



Neutral Citation Number: [2024] EWHC 443 (Admin)

Case No: AC-2023-LON-002733

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: Thursday, 29<sup>th</sup> February 2024

**Before :**

**ALAN BATES**  
**(sitting as a Deputy Judge of the High Court)**

-----  
**Between :**

**THE KING (on the application of HXN**  
**(a child supported by his litigation friend, PK))**

**Claimant**

**- and -**

**LONDON BOROUGH OF REDBRIDGE**

**Defendant**

-----  
**Mark Small (of Baker Small Solicitors) for the Claimant**  
**Lachlan Wilson (instructed by the Legal Department of the London Borough of Redbridge)**  
**for the Defendant**

Hearing date: 14<sup>th</sup> February 2024  
Confidential draft judgment circulated: 26 February 2024  
Judgment Released: 29 February 2024  
-----

**Approved Judgment**

This judgment was handed down remotely at 14:00 pm on 29<sup>th</sup> February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

ALAN BATES SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

**DHCJ Alan Bates:**

Introduction and factual background

1. This judicial review claim concerns a 15-year-old boy who has substantial special educational needs. In these proceedings, he has been anonymised using the initials “HXN”. In this judgment, I will refer to him simply as “H”.
2. H has a diagnosis of autism (i.e. autism spectrum disorder, or ASD). He has severe learning difficulties; he is non-verbal and has severe language and communication difficulties. He has limited self-help skills and has significant sensory sensitivities. He requires assistance with eating and toileting, and he also suffers from epilepsy.
3. H’s needs are the subject of an Educational, Health and Care Plan (“EHCP”) dated 23 January 2023 which sets out in some detail the package of special educational provision which is required for meeting those needs. That EHCP was produced pursuant to a decision of the First-tier Tribunal (“the Tribunal”) in December 2022. The Tribunal had considered evidence from multiple relevant professionals about H’s needs and how they could be met, and produced a detailed decision describing the package of special educational provision H should receive.
4. H is legally entitled to be provided with that package in full. The public authority responsible for providing him with that full package is the Defendant local authority, the London Borough of Redbridge (“the Council”). This is undoubtedly the law and there is no dispute about it.
5. But it is also both clear and undisputed that H is not being provided with that full package and is therefore not receiving the educational provision to which he is legally entitled. The issue the Court has to decide is essentially whether the Court should grant any remedy in respect of this ongoing failure by the Council.
6. At the heart of that package is extensive and consistent application of a specialist intervention called ‘applied behaviour analysis’ (“ABA”). ABA is a scientific approach that focuses on understanding and improving behaviour. It is widely used in the field of autism treatment and intervention. ABA is based on the principle that behaviour is learned and can be influenced by the environment. The delivery of ABA involves the use of ABA techniques, such as consistent programmes whereby the tutors working with the individual with autism teach and prompt him to carry out certain behaviours, and then, over time, ‘fade’ the prompts whilst offering positive reinforcement for the carrying out of those behaviours. Through the effective application of ABA techniques,

individuals with autism can develop new skills, reduce challenging behaviours, and improve their overall quality of life.

7. ABA is only one of a number of specialist intervention approaches used when working with children with autism. It is apparent from the Tribunal's reasoning in their decision, however, that ABA was determined to be the appropriate principal approach for helping H learn and develop new skills, albeit that other approaches could also be incorporated in H's programme.
8. H is the Claimant in these proceedings, which he brings with the support of his mother, anonymised as "PK", as his litigation friend. In this judgment, I will refer to her as "the Mother". H's father ("the Father") has also provided a witness statement in these proceedings. The Interested Party, anonymised as "School GB" (or simply "the School"), is the special school at which H is a pupil.
9. As explained further below, there have, in the course of these proceedings, been disagreements between the parties as to the precise extent to which the educational provision being received by H has fallen, or is continuing to fall, short of the full package set out in the EHCP. Those disagreements had narrowed by the time of the substantive hearing before me, albeit that some areas of disagreement remained.
10. The principal respect in which the education and care provision being received by H at School is currently falling short of the package set out in the EHCP is, however, largely undisputed. The EHCP specifies that H should receive "*full time 1:2:1 trained and experienced ABA tutor support (32.5 hours) to access the curriculum and unstructured times.*" The EHCP further specifies that this ABA tutor support "*should be provided by a team of 2 – 4 ABA tutors who can all work with him during the school week so he can generalise skills across different people and not be dependent on [one] person.*" It is common ground that these provisions of the EHCP require that H receive one-to-one support throughout the school day on every day when he should be at school, i.e. *5 days a week* during term-time, and that this support should be *delivered by at least two different ABA tutors*. But it is also common ground that, since the start of the current academic year in September 2023, H has been receiving one-to-one support from *just one ABA tutor* (an ABA practitioner who has been referred to in these proceedings as "Tutor 4"), and for *only three days a week* (Wednesday, Thursday and Friday). Those are the only days on which Tutor 4 is employed to work at the School. She is not available to work with H on Mondays and Tuesdays as she has another professional commitment on those days, working with another child at another place.

11. The School has offered to provide alternative support for H on Mondays and Tuesdays, not using a trained experienced ABA practitioner but instead involving a learning support assistant able to deploy other intervention techniques commonly used with autistic children. This offer, as the Council candidly accepts, falls short of the package set out in the EHCP. Further, I have seen (as an exhibit to one of the Mother's witness statements) an email the Mother sent the School on 3 October 2023 in which she complained that H was not receiving appropriate one-to-one support on Mondays and Tuesdays and that this was leading to him not eating or drinking whilst at school on those days. The email further stated that H had suffered an epileptic seizure and that a paediatrician had given advice, which had been shared with the School, that H needed to receive regular meals and fluids so as to avoid further seizures. Following that email, H's parents have not been sending him to school on Mondays and Tuesdays, citing concerns for his health and safety. The practical position at the present time is, therefore, that H is attending school for only three days a week.
12. The Council's failure to deliver the full ABA tutor support provision required by the EHCP is not new. H was likewise not receiving the required provision during the previous academic year (the 2022-23 academic year), albeit that the nature and extent of the support he was receiving during that academic year was different. As his current EHCP was issued in January 2023, the majority of that academic year fell within the period of that EHCP. During that academic year, the ABA tutor support provided for H was from single tutor, "Tutor 3". Tutor 3 worked with H on every school day (i.e. 5 days a week, as per that aspect of the EHCP's requirements), but H had no second ABA tutor. Further, Tutor 3 had not yet completed all the requirements, which included the passing of an examination, for attaining qualification as a Registered Behaviour Technician for ABA ("RBT"). She was an experienced learning support assistant who had been working at the School for around 7 years and had agreed to undertake a 40-hour online training course with a view to eventually taking the examination she would need to pass in order to attain qualified RBT status.
13. I emphasise that I see no basis at all for criticising Tutor 3; on the contrary, she is to be commended for her willingness to contribute to meeting H's needs (which might otherwise have been left unmet to a greater degree) over the period for which she made that contribution. But one-to-one support as provided by her alone – i.e. as H's sole ABA tutor – plainly did not (as the Council, to its credit, acknowledges) meet H's requirements identified by the Tribunal, and specified in the EHCP, for him to be supported by a *team* of trained and experienced ABA tutors.

