NCN: [2025] UKUT 239 (AAC)
Appeal No. UA-2025-000869-HS

RULE 14 Order:

THE UPPER TRIBUNAL ORDERS that, save with the permission of this Tribunal:

No one shall publish or reveal the name or address of D, who is the child involved in these proceedings, or any information that would be likely to lead to the identification of any of them or any member of their families in connection with these proceedings (including the name of the school).

Any breach of this order is liable to be treated as a contempt of court and may be punishable by imprisonment, fine or other sanctions under section 25 of the Tribunals, Courts and Enforcement Act 2007. The maximum punishment that may be imposed is a sentence of two years' imprisonment or an unlimited fine.

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

PS

Appellant

- v -

LONDON BOROUGH OF WANDSWORTH

Respondent

Before: Upper Tribunal Judge Stout
Hearing date(s): 11 July 2025
Mode of hearing: By video

Representation:
Appellants: In person
Respondent: Anna Staines (Solicitor)

On appeal from:

Tribunal:	First-Tier Tribunal (Health Education and Social Care) (Special Educational Needs and Disability)
First-Tier Tribunal No:	EH212/24/00035
Tribunal Venue:	By video
Hearing Date:	3 March 2025

SUMMARY OF DECISION

SPECIAL EDUCATIONAL NEEDS (85)

The appellants' child (D) attended X School (a special school). Following a breakdown in relations between the appellants and X School, the appellants appealed to the First-tier Tribunal seeking to have Y School named. D continued attending X School in the meantime. The First-tier Tribunal found Y School to be unsuitable. Neither party invited the Tribunal at the hearing to consider another school, although they were in the process of identifying alternatives. The Tribunal accordingly named 'special school' as a type in Section I. The local authority subsequently consented to D being removed from the roll of X School, without consulting with the appellants. The local authority acted on the understanding that removing D from the roll of X School was a consequence of the Tribunal's decision.

The appellants sought permission to appeal on the basis that the Tribunal had failed sufficiently to safeguard D's rights to prevent him being 'off-rolled' without the appellants' consent. The Upper Tribunal refused permission to appeal.

The Tribunal's decision to name a type of school was not arguably erroneous given the circumstances as they were at the time of the Tribunal hearing. The removal of X School's name from Section I of D's EHC Plan did not of itself arguably cause, require or even permit the local authority to remove D from X School without consultation with the parents either by way of considering, in accordance with the statutory framework: (i) parental preferences for alternative schools; or (ii) making provision of education otherwise than at school. Further, although X School ceased to be under a duty to admit D as a result of the Tribunal's decision, D was already a pupil at the school and could not be excluded from school otherwise than in accordance with normal procedures. Neither the First-tier Tribunal or the Upper Tribunal on appeal have any powers of enforcement. The First-tier Tribunal was entitled to proceed on the basis that the local authority would comply with its statutory duties. There was no arguable error of law in its decision.

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

I refuse permission to appeal.

I refuse to suspend the decision of the First-tier Tribunal.

REASONS FOR DECISION

Introduction

1. The appellants seek permission to appeal, in time, against the decision of the First-tier Tribunal of 13 March 2025. They also seek an order suspending the decision of the First-tier Tribunal pending the outcome of the appeal. Permission to appeal was refused by the First-tier Tribunal on 5 June 2025. The application for permission to appeal to the Upper Tribunal was lodged on 6 June 2025.

2. I gave directions for the listing of an oral hearing to determine the applications for permission to appeal and suspension of the First-tier Tribunal's decision.

3. At that hearing, which lasted approximately 1 hour, the appellants represented themselves and the local authority was represented by Ms Staines (an in-house solicitor) and Ms Maffre (a member of the local authority's SEND team) also contributed to the hearing. The appellants submitted a number of additional documents in advance of the hearing, which I considered.

4. The local authority also submitted written representations, which arrived after the start of the hearing. The local authority at the hearing did not rely in any detail in what was in the written submissions and, as it was a permission hearing at which the question was whether the appellants had identified an arguable error of law in the First-tier Tribunal's decision, I did not consider there was any need to deal in any more detail with the local authority's response as the local authority would have an opportunity to respond in full to the appeal if permission was granted. However, subsequent to the hearing, the appellants, having by then had an opportunity to read the local authority's written submissions, submitted a 'rebuttal' to the local authority's written submissions. I have considered that rebuttal in preparing this decision.

