Neutral Citation Number: [2023] EWHC 2088 (Admin)

Case No: CO/0984/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 August 2023

Before :

MRS JUSTICE FOSTER DBE

- -

Between :

THE KING
on the application of
AI

Claimant

- and -

LONDON BOROUGH OF WANDSWORTH

Defendant

- and -

SECRETARY OF STATE FOR EDUCATION

Interested Party

- -
- -

Ms Nicola Braganza KC, Mr Oliver Persey and **Ms Nadia O'Mara** (instructed by **Lawstop**) for the **Claimant**
Ms Aileen McColgan KC (instructed by **South London Legal Partnership**) for the **Defendant**
The Interested Party neither appeared nor was represented.

Hearing date: 29 November 2022

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Approved Judgment

This judgment was handed down remotely at 3.00pm on 11 August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE FOSTER DBE

MRS JUSTICE FOSTER DBE:

INTRODUCTION

1. The Claimant, known in these proceedings as AI, is a transgender young person, currently aged 22 with complex Special Educational Needs and Disabilities ("SEND"). He has since 2016 been a patient at Tavistock's Gender Identity Service.

2. The Claimant was represented by Ms Nicola Braganza KC, Mr Oliver Persey and Ms Nadia O'Mara and the Defendant by Ms Aileen McColgan KC, I am grateful to them all for the written materials and the oral submissions.

3. The Claimant argues the Defendant has failed to comply with the Public Sector Equality Duty ("PSED") arising under section 149 of the Equality Act 2010 ("the 2010 Act") as regards his needs as a transgender person with an Education, Health and Care Plan ("EHCP") and, generally, to transgender young people with special educational needs and disabilities. He expresses this challenge as follows in the Statement of Facts and Grounds at paragraph [68]:

   "*… Breach of the PSED*
   The relevant function engaging the PSED
   68. The Defendant is in breach of the PSED in how it discharges its absolute duty under section 42 CAFA to secure special educational provision for the Claimant, and transgender children and young people with EHCPs."

   It is expanded upon:

   "*Tameside duty*
   70. … the Claimant is under an extensive Tameside duty of inquiry. This duty extends to equipping itself with information about barriers to transgender children and young people accessing and participating in (see, section 149(3) EA 2010) special educational provision. If the Defendant does not understand the reasons for placements in EHCPs breaking down, it cannot take informed action to prevent it. Therefore, the Claimant submits that the Defendant is under a duty to monitor the ongoing impacts of misgendering and gender reassignment discrimination on access to special educational provision: see DMA at 135-146.

   71. In failing to monitor the ongoing impacts of misgendering, the Defendant is unable to demonstrate that it has had regard to eliminating discrimination and advancing equality of opportunity as required by the PSED. There is no evidence of "due regard" to the protected characteristic of gender reassignment in how the Defendant has secured special educational provision for the Claimant or for other transgender children and young people with EHCPs."

4. The circumstances of his early life are significantly distressing and can only provoke profound sympathy. Although he cannot yet read or write he has been able to make a statement through his solicitor. He records that his childhood was chaotic. His mother was a recovering drug addict, he saw her subjected to domestic violence and witnessed her taking drugs. He would go back and forth between her and his grandmother and when around 11 or 12 years old, AI went into his grandmother's care. He records moving all the time, living in numerous different places in the South East and spending a lot of

time with his grandmother, who is disabled, whom he cared for, and with whom he is in fact, once again, currently living, although he reports difficulties with that relationship. At about 13 or 14 AI went into the care system. He has a long history of disrupted schooling, attending eight separate primary schools and numerous other schools. He has been known to CAMHS since the age of 12.

5. In his own words (through his solicitor):

"*I can remember going to Coombe Girls School in Kingston for year 7. I got kicked out of Coombe about half way through year 8 (2014) and was moved to a PRU in Tooting. It took ages to get this transition sorted due to a mix up in paperwork. I started at the PRU on 6th January 2015. I left the PRU at the end of year 9. The next school placement was Ramsden Academy in Essex which I didn't start until sometime in year 10. This only lasted a few weeks. I was in care homes between Essex and Leicester and Lincolnshire - wasn't in school in the care homes - about 4 care homes. I was then sent to another PRU in Wandsworth in year 11. This only gave me a couple of months to do my GCSEs which I then sat in the summer term. I then started at Merton South Thames College after my GCSEs, in September 2017 but was permanently excluded in September 2018. When I left South Thames, I was out of college again for a year and a bit. I then started at Roots and Shoots in September 2019. After Roots and Shoots broke down, I had another couple of months out of school before being sent to Lambeth College in September 2020. This didn't last long. I was then out of education from December 2020 for a year and a half until starting at Share Community in November 2021.*"

6. Most of Year 10 was missed, but in September 2017 (Year 12, post GCSE), he attended South Thames Merton College and it was during this year that he began to transition. The succinct recent chronology is as follows:

   i. Merton South Thames College: September 2017-September 2018 attended
   ii. Out of college education: September 2018-September 2019
   iii. Roots and Shoots: September 2019-April 2020
   iv. Out of college education: April 2020-September 2020
   v. Lambeth College: September 2020-December 2020
   vi. Out of college education: December 2020-November 2021
   vii. Share Community: November 2021-present

7. He has a total of 14 diagnoses and continues to have complex needs. His difficulties have been medically described as Mild Mental Retardation, Attachment Disorder, Emotion Dysregulation, Attention Deficit Hyperactivity Disorder ("ADHD"), Oppositional Defiant Disorder ("ODD") and (Autism Spectrum Disorder ("ASD"), dyslexia, severe anxiety, Post Traumatic Stress Disorder ("PTSD") and low self-esteem. In 2021, he was diagnosed with disturbance of activity and attention, minimal impairment of behaviour and reactive attachment disorder of childhood.

8. The Claimant was assigned female gender at birth, but identifies as male. He was referred to the Gender Identity Clinic ("GIC") at the Tavistock and Portman NHS Foundation Trust ("the Tavistock"), when he was about 14. Mental health professionals have previously advised he may likely need 24-hour support in the foreseeable future. He has been approved for testosterone treatment with gender affirming surgery known as a Subcutaneous Mastectomy.

9. The Claimant's special educational needs, his disabilities and his gender identity are known to the Defendant who maintains an EHCP for him, having done so since July 2018, and before that maintained a Statement of Special Educational Needs between 2013 and 2016. A statutory process exists in respect of the EHCP which is not under challenge in these proceedings. Reference to AI's attendance since 2016 at the GIC at the Tavistock was mentioned in plan number 4 dated 8 July 2020, and that he was awaiting transfer to adult services. In the plan dated 30 November 2021 "Plan number 5" the gender identity disorder was included as a diagnosis in his EHCP where his health needs are described as:

"[AI] *has a diagnosis of: Autism, ADHD – not currently prescribed for, ODD, Anxiety, Low Mood and Sleep Difficulties, Gender Identity Disorder, Reactive Attachment Disorder of childhood.*"

The ESSENCE of the DISPUTE

10. The Claimant argues that the Defendant has provided no evidence of any compliance with their PSED obligations since 2020 and is in breach of them. It is not in dispute that section 42 of the Children and Families Act 2014 ("CAFA") is a relevant function in relation to securing particular special educational provision for individuals, and not only in general policy formation. The Claimant says that in his case, special educational provision was not secured for extended periods of time, but that if the Defendant had undertaken the enquiries required by the PSED, it "*might have better understood the reasons why the Claimant's placements were breaking down and taken appropriate action*". The Defendant has never turned its mind to the possibility that gender reassignment discrimination might be the cause and therefore failed to equip itself with relevant information to take appropriate remedial action.

