NCN: [2025] UKUT 323 (AAC)
Appeal No. UA-2025-000951-HS

RULE 14 Order

Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the appellants' child in these proceedings. This includes his name, the appellants' names, the names of the schools in issue and the names of the teachers at those schools. This order does not apply to: (a) the appellants; (b) any person to whom the appellants disclose such a matter or who learn of it through publication by the appellants, for reasons aimed in good faith at promoting their child's best interests; or (c) any person exercising statutory (including judicial) functions in relation to their child where knowledge of the matter is reasonably necessary for the proper exercise of the functions.

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

HJ and MM

Appellants

- v -

BIRMINGHAM CITY COUNCIL

Respondent

Before: Upper Tribunal Judge Stout
Hearing date(s): 23 September 2025
Mode of hearing: By video (CVP)
Decided on consideration of the papers

Representation:
Appellant: Leon Glenister and Louise McCormack (counsel)
Respondent: Anna Tkaczynska (counsel)

On appeal from:
Tribunal: First-tier Tribunal (Health, Education and Social Care) (Special Educational Needs and Disability)
Tribunal Case No: EH330/23/00332
Tribunal Venue: By video
Decision Date: 14 March 2025

SUMMARY OF DECISION

SPECIAL EDUCATIONAL NEEDS (85)

This case required the First-tier Tribunal to decide whether a child's special educational needs could reasonably be met within day special school provision or whether the child reasonably required educational provision extending beyond the normal school day, up to and including, a "waking day curriculum" that required a residential special school placement. The First-tier Tribunal erred in law by failing to adopt the necessary logical approach to the issues it needed to decide and by failing to give adequate reasons for its conclusion. In particular: the Tribunal failed to give adequate reasons for its conclusion that the child was previously making reasonable progress in all areas while at day special school; wrongly adopted a global approach to the question of whether provision outside normal school hours was reasonably required rather than considering what specific provision was required to meet the child's various special educational needs; wrongly proceeded on the basis that a need for consistency of approach outside school hours could not of itself equate to a need for education or training outside normal school hours; and wrongly assumed that because the provision the child was receiving in his 52-week residential special school placement did not include structured programmes of education it could not amount to education or training outside normal school hours.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal involved an error of law. Under section 12(2)(a), (b)(i) and (3) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the law as set out in this decision.

REASONS FOR DECISION

Introduction

1. This is an appeal by the appellants against the decision of the First-tier Tribunal of 14 March 2025 in relation their son's Education Health and Care Plan (EHC Plan). For the purposes of this decision, I will call their son Ali. This is not his real name. The Tribunal concluded that Ali's special educational needs could be met in day maintained special school (School X) and that accordingly School X should be named in Section I of Ali's Education Health and Care Plan (EHC Plan) because complying with parental preference for a 52-week placement at an independent residential special school (School Y) would cost approximately £400,000 per annum and constitute unreasonable public expenditure.
2. The practical consequence of the Tribunal's decision was that Ali, who had been attending School Y since September 2024, would have to return to School X,

which he had attended from 2019 until 2024. However, the local authority, while resisting the appellants' appeal, has agreed to maintain Ali's placement at School Y while this appeal is determined.

3. The grounds of appeal focus on the question of whether the Tribunal erred in law in its approach to assessing what special educational provision was required to meet Ali's special educational needs, although there are also some issues as to the Tribunal's analysis of the evidence.

Factual background

4. Ali was born in December 2014 and is now 10 years' old. He has a severe learning difficulty and diagnoses of Autism Spectrum Disorder (ASD) and Down's syndrome. He also has mild, bilateral, conductive hearing loss. He can walk independently but is unsteady on his feet. He is largely non-verbal and communicates mainly by gesture, vocalisation and signs.

5. The local authority has maintained an EHC Plan for Ali since 15 February 2019. From 2019 until the summer of 2024 he attended School X (a day maintained special school). Following the annual review of that Plan in May 2023, Ali's parents appealed to the First-tier Tribunal seeking a 52-week residential placement for Ali at School Y (an independent special school).

6. The appellants' appeal against the local authority's EHC Plan was heard first over two days on 30 April 2024 and 17 June 2024. The First-tier Tribunal who heard the case on that occasion decided that School Y should be named in Section I and Ali accordingly transferred to School Y, starting there in September 2024.

7. The local authority, however, sought permission to appeal the First-tier Tribunal's decision. By order dated 12 December 2024, the First-tier Tribunal set aside the decision and directed that the case should be reheard by a fresh panel.

8. The second hearing took place over two days on 3 February 2025 and 3 March 2025 before a panel comprising Judge Gough and two Specialist Members (Ms Hall and Ms Hari). The appellants were represented by a solicitor (Ms Hale) and they brought three witnesses: the Principal of School Y, another teacher from School Y and the Head of Therapies from School Y. The local authority was represented by Ms Tkaczynska of counsel, who also represents the local authority on this appeal. The local authority's witnesses were: Ms J (HLTA and EHC Plan co-ordinator at School X), Ms Burns (Educational Psychologist), Ms Trinner (Speech and Language Therapist), Ms Amadi (Social Worker) and Mr Dhugga (a social work manager). The Tribunal had before it a bundle and supplementary bundle of evidence and some additional late evidence, with the page count totalling in excess of 1,000 pages. This included a report by Dr Grace, an Educational Psychologist instructed by the appellants, who did not attend the hearing.

The First-tier Tribunal's decision

9. The First-tier Tribunal's decision following this second hearing was sent to the parties on 14 March 2025. The decision contains a number of errors, some of which were originally raised by the appellants as grounds of appeal, but on which I refused permission because I considered them either to be immaterial or merely typographical errors. Nonetheless, it is appropriate briefly to note here what those errors are so that they are not repeated when this case is remitted (as I have decided it must be). In particular: the decision does not correctly list the late evidence that was admitted or not admitted; it states that Ali has a diagnosis of ADHD when he does not, and fails to refer to his diagnosis of ASD; it fails to mention the attendance of Mr Dhugga; the name of School Y's Principal is mis-spelled throughout the decision; Ali's name is frequently mis-spelled, and there is an incomplete sentence in the final version of the Working Document issued with the decision.

10. The First-tier Tribunal in its decision identified the issues that it needed to determine as follows:-

> Issue 1 - "Discrete issues in Section B";
> Issue 2 - "Whether [Ali] requires an extended day curriculum and a residential placement";
> Issue 3 - "Does [Ali] require 1:1 support?";
> Issue 4 - "Is [School X] a suitable school for [Ali]";
> Issue 5 - "Identification of [Ali's] Social care needs and provision".

