Neutral Citation Number: [2026] UKUT 86 (AAC)
Appeal No. UA-2025-001293-HS

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

MB

Appellant

- v -

Hertfordshire County Council

Respondent

Before: **Upper Tribunal Judge Citron**
Decided on consideration of the papers

Representation:
Appellant: by Olivia McGonigle of counsel, instructed by IPSEA
Respondent: by David Lawson of counsel, instructed by Legal Services, Hertfordshire County Council

On appeal from:
Tribunal: First-Tier Tribunal (HESC Chamber) Special Educational Needs and Disability
Panel: Judge J McCarthy, Specialist Members B Graham, S Morris
Tribunal Case No: EH919/24/00305
Hearing date: 6 May 2025
Decision date: 14 May 2025

SUMMARY OF DECISION

85. SPECIAL EDUCATIONAL NEEDS
85.4 Special educational provision

The First-tier Tribunal rejected a number of proposed 'provisions' for inclusion in Section F of the Appellant's EHC plan. The Appellant was an 18-year-old with special educational needs who attended a college, and the proposed provisions included a drama group, volunteering activities, gym sessions and membership, a therapeutic gardening course, and a programme to help her with travelling. The Upper Tribunal sets out the basic conditions to be satisfied if such proposals were to be included in Section F (see paragraph 9 of the decision) and concludes that the First-tier Tribunal erred in not adequately explaining why they were not satisfied in this case. Despite this conclusion, the Upper Tribunal refrained from setting the tribunal decision aside,

as the EHC plan in question had now been replaced by a new EHC plan for the Appellant.

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, referred to above, involved the making of an error on a point of law. However, the decision is not set aside.

REASONS FOR DECISION

1. In what follows references to

    a. the "**tribunal**" and to the "**tribunal decision**" are to the First-tier Tribunal and its decision as referred to above;

    b. numbers in square brackets are to paragraphs of the tribunal decision (unless otherwise indicated);

    c. "**section**" or "**s**" are to sections of the Children and Families Act 2014;

    d. "**regulations**" are to the Special Educational Needs and Disability Regulations 2014.

The tribunal decision

2. The tribunal decision provided the following background:

    a. MB was born in 2006 and so was 18 at the time of the tribunal decision.

    b. MB's appeal to the tribunal was made under s51 and related to the contents of Sections B and F of her EHC plan.

    c. MB was attending a mainstream post-16 institution, where she was studying courses relating to childcare. She had diagnoses of GDD and ADD, which impacted her ability to learn. Her learning difficulties included a speech and language disorder. She had difficulties with social interaction and sensory processing. She had hypermobility and delayed gross and fine motor skills. The tribunal decision recorded MB's views, wishes and feelings as follows: she had a lot of interests, including academic subjects. She wanted to interact with other people her age and felt her difficulties with confidence held her back. She was

happy with her course in Early Years and Childcare and wanted to work in that sector or as a teaching assistant or teacher.

3. The tribunal decision made findings in relation to Section B of MB's EHC plan, between paragraphs 14 and 34. Paragraphs 35 to 74 made findings in relation to Section F; these, reflecting the format of Section F of the EHC plan itself, were organised by reference to the outcomes sought for MB, as set out in Section E of MB's EHC plan. In this appeal, the tribunal decision's conclusions as to the following seven proposed 'provisions' for inclusion in Section F of MB's EHC plan, are being challenged:

    a. proposed provision of a weekly drama/performing arts group outside of college with the support of mentor: the relevant paragraphs of the tribunal decision read as follows:

> 37. On behalf of MB, the parents request she should be provided with a weekly drama/performing arts group outside of college with the support of a mentor. This is to address MB's social isolation needs which are not met in college.
>
> 38. We do not find evidence to support this proposal as it is not related to MB's college studies and therefore is not provision that is reasonably required to ensure she can overcome barriers to learning.
>
> 39. We also see that this group activity would be in addition to the usual post-16 education provision of 18 hours per week. We do not have evidence to indicate that MB requires educational provision beyond the usual college hours. This is a further reason why we reject this proposal.
>
> 40. Our final comment is that this proposal appears to be a social care need to help support MB engage with others outside of the college environment. Although we acknowledge support from a mentor is likely to be required, neither the group nor the mentor would have a role in training or educating MB rather than facilitating her participation. As such, we do not find this would be social care provision that should be treated as special educational provision.