14. Against this background, the case put on behalf of H is a simple one. He is not receiving the provision he is entitled to receive; therefore, the Court should make a mandatory order to compel the Council to comply with its statutory duty.
15. The Council's case is that, in view of the following alleged circumstances, the Court should not grant any relief, whether by way of a mandatory order or a declaration:
  - i) H's ongoing lack of a second ABA tutor is a situation that has been caused, or at least substantially contributed to, by the conduct of H's parents (predominantly, the Mother). The parents' critical, aggressive, demeaning and/or rude approach to dealing with the School's staff – and especially to the tutors tasked with providing one-to-one ABA support for H – has deterred staff from being willing to be involved in carrying out that role. In particular, it is said that, by the end of the 2022/23 academic year, Tutor 3 had abandoned her ambition of taking the examination and attaining RBT status, because of the distress and discouragement she experienced in consequence of the Mother's behaviour and attitude towards her. Tutor 3 withdrew from working with H.
  - ii) The School has done its best to recruit a second ABA tutor for H, including by repeatedly advertising for ABA tutors, but it has not been successful in attracting suitably qualified applicants. There is a national shortage of ABA tutors, and the Council should not be ordered to do the impossible.
  - iii) Given that EHCPs are supposed to be reviewed annually, a review of H's EHCP is now overdue. It is possible that the outcome of such review may be that his EHCP is modified so that he is no longer to be provided with ABA intervention, either at all or to the same extent. In that regard, the Council notes that H is now approaching his 16<sup>th</sup> birthday, meaning that the EHCP review will need to consider where he will receive his post-16 education, and may re-assess the appropriateness of ABA intervention for H in view of his age.

### The law

16. Section 37(1) of the Children and Families Act 2014 ("the 2014 Act") makes provision for EHCPs to be prepared and then maintained by local authorities:

“Where, in the light of an EHC needs assessment, it is necessary for special educational provision to be made for a child ... in accordance with an EHC plan–

(a) the local authority must secure that an EHC plan is prepared for the child ..., and

(b) once an EHC plan has been prepared, it must maintain the plan.”

17. Section 37(2) of the 2014 Act explains what must be specified in an EHCP. This includes both “*the child’s ... special educational needs*” and “*the special educational provision required by him or her*”.
18. Section 42(2) and (6) of the 2014 Act place a duty on the local authority that maintains an EHCP, to ensure that the child is provided with the special educational provision specified in the EHCP. “*The local authority must secure the specified special educational provision for the child ....*”
19. In *R (N) v North Tyneside Borough Council* [2010] EWCA Civ 135, the Court of Appeal made clear that the duty of a local authority to secure the provision in a Statement of Special Educational Needs (which were the predecessors of EHCPs) was absolute. *Per* Elias LJ:

“[5] ... [T]he duty to arrange for the specified provision is a mandatory one. There can be no excuse if there are financial or other practical difficulties in giving effect to the terms of the statement ....”

Sedley LJ, who agreed with Elias LJ, added:

“[17] There is no best endeavours defence in the legislation. If the situation changes there is machinery for revising the statement, but while it stands it is the duty of the [local authority] to implement it. In a margin of intractable cases there may be reasons why a court would not make a mandatory order, or more probably would briefly defer or qualify its operation. But, as has been accepted before us, this is not such a case.”

20. In *R (BA) v Nottinghamshire County Council* [2021] EWHC 1348 (Admin), HHJ Coe QC, sitting as a Judge of the High Court, applied those principles to the duty imposed by s.42 of the 2014 Act:

“[27] There is no real dispute between the parties about the legal principles applicable here. Section 42 imposes a duty on local authorities to secure the special educational provision specified in an EHCP created by the Children and Families Act 2014. It is an absolute and non-delegable duty (see *R (N) v North Tyneside Borough Council ...* ). There is no ‘best endeavours’ defence.”

21. Section 19(1) of the Education Act 1996 imposes a further duty on local authorities in England:

“Each local authority in England shall make arrangements for the provision of suitable education at school or otherwise than at school for those children of compulsory school age who, by reason of illness, exclusion from school or

otherwise, may not for any period receive suitable education unless such arrangements are made for them.”

22. In *R (LB) v Surrey County Council* [2022] EWHC 772 (Admin), Neil Cameron KC, sitting as a Deputy High Court Judge, ruled that the failure of a local authority to give effect to the terms of an EHCP breached its duties under s.19 of the Education Act 1996 as well as under s.42 of the 2014 Act. The claimant, a looked-after child with complex health and education needs, had returned to live with her mother after residential placements had broken down; and, thereafter, the local authority had failed to deliver much of the provision set out in her EHC plan. Mr Cameron KC held:

“The duty to make arrangements for the provision of suitable education is not a duty to attempt to make arrangements. As was made plain by Richards LJ in [*R (G) v Westminster City Council* [2004] EWCA Civ 45], it is a duty to arrange for the provision of suitable education. It is a duty to ensure that there is available for each child an efficient educational facility that is suitable for the child’s age, ability and aptitude and any special educational needs that the child may have (as defined in section 19(6) of the 1996 Act). The question to be asked is whether educational provision is available, is possible, and is accessible to the child.”

23. None of these principles is disputed by the Council in this case.
24. The principles that should guide a court when deciding whether to make a mandatory or other order to enforce a local authority’s performance of its statutory duties to an individual were recently considered by the Supreme Court in *R (Imam) v London Borough of Croydon* [2023] UKSC 45. I discuss those principles further below, as part of my reasoning in paragraphs 93 to 98.

#### Procedural history

25. Before analysing the substantive issues in this case, it is important to set out the procedural history as that history is relevant to that analysis, and is also relevant to the admission of late-filed witness statements on which I permitted the Council to rely.
26. It needs to be said that the Council’s litigation conduct has been unacceptable. Its repeated failures to engage with the litigation process have led to costs and court time being wasted. More importantly, the failures have caused considerable delay to the resolution of this claim and the underlying dispute. This delay has been prejudicial to H, a young person who was coming to court seeking a remedy for a prolonged and ongoing failure to provide him with educational provision to which he was legally entitled pursuant to the outcome of previous judicial proceedings (the proceedings in the Tribunal).

27. H's solicitors sent a detailed pre-action protocol letter to the Council on 16 May 2023, requesting a response within 14 days. On 1 June 2023, the Council sent a holding response, indicating that it needed more time but would provide "*a detailed response*" by 9 June 2023. But no substantive response to the pre-action letter was ever provided.
28. The claim form, dated 11 September 2023, was filed with an Application Notice requesting that a hearing be listed within 28 days. Such priority consideration of the claim was requested by reason of the urgency of remedying the non-provision to H of the full package of ABA-based educational provision to which he was entitled. At least on the Mother's evidence, this non-provision was holding back H's progress – and, indeed, causing him some regression – in terms of his developing the skills that the ABA programme was intended to develop in him.
29. On 15 September 2023, H's solicitors sent the sealed claim form, together with the supporting bundle of documents, to the Council by email. There is no doubt the Council received those materials, as the Assistant to the Council's Mediation & Tribunal Manager acknowledged receipt in an email to H's solicitors on 20 September 2023. But the Council did not file an Acknowledgment of Service within the 21-day period specified in CPR rule 54.8 or at all.
30. The claim then came before a Judge for consideration of permission to apply for judicial review on the papers on 9 November 2023. That Judge happened to be me. In the absence of any response to the claim from the Council, I granted permission. Having read the Application Notice and the Mother's supporting evidence, I also ordered that an expedited hearing be listed during December 2023 and gave directions setting out a timetable for the Council to file and serve its Detailed Grounds and evidence, and for any reply evidence on behalf of H to be served, all in good time before that hearing. My directions provided that the Defendant should serve its skeleton argument 4 days before the hearing. So as to signal to the Council that it needed to engage with the claim, my observations set out alongside my order stated: "*The Court expresses its disappointment that the Defendant has not filed an Acknowledgment of Service, nor provided a substantive response to the Claimant's pre-action letter. The Court may consider the Defendant's litigation conduct (including pre-action conduct) when taking decisions about costs in due course.*"
31. H's solicitors emailed a copy of my order to the Council on the morning of 10 November 2023. It was undoubtedly received by the Council, as the Council acknowledged receipt to H's solicitors by an email on 13 November. The Council also received several subsequent emails from H's solicitors about the claim; for example,



emails requesting details of the legal representative who would be dealing with the claim on behalf of the Council, and the chasing for provision of that information.

