



Neutral Citation Number: [2018] EWHC 2735 (Admin)

Case No: CO/2907/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT IN WALES

Cardiff Civil Justice Centre
2 Park Street, Cardiff CF10 1 ET

Date: 19/10/2018

Before:

THE HONOURABLE MRS JUSTICE ANDREWS DBE

Between:

THE QUEEN on the application of DJ, (by his mother and litigation friend AJ) **Claimant**

- and -

(1) WELSH MINISTERS
(2) CAREER CHOICES DEWIS GYRFA LTD **Defendants**
(t/a CAREERS WALES GYRFA CYMRU)

- and -

(1) CARDIFF CITY COUNCIL **Interested**
(2) BW (by his father and litigation friend NW) **Parties**

Christian J Howells (instructed by **Watkins & Gunn** solicitors) for the **Claimant**
Stephen Knafler QC (instructed by **Government Legal Department**) for the **First Defendant**
Charlotte Hadfield (instructed by **Sinclairslaw**) for the **Second Interested Party**
The First Interested Party did not appear and was not represented.

Hearing dates: 5 October 2018

Approved Judgment

Mrs Justice Andrews:

INTRODUCTION

1. The Claimant (“DJ”) and the Second Interested Party (“BW”) are young adults with severe learning difficulties, both of whom have been assessed by the relevant local authority, which in DJ’s case is the First Interested Party, Cardiff City Council, as lacking capacity within the meaning of the Mental Capacity Act 2005. In each case, one of their parents is acting as their litigation friend.
2. The Welsh Ministers have duties and powers in relation to the education of those with learning difficulties under, inter alia, the Learning and Skills Act 2000 (“the 2000 Act”). DJ, who is 22 years old, has been diagnosed with autistic spectrum disorder and severe learning disability. It is common ground that he has a “learning difficulty” as defined by section 41(5) of the 2000 Act.
3. The Second Defendant, Careers Wales, is a wholly-owned subsidiary of the Welsh Government and, among other matters, submits applications to the Welsh Ministers asking them to fund specialist further education provision for those with learning difficulties.
4. This claim for judicial review challenges (i) the decision by the Welsh Ministers on 7 June 2018 not to reassess DJ’s educational and training needs pursuant to s.140(3) of the 2000 Act following his successful completion of a third year of study at Coleg Elidyr (a specialist residential college of further education (“FE”)) which was co-funded by the Welsh Government and Cardiff City Council; and (ii) Careers Wales’ refusal to make an application to the Welsh Ministers to fund an additional course of study for DJ at that college, which was communicated to his parents in an email dated 12 July 2018.
5. Initially the challenge to these decisions was confined to a contention that the decision of the Welsh Ministers was in breach of their statutory duty under s.41 of the 2000 Act to provide reasonable facilities for the education and/or training of persons under the age of 25 who have learning disabilities, and/or irrational, and that Careers Wales misdirected itself as to the contents of the relevant policy, “*Securing provision for young people with learning difficulties at specialist further education establishments*” (April 2017) (“the Policy”) or failed to follow the Policy.
6. However, by an unopposed amendment to the Grounds for Judicial Review, DJ now seeks to challenge the validity of the Policy itself, which he contends unlawfully fetters the Welsh Ministers’ discretion under s.41(3) of the 2000 Act. That further ground of challenge is supported by BW, a young man aged 24 with severe learning difficulties and a range of complex special educational needs, on whose behalf Miss Hadfield made brief additional submissions on that issue at the hearing. I am grateful to her, and to Mr Howells (who appeared on behalf of DJ) and Mr Knafler QC (who appeared on behalf of both Defendants) for the clarity and concision with which they presented their legal arguments.
7. For the reasons set out in this judgment I have reached the conclusion that the Policy is lawful and that there is no merit in any of the other grounds of challenge to the decisions complained of. The Welsh Ministers’ discretion was exercised lawfully and

rationality, and Careers Wales was not bound to submit an application to the Welsh Ministers for funding an additional course of study at Coleg Elidyr in circumstances where the Welsh Ministers had lawfully refused to agree to a further assessment under s.140(3) of the 2000 Act. Even if that is wrong, and Careers Wales were bound to make such an application, I would refuse to grant judicial review because the outcome for DJ would have been substantially the same even if it did make an application for funding.

THE STATUTORY FRAMEWORK

8. The Welsh Ministers are not the only public body charged with statutory duties and responsibilities for the education and training of persons with learning difficulties. The Education Act 1996, the Social Services and Well-Being Act (Wales) 2014 (“the 2014 Act”) and the Care and Support (Eligibility) (Wales) Regulations 2015 (“the Regulations”) made pursuant to the 2014 Act all contain provisions which impose overlapping or complementary duties and responsibilities on local authorities.
9. Part 4 of the Education Act 1996 sets out the duties of local authorities towards children with special educational needs. Section 324 (5) provides that where a local authority maintains a statement of special educational needs (“SEN”) then, unless the child’s parent has made suitable arrangements, the authority shall arrange that the special educational provision specified in the statement is made for the child. In practice, this is arranged by the local education authority.
10. Section 19 of the 2014 Act imposes a duty on a local authority to assess the needs of an adult for care and support if he is ordinarily resident in that authority’s area. S.19(4) provides that in carrying out an assessment under that section the local authority must –
 - (a) *seek to identify the outcomes that the adult wishes to achieve in day-to-day life,*
 - (b) *assess whether, and if so, to what extent, the provision of –*
 - (i) *care and support*
 - (ii) *preventative services, or*
 - (iii) *information, advice or assistance,*

could contribute to the achievement of those outcomes or otherwise meet needs identified by the assessment.
11. Section 32 of the 2014 Act and the Regulations set out how the local authority goes about the discharge of its duties under that Act. The need of an adult meets the eligibility criteria if, inter alia, it arises from his physical or mental disability and relates to involvement in work, education, or learning; the need is such that the adult is unable to meet that need either alone or with the care and support of others who are willing to provide it, or the assistance of services in the community to which the adult has access; and the adult is unlikely to achieve one or more of the adult’s personal outcomes unless the local authority provides or arranges care and support to meet the

need or enables the need to be met by making direct payments. In practice this is delivered by local social services.