    The tribunal decision indicated that this proposed provision related to 'outcome 1b' (as to which, see paragraphs 4c i and 4d i below).

    b. proposed provision to attend a Duke of Edinburgh course ([42]) – the tribunal decision said this was rejected for the same reasons as the proposal for MB to attend a drama group.

    The tribunal decision indicated that this proposed provision related to 'outcome 1ad' (as to which, see paragraph 4c i below).

c. proposed provision of access to gym sessions ([58]) – the tribunal decision said this was rejected for the same reasons as the proposals for a drama group and a Duke of Edinburgh course.

   The tribunal decision indicated that this proposed provision related to 'outcome 5c' (as to which, see paragraphs 4c iii and 4d ii below).

d. proposed provision of gym membership ([68]) – the tribunal decision said this was rejected for the same reasons as the proposals for a drama group and a Duke of Edinburgh course. The tribunal decision commented that such provision would be "outside what would usually be available in a mainstream college for students of a similar age".

   The tribunal decision indicated that this proposed provision related to 'outcome 5w' (as to which, see paragraphs 4c iii and 4d ii below).

e. proposed provision of therapeutic gardening course ([71]) – the tribunal decision rejected this for the reasons "already given for rejecting the proposal for non-college-based provision".

   The tribunal decision indicated that this proposed provision related to 'outcome 5z' (as to which, see paragraph 4c iii below).

f. proposed provision of supported volunteering opportunities ([72]) – the tribunal decision rejected this for the reasons "already given for rejecting the proposal for non-college-based provision".

   The tribunal decision indicated that this proposed provision related to 'outcome 6d' (as to which, see paragraph 4c iv below).

g. proposed provision of independent travel programme ([74]) – the tribunal decision stated that this "would be accessed through social care provision and not through college provision" and that for reasons already given about social care matters, the tribunal could not make any recommendation about this provision.

   The tribunal decision indicated that this proposed provision related to 'outcome 6e' (as to which, see paragraph 4c iv below).

Summary of relevant parts of MB's EHC plan, as amended by the tribunal

4. For relevant context to the analysis which follows, the following aspects of MB's EHC plan, as amended by the tribunal, are worth noting:

   a. Section B (MB's special educational needs) included the following:

      i. under the heading 'Communication and interaction': reliant on adults interpreting her non-verbal behaviours and to check in with how she is feeling; struggling to engage in conversation and

get her point across in a group; struggles with higher level language skills that require inferencing, and struggles initiating interactions and engaging with peers;

ii. under the heading 'Social, emotional and mental health': struggles in unfamiliar environments and with unfamiliar people; can struggle to engage and integrate within social groups in college;

iii. under the heading 'Sensory and physical': has a diagnosis of scoliosis and walks with internal rotation of the right leg; has great difficulty with her balance and her strength standing on the right leg and has to be very slow when going downstairs; the moment she lifts one leg up the other leg just collapses and it is very difficult for her to maintain that posture;

iv. under the heading 'Self help and independence': will continue to need significant support to access independence; needs to be given the opportunity to develop the skills she needs both to access further education or a career and to live independently in the future; when given the opportunity to take responsibility, she is diligent and capable with support and encouragement; unable to travel anywhere by herself and is unaware of common dangers and road rules and needs constant reminding of these; unable to handle money or use the shops independently; easily trusts and is compliant towards adults and peers, without full understanding of the possible dangerous consequences and social awareness of the risks.

b. Section D (MB's social care needs which relate to her special educational needs or to a disability) was blank.

c. Section E (outcomes sought for MB) included the following (being outcomes to which the proposed 'provisions' at issue in this appeal, related):

i. Outcome 1:

Long term outcome
To enable MB to access learning and social opportunities. For MBs functional speech, language and communication skills to reach their full potential.

