and his wife to have twice termly meetings with his teacher. His case both in writing and orally before me was that the it was *AR's parents* who required at least two face to face meetings per term with a teacher who taught AR on a regular basis. I could not get from the father at the hearing before me what in AR's special educational needs in Section B gave rise to the need for parental input at two face to face meetings per term. At best, he said that he needed to have the meeting with the school to discuss his son's problems because if he wrote to the school or emailed the school it may not be received or acted on, hence why he needed it to be face to face. However, even assuming the premise of insecure means of communication, this is no more than a requirement for a secure means *so as to communicate*. It says nothing about why the father's input was needed save "to discuss the problems", and identifies nothing as to what the father or his wife were needing to do in order to educate or train their son.

35. Secondly, the father placed great reliance on the words in section 21(1) of the CFA that special educational provision is provision that is additional to, or different from, that made generally for other children of the same age in the school. His case, as I understood it, was that as there was a need for the twice termly meetings (and the urgent telephone contact facility) and this was additional to that which other parents in the school would generally receive, this therefore had to be special educational provision. The flaw in argument is the premise about there being a need for the meetings. That need had to be shown on the evidence and come within the statutory tests in the CFA. This takes us back to the point made in the immediately preceding paragraph, namely the lack of an evidential basis showing why AR's learning difficulties and/or disabilities needed his parents to meet twice termly with his teachers.

36. Third, the father also relied on that which had gone before in terms of AR's Statement and a previous version of his EHC Plan. However, save for the letter of 8 September 2015, no evidence was advanced showing why the face to face meetings had, our ought to have, then qualified as special educational provision. Moreover, what occurred in a previous Statement or EHC Plan cannot be determinative of whether the provision sought in 2018 to be included in the EHC Plan in fact and on the law amounted to special educational provision.

37. Lastly, the facility for urgent telephone calls needs some separate or additional consideration. It did not feature greatly in the father's arguments. It was common ground, and argued before me, that these were said to be needed because of AR's respiratory problems, which may have arisen particularly at games in school. It was said the need for urgent telephone calls was to enable the parents to advise the school about how to deal with treating this problem when it arose, and that this amounted to either health or social care provision. I observe first that Section C of the EHC Plan only spoke in terms of AR getting short of breath at PE, which would not suggest the need for any serious remedial health input. That may be confirmed by section G of the Plan being blank. However, as noted in paragraphs 4 and 7 above, it was the father's case that the respiratory problems needed to have provision for them included in the EHC Plan, in the form of the urgent phone call facility. The point was argued before me by the father on the basis that such provision came within section 21(5) of the CFA. However, there was no credible or persuasive evidence advanced before either Judge Brayne or myself showing how such telephone contact by the parents would in fact educate or train AR.

38. It is for all these reasons that this appeal is dismissed

**Signed (on the original) Stewart Wright**
**Judge of the Upper Tribunal**

**Dated 6th December 2019**