Background and the First-tier Tribunal's decision

5. At the time of the First-tier Tribunal hearing, the appellants' son (D) was attending X School (a community special school). The First-tier Tribunal describes the parties' positions at that hearing in [6] of its decision as being that the appeal had started on the basis that the appellants objected to X School being named in Section I of D's EHCP, but that by the start of the hearing their first preference

was for X School to be named on the basis that there be "a robust review of [X] School and thereafter changes to ensure a harmonious community with full inclusion of [D] and others". The First-tier Tribunal records in the decision that it explained that a school could not be named on such a conditional basis, and that the appellants asked for Y School (a different community special school) to be named. The local authority argued that Y School was not suitable for D and invited the First-tier Tribunal to name a 'type' of school in Section I. In its decision, the First-tier Tribunal identified the issues it needed to decide as being: (1) whether Y school was unsuitable for D's age, ability, aptitude or special educational needs; and (2) if so, whether 'special school' should be named as type of placement in Section I of D's EHC plan.

6. The First-tier Tribunal went on to decide the appeal in the local authority's favour, concluding that Y School was not suitable, in particular because its cohort of pupils has Moderate Learning Difficulties (MLD) whereas D has Severe Learning Difficulties (SLD) so that D would not have an appropriate peer group.

7. At [13] the Tribunal considered the second issue of whether it would be appropriate to name 'special school' as a type of school in Section I. The decision notes that the appellants had said they had identified a potential school closer to home than those identified by the local authority and had shared the details with the local authority for a consultation. The Tribunal noted, *"While we are unable to direct a meeting takes place to discuss options, there is some urgency in identifying a suitable school and we expect the LA will act promptly in that regard in the fulfilment of its obligations"*. The Tribunal therefore named a type of school in Section I.

8. The Tribunal made no determination as to the suitability or unsuitability of X School, simply noting in [9] that the appellant's objections to it were *"founded in their disapproval of the school's ethos and principles of inclusivity which did not accord with those of the appellants"*.

9. D was at the time of the Tribunal hearing still attending X School. The parties have informed me that, subsequent to the Tribunal's decision, the local authority on 2 May 2025 unilaterally consented to the removal of D from the roll of X School so that he ceased to be registered as a pupil there. The appellants were not asked whether they consented to that course. Only the local authority's consent is required for a removal under regulation 8(2) of the Education (Pupil Registration) (England) Regulations 2006. X School did agree to allow D to continue to attend for a period and the local authority proposed an interim tuition package of 25 hours per week while a new school was identified. The local authority then went through a process of producing a new draft EHC Plan and inviting the appellants to put forward schools for consideration.

10. There appears to have been a breakdown in communications and relations between the parties in the course of this process. The appellants were very unhappy about the local authority removing D from the roll of X School without their consent. They felt that he had been unlawfully excluded effectively because

of the breakdown in the relationship between them and X School, when in fact there was no reason why D could not continue attending. They were also unhappy with the school(s) proposed by the local authority and had not identified an alternative they were happy with themselves. They did not accept the tuition package either. They submitted complaints to the local authority and the ombudsman.

11. The local authority on 2 June 2025 notified them that a final EHC Plan would name Z School and this was then issued. The appellants said at this hearing that they do not want D to attend Z School as the journey is too difficult/long. As it emerged at the hearing before me, the appellants' preference is now for D to return to X School.

The approach of the Upper Tribunal

12. The Upper Tribunal's jurisdiction under section 11 of the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007) is limited to considering whether there are any points of law arising from a decision made by the First-tier Tribunal.

13. Permission to appeal to the Upper Tribunal will normally only be granted where there is arguably a material error of law in the First-tier Tribunal's decision. A point is arguable if it stands a realistic prospect of success. A material error of law is an error of legal principle that might have affected the result.

14. Errors of law include misunderstanding or misapplying the law, taking into account irrelevant factors or failing to take into account relevant factors, procedural unfairness or failing to give adequate reasons for a decision.

15. An error of fact is not an error of law unless the First-tier Tribunal's conclusion on the facts is perverse. That is a high threshold: it means that the conclusion must be irrational or wholly unsupported by the evidence. An appeal to the Upper Tribunal is not an opportunity to re-argue the case on its merits.

16. These principles are set out in many cases, including *R (Iran) v SSHD* [2005] EWCA Civ 982 at [9]-[11] and *R (Wasif) v Secretary of State for the Home Department* [2016] EWCA Civ 82; [2016] 1 WLR 2793 at [13].

