

2. The danger I am referring to is not unique to this phrase, nor is it new. It has existed for as long as there has been a need to interpret legislation. The problem arises from the use of a non-statutory phrase that distracts attention from the requirements of the legislation. In *Environment Agency v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22, the House of Lords was concerned with causation. Lord Clyde at page 37 explained the danger of substituting a phrase or question for the statutory language:

There may be a danger in enlarging on any definition of what may constitute a cause that particular expressions may become elevated into standard tests which may distract attention from the critical question which the statute requires to be addressed or invite concentration on an issue whose formulation may not quite meet the statutory terms. The use of alternative language to that used by the statute may only lead to debate about the precise meaning of such alternative expressions and obscure the true question.

Indeed, as Lord Hoffmann pointed out in *Moyna v Secretary of State for Work and Pensions* [2003] 1 WLR 1929 at [23]:

... many words or phrases are linguistically irreducible in the sense that any attempt to elucidate a sentence by replacing them with synonyms will change rather than explain its meaning.

B. The law

3. Since it is the language of the legislation that matters, I will begin with what it says and how the waking day curriculum relates to it.

4. Education, Health and Care Plans are governed by the Child and Families Act 2014 and the Special Educational Needs and Disability Regulations 2014 (SI 1530). Together, they set up a chain of analysis.

5. This case concerns O, who was born in 2001. She is a young person, as defined by section 83(2). These were the questions to ask in order to complete her Plan.

6. Did she have ‘a learning difficulty or disability’? That is defined by section 20(2):

(2) 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.

7. Did that learning difficulty or disability call for ‘special educational provision’ to be made for her? That is defined by section 21(1):

(1) ‘Special educational provision’, for ... 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—

...

(c) mainstream post-16 institutions in England ...

8. If it did, she had special educational needs: see section 20(1). They are set out in Section B of the Plan: see regulation 12(1)(b).

9. What special educational provision do those needs call for? This is set out in Section F of the Plan: see regulation 12(1)(f).

10. Section I of the Plan then contains the name or type of institution that the young person should attend: see regulation 12(1)(i).

11. There is, in other words, a logical chain of analysis from O's needs to the provision required to meet those needs and then to the institution where that provision can be provided.

12. An argument for a waking day curriculum straddles Sections F and I. Whether it is required is part of the analysis of special educational provision. Whether the provision for the curriculum requires a residential placement is part of the analysis of placement. As Mr Rylatt accepted, a residential placement is not necessarily required to deliver a waking day curriculum.

13. Section 21(5) is also relevant. This deals with the possibility of overlap between special educational provision and health or social care provision:

(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).

C. The appeal to the First-tier Tribunal

14. The local authority made a Plan for O. She has autism and profound learning difficulties, exhibits challenging behaviours, and is non-verbal and doubly incontinent. So there was no doubt that she had both a learning difficulty and a disability. Nor was there any doubt that they called for special educational provision. The authority set those matters out in Sections B and F. In Section I, it identified an independent specialist college, which was approved under section 41 of the 2014 Act. The college was not residential, but this would be supplemented by O living in supported accommodation.

15. The appeal was presented as an appeal on placement only (Section I) and that is how the tribunal dealt with it, despite having some misgivings arising from the way that Section F was expressed. It made this explicitly clear in paragraph 47 of its written reasons:

... neither party sought amendments to sections B and F and their evidence showed they regarded the contents of section F as being what special educational provision O... requires. In addition, we have not gone behind the agreement between the parties despite our concerns because doing so would have delayed the appeal unnecessarily. ...

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16. In other words, on the tribunal's approach, it had to accept the Plan as written and decide on the name or type of institution appropriate for that provision, subject to any application of section 21(5).

17. The tribunal set out its reasoning under the heading *Waking-day curriculum*. The reasons began by identifying the issue as whether O 'requires a waking-day curriculum.' It noted, correctly, that there is no definition of that expression, but said that 'it is generally used to describe a situation where special educational provision is not limited to the usual college hours.' It then proceeded to set out its analysis in three parts.