32. On 21 November 2023 (just 1 day before the Council’s Detailed Grounds and evidence were due to be filed), the Council’s Mediation & Tribunal Manager sent an email to H’s solicitors. In her email, the Mediation & Tribunal Manager apologised for the delay in responding to the claim, explaining that she had been on sick leave for a period of some weeks. She acknowledged that this was “*not a satisfactory situation*” and promised that “[g]oing forward this LA is giving the matter extremely urgent priority.” She further stated that the Council would be applying for an extension of time for filing their Detailed Grounds and evidence, and she invited H’s solicitors to consent to such extension. But her email did not state how long an extension the Council was asking for.
33. H’s solicitors responded on the same day, pointing out that the Council needed to apply to the Court for an extension of time, and also that the Council’s email had not proposed a new timetable. As H’s solicitors fairly observed, “*we cannot agree to an open ended deadline.*” The Council replied accepting that the request for a new timetable was a reasonable one and stating that the Council would provide one after it had instructed counsel.
34. On 29 November 2023, H’s solicitors sent a chasing email to the Council. On 1 December 2023, an Assistant Solicitor in the Council’s legal department replied, indicating that the Council hoped to be able to “*draft a full reply to you by Friday next week*” (i.e. by 8 December 2023).
35. I note that this was in circumstances where the substantive hearing was listed for Wednesday 13 December 2023. No application – whether for an adjournment, or for an extension of time – was made by the Council until Friday 8 December. On that date, the Council filed an Application Notice seeking permission to file a statement of case and evidence by 4pm on Monday 11 December 2023. But no drafts of the proposed statement of case or evidence were provided with that Application Notice.
36. On the afternoon of the day on which that Application Notice was filed (8 December 2023), I had resorted to personally emailing the parties urgently seeking assurance that the Council had received notice of the claim and of the hearing, and enquiring after the Council’s Detailed Grounds, evidence and skeleton argument. I did so in circumstances where, at that time, the Council’s Application Notice had not yet been referred to me. The Council’s Assistant Solicitor responded to me later that day, drawing attention to the Council’s Application Notice and apologising for the delays.

37. The Council filed and served a short statement of case at around 4pm on 11 December, but without accompanying witness evidence. The Council's witness statements were eventually provided by email after 11am on the following day, 12 December, i.e. less than 24 hours before the start of the listed substantive hearing. The Council's skeleton argument for that hearing was sent to me by email early in the morning on the day of that hearing.
38. It was immediately apparent to me from reading the Council's statement of case and witness evidence that the Council's principal case in response to the claim was essentially that the deficiencies in providing H with the package of special educational provision specified in his EHCP were attributable to bad behaviour by his parents (principally, the Mother). In particular, it was being alleged by the Council that the parents' critical and rude behaviour towards school staff had made it very difficult for the School to find ABA tutors willing to work with H. The Council's statement of case put the Council's case this way:

“... [T]he principal reason why [H] is not in receipt of the full ABA tutor support is because of the antagonistic and unreasonable behaviour on the part of [H]'s mother and, to a lesser degree, father, which has caused the resignation of previously recruited ABA tutors. Nor could the School or LA recruit an ABA tutor from a body that [H]'s mother worked for (at a price which was more than the national average) as this was objected to by [H]'s father who claimed that there was a conflict of interest. ...”

“It would be wholly inappropriate for the Claimant to obtain relief ... in circumstances where the LA's failure to deliver EHCP provision (the full ABA tutor requirement) has been principally brought about by unreasonable conduct on the part of the [H's] litigation friend, and when the School's endeavours to recruit cannot be criticised.”

“The Court should, accordingly, be wary to provide relief that, in these circumstances, sets the LA up to fail .... It is clear that [H]'s mother still wishes to maintain that the School is not the correct placement for [him] ....”

“... [T]his claim ... portrays the hall-marks of an intention to set the School (and by consequence the LA) to fail in order to achieve what has been historically a longed-for campaign for a costly specialist placement for [H] instead of the School, and latterly a move towards home education (i.e. a costly package of Education Other Than In a School or College ...).”

39. These allegations in the Council's statement of case – effectively blaming the parents for the Council's failures to meet their child's needs – constituted the advancement by the Council of a case that it had not previously been intimated in any correspondence, whether to H's solicitors, the parents or the Court. Upon reading the Council's statement of case, I was immediately concerned about the obvious unfairness of

allegations of this kind being introduced to the proceedings at such a late stage. H's parents were likely to be shocked and upset by this turn of events; and they would have little opportunity to consider the allegations being made about them, and no real opportunity to serve evidence in response, prior to the 13 December substantive hearing.

40. The content of the evidence filed by the Council also gave me cause for concern. That evidence, insofar as it related to the Council's substantive case, consisted of a single witness statement: a statement by the School's Behaviour Intervention Lead, whom I will refer to by her initials, "MS". That witness statement contradicted multiple aspects of the Mother's factual witness evidence as to the educational provision being received by H. It also made serious criticisms of the parents, such as that an ABA tutor (referred to as "Tutor 1") who had been working with H during the 2021-22 academic year "*left due to unreasonable demands and antagonistic attitudes of H's parents*", and that, "*prior to this, she had a substantial amount of time off work due to the pressure of dealing with parents.*" The witness statement further asserted that "*two other ABA tutors are currently working with another child [at the School], but they have declined to extend their support to [H], alluding to a reluctance to engage with the parents.*" My concern about this witness statement was that, despite making all these factual assertions that were bound to be controversial, it did not exhibit any contemporaneous documents in support of them. The only documents exhibited to that witness statement were copies of job advertisements the School had placed, inviting applications for ABA tutor positions.
41. I raised my concerns with the parties' Counsel at the beginning of the 13 December hearing. Mr Small, who appeared on behalf of H, submitted that I should simply refuse to permit the Council to participate in the hearing; or, alternatively, I should refuse to grant a retrospective extension of time for the Council's statement of case and witness evidence, and should therefore refuse to admit that new material. In support of his submission, Mr Small referred me to the *Denton* criteria for 'relief from sanctions', i.e. the approach set out by the Court of Appeal in *Denton v TH White Ltd* [2014] EWCA Civ 906 and which has subsequently applied in Administrative Court cases, an example being *AT v Secretary of State for the Home Department* [2017] EWHC 3210 (Admin).
42. Having heard the parties' arguments, I decided effectively to permit the Council to rely on new material, but to adjourn the substantive hearing and direct a timetable for further evidence to be served. With the parties' agreement, I did not set out my full reasons for that decision by way of an *ex tempore* judgment on that occasion, instead stating that I would set out my reasons within my judgment on the claim following the re-listed substantive hearing. I therefore set out my reasons here. It is valuable to record in a

published judgment the procedural history of this matter and the specific reasons why the Council were permitted to file and rely on new material notwithstanding that history.

43. In my judgment, Mr Small was right that the *Denton* ‘relief from sanctions’ approach was, in the circumstances, the appropriate framework to apply for deciding whether the Council should be permitted to participate in the substantive hearing and to rely on a late-served statement of case and witness evidence. Pursuant to CPR rule 54.9, a person served with the claim form who has neither filed an Acknowledgment of Service within the 21-day period specified in CPR rule 54.8, nor complied with the Court’s directions as to the filing of Detailed Grounds and evidence, has no right to participate in the substantive hearing. There is therefore an automatic sanction that applies in such a case. Further and in any event, the *Denton* approach applies where the Court is considering whether to admit factual witness evidence that has been served late: see *Chartwell v Fergies* [2014] EWCA Civ 506; and *Wolf Rock (Cornwall) Ltd v Langhelle* [2020] EWHC 2500 (Ch); see also *Yesss (A) Electrical Ltd v Martin Warren* [2024] EWCA Civ 14, per Birss LJ, with whose judgment Asplin and Males LJ agreed, at [12].