11. The Tribunal dealt with the issues in that order in its decision. So far as the "Discrete issues in Section B" are concerned, the Tribunal addressed these by reference to the wording that remained in dispute in the "Working Document" version of the EHC Plan that the parties had prepared for the hearing. It is relevant to note that the parties had agreed in advance of the hearing that Section B should include the following descriptions of Ali's special educational needs:-

> "[Ali] is unable to complete any aspect of dressing independently. [Ali] is unable to manipulate fasteners, large buttons or zips."
>
> "[Ali] is not toilet trained and is in pads. He is not aware of his toileting needs and relies fully on adults to support his personal care."
>
> "[Ali's] nappies are frequently soiled and leaking, as he is always on Movicol medication due to his constipation."
>
> "[Ali] relies upon adult support for most of his self-help skills."

12. On the issues relevant to this appeal that were still in dispute in Section B, the Tribunal held as follows:-

> "2. **"[Ali] regresses and loses skills during school holidays."** Ms Burns gave evidence that [Ali] regresses and loses skills during the

school holiday. We accept the evidence by [Ms J] and find that [Ali] does lose skills during the school holidays, however this is typical of many children. [Ms J] told us that [Ali] "catches up" easily when term re-starts. [School Y Principal] told us that they had not seen him regress during holidays. We have therefore deleted this wording. …

4. [Ali] is **"not yet consciously aware of his emotional needs and is not able to ask for or express his need for emotional support,"** and the rest of the paragraph. This is from Dr Grace's report, however [Ms J's] evidence was that [Ali] displays his emotions but not consciously aware. Ms Burns gave evidence that [Ali] would go for a cuddle and seek out re-assurance. [School Y Therapies Manager] agreed that [Ali] is aware of his emotions. [School Y Principal] agreed that he displays his emotions but had not observed intentional communication around his needs. We find that [Ali] is aware of his emotions. Ms Burns has observed him seek out emotional support. We therefore delete that sentence.

5. **"[Ali] has limited emotional regulation and is unable to initiate and implement.."** [Ms J's] evidence was that [Ali] would stim, which would assist with emotional regulation. School had not observed challenging behaviour or resistance to support. [School Y Principal] confirmed that no challenging behaviour observed in [School Y]. We therefore deleted the entire paragraph as the evidence does not support it. …

11. **"[Ali] becomes highly distressed when engaging in personal care tasks…"** This was not observed by any witness from [School X]. [School Y Therapies Manager] said that he can become distressed but he is slowly allowing others to help him. [School Y Principal] confirmed that they have introduced role play and social stories so that he is not resistant. As this is being managed and he is improving, we do not consider it necessary to include this wording. …

16. **"[Ali] is increasingly resistant to and distressed by many aspects of daily life, ranging from routine activities like getting dressed or changed, to going out and about… [Ali] is unable to complete any aspects of washing independently.** [Ms J] told us that he did not resist as long as the routine was organised. He was supported in his washing. Witnesses from [School Y] told us that his resistance had improved and he was supported in his washing. We amend the sentence to reflect the evidence heard. …

18. **"[Ali] is resistive to having his teeth brushed,"** the witnesses from [School Y] told us that he is resistant to hair brushing and teeth cleaning. His bowel movements have improved. We have amended the sentence to reflect the evidence heard.

13. The Tribunal then went on to deal with Issue 2 ("Extended day curriculum and residential placement") and it is worth setting out this part of its decision in full:

"1. We did not find that [Ali] required an extended day curriculum or 1:1 support.
2. [Ms J] gave evidence that [Ali] does not require an extended day curriculum.
3. [Ali] did not display any challenging behaviour at [School X] or within the residential setting at [School Y].
4. There was no evidence that [Ali] needed education that extended beyond the school day. [Ms J] agreed that self-care and independent living skills did amount to educational needs, however [Ali] received such education and training at [School X] in the school day. [Ms J's] evidence was that [Ali] had made progress across the board.
5. [Ms J] agreed consistency of approach, liaison with home and communication boards to support [Ali] were important but did not amount to an educational need.
6. Ms Burns agreed that lots of children regress during the holidays, however any regression was not out of the ordinary and did not call for a 52 week placement. His gains are not negated by the length of time he is out of school.
7. Ms Burns' evidence was that there was a social care need for the family and school to work together.
8. [School Y Principal] gave evidence that [School Y] has a holistic approach to education and that 24 hour/ 52 week approach cannot fail to impact and [Ali] had made "significant progress." [Ali's] confidence has increased.
9. [School Y Principal] gave evidence about how the school operates which need not be replicated here as the LA accept that the school is suitable for [Ali] albeit not on a residential basis.
10. [School Y Principal] did not think that there could be any reduction in the 52 week residential placement as [Ali] has severe needs that requires "consistency in approach."
11. [Ali] lives in a cottage which provides him with opportunities to increase his socialisation. After the traditional school day, [Ali] engages in activities such as candle making, craft work, baking activities and pottery. He has the opportunity to go to the farm and enjoy the outdoors. All that the children do in the school day is extended to the weekend and evening. The extended day enables [Ali] to further generalise the skills taught in school.
12. MJ gave evidence that the parents could not replicate the opportunities and care afforded to [Ali] at [School Y]. The family would prefer [Ali] to live with them, however, they have seen [Ali] progress in the time that he has been away from the family home and believe that it is in his best interests to remain there. We found the evidence for an extended day curriculum to be weak. There is no doubt that [Ali] has benefitted from his time in [School Y], but the test is whether an extended day provision is reasonably required and if a residential placement is the medium within which it is to be provided.
13. The parents' case was predicated on the report by Dr Grace in 2023 who said that "[School Y] offers residential provision ...that would enable

> [Ali] to learn and practise all essential skills of daily living .. this would enable him to develop engagement in the world around him.“
> 14. This statement does not examine what SEP [Ali] requires that cannot be delivered during the school day and why that could only be delivered through a 52 week residential placement. An extended day curriculum may be linked with a residential placement, but not necessarily so. Dr Grace appears to conflate the two issues. Dr Grace was not present to expand upon her report. Furthermore, the witnesses from [School Y] also failed to answer that question.
> 15. Ms Hale submitted that an extended day curriculum was necessary for consistency in approach and further opportunities for over-learning. Ms Hale submitted that the activities after the normal school day amounted to SEP which the parents could not be expected to deliver in the home environment.
> 16. No witness disputed that [Ali] would benefit from a consistent approach, but this is not necessarily an educational need that is required to be met beyond the school day in a residential setting. We were not persuaded that [School Y] was providing a structured educational programme outside of the normal school hours. It is also important to note that [Ali] is only ten years' old; he is not yet preparing for adulthood and independent living. We considered that his age and stage in life was relevant to our considerations.
> 17. We also accept that [Ali] may regress during periods away from school such as the holidays, but even if he does, we heard evidence that he "catches up." Looking at the wider evidence, he was on a general trajectory of progress and any regression must fairly be seen in that light.
> 18. Accordingly we do not find that an extended day curriculum or a residential placement of any duration is reasonably required."

