IN THE UPPER TRIBUNAL **Appeal No.** UA-2023-001113-HS
ADMINISTRATIVE APPEALS CHAMBER **[2024] UKUT 87 (AAC)**

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

Between:

AB

Appellant

- v -

East Sussex County Council

Respondent

Before: Upper Tribunal Judge Freer

Decision date: 15 February 2024
Decided after an oral hearing on: 06 November 2023

Representation:
Appellant: Mr R Desai, Counsel
Respondent: Ms A Walker, Counsel

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 26 April 2023 under number EH845/22/00181 was made in error of law. Under section 12(2)(a) and (b)(i) 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 following directions.

Directions

1. **This case is remitted to a wholly different tribunal panel of the First-tier Tribunal for reconsideration at an oral hearing.**

2. **These Directions may be supplemented by later directions by a Tribunal Judge in the Health, Education and Social Care Chamber of the First-tier Tribunal.**

REASONS FOR DECISION

Introduction

1. This is an appeal to the Upper Tribunal against a decision of the First-tier Tribunal ("the Tribunal") dated 26 April 2023 that the Local Authority's decision to cease to maintain was upheld and that it was not necessary to maintain the EHC plan. The Tribunal having made that decision did not need to address changes to the EHC Plan and section F or recommendations for social care.

2. The Appellant, 'AB', is the mother of, and 'Alternative Person' for, 'O'.

Background Summary

3. The essential background to this matter is that at the time of the hearing before the Tribunal O was 22 years old and lived with his mother in Sussex.

4. O has diagnoses of Severe Learning Disability; Autistic Spectrum Disorder; Attention Deficit Hyperactivity Disorder; Oppositional Defiance Disorder; Separation Anxiety Disorder; and Generalised Anxiety Disorder plus other health conditions.

5. From September 2016 O attended the appointed School and from 09 September 2019 until July 2022 he transferred to a Specialist College, an independent placement that is not section 41 approved. O's education ceased after that time due to a lack of funding for his college placement.

6. On 16 June 2022 a decision was made by the Local Authority, pursuant to section 45 of the Children and Families Act 2014, to cease to maintain the EHC plan for O. That decision was to take effect from 31 July 2022.

7. An application for judicial review was made relating to that decision. The proceedings were withdrawn and a new section F provision was agreed by the parties of 15 hours of 1:1 tuition per week and 10 hours per week of a learning mentor during term time and 5 hours per week of Adult Social Care in non-term time to be increased incrementally.

8. At the date of the hearing, apart from a day session with the Interim Provision Service, O has not taken up the 25 hours of support in the order/schedule in the JR proceedings.

9. By an appeal made on 14 July 2022 and registered on 01 August 2022, AB as the 'Alternative Person' and parent of O, appealed against a decision by the Respondent Local Authority to cease to maintain the EHC Plan.

10. AB also appealed against section F of the last EHC Plan but not section I. AB also sought to appeal against what was said about social care.

11. AB's claim was made against the Respondent as the Local Authority.

12. The appeal was heard over two days and was dismissed by the Tribunal in a decision dated 26 April 2023.

The case put to the First-tier Tribunal

13. The Appellant argued, in summary, that none of the available evidence showed that O had either met the outcomes in his EHC Plan, or more generally that he no longer required educational provision. The evidence all supported the contrary view. The Local Authority accepted that educational provision was still required but were seeking either to place the responsibility on a College to meet O's needs, or for Social Services to do so, despite this not being their roles.

The First-tier Tribunal's decision and reasons

14. The Tribunal decided to uphold the Local Authority's decision to cease to maintain and that it was not necessary to maintain the EHC plan. The Tribunal having made this decision considered that it did not need to address changes to the EHC Plan and section F or recommendations for social care. There was discussion about the 25 hours of social care provision the Local Authority intended to make and the fact that consideration would be given to a 2:1 provision to start with in the community and that risk assessments would be needed.

15. The Tribunal set out a summary of the oral evidence given by Ros Leach, Joanna Brooks and Nicky Boyd for the Local Authority and Christopher Hayman, Dr Helena Bunn and AB for the Appellant.