17. It is not arguably an error of law for a tribunal to fail to consider evidence that was not put before it at the time unless the criteria in *E v SSHD* [2004] EWCA Civ 49, [2004] QB 1044 are met: i.e. (i) there is a mistake as to existing fact or the availability of evidence on a particular matter; (ii) the fact is uncontentious; (iii) the appellant is not responsible for the mistake; and (iv) the mistake plays a material part in the Tribunal's reasoning (see [66] of the Court of Appeal's judgment in that case). In public law cases, and especially where the appellant is not legally represented, these principles may be relaxed somewhat with the focus being on the overriding objective of dealing with cases justly, but cases in which that is

appropriate are rare: see *SM v Secretary of State for Work and Pensions (IIDB)* [2020] UKUT 287 (AAC) at [15]-[20] *per* Judge Poynter.

The grounds of appeal

18. The grounds of appeal allege that:

    (1) The First-tier Tribunal erred in by failing to ensure compliance with section 42 of the CFA 2014 and/or that the First-tier Tribunal failed to ensure that the local authority safeguarded D's rights during transitions (reference is made to *R (L) v Devon County Council* [2011] UKUT 192 (AAC));

    (2) The First-tier Tribunal erred in law by failing to ensure that D was not 'off-rolled' contrary regulation 8(2) of The Education (Pupil Registration) (England) Regulations 2006 (which requires a special school not to remove a pupil from roll without the consent of the local authority) and/or that the Tribunal's decision wrongly enabled D to be removed from the school roll without parents' consent. Reference is made to *R (C) v London Borough of Sutton* [2010] UKUT 184 (AAC) and paragraph 9.169 of the SEND Code of Practice 2015.

19. The appellants also invite me to suspend the decision of the First-tier Tribunal pending the appeal.

Consideration of whether to grant permission to appeal

20. The First-tier Tribunal's jurisdiction on an appeal under section 51 of the Children and Families Act 2014 (CFA 2014) is limited to considering the matters set out in that section, which are all specific decisions that have to be taken by local authorities in relation to children with EHC Plans. Its powers on such an appeal are laid down in regulation 43 of The Special Educational Needs and Disability Regulations 2014 (2014 Regulations). The First-tier Tribunal has no jurisdiction over what happens once an appeal is determined. It has no powers of enforcement. Alleged failures by a local authority in implementing an EHC Plan or a First-tier Tribunal decision must be taken to the Local Government and Social Care Ombudsman or the High Court on judicial review. The First-tier Tribunal has no jurisdiction in relation to the local authority's duty under section 42 of the CFA 2014 to secure special educational provision in accordance with the EHC Plan.

21. Before considering the grounds of appeal in more detail, I need to deal with some case law that the appellants have relied on in relation to this appeal.

22. The cases of *R (L) v Devon County Council* [2011] UKUT 192 (AAC) and *R (C) v London Borough of Sutton* [2010] UKUT 184 (AAC) to which the appellants refer in their Notice of Appeal do not exist. The latter neutral citation is a valid citation but it relates to a child support case not a case with the title that the appellants

have given it. Nor does paragraph 9.169 of the SEND Code of Practice 2015 say anything about obtaining parental consent to 'off-rolling'. We did not discuss these references at the hearing as I considered it unnecessary to do so as in my judgment the appellants arguments could properly be advanced without those references, but the local authority did raise the non-existence of these cases in its late written submissions. It may be these legal references were the product of AI generation as it is well known that AI 'hallucinates' the names of legal cases and legislation.

23. In their rebuttal document, the appellants have supplied some alternative references. The case of *B and M v Cheshire East Council* [2018] UKUT 232 (AAC) is advanced in place of the non-existent *R (L) v Devon County Council* [2011] UKUT 192 (AAC). *B and M* does exist, but I am afraid it does not assist either, as it does not contain the passage that the appellants quote as coming from [25] of that decision, and it is a case about a decision by a local authority to cease to maintain an EHC Plan. The question for the Tribunal was whether it was 'necessary' for the EHC Plan to be maintained, which did involve considering what provision was being made for the young person without an EHC Plan, but the statutory context is quite different to the present case and I find nothing in it that assists.

24. The appellants also refer to *KE and ors v Bristol City Council* [2018] EWHC 2103 (Admin). That case was a High Court judicial review in respect of Bristol City Council's decision to cut approximately £5 million from its high needs special educational needs budget. It is of no assistance in this context at all. The High Court on judicial review has an inherent jurisdiction to consider all relevant issues in assessing whether a public authority has acted unlawfully in public law terms. In contrast, the jurisdictions of the First-tier Tribunal and the Upper Tribunal are limited by statute as I have described above.