Short term outcome
MB will have a bank of conversation starters and be able to implement these in face-to-face settings and via text messaging to initiate conversations and develop social relationships. MB will be able to communicate her strengths and needs to an adult and explain strategies that support her to learn best e.g., ask me to repeat what I have

understood of a task, take a photo of instructions, give me a role within a social task etc.

ii. Outcome 4:

Long term outcome
For MB to improve her self-esteem and well-being so that she can feel confident asking for help and joining in.

Short term outcome
For MB to recognise when something is wrong and to feel confident in asking for help.

For MB to increase social awareness and understanding around keeping herself safe.

iii. Outcome 5:

Long term outcome
For MB to maintain her optimal levels of physical and sensory readiness.

Short term outcome
For MB to become more aware when to wipe her mouth after eating and blow her nose.

For MB to be aware of fingers and to be able to carry out more fine motor activities.

To increase awareness of level of activity and body strength. MB will gain independence in age-appropriate functional writing skills needed to independently complete a variety of functional writing tasks such as composing a note, a letter or a CV, filling in a form, addressing an envelope and taking notes.

MB will develop her fine motor skills, bilateral coordination and hand strength so that she is able to independently and safely use a variety of tools and equipment appropriate to her chosen college courses or future career pathway.

MB will maintain and continue to develop her gross motor skills and core strength in order to be able to engage in age-appropriate sporting and leisure activities within her education setting and in the community.

iv. Outcome 6:

Long term outcome

> For MB to be prepared for adulthood, careers options and independent living.
>
> Short term outcome
> MB will achieve the grades and qualifications to pursue a career of her choice.
>
> MB to be able to access the different levels of early years & childcare qualifications and make progress.
>
> MB to be able to reach her aspiration of becoming a teaching assistant and be able to pursue a career in teaching.

d. Section F (the special educational provision required by MB) comprised some 70 items, including the following:

   i. under outcome 1, some 29 items. The provision labelled 'Outcome 1b' was: "Ensure MB attends a weekly social skills group to allow her the opportunity to develop social skills in a fun but structured environment. When MB attends college, college staff will arrange appropriate support and guidance in line with college policy and practice". This was to be one 30 minutes session weekly, when at college.

   ii. under outcome 5, some 26 items. The provision labelled 'Outcome 5c' was: "MB will have access to regulation resources i.e.: Theraputty, hand squeeze balls, spinners, Theraband". This was to be throughout the day. 'Outcome 5w' was: "MB requires the following supports and accommodations to support her occupational therapy intervention: MB requires access to a quiet area away from the classroom for calming when sensory overwhelmed. This can be a quiet room but requires sensory support tools such as a therapy ball, resistive band to give calm proprioception. A system using discrete visuals to support MB to indicate when she needs a break, whether she is fatigued or is sensory overwhelmed." This was to be daily.

   iii. under outcome 6, some four items.

e. Section G (health provision reasonably required by the learning difficulties or disabilities which result in MB having special educational needs) had one item, relating to MB's special footwear.

f. Section H (social care provision reasonably required by the learning difficulties or disabilities which result in MB having special educational needs) was blank.

g. Section I named an independent school until July 2024, and a college of further education (the one MB was attending at the time of the tribunal hearing) from September 2024.

The Upper Tribunal proceedings

5. I gave permission to appeal limited to ground 1 as put forward by MB's counsel: that the tribunal decision failed to apply the relevant legal test to the question of what special educational provision was reasonably required for MB, alternatively it lacked adequate reasons.

6. Neither party requested a hearing and both were represented by counsel. In the circumstances, it seemed to me fair and just to determine the appeal on the papers. I am grateful to counsel for both parties (and those instructing and supporting them) for their submissions and assistance to the Upper Tribunal.

7. The powers of the Upper Tribunal in an appeal such as this are limited to deciding whether there was an error of law in the tribunal decision. If there is such an error, the Upper Tribunal may set the tribunal decision aside, and then either re-make the decision or remit the case back to the tribunal for its reconsideration.

Events subsequent to the tribunal decision

8. Following annual review of MB's EHC plan, the Respondent issued an amended plan on 5 February 2026. According to the Respondent, it includes two hours of travel training per week for eight weeks.