11. It is the Claimant's case that since he transitioned, his educational placements in his EHCP have repeatedly broken down and his misgendering by others (where the inappropriate pronoun is used for a person) "*has contributed to this*". That has caused serious disruption in accessing the special educational provision required in his EHCP.

12. The Claimant points to the Defendant's evidence of matters it has considered, and submits it is inadequate to demonstrate discharge of their statutory duty, they have not informed themselves of the position and have failed to monitor it.

13. AI refers in particular to:

    a. The fact that the Claimant was misgendered in two placements.

    b. An Equality Impact Needs Assessment (an "EINA") was carried out in respect of the SEND service and policy functions in September 2020, but that document indicated the answer "unknown" in respect of a question relating to the number in receipt of an EHCP for whom gender reassignment was an issue. This identified a data gap with respect to the data on protected characteristics of children and young people with SEN provision - sexual orientation, gender reassignment had not been followed up with a review which is evidence showing the Defendant has not lawfully discharged its duty to inform itself.

c. A "Toolkit" document developed by Brighton and Hove City Council which was promoted but later withdrawn from circulation on the Defendant's website, leaving an absence of any overarching policy document, illustrating the Defendant's disregard of its duties.

14. The Defendant defends the case in two ways. First, whilst the law and its context were not significantly in issue, in this case, there was no discretionary decision-making with respect to the Claimant upon which the provisions could bite. Section 42 CAFA imposes an absolute duty upon the Defendant which is generated by the particular needs and/or disabilities of the child or young person in question. The extent of the duty does not vary according to any protected characteristic; the section 42 duty is not concerned with the *assessment* of educational need but with the securing of the *provision* for that need as set out in the EHCP. In short, necessarily say Wandsworth, the section 149 considerations are taken into account in respect of the detailed and personal provision represented by an EHCP. The duty to secure the stated provision is absolute; the discharge of the duty under section 42 in connection with any individual EHCP holder (that is, its securing of the educational provision set out in the individual's EHCP) does not require separate, specific section 149 consideration - that consideration has already taken place in providing for the individualised needs of the person in question. Their case is that none of the evidence on which the Claimant relies discloses any unlawfulness in any event.

15. Secondly, the Defendant does not accept the factual premiss of the Claimant's case that misgendering was a cause or material cause of the educational and other failures he relies upon. They argue that neither the Claimant nor others at the time gave misgendering as a reason for breakdown of services provided under the EHCP and that the evidence does not support the Claimant. It shows, rather, that the Defendant has made strenuous efforts to provide the Claimant with suitable educational placements but these placements have been significantly disrupted by external factors including by his pattern of non-attendance.

16. The Defendant draws to the Court's attention the fact that when AI's attendance at Roots and Shoots fell below that capable of sustaining a full-time study programme, the Claimant was provided in January 2020 with a bespoke individualised programme. This ran to April 2020 by which stage he had ceased to attend. He was supported to do painting and decorating at Lambeth College instead. Possible placements have been closed to him by persistent substance abuse, the Claimant has not always accepted the assistance offered him by social care and he has a history of violent behaviour, including within educational placements.

LEGAL FRAMEWORK
Special Educational Provision

17. Section 42 CAFA imposes a duty on the relevant local authority to secure special educational and health care provision in accordance with the EHCP. It provides relevantly:

"*42(1) This section applies where a local authority maintains an EHC plan for a child or young person.*

42(2) The local authority must secure the specified special educational provision for the child or young person.
...
42(6) 'Specified', in relation to an EHC plan, means specified in the plan."

18. Thus section 42 CAFA imposes an obligation on responsible local authorities to secure special educational provision in the EHCPs for which they are responsible. It has been described as part of a scheme for achieving the "*best possible educational and other outcomes*" for children and young people with special educational needs and disabilities.

19. As succinctly set out in *ZK v Redbridge LBC* [2020] WL 07029301 (2020) the legal framework governing special educational needs is as follows:

"*8. A child or young person has special educational needs if he or she has a learning difficulty or disability which calls for special educational provision to be made for him or her.*

9. The current statutory provisions governing special educational needs and disability provision are in Part 3 of the Children and Families Act 2014 ("the 2014 Act") which replaced the previous scheme in Part 4 of the Education Act 1996. Local authorities are under a duty to exercise their functions ***with a view to ensuring that all children and young people with learning difficulties or disabilities in their areas are identified.*** *The parent of a child or young person may request an assessment of* ***the educational, health care, and social care*** *needs of a child or a young person (and there is a right of appeal against a refusal to assess): sections 36 and 51 of the 2014 Act.*

10. In the light of an assessment, ***if it is necessary for special educational provision to be made, the local authority must secure preparation of and once prepared must maintain, an education and health and care plan ("the EHC plan")*** *(which replaced statements of special educational need under the 1996 Act).* ***The EHC plan will specify, among other things, the special educational provision required for the child or young person:*** *section 37 of the 2014 Act. There are rights of appeal against the content of an EHC plan: section 51 of the 2014 Act.*" [Emphasis added.]

20. Regulations governing the form of an EHCP, the Special Educational Needs and Disability Regulations 2014, provide by regulation 12(1) for separate identification in the EHC plan of inter alia the following:

"*(b) the child or young person's special educational needs (section B); …. (e) the outcome sought by him or her (section E); (f) the special educational provision required by the child or young person (section F); …(i) the name of the school … to be attended by the child or young person and the type of that institution or, where the name of a school or other institution is not specified in the EHC plan, the type of school or other institution to be attended by the child or young person (section I);...*"

21. The duty is not merely a 'best endeavours' obligation but an absolute duty; see *N v North Tyneside Borough Council* [2010] EWCA Civ 135, a case on the predecessor section in the Education Act 1996.