Proceedings before the Upper Tribunal

16. The Appellant's application for permission to appeal to the First-tier Chamber was refused by a decision dated 13 July 2023. The Appellant made a further application to the Upper Tribunal, where permission to appeal was given on 12 September 2023. With that application the Appellant had presented written grounds of appeal comprising nine pages. The permission to appeal decision identified 7 essential grounds of appeal. Those advanced at the appeal hearing were:

    Ground 1 - Failure to make findings regarding the special educational provision O required, which the *Cheshire East* case makes clear are an essential precondition to being in a position lawfully to determine the statutory question in section 45(1) of the 2014 Act, and/or failure to provide adequate reasons;

    Ground 2 - Erroneously focusing on the appropriate educational setting without first identifying the provision required. This ground intersects in particular with Ground 1;

    Ground 3 - Failure to address O's ability to make progress in meeting the outcomes in his EHC Plan or the value of such progress to him and/or failure to provide adequate reasons;

Ground 4 - Failure to consider whether the required provision would (as opposed to theoretically could) be made through a prospective, as yet unformulated, adult social care package and/or failure to give adequate reasons;

Ground 5 - Breach of regulation 30(1) of the Special Educational Needs Regulations 2014 in circumstances where the Tribunal determined that O's views regarding returning to education or training were not properly before it.

Preliminary matters

17. It was argued by the Respondent that the Appellant was seeking to raise matters in addition to those contained in the grounds of appeal for which permission to appeal had been granted. The Respondent argues that Grounds 1 and 4 include a 'reasons' argument and that Ground 5 was impermissible because it raises an entirely new ground of appeal.

18. With regard to Ground 1, the Appellant contends and I accept, that paragraph 13 of the permission to appeal decision is consonant with a reasons appeal: "It is my conclusion that there is reasonable prospect that the First-tier Tribunal erred in law by either not identifying adequately, or at all, the special educational provision required for O; or by identifying the special educational provision and concluding that it could not identify why the EHCP was still needed". I also consider that a reasons appeal is covered by the first ground of appeal in the permission to appeal document: "The Tribunal fell into the same error as the Tribunal in *B&M v Cheshire East Council* in that the Tribunal decision makes no findings of the special educational provision to meet O's special educational needs and as a result the Tribunal was not in a position properly to answer the question of whether it was necessary for O's EHCP to be maintained". It is consistent with other grounds of appeal all of which raise issues of adequacy of reasoning.

19. The same conclusion is reached regarding Ground 4. The permission to appeal decision stated the ground as: "The Tribunal addressed the question of the setting in which O would be placed but undertook this consideration without first (or at all) identifying the provision that O required". This clearly includes a 'reasons' strand.

20. The appeal was built on the decision in the *Cheshire East* case, which addresses inadequacy of reasons. That argument is within the scope of these grounds of appeal.

21. Further, it is my conclusion that it is in the interests of justice for these matters to be ventilated as part of this appeal. There is no prejudice to the Respondent, as demonstrated by Ms Walker being in a position to address very ably those matters.

22. The Ground 5 issue is considered under that separate heading.

The Legal Framework

23. The relevant law can be derived from various sources:

The Children and Families Act 2014

24. Section 42 of the Children and Families Act 2014 ("the 2014 Act") sets out the duty on a Local Authority where it maintains an EHC plan for a child or young person to "secure the specified special educational provision for the child or young person" (s.42(2)) unless "the child's parent or the young person has made suitable alternative arrangements" (s.45(5)).

25. Section 45 of the 2014 Act makes provisions relating to ceasing to maintain an EHC plan:

> (1) A local authority may cease to maintain an EHC plan for a child or young person only if—
> (a) the authority is no longer responsible for the child or young person, or
> (b) the authority determines that it is no longer necessary for the plan to be maintained.
> (2) The circumstances in which it is no longer necessary for an EHC plan to be maintained for a child or young person include where the child or young person no longer requires the special educational provision specified in the plan.
> (3) When determining whether a young person aged over 18 no longer requires the special educational provision specified in his or her EHC plan, a local authority must have regard to whether the educational or training outcomes specified in the plan have been achieved.
> (4) A local authority may not cease to maintain an EHC plan for a child or young person until—
> (a) after the end of the period allowed for bringing an appeal under section 51 against its decision to cease to maintain the plan, where no such appeal is brought before the end of that period;
> (b) after the appeal has been finally determined, where such an appeal is brought before the end of that period.
> (5) Regulations may make provision about ceasing to maintain an EHC plan, in particular about—
> (a) other circumstances in which it is no longer necessary for an EHC plan to be maintained;
> (b) circumstances in which a local authority may not determine that it is no longer necessary for an EHC plan to be maintained;
> (c) the procedure to be followed by a local authority when determining whether to cease to maintain an EHC plan.

26. Section 21 of the 2014 Act addresses special educational provision, health care provision and social care provision:

> (1) "Special educational provision", for a child aged two or more or a young person, means educational or training provision that is additional to, or different from, that made generally for others of the same age in—

(a) mainstream schools in England,
(b) maintained nursery schools in England,
(c) mainstream post-16 institutions in England, or
(d) places in England at which relevant early years education is provided.
. . .
(3) "Health care provision" means the provision of health care services as part of the comprehensive health service in England continued under section 1(1) of the National Health Service Act 2006.
(4) "Social care provision" means the provision made by a local authority in the exercise of its social services functions.
(5) Health care provision or social care provision which educates or trains a child or young person is to be treated as special educational provision (instead of health care provision or social care provision). . .

