IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. UA-2023-001275-HS
[2024] UKUT 139 (AAC)

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

Between:

KTS

Appellant

- v -

Governing Body of a Community Primary School

Respondent

Before: Upper Tribunal Judge Stout

Hearing date: 24 April 2024
Decision date: 2 May 2024

Representation:

Appellant: Stephen Broach KC (instructed on Direct Access)
Respondent: Lachlan Wilson (counsel, instructed by Warwickshire County Council)

DECISION

The **decision** of the Upper Tribunal is that the appeal is allowed.

The decision of the First-tier Tribunal is **set aside** in part and **remitted** to be reconsidered by a fresh tribunal.

I **direct** that the file be placed before a salaried judge of the First-tier Tribunal (Health, Education and Social Care Chamber) (Special Educational Needs) for case management directions to be given.

RULE 14 ORDER

THE UPPER TRIBUNAL ORDERS that, save with the permission of this Tribunal:

No one shall publish or reveal the name or address of any of the following:

(a) D, who is the child involved in these proceedings;

(b) any of the other children mentioned in the evidence or argument;

or any information that would be likely to lead to the identification of any of them or any member of their families in connection with these proceedings (including the name of the school).

Any breach of this order is liable to be treated as a contempt of court and may be punishable by imprisonment, fine or other sanctions under section 25 of the Tribunals, Courts and Enforcement Act 2007. The maximum punishment that may be imposed is a sentence of two years' imprisonment or an unlimited fine.

REASONS FOR DECISION

Summary of this decision

1. The appellants' appeal to the Upper Tribunal succeeds. The decision of the First-tier Tribunal involves legal errors in relation to the claim of failure to make reasonable adjustments in respect of the delivery of the curriculum. The decision is set aside insofar as it concerns that claim (but not otherwise). That claim now needs to be reheard by a new and different First-tier Tribunal. The new tribunal may reach the same, or a different, decision to that of the previous Tribunal.

2. This decision is structured as follows:-

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Introduction

3. This case concerns D, a child who is now aged 12 but who was at the time of the matters that were the subject of the claim to the First-tier Tribunal a pupil at a community primary school in Warwickshire. She has a diagnosis of Autistic Spectrum Disorder (ASD) and has had an Education Health and Care Plan (EHCP) made and maintained by the local authority (LA) under the Children and Families Act 2014 (CFA 2014) since December 2015.

4. In the proceedings below, D's parents (hereafter referred to as KTS or the appellants) brought claims under the Equality Act 2010 (EA 2010) against the governing body of her primary school (the responsible body or RB). There were three heads of claim: two claims under s 15 of the EA 2010 that succeeded and one claim of failure to make reasonable adjustments under ss 20 and 21 of the EA 2010 that was dismissed by the Tribunal. The decision was issued on 16 May 2023 following a hearing on 17 April 2023.

5. The appellants appeal against the dismissal of the reasonable adjustments claim. Permission to appeal was granted on the papers by Deputy Judge Hocking on 11 October 2023 on four grounds as follows:-

> Ground A – The First-tier Tribunal erred in finding that a school is entitled to take time and to exercise discretion and professional judgment as to the steps that it takes and the adjustments that it makes for pupils;
>
> Ground B – The First-tier Tribunal erred in finding that there is no duty to achieve a goal or objective under the duty to make reasonable adjustments;
>
> Ground C – A finding that there was no dictation or copying and that D's written work was her own was not open to the First-tier Tribunal on the evidence;
>
> Ground D – The overall conclusion that there was no breach of the duty to make reasonable adjustments was the result of a misdirection in law, because that duty does not merely require some steps to be taken, but all the steps as it is reasonable to have to take to be taken.

6. I received from the parties, both of whom were ably represented by experienced counsel, helpful skeleton arguments and detailed oral submissions. I intend no disservice to the quality of those submissions by not setting them out in detail in this judgment. Their submissions on the legal principles (on which the parties were in agreement) have been incorporated into my discussion of the applicable

legal principles below. Their submissions on each of the individual grounds of appeal, I summarise below when dealing with each ground.

Factual background

7. D has had an EHCP since December 2015. When the EHCP was first issued, the local authority had named a special school for D's provision, but after an appeal to the First-tier Tribunal, D was placed in a mainstream school, one year behind her chronological age. D attended a nursery and another mainstream primary school before transferring in November 2020 to the mainstream community primary school that is the respondent to these proceedings.

8. D's EHCP records her ASD diagnosis and, in Section B, describes how this "impacts on her speech and language, her social communication and interaction, her play and her ability to share focus and take adult direction". It states that she "presents with a language disorder … has very disordered expressive language which impacts upon her ability to communicate significantly" and that her "receptive and expressive language skills continue to be significantly behind that of her age matched peers".

9. As relevant to this appeal, Section F of the EHCP stipulates that D will receive "a minimum of 32.5 hours per week of level 3 Teaching Assistant support solely assigned to [D], who has experience and/or training in young children with autism and language difficulties". It further states:

> Curriculum differentiation to be made explicit to reflect how it has been differentiated in terms of pace, content and delivery. …
>
> [D] requires a differentiated curriculum (in terms of pace, content and delivery) which emphasizes opportunities for learning through practical, visual and play based activities supported by an individualised timetable, identifying the differentiated teaching and learning activities she needs.
>
> Different learning materials as required by her action plan. …
>
> Ensure that [D] spends time completing activities on her own and doesn't only complete things when she has the support of an adult as she may become over reliant. Initially, this may need to be easier tasks that aren't overly challenging for her and are achievable independently. Really celebrate the fact that she has completed these things with independence. The challenge can increase as her confidence increases with completing things independently. [D's] Level 3 Teaching Assistant, may feel it appropriate to leave her for very brief periods of time (e.g. 1 minute) before checking in with her again.
>
> This time period can be extended as she gains confidence. …
>
> [D's] literacy programme should include alternative methods of recording so that the demonstration of her learning is not reliant on written work which is heavily scaffolded. For recording work, staff should consider alternative means of recording (a scribe, paired/collaborative work, voice recorder, talking tins/postcards video, laptop,

illustrated diagrams/charts). Frameworks should be provided for writing, with headings, sentence beginnings etc.

10. D’s parents became concerned about the progress that D was making at school and about certain aspects of her educational provision and commenced this claim to the First-tier Tribunal under the EA 2010 on 12 September 2022. The claim was registered on 4 October 2022. The appellants acted ‘in person’ in commencing the claim and were not legally represented until they instructed Mr Broach KC on a direct access basis to represent them at the final hearing.

11. At a Telephone Case Management Hearing on 30 November 2022, Judge Ozen identified the grounds of claim in outline, including the third ground with which this appeal is concerned. The third ground was recorded as being an “allegation that the school failed to differentiate [D’s] curriculum”. The statutory cause of action under the EA 2010 was not identified. The appellants indicated that they were unclear what further details were required and the Tribunal explained in general terms, ordering them to identify: (i) the specific failure or unfavourable treatment being alleged; (ii) the date or date range when the failure/treatment arose; (iii) how the claimants say that failure arises from D’s claimed disability; and (iv) the disadvantage that D has suffered as a result.

12. The appellants responded to that order by producing an 8-page document setting out further details of their allegation. This took the form of identifying four specific incidents where they alleged that the school had failed appropriately to differentiate the curriculum for D. In very short summary, those incidents were as follows. Each incident was based on what had been included in a report by D’s Specialist Teacher:-

    a. On 9 May 2022 it was alleged that D was expected to follow mainstream teaching without appropriate differentiation in relation to a topic about teeth and without using a multisensory approach such as being provided with a model of teeth as an additional learning tool;

    b. On another occasion (date not known to the appellants) the class did an activity on the Great Amazon River, D completed an A4 sheet with facts about the Amazon which it was alleged showed that there had been no differentiation in delivering the curriculum content to D and the written work produced had been dictated or scribed by D’s TA as it included long sentences and words which the appellants consider D is not capable of producing.

    c. On another occasion (date not known to the appellants) the class did a topic about an RAF Bomber Command Mission Debrief and again D’s work showed no differentiation but a full A4 page of writing with complicated sentences such as, “The mission was to bomb a bridge used by the enemy in Melsbroek Belgium. Before take off, we had a briefing…” which again the appellants considered had been scribed or dictated.

    d. On another undated occasion, when the class was doing ‘The War of the Worlds’, D had produced two pages of complicated sentences and long

words in response to prompt text which the appellants again considered had been dictated or scribed.

13. In their further particulars the appellants complained, "[D] has been deprived of appropriate learning opportunities using appropriate differentiating as outlined in section F of ECHP, which was recommended by three different independent EP [and included in the EHCP following the 2020 First-tier Tribunal decision …].[D] was not given access to an appropriately differentiated curriculum, and hence [D] has been in a disadvantaged position in her learning and progress. [D] has been made to write pages and pages of work without any understanding or learning". Further examples followed and the point that the school was failing to differentiate for D in the way stipulated in Section F of the EHCP was made strongly.

14. There was then a further Telephone Case Management Hearing on 24 January 2023. It appears from the record of that Hearing that the appellants' further particulars had got 'lost in the system' and were only retrieved during the course of the hearing. No doubt it was as a result of this that the opportunity was not taken at that hearing, as would have been desirable, for the Judge to identify the legal nature of the claim that was being made. The claim was again classified merely as 'discrimination in how the school is delivering the curriculum', rather than by reference to any particular statutory cause of action under the EA 2010 and whether the claim constituted, for example, a claim of failure to make reasonable adjustments under ss 20 and 21 or a claim of unfavourable treatment arising in consequence of disability under s 15.

