NCN: [2025] UKUT 187 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. UA-2025-000025-HS**
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

Mrs and Mr D

Appellants

- v –

Cheshire East Council

Respondent

Before: Upper Tribunal Judge S Davies

Hearing date: 9 May 2025
Heard in: Cardiff (by video)
Decision date: 10 June 2025

Representation:
Appellant: Mr S Broach, King's counsel instructed by Access to Public Law Ltd
Respondent: Mr R Holland, counsel instructed by the Respondent

ORDER

Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the child in these proceedings. This order does not apply to (a) the child's parents (b) any person to whom the child's parents, in due exercise of their parental responsibility, disclose such a matter or who learns of it through publication by either parent, where such publication is a due exercise of parental responsibility (c) any person exercising statutory (including judicial) functions in relation to the child where knowledge of the matter is reasonably necessary for the proper exercise of the functions. To support this order, the Appellants' surname is not included in this judgment.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 2 October 2024 under number EH895/23/00086 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside.

REASONS FOR DECISION

Background

1. This case concerns the Education, Health and Care Plan (EHCP) for G, who is now 7 years old. G has a diagnosis of autism (ASD).

2. In an appeal to the First-tier Tribunal (the 'Tribunal') made on 23 October 2023 and registered on 13 November 2023, the Appellants sought amendments to Sections B, F and I of the EHCP issued by the Respondent on 10 October 2023.

3. The Respondent was barred from participating in the Tribunal hearing on 30 September 2024 for non-compliance with the Tribunal's orders. Shortly prior to the hearing date, the Respondent produced an amended working document and agreed to name the school of parental preference in Section I. Thus, the appeal before the Tribunal focussed on sections B and F.

4. The Tribunal issued their decision on 2 October 2024. On 28 October 2024 the Appellants applied to the First-tier Tribunal for permission to appeal against that decision in respect of section F of the EHCP. The application was refused by Judge McCarthy in a decision dated 19 December 2024. Judge McCarthy found the Tribunal was in error of law for not considering amendments to the EHCP requested by the Appellants regarding Speech and Language Therapy (SLT). On review of the decision under Rule 47 of Tribunal Procedure (First-tier Tribunal) Health, Education and Social Care Chamber) Rules 2008, Judge McCarthy concluded that no action in relation to the Tribunal's decision was required on the basis that the amendments contested for did not amount to special educational provision.

5. The Appellant applied for permission to appeal to the Upper Tribunal, received on 14 January 2025. The two grounds of appeal are summarised as follows:

    a. Ground 1: The Tribunal's decision as to the wording that should be ordered into section F of G's EHCP in relation to 1:1 support was irrational (the 1:1 ground); and

b. Ground 2: The Tribunal unlawfully failed to deal with a key issue in dispute between the parties in relation to Speech and Language Therapy (the SLT ground).

6. In a decision dated 19 February 2025, I gave permission to appeal on ground 1 and ground 2 to a limited extent. An oral hearing was listed by video on 9 May 2025 to determine the appeal.

7. I have anonymised the name of the Appellants and their son (G) in these proceedings. In doing so, no disrespect is intended to the family.

The hearing

8. For the Appellant, Mr Broach KC appeared before me in the Upper Tribunal, with Ms I Jolley having appeared before the Tribunal. For the Respondent, Mr Holland appeared before me in the Upper Tribunal, the Respondent having been disbarred from appearing before the Tribunal.

9. The Appellants raised the possibility of the Respondent being disbarred from further participation were the case to be remitted. However, it was agreed that participation in future proceedings was properly a matter for the First-tier Tribunal and no application was made to me.