44. Applying the *Denton* approach, I reached the following conclusions:

- i) The seriousness and significance of the breach: There can be no doubt that the Council’s very late service of its statement of case and evidence amounted to a serious and significant breach of the relevant requirements of the CPR. It denied both H and the Court the opportunity of knowing the Council’s case until the day before the 13 December substantive hearing. It was liable to result in serious unfairness to H in circumstances where unpleasant allegations against his parents were being introduced into the proceedings without prior notice, giving them no realistic opportunity to file evidence in response, unless the substantive hearing was adjourned. If the substantive hearing was adjourned, then this would result in significant waste of costs and court time. It would also be liable to cause prejudice to H by prolonging the period during which he was unable to obtain effective relief in respect of the Council’s admitted failure to perform its statutory duty to him.
- ii) The reason for the breach: There was no good reason. Whilst I accept that the Council’s Mediation & Tribunal Manager was off sick for a significant period of time (including at the date when the claim was served), other officials in the Council’s education department were clearly aware of the claim. Those officials should have noted the deadlines within which steps needed to be taken and should have promptly alerted the Council’s legal department to the proceedings. The ability of a public authority to respond to legal proceedings cannot properly be allowed to

depend on a single official, especially where that person has been off sick for a significant period (meaning that there was time for the authority to make interim arrangements for that person's responsibilities to be covered by other staff). The Council's failure to respond to the claim within the required timeframes had also to be seen against the background of its prolonged failure to respond to the pre-action protocol letter since mid-May 2023; a failure for which the Council had offered different, but similarly unsatisfactory, explanations.

iii) All the circumstances of the case: Despite there being no good reason for the breach, I decided that it would not be appropriate for me to simply refuse to permit the Council to participate in the hearing and/or to refuse to admit its statement of case and evidence. Such a refusal would, in the circumstances of this case, inevitably have led to my granting H a remedy for the Council's failure to provide him with the full package of special educational provision specified in his EHCP. Such remedy could potentially take the form of a mandatory order. Absent any evidence from the Council, however, I would have been considering whether to make a mandatory order – and, potentially, determining the precise terms of that mandatory order – whilst having only a partial picture of the educational provision actually being received by H. I would also have been determining those terms without having considered the Council's evidence as to the practical challenges being experienced by the School in delivering the full package of provision. For me to take such an approach could therefore carry a significant risk of injustice; for example, I could be making an mandatory order requiring the Council to do something that was simply not practically possible for it to do.

45. The decision that I came to was that, on balance, the interests of justice required me to adjourn the substantive hearing, so as to: (a) allow the Council an opportunity to provide further witness evidence, which should be supported by exhibited contemporaneous documents, and to comply with its duty of candour; and (b) afford H and his parents a proper opportunity to consider that evidence and to file any evidence in reply. This approach inevitably caused some prejudice to H in terms of significant delay to the substantive determination of his claim. I was not sanguine about that prejudice: every month of appropriate special educational provision is something of real value to a child. This is especially so in relation to H, who is approaching his 16<sup>th</sup> birthday. He needs much support to develop skills that will make a difference to his ability to beneficially engage with his environment and other people throughout the rest of his life. Ultimately, however, I judged his interests to be best promoted by the Court being in a position of full knowledge regarding the educational provision he is receiving, and about what could realistically be done to bring that provision into line with his entitlement under

his EHCP. Such knowledge would enable the Court to grant suitably-crafted practicable remedies, if appropriate, for his benefit.

46. When adjourning the substantive hearing, I ordered that the Council pay, in any event, H's costs of attendance at the 13 December hearing and of responding to the Council's application to admit its late-served statement of case and evidence. I will also take account of the parties' litigation conduct when dealing with costs of the proceedings generally.
47. The substantive hearing was re-listed to take place before me on 14 February 2024 and took place on that date.
48. Prior to that re-listed hearing, the Council has filed and served further witness evidence, but it did so on 12 January 2024, rather than within the 21-day period specified in my order made at the 13 December hearing (a period which expired on 3 January 2024). The Council filed an Application Notice dated 3 January 2024 requesting a revised timetable so as to extend time for filing its further witness evidence. As far as I am aware, there is no objection on behalf of H to my granting that extension, and H has not objected to the Council's reliance on the further witness evidence at the re-listed hearing. I therefore grant that extension.

The evidence filed by the Council in advance of the re-listed substantive hearing

49. As noted above, on 12 December 2023, the Council had served a witness statement of MS, the School's Behaviour Intervention Lead, but the only documents exhibited to that witness statement were copies of job advertisements placed by the School for seeking to recruit ABA tutors.
50. On 12 January 2024, the Council served a further witness statement of MS, to which was exhibited a further 11 witness statements, each of which was itself verified by a statement of truth. Those witness statements were from the following individuals (I have anonymised those who are employed in the School, in order to protect H's identity from being revealed by publication of this judgment):
  - i) Tutor 3, i.e. the tutor who worked with H during the 2022/23 academic year;
  - ii) Tracey Cooper, the external ABA consultant engaged by the Council to develop and support the ABA programme being delivered for H;
  - iii) Tutor 4's manager in relation to the post in which she works on Mondays and Tuesdays;
  - iv) the School's Designated Safeguarding Lead;
  - v) Nicola Wolf, the Council's Head of Occupational Therapy – SEN & Inclusion Services;

- vi) the School's Assistant Headteacher;
- vii) Tutor 4, i.e. the ABA tutor who has been working with H on Wednesdays, Thursdays and Fridays during this present academic year;
- viii) the School's Health and Safety Officer;
- ix) the School's Deputy Headteacher;
- x) a teacher at the School; and
- xi) another teacher at the School.

51. I consider the evidence provided by these individuals, where relevant, as part of my analysis set out in the subsequent sections of this judgment. I note that many of these witness statements are very short, relate to alleged poor behaviour by the parents, and do not exhibit any contemporaneous documents in support of those allegations. Several witness statements, for example, say little more than that the witness has experienced or observed one or more instances where, at the school gate, one of H's parents spoke to a member of school staff in a manner that was rude or took an unpleasant tone.

Assessment of the extent to which H has not been receiving the educational provision set out in his EHCP

52. In assessing the extent to which H is receiving the educational provision specified in his EHCP, I have essentially accepted as true the facts set out in the witness statements of MS and the other witnesses who are, or have been, involved in delivering that provision. Although there are some areas of disagreement between those witness statements and the Mother's witness statements, those areas are relatively minor, and there has been no application by H to cross-examine any of the Council's witnesses. I see no reason to doubt that the Council's witnesses have given honest evidence about matters of fact of which they are best placed to have full and detailed knowledge.

53. As noted above at paragraph 9, by the time of the re-listed substantive hearing, there had been some narrowing of the disagreements between the parties as to the respects in which the educational provision being received by H had fallen, or was continuing to fall short, of the requirements specified in his EHCP. Given the Council's failure to respond to pre-action correspondence, I make no criticism of the Mother for adjusting H's case so as to take account of the Council's late-served witness evidence as to the educational provision H has been receiving.

54. The skeleton argument filed on behalf of H helpfully identified six specific "*SEN Provision Items*" which H alleged were not being delivered to him, identifying each such item by quoting the relevant text from the EHCP. It became clear during the hearing that there was a degree of interaction between various of those six items. By way of example, "Item 3" and "Item 5" were effectively consequences of the Council's

admitted failure to deliver “Item 4”, i.e. the “*full time 1:2:1 trained and experienced ABA tutor support (32.5 hours)*” to be “*provided by a team of 2 – 4 ABA tutors*”. In that regard:

- i) “Item 3” referred to the EHCP requirement for H to be provided with “*the use of specific behavioural teaching procedures, in particular, the use of Discrete Trial Teaching, prompting/prompt fading, and differential reinforcement*”, including “*numerous teaching trials and opportunities and performance measurement (i.e. data collection) by staff trained in this approach*”. Those behavioural teaching procedures and associated data recording are examples of techniques comprised within an ABA approach. Mr Small, on behalf of H, accepted that those procedures and associated data recording were now being delivered for H on the 3 days each week when he is being supported by an ABA tutor, i.e. Tutor 4. In my judgment, therefore, the complaint of non-delivery of Item 3 essentially overlaps with the complaint that H is not receiving ABA tutor support on Mondays and Tuesdays.
- ii) Likewise, “Item 5” refers to data being “*recorded on a moment-by-moment basis to make teaching decisions*”. Mr Small accepted that this is being done by Tutor 4 on the days when she is working with H. The complaint, therefore, is essentially about the failure to provide H with one-to-one support from an ABA tutor on the two days each week when Tutor 4 is unavailable.