25. The appellants also refer to *RP v Barnsley Metropolitan District Council* [2025] UKUT 46 (AAC). That is a short decision of Judge Jacobs holding that a First-tier Tribunal erred in law because there were three different versions of the hearing bundle and the appellant as a result had difficulty navigating the hearing and putting forward her case. Judge Jacobs held that the hearing was materially procedurally unfair. Again, I do not consider this case assists. Nothing like that has happened in this case.

26. In considering this appeal, however, I proceed on the basis of the well-established principle that a First-tier Tribunal must conduct the hearing in a procedurally fair manner. I also proceed on the basis that, generally, if a child is approaching an educational transition, the Tribunal should look ahead and ensure that the EHC Plan is fit to cover the transition. For example, a Tribunal considering an appeal may make an order in the form that Section I should name one school until the end of the current term or school year and then an alternative from the following academic period: see eg *Wilkin & Goldthorpe v Coventry CC* [1998] ELR 345. However, that case is only authority for the proposition that the Tribunal should exercise its jurisdiction under what is now section 51 of the CFA 2014 to cover

that transition. It does not extend the Tribunal's powers beyond their statutory remit.

27. In accordance with the legal principles as I have outlined them above, the First-tier Tribunal can also only be expected to consider the case on the basis of the evidence as it is before it on the day of the hearing. A Tribunal does not ordinarily err in law by failing to consider evidence or arguments that were not before it. Changes of circumstances subsequent to a hearing may form an appropriate basis for seeking a review of the First-tier Tribunal's decision under rule 48(2) of The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008. In this case, it is apparent that there is a change of circumstances because D has been removed from roll at X School, but the appellants now (apparently unconditionally) want D to attend X School. That opens the possibility of a review under rule 48(2). An extension of time would be required if such an application were to be made now, but that may yet be an avenue that the appellants will wish to explore.

28. So far as an appeal to the Upper Tribunal is concerned, the focus must be on whether the First-tier Tribunal erred in law on the basis of the position as it stood at the time of the hearing. The position at that time was that the appellants only wanted X School named on the conditional basis that it was subject to *"a robust review … and thereafter changes to ensure a harmonious community with full inclusion of [D] and others"*. The First-tier Tribunal rightly pointed out that it could not name a school on that basis as it has no power in the context of an appeal under section 51 of the CFA 2014 to make any such direction. The appellants had proposed Y School for consideration at the hearing, the parties were both in the process of looking for other alternative schools and the appellants had another specific school they wished to consider further following the hearing. In those circumstances, it seems to me that it was not arguably unlawful for the Tribunal to name 'a special school' as a type once it had concluded that Z School was inappropriate. Section 39(5) of the CFA 2014 permits the Tribunal to name a type of school where parental preference for a particular school has been rejected under section 39(4). This was in my judgment a course that was reasonably open to the First-tier Tribunal in this case as neither party had put forward any other option for consideration at the hearing.

29. The appellants case on this appeal is in substance that the Tribunal should have left X School named in Section I. However, at the time of the hearing, neither party was asking the Tribunal to leave X School named in Section I, otherwise than on the 'conditional basis' that the appellants had been arguing for at the start of the hearing, but had then abandoned. The reason why neither party was contending that X School should remain named in Section I was not because either party considered it to be *per se* unsuitable, but on the basis that it was no longer the school of (unconditional) parental preference and because of the difficult relations between the appellants and the school. The local authority has suggested that relationships between the appellants and X School meant that X School had become unsuitable, but that was not the case they invited the Tribunal to determine at the hearing. Further, although there are cases where a

breakdown between parents and school might lead to a conclusion that a school is 'unsuitable', the Upper Tribunal (Judge Ward) in *Richmond upon Thames LBC v AC* [2017] UKUT 173 (AAC); [2017] ELR 316 at [27]-[30] observed that great caution should be used before that conclusion was reached. In this case, neither party argued before the Tribunal that X School was unsuitable and the Tribunal made no determination to that effect. D remained 'on roll' at the school and attending daily at the time of the Tribunal hearing.

30. The fact that both parties were seeking alternative schools, was an important reason why it was necessary for the Tribunal to leave Section I as naming a 'type' of school. Naming X School in Section I at that point would have made it difficult for the appellants to pursue the other school they were then interested in as the appeal would have been determined on the basis that D should continue attending X School. Ordinarily it would be an abuse of process for either party to seek a further amendment to an EHC Plan so soon after a Tribunal hearing.

