

ENGLAND AND WALES / JUDGMENT

DOL, R (on the application of) v Southampton City Council

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IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
Case No: AC-2026-CDF-000007
Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR
Date: 28 August 2026

Before : JUDGE BARRY CLARKE
(sitting as a Judge of the High Court)

Between : The King (on the application of DOL)
By his mother and litigation friend DHL
- and -
Southampton City Council

Claimant
Defendant
Mr Ollie Persey and Ms Abby Buttle
(instructed by Sinclairs Law, Solicitors) for the Claimant
Mr Daniel Henderson
(instructed by Southampton, Fareham & Havant Legal Partnership) for the
Defendant
Hearing date: 29 April 2026

JUDGMENT

This judgment was handed down remotely by circulation to the parties' representatives at 10.30 am on 28 August 2026 and by release to the National Archives High Court Approved Judgment R (DOL) v Southampton City Council Judge Barry Clarke: 1. 2. 3. 4. The claimant – anonymised as DOL – is a young person with complex special educational needs. His disabling conditions include autism, global developmental delay and learning difficulties. The defendant local authority, in whose area the claimant resides, is responsible for maintaining his Education, Health and Care (“EHC”) plan. The issues raised by this claim for judicial review, which the claimant brings with permission, are (1) whether the refusal of the defendant to issue an amended version of his EHC plan was unlawful and (2) if so, whether this court should grant relief. More specifically, the claim raises the question of whether a local authority is entitled to disregard an order of the First-tier Tribunal (“FtT”) to amend an EHC plan in circumstances where the FtT has declined (pending an appeal against its decision) to suspend its effect and where there is also an extant appeal and an application before the Upper Tribunal (“UT”) to suspend the FtT's order. A further issue arose the day before the hearing of this claim. When the claimant first brought these proceedings, the defendant's refusal to issue the amended EHC plan was described as an ongoing one. However, the day before the hearing, the defendant issued the amended EHC plan to the claimant. The defendant has contended that this renders this claim academic. The claimant disagrees; he says that the defendant's refusal still operated for a period of six months, causing him significant prejudice, while recognising that this may lead the court towards declarative rather than mandatory relief. References to page numbers in this judgment are, unless otherwise stated, to pages in the main bundle for the hearing. I was also provided with three bundles of statutory and case law authorities. I have read those authorities to which counsel drew my attention, but refer to them below only to the extent necessary to explain my decision. The legal framework 5. 6. 7. I will begin with a summary of the legal framework, which introduces some important concepts and definitions. As between the parties, the framework is not controversial. An EHC plan is a legal document available for children and young people in England up to the age of 25 who need more support than is available through standard special educational needs mechanisms in a mainstream setting. The plan identifies those additional needs and sets out the extra steps needed to meet them. Responsibility for creating an EHC plan rests with the local authority in which the child or young person is resident, under Part 3 of the Children and Families Act 2014 (the “Act”). By section 42 of the Act, a local authority must maintain the EHC plan and secure for the child or young person the special educational provision that the plan specifies. It acts unlawfully if it fails in that absolute duty. By section 61 of the Act, a local authority may arrange for this special educational provision to be provided “otherwise than in a school or post-16 institution”. Such provision is routinely described as being “EOTIS” (education other than in school) or “EOTIC” (education other than in college). The Health, Education and Social Care Chamber is one of seven chambers of the First-tier Tribunal (“FtT”). Like all tribunals, it is a creature of statute. It can determine only those matters that Parliament has expressly empowered it to determine. One of its jurisdictional areas concerns

special educational needs and disability (“SEND”), by which it determines certain appeals against local authority decisions regarding special educational needs. These include Page 2 High Court Approved Judgment R (DOL) v Southampton City Council refusals to assess or reassess the EHC needs of a child or young person and refusals to issue, change or maintain an EHC plan. A child’s parent or a young person may present an appeal to the FtT by virtue of section 51(1) of the Act and then only in respect of the matters listed at section 51(2). The relevant procedural rules applying to the FtT in this context are the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (the “FtT Rules”). By contrast, a local authority’s failure to secure special educational provision for a child or young person in breach of section 42 of the Act – such as by an outright refusal to implement an EHC plan or otherwise to deliver that for which it provides – is only susceptible to challenge by way of judicial review in this court; the FtT has no power to compel delivery of a provision. Judicial review remains a remedy of last resort. This court will refuse permission where a claimant has an alternative remedy in the FtT. The FtT is the appropriate forum for complaints about the EHC plan which do not otherwise assert conduct by the local authority that is a serious abuse of power or in defiance of the rule of law; see R (LW) v London Borough of Islington

[2025] EWHC 703 (Admin) at paragraphs 34-39. The Special Educational Needs and Disability Regulations 2014 (the “SEND Regulations”) supplement the statutory framework established by Part 3 of the Act, and prescribe the procedural detail governing the assessment of a child or young person’s special educational needs and the preparation, review, amendment and cessation of an EHC plan. Central to this claim is regulation 44. Regulation 44(1) requires a local authority to take the action ordered by the FtT within the period specified in regulation 44(2) and thereby fulfil its duty under section 42 of the Act. In turn, regulation 44(2) prescribes differing timescales according to the nature of the order made: for example, where the FtT orders a local authority to maintain an EHC plan, the authority must issue a draft plan within five weeks and send the finalised plan under regulation 14 within eleven weeks of the order; and where it orders amendment of the special educational provision specified in an EHC plan, the amended plan must be issued within five weeks. I adopt Mr Persey’s characterisation of these time limits as a “safety valve” which accommodates the practical reality of a local authority needing some time to put in place the relevant provision, which may include contracting with appropriate providers. Regulation 44(3) of the SEND Regulations provides limited relief from these strict time limits. Relief is only available where compliance is “impractical” for one of three reasons: (a) because exceptional personal circumstances affect the child or their parent or the young person during that period of time; (b) because the child or their parent or the young person is absent from the area of the authority for a continuous period of two or more weeks during that period of time; or (c) because any of the circumstances in regulation 13(3) apply. It is worth emphasising that regulation 44(3) does not provide relief from the section 42 duty itself; its effect is simply to allow the local authority a longer period to comply with the FtT’s order. In turn, regulation 13(3) refers to impracticability by virtue of any of the reasons set out in regulation 10(4)(a) to (d). These

