Neutral Citation Number: [2026] UKUT 203 (AAC)
Appeal No. UA-2026-000190-HS

RULE 14 Order:

By an order dated 24 May 2026, the Upper Tribunal has prohibited the disclosure or publication in relation to these proceedings of the name of the child whom the case concerns, the child's mother, the educational psychologist concerned in the case, the child's school, the SENCO concerned in the case and of any matter likely to lead members of the public to identify any of those persons. Breach is punishable as a contempt of court by a fine or imprisonment.

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

DWL

Appellant

- v -

Milton Keynes City Council

Respondent

Before: Upper Tribunal Judge Ward
Hearing date: 20 May 2026
Mode of hearing: Cloud Video Platform

Representation:
Appellant: Emma Christie (at the hearing only) (instructed through Advocate).
Respondent: No attendance at the hearing. Written representations from Kelvin Sarfo.

On appeal from:
Tribunal: First-tier Tribunal (HESC Chamber)
Panel: Judge Kernthaler, Ms Graham
Tribunal Case No: EH826/25/00107
Tribunal Venue: On papers
Decision Date: 22 December 2025

SUMMARY OF DECISION

The FtT's decision to dismiss an appeal against a decision refusing to make an EHC Plan erred in law by overlooking a material consideration and by failing to address

anticipated needs and because the absence from the bundle of a key document resulted in an unfair hearing. The decision is remade so as to require an EHC Plan to be made.

KEYWORD NAME (Keyword Number)
Failure to prepare an EHC Plan (85.7)

***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 that the decision of the First-tier Tribunal issued on 22 December 2025 is in error of law and is set aside. Acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007, I remake the decision as follows:

The appellant's appeal against the respondent's decision not to make an EHC Plan as set out in their letter dated 14 July 2025 is allowed. The respondent must now proceed to make an EHC Plan.

REASONS FOR DECISION

Introduction

1. The pupil who this case is about, to whom in the interests of preserving anonymity I shall refer simply as "E", is aged 11 and a pupil in Year 6. She is, accordingly, approaching transfer to a secondary school in September 2026. She has a diagnosis of ADHD and Autism Spectrum Disorder (ASD) with a pathological demand avoidance profile. She attends a mainstream primary school, the C School.

2. An assessment was carried out of E's Special Educational Needs (SEN). The respondent accepts that E has SEN but considers that appropriate provision can be made for those needs from resources ordinarily available at a maintained school in England at a cost of less than £6,000, with the consequence that it was not necessary to make an Education Health and Care Plan (EHCP).

3. E's mother, the appellant, however, considered that an EHCP was necessary. The respondent refused this by a letter dated 14 July 2025. In her appeal to the First-tier Tribunal (FtT) the appellant referred to "various strategies and interventions that go beyond what can reasonably be expected of mainstream school provision including 1:1 therapeutic support, personalised sensory programmes, daily emotional regulation strategies and a detailed transition plan." These were put forward in the educational psychology report which the LA had commissioned. The appellant, outlining the reasons for seeking an EHCP, explained that [bullet points added]:

> "Ella's ability to manage independently is conditional upon those supports being implemented and successful which cannot be guaranteed without the protection of an EHCP. An EHCP is essential to ensure that:
> ● [E]'s needs are consistently recognised and met across settings
> ● She receives the emotional and sensory regulation support required to access learning
> ● Her secondary school transition is planned, monitored and appropriately resourced
> ● There is legal accountability and oversight for the provision she requires."

The law

4. By Children and Families Act 2014, s.37:

   "(1) Where, in the light of an EHC needs assessment, it is necessary for special educational provision to be made for a child or young person in accordance with an EHC plan—
   (a) the local authority must secure that an EHC plan is prepared for the child or young person, … ."

5. The authorities indicate that:

   a. necessity falls somewhere between indispensable and useful but is not susceptible of further definition and as a word in common usage, it is that which should be applied: *Buckinghamshire CC v HW* [2013] UKUT 470 (AAC)
   b. what is necessary is an evaluative judgment based on the facts of the particular case: see *Nottinghamshire CC v SF and GD* [2020] EWCA Civ 226 and the Upper Tribunal authorities approved therein; and
   c. the test of necessity has to be judged as a practical matter: *Buckinghamshire CC v SJ* [2016] UKUT 254 (AAC).