14. Issue 4 as identified by the Tribunal at the start of its decision concerned placement. In the body of the decision, the Tribunal incorrectly labels this "Issue 3". What the Tribunal says about placement is as follows:-

> "1. As the LA accept that [School Y] is a suitable school, we agree with that assessment and do not need to set out the evidence in support of that conclusion.
> 2. In addition to the statements in the bundle, we heard evidence from [Ms J] as to why [School X] is a suitable placement for [Ali].
> 3. We found [Ms J] to be a credible witness and we accepted her evidence from which we find that [School X] is a suitable school for the following reasons:
> a. It is a special school for children with complex needs and offers small classes and an appropriate curriculum.
> b. [Ali] was making progress at [School X] across all subjects and there were no concerns about his progress.
> c. [Ms J] thought an extended day was no doubt useful for him but was not required. The school offers a curriculum that incudes independence and social skills.
> d. [Ali] was settled at [School X] and was happy to attend.

> e. [Ali] would be returning to a class of pupils with very similar abilities and needs and if his needs have changed, he will be moved to a more suitable class.
> f. Ms Trinner, the SLT will draft some social stories to try and ease [Ali] back into the school.
> g. The bathroom team will help to develop [Ali's] toileting independence and other self-care issues that he has at school.
> h. As there is a cost difference of in excess of £400,000 between [School X] and [School Y], we must conclude that placing [Ali] at [School Y] would amount to the inefficient use of the LA's resources and therefore name [School X] in Section I.

15. The Tribunal then went on to consider the evidence in relation to social care and made recommendations for the local authority to arrange 100 hours' care from Mencap, 18 overnight respites, 1 hour's care at home each morning and each evening 52 weeks of the year and 8 hours per week additional care during the holidays.

16. (The appellants say that it has subsequently transpired that the Mencap provision is not available, but I refused permission to appeal in relation to that on the basis that it should first be raised with the First-tier Tribunal as an application to review the First-tier Tribunal decision on the basis of a change of circumstances. As I have for the reasons set out below now allowed this appeal and set aside the Tribunal's decision, this issue in relation to the availability of the Mencap support can be considered at the remitted hearing.)

Legal framework

The legislation

17. By section 20(1) of the Children and Families Act 2014 (the 2014 Act), a child has special educational needs if he or she has a learning difficulty or disability which calls for special educational provision to be made for him or her. By section 20(2), a child of compulsory school age 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.

18. By section 21(1) of the 2014 Act 'special educational provision', for a child aged two or more, means educational or training provision that is additional to, or different from, that made generally for others of the same age in mainstream maintained schools. By section 21(3) and (4), 'special educational provision' is distinguished from, respectively, 'health care provision' (which means the provision of health care services as part of the comprehensive health service in England continued under section 1(1) of the National Health Service Act 2006) and 'social care provision' which means the provision made by a local authority in the exercise of its social services functions. However, section 21(5) stipulates that 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).

19. By section 37(1) of the 2014 Act where, in the light of an EHC needs assessment, it is necessary for special educational provision to be made for a child in accordance with an EHC plan, the local authority must make and maintain such a Plan. By section 37(2), an EHC plan is a plan specifying (among other things): the child's or young person's special educational needs; the special educational provision required by him or her; any health care provision reasonably required by the learning difficulties and disabilities which result in him or her having special educational needs, and any social care provision which must be made for him or her by the local authority or which is reasonably required by the learning difficulties and disabilities which result in the child or young person having special educational needs.

20. The Special Educational Needs and Disability Regulations 2014 (SI 2014/1530) made under the 2014 Act (the 2014 Regulations) provide at regulation 12 that, when preparing an EHC plan, the local authority must set out in separate sections various matters including: in Section B, the child's special educational needs; in Section C, the child's health care needs which relate to their special educational needs; in Section D, the child's social care needs which relate to their special educational needs or to a disability; in Section F, the special educational provision required by the child; in Section G, any health care provision reasonably required by the learning difficulties or disabilities which result in the child or young person having special educational needs; in Section H any social care provision; and, in Section I, the name of the school or other institution to be attended by the child, or type of school or institution.

Relevant case law on extended / waking-day curriculum

21. The relationship between Section B and Section F of an EHC Plan was explained by Andrew Nicol QC, sitting as a Deputy High Court Judge in *The Learning Trust v MP* [2007] EWHC 1634 (Admin) (decided under the materially identical predecessor provisions of the Education Act 1996 and regulations made thereunder) as follows:

> [Sections B and F] have been likened to a medical diagnosis and prescription: *R v Secretary of State for Education and Science ex parte E* [1992] 1 FLR 377, 388-389. It is important then to identify or diagnose the need before going on to prescribe the educational provision to which that need gives rise, and only once the necessary educational provision has been identified can one specify the institution or type of institution which is appropriate to provide it. Instead, in this case, the Tribunal seems to have settled on the view that a residential school was necessary and expressed the hope that the parties would agree an amendment to the diagnosis for which this was the prescription. I bear in mind that one cannot be over-prescriptive in this regard. If it is clear, for instance, that a residential school is necessary to meet an identified educational need, the precise form of the provision can be influenced by

what is available at a particular school – see *S v City and Council of Swansea* [1999] ELR 315, at 323. However, in the present case, the Tribunal did not, in my view, identify the educational need which required a placement in a residential school.

22. As will be seen, the argument for the appellants in this case is the reverse of that considered by the High Court in *The Learning Trust v MP*, in that the appellants submit that the Tribunal in this case erred by determining that a residential school was not necessary without first determining what provision was reasonably required to meet Ali's special educational needs.

23. There have been many authorities on this topic since *The Learning Trust v MP*, but the parties are agreed that Judge Jacobs' decision in *London Borough of Southwark v WE* [2021] UKUT 241 (AAC) is the most helpful recent statement of the law in relation to this type of case. Judge Jacobs' decision begins with a warning:

> **A. Waking day curriculum.**
>
> 1. If those words do not induce a feeling of dread in a judge of this Chamber, at least they produce a sense of foreboding. Despite the hopes that have been expressed over the years, this case shows that the expression is still being used. More than that, it demonstrates its dangers by providing a stark illustration of how it can lead a tribunal into error.
>
> 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.

24. Having set out the legislative provisions, Judge Jacobs continued as follows:-

> 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.

25. Judge Jacobs also noted at [13] the relevance of section 21(5) which, as already set out above, provides that health or social care provision "which educates or trains a child" is to be treated as special educational provision and not as health or social care provision. This is important because it means that social care provision by the local authority in the exercise of its social services functions may in fact be educational provision that belongs in Section F of a child's EHC Plan rather than Section G if it "educates or trains", although if it is merely provision of care it will not be special educational provision. There is a wealth of case law on where the dividing line in this respect is to be drawn, and I do not seek to add to it in this case, but see generally Judge Levenson's decision in *East Sussex County Council v JC* [2018] UKUT 81 AAC, [2018] ELR 383.