The Education Act 1996

27. Section 2 of the Education Act 1996 ("the 1996 Act") defines primary, secondary and further education. The definition of further education is:

"(3) … in this Act "further education" means –
(a) full-time and part-time education suitable to the requirements of persons who are over compulsory school age, and
(b) organised leisure-time occupation provided in connection with the provision of such education, except that it does not include secondary education or … higher education".

28. Section 2(6) provides that 'organised leisure-time occupation' means:

"leisure-time occupation, in such organised cultural training and recreative activities as are suited to their requirements, for any persons over compulsory school age who are able and willing to profit by facilities provided for that purpose".

29. Section 2(6A) provides:

"In the context of the definitions of … further education, references in this section to education include vocational, social, physical and recreational training".

30. Section 15ZA(8) provides that 'training' includes:

"(a) full-time and part-time training;
(b) vocational, social, physical and recreational training;
(c) apprenticeship training".

The Special Educational Needs Regulations 2014

31. Regulation 30 of the Special Educational Needs Regulations 2014 ("the 2014 Regulations") provides:

> "(1) When a young person aged 18 or over ceases to attend the educational institution specified in his or her EHC plan, so is no longer receiving education or training, a local authority may not cease to maintain that EHC plan, unless it has reviewed that EHC plan in accordance with regulations 18 and 19 and ascertained that the young person does not wish to return to education or training, either at the educational institution specified in the EHC plan, or otherwise, or determined that returning to education or training would not be appropriate for the young person.
> (2) Where following the review, the local authority ascertains that the young person wishes to return to education or training either at the educational institution specified in the EHC plan, or at another educational institution, and determines that it is appropriate for the young person to do so, it must amend the young person's EHC plan as it thinks necessary in accordance with regulation 22."

32. Regulation 18 does not apply to the circumstances of this case.

33. Regulation 19 relates to the conduct of reviews:

> "When undertaking a review of an EHC plan, a local authority must—
> (a) consult the child and the child's parent or the young person, and take account of their views, wishes and feelings;
> (b) consider the child or young person's progress towards achieving the outcomes specified in the EHC plan and whether these outcomes remain appropriate for the child or young person;
> (c) consult the school or other institution attended by the child or young person".

The Special Educational Needs and Disability Code of Practice

34. The Special Educational Needs and Disability Code of Practice ("the Code of Practice") states at paragraph 9.203:

> "Where a young person aged 18 or over leaves education or training before the end of their course, the local authority must not cease to maintain the EHC plan unless it has reviewed the young person's EHC plan to determine whether the young person wishes to return to education or training, either at the educational institution specified in the EHC plan or somewhere else. If the young person does wish to return to education or training, and the local authority thinks it is appropriate, then the local authority must amend the EHC plan as necessary and it must maintain the plan. The local authority should seek to re-engage the young person in education or training as soon as possible".

B&M -v- Cheshire East Council

35. *B&M -v- Cheshire East Council* [2018] UKUT 232 (AAC), is the leading authority on the construction of section 45 of the 2014 Act. Upper Tribunal Judge Mitchell held:

> "[91] I agree with counsel that there is an affinity between the test for deciding whether to cease to maintain an EHC plan and the test for deciding whether an EHC plan is to be prepared and maintained in the first place. Under s 37(1) of the 2014 Act, the test for deciding whether to prepare and maintain a plan is whether it is necessary for special educational provision to be made in accordance with an EHC plan. It would serve no one's interests for children and young people to lose their EHC plans only to regain them following a fresh request for an assessment and the carrying out of an assessment. In deciding whether to cease to maintain an EHC plan, a local authority should ask itself whether a young person would meet the test for preparing and maintaining an EHC plan in the first instance. If the answer is 'yes', I do not see how a local authority could properly decide that it is no longer necessary for an EHC plan to be maintained.
>
> [92] . . . Given what I said in the preceding paragraph, local authorities should carefully consider whether they have sufficient up-to-date information about a young person before deciding to cease to maintain an EHC plan.
>
> [95] I decide that the First-tier Tribunal's decision involved an error on a point of law because it made inadequate findings about the special educational provision required to meet Ms M's special educational needs or, alternatively, gave inadequate reasons for the findings it did make. The tribunal simply found that Ms M needed a less structured and less formal 'setting'. It made no findings about the actual educational provision required, as opposed to the setting in which Ms M was to be educated/take part in learning activities. At the date of the tribunal's decision, it had sufficient evidence on which to base findings about the special educational provision she required yet did not do so. As a result, the tribunal was not in a position properly to answer the statutory question posed by s 45(1) – was it no longer necessary for Ms M's EHC plan to be maintained? Without more detailed findings about the special educational provision required, the tribunal could not be confident that the DL Footsteps programme would deliver what she required so that an EHC plan was not necessary".