55. In my judgment, H’s case, as at the time of the substantive hearing, raised essentially three respects in which the special educational provision he has been, or is, receiving at the School has fallen short of the requirements specified in his EHCP.
56. The first (and the most important) respect is the one that is admitted by the Council. Throughout the duration of the EHCP issued in January 2023, H has not been receiving “*full time 1:2:1 trained and experienced ABA tutor support (32.5 hours) ... provided by a team of 2 – 4 ABA tutors ... trained in the individualised programmes and also in the science of behaviour analysis in order to make in the moment decisions on levels of prompting required and the exact delivery of reinforcement*”.
57. During the current academic year, the nature and extent of the Council’s failure to deliver that requirement consists in: (a) the absence of ABA tutor provision on Mondays and Tuesdays; and (b) the fact that he is receiving support from only one ABA tutor, rather than from a minimum of two different ABA tutors.
58. Between January 2023 and the end of the last academic year, the nature and extent of the Council’s failure to deliver the ABA tutor provision requirement was: (a) the fact that he was receiving support from only one tutor, namely Tutor 3, rather than from a



minimum of two different ABA tutors; and (b) the fact that Tutor 3 was not a qualified ABA tutor but rather was a learning support assistant who had received some training in ABA techniques and was in the process of attaining the relevant qualification.

59. At the hearing, Mr Wilson, on behalf of the Council, contended that Tutor 3 met the EHCP requirement of being “*trained and experienced*”. She had considerable experience of working with children with autism and holds a bachelor’s degree in child psychology. She had undertaken specific training in ABA techniques and was delivering H’s personalised ABA programme under the guidance of the external ABA consultant. Had Tutor 3 not withdrawn from supporting H at the end of the 2022/23 academic year (in consequence, it is said, of the Mother’s conduct and attitude towards her), she would by now have taken the relevant examinations and attained qualified status. This would, Mr Wilson submitted, have led to H receiving support from two qualified experienced ABA tutors – namely, Tutor 3 in addition to Tutor 4 – in the present academic year.
60. In my judgment, for the purpose of assessing the extent to which the provision being received by H has fallen short of the requirements specified in his EHCP, it is not relevant for me to consider what might have happened had Tutor 3 chosen to continue to pursue qualification as a RBT. Rather, I should focus on the special educational provision that has been delivered for H. During the 2022/23 academic year, the extent to which H received one-to-one ABA tutor support was limited to support from Tutor 3, a single tutor who had not yet attained the qualifications needed for being registered as an RBT. I am satisfied that this was not compatible with providing “*trained and experienced ABA tutor support*” from a team of tutors. In so concluding, I have thought it right to read those words of the EHCP in light of the Tribunal’s decision to which it was intended to give effect. Within that decision, the Tribunal stated:
- “[44] ... The tribunal noted that the provision has been somewhat lacking from suitably trained and qualified ABA tutors and that, whilst [Tutor 3] has been the constant figure in the delivery, she is not fully qualified yet. ...”
- “[50] The provision agreed within the working document has to be able to be delivered in full and [Tutor 3] is not the agreed described ‘experienced’ tutor yet. The school needs to have in place suitably qualified tutors as stated in the plan ....”
61. I do not need to decide whether the ABA tutor requirement specified in the EHCP would have been met if Tutor 3 had been one of two tutors providing full-time one-to-one support for H, in circumstances where the other tutor had greater experience of

delivering ABA and was a qualified RBT. That hypothetical situation has not been the reality in either the present, or the previous, academic year.

62. The second respect in which the special educational provision delivered for H is alleged to have fallen short of the EHCP's requirements relates to the requirement for him to receive an ABA-based programme devised by a multi-disciplinary team ("MDT") including an ABA consultant, a speech and language therapist, an occupational therapist and an educational psychologist. The EHCP also states that, in addition to ABA, other ASD approaches should be incorporated as appropriate, and these "*will be considered by the MDT and [H]'s programme will be revised on a half-termly basis.*" The complaint raised on behalf of H is that the MDT responsible for the programme being delivered to him does not include all the professionals which were required to be included.
63. In my judgment, based on my consideration of the evidence before me, the requirement for an MDT is largely being met. But there is an ongoing failure to include one type of professional, namely an educational psychologist, in the MDT. Mr Wilson, on behalf of the Council, sought to persuade me that the requirement for inclusion of an educational psychologist was being met because such a professional, namely Dr Sylvia Reyes, had provided reports that had informed the content of the ABA-based programme devised for H. I disagree, given that the last report provided by Dr Reyes was in November 2021 and I have seen no evidence of her involvement in any development or review of H's programme since then. On a fair reading of the EHCP, what it envisages is that the programme would be devised by the ABA consultant "*in collaboration with*" an MDT including an educational psychologist, and that the MDT (including an educational psychologist) would be involved in revising the programme on a half-termly basis. Although Dr Reyes provided a report in 2021, I have seen no evidence of *collaboration* between the ABA consultant and Dr Reyes (or any other educational psychologist) either for devising the programme, or for the purposes of the half-termly reviews.
64. Mr Wilson also sought to place reliance on the fact that the Tribunal decision had been informed by evidence from another educational psychologist, Miss Blakemore-Brown. I am told, however, that Miss Blakemore-Brown was instructed by the Mother for the purposes of challenging the Council by way of the appeal to the Tribunal. I do not see how the fact that Miss Blakemore-Brown (who was not commissioned by, or paid by, the Council) was involved in the Tribunal proceedings could even arguably satisfy the requirement of the EHCP that H's ABA-based programme be devised, and then revised, in collaboration with an MDT including an educational psychologist.

65. The third respect in which the special educational provision delivered for H is alleged to have fallen short of the EHCP's requirements relates to the requirement for him to receive "*Direct Input (Speech and Language Therapy) for 30 minutes per week to develop his use of Proloquo2Go and to set new targets for the week.*" The witness evidence from the School's Behaviour Lead, MS, is that H has been, and is, receiving that provision, and she has exhibited a document that provides some support for that position. I see no reason to doubt the veracity of her evidence on this point. Accordingly, I do not make a finding of any failure to deliver this aspect of the EHCP's requirements.

Assessment of the parents' conduct and whether it is relevant to the determination of the claim

66. The parents are not on trial in these proceedings. H has a right to receive the full package of special educational provision specified in his EHCP, and it is the legal duty of the Council to secure the delivery of that full package for him. The only potential relevance of the parents' conduct to the determination of H's judicial review claim is in relation to the appropriateness of granting H a remedy, and to the form of any such remedy (e.g. whether the Court should grant a mandatory order against the Council). If the Council can show that such conduct has been a significant cause of its failure to deliver elements of the package which have not been delivered, then that *might* be a relevant consideration for the Court to take into account when taking decisions about remedies. But even if the Council can demonstrate that parental conduct has had a causal relationship to the Council's breach of its duty, this would not necessarily make it inappropriate for the Court to grant H a remedy— including, potentially, a mandatory order. Rather, the Court would still need to consider all the circumstances when deciding whether to grant a remedy, and the appropriate form of such remedy, bearing in mind the Council's duty is an absolute one. Whilst the Council should not be ordered to do the impossible, nor can the Council simply 'give up' in the face of obstacles, irrespective of the source of those obstacles. Rather, it is incumbent upon the Council to explain what it is doing to overcome those obstacles, and why it can do no more.
67. In relation to the allegations with regard to the parents' conduct which have been advanced by the Council and the witnesses from the School, there are certain points of fact on which the witness evidence before me differs in ways that cannot be fully reconciled; in other words, there are points on which the parents' witness evidence and the witness evidence from the School's staff cannot both be true. But neither party to these proceedings has sought permission to cross-examine any witness. In any event, in my judgment, the points on which the witness evidence conflicts are of little significance to the proper determination of these proceedings. Based on considering all the evidence as a whole, and doing the best that I can, I have been able to derive what

I consider to be a reasonably clear picture of the factual reality in terms of the parents' conduct.