12. Section 32(1) of the 2000 Act, as amended, provides, so far as is relevant:

The Welsh Ministers must secure the provision of reasonable facilities for –

- a) *education (other than higher education) suitable to the requirements of persons who are above compulsory school age who have attained the age of 19,*
- b) *training suitable to the requirements of such persons...*

There is no legal duty to comply with this duty continuously until persons have reached a particular age beyond the age of 19.

13. Education falling within s.32(1)(a) is part of the education which Part II of the 2000 Act describes as “*post-16 education*”: s.32(6).

14. Section 32(3) provides that:

In performing their duty under subsection (1) the Welsh Ministers must

- a) *Take account of the places where facilities are provided, the character of facilities and the way they are equipped;*
- b) *Take account of the different abilities and aptitudes of different persons;*
- c) *Take account of the education and training required in different sectors of employment for employees and potential employees.*
- d) *Take account of facilities whose provision the Welsh Ministers think might reasonably be secured by other persons.*

15. Section 41 provides that:

(1) In discharging their functions under section ... 32... the Welsh Ministers must have regard—

- (a) to the needs of persons with learning difficulties, and*
- (b) in particular, to any report of an assessment conducted under section 140.*

....

- (3) If the Welsh Ministers are satisfied that they cannot secure the provision of reasonable facilities for education or training for a person with a learning difficulty who has attained the age of 19 but not the age of 25 unless it also secures the provision of boarding accommodation for him, the Welsh Ministers must secure the provision of boarding accommodation for him.*

16. Section 34 empowers the Welsh Ministers to discharge those duties by the provision of financial resources, or by the arrangement of the provision of financial resources by another body, or by co-funding with another body (such as a local authority).
17. Section 140 of the 2000 Act, states, so far as is relevant:
 - (3) *The Welsh Ministers may arrange at any time for the assessment to be conducted of a person*
 - a) *... who is over compulsory school age but has not yet attained the age of 25,*
 - b) *who appears to the Welsh Ministers to have a learning difficulty...*
 - c) *who is receiving or in the Welsh Ministers' opinion is likely to receive post-16 education or training.*
 - (4) *For the purposes of this section an assessment of a person is an assessment resulting in a written report of –*
 - a) *his educational and training needs, and*
 - b) *the provision required to meet them.*

THE POLICY

18. The purpose of the Policy is to set out, for the benefit of interested parties, the policy and process by which the Welsh Government will make decisions about funding placements for young people aged 16-25 with learning difficulties who require access to specialist provision. The Policy guides the exercise of the Ministerial discretion under s.32 of the 2000 Act, having due regard to the obligatory factors set out in s.41.
19. Paragraph 3 of the Introduction identifies the Welsh Government's funding policy as follows:

to fund the specialist provision required for those young people with learning difficulties aged 16–25 who wish to undertake post-16 education but are not able to access the provision established as necessary to meet their identified educational and training needs through mainstream further education provision. This might also include boarding accommodation. The Welsh Government's policy is to fund the duration required based on the young person's capability to progress and achieve against their education and training outcomes.
20. Paragraphs 72 to 97 concern the procedure and considerations that apply to funding decisions. So far as initial applications for funding are concerned, paragraph 73 provides that the Welsh Government should not receive an application for a programme of study lasting more than two academic years unless exceptional reasons relating to the individual young person's capability to learn are demonstrated. Even in those cases, funding is unlikely to be offered for more than two years in the absence of objective evidence demonstrating that the provision identified as necessary to meet the young person's established needs cannot realistically be provided by a study programme of two years.

21. A footnote explains the reasoning behind the two-year funding policy, namely, that because specialist FE establishments are specifically set up to cater for the complex needs of the young people expected to attend them, the Welsh Government generally expects such establishments to design bespoke programmes of study that are comparable in duration to that provided by a mainstream FE establishment. These programmes should be specifically targeted at the realistic level of education achievable in that duration for the general cohort of young people who attend these establishments.
22. By these means, the Welsh Government seeks to create parity of treatment between young adults with learning difficulties, and young adults without disabilities who would usually receive no more than two years of funding at a mainstream FE establishment. It is not contended that this aspect of the policy is unlawful.
23. There are three exceptions to the normal policy that funding will only be provided for two years:
 - i) Where it is agreed at the outset that a longer programme of study should be funded, because the provision identified as necessary to meet the young person's established needs cannot realistically be provided by a two-year course;
 - ii) Where the Welsh Ministers agree to fund an extension of time to enable the young person to complete the originally agreed programme of study; or
 - (iii) Where the Welsh Ministers exceptionally agree to fund an additional programme of study, i.e. a different course from the course that was originally agreed.
24. Paragraphs 74 and 75 of the policy make clear that the Welsh Government expects that arrangements for effective transition will be embedded within the young person's programme of study, both at the start and at the end. Paragraph 74 stresses the importance that transition out of the specialist FE establishment has been planned and implemented effectively, in conjunction with relevant support agencies such as social services, in a timely way and in advance of the young person completing their programme. The Welsh Ministers will not consider any requests to fund additional time to support those transition arrangements that the specialist FE establishment failed to put in place for the young person.
25. DJ's funded placement at Coleg Elidyr lasted for three years, rather than two, and came to an end in July 2018. There was a dispute as to whether the three-year period was agreed at the outset, as Mr Knafler told the Court on instructions, or whether the Welsh Ministers exceptionally agreed to an extension of time for DJ to complete the programme that was originally identified and agreed upon, as Mr Howells contended. It is unnecessary to resolve that dispute for the purposes of determining this case. There is no dispute that DJ successfully completed that course, and that the present claim relates to an intended application to fund an additional programme of study at the same specialist FE college.
26. The process by which funding decisions are reached by the Welsh Ministers is described in paragraphs 17 and following of the Policy. Paragraphs 17 to 19 set out an

overview. Careers Wales carries out an assessment of the young person and produces a report of the individual's education and training needs and the provision required to meet them. This should include the young person's desired outcomes linked to their future aspirations. The report, which is known as a Learning and Skills Plan ("LSP") will contain a recommendation about the necessary provision and placement. Once the LSP is finalised, Careers Wales submits it to the Welsh Ministers, along with the young person's application for funding and other relevant supporting evidence. In deciding whether to fund a placement, the Welsh Ministers will take into account all information relevant to the funding application, and they will pay particular regard to the LSP.