The FtT's decision

6. The FtT decided the case on the papers, with the agreement of the parties. I am told that the appellant agreed because she had been advised that to wait for an in person hearing would involve a 9 month delay, which would have meant it could not be heard before E's transition to secondary school. The FtT had to grapple without assistance with a substantial and fragmented bundle, containing a lot of detail, and its task cannot have been an easy one. It recorded that having read the evidence in the 782-page bundle "the key points arising are [E's] tendency to mask her ASD leading to dysregulation at home and concern about her transition into secondary school without an EHC Plan in place.

7. It proceeded to address two key parts of the evidence. Where the tribunal recites parts of the evidence, I infer that it was accepting that evidence and intending to make findings in those terms, which I recast as follows:

a. the school has embodied the recommendations of the educational psychologist ("the EP") in practice;
b. the school has accessed a specialist teacher who has updated E's one page profile and will continue to be involved on her transition into secondary school;
c. (in a paragraph whose meaning is not wholly clear) "Whilst there is some disagreement from the appellant about the EP report, there is no dispute as to the measures being put in place as set out in the report";
d. the school was confident it was meeting E's needs through strategies of physical and sensory breaks, use of visual cue cards, access to sensory tools and advance preparation for changes to her routine or environment;
e. E masks at school and her anxiety impacts her well- being;
f. she has a friendship group and is a valued member of her class;
g. she is working at or above age-related expectations; and
h. a robust transition plan into secondary school was important.

8. Points d to h above were based on the evidence of the SENCO at C school ("the SENCO"), in a letter recorded by the FtT as dated 25 September 2025 but in fact dated 23 September.

9. From this material the FtT went to a conclusion that:
a. E's needs were being met currently and she is working above age-related expectations and able to participate fully in school;
b. the provision recommended by the EP could be met by a mainstream school from its standard resources and would not likely be over the £6,000 resource line;
c. it will be key for E to have a robust transition plan to her secondary placement, and that the secondary school has a good knowledge of how to work with young people with ASD and PDA profiles.… .

Permission to appeal and Grounds

10. The appellant, then acting in person, submitted grounds of appeal. On giving permission to appeal, I indicated that while I was not limiting permission, my key reasons for doing so related to the following grounds, which were set out in further detail in my ruling:

Ground 1:

Was the FtT's finding that the EP's recommendations were being fully delivered in practice and that there was no dispute in error of law, as being a mistake falling within *E v SSHD* [2004] EWCA Civ 49 and/or perverse on the evidence before the FtT?

Ground 2:

Was the FtT's decision in error of law, either by reason of a mistake falling within *E v SSHD* and/or by reason of procedural error in its reliance on evidence from the SENCO, when before the hearing the SENCO had changed her position towards favouring an EHCP and (on the appellant's case) had

communicated this to the LA in writing, but that letter was not in evidence before the FtT?

Ground 3:

Was the FtT's decision in error of law by reason of an erroneous failure to take into account future needs, when the question of E's needs following transfer to secondary school in September 2026 had expressly been raised by the appellant?

Ground 4:

Did the FtT err, by reason of a failure to give adequate reasons, for rejecting the Appellant's case that the needs assessment was incomplete?

Other procedural issues

11. With a view to deciding the appeal as far in advance of E's secondary transfer as possible, I abridged time for some stages in the procedure and directed an oral hearing. Those Directions were issued to the parties on 17 March. On 2 April the respondent filed a submission (but failed also to send it to the appellant, thought his had been directed). The 6 page submission invited the Upper Tribunal to conclude that, for reasons it gave, the decision of the FtT had not been in error of law. It indicated that the respondent would be content with a decision on the papers, would accept a decision without reasons and did not seek a hearing. As a hearing had previously been directed anyway, on 17 April the parties were instructed to keep the proposed hearing date free and on 23 April a formal notice of hearing was issued. No response was received from the respondent and on 12 May a reminder was sent asking for conformation of the respondent's attendance. This resulted in an email from an officer in the respondent's legal services department asking the purpose of the hearing, which was answered by sending a further copy of my grant of permission and case management directions. By the hearing date, the respondent had indicated that they would not participate in the hearing and would rely on their written submissions.

12. The hearing, listed to commence at 1030, had started about 45 minutes late owing to difficulties in establishing the video link. Proceedings were interrupted by the clerk at 1126 saying that the respondent wished to take part in the hearing after all. Shortly after 1120 the clerk had been alerted to the issue and forwarded to me a letter sent at 1003 in which an officer in legal services had explained that they had not been able to obtain counsel and would not be attending or represented. I indicated I would wish to hear what the respondent had to say about attending at this late stage and this was communicated to the respondent at 1128.