15. The RB was directed to respond to the appellants' further particulars and did so in a document dated 7 February 2023. It responded to the first incident as if it was a claim of failure to make reasonable adjustments, but made no attempt to categorise the second, third and fourth incidents. It provided dates for the undated incidents and asserted that each of the incidents had occurred more than six months before it was raised with the Tribunal and was therefore out of time.

16. The parties have also emphasised, as relevant to this appeal, the following paragraphs of the RB's response:

> 13. Nonetheless, the Responsible Body refute that [D] was disadvantaged by not having access to a model of teeth. Whilst it is not detailed in the observation report, the Responsible Body has established that during the lesson the class teacher presented from an interactive whiteboard and [D] has her own personal copy of the teaching resource on her desk in a paper-based format.
>
> 14. [D] was supported by her teaching assistant during the lesson, who acted as a scribe, writing down [D]'s ideas and adding labels.
>
> 15. It is apparent from the details of the observation that [D] was engaged with all other parts of the lesson and completed the tasks successfully.
>
> 16. The Claimants have not adequately evidenced that the lack of a model of teeth put [D] at a disadvantage and that this is directly linked to her disability. …

> 19. Whilst [D] follows the National Curriculum, it is suitably differentiated, and professional advice is followed in the implementation of this as well as, critically, [D]'s Education, Health and Care Plan. …
>
> 28. The pieces of writing are examples of shared composition, where [D]'s Teaching Assistant works with [D] to take her initial ideas and then [D] rehearses, writes and edits the written responses. This technique is used with [D] and is based upon the recommendations by [D]'s Speech and Language Therapist.
>
> 29. The Responsible Body notes that in Tonia Robinson's report of August 2022, [D]'s teaching assistant informed Ms Robinson that they use pictures and spider grams to generate ideas, and Colourful Semantic to help structure sentences. There is reference in the report that [D] does require a high level of guiding and scaffolding, as indeed would be expected for any child with [D]'s profile of special educational needs. Many techniques are used with [D] to support her writing.
>
> 30. The Responsible Body submits that the pieces of writing put forward by the Claimants are not examples of [D] writing independently of an adult but examples of [D] being heavily supported and the writing being scaffolded over a number of lessons.
>
> 31. The Responsible Body does also not agree that three examples of good written work by [D] amount to evidence of discrimination and that [D] was put at a disadvantage. By using a scaffolding technique when completing these pieces of work, the Responsible Body are adhering to professional recommendations and [D]'s Education, Health and Care Plan and adjusting to [D]'s needs as they present on daily basis.
>
> 32. Describing [D] as a 'slave' in such situation is not helpful, useful or accurate. [D] is having the Key Stage 2 curriculum differentiated heavily for her to enable her to be able to access the work being done within a mainstream environment. These very few examples of completed work are highly selective because they do not show the very high level of support and differing techniques being utilised to develop [D]'s skill levels and are simply illustrative of the end result of one particular set of techniques in particular circumstances.

17. The appellants then prepared a reply to the RB's response in which they clarified that their claim "is about ongoing lack of differentiated curriculum for [D] which is ongoing on day to day basis (from October 2020)" and not limited to the example incidents they had referred to in their further particulars, which they pointed out they did not have dates for until the RB provided its response. They also replied to a number of the factual points that the RB had made. One of the points that they repeated a number of times in the document, was that the school was overly reliant on "dictating and scribing" and that there was (they submitted) nothing in the EHCP about "dictating and scribing" being appropriate educational provision for D.

18. The matter then came on for final hearing on 17 April 2023. As is customary in the First-tier Tribunal in such cases, the hearing took place by video before a Tribunal Judge and a Specialist Member. The Tribunal had before it documentary evidence, the key items of which so far as relevant to this appeal included:

    a. A report by a Specialist Teacher dated 6 June 2022 following observations of D on 9 and 23 May 2022. This includes observation of the lesson about teeth referred to in the appellant's first incident in which it is noted that D was "quite passive" in her learning in this lesson although was able independently to write the learning objective with the rest of her class and to say the words "chew and bite" which the TA scribed for her. It also included a description of an intervention during assembly when D had a colourful semantics (sentence building) intervention and was able to choose different parts of a sentence (Who where, when, what) to construct a sentence;

    b. A report by CandLE (Communication and Learning Enterprises Ltd) provided by Ms Pedrosa (AAC Specialist Teacher and Area Manager) who had been supporting D six hours per week as specified in her EHCP. Her report indicates that D has started using an iPad with Grid3 (a text and symbol-based communication software) and it is recommended that she starts using this in lessons (which I note from p 220 started on 26 September 2022, after these proceedings commenced). The report notes: "[D's] handwriting is very neat, but she doesn't seem to understand what she is writing when content is more complex. [D] struggles to write freely without adult support and intensive scaffolding. For example, [D] can describe a picture, but she needs many questions throughout the process of writing". Ms Pedrosa made a number of recommendations of strategies for D, including working with "chunks of text rather than big texts", "scaffolding", "use of simple vocabulary", noting that "many of these" strategies were already being implemented but emphasising the importance of establishing a way of working with D that promotes her independence in producing schoolwork as currently "[D] strongly relies on an assistant to learn and all activities are adult led";

    c. A report by independent Educational Psychologist, Ms Robinson, dated 30 July 2022 following an assessment including in-school observation on 22 June 2022 and discussion with parents, school SENCO and D's TA. This includes D's WISC-V UK results, which include scores in the Extremely Low range for two elements of the Verbal Comprehension Index (Vocabular and Information), difficulties with working memory, but broadly average scores on other elements. Ms Robinson's report records (at paragraph 3.23) the range of resources that the TA uses to support D and includes the following further paragraphs on which the parties have placed particular reliance:

        > 3.27 To support writing, [the TA] uses pictures and spider grams to generate ideas, and Colourful Semantic to help structure sentences but despite this provision, [D] still struggles to create a sentence orally, prior

> to writing it. Examination of her workbooks showed immaculate handwriting and lovely drawings, with well written sentences that are clear and meaningful to the reader. [The TA] told me that this required a very high level of guiding and scaffolding and was often dictated by herself or copied from a sentence maker. She told me [D] is able to read back all of her work, and correct punctuation and spelling with some prompts but was unable to answer questions about what she has written.
>
> 3.28 [D] takes pride in her handwriting, an important source of self-esteem for her, and showed excellent fine motor co-ordination with very careful and meticulous drawings and letter formation. She can write well from dictation. Her arithmetic work is at a good level within the class, but she struggles with word problems and understanding what to do in Maths.
>
> …
>
> 5.15 Although [D] is very good at dictation and copying sentences, she found it very difficult to write a spontaneous sentence to describe what she liked to do …
>
> 6.15 [D] has made very little progress in recording her own ideas over the last 2 years. She is still unable to independently formulate a sentence even about a very familiar topic, and has become very dependent on the heavy prompting and scaffolding (dictation) provided by her TA. She will require a specifically targeted programme, using a range of strategies to support progress in small steps towards understanding situations, generating and visualising her own ideas, and organising her thoughts and words into a simple sentence which she can then rehearse and remember, to enable her to write independently.

d. A report by local authority Educational Psychologist, Ms Underwood, dated 23 November 2022, and based on observation of D in school on 16 November 2022 and discussion with class teacher and TA and parents. As relevant to this appeal, this notes (at paragraph 15) that the school has visual timetables and strategies in place for D and (at paragraph 46) that D is being enabled successfully to access the curriculum through a range of approaches (including the iPad with Grid3 which was being used in lessons by this point) and that she is making progress. At paragraph 32, Ms Underwood noted that "[D] responded well to verbal mediation and scaffolding provided by the [class teacher or TA]". She stated at paragraph 53 that "During literacy [D] required some prompting to attend to the class teacher. She [benefitted] from having her own copies of visual information presented on the board for reference." A sample of D's work was included at paragraph 55 as an example of her writing on the poster task being legible, neat and well formed. No comment was made on whether the content of this poster (which includes words such as "assassinated", Sarajevo, Serbian, Herzegovina, etc) was dictated to D or not. At paragraph 56, Ms Underwood refers to Ms Robinson's report and indicates that it "should be read in conjunction".

She noted that D "did not appear to have significant difficulty reading the information presented on worksheets or resources in the lesson". At paragraph 65 she concluded that appropriate provision was in place for D and that the school has provided a learning environment that has enabled her to make "sound progress". She considered that the provision in the EHCP remained relevant and at paragraph 88 stated that "staff should intervene with scaffolding and mediation where required, alongside visual support, taught strategies and resources".

e. A written statement dated 22 February 2023 prepared by the school Headmaster based (counsel for both parties agreed) on conversations he had had with D's class teacher and TA. This explained how D had over the course of a week produced a story map for Goldilocks (a story which I note from paragraph 5.13 of Ms Robinson's report had long been known to her), produced independent words about the character of Goldilocks and thought of short question sentences which she wrote in her book, worked with the specialist teacher from CandLE to retell the story and wrote a short description of Goldilocks at the end of the week.

19. At the hearing itself, the only witnesses who attended were the Headteacher and the appellants. The RB applied (late) for Ms Underwood to appear as a witness, but the Tribunal refused that application in part on the basis that as Ms Robinson had not attended it would not be fair to hear oral evidence from Ms Underwood.

The First-tier Tribunal's decision

20. The First-tier Tribunal identified the issue on the third claim with which this appeal is concerned to be (at paragraph 7) "From September 2021, the school did not differentiate [D's] curriculum at school and so failed to make reasonable adjustments for her".

21. At paragraphs 8-10 it directed itself by reference to the relevant statutory provisions of the EA 2010 and stated (at paragraph 8): "We remind ourselves that any failure to make the special educational provision in [D's] EHCP does not, of itself, constitute discrimination and that we are not considering whether the RB made best endeavours to make [D's] special educational provision under section 66 of the Children and Families Act 2014."