are: first, where advice was requested from the head teacher or principal of a school or post-16 institution during a period running from one week before that institution closed for a continuous period of at least four weeks, until one week before it reopened; second, where advice was requested, on the same timing, from the person responsible for special educational needs, or otherwise responsible for the child's education, at a provider of relevant early years education; third, where exceptional personal circumstances affected the 8. 9. 10. 11. 12. Page 3 High Court Approved Judgment R (DOL) v Southampton City Council 13. 14. 15. 16. child, the child's parent, or the young person during the relevant period; and fourth, where the child, the child's parent, or the young person was absent from the local authority's area for a continuous period of at least four weeks during that period. Regulations 10(4), 13(3) and 44(3) identify detailed and specific circumstances. For the purposes of this claim for judicial review, what matters is what they do not say, which takes on relevance in my conclusions. They do not operate to extend or disapply the time limit for compliance with the FtT's order where there is an extant application for permission to appeal, an extant appeal, or an extant application to suspend the FtT's order pending the outcome of an appeal or an application for permission to appeal. I shall address the procedure for such applications in a moment. Appeals on points of law against decisions of the FtT (in respect of those SEND matters falling within its jurisdiction) are heard by the Administrative Appeals Chamber of the Upper Tribunal ("UT"); see section 11 of the Tribunals, Courts and Enforcement Act 2007. The relevant procedural rules applying to the UT in this context are the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "UT Rules"). Any party wishing to challenge a decision of the FtT before the UT must first apply to the FtT judge for permission to appeal; see rule 46 of the FtT Rules. If the FtT judge refuses permission, a party must seek permission directly from the UT; see rule 21 of the UT Rules. The FtT may also decide to suspend the effect of its decision pending the determination of the application for permission to appeal and pending any subsequent substantive appeal before the UT. Given the nature of the decisions being taken in SEND cases, an application to suspend will usually only be sought by a local authority appealing the FtT's decision. That separate decision by the FtT – whether to suspend the effect of its substantive decision or not – takes the form of a case management order under rule 5(3)(l) of the FtT Rules. If the FtT refuses to suspend the effect of its substantive decision, a party may ask the UT to do so instead. The UT is empowered to suspend the FtT's substantive decision pending the outcome of an appeal by virtue of rule 5(3)(m) (and, in some circumstances, rule 20A) of the UT Rules. In both cases, the power to suspend is discretionary. In this case, the parties have used the words "stay" and "suspend" as synonymous; I will generally favour the word "suspend" as that is how the concept is expressed in the FtT and UT Rules.

17. When deciding whether to suspend the effect of the FtT's decision, the FtT or the UT (as the case may be) must answer two questions: whether the local authority has put forward solid grounds for the effect of the FtT's decision to be suspended and, if so, whether on balance it should be suspended (per Upper Tribunal Judge Jacobs in Carmarthenshire County Council

v M & JW [2010] UKUT 348 (AAC) at paragraph 17). The second question, having regard to the interests of justice, balances the prejudice to the parties of granting or refusing a suspension (per Potter LJ in *Leicester Circuits Ltd v Coates Brothers Plc* [2002] EWCA Civ 474 at paragraph 13). Factual background 18. The claimant had an EHC plan in place from when he was younger and at some point – the precise date does not matter – the defendant decided to cease maintaining it. The claimant’s mother challenged this decision by way of an appeal to the FtT. During that appeal, the Page 4 High Court Approved Judgment R (DOL) v Southampton City Council 19. 20. 21. 22. 23. defendant conceded that the claimant had some remaining special educational needs but considered that these could be provided outside, and without the need for, an EHC plan. By a judgment dated 21 July 2025, a judge of the FtT sitting with specialist members upheld the mother’s appeal and ordered the defendant to maintain the claimant’s EHC plan and, further, to amend it in a specified manner (pp 83-92). In this claim for judicial review, one particular amendment takes centre stage. It is found in a final working version of an EHC plan that the FtT appended to its decision (pp 93-105). It had the effect of requiring the claimant’s attendance “for 5 days a week, at an institution, which supports and implements learning in six areas of skills development encouraged there: life skills, teamwork skills, social skills, employment skills, reflection skills and communication skills”, and which was to be provided on a “2:1 basis of support” (p 103). The effect of the FtT’s decision was to require the defendant to amend the EHC plan so as to specify this provision as part of an overall EOTIC package. I shall adopt the same shorthand as the parties and refer to this requirement as the “Attendance Provision”. By virtue of regulation 44(2)(e) of the SEND Regulations, the defendant was required to issue the amended EHC plan within five weeks of the date of the order. That meant doing so by 25 August 2025. The defendant, as was its right, applied to the FtT for permission to appeal its decision. It did so on 7 August 2025. The sole focus of its application for permission was the Attendance Provision. Pursuant to rule 5(3)(l) of the FtT Rules, the defendant also applied for a suspension of the effect of the FtT’s order insofar as it related to the Attendance Provision (pp 106-117). The defendant’s central concern, and its reason for seeking a suspension of the Attendance Provision, was that its implementation would require it to spend money unlawfully outside of the relevant schools budget as defined and compel it unlawfully to arrange its delivery by only one provider. The FtT judge considered the defendant’s proposed grounds of appeal and the application to suspend. By a decision dated 11 September 2025, he agreed to consider setting aside the Attendance Provision and listed a review hearing by telephone for that purpose; and, pending that review hearing, he suspended the effect of the Attendance Provision (pp 121-123). However, having read the detailed written submissions from the parties, the FtT judge felt able to dispose of the matter on the papers. By decision dated 29 October 2025, he refused the defendant’s application for a review and refused its application for permission to appeal (pp 142-145). More relevantly for the purposes of this claim for judicial review, he also ended the suspension of the Attendance Provision. The logical consequence of his decision to end the suspension of the Attendance Provision was that the defendant was required to implement it; the prescribed five-week period had by now expired. There were no circumstances under