26. A further question that arises in cases where residential provision is in issue relates to the role of parents. Most parents play a significant role in the education of their children, but the legislative framework for EHC Plans places the duty on the local authority to secure the special educational provision reasonably required to meet a child's special educational needs. An EHC Plan cannot therefore stipulate that any provision in Section F is to be made by a parent. However, a pragmatic approach has been taken in the case law, with it being accepted that an EHC Plan may detail a need for liaison between school and home and may include arrangements for promoting "consistency of approach" between school and home without that necessarily equating to impermissible provision of education by parents (see *A v Cambridgeshire* [2002] EWHC 2391 at [60] *per* Pitchford J). In *The Learning Trust v MP*, Andrew Nicol QC put it thus:

> 40. The Tribunal considered that P needed 'a clear and consistent approach throughout his waking day to ensure that he was able to access education in school and has opportunities to develop his communication, social and independence skills across all settings.' However, the need for consistency of approach is not the same as a need for an educational programme beyond the normal school day. This can be illustrated by *R (Tottman) v Hertfordshire County Council* [2003] EWHC 1725 (Admin)

> [2003] ELR 763 where the Statement of Special Educational Needs had been determined by the Tribunal in the case of another autistic child whose parents had wished him to attend a residential school. The Tribunal had rejected the parents' case on the basis that their son did not need programmes of special education throughout the working day. It had agreed (and stated in Part 3) that the child needed a 'consistency of approach throughout the day and across all settings i.e. home/school/respite care/social activities with regard to programmes.' It was agreed that there needed to be consistency of approach and liaison between school and home. Moses J. in the High Court and the Court of Appeal (*T v Hertfordshire County Council* [2004] EWCA Civ 927 [2005] LGR 262 rejected the argument that the Statement was deficient because it did not spell out in more detail what was to happen outside school.
>
> 41. Of course the factual circumstances of cases vary, but *Tottman* illustrates that a need for consistency is not to be equated with a need for educational provision outside of normal school hours.

27. The apparent dichotomy between the need for a consistency of approach and the provision of educational programmes continuing beyond the end of the school day is one that has been repeated in a number of authorities since as representing the dividing line between an educational need that can be met within the normal school day and one that cannot. However, in *Westminster City Council v First-tier Tribunal (HESC)* [2023] UKUT 177 (AAC), Judge West made clear that there is no dichotomy. Holding that the First-tier Tribunal had not erred in law in determining that the child needed 5 hours of mentoring support every day, including outside school term in order to meet the child's anxiety disorder and promote consistent development of her executive functioning, Judge West observed as follows:

> 87. The Council argued that: "The need for consistency, or reinforcement of learning [i.e. a consistent delivery of provision], is not sufficient to establish that an educational need exists for the delivery of education beyond the ordinary school day and term structure." But that was not the law: the legal point was that a need for consistency of approach beyond the school day did not mean that that was necessarily an educational need: *R (TS) v Bowen & Solihull* [2009] EWHC 5 at [39]. That did not mean that, in a particular case, a Tribunal could not lawfully decide that a need for a consistency of provision was special educational provision in the circumstances of this young person.
>
> 88. But even that was not pertinent here because this Tribunal was not referring to consistency of provision. It was concerned with provision which would promote A's consistent development. The Council had confused two entirely different things. …
>
> 90. But, as stated above, even if the Tribunal had concluded that "consistent support" was the issue and that consistent support was all

> that was needed, then that would still have been entirely lawful conclusion for it to reach on the evidence and facts of this case. The law simply was that a need for consistent support alone was not necessarily enough to make it special educational provision, but that did not preclude it being enough in any particular case.

28. The parties in this case are agreed that Judge West in *Westminster* correctly stated the law.

Case law on adequacy of reasons

29. The parties have referred me to the following authorities, which re-state well-established principles.

30. Judge Citron in *AG v Brent Council* [2024] UKUT 166 (AAC) at [14]-[15]:

> 14. There are many well-known authorities on adequacy of reasons. The Respondent cited *Meek v City of Birmingham DC* [1987] IRLR 250, where Lord Bingham (then in the Court of Appeal) said (at paragraph 8):
>
> > It has on a number of occasions been made plain that the decision of an Industrial Tribunal is not required to be an elaborate formalistic product of a refined legal draftsmanship but it must contain an outline of the story which has given rise to the complaint and a summary of the tribunal's basic factual conclusions and a statement of the reasons which led them to reach the conclusion which they do so on those basic facts. The parties are entitled to be told why they have won or lost. There should be a sufficient account of the facts and the reasoning to enable the EAT or on further appeal this court to see whether the question of law arises…
>
> 15. As this appeal concerns certain arguable "gaps" in the tribunal's reasoning, I have also borne in mind the following well-known principles:
>
> a. the reasons of the tribunal must be considered as a whole.
>
> b. the appellate court should not limit itself to what is explicitly shown on the face of the decision; it should also have regard to that which is implicit in the decision. *R v Immigration Appeal Tribunal, ex parte Khan* [1983] QB 790 (per Lord Lane CJ at page 794) was cited by Floyd LJ in *UT (Sri Lanka) v SSHD* [2019] EWCA Civ 1095 at [27] as explaining that the issues which a tribunal decides and the basis on which the tribunal reaches its decision may be set out directly or by inference.
>
> c. the following was said in *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409 (a classic authority on the adequacy of reasons), on the question of the context in which apparently inadequate reasons of a trial judge are to be read:

> "26. Where permission is granted to appeal on the grounds that the judgment does not contain adequate reasons, the appellate court should first review the judgment, in the context of the material evidence and submissions at the trial, in order to determine whether, when all of these are considered, it is apparent why the judge reached the decision that he did. If satisfied that the reason is apparent and that it is a valid basis for the judgment, the appeal will be dismissed. … If despite this exercise the reason for the decision is not apparent, then the appeal court will have to decide whether itself to proceed to a rehearing or to direct a new trial.
> ….
>
> 118. ... There are two lessons to be drawn from these appeals. The first is that, while it is perfectly acceptable for reasons to be set out briefly in a judgment, it is the duty of the judge to produce a judgment that gives a clear explanation for his or her order. The second is that an unsuccessful party should not seek to upset a judgment on the ground of inadequacy of reasons unless, despite the advantage of considering the judgment with knowledge of the evidence given and submissions made at the trial, that party is unable to understand why it is that the judge has reached an adverse decision."