13. By 1138 the respondent had not joined the video link nor had any message been received indicating that it had experienced any technical difficulty. I ruled that the hearing was to proceed and the respondent, if they continued to wish to take part, were not to be permitted to do so. The respondent had had ample notice of the hearing and of its purpose. While it would be surprising that it should have been unable to obtain counsel for a short hearing by video link, appearing in the Upper Tribunal is far from the exclusive domain of counsel in any event and the respondent could have sent someone else, had it wished. The respondent's position had varied between not responding to the Upper Tribunal in a timely manner and, when they did do so, consistently indicating that they would not attend, up to 27 minutes before the start of the hearing. It was unreasonable to expect that their late change of heart could instantly be communicated to the clerk or the judge. It would be unfair to counsel, acting pro bono, to have to restart her submissions on account of the respondent's late change. The Upper Tribunal had the respondent's submission, which included references to case law and aspects of the evidence, so its stated position would be taken into account in the absence of representation. Given the extreme lateness of the decision to be represented, it was highly unlikely that any representative would have had the opportunity to consider the matter adequately and so was unlikely to add anything of significant value to the written submission. Allowing the respondent to participate at that point (having already given them 10 minutes to join) would have resulted in unacceptable delay to the hearing and potentially the need for an adjournment. I considered that the practicable steps had been taken to allow the respondent to participate and that to permit it at that point or subsequently would be disproportionate.

Consideration of Grounds

Ground 1

14. The issue is whether one can be satisfied, to a reasonable degree of certainty, that the required educational provision will be delivered without an EHCP in place: see *SC and MS v Worcestershire CC* [2016] UKUT 267. The FtT's view that the provision was being provided faces the difficulty that it was not considered by the EP to be within ordinarily available provision ("OAP") (FtT p269) or by the SENCO (FtT pp 575 and 714) and was not being documented as such.

15. The respondent argues that even if the FtT overstated the extent to which recommendations were being delivered at the time of the hearing, it was not material to the outcome and not an error of law. The LA lists evidence that was before the FtT and submits that it was entitled to conclude that the type of provision required fell squarely within what was available within that made by a mainstream school. It submits that "The FtT did not find that every recommendation as already in place; rather, it concluded that the school could and would deliver the required provision without the need for an EHCP."

16. The FtT's decision does not support this position. At para 15c, where the FtT lists matters to which it had had regard in reaching its conclusion it expressly

finds that "The recommendations from the EP report have been fully implemented by the school or the LA."

17. The FtT as a specialist tribunal is entitled to make its own assessment of whether provision is OAP, but the fact that those on the ground consider it is not is a material factor to whether it is in fact being provided and was not addressed by the FtT in its decision. Public law terminology is somewhat elastic and an alternative way of looking at the FtT's failure to take into account that some of the provision was considered not to be OAP and so was not being provided could be to say that a material consideration was overlooked. In any event, even the respondent does not seek to argue that the recommended provision was being delivered in full and, to the extent that the FtT did so find, it was a mistake of fact, is undisputed and was not the appellant's fault. The appellant succeeds on this ground.

Ground 2

18. The SENCO's letter dated 23 September 2025 had been in evidence before the FtT. On 5 November, she emailed the appellant, saying:

> "I will also provide a report for you to out in [E's] tribunal paperwork. I believe it is now appropriate to argue that [E] would benefit from an EHCP at secondary school, in order to safeguard her mental health and ensure that she continues to flourish and achieve her full potential."

19. The "report" referred to turns out to be a further letter from the SENCO, dated 12 November. It indicated that its purpose was to provide an "updated overview of [E's] current presentation and to outline why we believe she may require an EHCP to ensure her needs can be appropriately met, particularly as she prepares for transition to a secondary school." It referred to outward positive factors such as academic functioning and social integration and a calm and capable demeanour but also to concerns about her emotional well-being and ability to cope with day-to-day demands which were increasingly a cause for concern. Positive traits, seen as masking behaviour, "increase[d] the risk that [E's] needs may be underestimated, particularly in a larger and more complex educational setting." E showed certain behaviours suggesting that she was experiencing significant emotional strain, even when appearing outwardly settled. The letter referred to the transition to secondary school in September 2026 and the significant increase in academic demands this would bring (which it goes on list), observing that "For pupils with underlying anxiety, these changes can significantly increase emotional dysregulation and reduce capacity to access learning". In conclusion, the SENCO writes:

> "We therefore request that the Local Authority gives careful consideration to the need for an EHCP in order to ensure her emotional and mental health needs can be met effectively and proactively, and to reduce the risk of longer-term impact on attendance, well-being and access to education."