36. On the separate issue of a Tribunal providing adequate reasons to the parties, the purpose of reasons is to tell the parties in broad terms why they have won or lost as the case may be and also be sufficient to enable an appeal court to judge whether any question of law arises. The test is one of adequacy: the decision "must contain an outline of the story that has given rise to the complaint, a summary of the tribunal's basic factual conclusions, and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts" (*DC -v- Ealing LBC* [2010] UKUT 10 AAC). "The duty to provide adequate reasons must be seen in the context of the proceedings of the case as a whole. So the parties' prior knowledge of the nature of the dispute and the relevant contentions on appeal will be relevant in deciding whether the reasons are adequate" (*LS -v- Oxfordshire County Council* [2013] ELR 429).

Ground One

The Ground: Failure to make findings regarding the special educational provision O required, which the Cheshire East case makes clear are an essential precondition to being in a position lawfully to determine the statutory question in section 45(1) of the 2014 Act and/or failure to provide adequate reasons.

37. There are only two circumstances under the provisions of section 45(1) of the 2014 Act that allow the Local Authority to cease to maintain an EHC Plan for O: where the Local Authority is no longer responsible for him, which is not the position in this case, or the Local Authority determines that it is no longer necessary for the plan to be maintained.

38. The circumstances in which it is no longer necessary for an EHC Plan to be maintained for O include where he no longer requires the special educational provision specified in the plan (s.45(2)).

39. When determining whether O no longer requires the special educational provision specified in his EHC Plan, the Local Authority must have regard to whether the educational or training outcomes specified in the plan have been achieved (s.45(3)).

40. The Local Authority may not cease to maintain the EHC Plan for O, unless it has reviewed that EHC Plan in accordance with regulation 19 and ascertained that he does not wish to return to education or training, either at the educational institution specified in the EHC Plan, or otherwise, or determined that returning to education or training would not be appropriate for him.

41. The Tribunal found at paragraphs 61 and 62 of its decision, as part of the conclusions, that: “Ms Leach who has known O for about 6 years was a persuasive witness” and the view of Ms Leach was that for O an “appropriate provision was blended provision, with a transition to a social care package”.

42. This is consistent with the Tribunal’s relevant findings of fact relating to Ms Leach:

- “Being in an educational setting was no longer reasonably required and so an educational programme with the focus being in the community was deemed suitable. Ms Leach added that with a view to transition, one foot in education and one in social care to smooth transition was deemed best. The focus was to move away from an educational setting and transition away into lifelong learning and practice those skills in the community through shopping etc” (paragraphs 20 & 21).

- “The role of the college is to integrate students into post 19 lifelong learning” (paragraph 25).

- “at college . . . he had a study programme built of Maths taught through food preparation, life skills, shopping, cooking. English included community participation, accessing prescriptive units and the rest was around life skills and other options he could choose” (paragraph 30).

- "Following the annual review the proposal was for 2 days of education in College and 2 days community based activities building on life skills" (paragraph 31).

- "Some of the remaining outcomes could have been met in the 2 days" (paragraph 32).

- "Prior to O leaving, Ms Leach stated that they were looking at a day service provision and not residential provision" (paragraph 35).

- "If funding had been agreed he would have been at college this year. She said they agreed a programme for the whole year. No student can attend without an EHCP" (paragraph 36)

- "It became clear that the blended approach, working towards full social care provision was best for O" (paragraph 37).

43. The Tribunal's conclusions are set out a paragraphs 61 to 66 of its decision:

"61. The Tribunal has to consider whether it is appropriate to cease to maintain. Both parties agreed that outcomes and whether they have or have not been met are an important factor. It is not a tick box exercise. Ms Leach did not go through each outcome and nor did Dr Bunn. The key point is that most of the outcomes are generic and some are long term ones. Ms Leach who has known O for about 6 years was a persuasive witness. She contended that O could carry on for another 10 years and not meet the outcomes. As far as English and Maths are concerned, she stated that he is not going to achieve accreditation but that is not determinative either. The other outcomes can continue in the community. Dr Bunn's evidence provides substantial support for Ms Leach's position that a couple can be met partially and that the outcomes are either generic or long term. The only specific one is about communication and interaction and turn taking. The others are generic/long term or show fluctuating achievement. For example to be socially appropriate with peers is a lifelong objective.

