The Upper Tribunal
(Administrative Appeals Chamber)

UT NCN: [2025] UKUT 381 (AAC)

UT Case Number: UA-2025-000169-HS

Summary: Special educational needs (85.6)

Children and Families Act 2024 – section 21 - relationship between special educational provision and health care provision – order for consideration – whether tribunal right to treat occupational therapy as health care provision – scope of appeal to First-tier Tribunal's under section 51 – materiality of any mistake the tribunal may have made in applying section 21.

Before

UPPER TRIBUNAL JUDGE JACOBS

Between

R&RK	**Appellants**
v	
Hertfordshire County Council	**Respondent**

Decided on 6 November 2025 following an oral hearing on 14 July 2025.

Representatives

Appellants:	Ollie Persey of counsel, instructed by HCB Solicitors
Local authority:	David Lawson of counsel, instructed by Louise Coleman

DECISION OF UPPER TRIBUNAL

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

Reference: EH919/23/00425
Decision date: 16 September 2024
Hearing: Online

The decision of the First-tier Tribunal did not involve the making of an error on a point of law under section 12 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

A. What this case is about

1. This case is about the Education, Health and Care Plan [EHCP from now on] for M, who is the daughter of the appellants. In particular, it concerns the way that the First-tier Tribunal dealt with occupational therapy. The grounds of appeal raised the relationship between special educational provision and health care provision.

2. The legislation also provides for social care provision. It is not relevant on this appeal. Most of what I say about health care provision applies equally to social care provision. I will refer only to health care provision, in order to keep the discussion as clear as possible.

B. How I have approached the case

3. It has taken me a long time to deal with this case. In part, this was because the more I analysed the legislation, the more issues I identified, some of which were not covered by argument at the hearing. I am sure that was my fault. I was tempted to direct more argument. In the end, I decided not to do that, because M should by now have a new EHCP.

4. In the event, I have taken a practical approach based on materiality, which I anticipated in my grant of permission. I could have deleted my analysis and dealt with the case only on that basis, but I decided to retain my reasoning for whatever value it may be in other cases.

C. The legislation

Children and Families Act 2014:

> **20 When a child or young person has special educational needs**
>
> (1) A child or young person has special educational needs if he or she has a learning difficulty or disability which calls for special educational provision to be made for him or her.
>
> (2) A child of compulsory school age or a young person has a learning difficulty or disability if he or she-
>
> (a) has a significantly greater difficulty in learning than the majority of others of the same age, or
>
> (b) has a disability which prevents or hinders him or her from making use of facilities of a kind generally provided for others of the same age in mainstream schools or mainstream post-16 institutions.
>
> **21 Special educational provision, health care provision and social care provision**
>
> (1) 'Special educational provision', for a child aged two or more or a young person, means educational or training provision that is additional to, or different from, that made generally for others of the same age in—
>
> (a) mainstream schools in England,

(b) maintained nursery schools in England,

(c) mainstream post-16 institutions in England, or

(d) places in England at which relevant early years education is provided.

(2) 'Special educational provision', for a child aged under two, means educational provision of any kind.

(3) 'Health care provision' means the provision of health care services as part of the comprehensive health service in England continued under section 1(1) of the National Health Service Act 2006.

(4) 'Social care provision' means the provision made by a local authority in the exercise of its social services functions.

(5) Health care provision or social care provision which educates or trains a child or young person is to be treated as special educational provision (instead of health care provision or social care provision).

37 Education, health and care plans

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

(a) the local authority must secure that an EHC plan is prepared for the child or young person, and

(b) once an EHC plan has been prepared, it must maintain the plan.

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

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

(b) the outcomes sought for him or her;

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

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

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

(f) any social care provision reasonably required by the learning difficulties and disabilities which result in the child or young person having special educational needs, to the extent that the provision is not already specified in the plan under paragraph (e).

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

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

(5) Regulations under subsection (4) about amendments of EHC plans must include provision applying section 33 (mainstream education for children and

young people with EHC plans) to a case where an EHC plan is to be amended under those regulations.

42 Duty to secure special educational provision and health care provision in accordance with EHC Plan

(1) This section applies where a local authority maintains an EHC plan for a child or young person.