20. This letter was not in evidence before the FtT. The appellant's case is that, given in particular the terms of paras 13-15 of the FtT's decision which placed significant reliance on the SENCO's evidence, it would plainly have been material.

21. What initially became of the letter is not entirely clear. The appellant's evidence is that she was unaware of it until, following a post-hearing discussion with the SENCO on 4th January 2026, the SENCO emailed her that day saying "I am going to look into this because I sent them all the updated paperwork and I also wrote another letter stating that [E] would benefit from an EHCP at secondary school." There is no other evidence before me from the SENCO on this point.

22. The respondent's position is that the absence of the letter was not as the result of a deliberate or negligent action on its part, did not deprive the appellant of a fair hearing and was not material to the outcome. Its case is that it did not have any copy of, or record of the letter, which had been requested by the appellant directly from the school at the time of the FtT proceedings and it was therefore not available to be disclosed.

23. In any event, submits the respondent, there was already evidence of [E]'s masking and anxiety before the FtT; the 12 November letter did not contradict the evidence before the FtT; it did not identify unmet needs or provision beyond ordinarily available resources and the reference to a possible EHCP at secondary transfer was "cautious and speculative". It was highly unlikely that the FtT would have reached a different conclusion had the letter been before it.

24. On the balance of probabilities, I conclude that the SENCO did send the letter to the respondent. That is the clear inference from her email of 4 January 2026. It is supported by the fact that her previous letter (23rd September 2025) appears in Section D of the FtT bundle, containing evidence provided by the respondent, suggesting an effective route of communication between the SENCO and the respondent. It is not easy to see why she should have done anything other than what it appears she had successfully done in September to convey the 12 November letter to the respondent. It may, for whatever reason, not have reached the relevant person or file within the local authority – these things happen.

25. On the basis of that finding, the respondent should have disclosed the letter. The authority relied on by the appellant was cited as *JF v LB Croydon* [2016] UKUT 0607 (AAC). I believe that is a mistake and the correct citation is *JF v LB Croydon* [2006] EWHC 2368. Although the latter was a High Court case, that was, like the present case, a statutory appeal from a tribunal, though under the regime in force before the Tribunals, Courts and Enforcement Act 2007. At [11], Sullivan J (as he then was) observed:

> "Although the proceedings are in part adversarial because the Authority will be responding to the parents' appeal, the role of an education authority as a public body at such a hearing is to assist the Tribunal by

> making all relevant information available. Its role is not to provide only so much information as will assist its own case."

Having observed (at [13]) that "Whether the … failure to give this information to the Tribunal was deliberate or an oversight is of no consequence for present purposes", he went on to refer to previous authority:

> 14. It is common ground that the relevant test where information has not been disclosed to the Tribunal is to be found in the decision of the Court of Appeal in *A v Kirklees Metropolitan Council and Dorsey* [2001] EWCA Civ 582; [2001] ELR 657. The detailed facts of that case are not relevant for present purposes. It is sufficient to say that a child with special educational needs had a number of wheelchair accidents at his school. When a further accident occurred, he did not return to the school and a new school had to be found. At the hearing before the Tribunal, the Local Education Authority, through no-one's fault, failed to mention the fact that a similar wheelchair accident had occurred some years previously at the school it had successfully argued for before the Tribunal. The parents' appeal was dismissed by Turner J and their appeal to the Court of Appeal was dismissed upon the basis that it was not realistic to think that the Tribunal would have felt able either to give any weight to the earlier accident or to embark on any further enquiry.
>
> 15. The applicable principles are to be found in holdings (1) and (2) in the headnote:
> (1) the legal nature of the parents' case could be put in either of two ways: a material factor was omitted from the tribunal's consideration, or the family was denied a fair hearing. The matter would be approached upon the basis of well-established principles of domestic law. An argument based on Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 did not anything material in the present context.
> (2) The question was whether the information could have made a difference. If it was relevant, or if ignorance of it was a source of unfairness, that it would be only exceptionally that relief would be denied. *R v Chief Constable of Thames Valley ex parte Cotton* at para 60 applied..."

26. There is no reason to conclude that the failure to provide the 12 November letter was deliberate and I do not do so. The failure to provide the evidence in *A v Kirklees* was expressly found to be through no-one's fault, but that did not prevent the principles set out at [15] in the extract quoted above from being applied. I apply them to this case on a similar basis.