62. A wider question is, is it appropriate to continue with his EHCP, is it still needed and can provision be made without it? Ms Leach is well placed to know whether this is necessary and any likely gains to be made if educational provision is continued under an EHCP. Her clear view was that if O maintained a 4 day education programme he would have deteriorated. Her view was that appropriate provision was blended provision, with a transition to a social care package. This would involve meaningful activity, relationship building, living near family, developing life skills and links with the world of work. As to the college taking him back, she said if asked, she would not take O back as it would be detrimental for him. She did say he has plateaued in terms of his academic work but it is still meaningful for him to work on lifelong skills. If he continued in an educational setting he would be held back and his fantasies would continue. He needs to be part of a community. Dr Bunn disagreed and said O had the capacity to learn and needed an educational setting to do so. This was problematic as Dr Bunn also stated that O's

cognitive abilities were at the level of a young person at age 1:6-3:6 years ie still at a pre-school level. Further she stated in her report that O's performance suggested that very limited functional ability to logically acquire, remember and retrieve knowledge about the world around him was possible. This was inconsistent with her oral evidence. The Tribunal preferred the evidence of Ms Leach on this point who has seen the progress O is able to make academically – which is severely limited.

63. Dr Bunn also stated that she considered that education not for I year but until O reaches 25 is necessary. The Tribunal could not discern any basis for this statement. If one considers the progress O has made to date and the likely progress he will make it is not clear what formal education will provide for him. Dr Bunn's evidence suggested that a return to a school type provision was needed, but this is a young man of 21, who has not been able to access any interim provision, as agreed under the schedule attached to the JR where provision has been made of 15 hours of tuition per week. It is thus not at all clear that he would make use of full extended educational provision as advocated for by Dr Bunn. Dr Bunn's answers veered towards the inflexible as she appeared unwilling to accept that there may be more than 1 reason for example as to why O's mental health had broken down in the last few months and insisted that withdrawal from education was the only and or significant factor but could not provide her reasoning as to why other factors were not contributory eg a change in medication, difficulties with the police over an alleged assault incident, the withdrawal from all social care provision (apart from that provided by his mother), the reduction in structures and routines and so on.

64. Another issue considered by the Tribunal is what O's views are given his age. Does he want to continue in education?. Dr Bunn's report and Mr Haymans' report lack any information about what O wants. Mr Hayman said it is confidential information. The Tribunal have no independent evidence as to his views are. Dr Bunn referred to her report but that addresses other issues eg his hopes and desires. She suggested that he wanted to continue with his education and said he told her, he agrees [another] College but she had not recorded this in her report. Dr Bunn talked about past education and that O liked [the] College. The evidence was not clear enough to determine what O really thinks and it is not enough to determine that he wants to continue in education. It is concerning that his view is not properly before the Tribunal. AB brought up the Artwork Project work as indicating his views, but this was not in the bundle before the tribunal. It could have been adduced in evidence by the Appellant. AB's summary stated that O's main aspiration is to find work in the railways. He wants to be a part of his community. She stated that he would not understand that he needs English or Maths to do this. Ms Leach's evidence is that he can develop his English and Maths skills by practical implementation ie shopping, weights and measures and so on and that academic learning in these areas was not likely to result in any further gains. The Tribunal agreed with Ms Leach.

65. The Tribunal could not identify why the EHCP is still needed. We considered whether it will help O to engage and achieve. He has not

engaged and it is not clear why. He does not engage with small group work. There has been no engagement with the IPS provision. There has been no agreement to take up social care outside of term time. It is therefore difficult to see how he will engage and take up further educational provision of the highest level of provision – an extended day in residential provision and how an EHCP can help.

66. The Tribunal finds that the LA's decision to cease to maintain is upheld and that it is not necessary to maintain the EHC plan. The Tribunal having made this decision do not need to address changes to the EHC Plan and section F or recommendations for social care. There was discussion about the 25 hours of social care provision the LA intend to make and the fact that consideration will be given to 2:1 provision to start with in the community and that risk assessments will be needed."

44. The Upper Tribunal decision in the *Cheshire East* case makes clear that where a decision to cease an EHC Plan is being challenged the Tribunal must not make inadequate findings about the special educational provision required to meet the special educational needs nor, alternatively, give inadequate reasons for the findings it did make.

45. I conclude that the Tribunal reasons do not determine in its decision what special educational provision it considered O required. This was accepted in terms, quite properly, by Ms Walker in her submissions.

46. The Respondent raised the impermissibility of arguing a 'reasons' appeal, which has been addressed above.

47. Alternatively the Respondent argued that the Tribunal recorded the evidence given by Ms Leach regarding the appropriateness of the provision for O and also set out the instances where the evidence of Ms Leach was preferred to that of Dr Bunn. However, recitation of evidence without conclusion is not sufficient. A conclusion on the special educational provision for the purposes of a cessation of an EHP plan needs to be clear such that the Tribunal is in a position to answer the statutory question on 'necessity' posed by section 45(1). Even if the Tribunal decision is to be read as a whole and in some way can be construed as preferring the evidence of Dr Leach generally (although it does not indicate that), it still requires a clear finding of the special educational provision required, which is missing in O's case.