The grounds of appeal

31. I granted permission to appeal, limited to the following grounds, which may be summarised as follows:

> Ground 1h – Factual error as to the evidence in relation to regression during school holidays
>
> Ground 1j – Factual error as to the evidence in relation to Ali's emotional regulation and failure to take into account that Ms Burns (the local authority's Educational Psychologist) had not been involved with Ali since he was in nursery in March 2019
>
> Ground 2 – The First-tier Tribunal failed properly to apply the correct legal test when considering the need for an extended day curriculum
>
> Ground 3 – The First-tier Tribunal failed to take into account relevant factors when determining if an extended day curriculum is required as special educational provision in Section F
>
> Ground 4 – The First-tier Tribunal took into account irrelevant factors when determining if an extended day curriculum is required as special educational provision in Section F

Ground 5 – The First-tier Tribunal failed to give adequate reasons as to why School X was suitable to meet need

32. As will be appreciated, there was a significant overlap between Grounds 2, 3, 4 and 5, and the appellants in their submissions dealt together with Grounds 2 and 3, and focused Ground 4 solely on the question of whether the First-tier Tribunal approached the evidence of Ms Burns' correctly. There was no objection by Ms Tkaczynska to this approach, so I do the same.

Grounds 1h and 1j: Alleged factual errors in relation to regression during holidays and Ms Burns' evidence.

33. It is convenient to take these two grounds together as they overlap.

The appellants' submissions

34. Ground 1h concerns the Tribunal's conclusion in relation to the discrete issue of regression during holidays in Section B of the EHC Plan. The appellants complain that the First-tier Tribunal perversely took into account as part of its reason for concluding that Ali does not significantly regress during school holidays that "[School Y's Principal] told us that they had not seen him regress during the holidays". The appellants point out that as Ali has been attending School Y on a 52-week basis, School Y could not have seen Ali regress during the school holidays and that, far from justifying a conclusion that he does not significantly regress during school holidays, this evidence from School Y was essentially irrelevant to the issue in dispute on Section B.

35. The appellants submit that this error was material because it has infected other parts of the First-tier Tribunal's decision, in particular its conclusion that he was "on a general trajectory of progress and any regression must fairly be seen in that light". The appellants submit that the Tribunal has based this conclusion on what School Y's Principal said about his progress at School Y, but that should have been recognised by the First-tier Tribunal as evidence of progress on the basis of a 52-week curriculum not on the basis that (as it appears on the face of the decision the Tribunal thought) he was progressing despite having holidays at School Y (when he was not).

36. Ground 1j was that the Tribunal had wrongly recorded Ms Burns as giving the evidence that "[Ali] would go for a cuddle and seek out reassurance" when in fact it was School X's HLTA, Ms J, who had said this. The appellants also point out that the local authority's response suggests that the Tribunal had in addition wrongly attributed the evidence that Ms J gave about Ali regressing and losing skills during school holidays to Ms Burns and that this further underscores the error that the Tribunal made in relation to the evidence about regression during school holidays.

37. The appellants further submit that, on the face of the decision, it does not appear that the Tribunal understood there was a conflict of evidence on the issues of

regression during holidays and progress at all, when in fact this was a major point of dispute between the parties. The appellants say they drew the Tribunal's attention to documentary evidence in the bundle apparently showing lack of progress in relation to understanding instructions, failure to attain targets as between 2022 and 2023, no progress demonstrated in an Achievement Report and the May 2020 and May 2023 annual reviews noting only "some progress" made against long-term outcomes. The Educational Psychologist instructed by the appellants, Dr Grace, had accepted parents' concerns about regression during holidays (FTT bundle, p 241) and also noted apparent regression since Ali stopped receiving weekly SALT input (FTT bundle, p 244).

The respondent's submissions

38. The respondent submits in relation to ground 1h that the Tribunal's apparent error in relation to School Y Principal's evidence as to regression should not be understood as such when the First-tier Tribunal's reasons are read, as they should be, without applying too fine a toothcomb. The respondent submits it is clear from elsewhere in its decision that the Tribunal knew Ali was attending School Y on a 52-week basis. It cannot have forgotten that. The respondent submits the decision can and should be read as if the Tribunal properly recorded that School Y had not seen regression during the school holidays "because he attends on a 52-week basis". That is the only addition that is necessary to render the reasons comprehensible and accurate.

39. The respondent further submits that any error is immaterial because the Tribunal gave more than one reason for its conclusion in relation to regression, and that was that it accepted the evidence of Ms J as being credible generally and, in particular, that it accepted her evidence as to Ali having been on a "general trajectory of progress" while at School X. Moreover, the respondent submits, with reference to documents in the bundle, there simply was no evidence of significant regression during holidays so that the Tribunal's conclusion would have to have been the same in any event.

40. As to ground 1j, the respondent submits that the substitution of Ms Burns' name for Ms J's is plainly a typographical error and that the issue about Ali's emotional regulation to which the error went was not material to the decision on placement and is thus not material on this appeal. The respondent further submits that the Tribunal did not fail to take into account that Ms Burns had not personally observed Ali since 2019. In her witness statement she explains that she had read the bundle and also spoken to Ms J in advance of acting as a witness in Tribunal and she could therefore properly give her professional opinion on what she had read and heard about Ali since 2019.

My conclusions on grounds 1h and 1j

41. I can say very briefly that the substitution of Ms Burns' name for Ms J's, which was the principal focus of ground 1j, is plainly a typographical or nominal error that does not even undermine the Tribunal's conclusion in relation to Ali's emotional regulation needs, let alone make any difference as to placement.

42. The secondary point included in ground 1j, however, about the Tribunal having apparently failed to take into account Ms Burns' lack of involvement with Ali since 2019 is potentially more significant, as is ground 1h and what the Tribunal said about the evidence on regression and progress. However, I have ultimately concluded that the error of law regarding these matters is one as to the adequacy of the Tribunal's reasons (which I deal with in Ground 5) rather than as to the facts.

43. It seems to me to be plain that the Tribunal was aware that Ali was attending School Y on a 52-week basis and that, accordingly, reading the decision as a whole, all that the Tribunal is saying in relation to the evidence as to regression during school holidays is that the Principal of School Y understandably had not seen any regression because there had been no holidays. While the appellants are right that the Tribunal has therefore recorded the evidence as if there was no dispute on this issue, the reality is that there was little dispute on this issue. What Dr Grace says in her report about regression during holidays is, when one reads that report, apparently based principally on the concerns of parents, and it is clear that the Tribunal understood there was a dispute between parents and the local authority as to regression during the holidays because that is why the parties had been unable to agree this part of the wording of Section B.

44. I do not therefore consider there was any material misdirection as to the evidence in relation to regression. However, it is apparent that the Tribunal's conclusion on this issue rested heavily on the view it took as to the overall progress that Ali had made while at School X. I do consider it has erred in law in its approach to that issue and/or in its reasons, and the failure to acknowledge the limited involvement of Ms Burns in this respect is relevant to that. These errors are picked up in the course of the other grounds.