27. Paragraphs 21 and 22 set out the principles and objectives that are applied by Welsh Ministers when determining whether to fund placements at specialist FE establishments. They make it clear that whilst the Welsh Government will take account of the wishes of the young person, their families and/or carers, it does not have a legal duty to fund the specialist provision of their choice; nor does it have a legal duty to fund their programme duration of choice.
28. Paragraphs 24 to 38 deal with the s.140 assessment. Paragraph 25 provides that the starting point for the consideration of funding of specialist placement is the assessment under s.140 of the 2000 Act. Paragraph 32 explains the types of information and evidence relating to the young person's holistic needs that will be required by Careers Wales in order to complete the assessment. The young person and their parent/carer are free to provide any information they think is relevant to the assessment – this will be taken into account by Careers Wales in reaching an informed judgment about the young person's holistic needs and the provision required to meet them. Exceptionally, where there is insufficient or conflicting evidence available, the Welsh Government may arrange for an educational psychologist to undertake the s.140 assessment. The Welsh Government will act upon the outcome of that assessment.
29. Paragraph 36 provides that the assessment should result in a LSP, which will identify:
 - *the young person's education and training needs;*
 - *the reasonable and realistic provision and duration required to meet those needs;*
 - *prior education and training achievements;*
 - *reasons why a specific FE establishment has been chosen as being able to meet the young person's needs;*
 - *reasons why a young person's capability requires a particular duration for delivering the provision considered as necessary;*
 - *the young person's desired outcomes linked to their future aspirations, such as employment or semi-independent/independent living and how the identified provision will equip the young person to achieve these outcomes.*

It is to be expected that the young person's "desired outcomes" will mirror (or at the very least coincide to a large extent with) the "personal outcomes" that are identified when a local authority is considering what provision it should make in order to discharge *its* statutory duties to meet his needs under the 2014 Act. Those "outcomes" are not the same thing as the identified "education and training needs", although meeting the identified needs is intended to help the young person to achieve those outcomes.

30. Paragraph 40 of the Policy provides that, regardless of whether the LSP establishes that mainstream provision is required, (i.e. even if it suggests that there is no need for the young person to attend a specialist FE establishment) Careers Wales **cannot refuse to submit an application for funding** to the Welsh Government should the young person and/or their parent/carer wish. In these circumstances, the Welsh Government will give consideration to the application and the supporting evidence base, together with any additional relevant information, including any that the young person or their parent/carer wishes to provide. [Emphasis added].
31. Paragraph 43 provides that the LSP should be based on up-to-date information. For this reason, the LSP and key supporting evidence should be as up-to-date as possible and preferably not be more than one year old at the date the application is received.
32. Paragraphs 49 to 53 deal with the criteria for consideration. Paragraph 49 confirms that in determining an application for funding the Welsh Government will apply the general principles and objectives set out in paragraph 21. These are that:
 - *The Welsh Government's statutory obligations must be met (including consideration of availability of resources, where appropriate).*
 - *Young people will be treated fairly and equitably, and on a case-by-case basis.*
 - *The best interests of the individual will be considered.*
 - *Views and wishes of young people will be considered.*
 - *The provision available locally and across Wales is prioritised, where it is appropriate and reasonable to do so.*
 - *a balanced conclusion will be reached on the basis of the evidence and advice.*
 - *Decisions will be communicated in full to the young person and other interested parties, as appropriate.*
 - *Decisions will be made in a timely way.*
33. Paragraph 52 provides that:

The Welsh Government's starting point is that the provision established as necessary to meet the young persons identified needs is the provision specified in the LSP; and that the young person's identified educational and training needs are those specified

in the LSP (and this is what those terms mean when used in this document). It is unlikely that the Welsh Government will prefer the findings of an assessment carried out by a person other than Careers Wales in the absence of cogent and compelling reasons to do so.

34. Paragraph 53 provides that in making these judgements the Welsh Government will have regard to all relevant information before them. It then sets out a list of matters that will be specifically considered, including whether

the provision established as necessary to meet the young person's identified needs can be delivered within the duration that fits with the Welsh Government's policy for funding;

the young person's desired outcomes, linked to their future aspirations, have been identified and that the proposed programme of study will equip the individual to achieve these outcomes....

35. Paragraph 84 provides that:

*requests to extend the young person's placement beyond the programme's original agreed end date will only be agreed in **exceptional** circumstances. The Welsh Government will need to be satisfied that the circumstances giving rise to the need for the extension were unavoidable and that the extension is objectively necessary to ensure that the young person's identified educational and training needs are met. [emphasis in the original].*

Mr Howells accepted that this formulation was unobjectionable, since the discretion to extend the period of study on the agreed course from the normal 2 years relates specifically to the identified educational and training needs of the young person, and is unfettered.

36. The key paragraphs of the Policy so far as this claim for judicial review is concerned are paragraphs 92 and 93, which fall under the heading "**Requests to fund additional programmes of study**". They provide as follows:

92. *In certain circumstances it may be necessary for a young person to undertake additional specialist provision over and above, and following completion of, the young person's original agreed programme of study. It is not the Welsh Government's policy to routinely fund continuous education and training up until the age of 25. The Welsh Government will not, therefore, usually fund a second/additional programme of study at any specialist FE establishment unless the previous funded programme of study cannot fairly be said to have afforded the young person effective access to further education, or unless very exceptional circumstances have resulted in the young person being objectively deprived of the educational value of the previous funded programme.*

93. *These cases will be rare. Examples might include:*

- *where the education or training provided by the specialist FE establishment fell so far below the expected standard for the young*

person that the establishment cannot objectively be said to have delivered the provision established as necessary to meet the young person's identified needs

- *where **exceptional reasons** relating to **the personal circumstances** of the individual have caused a demonstrable regression of the skills previously learned to such an extent that the young person has effectively been deprived of the educational value of the previous programme.*

[Emphasis in the original].