22. At paragraph 13 it noted that there was no dispute that D was disabled "as she has significant learning difficulties associated with her diagnosis of ASD, including in respect of speech and language, communication, anxiety, sensory sensitivities and avoidant behaviours".

23. It is worth setting out the whole of the section of the decision dealing with this third claim:

> **Non-differentiation of the curriculum**
>
> 24. The third element of the Claim relates to the allegation that the school failed to differentiate its approach to teaching [D]. This is best considered as a failure

to make reasonable adjustments and the Claimants have identified, as the practice that puts [D] at a substantial disadvantage, one whereby pupils engage in their learning by oral instruction and independent written exercise. The Claimants say that the school's failure to make adjustments to this practice put [D] at a substantial disadvantage in her learning, as she failed to make the level of progress that she should have.

Parties' positions

25. The Claimants refer (among other things) to the evidence of Ms Tonia Robinson (EP) and Ms Catia Pedrosa (Specialist Autistic Teacher) to support this element of the Claim. That evidence is to the effect that through observing lessons, working with staff who knew [D] and considering pieces of [D]'s written work, they are of the view that the school did not appropriately differentiate [D]'s provision. They say, in summary, that:
a. On at least some occasions [D] was a passive participant in her lessons because her teaching did not follow a multi-sensory approach and they refer to a particular lesson observed by Ms Robinson relating to teeth;
b. [D] was too reliant on support from her teaching assistant and did not work with sufficient independence.
c. It appears that [D]'s written work was either copied or dictated to her by staff, because it contains language that she would not understand or use (these pieces of work were analysed in depth in the hearing).

26. The Claimants say that on the basis of the advice given by these professionals, the school could and should have made simple adjustments to the way that it supported [D]. The school should, for example, have used more visual aids to help [D] or could have got her to write short, simple text. The Claimants say that this failure meant that [D] was put at a substantial disadvantage because her learning, in particular her literacy, was not progressing, she was not learning to work independently and she was distressed in some lessons, expressed through making whining noises.

27. [The Headteacher]'s response, in summary, was that the school had pursued a quality
first teaching approach which included a variety of ways of supporting [D], including a multi-sensory approach (e.g. a lesson about teeth that involved looking at and touching teeth as well as listening to the teacher and preparing written work). The school followed the colourful semantics approach to developing [D]'s literacy skills as recommended by the Speech and Language Therapist, which involved a good deal of support and scaffolding. He pointed to a number of steps that the school had taken to support [D], including putting into practice professional recommendations (e.g. using the software recommended by Ms Pedrosa and her colleagues), making an appropriate environment available for her sensor needs, providing a good deal of adult support. According to [the Headteacher], [D] was happy at school and was making progress, especially with her social skills and numeracy. He stressed that the school never dictated work to [D] or got her to copy text, but worked with her on projects over a matter of days following the colourful semantics approach.

[The Headteacher] did not accept that [D] making whining noises was an indication of distress, but was rather a part of her self-regulating. He said that [D]'s progress with literacy was slower as that is an area that [D] struggles with. [The Headteacher] acknowledged that there had been problems with record keeping and
tracking [D]'s progress, but said that this had now been rectified and [D]'s progress was now being properly recorded.

Analysis

28. The school did not dispute that it had a practice of pupils engaging in their learning through oral instruction and independent written exercises and that this practice, without adjustment, put [D] at a substantial disadvantage. Indeed, the school's position is that it did make reasonable adjustments for [D] and that those adjustments were largely successful in supporting. The primary issue, therefore, for us to consider is whether the school had taken such steps as it was reasonable for it to have to take to avoid the disadvantage to [D].

29. Mr Broach, on behalf of the Claimants, suggests (in summary) that because the school did not put into effect the recommendations made by certain professionals (including Ms Pedrosa and Ms Robinson), it failed to take the reasonable steps that it ought to have done. As a result, [D] still suffered a disadvantage in her learning, because she was distressed in lessons, her literacy skills are still behind where they should be and she is unable to work with a sufficient degree of independence (e.g. [D] cannot spontaneously write a sentence).

30. In a matter as complex and as individual as [D]'s special educational needs and provision, we do not think that things are as straightforward as Mr Broach suggests. Although the Children and Families Act 2014 (CFA) is a separate piece of legislation, we nevertheless consider it to be a relevant reference point when considering this matter for the following reasons:
a. There is a comprehensive framework for identifying a child's special educational needs and specifying the special educational provision that is reasonably required. That framework involves ongoing assessment and reviews, drawing on the relevant advice of a range of professionals, including school staff, specialist teachers and Educational Psychologists.
b. A child or young person is entitled to the special educational provision that they reasonably require. There is no duty on a school or a Local Authority to provide the best possible special educational provision.
c. There is no strict obligation on schools to achieve certain outcomes. The duty is to use best endeavours to secure the special educational provision called for by a child's special educational needs is made (section 61).

31. In light of this and, in any case, drawing on our experience and expertise as a specialist panel, it is clear to us that identifying a young person's needs and making the provision that they require to meet those needs is in many cases a complex and delicate matter that depends on professional judgment. It requires time and learning from experience of what works and what does not. In making these decisions, a school is not obliged to rush to judgement or, indeed, to give

effect to the particular preferences of parents or the advice of individual professionals. A school is entitled to take time and to exercise discretion and professional judgment as to the steps that it takes and the adjustments that it makes for pupils. In doing so, the school is entitled to balance its decisions and approach against other, competing demands on school staff and resources. The simple fact that a parent or other professional may take a different view from the school or may be dissatisfied with the nature or timing of the decisions that it makes does not, of itself, mean that the school has failed to make reasonable adjustments or discriminated against the child in any other way.

32. Furthermore, we note that neither CFA nor the Equality Act 2010 impose any strict liability type duty on a school to achieve a particular goal or objective. There is no duty under either legislation, for example, to ensure that [D] achieves a particular level in her literacy skills. Under section 61 CFA the school must use best endeavours to make her special educational provision. Under section 20 EqA, the school must take reasonable steps to avoid the disadvantage that would otherwise arise under its general practice. In our view, [D]'s education and the progress that she makes is not something that can be measured simply by ascertaining her understanding of particular texts, for example. Determining whether a disadvantage has been (or would have been) removed will necessarily involve a degree of speculation. Different people may have different views about whether some approaches work better than others or would lead to better outcomes (however those outcomes are measured). But that will often involve trying to compare approach A with a hypothetical approach B. And in this context, it is important to see [D]'s educational objectives in a holistic way. Whilst a child's special educational needs may lead to a focus on particular types of provision to achieve particular objectives (e.g. literacy), in most cases there is a range of needs and it is a question for families, professionals and schools to balance those needs and to make progress across them. That is certainly so in [D]'s case.

33. In this context, we are cautious about the application of the disability discrimination provisions in the context of the school's approach to making [D]'s special educational provision. In particular, we are cautious about finding that there has been disability discrimination simply because there is disagreement between professionals as to the effectiveness of the special educational provision that is made.

Findings and conclusions

34. In light of all of this, we note and accept the steps that the school has taken to support [D] (as summarised above). We acknowledge that [D] has made little or no progress in literacy, but are satisfied (given what [The Headteacher] told us, which was not disputed) that numeracy was an area of relative strength and that [D] was generally happy in school, with good relationships with peers and others.

35. To the extent that we are required to make findings about the way in which the

> school supported [D] with her literacy, we accept [the Headteacher]'s explanation that there was no dictation or copying, as the Claimants allege, and that [D]'s written work was her own, produced over several days in accordance with the colourful semantics approach (as recommended by the Speech and Language Therapist) that the school followed and with a good degree of scaffolding and support. We find this because [the Headteacher] as headteacher has responsibility for
> this provision and is well placed to tell us about it. We were satisfied that he had a good understanding of [D] and the provision made for her. Ms Pedrosa's evidence on this was rather speculative (she did not see any dictation or copying and relied on what she was told by a Teaching Assistant and her own judgment as to the type of work that [D] would be able to do). Ms Robinson's observations of [D] in school were limited. In any case, we do not find that much turns on this. There may well be questions about the effectiveness of this approach for [D] given that she did not appear to understand much of the text that she had written, but that does not of itself mean that the exercise had no value or that the school discriminated against her in following it. Given the context referred to above, the school was entitled to try this approach. If, on reflection and based on evidence, that approach did not work well for [D] or required adjustments in some way, then something different could be tried.
>
> 36. Ms Underwood provided professional advice in November 2022 as part of the process of reviewing [D]'s EHCP. That report gives an overview of [D]'s progress up to that point and makes recommendations for changes to her EHCP, for example, by the provision of overlearning. Her observations are different from those of other professional witnesses and generally more positive about the progress that [D] was making. That advice, along with the advice of other professionals (including Ms Pedrosa and Ms Robinson), would ordinarily be factored into the review of [D]'s EHCP, which could lead to additional or different support for [D], drawing on what has worked well and what further steps are needed.
>
> 37. In considering the steps that the school has taken to support [D] we do not hold it to a standard of perfection. Mistakes have been made, such as the lack of data to track [D]'s progress. However, when considered within the context of a busy, mainstream school supporting a range of children with a range of needs and abilities, we are satisfied that the school has acted reasonably to support [D]: it provided additional support for her; it adopted some of the suggestions made by professionals (such as use of software); it adapted her curriculum with different lesson plans and implemented the colourful semantics approach; it engaged in her EHCP review. We are satisfied that it made reasonable adjustments for [D] and so conclude that it did not discriminate against her under section 20 EqA. We dismiss this element of the Claim.