48. The conclusion at paragraph 65 references doubt over whether an EHC Plan would help O to "engage and achieve". But that conclusion also omits the identification and consideration of what special educational provision O actually required.

49. The Respondent argues that this case is illustrative of the difficulties in drawing a line between special educational provision and lifelong learning. The Local Authority's case was that, properly considered, the work to be done with O in the community through social care provision was not special educational provision but continuation of lifelong learning. It argued that Ms

Leach's evidence supported this and the Tribunal expressly accepted Ms Leach's evidence, therefore it was clear that the Tribunal accepted the Local Authority's arguments.

50. However, the Tribunal does not set out that conclusion and I accept the Appellant's argument that it would be surprising if the Tribunal had resolved the appeal on that basis without expressly confirming it. In addition the Tribunal has not addressed, or at least set out its reasoning, how such an approach is to be reconciled with section 21(5) of the 2014 Act, where a social provision which educates or trains a child or young person is to be treated as special educational provision. Indeed, there are passages in the conclusions, such as paragraph 64, that suggest a focus on formal education with a compatibility with section 21(5): "Ms Leach's evidence is that he can develop his English and Maths skills by practical implementation i.e. shopping, weights and measures and so on and that academic learning in these areas was not likely to result in any further gains. The Tribunal agreed with Ms Leach". There are other conclusions that strongly suggest that at the date of the Tribunal's decision there was additional evidence to demonstrate an educational element, such as Ms Leach's position, accepted by the Tribunal, that the appropriate provision was a blended provision with a transition to social care.

51. It may have assisted the Tribunal to have adopted the 'affinity test' suggested by the *Cheshire East* case: a local authority/Tribunal should ask itself whether a young person would meet the test for preparing and maintaining an EHC plan in the first instance. If the answer is 'yes', it is difficult to reach a conclusion that it is no longer necessary for an EHC plan to be maintained.

52. I refer to the *Cheshire East* decision at paragraph 95 and echo the conclusions there that the Tribunal, in the shoes of a Local Authority, made no findings about the special educational provision. As a result, the tribunal was not in a position properly to answer the statutory question posed by section 45(1).

53. It is my conclusion that pursuant to the statutory test the Tribunal in this case did not identify adequately the special educational provision O required.

54. It is suggested guidance to a Local Authority or tribunal when considering ceasing to maintain an EHC Plan under section 45 of the 2014 Act and whether it is no longer necessary for the plan to be maintained, that when assessing whether the child or young person requires the special educational provision specified in the plan, to record the detail of the special educational provision together with the reasons and evidence why maintenance of the Plan is not required. In doing so the Local Authority or tribunal is advised to apply the 'affinity test' and ask itself whether the child or young person would meet the test for preparing and maintaining an EHC Plan in the first instance.

Ground 2

The Ground: Erroneously focusing on the appropriate educational setting without first identifying the provision required.

55. At paragraph 61 of its decision the Tribunal discussed whether the educational or training outcomes had been met.

56. At paragraph 62 the tribunal asked itself: "A wider question is, is it appropriate to continue with his EHCP, is it still needed and can provision be made without it?"

57. The Tribunal considered that Ms Leach was well placed to know whether it was necessary for the plan to be maintained. The Tribunal refers to Ms Leach's evidence in terms of "a 4 day education programme"; "the college taking O back"; O "had plateaued in terms of his academic work"; "if he continued in an academic setting he would be held back"; and the Tribunal preferred "the evidence of Ms Leach who has seen the progress O is able to make academically". At paragraph 63 the Tribunal concludes that it is "not clear what formal education will provide to O" and "it is not clear O would make use of full extended educational provision".

58. There are parallels with the *Cheshire East* case, in which the Tribunal considered that the Tribunal had found: "a less structured and less formal daytime environment was a more suitable learning environment" (paragraph 89) and "Apart from Ms M having achieved her special educational and training outcomes, the First-tier Tribunal relied upon findings that a formal education setting would not help" (paragraph 90). The Upper Tribunal concluded that the difficulty with the tribunal's reasons was that: "it was largely unclear what, in the tribunal's determination, Ms M should be learning what skills she needed to attain".