These are the paragraphs of the Policy that Mr Howells contends unduly fetter the discretion of the Welsh Ministers so as to render the Policy unlawful.

37. Paragraph 94 confirms what perhaps is obvious, namely, that in order to determine an application for funding an additional programme of study, the Welsh Government will usually need to arrange for a new s.140 assessment to be carried out in order to establish whether the additional programme of study is necessary to meet the education and training needs of the young person. Careers Wales will undertake this assessment. Paragraph 95 states that applications for additional programmes of study are made by Careers Wales:

As before, Careers Wales cannot refuse to submit an application, but should draw the attention of the young person and their parent/carer to the contents of the [Policy].

THE TECHNICAL GUIDANCE

38. The Welsh Government has provided a document setting out advice and guidance on its expectations for the role of Careers Wales in the assessment process under s.140 of the 2000 Act ("the Technical Guidance"). As one might expect, that document is principally aimed at Careers Wales, and they are required to have regard to the advice and guidance set out within it. The Technical Guidance is not the same as the Policy, and insofar as there is any inconsistency between them, the Policy has primacy.
39. Paragraph 19 of the Technical Guidance makes it clear that where any post-16 provision being sought by the young person or his parent/carer is not related to the young person's education and training needs, it is for the relevant agency, i.e. social services, to take over lead responsibility for that individual.
40. The relevant passages in the Technical Guidance begin at page 11, which addresses the circumstances in which the Welsh Government will or may exercise its discretion to arrange for an assessment pursuant to s.140(3) of the Act. Paragraph 42 refers to the circumstances in which the Welsh Government has predetermined that it is appropriate for such an assessment to be carried out, namely, where the young person is aged over compulsory school age but is still under 25, s/he has a SEN maintained by a local authority in Wales, and will leave school at the end of the academic year s/he is currently in to receive post-16 education or training, or higher education. That was the category into which DJ fell when his initial assessment under s.140 (3) was carried out.

41. The relevant text of Paragraph 43 of the Technical Guidance provides as follows:
- “in some circumstances the Welsh Government may determine that it is appropriate for a young person to be assessed under section 140(3). These may include the following, but this is not an exhaustive list:*
- a young person who ...*
- has previously received an assessment but whose circumstances have since changed (e.g. a young person with a deteriorating condition) to such an extent that a further assessment is necessary to ensure their learning needs are met...*
42. Paragraph 48 makes it clear that anyone who is able to advocate on behalf of the young person may approach the Welsh Government on behalf of the individual or their parent/carer to request that an assessment is undertaken, *if the criteria outlined in paragraph 43 applies*. In such circumstances it will be for the Welsh Ministers to determine whether an assessment is required.
43. Paragraph 81 states that where the request for a s.140 assessment relates to a young person who is seeking an additional funded programme of study, brief information pertaining to the original Welsh Government funded programme of study and the original desired outcomes (as stated in the LSP) should also be included. It continues:
- It should be noted that the reasons to update an LSP (for a young person seeking an additional funded programme of study) must relate to the specific conditions set out in paragraph 43; the reasons to support an additional programme of study (as outlined within paragraph 134) are not being considered at this stage and should not be included within the request.*
44. Paragraphs 133-139 of the Technical Guidance specifically address requests to fund additional programmes of study (as opposed to requests for a further s.140 assessment as a precursor to making such a request). Paragraphs 133 and 134 largely repeat, and mirror the language of, paragraphs 92 and 93 of the Policy.
45. Paragraph 135 provides that, in order to determine an application for funding an additional programme of study, the Welsh Government will usually need to arrange for a new s.140 assessment to be carried out, in order to establish whether the additional programme of study is necessary to meet the education and training needs of the young person. Careers advisers should consider the reasons for an additional programme of study and make a request to the Welsh Government to update an LSP.

THE FACTUAL BACKGROUND

46. Between the ages of 3 and 18, DJ was educated in special schools pursuant to a SSEN and the Education Act 1996. In his final year of education at school, the Welsh Ministers arranged for Careers Wales to complete an assessment under section 140(3) of the 2000 Act. The LSP is dated 27 January 2015. It summarised DJ’s future education and training needs in the left hand column, and the provision required to meet them in the right hand column. Among the identified needs, it stated:

“to ensure [DJ] can fulfil his academic potential he should have access to a suitable and meaningful curriculum that will help him to develop his basic skills and develop and engage his interests in fulfilling vocational studies”.

In the passage which identifies the provision required to meet those needs, the LSP stated:

“[DJ] will benefit from having access to a suitable and appropriate curriculum. He has been assessed at Coleg Elidyr and [they] deemed it appropriate for [DJ] to work towards the Foundation Programme. This course will allow [DJ] to continue to develop his basic skills in numeracy and literacy as well as develop his independent living and social skills. These will be vital for [DJ] to reach his full potential and to live as independent a life as possible, with some support. [DJ] should also have the opportunity to develop interest and skills in vocational areas such as gardening and working with animals that will not only be fulfilling to him academically but also help with his independence and overall personal development.”

47. Cardiff City Council and the Welsh Ministers co-funded DJ’s study on the Foundation Programme at Coleg Elidyr for a period of 3 years, ending in July 2018. The Welsh Ministers funded the educational cost element of the placement under the 2000 Act and Cardiff City Council funded the residential and support needs element under the 2014 Act. On 2 November 2017 the Welsh Ministers instigated transition planning for DJ. Coleg Elidyr proposed that DJ (by now aged 21) should progress onto its Trainee and Transition Programme, a 2-year personalised programme whose students will typically have completed the college’s education programme and require further support to develop the skills acquired to successfully live and work within their communities in their post-college lives. The college described the course as *“providing a stepping stone to increased independence and autonomy to enable individuals to live fulfilling lives and make a positive contribution to their community”*. It confirmed that DJ had made *“excellent progress”* on the foundation course.
48. DJ’s parents asked Cardiff City Council for funding, but on 27 November 2017, Cardiff City Council wrote a letter stating that they could meet his needs locally and were ready to start planning to do so. A transition meeting took place on 29 November 2017. On 22 December, solicitors acting on behalf of DJ wrote a letter before action to Cardiff City Council intimating that DJ intended to challenge their decision to refuse the funding for trainee placement for him at Coleg Elidyr. One of the complaints made was that the local authority had not properly carried out an objective comparison of the trainee placement for DJ as against supported living placement in the community in Cardiff. In response to this letter, Cardiff City Council accepted that their letter of 27 November was *“badly worded”*. They said that it should have stated that unfortunately the Welsh Government is not funding the educational element of any additional years of more than three-year programmes, once students have completed their courses. The Council accepted that a Wellbeing Assessment would have to be carried out, which would consider all potential solutions as to how they could meet DJ’s needs and achieve his personal outcomes, and that they would carry out an objective comparison of the type described above.
49. In January 2018, DJ’s parents approached Careers Wales to discuss an application to the Welsh Ministers for funding for the education element of the further programme of