regulation 44(3) in place providing relief from these time limits. As it happens, between the original substantive decision made by the FtT on 21 July 2025 and the subsequent decision to end the suspension of the Attendance Provision, the defendant did issue a revised EHC plan. The claimant says this happened on 19 August 2025. However, that plan did not include the Attendance Provision. This prompted the claimant to engage in pre- action correspondence, culminating in his first set of judicial review proceedings lodged on 29 October 2025 (AC-2025-CDF-000183). By those proceedings, the claimant contended that the defendant had failed to secure for him special educational provision under section 42 of the Act. He did not obtain the court's permission for that challenge. Page 5 High Court Approved Judgment R (DOL) v Southampton City Council 24. 25. 26. 27. 28. Once it became apparent that the defendant was still refusing to amend the EHC plan so as to include the Attendance Provision, despite the FtT judge ending its suspension, the claimant threatened a second set of judicial review proceedings. Those proceedings – which are now these proceedings – were lodged on 15 January 2026 (AC-2026-CDF-000007). No party has asserted any overlap with the first set of judicial review proceedings and I will say no more about them. At about the same time, the defendant was applying to the UT for permission to appeal the FtT decision insofar as it imposed the Attendance Provision (pp 146-170), and it was asking the UT to suspend the Attendance Provision under rule 5(3)(m) of the UT Rules (pp 171-182). Its application was made outside the specified time limit. For whatever reason, it did not act with expedition. The parties' positions had, by this stage, started to become entrenched. The claimant maintained that the Attendance Provision should be implemented now that it was no longer suspended. The defendant maintained that it was entitled not to comply with the Attendance Provision on the basis of its extant applications to the UT and especially its application to the UT for a suspension of the FtT's order. The parties accept that I should take into account the subsequent decision of the Upper Tribunal dated 27 April 2026. In that decision, UTJ Stout granted the defendant permission to appeal. More relevantly for the purposes of this claim, she refused the defendant's application to suspend the FtT's decision, doing so by reference to the tests in Carmarthenshire County Council and Leicester Circuits Ltd mentioned above. She expressed her dismay that it had taken several weeks for the UT's administration to refer the defendant's applications to her. The substantive UT appeal has yet to take place. However, in the light of UTJ Stout's decision, the defendant agreed to amend the EHC plan so as to include the Attendance Provision, and to implement it, albeit (as I understand it) only pending the outcome of its substantive appeal. It did so with effect from 28 April 2026. Having done so, the defendant then proposed that the application for judicial review had become academic. The claimant has disputed that assertion, contending that he was nonetheless still caused real prejudice by the defendant's failure over a period of six months (between 29 October 2025 and 28 April 2026) to implement the provision. The parties' submissions 29. 30. Both counsel provided helpful skeleton arguments but in the summary below I will focus on the main points that were developed at the hearing. For the claimant, Mr Persey contended that this claim was, at its core, a straightforward one about statutory construction. In his submission, the statutory scheme governing SEND appeals left no room for a local authority to refuse to comply with an FtT order merely because it had

lodged, or intended to lodge, an appeal and an application to suspend. The claimant's case was that the defendant was obliged to amend the plan so as to include the Attendance Provision within the timescale stipulated by regulation 44(2)(e) of the SEND Regulations, and that it was certainly obliged to do so once the FtT ended its suspension on 29 October 2025.

31. I pause at this point to mention one point arising from the chronology. It may appear that the defendant was in breach of the regulation 44(2)(e) timescale during an earlier period, namely Page 6 High Court Approved Judgment R (DOL) v Southampton City Council between 25 August 2025 (the end of the five-week period for implementation of the FtT's order) and 11 September 2025 (the date when the FtT judge agreed to suspend the Attendance Provision). However, this point was not fully developed at the hearing and Mr Persey sensibly confined his approach to the period of six months following the FtT judge's decision to end the suspension. In the interests of proportionality, I will do likewise and focus on the latter period.

32. Mr Persey contended that the claimant was without the Attendance Provision that the FtT had ordered, causing him genuine prejudice. In other words, the defendant did not merely refuse to amend the EHC plan; it refused properly to implement it. The provisions that it should have secured were not simply those set out in the EHC plan as it had stood before the claimant's mother appealed to the FtT; it was those that were set out in the EHC plan that the FtT had ordered. This included the Attendance Provision. This was in breach of regulation 44(1) of the SEND Regulations. It was not said, at least explicitly, that this was a breach of the absolute duty set out in section 42 of the Act; the breach of regulation 44(1) was enough to show unlawfulness and make the defendant's actions susceptible to judicial review. Mr Persey said that the defendant was acting unlawfully when these proceedings commenced; and, following its decision the day before this hearing to implement the Attendance Provision, it could now be said that the defendant was in breach of regulation 44(1) for six months.
33. Mr Persey contended that regulation 44 created a complete and exhaustive code governing compliance with FtT orders. There was a five-week period within which an amended EHC plan had to be issued and a closed list of circumstances in which compliance with that time limit could be excused or delayed. An extant application before the UT for a suspension of a provision in an EHC plan was not among those exceptions. Referring to Bennion, Bailey and Norbury on Statutory Interpretation, Mr Persey submitted that Parliament must be taken to have approved the SEND Regulations in full knowledge of the pre-existing FtT Rules, including their mechanism for dealing with applications for permission to appeal and applications for suspension, intending that they should operate as a coherent whole. (The Regulations are of course delegated legislation, so the intent would be gleaned from the relevant Parliamentary approval procedure.) If Parliament or the draftsman had intended that an extant application for suspension would itself have the effect of suspending a local authority's obligation to comply with an FtT order, they would have said so expressly by including it in the list at regulation 44(3). Its omission from that list was decisive as to how the scheme should be construed. The defendant's reliance upon an extant application to

suspend before the UT provided no lawful justification for it to refuse to implement the FtT's order.