Why I have decided that the tribunal decision erred in law

My analysis

9. It seems to me the basic matters the tribunal had to consider when assessing the seven proposed 'provisions' at issue in this appeal (the drama group, the Duke of Edinburgh course, the volunteering, the gym sessions and membership, the therapeutic gardening, and the travel training) for inclusion in Section F were:

    a. Is it either educational provision or training provision?

    b. Is it additional to, or different from, the educational or training provision made generally for other 18-year-olds in mainstream post-16 institutions in England?

    c. Is it called for by the special educational needs as set out in Section B?

    d. Is it required by the young person (here, by MB)?

    The above is based on s21 and regulation 12(1)(f). I also note:

(i) that training is defined to include, most relevantly here, social, physical and recreational training (s83(2), read with s15ZA(8) Education Act 1996); and

(ii) as an alternative to questions a and b above, there can be 'deemed' special educational provision, where social care provision or health care provision educates or trains (s21(5)).

All four of the questions, as I have posed them above, had to be answered in the positive, in order for the proposed 'provision' to be included in Section F of MB's EHC plan.

10. It is fair to say that the tribunal decision did not approach the seven proposed 'provisions' quite as I have set it out above. That, alone, certainly does not mean that the tribunal decision erred in law: it is well established that a tribunal's decision must be read as a whole, and 'generously', and not subjected to an unduly critical analysis; where there are gaps in the reasoning, regard may properly be had to what is implicit in the decision. (A fuller discussion of the adequacy of a tribunal's reasons can be found in any number of Upper Tribunal decisions; one such is *IC v Experian* [2024] UKUT 105 (AAC), a decision of a Presidential panel, at paragraph 63 and following). The question, really, is whether adequately explained answers to the questions I have set out (or to any of them, answered in the negative) can reasonably be derived from the tribunal decision, read in the spirit just described.

11. Turning now to the tribunal decision's reasoning, [38] says that the drama group proposal was not related to MB's college studies (a finding which is not challenged) and derives from this that it was not reasonably required to ensure MB could overcome barriers to learning. It is not clear if the tribunal decision here was saying that the drama group was not educational or training provision (question a at paragraph 9 above) (because it did not "overcome barriers to learning") (this was what the Respondent in this appeal argued was being said), or, alternatively, the tribunal decision was accepting that the drama group was educational or training provision, but deciding that it was not reasonably required in MB's case (question d at paragraph 9 above). If the former is the better interpretation of what the tribunal decision was saying, then, in my view, "overcoming barriers to learning" is a material constriction of the concepts of "educational provision" and "training provision", which were the correct legal test, and it was an error of law to apply such a restricted test. If, alternatively, the tribunal decision was accepting that the drama group was educational or training provision, then, in my view, it did not adequately explain why it was not reasonably required, given that it seems perfectly possible that a drama group would address certain of MB's special educational needs as set out in Section B (in particular, those under the 'Communication and interaction' and 'Social emotional and mental health' heads – see paragraph 4a i and ii above) – and noting that an adequate explanation may well have required further factual findings by the tribunal about the content of the drama group and its likely effect on MB.

12. The tribunal decision goes on to say, at [40], that the drama group proposal "appears to be a social care need to help support MB engage with others outside of the college environment". Unlike 'social care *provision*' (to which I shall turn shortly) and 'special educational needs', 'social care *need*' is not a defined term in the relevant legislation. If, by calling the drama group proposal a *social care* need (because it helped MB engage with others outside college), the tribunal decision was indicating that it did not consider MB's difficulties with engaging with other to be within her *special educational* needs, this seems to me at odds with MB's special educational needs, as set out in Section B, which include:

    a. struggles in unfamiliar environments and with unfamiliar people

    b. struggles to engage and integrate within social groups in college

    c. struggling to engage in conversation and get her point across in a group

    d. difficulties asking social questions

    e. struggles initiating interactions and engaging with peers.

    f. struggles with higher level language skills that require inferencing

    g. needs significant support to access independence.

    This part of [40] therefore seems to me difficult to understand, rationally.