The grant of permission

24. Permission was granted on the papers by Deputy Judge Hocking, who (having set out the grounds of appeal) observed as follows:-

10. As I will give permission to appeal it is not necessary for me to discuss these grounds at length. It seems to me the fundamental issue in the appeal, is: was the FtT's treatment of the interaction between the legal framework for special educational needs under the Children and Families Act 2014, and the duty to make reasonable adjustments under the Equality Act 2010 legally correct.

11. It seems to me at least arguable that the FtT used the Children and Families Act 2014 to "read down" the reasonable adjustment duties in the Equality Act, (with the results argued for in appeal points a, b and d above) and again at least arguable that on the facts of this case that was an error of law.

12. [D's] EHCP specifies as part of her special educational provision that she "requires a differentiated curriculum (in terms of pace, content and delivery) which emphasises opportunities for learning through practical, visual and play based activities supported by an individualised timetable, identifying the differentiated teaching and learning activities she needs." [D requires] "Different learning materials as required by her action plan".

13. This is precisely what [D's] parents say is not happening.

14. The FtT say: In this context, "we are cautious about the application of the disability discrimination provisions in the context of the school's approach to making [D's] special educational provision. In particular, we are cautious about finding that there has been disability discrimination simply because there is disagreement between professionals as to the effectiveness of the special educational provision that is made"

15. It is arguable that that statement (and the rest of the rather short discussion of the point) does not do justice either to the legal or the factual issues in the case.

16. As to the legal issues I would accept that caution might very well be indicated if a child had been assessed under the Children and Families Act 2014, and special educational provision was set out in an EHCP, and then the child's parents used the reasonable adjustments duties in the Equality Act 2010 to argue that additional provision over and above that included in the EHCP was required. But that is not [D's] position. Her position is that what is required is that which is set out in her EHCP, and that is not being delivered. It is at least arguable that the provision identified as special educational provision in an EHCP is in this case also provision that would be a reasonable adjustment to be made under s.20 of the Equality Act, as read in light of paragraph 2(3)(b)(ii) of schedule 13 to that Act, and that no particular caution is needed in applying the Equality Act in this situation.

17. As to the factual issues the FtT's conclusions are expressed in only four paragraphs. It is arguable that the reasons given are insufficient to "sufficiently explain what the judge has found and what he has concluded as well as the process of reasoning by which he has arrived at his findings and then his conclusion" (re B (appeal: lack of reasons) [2003] FLR 1035. In particular I note the following paragraph:

> Ms Underwood provided professional advice in November 2022 as part of the process of reviewing [D's] EHCP. That report gives an overview of [D's]

> progress up to that point and makes recommendations for changes to her EHCP, for example, by the provision of overlearning. Her observations are different from those of other professional witnesses and generally more positive about the progress that [D] was making. That advice, along with the advice of other professionals (including Ms Pedrosa and Ms Robinson), would ordinarily be factored into the review of [D's] EHCP, which could lead to additional or different support for [D], drawing on what has worked well and what further steps are needed
>
> 18. That seems to me to be arguably a failure to "take into account and/or resolve conflicts of fact or opinion on material matters" (per *DC v London Borough of Ealing*). The disadvantage that was being alleged to be caused by the application of the unadjusted provision, criterion or practice was a failure to make academic progress. That might be a difficult issue to resolve but, if as seems possible the FtT did not attempt to resolve it because it took the view the issues could only be correctly ventilated as part of a review of the EHCP that would arguably be a failure to apply the Equality Act.

The relevant legal principles

25. Sections 20 and 21 of the EA 2010 provide (so far as relevant to education):

> **20 Duty to make adjustments**
>
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice [PCP] of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> …
>
> (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.
>
> (6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

…

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

…

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

Part of this Act	*Applicable Schedule*
Part 6 (education)	Schedule 13

21 Failure to comply with duty

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

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

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

26. By s 212(1), *“substantial”* in s 20 (and elsewhere in the Act) means *“more than minor or trivial”*.

27. By s 85(6) of the EA 2010 a duty to make reasonable adjustments applies to the responsible body of a school. Paragraph 2 of Schedule 13 to the EA 2010 provides:

(1) This paragraph applies where A is the responsible body of a school to which section 85 applies.

(2) A must comply with the first and third requirements.

(3) For the purposes of this paragraph—

(a) the reference in section 20(3) to a provision, criterion or practice is a reference to a provision, criterion or practice applied by or on behalf of A;
(b) the reference in section 20(3) or (5) to a disabled person is—
(i) in relation to a relevant matter within sub-paragraph (4)(a), a reference to disabled persons generally;
(ii) in relation to a relevant matter within sub-paragraph (4)(b), a reference to disabled pupils generally.

(4) In relation to each requirement, the relevant matters are—
(a) deciding who is offered admission as a pupil;
(b) provision of education or access to a benefit, facility or service.

28. Section 136 of the Act, headed “Burden of proof”, provides:

(1) This section applies to any proceedings relating to a contravention of this Act.

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

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

29. There is no dispute between the parties as to the general legal principles applicable to considering claims of failure to make reasonable adjustments. They have in particular referred me to my own recent decision in *SS v Proprietor of an Independent School* [2024] UKUT 29 and also to the High Court decisions in *R (Rowley) v Minister for the Cabinet Office* [2021] EWHC 2108 (Fordham J) and *University of Bristol v Abrahart* [2024] EWHC 299 (Linden J).

30. In all claims of failure to make reasonable adjustments, the Tribunal needs to consider the following stages:

a. If the ‘first requirement’ in s 20(3) is relied on, the provision, criterion or practice (PCP) must be identified. If the ‘third requirement’ in s 20(5) is relied on, the auxiliary aid required must be identified.

b. The Tribunal must then consider whether the PCP, or absence of an auxiliary aid, has placed the disabled person at a substantial (i.e. more than minor or trivial) disadvantage in comparison to those who are not disabled. As I explained in *SS* at [67]-[69], by reference to *Environment Agency v Rowan* [2008] IRLR 20 and *Griffiths v Secretary of State for Work and Pensions* [2015] EWCA Civ 1265, [2017] ICR 150, the Tribunal needs to consider whether the PCP (or absence of an auxiliary aid) ‘bites harder’ on the disabled, or a category of them, than it does on those who are not disabled. If so, the duty to make reasonable adjustments applies.

c. It is then for the Tribunal to assess objectively whether the adjustment sought is reasonable, having identified and taken into account the nature and extent of the substantial disadvantage suffered (*SS*, ibid, at [67]-[69]

and [77l], and *Allen v Royal Bank of Scotland* [2009] EWCA Civ 1213 at [40]).

31. Linden J's judgment in the *Abrahart* case concerns the tragic death by suicide of a student at Bristol University who suffered from depression and Social Anxiety Disorder. At [148]-[171] Linden J deals with the reasonable adjustments claim and I draw the following points of general principle from those paragraphs that are also relevant to the present case:

    a. The duty to make reasonable adjustments may arise even if the claimant does not at the time identify what adjustment is required. All that is necessary is that by the time of the hearing of the claim the claimant has set out their case as to the adjustments which they say ought to have been made (although the fact that the claimant did not identify the step at the time may be relevant to whether it was reasonable): ibid at [163]-[164], applying *Cosgrove v Ceasar & Howie* [2001] IRLR 653, EAT, *Project Management Institute v Latif* [2007] IRLR EAT and *Finnegan v Chief Constable of Northumbria Police* [2013] EWCA Civ 1191, [2014] 1 WLR 445.

    b. The burden of proof is on the claimant under s 136 of the EA 2010 to adduce some evidence of an apparently reasonable adjustment from which the Tribunal could conclude the duty was breached, the burden then passes to the respondent to prove that there was no breach: ibid at [164], applying the same authorities.

    c. In deciding whether a particular adjustment is reasonable, the Tribunal needs to consider the extent to which the steps would avoid the disadvantage, but the fact that a particular adjustment will not wholly remove the disadvantage does not of itself mean that it is not a reasonable adjustment. In principle, it may be reasonable to take steps which merely reduce the disadvantage or have *"at least a real prospect"* of making a difference. (See ibid at [154], applying *Noor v Foreign and Commonwealth Office* [2011] ICR 695 and *First Group plc v Paulley* [2017] UKSC 4, [2017] 1 WLR 423, Linden J.)

    d. As the question of reasonableness is an objective one for the court, it is in principle irrelevant whether the respondent thinks the step is reasonable or not: ibid at [167], applying *Smith v Churchills Stairlifts place* [2005] EWCA Civ 1220, [2006] ICR 524 at [45]. (Although I would add that in the context of a claim such as this where witnesses for the respondent are likely in fact to have relevant expertise, their opinion as to the reasonableness of a step may be taken into account, provided always that the Tribunal forms its own objective judgment as to reasonableness.)