22. It was also not in dispute that the effect of the authorities is that:

a. The PSED duty of due regard read with the *Tameside* duty upon public authorities to be properly informed before taking a decision, may involve a duty of inquiry, *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin), per Elias LJ; *Bracking and others v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345; *Hotak v Southwark LBC* [2016] AC811. See more recently *R (Ward & Ors) v LB of Hillingdon* [2019] EWCA Civ 692.

b. This is, however, dependent on the context *Forward v Aldwyck Housing Group Ltd* [2019] EWHC 24 QB ([40]).

c. The scope of the obligation has been expressed in *R (Bridges) v Chief Constable of South Wales & Ors* [2020] EWCA Civ 1058, (at [181]) as:

"*The taking of reasonable steps to make enquiries about what may not yet be known to a public authority about the potential impact of a proposed decision or policy on people with the relevant characteristic*."

d. Following *Tameside*:

"*It will only be unlawful for a public body not to undertake a particular inquiry if it was irrational for it not to do so.*" (*R (AD) v Hackney LBC* [2019] EWHC 943 (Admin) at paragraph [83]).

e. As to general application of authority, it is well-established that it is important not to read the judgments (including the judgment in *Bracking*) as though they were statutes. The decision of a Minister on a matter of national policy will engage very different considerations from that of a local authority official considering whether or not to take any particular step (in that case, in a housing matter) - *Powell v Dacorum BC* [2019] EWCA Civ 23 at paragraph [44]. In *R (Hough) v Secretary of State for the Home Department* [2022] EWHC 1635 (Admin); [2022] 6 WLUK 31 at paragraph [106] the Court emphasised how fact-sensitive the exercise is.

f. The context of the case will determine the particular issues raised and:

"*… whether the s.149 duty has been complied with involves a highly fact sensitive inquiry, both into the nature of the decision and the form of the consideration of equality issues …*". [ibid.]

g. A duty to monitor arises in circumstances where it is necessary to determine whether a particular policy is working properly and lawfully and to remedy it if not. Nonetheless, as was said in *R (SG and others) v Secretary of State for the Home Department* [2016] EWHC 2639 (Admin), section 149 did "*not require more detailed consideration of a problem which had not been demonstrated to exist*".

h. Similarly,

"*Councils cannot be expected to speculate on or to investigate or to explore [possible disparate impacts of policies] ad infinitum; nor can they be expected to apply, indeed they are to be discouraged from applying, the degree of forensic*

analysis for the purpose of an EIA and of consideration of their duties under s149 which a QC might deploy in court". (*R (Bailey & Ors) v Brent London Borough Council* [2011] EWCA Civ 1586, [2012] LGR 530).

The PSED

23. The PSED comprises three limbs, as set out in section 149(1) of the 2010 Act:

"*(1) A public authority must, in the exercise of its functions, have due regard to the need to–*
(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it."

24. The Claimant relies here on section 149(1)(a), and section 149(1)(b). Section 149(1) applies where an underlying prohibition is engaged under a section of the Act; (see section 149(8) the 2010 Act, *R (Hottak and another) v Secretary of State for Foreign and Commonwealth Affairs and another* [2015] IRLR 827, at paragraphs [24] and [57]-[60], and *Turani v Secretary of State for the Home Department* [2019] EWHC 1586 (Admin) at paragraph [128]). The Claimant also relied on the duty not to discriminate in the discharge of public functions imposed by section 29(6) of the 2010 Act.

25. Section 149(3) elaborates on what it means to have "*due regard to the need to advance equality of opportunity*" explaining that:

"*[D]ue regard, in particular, to the need to–*
remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low."

26. It has been established that the PSED:

"*…applies both when the local authority is drawing up its criteria and when it applies them in an individual case, both of those being an aspect of carrying out its functions*". (*R (JL) v Islington LBC* [2009] 2 FLR 515 at paragraph (114), *Pieretti v London Borough of Enfield* [2010] EWCA Civ 1104; [2011] 2 All ER 642 at paragraph (26)).

27. This analysis of the obligations imposed (for which I draw upon the Claimant's clear exposition of the law) was not in contention. Indeed, recently in *ZK v Redbridge LBC* at paragraph (84), the Court of Appeal proceeded on the basis that section 42 CAFA was a relevant function for the purposes of the PSED.

28. It is thus accepted that the first two limbs of the PSED require a public authority to keep the duties under review and also, where required, to gather information relevant to its duty to have due regard to the need to eliminate discrimination including by taking the positive steps set out in section 149(3).

29. The Claimant expresses this as a statutory duty which reflects and complements the common law duty set out in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 (the '*Tameside* duty') for a public body to take reasonable steps to inform itself before exercising its public functions.

30. The Claimant points also to the guidance issued by the Equality and Human Rights Commission ('EHRC') (the 'Technical Guidance').

The Technical Guidance

31. The Claimant emphasises that Chapter 5 of the Technical Guidance underlines the need for a sound base of 'equality evidence' when discharging the general duty under section 149 (reference is made to paragraphs 5.15, 5.16, 5.18, 5.21, 5.25, 5.37 and 5.40).

32. For the section 149(1)(a) duty, the Technical Guidance states:

"*a body subject to the duty should remain alert to new evidence suggesting that discrimination or other prohibited conduct is, or could be, occurring and take appropriate action to prevent this happening*" (paragraph 3.6).

33. It says with regard to section 149(1)(b), it is for public bodies to consider whether they have:

"*enough information about levels of participation in [its] activities of people with different protected characteristics to enable it to have due regard to encouraging participation*" (paragraph 3.31).

and this may require a public authority to obtain information on participation broken down by protected characteristic, to enable it:

"*to ascertain whether participation is disproportionality low for people with any particular protected characteristic*" (paragraph 3.32).

34. The Claimant asserts here an obligation to monitor whether transgender children can effectively participate in education of young people and can access special educational provision in their EHCPs, referring to section 149(3)(b) requiring due regard to be paid to differences in the needs of people with different protected characteristics.

THE ARGUMENTS

The EINA

35. In the course of oral submissions Ms Braganza KC relied particularly on the document labelled 'The SSA Equality, Impact and Needs Analysis'. It was approved on 20 September 2020 by the Policy and Review Manager for the Defendant, within the

Children's Service Area of Special Educational Needs and Disabilities names the Directorate involved as "Children's Services", and the Service Area as "SEND". The "Service/policy/function being assessed" is "Special Educational Needs and Disabilities".

36. Wandsworth describes how the EINA was made in order to create a strategic plan for SEND going forward. Under a section headed "*2. Analysis of need and impact*" the strategy for children and young people from ages 0 to 25 years is considered. It names almost 45,000 pupils in Wandsworth schools of which 4,500 approximately have SEND support. The document reflects that the number of pupils classified has increased nationally and that Wandsworth has a higher than national average number of pupils so qualifying. Those details are listed under "Disability". Over the last four years, the number of EHCPs in the borough has increased by 73%.

37. Various other characteristics are listed, for example in respect of gender, the indication of the split is given. As to certain others, namely "*gender reassignment*" and "*marriage or civil partnership*" or "*pregnancy and maternity*", no details are inserted. Under the latter two it says, "*not applicable*" but under "*gender reassignment*" it says, "*not known*". The Claimant places particular emphasis on the "*not known*" entry for "*gender reassignment*".

38. The EINA concluded that there were no significant adverse outcomes for individuals or groups under the protected characteristics. They state an intention to monitor protected characteristics in order to target action if it is shown there is an increase among children with SEND provision.

39. In a box in the EINA headed "*Data gap(s)*" it is indicated that data on protected characteristics of those with sexual orientation, gender reassignment will be addressed:

"*As part of ongoing service development there will be a requirement to maintain a comprehensive data set including appropriate information on protected groups but the main focus will be on gender/ age /ethnicity / disability and where appropriate data on sexual orientation and gender reassignment.*"

40. The Claimant relies on this "data gap" which he says shows insufficient enquiry and a lack of engagement. There was a failure he says to comply with their duty once Wandsworth had identified a data gap. The absence of subsequent evidence of review or active monitoring demonstrated inadequate engagement and fell short of what was required under the local authority's duties.