13. [40] then states that neither the drama group, nor the mentor supporting MB at the drama group, would have a role in training or educating MB, as opposed to just facilitating her participation. This seems to be, quite rightly, addressing question a at paragraph 9 above: but it does not seem to me adequately explained as to why the tribunal decision concluded that the drama group was neither of these. It seems perfectly possible that such a group would be teaching or instructing drama and performing arts, and that this was capable of being educational provision – the tribunal decision does not explain why that was not the case here (which may well have required further fact finding about the content of the drama group). Similarly, it seems perfectly possible that a drama group was (social or recreational) training. The drama group may not have been labelled "social" training, in the sense of training in social skills – but I do not think that rules out its falling within that category if, for MB, that was one of its main effects. Once again, the tribunal decision does not adequately explain, based on relevant fact-finding, why this particular drama group was not social or recreational training, for MB.

14. [40] concludes by stating that it did not find that the drama group would be "social care provision that should be treated as special educational provision". Whether something is social care provision depends on whether it is *the*

provision made by a local authority in the exercise of its social services functions (s21(4)). The tribunal decision does not make a clear finding as to whether the drama group is provision made by the Respondent in the exercise of its social services functions, although, in their response to this appeal, the Respondent submits that it is (and refers to issues, articulated by Upper Tribunal Judge Jacobs in *R&RK v Herts CC* [2025] UKUT 381 (AAC) at [36] and [42], about overlap between educational provision and (in the context of this case) social care provision). In this particular case, I do not think those issues are material to the outcome of this appeal (bearing in mind the practical differences highlighted in *R&RK* at [31-32]), because, even if the drama group is social care provision, the tribunal decision does not, in my view, adequately explain why the drama group would not educate MB or train her (and so fall to be treated as special educational provision: s21(5)).

15. I note that in the course of its reasoning (at [39]), the tribunal decision cites, as a further reason for rejecting the proposal, that the drama group would be in addition to the usual post-16 education provision of 18 hours a week – and that the tribunal did not have evidence to indicate that MB required educational provision beyond the usual hours. This reasoning seems to me flawed, as:

    a. it does not consider the possibility of the drama group being (social or recreational) training provision, as opposed to educational provision; and

    b. it is not addressing any of the relevant questions, as I have outlined them at paragraph 9 above; specifically, it is not approaching matters from the perspective of what special educational provision MB (reasonably) required (as required by regulation 12(1)(f)), but rather on the basis of number of hours per week.

16. The tribunal decision applies its reasoning on the drama group (as set out at [38-40], and as just analysed), to the proposed Duke of Edinburgh course; and it seems to me the same legal errors arise; in particular, it seems to me that a Duke of Edinburgh course could, like a drama group, perfectly possibly

    a. be educational provision (it may well teach life skills) or training provision (it may be social and/or recreational training for MB); or it could educate MB or train her; and

    b. be reasonably required in light of MB's special educational needs, as set out in Section B (under one or more of the heads summarised at paragraph 4a above);

    but there is no adequate explanation (based on relevant fact-finding) of why the tribunal rejected these realistic possibilities.

17. The same analysis, in my view, applies to the tribunal decision's reasoning as regards the "supported volunteering opportunity to develop independence and communication skills in a workplace environment" proposal.

18. The tribunal decision again applies its reasoning on the drama group, to the proposed gym sessions; and it seems to me the same legal errors arise; in particular, it seems to me that gym sessions could, like a drama group, perfectly possibly

    a. be educational provision (they may well instruct MB in physical health) or training provision (they may well impart *physical* training); or they could educate MB or train her; and

    b. be reasonably required in light of MB's special educational needs, as set out in Section B (in particular, those under the 'Sensory and physical' head – see paragraph 4a iii above);

    but there is no adequate explanation (based on relevant fact-finding) of why the tribunal rejected these realistic possibilities.

19. The same analysis, in my view, applies to the gym membership proposal, except that this would be perfectly possible (physical) training provision (albeit not educational provision).

20. The tribunal decision rejects a therapeutic gardening course for the same reasons as it rejected "non-college-based provision", which must mean its reasoning as regards the drama group; and, again, it seems to me the same legal errors arise; in particular, it seems to me that a therapeutic gardening course could, like a drama group, perfectly possibly

    a. be educational provision (they may well instruct her in gardening) or training provision (it may impart physical and/or recreational training to MB); or it could educate MB or train her; and

    b. be reasonably required in light of MB's special educational needs, as set out in Section B (in particular, those under the 'Sensory and physical' head – see paragraph 4a ii above);

    but there is no adequate explanation (based on relevant fact-finding) of why the tribunal rejected these realistic possibilities.