Tribunal's decision

10. This appeal centres on the Tribunal's conclusions at paragraph 26(a) of the decision (my emphasis in bold on the most relevant parts of this passage):

> '*The **central issue is whether G needs 1:1 for 32.5 hours or a high level of adult support**. The evidence is not straightforward or one way. Ms McHugh, educational psychologist's, report dated 14.9.2022, says he needs a small nurturing environment and flexibility. She does not mention either a high level of 1:1 or full time 1:1. Ms Ali Sana, SaLT in her report dated 1.8.2022 stated that G can focus for large chunks of time on subjects of interest to him and he can access an age appropriate curriculum and she states that he needs a small nurturing environment which works with children with social communication difficulties. Denise Anthony, Consultant Education and SEND Specialist in her report dated 8.11.2023 stated that he was in year 1 when she observed him and there are 2 pupils in his class and 3 days a week 3 pupils including from the year above for English and Maths. There is a TA for 80% of the time and he accesses this support. During breaks he is able to find a teacher and speak to her and during lunch he is able to choose lunch and eat it and he is very settled and relaxed. Dr Eldred in her report with Harjinder Kaur dated 4.1.2024 states that G needs a high degree of 1:1 adult support to access learning and wellbeing, small class sizes and a high ratio of adult to children. **Ms Fern in her written statement stated that LSA support is throughout the school week, for growing independence skills, 1:1 reading/comprehension, daily 15 minutes and for use of alternative recording methods of ipad, social time support. This does not amount to either a high level of support or full time 1:1.** The evidence of Dr Kelly was for 1:1 support for 32.5 hours per week. **Dr***

> ***Kelly is therefore the only expert who contends that 1:1 support from a TA for 32.5 hours is required. The weight of the evidence is against him on this point****. That leaves the question of how much support is needed and whether it would be wise to put a number of hours on this or indeed qualify it as "high" as the LA suggests. The evidence is far from clear. Ms Anthony suggests G may be getting 80% of TA time but that is not crystal clear either. It is said that he does not need support at lunch times and is managing break times. The examples of risky behaviours given by Dr Kelly and [Mrs D] are all outside of the school and with family members. It is not clear what the reference to the climbing is and whether it is a one off and no date is given but it is suggested that this is not a very recent incident. Turning to the EHCP itself and the provision, its is clear that 8-10 hours of SaLT 1:1 is indicated and 4 hours of direct OT is also agreed for the year. In reviewing section F the vast majority of this provision is good quality teaching applying Quality First Teaching eg support for independent learning, for moving, for regulation of emotions, for scaffolding, for visual support or mediating language and providing descriptive commentary and so on. There is a reference to monitoring for movement and climbing- but this is not very specific. Sensory provision is already specified in the plan and this requires regular movement break opportunities which should be available to G on a minimum of three occasions in one school day for 10-15 minutes. There is small group work required, but the class is already small and so whether it is 5 or 3 the support in Section F is deliverable by a Teacher and fulltime TA as his EHC Plan does not specify large areas of work which require 1:1 although he does need directing back to task and reminders and other interventions and chunking as well as pre teaching. G will receive the time and attention to focus that he needs and does not require 1:1 support. His EHC Plan when read carefully for section F provision also does not indicate a high level of support. The support he needs under section F leaving aside the 1:1 therapies indicates that he will need some additional support, but not at breaks and lunch as any nurturing environment will have eyes on pupils from various staff and he is able to approach teachers/ staff when needed. It is not appropriate for the Tribunal to add up all the provision that may amount to 1:1 support but suffice it to say that the EHC Plan states when 1:1 is needed and that is for example, prompts and reminders at the beginning and end of tasks, advance warning of changes and countdowns of time are the obvious examples- any other. Other times when 1:1 is needed is for pre-teaching of vocabulary related to a new topic, identifying G's emotional needs and providing co-regulation to support G to calm down and be ready to continue learning and providing sensory breaks. There is not a "high level" of support indicated in G's EHC Plan and this is the document which properly identifies his provision in section F.* ***The Tribunal will delete the words 1:1 full time and the word "high" so that it is left that support will be needed and this depends on the individual tasks identified in the EHCP****.* ***Although section I follows F, it is difficult to put out of mind the fact the classes are as a matter of fact very small indeed and have a high pupil to staff ratio***.'

11. The wording inserted by the Tribunal in the final EHCP, attached to the decision at page 11, was as follows (my emphasis): '*To support G with independent learning,* ***a level*** *of individualised appropriate support by a consistent education team is needed as identified for the tasks in section F below*'. This is an

adaptation of the wording proposed by the Respondent; with the word 'high' replaced with 'a level' and the addition at the end of 'as identified for the tasks in section F below'.