34. Mr Persey further relied on constitutional principles concerning the need for obedience of court and tribunal orders. He submitted that it was trite law that orders must be obeyed unless and until varied or set aside. He relied particularly upon *R (Majera) v Secretary of State for the Home Department* [2022] AC 461 and *R (H) v Ashworth Special Hospital Authority* [2003] 1 WLR 127 as demonstrating that a public authority could not decline to comply with an order simply because it considered the order wrong or because it wished to challenge it. In the claimant's submission, the rule of law required compliance unless and until a suspension or stay was actually granted. A party could not behave as though an order had been suspended when it had not been suspended.
35. He submitted that the Ashworth case was particularly significant because it addressed circumstances in which there was an extant challenge to a tribunal decision. The claimant argued that the Court of Appeal had made clear that, absent a stay achieved by means of an injunction, the underlying tribunal decision remained operative and had to be respected. The Page 7 High Court Approved Judgment *R (DOL) v Southampton City Council* 36.
37. defendant therefore had no authority to act contrary to the FtT's decision after the stay had been discharged. As to relief, Mr Persey maintained that mandatory relief was still appropriate because, when issuing the amended EHC plan following the UT's refusal to suspend, the defendant appeared to have changed other social care aspects of the plan. Even if that were not so, declaratory relief was appropriate. He submitted that a declaration was necessary to establish unequivocally that the defendant's interpretation of the statutory scheme was unlawful. Although a mandatory order might become unnecessary if the EHC plan were corrected, a declaration remained important because the defendant continued to maintain that its conduct had been lawful and could therefore repeat the same approach in future cases. In reliance upon *R (L, M, P) v Devon County Council* [2021] EWCA Civ 358 and analogous authorities, Mr Persey argued that the claim should not be considered academic or, alternatively, should still be determined even if it had become academic. For the defendant, Mr Henderson resisted the claim. His primary submission was that the claim had become academic because, by the date of the hearing, the EHC plan had been amended so as to include the disputed Attendance Provision. The alleged unlawfulness identified in the claim was therefore no longer occurring. Any remaining disagreement between the parties concerning social care provisions found elsewhere in the EHC plan had not formed part of the appeal to the FtT and had not been the subject of its order. Accordingly, the defendant had complied with the FtT's decision for all relevant purposes and there was no longer any live controversy before this court bearing upon the parties' respective legal rights and obligations.
38. Mr Henderson argued that, even if this court retained a discretion to determine an academic claim, that discretion should not be exercised. This was a highly fact-sensitive case. He had located no case law authority directly addressing the impact of a pending but undetermined application to suspend on the obligations of a local authority. The unusual circumstances included the grant and subsequent discharge of the FtT's original suspension, the

defendant's acknowledged administrative failures by delaying its various applications to the UT, and the administrative failure in the UT by which the renewed application for a stay was not referred to UTJ Stout for many weeks. Together, these matters made the case an unsuitable vehicle for establishing wider principles. 39. Turning to the merits, Mr Henderson characterised the central question as whether a party which had lodged an application to suspend to the UT, but not yet obtained a determination, was required by the common law to act in a manner inconsistent with, and prejudicial to, its own application. The defendant contended that neither Majera nor any other authority answered that question in the claimant's favour. Unlike the Secretary of State in Majera, the defendant had pursued every available legal avenue to challenge the FtT's order and had sought a suspension pending appeal. It had done all that the legal system required it to do to protect its position while it tried to defend and clarify its obligations.

40. Mr Henderson said that the defendant of course accepted the importance of the rule of law, but he argued that the rule of law extended beyond mere compliance with court and tribunal orders. It also encompassed the constitutional right of appeal and the statutory right to seek a suspension of the disputed provision until such time as the appeal had been determined. He observed that Parliament had expressly conferred on local authorities the right to seek suspension in SEND appeals and had allocated the determination of such applications to specialist tribunals, both at the First-tier and Upper levels. The claimant's approach would Page 8 High Court Approved Judgment R (DOL) v Southampton City Council render those rights nugatory by compelling an appellant local authority to act contrary to its extant application for suspension before the specialist UT had ruled upon it, and this court should be wary of arrogating the UT's function. Parliament had entrusted such assessments to specialist tribunals and it would be constitutionally inappropriate for this court, through the grant of relief in judicial review proceedings, effectively to determine for itself whether a provision should be suspended.
41. Mr Henderson relied on *Essex County Council v FA* [2019] UKUT 38 (AAC) in support of his contention that implementation of a contested provision would materially increase the difficulty of obtaining suspension. Execution of the Attendance Provision would alter the status quo by compelling compliance before the determination of the application to the UT. It would therefore prejudice the defendant's pending application by diluting its ability to demonstrate that implementation was difficult or impossible. 42. Finally, Mr Henderson submitted that, if the court found that the claim was not academic and that the defendant had acted unlawfully, relief should nevertheless be refused. He reiterated that the effect of relief would be to predetermine the extant application to suspend that Parliament had entrusted to a specialist tribunal; it would interfere with the defendant's right to an effective appeal; and it would risk creating difficulties concerning educational funding. In practical terms there was little distinction between declaratory and mandatory relief because a declaration would inevitably require the defendant to alter its conduct in the same way as a mandatory order. Discussion 43. 44. 45. 46. It makes sense to deal first with the impact on these proceedings of UTJ Stout's refusal to suspend the effect of the FtT's order and the

defendant's decision to amend the EHC plan and implement the disputed Attendance Provision the day before this hearing. Two questions arise. The first is whether the claim is academic. The second is whether, if it is, I should determine it nonetheless. The test for the first is whether there remains a case to be decided which will directly affect the rights and obligations of the parties: *R v Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450, and paragraph 6.3.4.1 of the Administrative Court Judicial Review Guide 2025. The test for the second is whether there is good reason in the public interest to proceed. Both parties, but especially the claimant, placed weight on the Devon County Council case referred to above, which was itself about delayed implementation of EHC plans. The Court of Appeal declined in that case to decide whether the claims before it were academic, although Elisabeth Laing LJ inclined to the view that they were. Devon is especially helpful when considering the proper approach to the discretion to be exercised in respect of claims that are, or may be, academic. In my judgment, on balance, this claim is now academic. It is true that the claimant was deprived for six months of the benefit of the Attendance Provision through the defendant's refusal to implement it. That is far from being a trivial issue. But, with effect from the day before the hearing, he has the practical relief the court could give him. I note that, in the last-minute exchanges between the parties, there are, or appear to be, some outstanding concerns about social care aspects of the EHC plan. Even if the claimant is right that the defendant has moved Page 9 High Court Approved Judgment *R (DOL) v Southampton City Council* 47. 48. 49. 50. 51. the goalposts on other aspects of the plan (and I make no finding on that), they are immaterial to these proceedings which, from the outset, have only concerned the Attendance Provision as it sits within the overall EOTIC package. In my judgment, there is no dispute remaining that would be resolved through the grant of mandatory relief. Having said that, I consider it appropriate to exercise my discretion to decide the claim. I say this for four reasons. First, there is something about a dispute of this kind that is self-extinguishing. It disappears the moment the UT rules upon the application to suspend, whichever way it rules. If such claims are never heard because events have moved on by the time they reach a hearing, the question can never be answered at all. Second, notwithstanding its belated implementation of the Attendance Provision, the defendant maintains that its conduct has been lawful throughout. That is an important assertion which should still be tested. Third, the issues raised in the claim have general application. They may affect every local authority which appeals to the UT and which could use the mechanism for renewing an application to suspend as a reason for delay, affecting children and young persons in whose favour an order has been made. This is a substantial public interest point. Fourth, the parties are before me, permission has been granted, the claim has been fully prepared and argued, and the objection was not taken until the day before the hearing. I add this. The claimant is a vulnerable young person for whose benefit the FtT ordered the Attendance Provision. Six months is not, as I have said, a trivial period in the education of such a person. Whether the defendant was entitled to withhold that provision during that period is the question I must now decide. I therefore now turn to the substance of the claim. The question as framed by the defendant in resisting this claim is whether, as a local authority, it was obliged to implement an order of the FtT