Grounds 2 and 3: Whether the First-tier Tribunal failed properly to apply the correct legal test when considering the need for an extended day curriculum

The appellants' submissions

45. The appellants submit that the First-tier Tribunal failed to take the proper legal approach to considering whether Ali needs an extended day curriculum. They submit that the First-tier Tribunal should have considered, in relation to each of his special educational needs, and each aspect of the specific educational provision that was in dispute in Section F of the Working Document, what he reasonably required to meet his special educational needs and whether that constituted education or training so as to be special educational provision that needed to be specified in Section F. The appellants submit that the First-tier Tribunal wrongly proceeded from its view that Ali was not at School Y receiving "structured educational programmes" outside the normal school day to a conclusion that he did not require an extended day curriculum.

46. In particular, the appellants submit that the First-tier Tribunal failed to engage with what provision was required to meet Ali's daily living and self-care needs, which

the parties agreed constituted special educational needs rather than social care or health needs in Ali's case. There was ample evidence as to the provision that was being made in that respect on an extended day basis at School Y and as to Ali's progress in those areas, which included as outcomes achieved or developing in the residential setting: learning to pass urine in the toilet; using knife and fork at mealtimes; setting the table; accepting self-care tasks such as hair and nail-cutting. The appellants submit that the Tribunal failed to provide any reason for concluding that Ali did not require extended day provision to meet those needs, save for stating that, "It is also important to note that [Ali] is only ten years' old; he is not yet preparing for adulthood and independent living. We considered that his age and stage in life was relevant to our considerations." They submit that was not an adequate or rational reason for concluding that Ali did not require education or training extending beyond the normal school day in relation to toiletting, eating, cleaning, dressing etc., all of which activities normally need to be mastered before adulthood.

47. They submit that the First-tier Tribunal was in error in saying there was "no evidence" that Ali required an extended day curriculum because the evidence was there in the progress that he was making at School Y, as well as in the opinion of Dr Grace, on whose report the appellants relied.

The respondent's submissions

48. The respondent submits that the First-tier Tribunal did not err in law in its approach to the question of whether Ali reasonably requires an extended day curriculum. The respondent submits that the First-tier Tribunal did follow the logical chain of analysis from needs to provision to placement as the law requires. The respondent submits that the Tribunal properly first determined the outstanding issues between the parties as to Section B, as a result of which it was determined, for example, that Ali is not resistant to and/or aggressive when support was provided in a school setting for personal care routines. The First-tier Tribunal concluded that he was not resistant/aggressive, so provision to address those needs was not required.

49. The respondent submits that it was legitimate in this case for the Tribunal to subsume consideration of all the elements of provision in Section F that were in issue between the parties under the one heading of whether an extended day was required because that question was capable of being properly answered by considering whether Ali was making reasonable progress while at School X where educational provision was only made during the normal school day. Having concluded that he did make reasonable progress at School X, it followed that he did not reasonably require extended day provision.

50. Further, the respondent submits that the Tribunal's conclusion that Ali made reasonable progress at School X was one that was open to it and that its reasons are adequate. The Tribunal was entitled to take into account Ali's age and stage of development. The Tribunal rightly noted that Dr Grace's report did not adequately explain why the recommended provision could not be delivered during the school day, that she had conflated the question of an extended day

curriculum with whether residential provision was reasonably required, that she did not attend the hearing to expand on her report, and that the witnesses from School Y were unable to explain why Ali reasonably required provision outside of school hours.

51. The respondent submits that it was relevant for the Tribunal to take into account that School Y was not providing structured programmes outside of school hours, and that it was reasonable for the Tribunal to conclude that, just because Ali was benefitting from the provision at School Y, it did not mean he reasonably required it.

52. Finally, the respondent submits that what the Tribunal meant by there being "no evidence" that Ali needed education beyond the school day was simply that it was not persuaded there was evidence.

My conclusion on grounds 2 and 3

53. I deal with the parties' last point first: this is not a case where the First-tier Tribunal has in my judgment erred by saying, as it does in [4] of this section of its decision, that there was "no evidence" that Ali required education that extended beyond the school day. The decision needs to be read as a whole and it is clear from the paragraphs that follow that the First-tier Tribunal recognised and accepted that Ali "has benefitted from his time in [School Y]" ([12]) and that "the extended day enables [Ali] to further generalise the skills taught in school" ([11]). Further, at [12] the Tribunal states that it finds "the evidence for an extended day curriculum to be weak". Superficially, the latter statement directly contradicts what the Tribunal said in [4], but on a fair reading of the whole decision, I consider it to be clear that when the Tribunal said there was "no evidence" that an extended day curriculum was reasonably required, it meant merely that it was not persuaded of the evidence, not that it (wrongly) thought there was "no evidence".

54. I also accept in broad terms the respondent's submission that cases such as this can sometimes properly be resolved by the Tribunal considering whether or not the child is making reasonable progress in all areas in day special school provision because, if so, a Tribunal can legitimately conclude that the child does not reasonably require additional provision.

55. However, the difficulty in this case is that there was a substantial dispute between the parties as to whether Ali was at School X making reasonable progress in all areas or not, and the nature of the dispute was such that it required consideration to be given to each of Ali's areas of need separately. Taking a global approach has led the Tribunal into error, in my judgment.

56. The provision that was in dispute in Section F included whether or not Ali should have a physical environment with appropriate resources available throughout the extended school day as part of continuous provision, whether the continuous provision should include weekends and school holidays, whether he needed extended / 24-hour continuous provision to help him establish daily living and self-care routines, whether he needed his SALT and OT therapeutic support and

programmes to be reinforced and embedded throughout the extended day, and whether he needed his sensory diet to be embedded into his extended day.

57. It was not a sufficient answer to the appellants' case in respect of those different aspects of provision to say that Ali was on a "general trajectory" of progress at School X. The Tribunal needed to consider, in relation to each element of the Section F provision that was in dispute, whether the particular special educational needs the particular provision was intended to address had been met by the day provision at School X (possibly in combination with the home provision of speech and language therapy and social services) or, if not, what provision was reasonably required to meet Ali's needs in each respect, in terms of additional hours per week, up to and including an extended or "waking day".

58. In particular, as the appellants detailed in their submissions on grounds 1h and 1j (summarised above), they had put before the Tribunal documentation that on its face showed a lack of progress in areas such as communication and interaction, cognition and learning and sensory and physical. The Tribunal in its decision does not mention this evidence, but simply records Ms J's opinion that Ali had made progress "across the board". It is not possible to tell from the Tribunal's decision why the appellants' case on progress was rejected. Indeed, although the respondent accepts this was a significant issue between the parties at the hearing, the Tribunal's decision is written as if the nature and extent of the progress that Ali had made at School X was not in dispute, with the Tribunal even stating in the section dealing with the suitability of School X that there were "no concerns" about his progress at School X. I acknowledge that Ms Tkaczynska for the respondent has in her skeleton argument identified documentary evidence of progress, but it is not for me to assess the evidence. The Tribunal needed to explain what it made of the parties' conflicting evidence and arguments on this critical issue. Just stating that it found Ms J to be "credible" was inadequate by way of explanation for its conclusions.