study at Coleg Elidyr. On 29 March 2018 Careers Wales submitted a request to Welsh Ministers, after input from DJ's parents, for permission to update his s.140 assessment. The Welsh Ministers sought additional information relating to the request for an updated assessment, which was supplied by Careers Wales on 21 May 2018.

50. On 7 June 2018, the Welsh Ministers made the first decision under challenge, refusing permission to update the s.140 assessment. DJ's parents appealed that decision pursuant to the appeals process set out under paragraphs 98-104 of the Policy. This is a two-stage process; the first stage is an internal appeal, the second appeal is to an independent and impartial person who acts as an independent assessor. In DJ's case that person was an independent educational psychologist. Both appeals were unsuccessful.
51. The second appeal decision, which all parties have treated as also being the subject of challenge in this claim for judicial review, was made on 24 August 2018. The independent assessor concluded that guidance and policy governing the decision to refuse the requested update of the s.140 assessment were applied correctly in the light of the evidence provided. He stated that "*the guidance is clear that such an update should occur when needs have **changed to such an extent** that it is warranted*" and that although it was very satisfying to know that DJ had made good progress and had developed some skills which seemed hard to envisage in 2015, "*progress, in itself, does not constitute evidence of a **change to such an extent** that an update is required*". He said it was entirely reasonable for Welsh Ministers to conclude that the progress DJ had made was the kind of progress they would expect him to have made at Coleg Elidyr:

*"The evidence suggests that [DJ] has not outpaced his original learning goals to such an extent that the original s.140 is not meaningful or useful... the progress reports provided do not suggest that [DJ] has reached a point where his learning needs are not being met, or challenged, by the courses. It is therefore not reasonable to propose that his good progress, which was also quite reasonably expected, constitutes a **change of great extent.**"*

[All emphasis in the original].

52. Meanwhile on 3 May 2018, Cardiff City Council, as the responsible local authority under the 2014 Act, completed its own "wellbeing assessment" of DJ's needs. This replaced an assessment it had carried out in January which was challenged by DJ's parents. The wellbeing assessment is the subject of a separate claim by DJ for judicial review against Cardiff City Council which has been stayed pending the outcome of these proceedings.
53. While the appeals were in train, Cardiff City Council completed their care and support plan for DJ on 4 July 2018. On 12 July 2018 Careers Wales made the final decision under challenge in this claim for judicial review, which was communicated to DJ's solicitors by email. They said they were unable to proceed with a funding application for an additional programme of study as this process is initiated by the production of the LSP. If the Welsh Government upheld the appeal for an updated assessment, they would update the LSP as a matter of urgency to expedite the application process as efficiently as possible.

IS THE POLICY LAWFUL?

54. Although the challenge to the lawfulness of the Policy is the second of the three grounds relied on by DJ for seeking judicial review, logically it arises for consideration first, because if any part of the Policy acted as an unlawful fetter on the Welsh Ministers' discretion under s.140(3), or s.32 read together with s.41, any exercise of that discretion in accordance with the Policy will be flawed. It would then be incumbent on the Court to consider what the consequences of that are, and whether, as Mr Knafler submitted, the rationality of the decision under challenge would be a complete answer to the claim for judicial review even if the Policy were held to be an unlawful fetter on the discretion.
55. It is important to interpret the Policy consistently with the statutory duty, which is to secure the provision of *reasonable* facilities for education and training suitable to the requirements of persons aged 19 and above, and in doing so to *have regard* to the needs of persons with learning difficulties and to any LSP. In the case of a young adult, there is no obligation to ensure that the facilities achieve those needs. Indeed, as Mr Knafler pointed out, a person with learning difficulties will continue to have needs, including educational and training needs, after completion of a 2 year or 3 year course of study.
56. An assessment under s.140(3) of the 2000 Act is required to identify the provision of education or training that will meet the assessed needs of a person with learning difficulties. If an assessment has already been carried out, and an LSP has been produced, a fresh assessment would determine whether and to what extent those previously identified needs have been met, and if they have changed, and if so, to what extent they have changed. It might also shed some light on why those needs have changed, though the circumstances giving rise to the change are more likely to be the subject of independent evidence, such as medical evidence, that feeds into the assessment. Careers Wales must obtain the permission of the Welsh Ministers to carry out a new s.140(3) assessment.
57. As a preliminary point, Mr Howells submitted in his skeleton argument that what he erroneously described as the "criteria" set out in paragraphs 92-93 of the Policy were not even a relevant consideration when an updated assessment is requested, because the s.140 assessment is at one stage removed from the substantive decision on an application for funding, and consideration of the criteria would lead to pre-determination of a future application for funding that had not yet been made. Further, the criteria were inconsistent with the policy considerations that expressly apply to a request for an updated assessment.
58. Mr Howells wisely did not press these points in his oral submissions. A request for a further s.140 assessment does not exist in a vacuum. There has to be some justification for making it, and for granting it, beyond the fact that the young person or their parents/carers intend to make an application for additional funding. When the Welsh Ministers consider the exercise of their discretionary powers under the 2000 Act it is inevitable that they will take into account their overarching policy to provide funding that allows all young persons who are likely to benefit from it, to receive 2 years' FE funding (or 3 years in exceptional cases) and no funding for additional programmes of study save in exceptional circumstances. That approach underpins their budgeting for further education.