41. Wandsworth defend their position on the grounds that there was no evidence before the Defendant at the time of carrying out the EINA into its SEND strategy indicating that the Claimant, or indeed any other transgender child or young person with an EHCP, might be subject to discriminatory barriers in accessing their educational provision so as to trigger any obligation to monitor and/or otherwise collect information on this issue. Furthermore, they submitted, the position has not changed. There is no evidence that the Claimant or any other child or young person with an EHCP issued by the Defendant has been subject to systematic discrimination, whether by misgendering or otherwise, in educational settings contrary to the Claimant's Grounds. Nor is there any evidence that

transgender children or young persons with EHCPs are more likely than other children with EHCPs to have their placements break down.

42. Wandsworth argue that the case made against them appears to require that the Council had in place separate policies, procedures and guidance on gender reassignment for children and young people *with an EHCP*, and specific protection against gender reassignment discrimination. A breach is also alleged by way of a failure to have in place a monitoring system to alert to discrimination, especially gender reassignment discrimination, taking place within schools or colleges but Wandsworth have not been able to find any other authority who has such a system - whether generally or for those with an EHCP in place, which in their submission reflects the strength of their approach to this issue in the borough.

The EHCP

43. The Claimant submits that the local authority were aware of misgendering as an issue because it was specified in AI's EHCP. Ms Braganza KC refers to the entries in the plan dated 4 March 2020, reviewed with AI during a meeting of 16 December 2020. It is the Defendant's case that it is this very process, or developing, giving effect to and reviewing the EHCP that fulfils their obligations under the 2010 Act: necessarily where there are issues or potential issues, the provision they are obliged to make must be tailor-made to the recipient of the EHCP.

44. The Claimant's EHCP annual review, a document in standard form, lists under "*Attainment and progress*" that AI was at the end of his first term in his first year at college on a life and work skills course. He went to Lambeth College between September and December 2020, having been at Roots and Shoots from September 2019 to April 2020. The review records that he started the year well but his attendance in person dropped off and he stopped in October. He had explained this was due to him becoming officially homeless and he had become more anxious about Covid. He had started online lessons but then dropped out. His attendance was below 40%. It was noted that he had found it hard to articulate his concerns and became frustrated, leading to avoiding dealing with issues. When expectations were put on him to complete work, he would actively avoid lessons. He had not been engaging in cognition and learning, he had not attended any of the maths online classes.

45. It is also recorded, and the Claimant relies on this, that he attended one lesson with the drama teacher at Lambeth and during the lesson he was misgendered in a conversation, and he left the class. The plan states:

> "*Maths Online*
> [AI] *has not attended any of the classes.*
>
> *Drama Teacher*
> [AI] *attended one lesson. During this lesson* [AI] *was misgendered in a conversation* [AI] *was upset and left the lesson he has been unable/ unwell* [*sic*] *to discuss and resolve the issues and not attended any more of these classes.*
>
> *Dance Teacher*
> [AI] *has not attended any of the classes.*"

46. The review notes also recorded that he did not mix with other students and spent time on his own. He had not wished for any parent or carer to be involved in the review and he lived independently. He said when asked that he was finding coming to college too much pressure as he was homeless. He said at this point in the document that he would like to come back to the course at Lambeth College but he needed time off college to get his life sorted out, and he was happy to withdraw for the year and reapply in April 2021 to start in September. He reported becoming anxious about Covid and not travelling out in the community and not feeling confident to come into college. He had not taken up the offer of online lessons. AI also said the following under the heading, "*views on his/her progress and what he/she would like to achieve next*":

"*Things have been going 'shit'. I don't think that Wandsworth have found the right colleges for me. I wasn't interested in Roots and Shoots but the staff were nice, but I didn't want to do gardening and Oval is too far away for my anxiety. I probably wouldn't have stayed at Lambeth College even if I hadn't had problems with housing because they weren't LGBT friendly.*"

and

"*I want to go to St. John's College in Brighton. I am now 20 and there aren't many places that I can go to. I can't live alone anymore, I feel I need to be in care. St. John's can teach me skills so I can go and live independently in the future.*"

47. The professionals involved with him indicated that he was not using public transport; he did not use trains because people and noise give him anxiety. He would get a panic attack and would get off the bus. AI had been referred for further support and had met up once.

48. Under each of the long and short term outcomes which were monitored under Part 3 of the form, in almost every case they were not met. The comments include that he had been out of education since December 2020. He had not been able to follow a range of straightforward instructions from trusted, familiar college staff, he does not feel that he understands his autism but can express his needs to key people, for example Brian. He does not have any strategies for anxiety and anger, does not follow his safety plans that are given, nor those from the mental health team. There are numerous comments concerning the fact that he finds it difficult to leave the house alone or do things without another. He had key relationships with B, K and J and thinks he could build a relationship with the teachers because he knows them. The comment is expressed as "[AI] *thinks she* [sic] *could build a relationship with the teachers at Merton College because he knows them* [sic]." He relies on this as an indication of the Defendant's hurtful and also unlawful approach.

The Toolkit

49. The Claimant relied on a document known as "the Toolkit" which had been produced by Wandsworth and posted on their website for a time but was withdrawn after being posted in error. He relied on the Toolkit as evidence that Wandsworth knew they had to do more, and it was not open to them to deny there was an issue, or to say that what they had done was adequate and lawful. It represented a breach of the duty of candour too

since the document was not disclosed at the time the claim was brought – it came to light only later - though a simple search would have found it. Wandsworth deny any breach stating the information came to light after a further review in preparation for drafting the witness statement, which is why it did not feature in the previous correspondence or documents.

50. Wandsworth had developed the document based on a similar Toolkit produced by Brighton and Hove City Council. They explained it was formed in conjunction with a number of local and national organisations and services. The guidance was withdrawn because of controversy at the time about the legal status of similar guidance. The Toolkit was developed in order to be made available to schools on a case-by-case basis to provide schools with advice for individual children, it was not as a blanket Council policy. The document was not signed off as approved but was published in error on the Council's webpages in about March 2020. It remained there until January 2022. They point out it says nothing about EHCPs and transgender – which reflects there was not thought to be an issue or a particular problem in that area.

51. The draft before the Court, the "Trans Inclusion Toolkit for Schools – Draft Three" (Wandsworth did not know which version had appeared later on their website), was evidenced as sent in one instance to a pupil referral unit in 2017. This had been after a discussion between the personnel there and the Deputy Head of Education and Inclusion and Participation Service who later sent weblinks and information for the pupil in question, and visited the school. AI was at the unit at the time said Wandsworth. AI argued that the absence of a Toolkit was a very strong indicator of the section 149 duty not having been complied with and underlined the importance of gathering information: it was not enough Wandsworth had a developed education policy on bullying and transgender persons.