59. Further, there was specific evidence of progress that Ali had made at School Y in relation to daily living and self-care skills which, as I understand the evidence, he had not made previously at School X. Or, at least, the appellants' case was that he had not made this progress previously at School X. This includes the progress detailed in the witness statement of School Y's Principal regarding progress within the residential care facility at School Y (FTT Bundle, pp 640-641). It includes progress in passing urine on the toilet, allowing staff to change his continence products while standing, using a knife and fork at mealtimes and improvement in tolerating nail cutting, hair cutting, daily bathing and administration of medications. On the face of it, this is all progress towards meeting Ali's special educational needs in relation to toiletting and self-care. The Tribunal needed to consider whether or not this sort of progress was being achieved previously at School X and, if not, whether the progress was attributable to the additional provision at School Y or just to Ali getting older. The Tribunal then needed to take its conclusion in this respect into account in deciding whether or not Ali's special educational needs as regards toiletting and self-care could reasonably be met within the ordinary school day and, if not, what extended provision was required in order him to make reasonable progress.

60. It is also important for a Tribunal to remember in cases such as this that the possible answers to the question of what is reasonably required by a child with special educational needs such as Ali may not be binary, i.e. it is not the case that the only possible answers are either that Ali's special educational needs "can be met within the ordinary school day" or that a "waking day curriculum" is required. A child may reasonably require additional provision outside of school hours that falls short of a so-called "waking day curriculum". The level of additional provision reasonably required may be of a nature and quantity that can provided by professionals working within the family home or through respite provision. The Tribunal needs to determine what is reasonably required and specify that in Section F. Only then should it turn to considering placement and whether the provision reasonably required can be made by a day school in combination with input at home from education professionals or trained social care workers or whether a residential placement is required. In this respect, it must be remembered that all or part of a child's special educational provision may (subject to consultation with the child's parent) be made outside of school if the local authority, or Tribunal, is satisfied that it is "inappropriate" for it to be provided in school: see section 61 of the 2014 Act.

61. In this case, it is concerning that the Tribunal considered that Ali requires a substantial social care package outside school hours, but apparently failed to consider whether this provision in Ali's case constitutes education or training to meet his special educational needs. This appears to be another respect in which the Tribunal failed to recognise the nature of the dispute between the parties. It recorded Ms Burns' view that there was a "social care need for the family and school to work together" without recognising that this was actually a legal issue that was in dispute between the parties: the appellants' case for residential school was, in legal terms, a dispute with Ms Burns' view that what Ali needed by way of extended day provision was social care rather than education. The Tribunal did not engage with this at all. The parties were in agreement that Ali needed at least some provision out of ordinary school hours. The Tribunal needed to decide whether this was a need for education or training reasonably required in order to meet Ali's special educational needs or whether it was merely a care need. If it was a need for education or training, then the provision (even if it was to be made by social services) needed to be specified as such in Section F and not merely made the subject of a recommendation for provision in Section H1 or Section H2.

62. I add that I agree with the submission of the appellants that, if and to the extent that, the Tribunal's reason for concluding that Ali did not require extended provision in order to enable him to make reasonable progress with his toiletting and self-care needs, was that Ali was "only ten years' old" and "not yet preparing for adulthood", that reasoning was perverse. Ali's needs in these areas are ones that reasonably need to be address well before adulthood. The Tribunal's reasoning would be appropriate if what was in issue was development of independent living skills, but that is not what is in issue in Ali's case.

63. I also accept the submission of the appellants that the Tribunal has fallen into the error identified by Judge West in *Westminster City Council* of proceeding as if

there is a dichotomy between a need for "consistency of approach" and a need for "structured educational programmes" continuing beyond the ordinary school day, with only the latter constituting special educational provision. While I note that the Tribunal at [16] correctly stated the law in saying "No witness disputed that [Ali] would benefit from a consistent approach, but this is not necessarily an educational need that is required to be met beyond the school day in a residential setting," it then continued "We were not persuaded that [School Y] was providing a structured educational programme outside of the normal school hours", with that latter sentence on the face of the decision constituting the Tribunal's sole reason for concluding that School Y is not providing education or training outside of school hours. Given the description in School Y's Principal's statement of the "waking day curriculum" that School Y at least purports to provide, with therapeutic support integrated into the residential provision, and adult-led activities continuing through the waking day, the Tribunal's conclusion that this is not educational provision just because it does not constitute "a structured educational programme" is inadequate by way of reasoning. The Tribunal needed to consider whether the provision at School Y amounts to "education or training" within section 21(5) of the 2014 Act and explain its conclusion.

64. In this respect, I would add that what the Tribunal says about Dr Grace's report at [13]-[14] does not in my view help explain its decision. At [13] it quotes a sentence from the concluding section of Dr Grace's report that "[School Y] offers residential provision … that would enable [Ali] to learn and practise all essential skills of daily living …" and then comments on it at [14] by saying:

> "This statement does not examine what [special educational provision] [Ali] requires that cannot be delivered during the school day and why that could only be delivered through a 52-week residential placement. An extended day curriculum may be linked with a residential placement, but not necessarily so. Dr Grace appears to conflate the two issues. Dr Grace was not present to expand upon her report. Furthermore, the witnesses from [School Y] also failed to answer that question."

65. That reasoning is in my judgment perverse. There is a whole section of Dr Grace's report that precedes the concluding section quoted by the Tribunal in which Dr Grace makes recommendations for the contents of Section F of Ali's EHC Plan. These include multiple references to specific provision that she considers should be provided over the extended or waking day, such as a sensory diet to be embedded into the waking day, adult-led activities every 60 minutes "ideally" across the waking day, physical environment with "appropriate resources … available throughout the waking day as part of continuous provision", "continuous provision [to] include weekends and conventional school holidays in order to prevent the dysregulation and disruption caused by transitions from one environment to another", SALT to "train [Ali's] key worker to deliver intensive communication sessions through the waking day", "extended or 24 hour continuous provision will help [Ali] to establish daily living and self care routines", etc. When one reads Dr Grace's report in full, accordingly, the Tribunal's reasons for rejecting her opinion simply make no sense.

66. Likewise, the Tribunal's statement that "the witnesses from [School Y] also failed to answer that question" (i.e. to identify what provision was required after school hours) also makes no sense given that School Y's Principal's statement is replete with examples of provision within the residential placement that the Principal considers constitutes a "waking day curriculum" and the Tribunal itself in its reasons at [10] and [11] has summarised the Principal's oral evidence as to what is provided at School Y by way of consistency of approach and extension of the school day into evenings and weekends that self-evidently cannot be provided by a school operating only during school hours.