(2) The local authority must secure the specified special educational provision for the child or young person.

(3) If the plan specifies health care provision, the responsible commissioning body must arrange the specified health care provision for the child or young person.

(4) 'The responsible commissioning body', in relation to any specified health care provision, means the body (or each body) that is under a duty to arrange health care provision of that kind in respect of the child or young person.

(5) Subsections (2) and (3) do not apply if the child's parent or the young person has made suitable alternative arrangements.

(6) 'Specified', in relation to an EHC plan, means specified in the plan.

51 Appeals

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

(2) The matters are—

…

(c) where an EHC plan is maintained for the child or young person—

(i) the child's or young person's special educational needs as specified in the plan;

(ii) the special educational provision specified in the plan;

(iii) the school or other institution named in the plan, or the type of school or other institution specified in the plan;

(iv) if no school or other institution is named in the plan, that fact; …

Special Educational Needs and Disability Regulations 2014 (SI No 1530)

12. Form of EHC plan

(1) When preparing an EHC plan a local authority must set out—

(a) the views, interests and aspirations of the child and his parents or the young person (section A);

(b) the child or young person's special educational needs (section B);

(c) the child or young person's health care needs which relate to their special educational needs (section C);

(d) the child or young person's social care needs which relate to their special educational needs or to a disability (section D);

(e) the outcomes sought for him or her (section E);

(f) the special educational provision required by the child or young person (section F);

(g) any health care provision reasonably required by the learning difficulties or disabilities which result in the child or young person having special educational needs (section G);

(h) (i) any social care provision which must be made for the child or young person as a result of section 2 of the Chronically Sick and Disabled Persons Act 1970 (section H1);

(ii) any other social care provision reasonably required by the learning difficulties or disabilities which result in the child or young person having special educational needs (section H2);

(i) the name of the school, maintained nursery school, post-16 institution or other institution to be attended by the child or young person and the type of that institution or, where the name of a school or other institution is not specified in the EHC plan, the type of school or other institution to be attended by the child or young person (section I); and

(j) where any special educational provision is to be secured by a direct payment, the special educational needs and outcomes to be met by the direct payment (section J),

and each section must be separately identified.

(2) The health care provision specified in the EHC Plan in accordance with paragraph (1)(g) must be agreed by the responsible commissioning body.

(3) Where the child or young person is in or beyond year 9, the EHC plan must include within the special educational provision, health care provision and social care provision specified, provision to assist the child or young person in preparation for adulthood and independent living.

(4) The advice and information obtained in accordance with regulation 6(1) must be set out in appendices to the EHC plan (section K).

This regulation is authorised by section 37(4) of the 2014 Act.

D. About M

5. I take this short description of M's health from Mr Persey's skeleton argument:

> M is a 6-year-old disabled child. Shortly following her birth, M suffered a cardiac arrest as a result of negligent medical treatment. The cardiac arrest led to profound hypoxic ischemia. M has been diagnosed with severe bilateral cerebral palsy. She is visually impaired and has learning difficulties.

E. M's EHCP

6. Health care provision is set out in Section G.

7. In the plan under appeal, there was no mention of occupational therapy in Section G, but there were a couple of references in Section F (special educational provision) to 'necessary adaptions as advised by the Occupational Therapist or Physiotherapist.'

8. In the working document before the tribunal, the parents had proposed a number of references to occupational therapy be included in Section F. Some were agreed by the local authority. For Section G, the local authority proposed that it should read:

> *Occupational Therapy provision:*
>
> *In addition to the education provision above, M will also receive the following provision:*
>
> *- Health OT – provision of and review of bilateral hand splints in clinic as indicated by need.*
>
> *- Social care OT – assessment and recommendation of equipment for use at home (at home (provided by HES) M has a height adjustable profiling bed, 2 mobile hoists, 2 in-chair slings, 1 bathing/toileting sling, HTS toilet chair, Bealift bath aid and Triton Chair) – frequency is dependent on need.*

The italics in the document indicate that this was an amendment proposed by the local authority. The section specifies that this would be provided by the NHS 'As required by need'. I do not know why the social care was included in Section G rather than Section H. Be that as it may; this appeal was argued on the basis of health care.