59. In my respectful view the same can be said of the decision in O's case, where the Tribunal records, for example, that the clear view of Ms Leach was that "appropriate provision was blended provision with the transition to a social care package. This would involve meaningful activity, relationship building, living near family, developing life skills and links with the world of work". This is a broad view of the circumstances with no, or inadequate, findings on what special educational provision was required. This may have been perhaps because Ms Leach had not seen O since he left college in July 2022 and there was no up to date educational assessment by the Local Authority. At the date of the hearing the Local Authority had not put together the Adult Social Care package relied upon to meet O's needs, which made any comparison difficult, particularly in the absence of identifying any special educational provision that O required.

60. I also agree with the Appellant's submissions that without having identified what special educational provision O required, the Tribunal appears to have undertaken a comparison of the merits of education in a formal setting, with focus on the residential setting sought by AB for O, as against education in the community under an unspecified Adult Social Care arrangement.

61. Accordingly, it is my conclusion that, linked with Ground 1, the Tribunal made the error of law identified in the *Cheshire East* case and focussed on the appropriate setting to deliver education and training without identifying the special educational provision O needed.

Ground 3

The Ground: Failure to address O's ability to make progress in meeting the outcomes in his EHC Plan or the value of such progress to him and/or failure to provide adequate reasons.

62. A combination of section 45(3) of the 2014 Act and the decision in *Bromley London Borough Council -v- SENT* [1999] ELR 260 requires the Tribunal to stand in the shoes of the Local Authority and have regard to whether the educational or training outcomes specified in the plan have been achieved.

63. The Appellant argues that the Tribunal did not make sufficiently clear findings of fact on: (i) O's progress in achieving both academic and non-academic outcomes as identified in section E of his EHC Plan; (ii) O's ability to make further progress in respect of these outcomes; and/or (iii) the value of such progress to O. In respect of that final point the Appellant referred to *Buckinghamshire County Council -v- SJ* [2016] UKUT 0254 AAC, which highlighted the importance of taking into account the value of further educational progress: "it is true that Ryan was functioning only at a pre-school level. That meant, no doubt, that any further achievements would be small. That does not mean that they would not be valuable for Ryan in his adult life…" (para. 31).

64. The Tribunal correctly stated that this is not a tick box exercise and focussed on what it considered to be the key points. The tenor of the Tribunal's conclusion was that most of the outcomes were generic, some were long-term, or show fluctuating achievement, and as a whole were not useful indicators of necessity and the section 45 question. Section 45(3) only requires the Tribunal to have "regard to" whether the education or training outcomes specified in the plan have been achieved. The Tribunal did so and moved on to consider the wider question of whether the EHC Plan was still needed. Therefore this ground of appeal is not made out and is dismissed.

Ground 4

The Ground: Failure to consider whether the required provision would (as opposed to theoretically could) be made through a prospective, as yet unformulated, adult social care package and/or failure to give adequate reasons.

65. The Appellant relies upon the *Cheshire East* case at paragraph 95 and that it is necessary for the tribunal first to make sufficiently detailed findings regarding the special educational provision required so that the tribunal is then in a position to determine whether it is: "confident that the proposed [*Adult Social Care*] programme would deliver [*the special educational provision required*] so that an EHC plan is not necessary". The Appellant also relies on

the *Buckinghamshire* case in which it was held: "the tribunal was entitled to find that the plan is necessary… Necessity has to be judged practically and in light of the reality, not by reference to attainments that are more theoretical than real".

66. The Respondent argues that the Upper Tribunal should not be too exacting with words used by witnesses, 'could' or 'would', in their witness statements. It is the formulation made by the Tribunal that is important. It contends that the Tribunal concluded O did not need an EHC Plan and what needs he had can be met through a social care package.

67. It is my conclusion that this ground of appeal again addresses the same point covered in appeal Ground 1. Without a clear finding of what special educational provision is required, the Tribunal was not in a position to address whether or not that provision was achievable through an Adult Social Care arrangement or otherwise.

68. In my conclusion this issue does not particularly turn on whether or not the Tribunal was required to be "confident" that the provision "would" be made by an Adult Social Care package, or that it "could" or "might". Having regard to the *Buckinghamshire* case and the need for a focus on reality rather than the theoretical, it is my conclusion that there is no material difference between 'would' or 'could' in this context. There is unlikely to be a guarantee that an Adult Social Care package or arrangement would deliver the special educational provision required such that an EHC Plan is no longer necessary. Despite planning for the best, there are any number of variables that, in reality, may potentially make completion of elements of the Adult Social Care package not possible. Therefore 'would' and 'could' may be interchangeable. What matters is that in a practical sense there is a realistic prospect that the Adult Social Care arrangement can achieve that aim.

69. Accordingly this head of appeal is dismissed and adds little to the issues already addressed. The touchstone for the assessment of the suitability of any Adult Social Care programme is adequate conclusions on the special educational provision required, which were missing in both the *Cheshire East* case and O's, as addressed above under Ground 1.