67. In short, the Tribunal's stated reasons for finding the evidence of Dr Grace and School Y's witnesses to be deficient make it clear to me that the Tribunal was not applying the proper legal approach. I infer that the Tribunal was wrongly thinking of the provision at School Y as constituting merely provision of a "consistent approach" outside school hours which it wrongly assumed meant it was obviously not educational provision. In fact, the Tribunal had before it a respectable case that School Y is providing education or training outside school hours. The Tribunal was free to reject the appellants case in that respect, but it could only do so if it was able adequately to explain that decision applying the proper legal approach.

68. It was also, of course, for the Tribunal to decide whether or not Ali reasonably requires any educational provision extending beyond the normal school day, or whether the provision at School Y represents for him more than he reasonably requires, or "Rolls Royce" provision as it is often termed. This remains a case in my view which may ultimately be concluded either way. However, whatever decision the Tribunal reached, it needed to do so applying the proper legal approach and giving adequate reasons for its conclusions. This Tribunal has failed to do so.

69. Grounds 2 and 3 therefore succeed.

Ground 4: Evidence of Ms Burns

70. In view of my conclusion on Grounds 2 and 3, I can deal with this issue briefly. The appellants' complaint is that the Tribunal placed significant reliance on the evidence of the local authority's educational psychologist Ms Burns' when she had not in fact had any personal involvement in Ali's case since he was at nursery in 2019. In particular, they complain that the Tribunal at [6] apparently accepted Ms Burns' opinion that Ali's regression during school holidays was within the normal range and that "His gains are not negated by the length of time he is out of school", and also Ms Burns' opinion that "there was a social care need for the family and school to work together". I am sympathetic to the appellants' concerns about the Tribunal's reliance on the evidence of Ms Burns, but I consider that the Tribunal's error in this respect is one of inadequate reasoning rather than an error in the assessment of the evidence. Although Ms Burns had not personally observed Ali since 2019, she had reviewed the more recent reports, and spoken to Ms J. She was therefore able to give her professional opinion on the matters that she did, and it was open to the Tribunal to accept that evidence. Given the strikingly long time since her personal involvement with Ali, however, and the lack

of recent involvement by anyone else in the local authority's educational psychology service (as described in her witness statement: FTT Bundle, p 546), I would have expected this to be mentioned in the Tribunal's reasons. The Tribunal's failure to address this issue is part of why I have concluded that its reasons in this case are inadequate. The failure in reasoning is, however, covered in part by grounds 2 and 3 above and also by ground 5 below. Ground 4 as a free-standing ground does not succeed.

Ground 5: Alleged failure to give adequate reasons as to why School X was suitable to meet need

71. Again, in view of my conclusion in relation to ground 2, I can deal with this ground briefly. Most of ground 5 as it was advanced by the appellants at the hearing focused on the inadequacy of the Tribunal's reasoning in relation to the question of whether Ali was making adequate progress at School X. These submissions were also relevant to ground 2 and I have summarised them above when dealing with that ground. I have also explained there why I consider that the Tribunal's reasons are inadequate in that the decision is drafted as if there was no dispute on this issue, when in fact there was a substantial dispute. The Tribunal fails adequately to explain why it has rejected the appellants' case that Ali was not making adequate progress in all areas at School X. While it was open to the Tribunal to accept the evidence of Ms J and the opinion of Ms Burns on this issue, the acceptance of this evidence simply because it found them to be credible witnesses does not adequately explain its decision in this case. The appellants had advanced specific concerns about progress as set out in their skeleton argument for this hearing and as summarised above. They had also advanced evidence of progress made at School Y that had not been made at School X. That evidence was relevant to whether progress at School X had been adequate. There was a need specifically to consider progress in relation to each of the various aspects of Ali's special educational needs, taking into account and distinguishing the progress made at School X from that made at School Y, in order to assess whether the progress made at School X was adequate. The Tribunal needed to explain what it made of all these aspects of the case in order adequately to explain its decision.

72. The appellants in their skeleton argument also raised a further issue under this ground as to the Tribunal's reasoning in relation to peer group at School X. The respondent objected to this argument on the basis that it was not included within the grounds of appeal on which I granted permission. I agree that this argument was not raised in the grounds of appeal and as the appeal has succeeded on other grounds which mean there will need to be full re-hearing in any event, I do not consider it necessary to deal with this argument. The question of whether School X will, if or when Ali returns to it, provide an appropriate peer group will need to be considered by the Tribunal at the remitted hearing.

Conclusion

73. The appeal therefore succeeds. The parties were agreed that if the appeal succeeded on any ground other than ground 1j it should be remitted to a new

Tribunal panel. I agree, but it is with regret that I set the decision of the First-tier Tribunal aside and remit this case for its third hearing before a new Tribunal panel. The First-tier Tribunal's resources are overstretched with many cases waiting longer than they should for hearings. This case will likely need a further 2-day hearing so that it will in total have taken up 6 days of First-tier Tribunal time. However, there is no reasonable alternative. The First-tier Tribunal has made errors of law that undermine the decision it made as to placement in this case. It would not be appropriate for me to remake the decision myself. This remains a case which could be decided either way, and the evidence needs to be assessed again by a new Tribunal applying the proper legal approach and considering the position as it is whenever that hearing now takes place. There is much at stake on both sides: £400,000 per annum of public money on the one hand, and, on the other, Ali, who has now been at School Y in a 52-week residential placement for over a year. If the Tribunal applying the proper approach concludes that Ali's special educational needs can reasonably be met at School X, with or without additional special educational provision outside of school hours by social services or other professionals, the Tribunal and parties will need to give careful consideration to how the transition from School Y is to be managed.

74. I add this: the Tribunal at the remitted hearing will need to consider all issues in the case afresh, including recommendations as to social care provision if it decides School X is appropriate. I note that the Tribunal did not take into account when considering the cost differential between placement at School X and placement at School Y the costs of social care provision for Ali that are saved if he attends School Y. The parties and the Tribunal will need to consider this at the remitted hearing and ensure that the Tribunal has the necessary evidence before it as to these costs: see *H v Warrington Borough Council* [2014] EWCA Civ 398, [2014] ELR 212 at [27]-[37] *per* Dyson LJ.

Rule 14

75. The parties invited me to make a Rule 14 order in the terms set out at the head of this judgment. I am satisfied that it is necessary and appropriate to do so in this case in order to protect the Article 8 rights of Ali. The important public interest in open justice is met by the hearing before the Upper Tribunal having been held in public and this decision being published. The order covers the identities of the appellant, the schools and the school teachers as well only because that is necessary in order to protect Ali's identity.

Holly Stout
Judge of the Upper Tribunal

Authorised by the Judge for issue on 30 September 2025
Re-issued 10 November 2025 to correct an anonymisation error.