32. From Fordham J's judgment in *Rowley* (which was concerned with the provision of British sign language interpretation services for the government's live Covid-19 pandemic briefings), Mr Broach draws the further point that, in order to determine a reasonable adjustments claim, the Tribunal may need to decide

whether the adjustment sought by the claimant is reasonable, even where the respondent is already making some, ostensibly reasonable, adjustments. As Fordham J put it in that case at [32], drawing in turn on the decision of the Court of Appeal in *Road v Central Trains* [2004] EWCA Civ 1541 at [13] and the EHRC's *Statutory Code of Practice on Services, public functions and associations*:

> The Court may well be considering a range of steps. … They may be steps which are already in place, steps advocated by the claimant as necessary, or by the defendant as sufficient. They may be steps which could operate in combination, or steps which are alternatives. The Code (§7.47) refers as examples to "the provision of a sign language interpreter, lip-speaker or deaf-blind communicator". Using its "large public conference" example (§7.34) the Code illustrates a combination of steps for deaf delegates who use BSL (§7.38): the provision of BSL interpreters, who are in a well-lit area, with the option of those delegates being seated near and in full view of them. In some cases the 'superiority' of a step when compared with another – in terms of practical accessibility and the legislative policy of closest reasonably approximated access (§20 above) – will lead the Court to reject the 'lesser' step as not being a reasonable step. That was the position in *Roads* where the Ely alternative was not reasonable by comparison with the free taxi alternative. So: it "may not be enough" that one solution "if it stood alone" would satisfy the statutory duty; the solution does not 'stand alone' where there are "a range of solutions"; the statutory duty "makes comparison inescapable" where the defendant's "proffered solution" is said by the claimant "not to be reasonable precisely because a better one, in terms of practicality or of the legislative policy, is available"; but the statutory duty "does not require the Court to make nice choices between comparably reasonable solutions". All of these points derive from Roads at §13. The Code puts the position this way (Code §7.35): "Where there is an adjustment that the service provider could reasonably put in place and which would remove or reduce the substantial disadvantage, it is not sufficient for the service provider to take some lesser step that would not render the service in as accessible a manner".

33. In other words, the fact that some adjustments have already been made does not mean that the statutory duty does not require further or different adjustments. In all cases, unless the adjustments already in place have removed the substantial disadvantage so as to relieve the respondent of the duty to make further adjustments, the reasonableness of the adjustments sought by the claimant will need to be evaluated and consideration given to whether the adjustments sought stand a 'real prospect' of removing or further reducing the substantial disadvantage than the adjustments already in place, whether alone or in combination.

34. The EHRC's *Technical guidance for schools in England* (updated September 2023) makes a similar point at paragraphs 6.37 and 6.39 (I omit paragraph 6.38 which does not bear on the present appeal and, it appears to me, may contain a drafting error):

> 6.37 It is unlikely to be reasonable for a school to have to make an adjustment involving little benefit in reducing the disadvantage experienced by the disabled pupil, even if the pupil requests this. If this is the only possibility, however, of avoiding the

disadvantage and there is a prospect of it having some positive effect, then it may be reasonable for the school to have to take the step.

6.39 However, if an adjustment, when taken alone, is of marginal benefit but may be one of several adjustments that, if grouped together, would be effective in overcoming the disadvantage, in that case, it would be reasonable for the school to make the adjustment.

35. Mr Broach for the appellants has also drawn my attention to paragraph 6.23 of the Technical Guidance which provides:

> 6.23 The purpose of taking the steps is to ensure that disabled pupils are not placed at a substantial disadvantage compared to non-disabled pupils. The duty to make reasonable adjustments equates to ensuring that steps are taken to provide the best possible education for disabled pupils.

36. I observe that the suggestion in that paragraph that the duty to make reasonable adjustments is a duty to provide "the best possible education for disabled pupils" should be regarded as aspirational. The Guidance cannot alter the effect of the statute, which provides a duty to make reasonable adjustments where disabled pupils are substantially disadvantaged in comparison to non-disabled peers. It is not a duty to provide "the best possible education", although it may be hoped that compliance with the duty will achieve that result.

37. Those, then are the relevant general principles. However, this case, like *SS*, raises the question of the inter-relationship between the EA 2010 and the Children and Families Act 2014 (CFA 2014). At paragraphs 74-77 of *SS* I gave general guidance on this topic, insofar as was relevant to the matters to be considered by the Tribunal on remission in that case. The issue in that case (so far as reasonable adjustments was concerned) was whether, and to what extent, a 'mainstream' independent school might be expected to make reasonable adjustments to accommodate a disabled pupil in respect of whom an EHCP was made and maintained by the local authority naming another school. The guidance I gave at paragraph 77 was *obiter*, but the parties in this case were content that it is correct and both relied on it. Not all the points that I made in that paragraph are of relevance to this case, but the following are (with some minor amendments to render the paragraphs of more general application):

> a. The EA 2010 contains no exception from the responsible body's duty to make reasonable adjustments for a pupil with an EHCP.
>
> …
>
> e. Although the responsible body of an independent school is not subject to the duty that applies to [non-independent] schools [and other institutions] under s 66 of the CFA 2014 to secure that special educational provision is made where it is called for by the pupil's special educational needs, the framework under the CFA 2014 is such that [no school] is under a duty under that Act to secure that the provision in an EHCP is made for a child – that duty is on the local authority: see generally *RD and GD v The Proprietor of Horizon Primary (SEN)* [2020] UKUT 278 (AAC) at [68]-[71] per Judge S M Lane. However, the duty to make reasonable adjustments applies to all

schools. The framework of provision under the CFA 2014 is relevant to considering what is reasonable by way of adjustments under the EA 2010, but it is merely one factor to consider, it carries no special weight (cf the similar point made by Judge S M Lane in *RD and GD v The Proprietor of Horizon Primary (SEN)* [2020] UKUT 278 (AAC) at [84]-[85]).

f. In all cases, it will be a question of considering what is reasonable in all the circumstances in the light of the nature and extent of the substantial disadvantage suffered by the child at the school the child attends, in comparison to non-disabled children.

g. The relevant circumstances to take into account will generally include the cost of the adjustments, how effective they will be, the school's resources, the reasons why the child is at the school and the nature and availability of support from a local authority through an EHCP. The Tribunal is likely to find it helpful to consider the Equality and Human Rights Commission Guidance on Reasonable Adjustments for Disabled Pupils (2019) (the EHRC Guidance) which identifies other factors that may be relevant in the particular case. Among other things, that guidance explains that, "The extent to which special educational provision will be provided to the disabled pupil under Part 3 of the Children and Families Act 2014" is a relevant factor in deciding whether it is reasonable for a school to make a particular adjustment, and notes, "It is more likely to be reasonable for a school with substantial financial resources to make an adjustment with a significant cost than for a school with fewer resources". It needs hardly be said that some independent schools will have more financial resources than other independent schools, and the financial resources of independent schools are likely to be differently structured, and sometimes greater, than those of maintained schools.

…

i. The focus under the EA 2010 must be on the reality. While it may be that more or better provision ought to be being made for a child by the local authority under an EHCP, if that is not in fact happening in a particular case, the Tribunal will need to decide whether it would be reasonable for the school (of whatever type, whether independent or maintained) to put that support in place. How long it may be necessary for a school to 'bridge a gap' of that sort will be a factor for the Tribunal to take into account in deciding what is reasonable.

j. It is only if appropriate support is already in place in the school in question through an EHCP, so that the child is no longer under a substantial disadvantage at that school, that the responsible body of a school is relieved of its duty to make reasonable adjustments. This point is also made in the EHRC's [*2019 Guidance on making reasonable adjustments for disabled pupils*] (although this is a passage in the Guidance that it is easy to misread as suggesting – incorrectly - that once an EHCP is in place the duty to make reasonable adjustments falls away):

> There is a significant overlap between those pupils who are disabled and those who have SEN.

> Many disabled pupils may receive support in school through the SEN framework. In some cases, the substantial disadvantage that they experience may be overcome by support received under the SEN framework and so there will be no obligation under the Act for the school or local authority to make reasonable adjustments.

…

38. To those points, I need to add the following, which deal more directly with the situation in the present case where the claimed reasonable adjustments overlap with the provision that is specified in the EHCP. For ease of reference, I will continue the lettering of the sub-paragraphs from paragraph 77 of the *SS* case so that if need be these can be referred to as a composite list of principles. At paragraph 77 of the *SS* case I ended with sub-paragraph l., so will continue with m.:

    m. Where a child with an EHCP is attending the school named in that EHCP and that school is a maintained mainstream school (or other school or institution to which the duty in s 66 of the CFA 2014 applies), the school will be under a statutory duty, enforceable by way of judicial review proceedings, to “use its best endeavours to secure that the special educational provision called for by the pupil’s or student’s special educational needs is made”. However, as already noted, that duty does not itself require the school to implement an EHCP, which remains the responsibility of the local authority under s 42 of the CFA 2014. Nor does it elevate the duty on the school to make reasonable adjustments under the EA 2010 to a duty use best endeavours: *RD and GD v The Proprietor of Horizon Primary (SEN)* [2020] UKUT 278 (AAC) at [68]-[71]. The duty to make reasonable adjustments is a duty that applies in the same way, and to the same standard, regardless of the nature of the school placement.

    n. In most cases, provision that has been properly specified in Section F of an EHCP will also be provision that the duty to make reasonable adjustments under the EA 2010 will require a school to provide. This is because of the similarities in the legal provisions. The special educational provision specified in an EHCP is, by virtue of ss 21 and 37 of the CFA 2014 (as interpreted by *R (A) v Hertfordshire County Council* [2006] EWHC 3428 (Admin) at [25]-[27] and *Devon CC v OH* [2016] UKUT 0292 (AAC) at [38]), supposed to be the special educational provision ‘reasonably required’ by the child’s special educational needs. ‘Special educational needs’ are in turn defined in s 20 by reference to the child having a learning difficulty or disability which presents them with ‘significantly greater difficulty’ in learning than the majority of others the same age or ‘prevents or hinders’ them from accessing the facilities generally provided for others. ‘Disability’ in CFA 2014 is the same as ‘disability’ under the EA 2010: see s 83(3). It can readily be seen therefore that, in most cases, what is specified in Section F will be

provision that is also required by the duty to make reasonable adjustments because, by statutory definition, it should be the provision reasonably required to remove the disadvantage that the child is under in relation to their peers. The provision in Section F and the provision required by the duty to make reasonable adjustments will, in particular, normally be the same where the provision in the EHCP consists of teaching approaches, strategies and resources that would ordinarily be provided by a school from within its own resources. That is not to say, though, that there will not be scope for argument in a particular case that, for example, the provision in the EHCP is out of date or unreasonable in some other respect, or that in fact the child is not at a substantial disadvantage in relation to that particular matter so that the duty to make reasonable adjustments does not arise. Further, where an EHCP makes provision for a child to receive support from another agency, it is unlikely to be reasonable to expect the school to duplicate that support (see paragraph 6.31 of the Technical Guidance as updated in September 2023), but, as already noted at sub-paragraph i., it may be reasonable for a school to 'bridge a gap' in provision that ought to be provided by the local authority under the EHCP. However, in the ordinary course of events, a school that fails to implement the teaching approaches, strategies and resources specified in the EHCP as being required for the child is likely also to be failing in its duty to make reasonable adjustments under the EA 2010.