12. The Tribunal did not engage in their decision with the following amendments requested by the Appellants (page 165 FTT bundle):

> *'G requires a full assessment of his receptive and expressive language skills in line with his annual review process G requires SLT school and home visits until all assessments can be completed to the best of G's ability (6 hours per annum). This should include a full day visit to observe him in both an afternoon and morning session (7 hours) and a home visit (3 hours).*
>
> *G's assessment findings will need to be shared with teaching staff and parents. To plan further communication targets. G will require a full speech therapy report based on the assessment findings (To include assessment scoring/analysis and interpretation of data) (10 hours)'*

Submissions

13. It was agreed there was no issue between counsel on the law. I am grateful for the assistance provided in Mr Broach's detailed submissions and by Mr Holland's pragmatic and focussed approach.

Appellant's Submissions

Ground 1 (1:1)

14. It was submitted that the Tribunal's decision resulted in an EHCP which lacked an adequate level of quantification and specificity with regard to the level of 1:1 support required by G. Oral submission was made in respect of the decision of Judge West in **Worcestershire County Council v SE [202] UKUT 217 (AAC)** which rehearses the applicable case law authorities from paragraph 56 onwards.

15. Further it was submitted that the Tribunal fell into error in the following three ways:

    (i) The decision was based on a factual error; the finding that only one professional recommended the level of 1:1 support contended for. The evidence of the Appellants' educational psychologist, Dr Kelly, was in fact supported by evidence from Ms Fern, SENDCo at G's school;

    (ii) It was not reasonably open to the Tribunal to prefer evidence from historic reports of Ms McHugh, educational psychologist, dated September 2022, and Ms Sana, SLT, dated August 2022, over that of contemporary evidence from professionals working with G or who had assessed him more recently; and

(iii) The decision impermissibly made reference to a setting-specific factor, class size, which was an irrelevant consideration.

Ground 2 (SLT)

16. The Tribunal failed to address a key disputed issue in its decision making; the amendments sought to SLT provision. The only reference to SLT in the decision is at paragraph 26(a) of the decision: '*Turning to the EHCP itself and the provision, its* (sic) *is clear that 8-10 hours of SaLT 1:1 is indicated'*. This reflected agreed provision in the working document: '*SLT to deliver 8-10 weekly 1-hr sessions in a school setting. The sessions should include direct intervention and admin time for case notes. (10 Hours)*'. However, the decision says nothing about the aspects of SLT provision which remained in dispute.

17. Notwithstanding the absence of any reasoning, the EHCP ordered by the Tribunal demonstrates that the Tribunal did take a decision on these issues in substance. At page18, the EHCP includes the agreed wording, but removes both the wording the Appellants sought to be deleted and the wording they sought to be included.

18. The Appellants referred to the Practice Direction from the Senior President of Tribunals on Reasons for decisions dated 4 June 2024 (the Practice Direction), at paragraph 5: '*Where reasons are given, they must always be adequate, clear, appropriately concise, and focused upon the principal controversial issues on which the outcome of the case has turned. To be adequate, the reasons for a judicial decision must explain to the parties why they have won and lost*. *The reasons must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the main issues in dispute. They must always enable an appellate body to understand why the decision was reached, so that it is able to assess whether the decision involved the making of an error on a point of law*'.

19. When considering permission to appeal, Judge McCarthy concluded this ground disclosed an error of law; failure to resolve a dispute between parties. Judge McCarthy decided to review the decision on this point and take no action. The decision on review, that the text in question did not identify special educational provision, was made in the absence of submissions on the point and was made in error.

20. The text in dispute was not limited to assessment of need only and in fact described provision to G (direct or facilitative) in a number of respects. It was not reasonably open to Judge McCarthy to find that none of the text described special educational provision and that this point was so clear that it would serve no useful purpose for the parties to be able to address the Tribunal on the question at a re-hearing.

Respondent's Submissions

Ground 1 (1:1)

21. Mr Holland urged caution in my approach to disposal of the appeal and reminded me of the expert nature of the Tribunal and its inquisitorial function. It was submitted that, if I conclude the Tribunal erred on facts or the decision lacked rationality, I should not constrain any future First-tier Tribunal by considering specificity to the extent contended for by the Appellants.