amending an EHC plan while there was, before the UT, an extant application for permission to appeal and, in particular, an extant application to the UT to suspend the FtT's order. The premise underlying the question, once framed in this way, is that a local authority is obliged to comply with an FtT order only once some further condition is satisfied, such as the refusal of its appeal or the determination of its application to suspend. I think that is the wrong way round. The FtT's order binds from the moment it is made, subject only to the timescale for implementation. The issue is whether anything has displaced the binding nature of the order. A further difficulty lies in the language of "rights" as deployed by Mr Henderson. He says that the defendant enjoys a right of appeal and a right to seek a suspension, and that those rights are rendered nugatory if it must comply meanwhile. But a right to apply for discretionary relief in the form of suspension is not a right to that relief. There is perhaps a third difficulty arising from the terminology used by the parties. As I noted earlier, they have both used "stay" and "suspend" interchangeably. But the FtT Rules speak of suspending the effect of a decision. I adopt that language because it identifies more precisely what is in issue: not the postponement of the Attendance Provision but the temporary removal of its effect. It may seem obvious to say so, but an order which has not been suspended is an order that has effect. 52. I think the question raised by this claim should be framed more precisely, and in this way: does the pendency of an appeal to the UT, coupled with the pendency of an undetermined application to the UT to suspend the effect of the FtT's order, relieve a local authority of its obligation to Page 10 High Court Approved Judgment R (DOL) v Southampton City Council 53. 54. 55. 56. 57. comply with that order within the period prescribed by regulation 44 of the SEND Regulations? In my judgment, it does not. I say this for two essential reasons. The first is a matter of statutory construction. The second is a matter of general law. Each answers the case in the claimant's favour. I will address them in turn. As I noted above, regulation 44 of the SEND Regulations governs compliance with an order of the FtT and sets out the timescales fairly characterised by Mr Persey as a "safety valve". The reasons for permissibly delaying implementation are found in regulation 44(3), which provides relief from those timescales on the grounds of impracticability. Section 11 of the Tribunals, Courts and Enforcement Act 2007 provides for the right of appeal against the FtT's order to the UT on a point of law. It only confers a right of appeal. It does not suspend the decision appealed against. It contains no words capable of doing so. It is the two sets of tribunal procedure rules that supply the mechanism for suspension (and which would be redundant if an appeal by itself had suspensory effect); see rule 5(3)(l) of the FtT Rules and rule 5(3)(m) of the UT Rules. The SEND Regulations and the FtT Rules dovetail on this point through the opening words of regulation 44(1), by which the various timescales for implementation are said to be subject not only to regulation 44(3) but also to "any direction made by the First-tier Tribunal". The position is materially the same in ordinary civil litigation. CPR 52.16 provides that, unless the appeal court or the lower court orders otherwise, "an appeal shall not operate as a stay of any order or decision of the lower court". A defendant who appeals a money judgment must pay unless he obtains a stay. A defendant who appeals a possession order must give up possession unless he obtains a stay. Simon Brown LJ drew that analogy in the Ashworth case at paragraph 105, an important

authority to which I will return later. He observed that in principle the position is no different from the retrospective staying of a possession order, or a judgment for the delivery up of goods or the payment of money, save that the court will pause longer before a stay curtailing liberty. There is nothing exceptional about the position of a local authority in a SEND appeal. It is the ordinary position of every unsuccessful party in civil proceedings. Regulation 44(3) is drafted as a closed and particularised list. I agree with Mr Persey that it is unlikely that, in this context, the relevance of bringing an appeal was simply overlooked. The more powerful point, in my view, is not simply the absence of suspension from the regulation 44(3) list but the presence of a different mechanism in regulation 44(1), which is expressed to be subject not only to paragraph (3) but to “any direction made by the First-tier Tribunal”. The SEND Regulations provide expressly for the possibility that the FtT might alter the prescribed timetable. What they do not provide is for the making of an application for such a direction, or the pendency of an appeal, to have that effect. I disagree with Mr Persey to this extent: it is in regulation 44(1) that one would expect to find the saving for which the defendant contends, rather than in the regulation 44(3) list. Either way, it is not there.