F. The First-tier Tribunal's reasons

9. These are the tribunal's reasons on occupational therapy. I have anonymised the names of the witnesses.

> *Section F – occupational therapy*
>
> 55. We considered that some of the provision requested by the parents was health provision, rather than educational provision. Occupational therapy is health care provision and we must be satisfied that it educates and trains M, within section 21(5) of the Children and Families Act, if we are to include it in Section F. The parents' submissions drew our attention to EAM v East Sussex County Council [2022] UKUT 193 (AAC). However, this is not applicable because it is a case about the meaning of "educational provision" within section 21(1). EAM draws a clear distinction between the meaning of section 21(1) and section 21(5). We did not include provision relating to staff training, timetabling of equipment use, and a moving and handling plan.
>
> 56. We included the recommendations of HR [occupational therapist] that the occupational therapist should work directly in the classroom to suggest positional of equipment changes. This trains M to use her equipment effectively and manage her posture. We included some items which would be used to train M to manage her posture like a wedge and adjustable height box.
>
> 57. As regards standing transfers, we considered that these did train M to maintain her posture and move between different pieces of equipment. KW physiotherapy report (page 458) says that standing transfers are reinforcing her learning. HR's occupational therapy recommended two to one support for these transfers. In oral evidence, SB said that she did not dispute that M has the

potential to do a standing transfer to a piece of equipment and that this would need two people. One person would hold M and the other would transfer the piece of equipment. She said she had not seen M do a standing transfer. If a hoist were to be used, one person could manage. She said that a standing transfer to a toilet chair would not be appropriate because this was set for the height of the toilet, not the child and this was not the right item for a standing transfer.

58. Mrs L said that M gets a lot out of standing transfers at the PC. She does not like being static or in a chair for too long.

59. We accept the evidence of SB that a toilet chair is not appropriate. We have amended the wording so that M has two to one support for transfers and one to one if using a hoist to move. M is a young child and clearly the staff and equipment needed for moving and handling will need to be reviewed regularly.

60. We did not include the proposed LA wording for staff ratios to be dealt with in a risk assessment because we are required to specify the special educational provision required, not leave this for further assessment. A risk assessment is clearly good practice, but we do not consider this to be educational provision.

61. As regards sensory integration, HR's occupational therapy report does not recommend direct sensory integration but recommends the provision of equipment overseen by a sensory integration qualified therapist. Sensory integration equipment is available at the P as part of the general offer to pupils. The LA provided a position statement about sensory integration based on the Royal College's guidance (page 540). SB said in oral evidence that there was no evidence base for sensory integration therapy, but M needed a sensory rich environment. The evidence of Mrs L was that M does not necessarily need sensory integration equipment, but it is available in the toolkit for her. There is nothing in the annual review occupational therapy report (page 292) about sensory integration, although there is some reference to equipment such as swings.

62. The parents' submissions say that the LA 'has failed to evidence why sensory integration occupational therapy isn't required to meet M's special educational needs, rather than being as a result of a policy decision.' This is the wrong way round. The parents should have provided evidence as to why it is needed. HR's report contains no explanation and there is no evidence explaining why it is reasonably required. In fact, the evidence of Mrs L was that M does not necessarily need it. Therefore, we have not included this provision.

63. HR's report recommends weekly direct occupational therapy. Her report is a simple assessment of needs and recommended provision without any explanation as to why the provision has been recommended. Direct therapy is provided as part of the general offer at P and the annual review report (page 292) explains that the focus has been on using switches. Mrs L said in oral evidence that M had made progress with switches and is now able to turn on a fan using a switch. The parental evidence was also that M has made progress with switches.

64. SB's witness statement (page 545) and her comments on the Working Document say that M should have indirect therapy. In oral evidence, she said that staff could implement a programme written by an occupational therapist and this

> could be adjusted if staff observe any changes or progress. She said that at the moment M is only taking what an adult places in her hand. The programme would need to be reviewed if she started to reach for objects but otherwise there was no point in changing the programme.
>
> 65. In a similar way as for speech and language therapy, none of the experts have given detailed reasoning for their recommendations. We consider that M is making progress with the model at P and have included it. M has very complex needs and we consider that she need support in learning how to manage daily activities. This can be considered at the next annual review if the circumstances change.