52. A recent Brighton Toolkit is exhibited by AI. It is headed "*Trans Inclusion Schools Toolkit 2021 A guide to supporting trans children and young people in education settings*" with a Brighton and Hove City Council logo on the front. It was introduced with the words:

"*We are pleased to present this updated version of the Trans Inclusion Schools Toolkit, agreed by Brighton & Hove City Council's Children, Young People and Skills Committee in June 2021. Trans children and young people are vulnerable to bullying and prejudice and poor mental health outcomes if they are not effectively supported. There is no equivalent national guidance available yet in England and so we see this as an important addition to the range of equality and anti-bullying resources and guidance we provide to education settings in Brighton & Hove.*

…

1.3 Target audience for the Toolkit

The Trans Inclusion Schools Toolkit is intended for use by staff and governors in Brighton & Hove primary, secondary and special maintained schools, free schools and academies. Some of the content and principles will also be of use to Further Education and Early Years Settings. Independent schools within our city are welcome to access it. It will be of particular interest to senior leaders involved in developing and leading whole school policy across a range of areas of practice and to pastoral staff working directly

with trans children and young people. However, all members of the school community should have a good level of trans awareness (see sections 4.2 and 4.3 for information on the role of governors and staff training).

…

1.6 Underlying principles and messages in the Toolkit
Education settings should develop effective equality and anti-bullying policies and practices across all protected characteristics of the Equality Act 2010 and in line with the values and ethos of the setting."

53. AI relied on the fact that it contained passages dealing particularly with SEND including:

"5.5

… Children and young people with SEND may need additional support in understanding or accepting their own identity, learning about those who are different to them, and understanding that difference is to be respected and celebrated. Staff, parents, carers, and wider professionals may need support in understanding that a child or young person with SEND is just as likely to be lesbian, gay, bisexual, trans or gender exploring as any other person. There is developing research showing that there is a higher prevalence of autistic people who are gender exploring or who have gender identity differences. There is likely to be a range of reasons for this. The National Autistic Society includes articles on its website about this."

54. Ms Maffre, Head of Special Needs Assessment Section (SNAS), explained that OFSTED has responsibility for ensuring schools fulfil their statutory duties under the Equality Act, and ensuring schools promote equality of opportunity within an inclusive environment. This includes assessing whether schools have effective anti-bullying polices, and gender issues had been dealt with by them as part of the anti-bullying initiative. She emphasised the Toolkit had been used for individuals, and submitted the Toolkit was:

"*not an indication that there is a problem with bullying or … a problem with homophobia, biphobia or transphobia in Wandsworth schools but to ensure we are proactive and preventative in our approach to safeguarding vulnerable groups of children and young people*".

55. The Defendant's evidence as to its approach to these issues was as follows:

"*Advice relating to trans pupils and students has been provided, and continues to be available, via relevant community-based LGBT services. The Council supports schools and colleges through the Wandsworth School Participation & Performance Service, who work closely with the Free2B Alliance, a community interest company (CIC) linked with Wandsworth's Youth Service. When schools request support for LGBT+ children and young people they are signposted to the advice and support Free2B Alliance offers, including mentoring and training.*"

56. The Defendant said in its Defence:

"*The [Claimant] does not suggest that Brighton & Hove City Council or any other local authority has put in place monitoring of discrimination in schools, whether in relation to gender reassignment or more generally, and whether in relation to children/ young people with EHCPs or more generally. Nor, despite its repeated suggestions that multiple local authorities have adopted guidance relating to trans children in schools, has the SFG made reference to any example of such guidance other than that issued by Brighton & Hove City Council. Further and in any event, the Claimant having long since passed school leaving age such guidance would have no direct application to him.*"

57. Put shortly, the Defendant's case is that there has been no policy change or other trigger which ought to have caused them to anticipate a possible impact on one or other group of people identified by reference to any protected characteristic such as required further investigation. Nor, absent any actual evidence of systemic or repeated problems is there a trigger requiring an investigation. The contemporaneous evidence does not support either repeated or systemic issues.

58. As indicated, for those with EHCPs, where there is a placement breakdown, the Defendant is involved in review meetings for pupils and students with EHCPs. It is thus aware of the reasons for such breakdowns. There was just no evidential basis on which it could form a view that misgendering/gender reassignment discrimination might play a significant role in such breakdowns so as to require further investigation to be undertaken. Here there was no evidence that there ever had been a breakdown on gender grounds with this cohort - namely EHCP recipients with a gender reassignment characteristic. In the present case Wandsworth say in any event in this case, the evidence here does not support the contention that it was gender reassignment issues/misgendering that caused placement breakdown.

The Wandsworth Strategy Document

59. The policy background within Wandsworth was further described by Ms Maffre, Head of SNAS, for the Defendant. She produced a document entitled "*Wandsworth Strategy for Children and Young People with Special Educational Needs and Disabilities aged 0 – 25 2020 – 2024*". Wandsworth's strategy and provision was produced following public consultation with parents, carers, professionals and young people and the feedback was incorporated into it. It sets out the aims of partners within E, H and C after data collection from groups in the relevant demographic, such as the number of those with an EHCP, the placement types, the ethnic origins etc. It also covers statistics on vulnerabilities within those groups; education, training and employment etc. No specific feedback was received suggesting there was a particular need regarding gender reassignment, or that further data regarding gender reassignment needed to be collected and fed into the impact needs assessment. No issues were identified that would have impacted on the action plan that followed. To the best of her knowledge, no areas of concern had otherwise been raised indicating the need to isolate this protected characteristic. The information was limited. There had been no reason to begin equality monitoring for discrimination against transgender students either generally, or, as is alleged here, for those with EHCPs.

60. She expressed it in terms that "*information is limited on the transgender population in the borough in relation to the EHCP population*" and that "*Census information does not collate this data*" but that the SEND strategy was subject to extensive public consultation and that neither the responses to that consultation nor anything else which came to the

attention of the Council indicated that the strategy might have any particular implications for gender reassignment equality. There was no evidence before the Defendant which indicated at the time of carrying out the EIA that the Claimant or any other transgender child or young person with an EHCP might be subject to "discriminatory barriers" in accessing their educational provision and "*no reason to instigate/commence equality monitoring to monitor discrimination against transgender students generally, or with EHCPs*". This has remained the case.

61. The Head of SNAS was aware that certain local authorities had produced guidance to promote transgender inclusion in schools. Several had been produced by Brighton and Hove in the areas of safeguarding, equality and anti-bullying policies. The advice was for trans inclusion work to be applied within the equalities framework preventing gender stereotyping and sexism. Other authorities have produced guidance for schools, for example in May 2020 Oxfordshire County Council were challenged following production of their own trans inclusion Toolkit. Oxfordshire did not proceed with their Toolkit in light of the challenge, and Wandsworth withdrew theirs.

Factual differences

62. The Claimant submitted that at other colleges he was misgendered and discriminated against. In one of the pre-action protocol letters he stated:

"*The local authority has repeatedly failed to tackle such prejudice and promote understanding in order that [AI]can be properly supported and a placement maintained. The local authority have also failed in their duty to promote understanding by using the incorrect name and pronoun in their correspondence with* [AI] *when drafting significant documentation such as his ECHP.*"

He complains of misgendering in two placements, the first in time at Roots and Shoots, the second at Lambeth College. He also alleges a *member of staff* at Roots and Shoots:

"*…used 'she' which really got to me because I didn't want other students to know. It made me angry and I kicked a sign and punched a wall…*".