31. The only possible alternative to naming a type of school, it seems to me, would have been for the First-tier Tribunal to issue a 'provisional decision' on the suitability of Y School and then give directions for an adjournment and further hearing to determine Section I at a later date. Neither party contended for that outcome before the First-tier Tribunal and neither has suggested before me that the Tribunal should have adopted that course of its own motion. For the avoidance of doubt, I do not consider that the First-tier Tribunal arguably erred in law in not expressly considering that option of its own motion given the circumstances. It is not the role of the Tribunal to 'supervise' the parties in their search for an appropriate school. The Tribunal's role is to determine the appeal before it. The Tribunal in this case did that and did not arguably err in law in doing so.

32. So far as the Tribunal's decision is concerned, that really is the end of the matter because nothing the local authority did following the decision could render the decision unlawful at the time it was taken. However, given that both parties argue (in different ways) that what the local authority did following the hearing was a consequence of the First-tier Tribunal's decision, I need to explain what that is not the case.

33. The naming of 'a special school' in Section I of D's EHC Plan left the parties free to reach agreement as to school placement, or for the usual statutory processes to be followed for parents to request a particular school be named and the local authority to consider that request in accordance with the statutory framework, with any consequential amendment to the EHC Plan triggering a further right of appeal for parents.

34. As X School is a special school, it also meant that it was open to the local authority to comply with its obligation under section 42 of the CFA 2014 by maintaining D's place at X School or by identifying an alternative special school for D, taking account of any parental preferences, through the statutory framework. The framework of course includes the obligation on the local authority under sections

38 and 39 of the CFA 2014 to consult with parents and consider their preferences before changing the school named in Section I.

35. By section 61 of the CFA 2014 a local authority is only permitted to arrange special educational provision otherwise than in a school if it is satisfied that it would be inappropriate for provision to be made in a school, and before doing so the authority must consult the child's parent. If the local authority considered that, as a result of the breakdown in relations between the appellants and X School, it was 'appropriate' for provision to be made for D otherwise than in a school for a period, it was therefore obliged to consult the appellants before taking action to provide education in that way.

36. Notwithstanding that regulation 8(2) of the 2006 Regulations in principle permits a local authority to consent to the removal of a pupil from the roll of a special school, there were thus statutory obligations on the local authority to consult parents before naming a new school in Section I or deciding that D's educational provision had to be made otherwise than at school for a period through section 61 CFA 2014 (reinforced by the duty in section 19 of the Education Act 1996).

37. The only practical legal effect of the Tribunal's decision to name a type of school in Section I rather than leave X School named was that X School ceased to be under a 'duty to admit' D under regulation 43 of the 2014 Regulations. However, D had already been admitted to the school, and it does not follow from a school no longer being under a duty to admit that they are permitted to exclude a child otherwise than in accordance with the proper procedures, and for the proper reasons.

38. The local authority's position in this case is that D was not excluded, but that he was removed from roll as a consequence of the First-tier Tribunal's decision (and/or perhaps because the local authority believed that the appellants no longer wanted him to continue at X School).

39. It is understandable that, because of the stance taken by the local authority, the appellants have focused on the First-tier Tribunal's decision and contended that it 'allowed' the local authority to do what it has done. However, that is not the case. The Tribunal is not arguably responsible for the subsequent actions of the local authority, which were not directed, caused or permitted by anything the Tribunal had done or not done. The Tribunal at the end of its decision added a plea to the local authority to comply with its legal obligations. The Tribunal's (wholly reasonable) expectation was that the local authority would adhere to the statutory framework set out above and the Tribunal did not arguably err in law in proceeding on that basis.

Conclusion

40. There is accordingly no arguable error of law in the decision of the First-tier Tribunal and I refuse permission to appeal.

41. It follows that the application to suspend the effect of the First-tier Tribunal's decision must also be refused because under rule 5(3)(m) of the Upper Tribunal rules, I cannot suspend the decision if I am refusing permission to appeal.

42. I do, however, urge the parties to work together going forward in D's best interests. If parental preference is now for X School, the local authority will need to consider that preference according to the section 39(4) criteria.

Rule 14 Order

43. A Rule 14 Order was made for reasons given in a separate case management order. In summary, I considered that the open justice principle has been sufficiently served in this case by holding an open hearing and publishing this judgment. Although names are important to the principles of open justice and the exercise of the right to freedom of expression, disclosure of the names of the appellants and their child would constitute an unwarranted interference with their Article 8 rights, in particular given their child's vulnerability.

Holly Stout
Judge of the Upper Tribunal

Authorised by the Judge for issue on 14 July 2025