G. The grounds of appeal

10. I gave M's parents permission to appeal. There were two grounds of appeal.

11. Ground 1 was that the tribunal misapplied section 21. Mr Persey argued that the tribunal went wrong in law by not asking itself first whether occupational therapy was direct special educational provision. *Direct* special educational provision means provision that satisfies section 21(1) or (2). This is in contrast to health care provision as defined by section 21(3), which may be treated as special educational provision by virtue of section 21(5).

12. Ground 2 was that it gave inadequate reasons for deciding that occupational therapy was not direct special educational provision under the section. Mr Persey argued that the tribunal failed to explain: (a) why all occupational provision is health care provision; and (b) why even if it is health care provision it is not direct special educational provision.

H. Analysis of the legislation

13. I first analyse the legislation as it has to be applied by the local authority. Later, I consider how it has to be applied by the First-tier Tribunal on appeal.

General approach

14. As the Supreme Court said in *R (O) v Secretary of State for the Home Department* [2023] AC 255:

> 29. … Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. …

15. Mr Persey referred to section 21 and argued that the 'standard approach to statutory construction' was to apply the first subsection before applying others. I do not accept that. The standard approach is to interpret provisions as a whole.

The structure of the legislation

16. The starting point for this case is with the definition of special educational needs in section 20. There are two elements to the definition. The first element is that the child must have either a learning difficulty or a disability. These are alternatives, although a child may have both. A learning difficulty is defined comparatively with the

majority of others of the same age (section 20(2)(a)). A disability is defined by reference to its impact on the child's ability to access facilities of a kind generally provided for children of the same age (section 20(2)(b)). The second element is that the learning difficulty or the disability must call for special educational provision (section 20(1)).

17. That leads to section 21(1) and (2), which provide general definitions of special educational provision. M is six, so section 21(1) applies. This defines educational provision for children aged two or over, and it does so comparatively with provision made generally for others of the same age.

18. Section 21(3) provides a general definition of health care provision. But not all health care provision has to be included in an EHCP. This is limited by section 37(2)(d), which refers back to the definition of special educational needs. And that is picked up in regulation 12(1)(g). There is also power to include other health care provision under section 37(3).

19. The NHS may be making the provision when an ECHP is being written. This is not, though, necessarily so. The duty to make provision in accordance with the ECHP only arises from the time when it comes into effect.

20. Mr Lawson argued:

> These simple definitions are not without difficulty – but it is submitted this must mean not that the provision is in fact being made by the NHS for the appellant but that it is provision the NHS would make if it was 'reasonably required' by the person. Otherwise, the meaning of health care provision could vary from case to case and within one case over time.

21. My understanding is that the occupational therapy in this case was privately funded provision. If Mr Lawson meant that this is within the definition, I do not accept his submission. That is not what section 21(3) says. The duty to commission the provision under section 42(3) and (4) makes no sense if it is not being provided by the NHS. Nor does the duty to agree the health care provision with the responsible commissioning body under regulation 12(2).

22. It may be that if health care is privately funded, it can only be included as special educational provision under section 21(1) or (2). I did not have any argument on this.

Classification

23. Even a nodding familiarity with some of the cases that deal with classification of provision is sufficient to show that it is not always straightforward. Mr Lawson cited *R v Lancashire County Council ex parte M* [1989] 2 FLR 279. The Court of Appeal there said at 301:

> To teach an adult who has lost his larynx because of cancer might well be considered as treatment rather than education. But to teach a child who has never been able to communicate by language … seems to us just as much educational provision as to teach a child to communicate by writing.

24. That decision has to be read in the context of the legislation at the time. In particular, the Court applied regulation 10 of the Education (Special Educational Needs) Regulations 1983 (SI No 29). That regulation provided for a statement of

educational needs to include additional non-educational needs that would be provided by a district health authority and would allow a child to benefit properly from the special educational provision. That is different from section 21(3) and (5) of the 2014 Act.