o. It does not follow, however, that a claim for failure to make reasonable adjustments under the EA 2010 will necessarily be an appropriate way of enforcing a failure to make the provision specified in the EHCP. Informal resolution and, if necessary, mediation should always be the starting point. Judicial review proceedings may be more appropriate in some cases, particularly perhaps where there may be joint responsibility for the failure as between the local authority and the school. If a claim is brought under the EA 2010, consideration will need to be given to how a claim for reasonable adjustments needs to be approached. A claim of failure to make reasonable adjustments cannot be presented to the Tribunal as a generalised claim for enforcement of the EHCP. Just because provision is specified in an EHCP, that does not relieve the party bringing the claim of the need to frame it as a claim for reasonable adjustments, with all the elements required for a successful claim under EA 2010 as discussed above. Nor does it relieve them of the need to satisfy the initial burden of proof under s 136 of the EA 2010. In other words, the claimant still needs to adduce evidence of the PCP that has been applied, or the auxiliary aid that has not been provided, together with evidence of the disadvantage suffered and evidence from which the Tribunal could conclude a reasonable adjustment has not been made before the burden will pass to the responsible body to show that it has not failed to comply with the duty.

39. The latter point brings me to another point of general principle in relation to reasonable adjustments claims that also has a bearing on the present case. The

First-tier Tribunal hearing a claim under the EA 2010 is not exercising the same sort of inquisitorial jurisdiction that it exercises when dealing with appeals under s 51 of the CFA 2014 (cf, for example, *AJ v London Borough of Croydon [2020] UKUT 246 (AAC)* at [140]-[141]), but is adjudicating on a dispute between adversarial parties in the same way as an Employment Tribunal does for employment claims under Part 5 of that Act, or the County Court for a goods and services claim under Part 3. However, it is nonetheless required, in furtherance of the overriding objective, and to ensure that the hearing is fair and that it as the Tribunal is able to discharge its own duty to determine the claim brought in accordance with the facts and proper legal principles, to take appropriate steps to ensure that the legal issues in a case are identified at the outset. This is necessary so that the claimant is able properly to put forward their case, the respondent knows the case it has to meet, the hearing can focus on the relevant evidence and submissions and the Tribunal knows what issues it has to decide.

40. In a claim under the EA 2010, the First-tier Tribunal will need to identify with the parties either in a case management hearing, and/or at the start of a final hearing, what the legal issues are in the case. Especially (but not only) where a party is unrepresented, this may include putting legal labels on the facts raised by the claimant, such as identifying (in discussion with the parties) the PCP, the nature of the disadvantage and the particular adjustments sought.

41. I derive these observations about case management from the many cases in the employment context that give guidance on the extent to which it is appropriate for the Tribunal (impartially, and without 'stepping into the arena') to assist the parties in identifying the legal issues that arise on the factual cases that they are seeking to present, and also the evidence and submissions that are relevant to those legal issues: see, for example, *Drysdale v Department of Transport* [2014] IRLR 892 at [49]; *Mervyn v BW Controls Ltd* [2020] EWCA Civ 393, [2020] ICR 1364 at [38]-[45] and *Saha v Capital Plc* [2018] 11 WLUK 528 *per* Slade J at [37]-[42] (the latter emphasising Mummery LJ's dictum in *Parekh v London Borough of Brent* [2012] EWCA 1630 at [31] that the Tribunal is not bound by what the parties consider the issues in a case to be if that would "impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence").

42. The guiding principle, always, of course, is fairness: a Tribunal that considers the parties require assistance in putting legal labels on their factual cases must always raise that with the parties and should normally formulate the list of issues by agreement with the parties. Although good case management may sometimes require the Tribunal to make a ruling as to what the issues are that it will consider, the Tribunal should never take over the running of a party's case. It should not seek to identify as legal claims or defences issues that do not 'shout out' from the pleadings (to use the language of Auerbach J as adopted by the Court of Appeal in *Mervyn* at [42]). And if a party does not wish to pursue a particular claim or defence that the Tribunal has identified as arising on the facts, the Tribunal should simply record that in its decision.

43. Another matter (relevant to the present case) that a Tribunal may need to consider of its own motion, because it is a jurisdictional issue under the EA 2010, is time limits. These work somewhat differently in relation to claims of failure to make reasonable adjustments than they do in relation to some other types of discrimination under the EA 2010. That is because claims of failure to make reasonable adjustments are usually claims about discriminatory omissions rather than discriminatory acts. Paragraph 4 of Schedule 17 to the EA 2010 contains specific provision in relation to discriminatory omissions as follows (emphasis added):

> **4 Time for bringing proceedings**
>
> (1) Proceedings on a claim may not be brought after the end of the period of 6 months starting with the date when the conduct complained of occurred.
>
> (2A) If, in relation to proceedings or prospective proceedings on a claim under paragraph 3 or 3A, the dispute is referred for resolution in pursuance of arrangements under paragraph 6C before the end of the period of 6 months mentioned in sub-paragraph (1), that period is extended by 3 months.
>
> (3) The Tribunal may consider a claim which is out of time.
>
> (4) Sub-paragraph (3) does not apply if the Tribunal has previously decided under that sub-paragraph not to consider a claim.
>
> (5) For the purposes of sub-paragraph (1)—
>
> (a) if the contravention is attributable to a term in a contract, the conduct is to be treated as extending throughout the duration of the contract;
>
> (b) conduct extending over a period is to be treated as occurring at the end of the period;
>
> **(c) failure to do something is to be treated as occurring when the person in question decided on it**.
>
> **(6) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—**
>
> **(a) when P acts inconsistently with doing it, or**
>
> **(b) if P does not act inconsistently, on the expiry of the period in which P might reasonably have been expected to do it**.

44. Save that paragraph 4(3) provides a general discretion to extend time (see *RD and GD v The Proprietor of Horizon Primary* (SEN) [2020] UKUT 278 (AAC)) rather than a specific statutory 'just and equitable test', it is in materially identical terms to s 123 of the EA 2010 which sets out the time limits for bringing claims under the Act to the Employment Tribunal. I see no reason why in the education context a different approach should be taken to time limits where the statutory

provision is the same (and I note that that was also the view of Judge Freer in his recent decision in *The Governing Body of School T v AA and RA* [2023] UKUT 311 (AAC)).

45. A number of authorities in the employment context have discussed how time limits apply to claims of failure to make reasonable adjustments. In *Humphries v Chevler Packaging Ltd* (UKEAT/0224/06) at [24] the EAT held that a failure to make a reasonable adjustment is usually an omission and that time begins to run when a respondent decides not to make the reasonable adjustment or is taken to have so decided applying the provisions equivalent to paragraphs 4(5) and (6) of Schedule 17. The Court of Appeal considered the question further in *Kingston upon Hull City Council v Matuszowicz* [2009] ICR 1170, CA. Where a respondent is not deliberately failing to comply with the duty and the omission is due to lack of diligence or competence or any reason other than conscious refusal, it is a 'continuing omission' to which the Court of Appeal held the equivalent of paragraph 4(5)(c) applies rather than a 'continuing act' to which the equivalent of paragraph 4(5)(b) applies. Accordingly, for the purpose of the limitation period, the Court of Appeal observed that the relevant date is in one sense an artificial date. In the absence of evidence as to when the omission was decided upon, paragraph 4(6) provides two alternatives. The first is when the respondent does an act inconsistent with doing the omitted act. The second requires an inquiry into when a respondent might reasonably have been expected to do the omitted act if it was to be done. *Matuszowicz* was followed by the EAT (Slade J) in *Olenloa v North West London Hospitals NHS Trust* (UKEAT/0599/11). Slade J emphasised at [32] the difficulty of determining the 'artificial' *Matuszowicz* date without hearing all the evidence and indicated that in such cases time limits may need to be decided only after the final hearing and not as a preliminary issue.

46. It is also worth adding, in view of the 'ongoing' nature of the claim in this case, that it seems to me that it is correct that, as Mr Broach acknowledged in the course of argument, a claim under the EA 2010 can in principle only relate to matters that occurred prior to the date on which the claim was brought (in this case, 12 September 2022), unless permission is given to amend to include matters occurring after that date. That is the general understanding of how claims work in the employment context: see *Prakash v Wolverhampton City Council* (UKEAT/0140/06/MAA) (albeit dealing with a claim under the Employment Rights Act 1996) and see also *Galilee v Commissioner of Police of the Metropolis* [2018] ICR 634 (dealing with the slightly different point that amendments to add claims after the commencement of proceedings, whether concerning things that happened before or after commencement of the proceedings, are to be treated as brought at the time of the application to amend). Accordingly, anything happening after the date of claim could not form part of the claim in this case unless the Tribunal gave permission to amend the claim (albeit that evidence of what happened after 12 September 2022 could of course be adduced if it was relevant to the claim made in respect of the period before that date).