22. It was submitted that the appeal primarily proceeds by criticising how the Tribunal approached the evidence and this, in effect, is a disagreement with the factual conclusions of the Tribunal. While it was accepted that the Tribunal could have expressed itself more clearly, the conclusion that 1:1 support was not necessary was a conclusion open to it. The appeal should not succeed on this basis because it effectively invites the Upper Tribunal to make a determination on the facts.

23. It was accepted that normally special educational provision would be specific and quantified. However, the context for this appeal is that the Tribunal determined that full time 1:1 support was not necessary. It would therefore not be appropriate, on these facts, to specify the precise circumstances when 1:1 support may be required. The Appellants' suggestion is that for each and every element of provision in Section F, required support should be precisely specified. It is submitted that this would be both impractical and undesirable. If this level of specificity were written into the EHCP it would remove professional discretion.

24. The Tribunal made reference to the fact that G was already schooled in an environment with a high staff to student ratio. This comment was made in the context of an agreed Section I school placement. It does not follow that the Tribunal made its decision because of the level of support available at the school in question, it was simply giving additional factual context to its decision.

25. On the issue of specificity, professional discretion and flexibility the Respondent referred to the Court of Appeal decision in **E v Newham [2003] EWCA Civ 9** and the Upper Tribunal in **FC v Suffolk County Council (SEN) [2010] UKUT 368 (AAC).**

Ground 2 (SLT)

26. The Respondent adopts the reasoning of Judge McCarthy when refusing permission to appeal. It is conceded that there was an error of law in that the Tribunal did not address the SLT dispute. However insofar as a needs assessment was sought, an assessment is not special educational provision. As such it is unfortunate that the Tribunal did not address the point, but it did not make any difference to the outcome.

Law

27. I start with reference to the Practice Direction:

> 6 *Providing adequate reasons does not usually require the First-tier Tribunal to identify all of the evidence relied upon in reaching its findings of fact, to elaborate at length its conclusions on any issue of law, or to express every step of its reasoning. The reasons provided for any decision should be proportionate, not only to the resources of the Tribunal, but to the significance and complexity of the issues that have to be decided. Reasons need refer only to the main issues and evidence in dispute, and explain how those issues essential to the Tribunal's conclusion have been resolved*.
> …
>
> *8 Judges and members in the First-tier Tribunal should expect that the Upper Tribunal will approach its own decisions on appeal in accordance with the well settled principle that appellate tribunals exercise appropriate restraint when considering a challenge to a decision based on the adequacy of reasons. As the Court of Appeal has emphasised, a realistic and reasonably benevolent approach will be taken such that decisions under appeal will be read fairly and not hypercritically.*
>
> *9 As an expert tribunal, the First-tier Tribunal will generally be taken to be aware of the relevant authorities within the jurisdiction being exercised, and to be applying those cases without the need to refer to them specifically, unless it is clear from the language of the decision that they have failed to do so. The Upper Tribunal will not readily assume that a tribunal has misdirected itself merely because every step in its reasoning is not fully set out in its decision. Thus, a challenge based on the adequacy of reasons should only succeed when the appellate body cannot understand the Tribunal's thought process in making material findings.*

28. I considered the cases of: **E v London Borough of Newham**; **FC v Suffolk County Council** and **Worcestershire County Council v SE** and in the latter, the principles distilled from previous authorities set out by Judge West at paragraph 74. In particular the following passages were of assistance:

> *74 (ix) in distinguishing between cases where provision is sufficiently specific and those where it is not, it is important that the plan should not be counter-productive or hamper rather than help the provision which is appropriate for a child. The plan has to provide not just for the moment it is made, but for the future as well. If absolute precision is required, it can only be obtained by a continual process of revision of the plan, and the time involved in investigating and decision-making on exactly what is now required, with possible appeals, could disrupt the professional's ability to provide what the child requires and disrupt the child's progress. A plan must allow professionals sufficient freedom to use their judgment on what*

*to do in the circumstances as they are at the time. A tribunal is entitled to use its expertise to decide on the proper balance between precision and flexibility: see Judge Jacobs in **BB** at [23].*