18. The first part of the analysis dealt with Section F of the Plan, where O's special education provision was set out. The tribunal set out three passages from that Section:

O... will need brief, but daily structured language activities, developed in conjunction with SALT. These activities should be incorporated into her daily learning programme (school and home).

School and home will need to maintain regular contact in order to share objectives and strategies.

... a high level of adult support and supervision to manage her self-help skills, until she becomes more independent. ... O... needs frequent adult modelling opportunities to practice tasks and positive reinforcement when she uses these skills.

The tribunal concluded:

We find these three points identify that O... requires special educational provision that goes beyond that provided during usual college hours.'

Mr Lawson criticised the tribunal for selective quotation. That aside, in this part of its analysis the tribunal limited itself to interpreting Section F in order to decide what provision it required.

19. Having interpreted Section F, the tribunal began the second part of its analysis with the words 'Turning to the other available evidence'. By that, it meant two criticisms of a waking day curriculum that had been put by the local authority's witnesses. One was that such a curriculum would deprive O of 'having down-time and that would impact negatively on her ability to learn because of the anxiety it would instil.' It rejected this concern on the ground that the same approach to the curriculum would not be taken throughout the day. The other concern was that O would not be able to benefit from the curriculum, because she was a slow learner and had barriers to learning. It rejected this concern on the ground that the Plan referred to the need for O's 'family supporting her by bringing objectives and strategies into home life and community for continuity and consistency.' Mr Lawson criticised the tribunal for the way it dealt with the evidence of the local authority's concerns.

20. Finally, the third part of the tribunal's analysis identified care needs that involved education and training. It identified these as special educational provision and

accordingly applied section 21(5). Mr Lawson noted that the care needs were not identified as social care needs in the Plan, but were set out in the needs assessment and transition plan provided by Transform Supported Accommodation. Strictly speaking, section 21(5) did not apply.

21. This led to the conclusion that O needed a waking day curriculum:

Overall, we find that to develop her independent living skills, O... requires a waking-day curriculum. This is necessary provision to enable her to learn and live as independently as possible. It will involve not only teaching her self-care and social skills but also the emotional resilience and opportunity to no longer depend on her mother, which will need to be provided in her accommodation because O... is not able to transfer skills from college to home.

Ultimately, this led to the decision that a residential placement was required.

D. How the tribunal went wrong in law

22. The tribunal made a fundamental error by going beyond Section F of the Plan in its analysis of whether a waking day curriculum was required. It had made clear that it accepted Section F as setting out the special educational provision for O. All that was left was for it to interpret what that Section meant. That is what it did in the first part of its analysis. Leaving aside Mr Lawson's criticisms, that was the correct approach given the scope of the appeal. However, it then went on to deal with the concerns of the local authority. Those concerns were not relevant to the interpretation of Section F and the tribunal did not deal with them as if they were. Its reasons put that beyond doubt. It concluded the first part of its analysis, dealing with what the Section provided, by *finding* that a waking-day curriculum was required. It then came to 'the other available evidence'. But that evidence was irrelevant to the interpretation of Section F. It was only necessary to deal with it if the tribunal was doing something more than interpret Section F. If, as the tribunal had already found, Section F required a waking-day curriculum, the local authority's concerns about that were beside the point. But that is not how the tribunal dealt with them. The only sense I can make of this is that the tribunal saw its role as wider than interpreting Section F. This should not have happened if the tribunal had focused on the special education provision that O required. It seems to me that it ventured into a wider consideration only because of its reliance on and reference to the waking day curriculum.

23. If that were the tribunal's only error, I could decide that the first part of the tribunal's analysis was sufficient of itself to justify its decision and reject the second part of the analysis as mere surplus. I have not done that, because I accept Mr Lawson's criticism of the selective nature of the tribunal's approach to Section F.

24. Section F is set out in two columns. The one on the left is headed *What O... needs to achieve outcomes* and the other on the right is headed *Who will provide the support? How often? Other arrangements e.g. group size*. All the tribunal's quotations came from the left-hand column. The tribunal did not set along side those quotations the comments in the other column that emphasised the role of O's mother and family:

Parent and family to integrate SALT targets into home life.