59. In a situation in which the original LSP has already identified a young person's educational and training needs and the specialist FE provision that is designed to meet them, and the young person has completed that course, the Welsh Government could only be asked to exercise its power to assess his educational and training needs for a second time if it were intended to make an application for funding an additional programme of study, as was the case here. The question whether such an application is even likely to get off the ground is bound to have a bearing on the decision whether to allow a fresh assessment, and so consideration of whether the case falls within the two broad categories of recognised exception referred to in paragraph 92 and exemplified in paragraph 93 of the Policy is not only relevant but likely to be essential.
60. The suggestion that the so-called criteria are inconsistent with the policy considerations that expressly apply to a request for an updated assessment betrays a misunderstanding of what those policy considerations are. Whilst paragraph 94 of the Policy confirms that the Welsh Ministers would usually need to arrange for a new s.140 assessment to be carried out in order to establish the current education and training needs of the young person, so as to enable it to determine an application for funding an additional programme of study, that paragraph does not mean that whenever it is envisaged that such an application will be made, the Welsh Ministers *must* accede to a request for such an assessment and should ignore considerations of whether an updated assessment would serve any useful purpose.
61. The Welsh Ministers are entitled to take into consideration the policy considerations governing such requests, and these are not confined to ascertaining the young person's current educational and training needs. They include the stated policy that funding for an additional course will not usually be granted, and the illustrations given of the types of exceptional circumstances in which it might be. Consideration of those matters does not mean that the Ministers are pre-emptively determining the outcome of a future application for funding; they are evaluating the prospects of its success, which is quite a different matter. That is plainly a legitimate consideration when deciding whether to permit Careers Wales to carry out a new assessment.
62. I turn, therefore, to consideration of the substantive grounds of challenge to the lawfulness of the policy. Mr Howells relied on guidance derived from the approach of the House of Lords in *Re Findlay* [1985] AC 318, which concerned a challenge to the lawfulness of a policy by the Home Secretary of refusing in all but the most exceptional cases to exercise his power to release on licence certain classes of offenders. Lord Scarman, with whom the other members of the House agreed, indicated at 336E-F that

“Consideration of a[n individual] case is not excluded by a policy which provides that exceptional circumstances or compelling reasons must be shown because of the weight to be attached to the nature of the offence, the length of the sentence and the factors of deterrence, retribution, public confidence, all of which it was the Duty of the Secretary of State to consider.”

He went on to say that a presumption in certain cases against parole, which was an inevitable and no doubt intended consequence of the policy, would be unlawful “*only if it were irrebuttable, i.e. if it precluded consideration of other factors,*” which the policy in that case did not. Thus, if a policy allows for exceptions, it is not unlawful.

63. Indeed, a policy that spells out the way in which a statutory discretion is likely to be exercised in the absence of exceptional circumstances, and then gives examples of what will or might constitute exceptional circumstances, will promote consistency and transparency in decision making. Even if the policy appears on its face to create an unlawful fetter on the exercise of discretion, if it is operated in practice in a way that is fair and consistent with any relevant statutory duties it will be tolerated.
64. Mr Howells objected to paragraph 92 of the Policy and the imposition of a “very exceptional” (as opposed to “exceptional”) threshold which was, he submitted, unrelated to the needs of the young person concerned. In the public law context there is a distinction between guidance and a rule; guidance is advisory because it assists the decision maker without compelling a particular outcome, whereas a rule compels the decision maker to reach a particular result. If the so-called guidance is in fact a rule prescribing how a statutory discretion will be exercised, and admits of no exceptions, then it is an unlawful fetter on the exercise of that discretion.
65. Mr Howells submitted that, notwithstanding the presence of the word “usually”, Paragraph 92 is in effect a rule which mandates a particular outcome and precludes consideration of an application for assessment by someone in DJ’s situation on its merits. He submitted that it does not permit consideration of a positive change in the situation of the applicant, as opposed to a negative change. The examples given are self-contained and treated as mandatory, so that if a person with learning difficulties does not fall within them, they would be treated as falling outside the Policy.
66. Miss Hadfield supported the submission that the criteria in paragraphs 92 and 93 are not focused upon the needs of the young person or the provision required to meet them, which is what the 2000 Act requires, but on the quality of the education they have already received. She characterised the two clearly defined exceptions in paragraph 92 as extreme examples, and submitted that the introduction to the further tightly drawn examples of those categories in Paragraph 93, “*these cases will be rare*” was antithetic to the existence of an unqualified residual discretion. In reality, she contended, the effect of the Policy was overly restrictive. Miss Hadfield also referred to the target duty on Welsh Ministers under section 33 of the 2000 Act to encourage individuals to undergo post-16 education and training, and submitted that far from encouraging individuals with learning disabilities to do so, the Policy overall makes it very difficult for them to do so in a way which meets their needs.
67. I cannot accept any of those submissions, which fly in the face of the language of the Policy and the approach set out in the technical guidance. Paragraphs 92 and 93 are not rules, nor do they lay down criteria which have to be fulfilled in order to qualify for additional funding. Paragraph 92 articulates *exceptions* to the general underlying policy of providing funding for 2 years (or exceptionally, 3 years) only, and that general approach to the fulfilment of the Welsh Ministers’ statutory duty under sections 32 and 41 of the 2000 Act is accepted to be lawful.
68. It is not unlawful for a policy to indicate the type of circumstances that would normally need to be demonstrated to justify a departure from the general position on funding articulated in the Policy, and why, so long as it is made clear that they are not the only circumstances. The word “usually” serves that function here, and I can see no justification for treating it as meaningless. It is in the nature of a general residual

discretion that the circumstances in which it will arise cannot be foreseen or characterised in advance.