63. Although he does not suggest that he raised this incident with the Defendant, he says Wandsworth were aware of a report that the Claimant had been misgendered while at Roots and Shoots by a fellow *student* who had a learning disability. The evidence from Wandsworth showed that this latter incident had resulted in a reminder to all Roots and Shoots staff about the Claimant's name and gender. By contrast, there was no previous mention to the Defendant (or to Roots and Shoots), about any claimed misgendering by a member of staff.

64. The chronology of Roots and Shoots materials shows the following at the start of the placement:

"*August 2019*

…

In-house staff were fully briefed in person at training days before term commenced, with emphasis on using [AI's] *chosen name and being mindful of this when ascertaining needs from the EHCP that had been sent from Wandsworth SEND.*

Email correspondence was sent to sessional sports coaches to outline the same information.

September 2019
As part of his enrolment at Roots and Shoots, [AI] *provided a passport in his chosen name and gender, this began a conversation about having his EHCP fully reviewed to reflect his chosen name, gender identity and recent diagnosis of Autism (April 2019).*

October 2019
…
In the Education Team Meeting for the Autumn Term there was a reminder to all staff about [AI's] *chosen name and identity. This followed a fellow student with a learning disability misgendering him.*

November 2019
[AI] *expressed that the Horticulture Study Programme was not of interest to him, so he was transferred to a bespoke programme, with the blessing of Wandsworth SEND, that did not require him to have a main aim and therefore reduce the demand upon him.*

External issues became prevalent for [AI] - debts, risk of homelessness and he continued to experience barriers to his learning."

65. Wandsworth note that the chronology has no reference to any incident or complaint, rather it details that the SEND Head at Roots and Shoots and the Claimant changed his EHCP sentence by sentence together – and it was finalised in March 2020. The subsequent chronology indicates his discussion about other courses but accommodation issues were predominating and a move to Croydon appeared to prohibit further attendance – but was resolved with extra finance in January 2020. The note records that the pandemic intervened stating in June 2020 that:

"*Although initially keen to return to college,* [AI] *was reluctant to use public transport to attend college in person. We continued to offer the interventions and support that we had offered, however* [AI] *was unable to attend nor engage.*
…
[AI] *shared with us that he was struggling with his mental health and had seen his GP. He had also returned to live with his grandmother, as she needed help in the house.*"

66. There was also no reference to a further incident in his Annual Review on 16 December 2020 when he attributed attendance failures at the college before October 2020 to becoming homeless – not to any lack of support by the College for LGBT young people:

"*He said that he has become more anxious about Covid so was offered online lesson which started well then dropped off and ended in November with "overall attendance is below 40%" … We want to continue offering him a place at the college but he needs to make a commitment to attended in person or online for the place to remain open.*"

67. The Roots and Shoots material also suggested good ongoing relations and that he kept in touch after he had left them for Lambeth College:

"*He would regularly contact staff to express his struggles, he started doing this very soon after enrolling and continued even after he transferred to Lambeth College.*"

68. Wandsworth rely on the fact that there had been no previous mention to the Defendant, or to Roots and Shoots, as to what AI's Witness Statement refers to as the act of misgendering by a member of staff at Roots and Shoots. They submit that in any event not all instances of misgendering are discrimination contrary to the 2010 Act, in particular, inadvertent misgendering, even deliberate misgendering by one student of another is unlikely to fall within the Act.

69. They state also that not all trans students have the protected characteristic of gender reassignment, and it is not arguable that the very limited instances of misgendering of which Wandsworth was aware alerted them to "*discrimination suffered by the Claimant and therewith, inevitably, the risk to the Claimant, and other transgender young people with EHCPs*".

70. Wandsworth isolate some examples from the evidence which they say show that there is no connection between what is alleged and the failures in AI's education:

    a. When his attendance at Roots and Shoots (September 2019 to September 2020) fell below that capable of sustaining a full-time study programme, the Claimant was provided in January 2020 with a bespoke individualised programme.

    b. The individual programme ran to April 2020 by which stage the Claimant had ceased to attend.

    c. He was then supported to do painting and decorating at Lambeth College instead but ceased attendance at Lambeth in October 2020 for reasons he attributed to homelessness and anxiety about Covid-19 (see his Annual Review on 16 December 2020 he stated: "*I need time off college to get my life sorted out. I am happy to withdraw from the course for this year and reapply in April 2021 for a start in September*" he has frequently disengaged from education.

71. They point to a number of external factors by which his access to education has been interrupted:

    a. Multiple changes of address.
    b. Homelessness.
    c. Suspension and exclusion for fighting.
    d. Exclusion for drug use.
    e. The inability to join certain placements due to continuing cannabis use.
    f. He has not always accepted the assistance offered him by social or health care.

72. They rely on evidence from those who have had oversight of his EHCP and others and submit that the evidence the Claimant relies on as to his own personal treatment claimed to demonstrate the effect of the Defendant's failure under the 2010 Act, is not accurate. The pleadings say:

    "*the Claimant's educational placements have repeatedly broken down and misgendering has contributed to this*"; he has "*repeatedly experienced misgendering at school*); that

"*systemic misgendering, including by teachers, has contributed to the Claimant's placements breaking down*"

and that his placement at Lambeth College broke down in December 2020 after he was "*repeatedly misgendered by a teacher*", however the evidence does not support this characterisation.

73. Wandsworth refer to the allegation that:

"*[w]hen the placement [at Lambeth College] then broke down … the local authority didn't ask me why the placement had broken down or try to sort out the misgendering issue*"

and exhibit materials showing that the Claimant did in fact tell his education worker and his personal adviser about the incident. The Course Tutor at Lambeth College was phoned by the education worker and AI was told his drama teacher would be spoken to, to ensure that it did not happen again. The Claimant's personal adviser then emailed the Course Tutor on Monday 28 September 2020 recording that the Claimant had rung him on the Friday:

"*very frustrated and upset, as Paul his drama teacher kept on openly referring to him as she in the presence of other students and that he also looked like a female*".

74. The personal advisor asked that the Course Tutor "*meet with Paul and address this matter so it can be stopped as* [the Claimant] *is very sensitive about this matter*." Less than 40 minutes later the Course Tutor replied saying Paul had referred to the Claimant as "*she*" and been corrected at the time, before the Claimant left the room, and then had "*further conversations with* [the Claimant] *outside the class. I have also had further discussion with Paul after the lesson regarding this event.*"

75. Wandsworth also indicate a note made by the Course Tutor in March 2022 indicating AI said the drama teacher had misgendered him twice in the lesson and that he did not want to return to the classroom, and that the Course Tutor had advised him that he would follow up with the drama teacher to make sure this did not happen again. The drama teacher had wanted to apologise to the Claimant and assured the Course Tutor that there would be no repeat but the Claimant did not wish to see the drama teacher again or to attend the course. The Course Tutor noted he was "*not aware of any other times that this occurred*".

76. The Claimant responded (by Reply) to this that:

"[t]*his means that the Defendant was alerted to the discrimination suffered by the Claimant and therewith, inevitably, the risk to the Claimant, and other transgender young people with EHCPs.*"

The Defendant disputes this interpretation saying it was one instance of what appears to have been inadvertent misgendering by the Claimant's drama teacher, and one incident of misgendering by a disabled fellow student at Roots and Shoots.