27. Applying the test of whether the missing letter could have made a difference, while I agree with some of the respondent's observations about the content of the letter, they do not overcome the fundamental issue that the FtT had, at paras 13-15, placed substantial weight on the SENCO's earlier letter. That letter had indicated that E's primary school was able to meet her needs. When referring to the transition to secondary school, it anticipated that her anxiety

levels were likely to rise and that she would require additional support. It did not however suggest that an EHCP was indicated.

28. By 5 November, however, the SENCO was indicating that she believed that "it is now appropriate to argue that [E] would benefit from an EHCP at secondary school" (email of 5 November, above). Her view had evolved and the FtT might not have placed the considerable weight which it did on her letter of 23 September had it had the letter of 12 November before it.

29. In fact, even without the letter, the FtT did have evidence before it, in the form of the email of 5 November, that the SENCO's view had evolved. The FtT's unqualified acceptance of the earlier evidence without reference to this suggests that it may have missed the point, which potentially opens up other public law grounds. It is not necessary to explore these; it suffices to say that the FtT's failure to address the 5 November email further strengthens the unfairness resulting from the omission, even if inadvertent, of the 12 November letter.

30. I raised at the hearing the point that it might be suggested that it would have been open to the appellant, to whom the 5 November email was addressed, to have raised with the FtT that the bundle did not contain the further material from the SENCO which, on the basis of that email to her, could have been anticipated. Ms Christie submits that the appellant may continue to rely on *JF*. She had experienced considerable difficulty in securing timely disclosure of material from the LA, culminating in her Stage 2 complaint, which was upheld on 12 December 2025.

31. The decision letter on the complaint is in evidence before me. Among other things, it provides:

> "Please accept my apologies that you were not provided with the tribunal pack with your SAR disclosure, there was miscommunication about this between the Information Governance team and the SEND team. All information in [E]'s file including the tribunal pack has been issued to you today 12/12/2025.
> …
> I am upholding your complaint at stage two due to the error with the tribunal pack. A new process has ben agreed between the Information governance team and the SEND team that will stop this issue occurring in future."

32. This letter therefore indicates that the "tribunal pack" was only issued by the respondent on 12 December, a Friday. The FtT sat on 15 December, the next working day. On that timescale, even if she received the material on the date it was issued, it would be unreasonable to expect the appellant, then acting in person and with family responsibilities, to have identified the omission of the anticipated letter from the respondent's evidence and communicated it to the FtT in time for that information to be passed to the panel considering the case on the Monday.

33. While I do not consider that the FtT's reliance on the SENCO's views in their unmodified form constituted an error of fact and so would not fall within *E v SSHD*, I do find that there was a procedural error for the reasons above. It resulted in the appellant's case being denied a fair hearing and in a potentially material factor being omitted from the FtT's consideration. The FtT consequently erred in law on this Ground also.

Ground 3

35. In para 8 of its decision, the FtT indicated its understanding that the appellant's position was that "[E] needs a plan in place to set out the provision that she needs and to help with planning her transition into secondary school." The appellant complains to the Upper Tribunal that there was "an erroneous failure to take into account future needs."

36. The difference in the demands placed on a child in secondary education compared with primary education. was summarised in the 12 November letter, but even in its unfortunate absence from the evidence, may be taken as well-known to the specialist FtT:

> "This transition will represent a significant increase in both academic and social demands. Secondary school environments typically require pupils to manage multiple teachers, navigate a larger site, follow more complex timetables, and demonstrate higher levels of independence and organisational skills."

37. The appellant directs me to *Buckinghamshire CC v HW* where at [21] the Judge observed:

> "The statutory test inevitably directs attention to something that will happen after the assessment has been made. The assessment is made for a purpose. That purpose involves identifying provision necessary to meet a child's needs. The assessment cannot realistically limit itself to the immediate present. When there will be a change of circumstances in the near future, it is impossible to ignore that future… I can see no reason in principle why it should not be permissible to take account of the future, subject to the practical evidential problems that this may involve. There is some support for this…, in paragraph 5.66 of the Code, which refers to the importance of planning ahead when transferring schools. It would be strange if, in the midst of so much statutory provision for a child with special educational needs, there were no provision requiring or even allowing for those needs in a new school to be anticipated, at least to the extent that that is possible."