68. As already noted above, the Council's case is that the parental conduct contributing to its failure to deliver the full package of support for H has come predominantly from the Mother. The witness evidence from the School's staff describes her as having been rude and critical in her approach to Tutor 3 and other staff, to the extent that individual staff members have, on occasion, been caused to feel upset or undermined. I have no doubt that those witnesses have accurately described their own perceptions and that the upset felt by Tutor 3 and others has been genuine.
69. But I do not find that the Mother has been generally rude or antagonistic, or that she has deliberately set out to undermine or upset any member of staff at the School. My reasons are these:
- i) A surprising feature of the witness statements from the School's staff is the dearth of exhibited contemporaneous internal documents – such as emails or instant messages between staff members, or notes of an exit interview with Tutor 1 (see paragraph 40 above) – referring to difficulties in dealing with the Mother, or the provision of support for staff members feeling upset as a result of the Mother's interactions with them. If the Mother's behaviour was a major source of difficulty for the School, then one might reasonably have expected that such internal communications and records would have been made, and that the School's witnesses would have wished to rely on those documents in support of their witness statements.
  - ii) The witness statement from the School's Safeguarding Lead exhibits a single item of contemporaneous internal material relating to the parents' conduct, namely the extracted text from – not a copy of – a note she says she made of a meeting with H's parents. She describes that note as showing that the parents were given an “*oral warning*” about their conduct. The note relates to an incident on 16 May 2023, namely that the Safeguarding Lead had observed *the Father* (notably, not the Mother) speaking to Tutor 3 in the vicinity of the school gates “*in a very rude manner*”, and that Tutor 3 had “*looked upset and tearful*”. The note records that the Safeguarding Lead did not herself hear what the Father was saying. (The note does not say whether Tutor 3 had been asked by the Safeguarding Lead to provide information as to what the Father was saying to her and any use by him of inappropriate language.) That is the sole occasion on which the parents are said to have been given an oral warning about their conduct, and there is no exhibited record of the School sending any written warning to either parent. It seems

surprising that neither the Council, nor the School, took greater action, if H's parents' conduct was so serious as to be impeding the Council's ability to carry out its statutory duty to him.

iii) What I do have before me by way of contemporaneous evidence of the Mother's communications with school staff are copies of email chains between the Mother and the School. In those communications, the Mother sometimes writes in quite robust terms, but she never crosses into being rude or abusive. The overall impression I glean from reading the email chains, from my objective standpoint, is of a parent who is very concerned for her son, and is upset and frustrated at her inability to secure for him the special educational provision that the Tribunal decided he should receive.

70. The Mother's sense of frustration has likely been enhanced by the knowledge and experience she has gained from having herself undertaken the requisite training and examination in ABA for becoming an RBT. Her occupation is now as an RBT providing ABA interventions for other children. This has no doubt given her deep insight into 'how things should be done' in terms of what optimal ABA provision looks like, and it has probably led her to bringing a critical eye towards the School's provision for H.
71. The Mother has at times behaved insensitively towards school staff. Her frustration that Tutor 3 (someone who was not yet an RBT) was H's only ABA tutor during the last academic year is likely to have been made very evident to Tutor 3, in a way which caused Tutor 3 to feel upset and undermined. The Mother – and, on occasion, the Father – have sometimes unfairly directed towards school staff frustrations that might more justifiably have been directed towards the Council as the body legally responsible for securing the special educational provision for H.
72. They have also behaved unreasonably at times. An example is the Mother's complaints about Tutor 4 having promoted, by a posting on Facebook, the School's effort to recruit an ABA tutor: something that Tutor 4 did in an attempt to be helpful and without identifying H. The Mother has asserted, without any reasonable basis, that this should only have been done with her prior agreement, and that Tutor 4's Facebook posting was a breach of the ethics standards for RBTs. It appears that the Mother even went to the extent of raising this matter with an individual outside the School who is Tutor 4's supervisor in relation to the work in which Tutor 4 is engaged on Mondays and Tuesdays. This was wholly disproportionate and inappropriate. Another example is the parents' recent objections to an educational psychologist making an assessment of H for informing the forthcoming review of his EHCP. This was something the parents did despite my having made clear at the 13 December 2023 hearing that the interim order I

made on that occasion should not prevent the Council from carrying out work preparatory to that review.

73. There have also sometimes been disagreements between the parents (who no longer live together), which have caused additional difficulties for the School. An example is an incident on which School staff were scolded by the parents for having informed one, but not the other, parent about a proposed school trip.
74. All this has been unfortunate and has damaged the relationship between H's parents and his school, which has not been in his best interests. It has also been contrary to his interests in a more specific way. In that regard, I find, on the balance of probabilities, that the parents' approach to dealing with Tutor 3 at least played a part in her decision not to continue working with H and not to take the examination for becoming an RBT. In that sense, the parents' conduct has materially contributed to the present situation, namely that H has only one ABA tutor, and there is no ABA tutor provision for him on Mondays and Tuesdays.
75. My findings regarding the parents' conduct and their likely impact on the educational provision being received by H must, however, be seen in the context of two important features of the broader picture.
76. The first of those features is the extent to which the parents' behaviour is likely to have been borne out of their sense of frustration, and perhaps even trauma, caused by the extent to which they have had to fight for H to receive appropriate educational provision. H was 3 years old when his autism was first diagnosed only after the parents had self-funded a consultation at a private hospital in circumstances where the waiting time for an NHS consultation was 18 months. The intervening 12 years are likely to have placed great strain on them in multiple ways: emotionally; in the sheer physical effort involved in caring for H; and also financially. The 2022 Tribunal appeal was the second time they had challenged the Council in the Tribunal over the special educational provisions proposed for H. Yet, even after they had again succeeded before the Tribunal, the Council was still not providing H with the special educational provision he needed.
77. The parents' sense of frustration is, when viewed in that context, understandable. Responsibility for generating that frustration lies with the Council, which (as I discuss further below) has not done what it could – and, therefore, should – have done to provide H with the full-time ABA tutor support, delivered by a team of between 2 and 4 trained and experienced ABA tutors, as specified in the EHCP pursuant to the Tribunal's decision.

78. The witness statements filed by the Council display no recognition of how difficult the parents' experience is likely to have been for them. At times, the School has contributed to the parents' sense of mistrust, such as by refusing to provide them with information as to Tutor 4's qualifications – a refusal which the School sought to justify by reference to data protection legislation. Whilst the Mother has sometimes taken positions that were unreasonable or manifested an unrealistic desire to supervise and control the School's provision for H, the likely source of this 'hyper-alert' behaviour is not difficult to make out if viewed through an empathetic lens.
79. The second feature of the broader picture is that, in my judgment, there has never been any insuperable obstacle to the Council providing H with the full ABA tutor support specified in his EHCP, notwithstanding any of the parents' conduct. In that regard, I note that, as long ago as January 2023 (i.e. at around the time when the current EHCP was issued), the Mother directed the Council's attention towards sourcing ABA provision for H from an ABA consultancy company (to which I will refer as "Consultancy 1"). Consultancy 1 was, at the time, apparently able and willing to provide an ABA support package for H, including both the required ABA consultant *and a team of ABA tutors* able to provide one-to-one support for H throughout the full school week.
80. The Council's statement of case makes oblique reference to the quotation it received from Consultancy 1 for such provision, stating that the Council could not "*recruit an ABA tutor from a body that [H]'s mother worked for (at a price which was more than the national average) as this was objected to by [H]'s father who claimed that there was a conflict of interest.*" The Mother's evidence is that she has never worked for Consultancy 1; but in any event, an email from the School to the Mother in March 2023 gave a different reason as to why Consultancy 1 was not engaged: "*Whilst the [Council] had approached [Consultancy 1] with the view of supporting the school to find an experienced ABA tutor, the quote provided by them is an inefficient use of the [Council]'s resources and their quote have not been agreed by the [Council].*" In other words, the reason related to price.
81. In any event, there is now before the Court, as part of the Mother's evidence, quotations or price lists obtained from *four* further ABA consultancies which she believes would be able to provide an ABA package including ABA tutors. I have examined the prices set out by those four consultancies. They suggest that the cost to the Council of sourcing such a package from such a consultancy would not be very much higher than the costs the Council had itself projected for making appropriate provision for H at the School. In that regard, the Mother has exhibited to one of her witness statements a table, which I understand was part of the evidence before the Tribunal, setting out the Council's

projected costs. The sum of the costs projected in respect of the ABA consultant and ABA tutors was £48,730 per year. The prices of equivalent provision sourced from the four consultancies are broadly in line with that figure: for example, of the two consultancies that have provided prices apparently including all elements likely to be required (including, for example, fees for paperwork required for the annual review of the EHCP), one quotation is for £48,768 and another is for £56,375.