25. I am not going to formulate a test, still less a definition, but perhaps the essence of classification depends on how closely connected a provision is to the delivery of education in a particular case. This explains the way that speech and language therapy is dealt with in the *Special educational needs and disability code of practice: 0 to 25 years*:

> 9.74 … since communication is so fundamental in education, addressing speech and language impairment should normally be recorded as special educational provision unless there are exceptional reasons for not doing to.

26. Two points follow from the example of speech therapy in *ex parte M*.

27. First, I do not read the Court as saying that a local authority, or a First-tier Tribunal nowadays, has a free choice about how to classify a particular provision. What the Court said was that, depending on the circumstances, speech therapy might treat or it might educate. That depends on whether the statutory definition is satisfied or not. I accept that there is a judgment involved in classification, and where there is judgment, there is scope for a difference of views. I refer to judgment rather than to discretion, which Mr Persey used, in order to avoid any suggestion that there is a choice.

28. Second, although the Court did not say so, there is no reason why a provision cannot fulfil both functions of education and treatment, as speech therapy would for a child who had never been able to speak. Translating that point into the terms of section 21, there can be overlap between educational provision and health care provision. Section 21(5) makes provision for this. It provides for health care provision that educates or trains to be treated as special educational provision instead of health care provision. It then comes within section 37(2)(c) and the local authority becomes responsible for securing the provision under section 42(2). It is also appealable under section 51(2)(c)(i). This is explained in the *code of practice*:

> 9.76 In cases where health care provision or social care provision is to be treated as special educational provision, ultimate responsibility for ensuring that the provision is made rests with the local authority (unless the child's parent has made suitable arrangements) and the child's parent or the young person will have the right to appeal to the First-tier Tribunal (SEN and Disability) where they disagree with the provision specified.

'Educational provision' and 'educates or trains'

29. The legislation distinguishes between 'educational provision' in sections 20(1) and 21(1) and (2) and 'educates or trains' in section 21(5). The different language, in the same section, indicates that the expressions have a different meaning. The example I have used in other cases is an arrangement to help a child hear. This does not itself educate or train the child, but it is educational provision as it provides a means by which the child can participate in a lesson.

30. The distinction is necessary in order to render the disability element in section 20(2)(b) effective. This provides that an educational need may arise from a disability that prevents or hinders use of a facility generally provided for children of the same

age. It is possible, even perhaps likely in the case of physical disabilities, that the provision will not of itself educate or train. A wheelchair cannot help a child learn French. This does not mean that the distinction is only relevant to cases based on disability rather than learning difficulty. The point I am making is that educational provision can be wider than education and training.

31. There is a practical difference between direct educational provision under section 21(1) and deemed educational provision under section 21(5). I explained this in *East Sussex County Council v TW* [2016] UKUT 528 (AAC). The case concerned social care provision rather than health care provision, but my reasoning applies equally to both:

> 24. When a case comes before the First-tier Tribunal, the local authority may already have applied section 21(5). If not, the tribunal must apply it and, if necessary, move the relevant provision from Section D to Section F. In order to apply section 21(5), the tribunal must identify the person's social care provision – this should be clear from Section D of the plan – and then identify which parts of social care provision educate or train. Any parts that have that effect must be moved to Section F.
>
> 25. The nature of the tribunal's task differs between direct and deemed special educational provision. For direct provision, it may make its own decision on what the person's needs are and what provision is called for in the light of those needs. In doing so, it may add to the provision in the plan, amend it, or remove it. For indirect provision, the task is different. The tribunal's only role is to classify the social care provision to filter out that part of the provision that is properly classified as special educational provision under section 21(5). The tribunal has no jurisdiction over the social care provision as such, because section 51 does not provide for an appeal. The tribunal only has jurisdiction in so far as it is properly classified as special educational provision, at which point it comes within section 51(2)(c). It has no power to change in any way the provision that remains social care provision under section 21(4). Nor has it power to include social care provision in Section F of the plan. All it can do is to include additional direct special educational provision.

Mr Lawson was right to say that 'Allowing the Tribunal to change text for services provided by social care or health care could lead to extensive decisions made about bodies [such as the NHS] that are not parties or represented …' That is consistent with my analysis of jurisdiction.