77. The instance of misgendering that occurred in the 19 October 2021 letter to AI was the subject of a specific apology. Wandsworth explained that the documentation had been sent out using AI's former name and the electronic recording database had created a case file inputting his former name - which led to an autogenerated letter. The database had subsequently been amended; they stated they much regretted the human error.

78. The SNAS team had not been made aware of issues of misgendering and discrimination against AI at any of his placements save for the one incident at Lambeth College, with the drama teacher, which was brought to their attention once the placement had ended. Had they been told they would have contacted the provider to ensure appropriate action had been taken. The annual review report had noted the misgendering at Lambeth - which they had hoped to address – but, as described, he stopped attending.

79. AI raised no other concerns at his annual review meeting, nor about the College not supporting LBGT young people as a reason for not attending.

80. The authority rely on the fact that the EINA outcome revealed there were no significant adverse outcomes from the adopted SEND strategy under the protected characteristics. The schools and colleges themselves consider gender reassignment when looking at the PSED and in their letter dated 11 November 2021 in response to the PAP letter, explained steps they were taking to develop policy. They denied that AI had "*repeatedly not had access to suitable education*" and had experienced "*multiple placement breakdowns … often … caused by incidences of misgendering*" as he claimed.

81. The Claimant said on the contrary, there was a systemic and/or operational failure to protect children and young people with EHCPs from gender reassignment discrimination, and a failure to exercise a *Tameside* duty of inquiry in order for Wandsworth to equip itself with relevant information so as to discharge the PSED duty. As a corollary of this was the obligation to have monitoring systems in place for students with EHCPs who were especially vulnerable and "*not necessarily in a position to report discrimination*". There were "*operational and/or systemic failures*", and the Defendant was apparently oblivious that this played a part in the breakdown of placements. The correspondence went further, describing "*… repeated misgendering from his drama teacher, who did not take heed of repeated attempts to correct them and continued to address the Claimant using the wrong pronoun.*" The correspondence was "*… riddled with incorrect pronouns and name*". (The example given is the mistake noted above in the EHCP of October 2021.)

82. Wandsworth submitted AI was well supported, provided with two key workers, and was accessing adult social services. Only two incidents had ever been reported, both advisors had been involved in the reported incident at Lambeth and the other at Roots and Shoots involved a student with learning difficulties. Assistance was offered, as reflected in the letter of 16 October 2018 from South West London CAMHS, recording AI's diagnoses and difficulties. It records a brief crisis admission after he had phoned the Samaritans expressing a desire to self-harm and to harm others. He was attending appointments, including with the Tavistock. He had experienced several social stresses including a physical fight with his mother, losing his phone, struggling to adjust to his new supported accommodation and building relationships with the staff (they used the wrong gender pronouns), and feeling anxious about college. He described being overwhelmed with negative feelings. AI had attended a school meeting with his new teacher and learning

support worker and his personal assistant. "*He also struggled with peer relationships not understanding his gender dysphoria and managing his emotions, especially anger*." They had suggested facilitating another school meeting and a teaching session including on his gender dysphoria to the placement staff but he had declined it.

83. The Defendant, reviewing all the materials on his assessments, his medical diagnoses and his reports submitted that there was no reason to impose upon this a superadded duty to monitor. The Defendant stated that a number of safeguards were in place.

84. On the general position, Wandsworth denied that the fact of the draft Toolkit document was evidence of a problem. The evidence they had gathered was to the effect that no local authority of the 17 who had responded amongst the London boroughs to Wandsworth's request for information, had produced *any* monitoring system to alert to discrimination, especially gender reassignment discrimination, taking place within schools or colleges. No borough had produced separate guidance to schools on transgender issues. None had any separate policy or procedure concerning gender reassignment for children and young people with an EHCP, nor a distinct policy relating to gender reassignment, no documents or indication that there had been any enquiry undertaken regarding gender reassignment and provision was made available.

85. A number of systems exist through which they would be made aware of any discrimination in schools or colleges. Wandsworth submitted detailed evidence of how the system worked. There were equality policies in place in boroughs, and EHCPs are processed for the individual recipient under the umbrella of the equality policy. London Safeguarding Children Procedures are applied in all settings against discrimination in all settings, including discrimination on this ground.

86. Similarly, as to monitoring the breakdown of placements for students with EHCPs, under CAFA the Council is responsible for ensuring service procedures are undertaken in what they describe as "*a holistic and person-centred way*", so that all documentation is co-produced with parents or other carers and the young person as well as with Health and Social Care. The essential point is that the relationship of the Council with the school or educational setting means that any discrimination is brought to their attention and the Council may police it, given the obligations of the placement under the 2010 Act. The Defendant in particular has a number of actions that may be taken – using data to monitor schools' performance which will indicate those requiring intervention and improvement, undertaking regular health checks with schools and colleges and recommending where necessary schools for the additional Support Programme, and also assistance to headteachers and governing bodies to take responsibility for their own improvement through the link inspector programme and other external validation.

87. A broken down placement will be examined and considered and any recommendations on annual review. Early review is recommended if a placement breaks down. This will take place at the Council's instigation where a person has been excluded from school or is at risk of it.

88. The data on education arrangements for all children and young people with an EHCP is monitored by the SEND team. As of mid-2022 the SEND team had at least 70 requests for changes of placement through the annual review process. Individual schools which may not have complied with their various duties are challenged by the Council. None of

the reasons to which placement breakdowns had been attributed concerned misgendering or other discrimination against trans pupils or students.

89. The Council emphasised that AI's gender reassignment needs were not considered to be distinct from the rest of his needs: they all interacted together and were considered social, emotional and mental health requirements. Where it is considered that detailed information on gender matters is necessary and required to be articulated in detail in a plan, that would be discussed in terms with the student in question.

Issues on the Framework

90. The Claimant argues (and it is accepted) that the duty to monitor and/or seek information is a *Tameside* duty: *R (Hurley and Moore) v SSBIS* [2012] EWHC 201 (Admin), (at paragraph [25(8)]). The scope of the obligation is to make such inquiries or take such steps as are reasonable: *R (Plantagenet Alliance Ltd) v SSJ* [2014] EWHC 1662 (Admin), [2015] 3 All ER 26 (at paragraph [100(1)]) but Wandsworth emphasises it is unlawful for a public body not to undertake a particular inquiry only if it was irrational not to do so, also relying on *Plantagenet Alliance* (at paragraph [100(3)]), *R (D) v Hackney LBC* [2019] EWHC 943 (Admin), [2019] PTSR 1947 (at paragraph [83]).

91. Wandsworth take issue with the scope of the duty argued for by the Claimant. The PSED they say may impose a duty to monitor and/or otherwise collect information where necessary in order to fulfil the statutory duty and to pay "due regard" to the particular need, but it does not extend to a public authority gathering information relating to every protected characteristic in relation to everything that they do (see e.g. *R (Bailey & Ors) v Brent London Borough Council* [2011] EWCA Civ 1586, [2012] LGR 530).