58. Mr Persey submitted that this approach was supported by an application of the presumption of an ideal, rational legislature, as articulated at section 11.3 of Bennion, Bailey and Norbury on Statutory Interpretation. As he put it, the legislature is presumed to be rational, reasonable and informed, pursuing a clear purpose in a coherent and principled manner, and legislation is presumed to have been competently drafted. Bennion cites in support of the proposition that, in delegated legislation such as that under consideration in the instant case, differences in wording Page 11 High Court Approved Judgment R (DOL) v Southampton City Council should not be treated as accidental, the judgment of the Court of Appeal in R (Ahmed) v Secretary of State for the Home Department [2019] EWCA Civ 1070 at paragraph 15(7). I think those points are fair ones. When the SEND Regulations were made, rule 5(3)(l) of the FtT Rules and rule 5(3)(m) of the UT Rules had been in force for almost six years. It can safely be said that they were, by then, part of the ordinary landscape of tribunal practice. If the pendency of an application for suspension carried its own interim suspensory effect, rules 5(3)
- (l) and 5(3)(m) might be thought pointless. Every local authority wanting not to comply with the timescales could simply appeal and apply to suspend (even, as happened in this case, doing so out of time), with the odd effect of reducing an express discretionary power given to the FtT to a formality. Accordingly, as a matter of statutory construction, I reject the defendant’s contention that the SEND Regulations, the FtT Rules and the UT Rules can be read in such a way as to allow the defendant not to comply with the FtT’s order in circumstances where the FtT has declined to suspend and there is a pending application to suspend before the UT. In behaving as it did, the local authority acted unlawfully: it did not do what regulation 44(1) required it to do, which was to take the action that the FtT had ordered. Even if the SEND Regulations had been silent on the point, in my judgment the answer would be the same under the general law. The starting point is *Majera*. Lord Reed opened his judgment by

identifying the issue as one of constitutional importance, defined as: 59. 60. 61. 62. ... whether the Government (or, indeed, anyone else) can lawfully act in a manner which is inconsistent with an order of a judge which is defective, without first applying for, and obtaining, the variation or setting aside of the order. 63. At paragraph 44 of that judgment he said: It is a well established principle of our constitutional law that a court order must be obeyed unless and until it has been set aside or varied by the court (or, conceivably, overruled by legislation). 64. The principle derives from *Chuck v Cremer* (1846) 47 ER 884, where Lord Cottenham LC said, in a passage set out at paragraph 44 of *Majera*: A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it ... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the Court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the Court that it might be discharged. As long as it existed it must not be disobeyed. 65. Lord Reed drew three points from that passage at paragraph 45. First, “there is a legal duty to obey a court order which has not been set aside: ‘it must not be disobeyed’. As the mandatory language makes clear, this is a rule of law, not merely a matter of good practice”. Second, the rationale is the rule of law; he cited *R (Evans) v Attorney General* [2015] UKSC 21, [2015] AC 1787 at paragraph 52 for the proposition that a decision of a court binds the parties and “cannot Page 12 High Court Approved Judgment *R (DOL) v Southampton City Council* be ignored or set aside by anyone, including (indeed it may fairly be said, least of all) the executive”, a principle there described as “fundamental to the rule of law”. Thirdly, the rule applies to orders said to be null as much as to those said to be irregular. He then set out at paragraph 46 the classic statement of Romer LJ in *Hadkinson v Hadkinson* [1952] P 285 at 288: It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. 66. One further feature of *Majera* is worth noting. The order in question was an order of the FtT. Lord Reed rejected any suggestion that the rule is confined to superior courts, holding at paragraph 49 that it is: ... based on the importance of the authority of court orders to the maintenance of the rule of law: a consideration which applies to orders made by courts of limited jurisdiction as well as to those made by courts possessing unlimited jurisdiction. 67. Lord Reed’s conclusion at paragraph 56 is expressed without qualification: 68. 69. 70. Even assuming that the order was invalid, the Secretary of State was nevertheless obliged to comply with it, unless and until it was varied or set aside. The allegation that the order was invalid was not, therefore, a relevant defence. If a defective order must be obeyed, an order said merely to be wrong in law must be obeyed a fortiori. *Majera* rests in part on *Ashworth*, a case I have already mentioned and on which Mr Persey placed especial reliance. It is important to look at *Ashworth* for several reasons. Lord Reed cited that case at paragraphs 51 and 52 of his judgment as an illustration that the rule is not confined to courts of

unlimited jurisdiction, the mental health review tribunal being a creature of statute exercising a limited jurisdiction. It also meets the point Mr Henderson made about Majera being distinguishable in the instant case; this is because, unlike the Secretary of State in that case, Mr Henderson says that the defendant here has done everything it could to challenge the FtT's order within the relevant rules and procedures. I will briefly set out the facts of Ashworth. H had been detained at Ashworth Special Hospital since 1994 under section 3 of the Mental Health Act 1983, following a history of serious violence. On 22 March 2001 a mental health review tribunal ordered his immediate discharge. Nine medical reports from six doctors were before it. Only one doctor supported discharge. No after-care package was in place, and the local authority's senior social worker had reported that it could not provide appropriate accommodation. H did not in fact leave, because he had nowhere to go, and remained as a voluntary patient. The hospital authority regarded the tribunal's decision not merely as mistaken but as perverse; the tribunal chairman had said that immediate discharge was ordered because otherwise "nothing ever happened" at Ashworth. Within a few days the hospital authority had been advised that there were substantial grounds for judicial review. Its clinicians then took steps to re-detain H under the 1983 Act. It justified its actions on various grounds including its belief that the tribunal's decision was irrational. The hospital authority in Ashworth was doing something similar to what a local authority does when Page 13 High Court Approved Judgment R (DOL) v Southampton City Council 71. 72. it declines to implement a FtT order about an EHC plan pending an appeal: it was treating the strength of its disagreement with the order and the commencement of proceedings as a reason justifying non-compliance. Ultimately, it might be said that the hospital authority in Ashworth was right. Its application for judicial review succeeded and the tribunal's order to discharge H was quashed as irrational and inadequately reasoned. Yet the hospital authority, despite having been accepted as acting in good faith, was still held to have acted unlawfully in re-detaining H at a time when that order stood. The hospital authority's vindication through its successful judicial review did not retrospectively legitimise its interim disobedience. Dyson LJ identified the tension at paragraph 55 of his judgment between the need for certainty and respect for the rule of law (through compliance with the tribunal's order) and the duty of professionals to act according to their consciences and professional judgment. He said that, in a case of simple difference of opinion between the two, that tension is "resolved in favour of the former". At paragraph 56 he held that advice that the tribunal's decision was unlawful provided no justification: To countenance such a course as lawful would be to permit the professionals and their legal advisers to determine whether a decision by a court to discharge a detained person should have effect. 73. Then, at paragraph 57, came the point that Mr Persey said was the most relevant to the claimant's claim: In my view, where there is a simple difference of view between the professionals and the tribunal (and no more), the view of the tribunal must prevail until and unless the court decides that the tribunal's decision was unlawful. Nothing less will do. 74. Simon Brown LJ stated the general rule at paragraph 105: In my judgment the tribunal's decision, whatever it may be, must be given effect unless and until the reviewing court orders otherwise. 75. He had earlier expressed the principle at paragraph