82. The Council has not provided any evidence to show that it has investigated or pursued such options. The Council's approach appears to have been essentially to devolve responsibility to the School to recruit its own staff for meeting the requirements of H's EHCP regarding ABA tutors. The Council and the School are, in principle, entitled to pursue their own preferences as to the extent to which they meet children's special educational provision requirements by way of employing their own staff, rather than by using external consultancies or agencies. But that entitlement is subject to the Council's absolute legal duty to secure the fulfilment of those requirements. In circumstances where the School's attempts to recruit have not been successful, it was legally incumbent on the Council to find and pursue such alternative options as have been available. I do not know why the consultancies are apparently able to recruit ABA tutors whilst the School has had difficulty in doing so. Perhaps, as the Mother asserts, the salary being offered by the School was below the market rate. Or perhaps the consultancies offer their employees greater flexibility, training, mentoring or support. The reason does not matter; what matters is that the Council should not ignore an available source of ABA tutors for meeting the requirements of H's EHCP in circumstances where the School's 'Plan A' for doing so had not been effective.
83. Against that background, whilst the parents' conduct has been a contributory cause of H not having, in the present academic year, the full ABA tutor support to which he is entitled, it is not the predominant cause. There is no evidence that the parents' conduct has made ABA consultancies unwilling to provide ABA tutors for H. Nor is there any evidence that the parents' conduct has, by some unusual mechanism, deterred potential applicants for ABA tutor posts advertised by the School from submitting applications. I am bound to conclude, therefore, that the predominant cause is the Council's failure to ascribe sufficient priority to resolving a situation whereby H is not receiving the ABA tutor support the EHCP says he needs.
84. I note, for completeness, that the parents' conduct has had no impact on the other respect in which the Council is failing to deliver the requirements of H's EHCP, namely the lack of inclusion of an educational psychologist in the MDT.



Assessment of the Council's efforts to deliver the requirements of the EHCP

85. In my judgment, a local authority bears the burden of proving that it is doing all it can to meet its legal duty to secure for a child the special educational provision to which he is entitled. Unless the local authority can so prove, it is likely to find itself 'rowing against a very strong current' if it is nonetheless seeking to persuade a court that no relief should be granted in respect of a prolonged failure to comply with its duty.
86. That being so, it is a striking feature of the evidence filed by the Council for addressing the substantive issues in the claim – totalling 12 witness statements in all – that there is no witness statement from an officer of the Council responsible for securing delivery of requirements specified in children's EHCPs. Only one of those 12 witness statements is from an officer of the Council: Ms Wolf, the Head of Occupational Therapy, who gives evidence about the occupational therapy provision being received by H. There is no evidence from, for example, a senior officer in the Council's education or children's services departments explaining what, if anything, their department is, and has been, doing for seeking to secure a second ABA tutor for H. Nor has anyone from the Council provided evidence explaining why the Council has not placed a contract with Consultancy 1 or any of the other four ABA consultancies which the Mother understands are able and willing to provide an ABA delivery team, including experienced ABA tutors, to support H at school for all 5 days a week.
87. For the reasons set out above at paragraphs 79 to 84, the Council has, in my judgment, at all material times had options available to it for securing for H the full package of special educational provision specified in his EHCP. But the Council has failed to do so.
88. The evidence filed by the Council, seen as a whole, strongly suggests that the Council has effectively sought to delegate to the School the responsibility for ensuring that the requirements of H's EHCP are delivered. This is inappropriate. The statutory responsibility for securing the special education provision specified in the EHCP rests with the Council, not the School.
89. The School has been doing what it could to deliver the full package of provision, within the resources provided by the Council for that purpose. Had the Council not rejected Consultancy 1's quotation, I have no reason to think that the School would have refused to work with Consultancy 1. Nor would the School refuse to work with any of the other four consultancies, if the Council was willing to provide the necessary funding.

Assessment of the relevance or otherwise of the forthcoming (and now overdue) review of the EHCP

90. In my judgment, the fact that a review of H's EHCP is now overdue, and that there may be amendments made to his EHCP arising out of that review, is not a strong reason for refusing to grant H a remedy in the circumstances of this case. I am in no position to assess the likelihood of his EHCP being amended so as to remove or reduce the requirements relating to ABA tutors. For all I know, his EHCP might be revised so as to increase the extent of support from ABA tutors, so as to try to reverse any regression he has suffered in consequence of the inadequate delivery of ABA provision during the currency of the January 2023 EHCP.
91. I also cannot be sure how long it will take the Council to complete a review of the EHCP, and whether there will then be another appeal to the Tribunal. What I can be sure about is that H is currently not receiving the provision specified in his current EHCP, and that there are means available to the Council for bringing this state of affairs to an end within a reasonably short period of time. The delivery to H of his full entitlement can be secured if prompt and diligent action is now taken by the Council to comply with its duty.
92. The Council's reliance on the forthcoming review of the EHCP as a point against my granting H a remedy must also be seen against the background of the procedural history. H's pre-action letter of 16 May 2023 was sent less than four months into the lifetime of the January 2023 EHCP. The Council could have taken appropriate action in response to the pre-action letter but did not do so.

Conclusion: Should the Court grant a remedy? If so, what remedy?

93. The principles that should guide a court when deciding whether to make a mandatory or other order to enforce a local authority's performance of its statutory duties to an individual were recently set out by Lord Sales JSC, giving the judgment of the Court, in *R (Imam) v London Borough of Croydon* [2023] UKSC 45. Although the facts of that case related to a local authority's duties under housing legislation, I see no reason why any different principles should apply in the context of local authorities' duties under s.42 of the 2014 Act to secure delivery of special educational provision requirements specified in an EHCP.
94. The following paragraphs of Lord Sales' judgment set out principles relevant to the present case: [40]-[43], [48]-[49], and [65]-[70]. In summary:

- i) Remedies in public law are discretionary. A court which finds that there has been a breach of a public law duty is able “*to decide, in light of all the circumstances as appear to the court at the time when it applies the law, how individual rights and any countervailing public interests should be reconciled*”: [41].
  - ii) “... *[T]he ordinary position is that a remedy should be granted. A court should proceed cautiously in exercising its discretion to refuse to make an order and should take care to ensure that it does so only where that course is clearly justified. But different types of order are available, and it may be that due enforcement of the law can be sufficiently vindicated by some order other than a mandatory order*”: [43].
  - iii) “... *[A] court should not make a mandatory order to require compliance with a statutory duty where that is impossible*”: [48].
  - iv) “... *[I]t is a factor relevant to the exercise of the court’s discretion if it emerges that the authority was on notice in the past of a problem in relation to the non-performance of its duty but failed to take the opportunity to react to that in good time*”: [67].
  - v) “... *[A]nother relevant factor is the extent of the impact on the individual to whom the duty is owed. It is the vindication of their right which is being denied, and if the impact on them of the failure to comply with it is very serious and their need is very pressing, this may justify the court in issuing a mandatory order despite the wider potentially disruptive effects it may have*”: [68].
  - vi) “... *[I]f there is no sign as things stand at the time the matter is before the court that the authority is moving to rectify the situation and satisfy the individual’s rights, that is a factor pointing in favour of the making of a mandatory order*”: [69].
95. In my judgment, it would, in the circumstances of this case, be wrong to refuse to grant a remedy. For the reasons I have set out, this is a case having the following features:
- i) The special educational provision delivered for H has, for a prolonged period (over 12 months, counting from the date when the January 2023 EHCP was issued), fallen significantly short of the requirements specified in his EHCP.
  - ii) Far from being merely technical or minor, this shortfall is likely to have had a material impact on the quality of education received by H and may well have reduced his progress in developing important skills (as compared with the progress he might otherwise have made). If, for example, his one-to-one support had been

delivered by more than one ABA tutor each week, this would have assisted him in better ‘generalising’ his skills beyond interactions with only one person.