69. Against a background in which:

- i) The statutory duty is to provide reasonable facilities for FE, having had due regard to the needs of a young person with learning disabilities;
- ii) The 2000 Act left it to the Welsh Ministers to exercise a political, social and economic judgment about the period of funding that would be provided in order to fulfil their statutory duty;
- iii) The policy of the Welsh Government, consistent with the statutory duty, is normally to fund for two years only, for a single FE programme identified and agreed in the initial LSP which has determined that that programme will address the individual's identified educational and training needs; and
- iv) A different public authority (in DJ's case, Cardiff City Council) has a statutory duty to provide for the needs of a young person in the circumstances identified in paragraph 92 of the Policy, i.e. when it is necessary for that person to undertake additional specialist provision over and above and following completion of the young person's agreed programme of study;

the approach in paragraph 92 of the Policy, namely, that further funding will not usually be forthcoming unless the previous funded programme cannot fairly be said to have afforded the young person effective access to further education, or unless in very exceptional circumstances, the young person has been objectively deprived of the educational value of that programme, is consistent with the underlying policy and the relevant statutory duties.

70. There is nothing in the characterisation of the latter situation as arising in "very exceptional circumstances" that creates a threshold, let alone turns the guidance into an inflexible rule. In context the phrase "very exceptional" does no more than signify that the second category of recognised exception referred to in paragraph 92 will rarely arise. In any event, there are numerous examples of lawful policies in which stringent requirements are laid down for a discretion to be exercised, exceptionally, in circumstances in which the rules are not met, most notably in the field of immigration.

71. The approach in the Policy is not divorced from the educational and training needs of the young person. The reasons why further funding may be considered justifiable in the two broad categories of case identified in Paragraph 92 are consistent with the underlying policy of funding for 2 years only, and the reasons for it, and directly concerned with the young person's education and training needs. The original LSP is necessarily premised on an expectation that the identified course will address the educational and training needs identified at the time when the young person leaves full-time secondary education. If it subsequently transpires that it failed to do so, or it is no longer suitable because the needs have fundamentally changed, that objective will not have been achieved. That is a justification for potentially departing from the normal position, and for requiring a further assessment, though of course the actual decision on funding may depend on the specific reasons why the course has failed to achieve the objectives set out in the LSP. The same justification underpins the policy

articulated in paragraphs 83 and 84 of the Policy which deal with requests for an extension to an agreed programme of study, and provide that “*the Welsh Government will need to be satisfied that... the extension is objectively necessary to ensure that the young person’s identified educational and training needs are met*”.

72. On the other hand, if the objectives of the original LSP have been achieved, on the face of it the Welsh Ministers will have delivered effective access to further education in accordance with the Policy and made reasonable provision in accordance with their statutory duty.
73. The two broad categories in paragraph 92 cover the situation where the quality of the education or training is sub-standard or even non-existent (e.g. if the educational establishment shuts down, or it fails to provide modules on the course that were agreed to be delivered as part of the original study programme) or the young person has a medical condition or learning difficulty that has deteriorated or improved to such an extent that the course has turned out to be wholly unsuitable.
74. The two examples given in paragraph 93 are just illustrative scenarios falling within each of those two categories, as the introductory words make clear. Although the second specific example (of a case falling within the second category) relates to a deterioration in the young person’s previous learning skills, there is no reason to interpret the Policy as being confined to situations of negative change, and it is noteworthy that on appeal the independent adjudicator did not interpret it so narrowly. For example, if the young person who had learned to read and write had become blind at the time of the original LSP, and funding was granted for her to attend a college where she would be studying in Braille; but following an operation, she gained sight in one eye, this development could have a significant impact on the suitability of the FE course on which she is or has been enrolled, though that will not necessarily be the case.
75. It is not difficult to conceive of other examples falling within the recognised categories of exception in paragraph 92, such as where the young person is subsequently diagnosed with a condition such as autism that impacts on their educational needs, and that was unknown at the time of the original LSP, and that condition cannot be accommodated within the existing course; or where a traumatic experience (such as the death of a close family member or involvement in a road traffic accident) has had a direct impact on the ability of the young person to engage with the course in a meaningful way or has given rise to a regression in their pre-existing skills. If those changes of circumstance cannot be catered for by an extension of time to complete the course on which the young person is already enrolled, because the course is no longer suitable to meet their needs, it may be appropriate to consider funding for an entirely different course.
76. Indeed, the five cases since January 2017 in which requests were successfully made to the Welsh Ministers for an updated assessment under s.140(3) as a preliminary step to applying for funding for an additional programme of study (which applications were also granted) all involved situations falling within the scenarios set out above.
77. So long as the indication given in the Policy and technical guidance of the types of circumstances that would be regarded as exceptional, are not exhaustive, and there is a residual discretion outside those examples, as there is, the Policy remains unfettered.

Of course, it is difficult to conceive of circumstances falling outside the two broad scenarios outlined in paragraph 92 and exemplified in paragraph 93 that might qualify, but the Policy expressly allows for the possibility that they may be demonstrated. There is nothing in it that precludes the decision maker from consideration of an application for a further assessment or an application for further funding on its merits in circumstances that do not fall within the parameters of those examples.

78. What is clear, however, is that the successful completion of the original funded course, in accordance with the aim of the LSP, is not a situation which would justify a departure from the normal position on funding, because there is nothing about it that is exceptional. It is no different from the position that is expected to arise when the course has been completed. If that situation were to be treated as a sufficient basis for applying for further assessment under s.140(3), it would drive a coach and horses through the underlying policy, as it would mean that any young person who had successfully completed their 2 year (or 3 year) course, and thereby achieved what their LSP set out to achieve, could demand a fresh assessment of their current educational and training needs with a view to making an application for funding for a further course as a matter of routine.
79. As to Miss Hadfield's point about the target duty under s.33 of the 2000 Act, the Policy seeks to put young people with learning disabilities on a level playing field with other young people in terms of the funding for further education and training they are likely to receive from the Welsh Government; it does not deny them access to such funding as they may require from other public sources. The availability of two years' funding from the Welsh Government at a FE institution that has been identified as suitable to meet the further education and training needs assessed at the time when they leave school is reasonable provision, and I regard it as unrealistic to suggest that the policy that funding will not be made available by Welsh Ministers for *additional* courses thereafter save in exceptional circumstances would act as a disincentive to anyone who wished to undergo post-16 education.
80. For all the above reasons the challenge to the legality of the policy fails.