32. There is, therefore, a difference between direct and deemed special educational provision. I accept that education will typically or usually involve instruction, although I hesitate to say that it always does so. But educational provision can be wider than education.

I. Appeals

33. So far I have analysed the legislation as it has to be applied by the local authority. It is more complicated at the appeal stage. This is because the legislation is written from the perspective a local authority drafting an EHCP and does not particularise how the tribunal should approach the issues raised on an appeal.

34. The nature of an appeal depends on the legislation that creates it. Some legislation specifies what the tribunal is allowed to do. Section 58 of the Freedom of Information Act 2000 is an example:

> **58 Determination of appeals.**
>
> (1) If on an appeal under section 57 the Tribunal considers—
>
> (a) that the notice against which the appeal is brought is not in accordance with the law, or
>
> (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,
>
> the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.
>
> (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

35. Section 51 of the 2014 Act is different. It simply provides for an appeal against any of the matters listed. For this case that means an 'appeal to the First-tier Tribunal against … the special educational provision specified in the plan' (section 51(1) and (2)(c)(ii)). How does that work when health care provision is involved?

36. There is no provision in section 51 for an appeal against the health care provision specified in an EHCP. So, how should the tribunal deal with occupational therapy, assuming that it is within the meaning of section 21(3)? The tribunal has no power to insert it into the EHCP. One possibility is that the tribunal can only consider whether the provision is direct special educational provision. That would make the tribunal's powers depend on the chance whether the provision had been included by the local authority. In other words, it would limit the tribunal's jurisdiction to deciding on the proper classification of the provision already in the plan. Another possibility is that the tribunal has to undertake a notional exercise by first assuming the occupational therapy was included as health care provision and then classifying the provision that should be moved to the special educational provision section. I did not have argument on these, or other possible, options.

37. I did, though, have argument on the order in which the tribunal had to apply section 21. More accurately, I had argument on the order in the tribunal should consider direct and deemed special educational provision. I deal with this separately.

J. The order in which to consider or apply section 21(1)-(2) and section 21(5)

38. Mr Persey argued that the tribunal should have considered whether occupational therapy satisfied the definition of special educational provision before deciding that it was health care, some of which was to be treated as educational provision. He relied on the decision of the Court of Appeal in *Bromley London Borough Council v Special Educational Needs Tribunal* [1999] 3 All ER 587.The Court was concerned with the distinction between educational and non-educational provision. Sedley LJ gave the only judgment and said at 595-596:

> If one returns to sections 312 and 324 [of the Education Act 1996], some indications of Parliament's intention begin to emerge. Special educational

> provision is, in principle, whatever is called for by a child's learning difficulty. A learning difficulty is anything inherent in the child which makes learning significantly harder for him than for most others or which hinders him from making use of ordinary school facilities. What is special about special educational provision is that it is additional to or different from ordinary educational provision (see section 312(4)). So far the meaning is open ended. It is when it comes to the statement under section 324 that the LEA is required to distinguish between special educational provision and non-educational provision; and the prescribed form is divided up accordingly. Two possibilities arise here: either the two categories share a common frontier, so that where the one stops the other begins; or there is between the unequivocally educational and the unequivocally non-educational a shared territory of provision which can be intelligibly allocated to either. It seems to me that to adopt the first approach would be to read into the legislation a sharp dichotomy for which Parliament could easily have made express provision had it wished to do so, but which finds no expression or reflection where one would expect to find it, namely in section 312. Moreover, to interpose a hard edge or a common frontier does not get rid of definitional problems: it simply makes them more acute. And this is one of the reasons why, in my judgment, the second approach is the one to be attributed to Parliament. The potentially large intermediate area of provision which is capable of ranking as educational or non-educational is not made the subject of any statutory prescription precisely because it is for the local education authority, and if necessary the SENT, to exercise a case-by-case judgment which no prescriptive legislation could ever hope to anticipate. The potential breadth of what can legitimately be regarded as educational is illustrated by section 322, permitting as it does the enlistment by the LEA of other statutory providers to "help in the exercise of any of their functions under this Part". It is true that the LEA's functions (which include both powers and duties: see section 579(1)) will include the elective making of arrangements for non-educational provision as well as the mandatory making of arrangements for educational provision pursuant to section 324(5)(a); but it is the fact that health, social services and other authorities can be enlisted to help in the making of special *educational* provision which gives some indication of possible breadth of the duty.