Ground 5

The Ground: Breach of regulation 30(1) of the Special Educational Needs Regulations 2014 in circumstances which the Tribunal determined that O's views regarding returning to education or training were not properly before it.

70. The Appellant accepted in its submissions that this matter was not raised in its grounds of appeal.

71. Permission to argue this ground of appeal is granted. There is no disadvantage to the Respondent in addressing it. The Respondent referred to regulation 30 in its Response and the issue was set out in both the Appellant's

Reply on 13 October and skeleton argument 23 October 2023. The Respondent, through Ms Walker, has addressed the point.

72. The Appellant relies upon regulation 30(1) of the 2014 Regulations which provides that the local authority "may not" cease to maintain an EHC plan: "unless it has reviewed that EHC plan in accordance with regulations 18 and 19 and ascertained that the young person does not wish to return to education or training, either at the educational institution specified in the EHC plan, or otherwise, or determined that returning to education or training would not be appropriate for the young person".

73. Regulation 19 provides an obligation on the Local Authority to consult "the young person and take into account their views wishes and feelings" and to consider their progress towards achieving the outcomes specified in the EHC plan.

74. The Appellant relies upon the Tribunal's conclusion that: "The Tribunal have no independent evidence as to [what O's] views are . . . The evidence was not clear enough to determine what O really thinks and it is not enough to determine that he wants to continue in education. It is concerning that his view is not properly before the tribunal" (paragraph 64).

75. The Appellant argues that regulation 30 can only be read as expressly prohibiting the Local Authority from ceasing to maintain the EHC Plan until it has at least discharged the statutory requirement to ascertain O's view regarding returning to education or training. The Appellant also relies upon para 9.203 of the Code of Practice. The Appellant argues that the Tribunal standing in the shoes of the Local Authority on appeal, was similarly required to ensure that O's view had been ascertained and taken into account before it could lawfully uphold the Local Authority's decision to cease to maintain the EHC Plan.

76. The Respondent contended that there was no reasonable basis on which it could be said that either the Local Authority or the Tribunal failed in not making explicit a need to ascertain O's view. The Respondent refers to difficulties in securing a meeting with O, but no express request for views was made. Equally no steps were taken by the Appellant to provide them. Neither of the two experts reflected O's views. If the request had been made formally, O's mother would have been best placed to obtain his views.

77. In the typical course of events complying with regulations 30 and 19 should not be a problem for a Local Authority or a tribunal, but difficulties may arise, for example, if there are circumstances where the young person and/or their parents either do not engage with the Local Authority; or the young person was not able to provide their wishes on the questions required to be answered; or, as in this case, there was insufficient evidence before the Tribunal.

78. Regulation 19 simply requires consultation, not negotiation with an agreed outcome. Therefore the Local Authority can request input and if none is

forthcoming, or, once consultation has occurred the Local Authority takes a contrary view in good faith, provided it has taken those views into account it will have discharged its consultation obligation.

79. Regulation 30, however, requires the Local Authority to ascertain the young person's wishes. Regulation 30 does not prescribe how that is to be done. It may not be necessary to ascertain that information directly from the young person in circumstances where, for example, it would be proper to obtain it from other sources or evidence.

80. In this case, the Tribunal referred to AB's summary and then recounted Ms Leach's evidence, with which the Tribunal agreed that O: "can develop his English and Maths skills by practical implementation i.e. shopping, weights and measures and so on and that academic learning in these areas was not likely to result in any further gains" (paragraph 64). There is an implication in that paragraph, leading into paragraph 65, that the Tribunal considers that the Local Authority may cease to maintain the EHC Plan because returning to education or training would no longer be appropriate for O.

81. However, if that is the approach taken by the Tribunal, it appears only to have focussed on the academic learning element and not the broader view of 'education and training' set out in the statutory definitions referred to above, or has made a decision without first ascertaining a view based on any element of the evidence that O does not wish to return to education or training, either at the educational institution specified in the EHC Plan or otherwise. Either approach demonstrates an error of law.

82. On a practical level, if a tribunal find itself in the unusual position where regulation 30 is engaged and the wishes of the young person have not been ascertained, then it should be proactive in seeking that input. In this case for example, AB gave oral evidence and that point may have been expressly put to her. If the position remained unclear then suitable and proportionate orders could have been made after discussion with the parties.

83. The appeal is successful on Grounds 1, 2 and 5 and after considering representations by the parties the matter shall be remitted to a wholly different tribunal panel of the First-tier Tribunal for reconsideration at an oral hearing. That is the most appropriate course of action given the matters for consideration and the potential time scales involved.

A Freer

Judge of the Upper Tribunal

Signed on the original/authorised for issue on 15 February 2023