THE OTHER GROUNDS OF JUDICIAL REVIEW

81. These can be dealt with more speedily. The first ground is that the refusal by the Welsh Ministers to allow Careers Wales to carry out a further assessment under s.140(3) was irrational or in breach of the statutory duty under s.41 of the 2000 Act. It was neither. Nothing in s.41 of the 2000 Act compels Welsh Ministers to accede to a request for a further assessment under s.140(3); it is purely a matter of discretion.
82. In this case the refusal by the Welsh Ministers, as a matter of discretion, to agree to a further s.140(3) assessment in DJ's case was lawful. The discretion was exercised rationally after taking into consideration all relevant factors and was consistent with their published Policy. The decision of the independent adjudicator on appeal to uphold the Welsh Ministers' decision for the reasons that he gave is likewise unimpeachable on public law grounds.
83. Mr Howells submitted that the fundamental problem with the approach adopted by the Welsh Ministers was that they treated the completion of a course as an end in itself.

That conflated two entirely separate considerations mentioned under s.140(4), namely, the needs of the person with learning difficulties and what provision is needed to meet those needs. The needs were the personal outcomes identified in the original s.140(3) assessment, and if and to the extent that those outcomes had not yet been achieved by the end of the course of study then a further assessment would be justified.

84. That submission itself conflated two entirely separate considerations by conflating the personal outcomes with the educational and training needs identified in the LSP. These are not the same thing, as Paragraph 36 of the Policy makes clear. The identified FE provision is intended to equip the young person to achieve the personal outcomes, such as employment or semi-independent/independent living, but the assessment focuses on how the provision will meet the young person's identified education and training needs, which may only be one step towards achieving those personal outcomes.
85. In any event it was open to the decision makers to decide, as a matter of fact and judgment, that the progress that DJ made at Coleg Elidyr, whilst excellent news, was the type of progress expected and envisaged by the original LSP and therefore not a material change for the purposes of the Policy. The Welsh Ministers did not decide that it was unnecessary to carry out a s.140(3) assessment in order to identify DJ's educational needs. They did not ignore the fact that he still had educational needs (as the evidence provided in support of the application made clear) and that he had not achieved all his personal outcomes. They were aware, however, that Cardiff City Council was assessing those needs and deciding how they could be addressed.
86. There is no reason for this Court to disbelieve the statement by the Welsh Ministers that they had considered all the material supplied to them. They were entitled to conclude that there had been no significant change since the previous assessment, such as to warrant a departure from the normal position on the period of funding. As the educational psychologist said in the second appeal decision "*the evidence suggests that DJ has not outpaced his original learning goals to such an extent that the original Section 140 is not meaningful or useful..., it is not reasonable to propose that his good progress, which was also quite reasonably expected, constitutes a change of great extent.*"
87. As Mr Knafler submitted, DJ had progressed well at college, as expected, but continued to have educational and training needs that could be met, after a transitional process, under the 2014 Act, as envisaged throughout. There was nothing about his case to render it unusual, let alone exceptional, and the decision to refuse the request to carry out a further assessment was well within the ambit of rational judgment open to the decision makers (i.e. the Welsh Ministers and the independent adjudicator). I agree. The independent assessor decided that the guidance and Policy were correctly applied and that the decision was right. This court is not concerned with whether the decision was right or wrong, but whether it was open to the decision maker to take, and in this case it cannot begin to be described as irrational.
88. This leaves Ground 3, the challenge to the decision of Careers Wales not to apply for funding following the refusal by the Welsh Ministers to update the s.140 assessment. DJ seeks a quashing order in respect of that decision and a mandatory order that Careers Wales makes the application within 7 days.

89. Mr Howells submitted the refusal fell outside the Policy guidance and was therefore unlawful. Paragraphs 40 and 95 make it clear that Careers Wales cannot refuse to make such an application even where an assessment is obtained but is not supportive of the application. If the Policy allowed such a refusal it would be irrational.
90. Mr Knafler's riposte was that this challenge was based on a misunderstanding of the Policy. Paragraph 40 addresses the situation in which the necessary initial s.140(3) assessment has been carried out, but the resulting LSP does not support the application for funding because a view is taken that the young person's needs can be met in mainstream education. The ultimate decision on the application for funding rests with the Welsh Ministers, and therefore an apparently negative LSP cannot be determinative of the outcome of that application. That is why Careers Wales are obliged to submit the application to the Welsh Ministers if the applicant so wishes, regardless of whether the prospects of success in the teeth of the contents of the LSP are slender.
91. Paragraph 95 addresses the situation in which an application is made for funding for an additional programme of study. However, the words "as before" must be interpreted in the context of the situation addressed in paragraph 40, and also in the light of the preceding paragraph, which envisages that a new LSP will have been undertaken. Again, if the LSP appears negative, there is still a decision to be made by the Welsh Ministers based on that LSP, and Careers Wales cannot usurp their function by refusing to send them the materials. However, Mr Knafler contended, where the Welsh Ministers have already been engaged as decision makers and have rationally refused to allow a fresh LSP to be obtained, paragraph 95 of the Policy is not engaged. The only question is whether the decision of Careers Wales not to submit an application for funding which is bound to fail (not least because the only LSP is now three years old) is irrational, and plainly it is not.
92. I consider Mr Knafler's analysis to be correct, since the alternative interpretation involves the Policy compelling Careers Wales to embark upon a futile exercise; but even if I am wrong about that, and Paragraph 95 of the Policy does require Careers Wales to submit an application for funding in the absence of an updated LSP even where the Welsh Ministers have refused the application for a further assessment under s.140(3), nothing would be gained by making Careers Wales submit that application. In any application for judicial review, where a public body has acted unlawfully and the claimant seeks discretionary relief, in this case quashing and mandatory orders, the Court must have regard to whether the outcome for the claimant would have been substantially different had the conduct complained of not occurred. In this case, if the application for funding had been submitted without an updated LSP, it would have been refused, and the decision to refuse it would have been lawful. There is nothing to be gained, therefore, by granting the relief sought.
93. For all the above reasons this claim for judicial review fails on the additional grounds also.