21. As regards the proposed independent travel programme, the tribunal decision's reasoning was that this "would be accessed through social care provision and not through college provision" and so, for reasons it gave earlier about "social care matters", the tribunal "could not make any recommendation for this provision". The Respondent in this appeal has accepted that this part of the tribunal decision was inadequately reasoned. I agree, for much the same reasons as I have given for the other six proposed 'provisions'.

My response to certain other arguments advanced on the Respondent's behalf

22. I have not accepted a submission of the Respondent that the tribunal decision did not err in its analysis of the seven proposed 'provisions', because the evidence before the tribunal was not sufficient for it to conclude that any of these should be included in Section F of MB's EHC plan, as

    a. this is not, on my reading, how the tribunal decision itself explained its determination: it gave other reasons, which, per my analysis above, I have found to be in error; and

    b. had the tribunal been of the view that it needed more information to make a decision on the proposed 'provision', it should at least have considered its inquisitorial role (and so, given reasons if it decided not to pursue the further information, inquisitorially). I have in mind the following well-known dicta in *W v Gloucestershire CC* [2001] EWHC Admin 481 at [15] (coupled with the fact that MB was not legally represented before the tribunal):

> "… if there was inadequate information [about the proposed school placement], the FTT should have taken the necessary steps to obtain it, if necessary adjourning to do so. Tribunals, it seems to me, cannot proceed on a purely adversarial basis, but have a duty to act inquisitorially, when the occasion arises by making sure they have the necessary information on which to decide the issues before them, rather than rely entirely on the evidence adduced by the parties. The FTT will usually have much greater expertise than the parents who appear before them":.

23. On the question of adequacy of reasons, I have certainly taken into account the following submission of the Respondent (as well as the well-known principles summarised at paragraph 10 above):

> This was a half day hearing looking at educational needs and provision. The working document ran to 31 pages. The complexity of the working document can be seen from provision just for objective 1 running right through the alphabet from 1a to 1z and then continuing to 1ad. There was a 342 page bundle as well as oral evidence. Even working at that pace and with that much material the Tribunal system still has a 1 year time period from start to finish (at least that was the approximate time here).
>
> This therefore is a case where significant weight needs to be given to the principle that reasons can be brief and simple and the question is that parties need to know why they have succeeded on a point or not.
>
> The key paragraphs are 37-40, which explain why the tribunal is not adopting the proposed text in respect of the drama group outside of college. These paragraphs are later adopted in respect of the Duke of Edinburgh course (para 42), gym sessions (para 58), gym membership (para 68), therapeutic gardening (para 71), volunteering (para 72) and independent travel (para 74). That is a

> simple and efficient way to give reasons for related issues, particularly where there is so little information about what is being asked for.

24. What I would say here is that there is no error in the brevity of the tribunal decision's approach: it is that I have found it impossible to derive adequately explained answers to the questions asked by the legislative code (see paragraph 9 above) (or to at least one of them in the negative). I certainly acknowledge that this is a case where the tribunal had much material before it, of considerable detail, and most of its decision on that material is unchallenged (and rightly so); but it remains the case that, in my view, that the tribunal decision erred in the distinct matters that are the subject matter of this appeal.

Why I have not exercised my discretion to set the tribunal decision aside

25. Were it not for the fact that the EHC plan that was the subject matter of the tribunal decision has now been replaced with a new EHC plan for MB, my inclination would have been to set aside the tribunal decision, so far as it dealt with the seven proposed 'provisions' considered above, and remitted the case to the tribunal with directions for its reconsideration (given that further fact-finding may well be required, to determine these matters). However, given the position as it is, taking that path would seem an empty exercise, and so contrary to what is fair and just. I have therefore refrained from exercising my discretion to set aside the tribunal decision. That does not, however, render the outcome of this appeal academic, as this decision will now be something for tribunals to consider (and, where appropriate, apply) when deciding future appeals on similar issues.

Zachary Citron
Judge of the Upper Tribunal

Authorised by the Judge for issue on 18 February 2026