**IN THE UPPER TRIBUNAL** **Appeal No.** CDLA/56/2016
**ADMINISTRATIVE APPEALS CHAMBER**

**Before Judge S M Lane**

This decision is made under section 12(1) and (2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007.

i. The decision of the tribunal heard on 21 July 2015 under reference SC156/14/01103 is **SET ASIDE** because its making involved an error on a point of law.

ii. The appeal is **REMITTED** to a freshly composed F-tT for a complete rehearing.

iii. The appellant shall provide evidence of the provision made under the Statement of Special Educational Needs or School Action Plus for her son, D, in the period beginning 9 September 2013 (3 months before the date of claim) to 6 March 2014.

## REASONS FOR DECISION

1 The appointee (whom I shall call the appellant for ease of reference) and the Secretary of State both agree that the decision should be set aside for the reasons I gave when granting permission to appeal. The appellant, however, does not agree to me giving a decision without further reasons unless I substitute my own decision rather than remit the matter to a fresh F-tT. I do not consider myself to be in a position to substitute my own decision. It would involve an Upper Tribunal judge in a wide ranging fact-finding exercise without the benefit of medically and disability qualified members. Their input is vital in disability cases unless the evidence is very clear.

2 The claimant, D, was 4 years 7 months old at the date of claim and 4 years 10 months at the date of the Secretary of State's decision on 6 March 2013. The decision was that D was not entitled to either the mobility or the care component of DLA.

3 D has cerebral palsy, developmental coordination delay, dyspraxia and hypertonia. He has some signs of autism, but his doctors have not confirmed a diagnosis of that condition. The lack of a diagnosis is not, as the F-tT said, determinative of which he suffers from a disability. D additionally has problems with faecal seepage owing to constipation caused by poor muscle tone. He has medically recognised absences which his consultant confirms are not caused by epilepsy. They may, however, require the intervention of another person, who would generally be an adult, to rouse him by tapping him on the nose. Although the consultant refers to the absences as daydreaming in one report, he does not appear to be describing simple drifting away in a reverie that most people would associate with that term. The appellant asserts that D often has these absences when walking outdoors. These are said to require interventions to avert danger. In one instance, D fell down some outdoor steps when he was having an absence.

4 The F-tT confirmed the Secretary of State's decision. Its Statement of Reasons revealed a number of errors. I find the following errors established:

5 **Attention in connection with D's cognitive difficulties at school:** In granting permission to appeal**,** I drew attention to the F-tT's omission to deal with the extra attention D

received at school under his Statement of Special Educational Needs. A line of Upper Tribunal case law confirms that extra attention a child receives of this sort may qualify as attention in connection with bodily functions. Cognition is an aspect of the working of the brain: *R(DLA)1/07*; *KM v Secretary of State for Work and Pensions* [2013] UKUT 159; *BM v Secretary of State for Work and Pensions* [2015] UKUT 18 AAC.

6 The Secretary of State submits that the F-tT *did* consider these needs, but I disagree. The F-tT mentions attention in connection with cognitive needs but confines its consideration to the attention D needs with his absences. It does not deal with the extra provision made under D's Statement of Special Educational Needs.

7 The Secretary of State has done a rough calculation of this in his Submission to the UT. D gets approximately 215 minutes of extra attention per week (phonics - 60 minutes per week, teaching assistant – 20 minutes, group support – 30 minutes, SEN – 30 minutes, DCD – 75 minutes). When divided across the week, this amounts to roughly 43 minutes per week at various times of the day. When the recent case law is applied, he *may* be found to receive enough attention in connection with his bodily function of cognition at school to qualify for some award of the care component, particularly if these needs are aggregated with other attention needs.

8 Whether it does so or not will require the F-tT to consider a range of factors:

(i) whether the F-tT considers that 43 minutes is a significant part of the day for the purposes of the lowest rate of the care component, or alternatively whether the attention is spread frequently throughout the day for the purpose of the middle rate of the care component, is a matter of judgment for the F-tT. In respect of the lowest rate of the care component, it is not enough following *R(DLA)5/05* for a Tribunal simply to say that 'an hour' is a significant portion of the day.

(ii) the appellant's evidence regarding D's Statement of Special Educational Needs post-dates the period in question considerably. It may not be an accurate reflection of the amount of attention that was reasonably required or, indeed, received during the qualifying period in 2013.

9 **Absences: attention in connection with bodily functions and the lower rate of the mobility component:** The F-tT failed to recognise that the attention a claimant needed in connection with bodily functions when outdoors, and a need for supervision or guidance when walking outdoors for the purpose of the lower rate of the mobility component, are not mutually exclusive. There is clear reported authority on this point: R(DLA)4/01 (see also CDLA/333/2005).