38. The respondent's case on this Ground is:

a. the FtT was not required to speculate about future difficulties in the absence of evidence that mainstream provision would be unable to meet E's needs;
b. contrary to the appellant's case, the FtT expressly recognised the importance of transition planning;

c. citing *Nottinghamshire CC v SF* [2020] EWCA Civ 226, the statutory test does not require an EHCP solely because transition may be challenging;
d. citing *Buckinghamshire CC v SJ* [2016] UKUT 254 (AAC), future needs are relevant only where there is evidence that current provision will not be sustainable or that mainstream provision will be unable to meet needs. At the time of the FtT's decision, evidence showed good academic progress, social inclusion, an understanding of E's needs, management of her anxiety and that specialist support had already begin to inform transition planning; and
e. the FtT applied the correct test and was entitled to teach the conclusion that it did.

39. No particular part of *Nottinghamshire* is relied upon. The proposition for which the LA relies upon it is uncontroversial so far as it goes – no doubt many children find the transition challenging whether or not they have special educational needs - but insufficient. The case is authority for the proposition (at [38]) that

> "The function of the FtT in these cases is to find facts and to exercise an evaluative judgment by using its specialist expertise about whether an EHC plan is necessary. That is a deduction from the facts and it will depend on the nature and extent of the provision required for the child concerned. It is a fact specific conclusion."

Here, however, the FtT's decision contains no indication that they considered whether her needs, whether met or unmet, might differ once E transferred to the radically different setting of a secondary school, by then less than 9 months in the future, and so whether an EHCP would be required..

40. Nor is any particular part of *Buckinghamshire v SJ* relied upon by the respondent. I can find no support in it for the proposition which it seeks to derive from it.

41. Nor is the respondent's reliance on aspects of the evidence of the current position as at December 2025 necessarily an answer. As Ms Christie notes, para 6.23 of the Code of Practice states:

> "Equally, it should not be assumed that attainment in line with chronological age means that there is no learning difficulty or disability. Some learning difficulties and disabilities occur across the range of cognitive ability and, left unaddressed may lead to frustration, which may manifest itself as disaffection, emotional or behavioural difficulties."

42. Consequently, the appellant succeeds on this Ground also.

Ground 4

43. This Ground was not pursued with any vigour at the oral hearing. In view of the decision I have reached on Grounds 1 to 3, there is no need to consider this Ground further.

Remedy

44. The respondent's submission response merely invited the Upper Tribunal to dismiss the appeal on the basis that the FtT's decision contained no error of law and made no submission as to what should happen if the Upper Tribunal were to disagree. Ms Christie invites the Upper Tribunal to set the FtT's decision aside and to remake the decision so as to allow the appeal, with the consequence that the respondent would be required to prepare an EHCP.

45. With hindsight, it is possible to see that this case was far from well-suited to a decision on the papers and it is unfortunate that, as I was told, the driving force towards the appellant's choice of such a route was the long delay before an in-person hearing could take place. While it is to a degree understandable how errors in the FtT's decision may have occurred, their number and significance is such that it is appropriate to set its decision aside.

46. As to whether I should remake the decision rather than remit the case to the FtT, I am mindful that in dealing with an appeal under s.37, the FtT (and, if remaking the decision, the Upper Tribunal) is not concerned with what the content of the EHCP should be, merely with whether it is necessary that there should be one: see *Buckinghamshire v SJ* at [28] (in particular the last two lines). If there is disagreement as to the content of an EHCP that is potentially the subject of a further appeal.

47. In the present case, there is in particular:

    a. the evidence from the EP and from the SENCO that some elements of the provision recommended by the EP do not constitute OAP;
    b. the evidence of the email exchanges between the appellant and the SENCO indicating that in consequence those parts of the provision were not being provided; and
    c. the letter of 12 November from the SENCO indicating the evolution in her view towards recommending that consideration be given to issuing an EHCP, in particular with a view to assisting with the demands on E of secondary transfer.

48. As the FtT did, I attribute substantial weight to the SENCO's evidence. In my view, by reason of her role at E's school, her expertise and experience as a SENCO and her extensive dealings with the appellant, her professional view is a well-informed one.

49. For the reasons I gave in allowing the appeal on Ground 3, I do not consider that the LA's submissions as to why an EHCP is not needed to address secondary transfer hold good.

Conclusion

50. For the above reasons, I conclude that it is necessary that an EHCP be made in order to be reasonably confident that E will receive the special educational

provision she requires and remake the decision so as to allow the appellant's appeal against the LA's decision refusing to make an EHCP for E.

Christopher Ward
Judge of the Upper Tribunal

Authorised by the Judge for issue on 24 May 2026