*(x) the broad general principles laid down by the Court of Appeal in **E v Newham LBC** must be applied to the particular circumstances of each case as they arise. The contents of an EHCP have to be as specific and quantified as is necessary and appropriate in any particular case or in any particular aspect of a case, but the emphasis is on the EHCP being a realistic and practical document which in its nature must allow for a balancing out and adjustment of the various forms of provision specified as knowledge and experience develops on all sides. Wisdom lies also in leaving a wide scope to the expert judgment of the members of the First-tier Tribunal and not subjecting matters which fall rather uneasily within the framework of a judicial process to inappropriately technical standards: see Judge Mesher in **CL** at [15].*

Conclusion

Ground 1 (1:1)

29. Dealing first with the areas of the decision where it is asserted the Tribunal erred. I have read the Tribunal decision as a whole and borne in mind the Practice Direction, in particular that reasons '*must always enable an appellate body to understand why the decision was reached, so that it is able to assess whether the decision involved the making of an error on a point of law'*. I have asked myself whether the decision sufficiently explains why the Tribunal made its decision on the issue of the level of 1:1 support required and conclude that it does not.

Ms Fern's evidence

30. The Tribunal rehearses the oral witness evidence at paragraphs 17 to 21 of the decision. The Tribunal's summary of Ms Fern's evidence (paragraphs 18-19) does not make reference to a provision map prepared by the school (FTT supplementary bundle page 134). Under '**Description of provision'** in the provision map it states: '*G is supported by a team of 2 LSAs throughout the day*' and under '**Cost per academic year'** it states: '*32.5 hours specialist support £13.52 per hour. Specialist support per term £5,565.73. Per annum £16,697.20*'. The provision map was adduced into evidence in Ms Fern's witness statement under the words 'Section F' at the bottom of page 71 (FFT supplementary bundle).

31. The Tribunal's conclusion that Ms Fern's evidence on the level of 1:1 support '*does not amount to either a high level of support or full time 1:1*' does not engage with the contents of the provision map at all. It is not possible to decern how, if at all, the Tribunal weighed this evidence. If, using their own expertise and/or weighing against other available evidence, the Tribunal disagreed with the level of provision specified in the provision map it was incumbent on them to explain why.

Weighing of available evidence

32. The omission to engage with the provision map, appears to have led the Tribunal into further error in that they state that '*Dr Kelly is the only expert who contends that 1:1 support from a TA for 32.5 hours in required*'. It appears based on the provision map that Ms Fern's evidence was supportive of Dr Kelly as outlined above. This error of fact is material to the Tribunal's reasoning.

33. The Tribunal notes that the evidence on the question of the appropriate level of 1:1 support '*is not straightforward or one way'.* I consider that it is not possible to understand from the decision how the competing evidence has been comparatively weighed for the Tribunal to reach its conclusion.

34. The Tribunal refers to the written reports of Ms McHugh, educational psychologist, and Ms Sana, speech and language therapist both dating from 2022. In noting that Ms McHugh does not mention a high level of or 1:1 support no reference is made by the Tribunal to the comparative age of the report with that of Dr Kelly. The Tribunal does not explain why the absence of specific reference to the level of 1:1 support by Ms McHugh is weighed as being more significant than more recent evidence suggesting 32.5 hours of 1:1 support is required. The Tribunal does not explain what significance is placed on the content of Ms Sana's report in the context of 1:1 support.

35. The requirement for the Tribunal to articulate its reasoning clearly when departing from the wording proposed by both parties must also be considered in its particular context: that the Respondent accepted that G required a 'high' level of 1:1 support and evidence that, in 2023, G accessed 1:1 support from a TA available 80% of the time.

36. I was unable to understand the Tribunal's thought process in the making of material findings on the question of 1:1 support. I consider that the Tribunal fell into error of law arising from a lack of adequate reasoning. That is sufficient to uphold this ground of appeal. I do not need to consider whether the decision is irrational in the sense that no tribunal, properly instructed on the law, could have arrived at this decision (if using their own expertise and based on all the available evidence they had properly explained their conclusion).