10 In this case, the F-tT wrongly decided that D's absences when walking outdoors were *only* relevant to whether he qualified for the lower rate of the mobility component. Since D was too young to qualify for that, the F-tT looked no further. That was not right. Attention in connection with bodily functions may arise indoors or outdoors, and whilst walking or involved with some other outdoor activity. If that attention also amounts to supervision or guidance, it will also count for the lower rate of the mobility component. So, if D needed to be tapped on the nose during an absence whilst playing outdoors, that action could count as attention with a bodily function of cognition for the purposes of the care component, though it would not seem to amount to guidance or supervision for the purposes of the lower rate of the mobility component. On the other hand, tapping a child on the nose during an absence to stop him getting run over by a car on the road might be seen as both.

11 The F-tT will have to decide whether such attention is assessed as meeting either of the conditions in section 72(1A)(b)(i) or (ii) of the Social Security Contributions and Benefits Act 1992. Section 72(1A)(b) requires either (i) that the child has needs of a description substantially in excess of those of the normal requirements of a person of the claimant's age; or (ii) that the child has substantial requirements of such a description which a younger person in normal physical and mental health may also have but which persons of the claimant's age and in normal physical and mental health would not. This will be a matter for the next F-tT.

**12** The main issue in this appeal will probably turn on the aggregation of the special educational needs the child reasonably requires, as shown in his SSEN, and those arising from his absences. I do not have enough facts before me to make this decision.

13 **Faecal leakage:** The F-tT dealt with D's asserted problems of incontinence, both night and day, in two ways. Its main reasoning (paragraphs 13 – 18), based on a careful analysis of objective medical evidence provided by the appellant herself and by D's school, undermined her account of D's problems. Its findings were that insofar as D had a problem, it was mostly during the day; and as regards the night, it was infrequent and in its view as a specialist Tribunal, D could wear nappies to minimise the need for attention. The findings were rational on the evidence before the Tribunal and I am unable to see any ground on which I could have interfered with them.

14 The second strand of the F-tT's reasoning was where the error arose. It related to a misinterpretation of section 72(1A)(b). The requirements of the sub-section are set out in paragraph 11. The misinterpretation needs to be corrected.

15 Section 72(1A) is aimed at deciding whether the needs arising from the child's particular problem(s) are, put briefly, in excess of those of other children of the claimant's age (or only seen in normally in younger children).

16 In this case the appellant's evidence was that D (aged 4 at the material time) suffered from faecal incontinence at night even more frequently than during the day. This meant that he would have been having accidents at least 4 – 8 times every night. The appellant said D needed help changing himself and his bedding every time.

17 The Tribunal essentially asked itself 'what four year old wouldn't need that help?'

18 By basing its decision on the view that all under-5s would need help with cleaning and changing themselves and their bedding during the night, the Tribunal missed the main point, which is that only a very small percentage of children of this age are faecally incontinent.[1] The real question to ask was whether the child's requirements arising from his faecal incontinence at night were substantially in excess of those of 'normal' children his own age or were substantial requirements normally seen in younger children.

19 The Secretary of State agrees that the F-tT did indeed miss the main point. 'The cause of the pro9blem – the faecal incontinence – is what makes this substantially in excess', not the actual changing of the clothes/bedding itself.

1 [1] The research of Issenman, Filmer and Gorski, published as *Review of Bowel and Bladder Control Development in Children: How Gastrological and Urologic Conditions in Children Relate to Problems in Toilet Training* (Paediatrics, June 1999 Vol 103, supplement 3 by the American Academy of Paediatrics) indicates that only 1.5% of children in early elementary grades suffered from encoparesis (night-time faecal incontinence). (Elementary grades in the US are between approximately 5 years – 12 years old.)

20 Even though the F-tT did make an error of law on this point, I consider that the error was immaterial because of the facts found by the F-tT. These were that the incidents of incontinence at night were simply insufficient to meet the conditions of entitlement and could be offset by using nappies. That was more than sufficient to dispose of this matter.

21 A final matter to raise is no more than a reminder to First-tier Tribunal of the power to make advance awards where the conditions of regulation 13A(1) of the Social Security (Claims and Payments) Regulations 1987 are satisfied. This regulation allows a Tribunal to make an award even though the claimant does not satisfy the conditions of entitlement on the date on which the claim is made, if he will satisfy those requirements beginning on a day…not more than 3 months after the date on which the claim is made.

22 D was 4 years and 7 months old when the claim was made, so the F-tT was correct in deciding that an award was not possible. However, tribunals should bear in mind the advance award provisions where it is clear that claimants *shall* meet the conditions of entitlement within the 3 month period.

23 **Disposal:** I have come to the conclusion that it is necessary to remit the appeal as a matter of fairness to the appellant. She should be given the opportunity to provide evidence to the Tribunal regarding the provision made for D's special educational needs at the material time and to discuss with the Tribunal the extent of D's absences. Taken together, there may be enough for some award of the care component to be made for day needs. It is very difficult, however, to see how the appellant could successfully argue that any night needs are established. Nor is it possible for an award of the lower rate of the mobility component to be made on this claim.

**[Signed on original]**

**[Date]**

**S M Lane**
**Judge of the Upper Tribunal**
**12 May 2016**