39. Sedley LJ was concerned with the Education Act 1996 and the distinction between educational and non-educational provision in section 324(5)(a)(i) and (ii). This case is concerned with the 2014 Act. Section 21 deals with educational provision, health care provision and social care provision. Sedley LJ's reasoning did not envisage the addition of health and social care, so it cannot simply be read across to the current regime. The concepts used in section 21 have to be taken into account in interpreting and applying the section.

40. Mr Lawson argued that as the provisions 'are just definitions, so that order of their application should not matter.' I notice that Mr Lawson does not say that it *could* not matter or that it *will* not matter.

41. My analysis has shown that there is the possibility of an overlap between educational provision and health care provision. The scope for overlap is reduced when section 21(5) is read in conjunction with the limitation in section 37(2)(d). But

there is still the possibility. The practical application of the provisions may be different. That will depend on the circumstances.

42. I do not accept the order in which the different types of provision are decided makes no difference. The tribunal has to remove any health care provision that educates or trains from Section G. This is necessary in order to relieve the responsible commissioning body of the duty to arrange that provision under section 42(3). This can only be authorised by section 21(5). Logically, therefore, the tribunal should undertake that exercise before considering direct educational provision. That approach will also prevent duplication of effort.

43. As a matter of practicality, the tribunal may prefer to *consider* educational provision before health care provision. That will not be an error of law, provided the tribunal *applies* section 21 correctly when it decides what provision should be in which section of the ECHP.

K. Materiality

44. As I said, I am going to take a practical approach to disposal of this case.

45. The tribunal accepted some occupational therapy as special educational provision. I assume that Mr Persey does not criticise those parts of the tribunal's decision. That leaves the occupational therapy that the tribunal decided was health care and not special educational provision:

- Transfers to a toilet chair at paragraphs 57-59 of the tribunal's written reasons.
- Staff ratios at paragraph 60
- Sensory integration at paragraph 61-62.
- Direct and indirect occupational therapy at paragraphs 63-65.

46. The tribunal was assessing expert evidence. In other words, it was assessing the opinions of the experts. The assessment of evidence is a matter for the tribunal. It does not have to accept evidence, even from an expert. It must, though, have a reason for not doing so. Expert evidence is only as good as the reasons for it. In this case, the tribunal was a specialist one, used to dealing with issues relating to educational needs and provision.

47. I need, therefore, to look at the reasons the tribunal gave. In each case, the tribunal summarised the evidence, stated and explained its conclusion.

48. For transfers to a toilet chair, the tribunal decided that this was not appropriate on the basis of the evidence of SB (paragraph 59). SB's evidence was at paragraph 57 and was that 'a standing transfer to a toilet chair was not appropriate because this was set for the height of the toilet, not the child'.

49. For staff ratios, the tribunal decided that it was not appropriate to leave this for further assessment and although a risk assessment was good practice, it was not educational provision (paragraph 60).

50. For sensory integration, the tribunal decided that this was not required. Two of the witnesses (SB and Mrs L) did not support it. The third (HR) did not recommend integration, but said a sensory integration qualified therapist should oversee the provision of equipment. The tribunal rejected HR's evidence, because she had not provided any explanation (paragraph 62).

51. For direct and indirect occupational therapy, the tribunal did not accept the recommendations, because the experts had not explained why they had made them (paragraph 65).

52. All of those reasons were rational. They explained why the provision did not educate or train. The same reasons would have led to the conclusion that they did not satisfy the test for direct special educational provision.

53. The tribunal appears to have dealt with the case under section 21(5). Its reasoning supported the tribunal's decision on that basis and it would have supported it if the tribunal had been considering direct provision. Putting that into legal language, if the tribunal made a mistake about the order in which it considered provision, that mistake did not affect the outcome of the appeal.

Authorised for issue
on 06 November 2025

Edward Jacobs
Upper Tribunal Judge