The grounds of appeal: discussion and conclusions

Preliminary observations

47. Before dealing with the specific grounds of appeal, I need to make some preliminary observations about the Tribunal's self-directions in this case at [30]-[33] of its decision as to the interface between the EA 2010 and the CFA 2014. As Deputy Judge Hocking recognised when granting permission, those self-directions are out of line with the proper legal approach as I have set it out above, which does not require any particular caution in applying the EA 2010 to a child with an EHCP.

48. It seems to me that the Tribunal in these proceedings, faced with a case that was being presented to it as a case of "ongoing failure to make reasonable adjustments", without a focus on specific incidents of alleged failure to make reasonable adjustments, misidentified the reasons why it needed to approach this case with caution. In my judgment, caution was required not because of the interface between the CFA 2014 and the EA 2010, but because there had not been sufficient clarification of the issues at the start of the hearing, in accordance with the guidance I have set out above.

49. The Tribunal understandably felt cautious because it was faced with a case that in some ways sought to put the whole of D's school provision 'on trial', by reference only to 'examples', none (or few?) of which were said to constitute specific failures to make reasonable adjustments on particular dates. In fact, the appellants had identified some specific failures, but these were, it seems to me, somewhat lost in a more cloudy case about 'general failure' by the school in relation to provision for D. The case remained somewhat cloudy on this appeal until Mr Broach, when pressed by me, pointed to [25]-[27] and [29] of the First-tier Tribunal's decision where the First-tier Tribunal has recorded its understanding of the appellant's case. I observe that, although these paragraphs do refer to some specific adjustments (i.e. multi-sensory approach, visual aids, getting D to write short, simple text), they also include much more generic complaints about D being 'too reliant' on adult support, use of copying/dictation, and failure to follow (unspecified) advice of Ms Pedrosa and Ms Robinson. He also referred to [15]-[18] of the appellant's Grounds of Appeal which in turn refer to the appellant's further particulars and assert that there was 'no differentiation' in relation to the 'teeth lesson' and a failure to provide her with a teeth model. So far as I could tell from Mr Broach's responses during submissions, the appellants (who represented themselves in the proceedings up to the actual final hearing before the First-tier Tribunal) had nowhere set out anything that purported to be a complete and specific list of adjustments sought.

50. The appellants had, of course, set out in their further particulars document four specific incidents of failures to make reasonable adjustments that could have formed a good basis from which to identify specific issues for consideration at the hearing, but it seems to me that they had been deterred from pursuing that relatively clear case by the RB in its response taking points about time limits – points about time limits which, I observe, failed to address the relevant law in relation to time limits for reasonable adjustments claims as I have set it out above,

including failing to mention that even if a claim is 'out of time', the Tribunal has a general discretion to extend time.

51. As I have detailed above when setting out the relevant legal principles, it is in my judgment incumbent on a Tribunal faced with a case being thus presented, even where a party is legally represented, to exercise its case management powers to achieve clarity as to the legal issues through case management either in advance of, or at the start of the hearing. That was essential if the parties were to focus their evidence, and the Tribunal to focus its decision on the right matters. Clarity was required on each of the elements of the reasonable adjustments claim in line with the legal principles I have set out above, i.e. the PCP needed to be identified, along with the nature and extent of the specific disadvantage suffered (or claimed to be suffered) by D, and the specific reasonable adjustments sought needed to be identified, together with the date (or dates) when it was said that those adjustments should have been made.

52. Those preliminary observations aside, I turn to the specific grounds of appeal. I take the first two together because of the similarity of the issue that arises in relation to each of them.

Ground A – "The First-tier Tribunal erred in finding that a school is entitled to take time and to exercise discretion and professional judgment as to the steps that it takes and the adjustments that it makes for pupils"

Ground B – "The First-tier Tribunal erred in finding that there is no duty to achieve a goal or objective under the duty to make reasonable adjustments"

53. In essence, Mr Broach for the appellants relies on these passages from the First-tier Tribunal's decision as being indicative of the Tribunal having misdirected itself in law in relation to the duty to make reasonable adjustments, a misdirection which (under Ground D) he argues had a material impact. He refers in support of his argument to the legal principles that I have set out above.

54. In very short summary, Mr Wilson for the respondent submits that Grounds A and B disclose no error of law and that, by reference to the same legal principles, these were legitimate observations for the Tribunal to make.

55. In my judgment, although I do (as already indicated) consider that the Tribunal has taken an erroneous approach to this claim, I do not consider that these two particular sentences in its self-directions at [30]-[33] themselves disclose any error of law.

56. The sentence referred to in Ground A is taken from [31] of the Tribunal's decision, which is a paragraph where, as I read it, the Tribunal is setting out the sorts of factors that may be relevant to deciding whether a particular adjustment is reasonable. There is nothing wrong in principle, in matters of educational provision, with the Tribunal taking into account, when deciding whether it would be reasonable to make a particular adjustment sought by a parent, the professional opinion of staff as to what is working, or what is worth trying for a period, or allowing time for reflection and assessment before expecting changes

to be made. Provided that the Tribunal keeps well in mind that it is ultimately for it as the Tribunal to make an objective decision about whether it would have been reasonable at a particular point in time for a particular adjustment to be made, there is nothing wrong with the Tribunal taking into account in making that decision the sort of factors that it mentions in paragraph [31]. One of the problems in this case is that, it seems to me, the Tribunal did not ultimately discharge its duty to carry out that exercise, but that is Ground D and not Ground A.

57. As to the sentence referred to in Ground B, that is taken from [32] of the First-tier Tribunal's decision and in my judgment there is nothing objectionable about it. In context, all the Tribunal is saying in this paragraph is, quite correctly, that the duty to make reasonable adjustments is not a duty to achieve a particular result, nor is it to be equated with the "best endeavours" duty under s 66 of the CFA 2014. Indeed, as is clear from the legal principles I have set out above, it would be an error of law if the Tribunal <u>had</u> conflated the s 66 duty with the reasonable adjustments duty. The duty to make reasonable adjustments is what it is, and the Tribunal in [32] goes on to state the nature of that duty correctly. Its further observations in this paragraph about the difficulties in assessing the nature and extent of disadvantage or benefit that may accrue to a child from differing educational approaches are also not in themselves objectionable, provided – again – that it understands that ultimately its task is to determine in the particular case the nature and extent of the substantial disadvantage and whether the particular adjustment sought by the claimant would be reasonable.

58. It follows that Grounds A and B are dismissed.

<u>Ground C – "A finding that there was no dictation or copying and that D's written work was her own was not open to the First-tier Tribunal on the evidence"</u>

59. Mr Broach submits that the Tribunal reached a perverse or irrational conclusion at [35] that (emphasis added) "there was **no** dictation or copying … and that [D's] written work was her own, produced over several days in accordance with the colourful semantics approach (as recommended by the Speech and Language Therapist) that the school followed and with a good degree of scaffolding and support". He submits that the Tribunal's reasons for rejecting what Ms Robinson's report stated about the TA having told her that D's work was "often" dictated by her or copied from a sentence maker are inadequate. He submitted that paragraphs 3.28 and 5.15 of Ms Robinson's report show that Ms Robinson herself witnessed D copying. He submitted that Ms Pedrosa's evidence could not be described as "speculative" given that she had been working with D as her specialist teacher for 6 hours per week. He submits that the school's own case in its response was that D's work involved "shared composition" and were "not examples of [D] writing independently" and that the examples of D's work in the bundle that were referred to in the appellant's further particulars evidently had to include copying and dictation given the long words and complex sentences used and D's 'extremely low' verbal skills.

60. Mr Wilson in response reminded me that the threshold for a finding of perversity is a high one and he submitted it is not met in this case. He submitted that this is

simply a case in which the Tribunal, legitimately, preferred the oral evidence of the headteacher, supported by the document he had produced about the Goldilocks work that D had undertaken in the w/c 12 September 2022. He submitted that the Tribunal had given adequate reasons for that conclusion.

61. I have considered both side's submissions carefully, and remind myself that perversity is a high threshold which means that the conclusion must be irrational or wholly unsupported by the evidence. An appeal to the Upper Tribunal is not an opportunity to re-argue the case on its merits. These principles are set out in many cases, including *R (Iran) v SSHD* [2005] EWCA Civ 982 at [9]-[11]. I also reminder myself that, in scrutinising the judgment of a First-tier Tribunal, the Upper Tribunal is required to read the judgment fairly and as a whole, remembering that the First-tier Tribunal is not required to express every step of its reasoning or to refer to all the evidence, but only to set out sufficient reasons to enable the parties to see why they have lost or won and that no error of law has been made: cf *DPP Law Ltd v Greenberg* [2021] EWCA Civ 672 at [57].