- iii) The Council’s failure to comply with its duty has substantially deprived H of the substantive benefit of the outcome of contested proceedings before a judicial body, namely the Tribunal.
- iv) The Council’s failure to comply with its duty has not been brought to an end, but has persisted up to, and including, the date of the re-listed substantive hearing.
- v) The current, ongoing shortfall in provision is very substantial, given that ABA tutor support is being provided for H on only 3 days a week.
- vi) On the evidence before me, the Council has, at all material times, had options readily available to it for providing H with the full package of special educational provision, including ABA tutor support, specified in the EHCP. The costs of doing so would not represent a major additional financial burden on the Council, given the Council’s own cost estimates relating to H. But the Council has not taken up those options.
- vii) The Council has not presented any credible plan for bringing its breach of duty to an end. On the contrary, the Council appears content to leave matters as they are, pending the next review of the EHCP, perhaps in the hope or expectation that the requirements specified in the EHCP may be modified in a way that removes the need for H to be provided with the ABA tutor support specified in the current EHCP.
- viii) There is little to suggest that the Council is taking seriously its statutory duty, rather than seeking effectively to delegate it to the School. The Council’s failures to respond to pre-action correspondence, or to respond to the claim in accordance with the CPR and the Court’s directions, serve to reinforce the sense that the Council is not giving due priority to its duties under the 2014 Act.
- ix) Given these circumstances, there is little prospect of the Council’s breach, and its detrimental impacts on H, being brought to an end unless the Court grants a remedy.
- x) H is not in any way to blame for the shortfall in the special educational provision he is receiving. Whilst his parents’ conduct may have made some causal contribution to the extent to which the requirements of his EHCP are currently not being delivered, that conduct is not to be attributed to H. The right to receive the

educational provision specified in the EHCP is owed by the Council to H, not to his parents. Insofar as the parents' conduct has constituted an additional obstacle, it was – and remains – incumbent on the Council to seek to avoid or overcome that obstacle.

96. I have given careful thought to whether the relief to be granted should include a mandatory order. I have concluded that it should, by reason of the same features of this case as are set out in the foregoing paragraph. Of particular significance, in this connection, is the Council's failure to present to the Court any plan, or any timetable, for bringing its prolonged breach of duty to an end. Absent a mandatory order, the Court could have no realistic expectation that the remedy it granted would make any substantive difference in upholding H's rights.
97. Many of the above-listed features of this case relate only or predominantly to the failure to deliver the requirement relating to ABA tutors, rather than the failure to include an educational psychologist in the MDT. The potential for the latter failure to have caused material prejudice to H in terms of the quality of his education, or the extent of the progress he has made, is less obvious. Had that latter failure been the only respect in which the Council was failing to deliver the EHCP's requirements, then I might have taken the view that such failure did not, in isolation, justify the making of a mandatory order. But, in the present case, it is not an isolated failure. Further, it is a failure that can more easily be remedied by the Council, which will have existing relationships with educational psychologists (including the educational psychologist whom the Council has already instructed to assess H for the purposes of the forthcoming review of his EHCP). In circumstances where a mandatory order is to be made in respect of the Council's performance of its duty to H, I am satisfied that it is just, convenient and appropriate that the terms of the mandatory order should encompass *both* respects in which the requirements specified in the EHCP are not being delivered.
98. I now turn to consider how long the Council should be given to comply with the mandatory order. The statutory scheme effectively allows a local authority 5 weeks to make the preparations necessary for implementing an order made by the Tribunal requiring amendments to an EHCP (see Special Educational Needs and Disability Regulations 2014, reg.44(2)(e)). At risk of being over-generous to the Council, I will allow a period of 5 weeks, running from the date of handing down of this judgment, for compliance with the mandatory order I will make.

Litigation conduct and costs

99. I have set out above, at paragraphs 25 to 48, the procedural history of this case, noting that the parties' litigation conduct would be taken into account when the Court is making decisions about costs.
100. An aspect of a party's litigation conduct that may be taken into account is whether it has acted reasonably by seeking to resolve matters out of court, whether by mediation or in another way. At the aborted substantive hearing on 13 December 2023, I encouraged the parties to seek to resolve the dispute by mediation and without coming back for the re-listed substantive hearing. In that regard, I noted that the fact that the Council was breaching its duty to H was common ground, and that the Council's and the Mother's energies and resources might be better deployed in working together to improve the educational provision being delivered for H.
101. Regrettably, the parties were not able to resolve the dispute and so the re-listed substantive hearing did take place. It is apparent from the statements of costs filed on behalf of H that the total cost incurred by the parties in these proceedings will have substantially exceeded the annual cost of providing ABA tutor support for H in accordance with his EHCP. (Based on the quotations provided by ABA consultancies, the cost of that element of provision, if sourced from them, would be around £40,000 a year.) The energy and money expended on these proceedings are further to the expenditures on the two Tribunal appeals of which H's educational provision has already been the subject.
102. At the conclusion of the re-listed substantive hearing, I stated that, upon circulating my judgment in draft, I would be requiring submissions from the parties as to the efforts made to resolve the dispute through mediation or other non-court means. I have received those submissions and considered them. It is apparent from those submissions and the supporting documentation that:
- i) During the course of the proceedings, two constructive proposals were submitted to the Council on behalf of H on a 'without prejudice save as to costs' basis, namely: (1) that H be provided with a personal budget so that he could, with the Mother's assistance, secure the ABA tutor support provision he required; and (2) that the Council source the ABA tutor support from one of the ABA consultancies from whom the Mother had obtained quotations (copies of which were provided to the Council). Those proposals will no doubt have been made on the instructions of H's litigation friend (the Mother), who is likely to have been incentivised to seek an out-of-court solution given that H has not had legal aid funding for these proceedings.

The Council did not engage with those two proposals, which were both made prior to the 13 December aborted hearing.

- ii) After that aborted hearing, neither party sought to propose any meeting, discussion or mediation with a view to reaching a compromise and avoiding the need for the re-listed hearing. Even at that stage, the Council did not engage with the proposals that had been made on H's behalf. The parties' failure to respond to my encouragement to them to seek to resolve matters between themselves was perhaps understandable on the part of H's litigation friend, given that the Council had not engaged with the proposals already made. But I do not see any good reason for the failure on the part of the Council.

- 103. On behalf of H, Mr Small invites me to order that the Council pay H's costs on the standard basis and to assess those costs in the full amount shown in the Statements of Costs he has filed. Mr Wilson, for the Council, accepts that the Council should pay at least part of H's costs, but urges me, in assessing those costs, to reduce them by a factor to reflect my findings about the personal conduct of the Mother. I decline to do so. Those findings do not relate to the conduct of the Mother in relation to the litigation (including pre-action correspondence): it is not litigation conduct. In my judgment, it would not be appropriate to reduce the costs award to H by reason of the conduct of the Mother which was not conduct in the course of her acting as H's litigation friend.
- 104. I will therefore make an order that the Council pay H's costs of these proceedings on the standard basis. I have summarily assessed those costs taking account of all relevant factors, including the parties' litigation conduct and the specific points of dispute raised by the Council with respect to items in the Costs Statements filed on H's behalf. I will provide further reasons for my summary assessment decision in a document separate from this judgment.

### Disposal

- 105. For the reasons I have given, the claim for judicial review succeeds. I will make a mandatory order for ensuring that the Council, by no later than 5 weeks from now, brings the special educational provision being received by H into line with the full package to which he is entitled under his EHCP.