102 in words that the Supreme Court adopted in *Majera*: ... the tribunal's view must prevail; the authority cannot simply overrule the discharge order. Court orders must be respected – the rule of law is the imperative here. 76. These two lines of reasoning – statutory construction and general law – are independent, but they reinforce each other. They compel the conclusion that the order of the FtT in the instant case was binding unless and until it was suspended or it was set aside on appeal. That is my conclusion. At the time the local authority decided, in effect, to disregard it, it had not been suspended and it had not been set aside. By the time of the hearing of the claim for judicial review, it was clear that neither the FtT nor the UT was going to suspend it; and then and only then did the defendant comply, accepting that its extant appeal was now nothing to the point. 77. I infer that this was, as Mr Persey contends, genuinely prejudicial to the claimant. The FtT decided that he would benefit from the provision and the defendant did not implement it. Page 14 High Court Approved Judgment R (DOL) v Southampton City Council 78. I need to address head on Mr Henderson's point that, during the six-month period of non-compliance, the defendant had renewed its application to suspend to the UT and that its undetermined status justified it acting as it did. As I understood it, his argument was that compliance with the Attendance Provision within that window would have rendered nugatory the defendant's pending application for suspension and deprived it of the benefit of a right Parliament conferred on it. Furthermore, if this court held its approach to be unlawful, this court would effectively arrogate to itself the suspension decision that Parliament had entrusted to the specialist tribunals. 79. That argument fails for these reasons: 79.1 There is no "right" to a suspension. If it can be so described, it is a right to apply for one, and the power to grant it is discretionary in both tribunals. The right to apply has been exercised twice. The application was refused by the FtT, and the defendant's refusal to comply with the provision led to these proceedings. The renewed application has since been refused by the UT. There has been no diminution of that right; a right to seek discretionary relief is not diluted by the fact that the relief has not (or not yet) been granted. 79.2 The statutory right of appeal under section 11 of the 2007 Act is not hindered by compliance in the meantime. The appeal still proceeds. The UT may allow the appeal or dismiss the appeal. If it allows the appeal, the EHC plan may then be amended again. What compliance affects is not the local authority's right of appeal but the practical position in the interim. That is precisely what the suspension power exists to regulate. 79.3 The Court of Appeal in *Ashworth* has already rejected the intermediate position on facts more favourable to the hospital authority than the facts in the instant case. In that case, the hospital authority had commenced judicial review, obtained permission, and obtained a stay and an injunction from Stanley Burnton J on the same day. Dyson LJ nevertheless held at paragraph 57 that even a prior grant of permission would not suffice. If a court's grant of permission is not enough, an undetermined application to suspend to the UT is plainly not enough. 79.4 The objection identified by Dyson LJ at paragraph 56 applies with greater rather than lesser force. His complaint was that, on the authority's case, "the decision to sideline the effect of the tribunal is taken away from a court altogether". On the argument now advanced, the sidelining is achieved by the local authority's own act of making an application. In this case, although this may perhaps put the point too bluntly, the

authority became the effective grantor of its own suspension. The fact that it may have done so in good faith and on advice, based on concerns about budgets, does not alter the fact that it effectively gave itself the suspension that the FtT had refused. 79.5 The arrogation objection runs the other way. This court is not asked to decide whether a suspension should be granted; it is asked whether, in the absence of one, the authority has complied with a duty under regulation 44(1) that is enforceable nowhere else. Those are distinct questions. To hold that compliance is excused while an application to suspend is pending before the UT would be to confer a de facto suspension which neither tribunal has granted. Page 15 High Court Approved Judgment R (DOL) v Southampton City Council 79.6 The premise that compliance renders the pending application nugatory is also wrong as a matter of general law. That question was considered in *Ashworth*. Dyson LJ addressed at paragraph 46 the objection that a decision already carried out cannot sensibly be suspended: At first sight, it seems nonsensical to speak of making an order that such a decision should be suspended. How can one say of a decision that has been fully implemented that it should cease to have effect? Once the decision has been implemented, it is a past event, and it is impossible to suspend a piece of history. At first sight, this argument seems irresistible, but I think it is wrong. It overlooks the fact that a successful judicial review challenge does in a very real sense rewrite history. He held that the court has jurisdiction to stay the decision of a tribunal even where it has been fully implemented. Upper Tribunal Judge Ward expressly adopted that reasoning in the SEND context in *Essex County Council v FA* at paragraphs 37 to 39, accepting that it is possible to seek a suspension of an order which has been implemented. Implementation therefore does not deprive the UT of the power which the local authority has invoked. 79.7 The Essex case – on which Mr Henderson placed particular reliance – goes further and, on my reading, undermines the submission on which the defendant’s argument rests. Counsel there contended that the main utility of a suspension was that, having obtained a suspension, the authority’s subsequent actions could not prejudice its legal position. UTJ Ward disagreed. A local authority which succeeds on appeal “will be vindicated as to the legal position by that eventual success”. The purpose of a suspension in this jurisdiction is not the protection of the appellant’s legal position but the practical question of how a child is to be educated while an appeal is pending. He then said this, at paragraph 39: If a local authority ... may wish to help and support the child or young person, it only needs to seek a stay if the help and support proposed takes a form other than that ordered by the FtT. If it is content to go along with the provision ordered by the FtT until such time as its appeal to the Upper Tribunal succeeds, then it does not (at any rate in the vast majority of cases) need a stay. 79.8 The mechanism is not a one-sided protection for appellants. UTJ Ward described the mechanism at paragraph 35 in these terms: [It] holds a balance between seeking to ensure that a local authority (and, indirectly, those who fund it through taxes and otherwise) can benefit from a successful appeal to the Upper Tribunal, but also that provision which is acceptable – at least on an interim basis – is put in place for the child. 79.9 The authorities indicate that the answer to the risk of delay is expedition rather than what might be described as “self-help” (that is, a local authority granting itself a de facto stay). UTJ Ward observed at paragraph 31 that Parliament has created a rights-