Placement specific factor

37. Turning now to the Tribunal's reference to a placement specific factor in its conclusions. Of course, class size is an irrelevant consideration to determining Section F special educational provision. The Tribunal makes reference to class size twice in paragraph 26a: '*There is small group work required, but the class is already small*…' and '*Although section I follows F, it is difficult to put out of mind the fact the classes are as a matter of fact very small indeed and have a high pupil to staff ratio*'.

38. The inclusion of the above sentence introduces an element of ambiguity as to the Tribunal's decision making. I am however persuaded by Mr Holland's

submission that these references to class size were made to give context in circumstances where placement at the school was agreed and known. In doing so I take into account the Tribunal's specific reference to the correct order of decision making: '*Section I follows F'.* As such this aspect of Ground 1 is not well made and is dismissed.

Specificity

39. Finally, as for whether the Tribunal's wording was impacted by a lack of specificity. The wording inserted into the EHCP should be sufficiently specific so as to leave no room for doubt. This may be particularly so if the school is not a special school. G's school is not a special school rather it is an independent school with a significant number of pupils with special educational needs. On the other hand, the SEND Code of Practice of January 2015 is not absolute on this point (page 166): '*Provision must be detailed and specific and should normally be quantified, for example, in terms of the type, hours and frequency of support and level of expertise'* (my emphasis). Further as stated in **Worcestershire** the tribunal is entitled to use its expertise to decide on the proper balance between precision and flexibility.

40. The Tribunal rejected the wording put forward by both parties (full time 1:1 versus a high level of 1:1) selecting 'a level' of 1:1 based on the provision in section F. Dependent on the case it is open to a Tribunal using its expertise to leave the level of support to be determined flexibly based on tasks. However, I consider that the wording selected lacked the appropriate degree of specificity required in the context of this EHCP. Further explanation was required in this case as the Tribunal relied on its own expertise to insert wording of their choosing and felt unable to quantify the level of 1:1 support required based on the provision specified in section F. This may have been a situation where the Tribunal could have laid down a minimum level of requirement in terms of 1:1 support, as anticipated by the Court of Appeal in **Newham** (paragraph 64 ii). Although I stress that nothing said by me should constrain a future tribunal's decision making.

41. For the reasons above and to the extent specified the appeal on Ground 1 is well made and is allowed.

Ground 2 (SLT)

42. In accordance with Judge McCarthy's conclusion, and as conceded by the Respondent, the Tribunal was in error of law because it did not explain its determination of the disputed SLT provision. On review it was determined that the amendment sought was not of provision as it related purely to assessment. This decision on review was made without the benefit of submissions.

43. I consider it is arguable that elements of the amendment sought may be determined to be provision within the meaning of section 21(1) Children and Families Act 2014. This is because the text in question was arguably not limited to 'pure' assessment and described some elements of provision to G. The parties should have the opportunity to address a tribunal on this at a hearing.

44. For these reasons Ground 2 of the appeal is well made and the appeal is allowed.

Disposal

45. Section 12 of the Tribunals, Courts and Enforcement Act 2007 provides that the Upper Tribunal may re-make a decision rather than remitting it, including by making findings of fact. Mr Broach urged me to remake the decision on 1:1 provision on the basis of the evidence in Dr Kellys' report. Mr Holland urged caution and to limit the approach I took to disposal.

46. Whilst I have sympathy with the Appellants' position, that they should not be put to further delay or costs, I do not consider it appropriate for me to remake this decision. Particularly in circumstances where the level of 1:1 support required is contested and the Tribunal took a different approach to that advanced by both parties. Consideration of this point requires consideration of all the available evidence as well as a tribunal's own expertise.

47. Further, the issue of SLT provision requires remittal in any event. I was not pressed by Mr Broach to remake the decision in this regard, albeit his written submission invited me to do so on the basis of Dr Aldred's report.

48. In light of the errors identified in the decision and the possible delay in reconvening the panel, the remitted hearing will be before a newly constituted panel.

49. Discussion is currently ongoing between the parties as to the content of the EHCP for G for the next academic year. The parties are encouraged to consider whether they may be able to proceed by way of agreement rather than investing further cost and time into a future hearing related to this EHCP which will soon be out of date.

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S Davies
Judge of the Upper Tribunal
Authorised for issue on 10 June 2025