Parent and family to support school based approaches into home life and community for community and consistency.

Parent and family to support school based approaches into home life and community.

I have not selected these sentences at random. Their locations indicate that they complemented the passages quoted by the tribunal. Their effect is to negate the possibility that after school hours was to be provided as part of a programme of educational provision.

25. Section F as a whole sets out the special educational provision required. If the tribunal considered that only the left-hand column contained that provision, that was wrong. The two columns had to be read together to fulfil the statutory function of that Section under regulation 12(1)(f). Taking the passages cited by the tribunal and reading them together with the qualifying comments that I have quoted, and doing so in the context of Section F as a whole, the tribunal was not entitled to interpret Section F as requiring a waking day curriculum. To put it more precisely, the tribunal was not entitled to interpret Section F as requiring special educational provision beyond the normal college day.

26. Mr Rylatt rightly emphasised that the decision was made by a tribunal consisting of a judge and two specialist members. My decision is consistent with an appropriate respect of a specialist tribunal. It is based on identifying the correct legal approach and the proper interpretation of the local authority's Plan. Neither of those depended particularly on the specialist knowledge and experience of the panel that heard the appeal.

E. Drafting EHC plans

27. Mr Lawson emphasised the problems local authorities would face in drafting plans if the language used in this case were insufficient to exclude the possibility of a waking day curriculum. He referred in particular to generalising skills and consistency of approach.

28. If there is a formula that can guarantee excluding the need for a waking day curriculum, it will not be found in this decision. My comments on the correct interpretation of Section F have been made in the context of that Section as a whole. I have not decided as a matter of law that any particular expression of itself negates the possibility of a waking day curriculum.

29. The meaning of language always depends on its context. As Lord Hoffmann explained in *Moyna v Secretary of State for Work and Pensions* [2003] 1 WLR 1929 at [24], referring to:

... the well-known distinction between the meaning of a word, which depends upon conventions known to the ordinary speaker of English or ascertainable from a dictionary, and the meaning which the author of an utterance appears to have intended to convey by using that word in a sentence. The latter depends

not only upon the conventional meanings of the words used but also upon syntax, context and background. ...

In all drafting, the best advice is for the drafter is to have a precise and legally accurate understanding of what they wish to convey and then to express that meaning in language that is as clear as possible.

30. The decision of Latham J in *S v Special Educational Needs and Disability Tribunal* [2007] EWHC 1139 (Admin) illustrates the importance of precision. I was not referred to this case, but it is particularly useful because, like this case, it involved generalising skills outside normal school hours. It concerned a statement of special educational needs, but it is just as relevant to education, health and care plans.

31. The judge found that the tribunal had made it clear that the child had special educational needs outside normal school hours in order to help the child generalise the skills taught during normal school hours. The tribunal had recorded that the 'School have explicitly recognised the need to teach LS life skills.' It went on: 'We consider responsibility to share their expertise and strategies to back up skills base to enable transfer and generalisation rests with the school. Such generalisation is an educational need: the ability to generalise is an outcome but the inability to do so is a learning difficulty and therefore a special educational need.'

32. Despite this, the judge set aside the tribunal's decision on the ground that it had failed to make the provision that was required to meet that need sufficiently specific. But that does not detract from my point that about precision of analysis and clarity of expression.

F. Disposal

33. Both Mr Lawson and Mr Rylatt, for different reasons, invited me to remit the case to the First-tier Tribunal should I decide to allow the appeal. That is what I have done.

34. I need to make clear what I have and have not decided. I have decided that Section F as written by the local authority did not require a waking day curriculum. So long as the appeal remains as a challenge on placement only, that is the position. If the tribunal were to allow the appeal to extend to Section F, or extend it of its own initiative, it would then be possible to change that Section. That, though, is not a matter for me. I merely want to make clear that my decision does not rule out the possibility of changing the scope of the appeal.

**Signed on original
on 16 September 2021**

**Edward Jacobs
Upper Tribunal Judge**