based framework and that the institutions established to adjudicate those rights must play their part, including “being ready to adjudicate swiftly on applications to it for a stay”. Simon Brown LJ said the same in *Ashworth* at paragraph 105: an authority which Page 16 High Court Approved Judgment R (DOL) v Southampton City Council 80. 81. 82. regards the order as unlawful “should instigate judicial review proceedings without delay”, and where a stay is granted it should be for as short a time as possible. 79.10 It bears repeating: the FtT itself refused suspension. That refusal was not a formality. It was a judicial evaluation by a specialist tribunal. To treat a renewed application to suspend before the UT as carrying its own interim suspensory effect would enable local authorities to nullify the FtT’s refusal through the simple expedient of renewal. For these reasons, the pendency of the defendant’s application to the UT in this case does not legitimise its refusal to implement the Attendance Provision. Once the FtT lifted the suspension, the defendant’s obligations were clear. I am not without sympathy for a local authority faced with the need to comply with fairly short timescales, albeit ones prescribed by Parliament. I can envisage circumstances in which a local authority acts diligently but may find itself in breach through no fault of its own. Regulation 44(1) supplies an answer, as does expedition, but the difficulty is not inconceivable where (for example) other contractors or providers are involved. Also, education placements are not readily reversed: as a hypothetical example, a child moved in September and moved back in February may suffer disruption. Essex itself illustrates the point: at paragraph 34, UTJ Ward held that the child’s having spent a term at the new school had become “part of the factual matrix against which appropriate educational provision for him falls to be decided”, and at paragraph 41 he concluded that there would be nothing to be gained by setting the FtT’s decision aside. This is Mr Henderson’s point about implementation affecting the merits. Two things can be said in response to that. The first is that the prejudice in Essex arose from the authority’s own failure to give effect to a suspension it had obtained, not from compliance with an unsuspended order; UTJ Ward described the authority as having acted “in a way which flies in the face of the basis on which the stay was obtained” (paragraph 40). The second is that prejudice of this kind is the ordinary incident of an appellate system in which appeals do not suspend. It arises whenever a money judgment is enforced or a possession order is executed pending appeal; and, in the case of a money judgment, sanction for non-compliance comes from the accrual of interest. In the SEND jurisdiction, Parliament’s answer is the discretionary suspension power in the relevant tribunal procedure rules. The answer to its refusal is expedition. Expedition may be frustrated by administrative delay (such as the delay that occurred in this case in referring the defendant’s renewed request for a suspension to a UT judge), and that may cause prejudice to a local authority; however, that offers no justification for undermining the constitutional principle by which the FtT’s order prevails until varied or set aside.

Conclusion

83. I will summarise my judgment as follows: 83.1 By refusing for six months to implement the Attendance Provision of the claimant's amended EHC plan as ordered by the FtT, on the ground that it had an undetermined application to the UT for suspension, the defendant acted unlawfully. It acted in breach of regulation 44(1) of the SEND Regulations. The defendant neither amended the plan nor secured in practice the Attendance Provision which the FtT had ordered the amended plan to specify. Page 17 High Court Approved Judgment R (DOL) v Southampton City Council 83.2 The defendant also acted contrary to the principles in *Majera* and *Ashworth* that an order of a court or tribunal must be obeyed unless and until it is set aside, varied or suspended. 83.3 The defendant's actions cannot be justified by the pendency of an application to the UT. Section 11 of the 2007 Act confers a right of appeal with no suspensory effect, and the FtT Rules give the FtT a discretionary power to suspend which would be effectively meaningless if the act of appealing or renewing the application to the UT achieved the same result. CPR 52.16 reflects the same principle in ordinary civil litigation. 83.4 The defendant's rights in this position were protected by rule 5(3)(l) of the FtT Rules and rule 5(3)(m) of the UT Rules. What the defendant could not do was to confer upon itself, by the act of appealing to the UT or by renewing its application for suspension to the UT, the very relief which those rules commit to the judgment of specialist tribunals. 83.5 The defendant's argument that its right of appeal is rendered ineffective proceeds on the false premise that its right to apply for the discretionary relief of suspension is a right to obtain it. The UT's power to suspend survives implementation of the disputed provision, as *Ashworth* at paragraph 46 and *Essex* at paragraphs 37 to 39 confirm, so that compliance would not render the pending application nugatory. 83.6 The suggestion that this court's ruling has arrogated the UT's function inverts the position. The court decides only whether, in the absence of a suspension, the authority has complied with a duty enforceable nowhere else. It is the contrary conclusion which would usurp the specialist role of the tribunals: it would confer a de facto suspension which neither tribunal has granted, and it would allow the defendant to confer a suspension upon itself by the mere fact of appealing or renewing its application. As Simon Brown LJ put it in *Ashworth*, the tribunal's decision, whatever it may be, must be given effect unless and until the reviewing court orders otherwise, that being a feature of the rule of law. 84. It follows that the defendant acted unlawfully between 29 October 2025 and 28 April 2026 in failing to secure the special educational provision which the First-tier Tribunal had ordered, contrary to regulation 44(1) of the SEND Regulations. Relief 85. 86. In my judgment, as the Attendance Provision has now been incorporated into the operative EHC plan, no mandatory order is required. I do not consider it appropriate to use the vehicle of mandatory relief to settle any surviving disagreement between the parties about other aspects of the plan pertaining to social care. However, I consider declaratory relief to be appropriate in this case. The appropriate relief is a declaration that the defendant acted unlawfully for the six-month period as defined above. An order of a specialist tribunal, made in favour of a young person entitled to its benefit, was not implemented for six months without lawful justification. In

deciding that declaratory relief is appropriate, I have borne in mind that the defendant continues to maintain that its conduct was lawful; that its unlawful conduct persisted for a significant period of time; and that a declaration Page 18 High Court Approved Judgment R (DOL) v Southampton City Council formally determines the parties' dispute concerning the lawfulness of the defendant's past conduct. 87. I express my gratitude to counsel for their submissions. I am also grateful to the parties, to whom the draft of this judgment was provided, for their co-operation in drawing up a consequential formal order, which I have now approved. Page 19

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