62. However, even bearing in mind the latitude that must be granted to First-tier Tribunals on such factual findings, it seems to me that the Tribunal in this case has erred in law in its conclusion at [35] for the following reasons:-

    a. In finding that there was "**no** dictation or copying" (emphasis added) it has in my judgment perversely overstated the position. That may have been true of the work on Goldilocks that the headteacher dealt with in his document at p 215 of the bundle, but it was irrational to find that was the case in relation to all of D's work, including in particular the examples that were given in the appellants' further particulars which evidently included complex words and sentences (much more complicated than anything in the Goldilocks' example), where at least some dictation or copying had to have taken place. Alternatively, and at any rate, in the absence of any reasons in [35] dealing with why the Tribunal rejected the appellant's case that this work was beyond D's capabilities, the Tribunal's reasons on this point are inadequate.

    b. The Tribunal's reasons in [35] appear to me to have mixed up Ms Pedrosa with Ms Robinson. The Tribunal states that Ms Pedrosa's evidence on this was "speculative" but then go on to say that "she did not see any dictation or copying and relied on what she was told by a Teaching Assistant and her own judgment as to the type of work that [D] would be able to do". This seems to be a reference to paragraph 3.25 of Ms Robinson's report as Ms Pedrosa does not purport to recount what the Teaching Assistant told her. There was no need for Ms Pedrosa to do so as she was personally working with D for 6 hours every week. As such, what the Tribunal says about its reasons for rejecting Ms Pedrosa's evidence (such as it was on this issue) are not founded in the evidence, irrational and inadequate.

    c. Even if the Tribunal has simply mixed up Ms Pedrosa's and Ms Robinson's names at this point, its reasons are inadequate and not

founded in the evidence, because, although the TA's evidence is given 'hearsay' in Ms Robinson's report and Ms Robinson herself did not attend to give oral evidence (and so could legitimately be given less weight by the Tribunal in principle): (a) the Tribunal has overlooked paragraphs 3.28 and 5.15 of Ms Robinson's report which indicate that she also personally witnessed copying; and, (b) the Tribunal has failed to take into account, when weighing the oral evidence of the headmaster against the 'hearsay' evidence of the TA, that a TA works with D 32.5 hours per week, while the headmaster will not have that extended personal contact.

d. I also agree with Mr Broach's submission that the conclusion that there was "no" dictation or copying is inconsistent with the school's own case that there was "shared composition" and "heavy scaffolding", each of which techniques inevitably requires the provision of some words or starter phrases which must be "dictated or copied".

e. Finally, I observe that the Tribunal in this same paragraph appears to have accepted the evidence that D "did not appear to understand much of the text that she had written" without dealing with the obvious point that D's lack of understanding supported the appellant's case that at least some of the work had been dictated or copied.

63. It follows that Ground C succeeds. It does not, however, follow, as Mr Broach appeared at times to suggest, that the appellants' whole claim should have succeeded. Although I have found the Tribunal's reasons on this point to be irrational and/or inadequate, I should make clear that it would have been open to the Tribunal to make a more nuanced finding about the nature of the support that the school was providing to D that acknowledged the elements of copying and dictation while nonetheless accepting the school's case in (large) part. It seems to me that the Tribunal has fallen into error on this factual finding because it, wrongly, considered that it did not need to make careful factual findings about the provision that was being made for D. That appears from what it says at [35], i.e. "To the extent that we are required to make findings about the way in which the school supported [D] with her literacy …" and, having made the finding of fact that I have found was an error of law, continuing "we do not find that much turns on this".

<u>Ground D – "The overall conclusion that there was no breach of the duty to make reasonable adjustments was the result of a misdirection in law, because that duty does not merely require some steps to be taken, but all the steps as it is reasonable to have to take to be taken"</u>

64. Mr Broach submitted that the First-tier Tribunal had misdirected itself at [31] in concluding that, because it found the RB had made some reasonable adjustments for D, that was sufficient to discharge its duty under section 20(3). He submitted that the First-tier Tribunal had failed to determine and/or erred in law in rejecting the appellant's case for other modest adjustments such as writing in small sentences that she could produce herself rather than big pieces of text, providing more visual aids and other (non-specific adjustments) recommended

by professionals. He submitted that the First-tier Tribunal's misunderstanding of the task it had to carry out was demonstrated through what it said at [35] about not necessarily having to make findings about the support provided to D in literacy. He submitted that these matters were crucial to the Tribunal identifying the nature and extent of the substantial disadvantage to D and whether the adjustments sought were reasonable. He further submitted that the Tribunal was wrong at [36] to regard this as a case where there was a conflict between the professionals as to what provision was required for D, pointing out that Ms Underwood's report expressly adopted Ms Robinson's report and indicated that the two should be read together.

65. Mr Wilson for the RB submitted that there was no error of law. He submitted that the Tribunal had found that the school had done enough by way of adjustments to address D's substantial disadvantage and that it had given adequate reasons for its conclusion that no further adjustments were reasonably required. He emphasised the strong evidence that the RB had put forward (summarised by the First-tier Tribunal in particular in [27]) and submitted that there was ample evidence from which the Tribunal could conclude that the duty to make reasonable adjustments was discharged.

66. I acknowledge the force of Mr Wilson's submissions in general terms, but in my judgment the Tribunal in this case has erred in law in its determination of the reasonable adjustments claim in the way alleged by the claimant under Ground D. I identified in my preliminary observations above how and why it seems to me this error has come about, and it is fair to note that the appellants bear some responsibility for it as a result of the way in which the case was presented. In so saying, I intend no criticism of the appellants personally who, it seems to me, produced well-written documents for the First-tier Tribunal setting out their case in response to the Tribunal's case management orders. However, the orders made at the Telephone Case Management Hearings did not specifically direct them to identify the elements of their case as if they were claims for reasonable adjustments and, as litigants in person, it is entirely understandable that they did not organise their case as the statute requires them to. By the time of the hearing, with leading counsel representing them, greater precision could perhaps have been expected. However, as Mr Broach points out, the Tribunal has in fact understood the key elements of the appellants' case and recorded in its judgment a number of the specific reasonable adjustments sought. The difficulty is that it has not gone on to determine that case at all, but has instead engaged in what seems to me to be essentially a general assessment of whether the school was making reasonable educational provision for D of the sort that it might undertake when considering under the CFA 2014 whether a school is suitable or appropriate for a child. Unfortunately, that is not what is required when determining a claim for reasonable adjustments.

67. The particular errors that the Tribunal has made seem to me to be as follows:-

    a. It failed to clarify the issues at the start of the hearing as I have explained in my preliminary observations that it needed to do.

b. It failed to focus on the nature and extent of the substantial disadvantage, glossing over at [34] its own finding that D had made "little or no progress in literacy". In principle, unless the Tribunal was satisfied that D would not have been capable, even with the right support, of making more progress in literacy, its own finding that she had made "little or no progress in literacy" meant that there was, on the face of it, a strong case that some additional or different provision was required to that which D had been receiving.

c. Although it had identified at [25]-[26] and [29] that the appellants had identified as reasonable adjustments sought the use (or, possibly, increased use) of a multi-sensory approach, visual aids, and getting D to write short, simple text, it failed to make any findings of fact about whether and to what extent these particular adjustments were already in place. As already noted, it appears from what it says at [35] that it considered it did not need to make proper findings of fact on these issues. That was a misdirection.

d. In its conclusion at [37], it failed to give any reasons for why it had decided that the further adjustments sought by the appellants were not reasonable. Instead, it took the approach in this paragraph that, because the RB had provided her with some additional support and made some reasonable adjustments, the duty to make reasonable adjustments had been fulfilled. It did not, however, state that it was satisfied that the reasonable adjustments made had fully removed the substantial disadvantage suffered by D (and it is hard to see how it could have so concluded given its own findings about her lack of progress in literacy). Nor did it state that the further adjustments sought by the appellants had either already been made or stood no 'real prospect' of making any difference. It would only be if it had reached one or other of those conclusions, that the reasons it actually gives in [37] would have been sufficient to explain why it had rejected the appellants' case. As the paragraph stands, it has simply failed to deal with the appellants' case at all.

e. I also note at [37] that the Tribunal takes into account as additional support that the RB has provided that it has provided D with software 'as recommended by professionals'. I understand this to be a reference to the Grid3 software which in fact was not adopted for use in class as recommended by professionals until after the claim had been commenced. It was thus in principle irrelevant to whether the RB had complied with its duty to make reasonable adjustments in the period that the Tribunal was supposed to be considering, which was the period prior to the making of the claim.

68. It follows that Ground D succeeds.

What happens next: why I have decided to set aside the decision and remit the case to a fresh tribunal

69. For the reasons set out above, I have concluded that the Tribunal materially erred in law in its determination of the appellants' reasonable adjustments claims. Under s 12 of the Tribunals Courts and Enforcement Act 2007, I have power where I conclude that the First-tier Tribunal has erred in law to set the decision (or part of it) aside and either remit the case for re-determination by the same or a fresh Tribunal or to re-make the decision myself: see generally *Sarkar v SSHD* [2014] EWCA Civ 195, [2014] Imm AR 911 at [15].

70. Mr Broach urged me, if the appeal succeeded, to re-make the decision on the basis of the documentary evidence in the bundle. Mr Wilson, however, more realistically accepted that if the appeal succeeded on essentially the basis for which Mr Broach contended (i.e. on the basis that there had been a wholesale erroneous approach by the Tribunal) that there was unlikely to be any alternative to remitting the whole of the reasonable adjustments case for re-determination.

71. In the event, although only two grounds of appeal succeeded, it seems to me for the reasons I have given above that the Tribunal's approach to the reasonable adjustments element of this case was erroneous and that as a result there has been a wholesale failure to determine the claim that was actually made. The determination of the reasonable adjustments claim needs to start again, beginning with case management to ensure that the issues are properly identified (including any time points that arise). It is not appropriate for me to re-make the decision. Further oral evidence may well be necessary and detailed findings of fact are required. This is not the open-and-shut case that Mr Broach at times made it out to be.

72. I have considered whether the fact that this panel has already reached unimpeached conclusions on the appellant's other two claims poses any difficulty for remission, but it seems to me that the issues that arose on the reasonable adjustments claim are properly separable from the other claims on which the appellants succeeded at first instance, so that in itself is not a reason for this to go back to the same panel. The hearing itself took place over a year ago so memories will have faded and there will be no great saving of time from remitting to the same rather than a different Tribunal. Finally, although there is no reason to doubt the professionalism of either of the members of the Tribunal panel, it would be difficult for even the most conscientious of judges truly to approach this case with the fresh mind that is required in order for it to have a fair hearing on remission.

73. I therefore set the decision aside insofar as concerns the reasonable adjustments claim and remit that claim for re-determination by a fresh Tribunal.

Holly Stout

Judge of the Upper Tribunal

Authorised for issue on 2 May 2024