CONSIDERATION

Section 42 and the section 149 due regard duty

92. In my judgement it is an unavoidable conclusion that in the present case, where the underlying statutory mechanism is designed to discharge a local authority's education, health and social duties to an individual based upon that individual's own particular personal needs and characteristics, including disabilities and diagnoses that render him the subject of particular protection and concern, and it has provided for them under that section it is impossible to argue that no due regard has been had under section 149 PSED in respect of that individual.

93. There was recognition in performance of the section 42 duty that there was an issue of gender reassignment in respect of this Claimant – indeed it was recorded in the EHCP. When there was an incident at Lambeth it was noted, investigated and remediated as far as was possible in the circumstances: likewise with the inadvertent and obviously hurtful misgendering that occurred in correspondence.

94. This is a case such as was described in *ZK v Redbridge LBC* (supra) per Simler LJ citing Lord Brown in *McDonald v Kensington and Chelsea RLBC* [2011] UKSC 33:

"*84. … in McDonald Lord Brown rejected the argument that there was a failure to have regard to the PSED. At [24] he said:*

> *"24. This argument … is in my opinion hopeless. Where, as here, the person concerned is ex-hypothesis disabled and the public authority is discharging its functions under statutes which expressly direct their attention to the needs of disabled persons, it may be entirely superfluous to make express reference to section 49A and absurd to infer from an omission to do so a failure on the authority's part to have regard to their general duty under the section. That, I am satisfied, is the position here. The question is one of substance, not of form. …"*

The logic of the approach identified by Lord Brown in McDonald is that in any case where the public body concerned is discharging its functions under legislation expressly directed at the needs of a protected group it may be unnecessary to refer expressly to the PSED or to infer from an omission to do so, a failure to have regard to that duty. In other words, the nature of the duty to have due regard is informed by the particular function being exercised and not vice versa. In this case, Redbridge makes arrangements to discharge the duty imposed by section 42 of the 2014 Act expressly to secure special educational provision for pupils with special educational needs, including those with a disability. Accordingly I can see no error in the judge's reliance in this regard, on the very purpose of the arrangements that Redbridge makes with JCES to ensure that the provision required to meet the assessed needs of visually impaired pupils in mainstream schools, as specified in EHC plans, is made. That was sufficient to meet the public sector equality duty in this case."

95. In the present case, it is clear from the materials and Wandsworth's approach to their section 42 duty that the Defendant paid careful attention to AI's requirements and responded to his experiences. This is similar also to the case of *R (on the application of AD) v Hackney LBC* [2019] P.T.S.R where Supperstone J held that the duty under section 149 of the 2010 Act to have "due regard" to the specified "needs", including the need to advance equality of opportunity for disabled children, was the very matter which the authority's decisions had been addressing by its policy of meeting all the identified needs of children with special educational need.

96. Whether or not it is the case (as argued by Wandsworth) that there is no discretionary decision to be taken here where provision must be made for AI, this is in my judgement, a like case. The duties envisaged by the 2010 Act are subsumed within the section 42 obligations.

97. However, I do also accept the principal argument of Wandsworth that there is here, (unlike *ZK* concerning choice as to teaching provision), no overarching policy decision or discretionary choice made: section 42 imposes an obligation to provide what is set out in the EHCP – which provision may be challenged elsewhere.

98. In any event, and conclusively for AI's personal case, even if I am wrong about those issues, the Claimant has not been able to substantiate the case he sought to make on the facts. The Defendant submitted that it was not arguable that the limited instances of misgendering of which the Defendant was aware had alerted Wandsworth to "*discrimination suffered by the Claimant and therewith, inevitably, the risk to the*

Claimant and other transgender young people with EHCPs" as AI claimed in his Reply in these proceedings. I agree.

99. There is also no systemic case to be made out. What matters in a systemic challenge of this kind as *ZK* also highlighted, is to distinguish between individual examples of failings and unfairness which do not touch on a system's integrity, and an inherent failure in the system rather than just individual operational or other failure. It is recognised that that may be difficult to do in practice *R (Woolcock) v Secretary of State for Communities and Local Government* [2018] EWHC 17 (Admin), [2018] 4 WLR 49, Hickinbottom LJ at paragraph [68]; it involves asking whether the operation of the system entails any inherent likelihood that Wandsworth would fail to comply with its obligations.

100. Wandsworth, properly, accepted that a systemic approach or policy *might* have the effect that the authority placed itself in breach of the section 42 duty towards individual children or young people by rendering it incapable of complying with the duty to the individual. But here, they said, there just was not the evidence that transgender children or young people with EHCPs maintained by the Defendant are being subject to discrimination or disadvantage because of the characteristic so as to place an obligation on Wandsworth to monitor particularly in respect of transgender children and young persons with EHCPs. As was also endorsed by Lord Brown in *Woolcock*:

"*23. … As Dyson LJ held in an analogous context in Baker v Secretary of State for Communities and Local Government (Equality and Human Rights Commission intervening) [2009] PTSR 809, 'due regard' here means 'appropriate in all the circumstances'.*"

101. In the present case, appropriate regard was had, given the circumstances and the evidence before Wandsworth: it is clear that the borough had in mind clearly its obligations - it could in my view be confident, given the engagement demonstrated in their handling of AI's case, that the cohort of persons with EHCPs would be protected: when matters were brought to Wandsworth's attention, they acted. Their decision not to issue as official general policy (not a decision challenged here) a document such as Brighton's Toolkit cannot be faulted. It did not, either, put them on notice of issues of which they were otherwise ignorant, nor was it *Wednesbury* unreasonable not to take matters further themselves.

Monitoring

102. As to a duty to monitor, accepting that in *R (Hurley) v Secretary of State for Business, Innovation and Skills(supra)*, Elias LJ reflected a submission to the effect that:

"*the combination of the principles in Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014 and the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required*".

It is nonetheless imperative to ask whether in the particular circumstances "due regard" requires the propounded inquiries. I do not accept that in this case it does for the reasons given by Wandsworth.

103. Again, as Supperstone J said in *AD* it will depend on the circumstances. Importantly, he emphasised that the "duty of inquiry" is an application of the *Tameside* duty on a public body to take reasonable steps to acquaint itself with the relevant information necessary to enable it properly to perform the relevant function, thus it will only be unlawful for a public body not to undertake a particular inquiry if it was irrational for it not to do so. In my judgement it is impossible to say that the failure to canvass for further material or to establish a system of monitoring was irrational in the circumstances.

104. I respectfully adopt the approach of Davis LJ in rejecting the library closure appeal in *Bailey v Brent* (supra), albeit, of course, on its own facts:

"***[102]*** *The importance of complying with s 149 is not to be understated. Nevertheless, in a case where the council was fully apprised of its duty under s 149 and had the benefit of a most careful report and EIA, I consider that an air of unreality has descended over this particular line of attack. Councils cannot be expected to speculate on or to investigate or to explore such matters ad infinitum; nor can they be expected to apply, indeed they are to be discouraged from applying, the degree of forensic analysis for the purpose of an EIA and of consideration of their duties under s 149 which a QC might deploy in court. The outcome of cases such as this is ultimately, of course, fact-specific (see Harris's case). All the same, in situations where hard choices have to be made it does seem to me that to accede to the approach urged by Miss Rose in this case would, with respect, be to make effective decision-making on the part of local authorities and other public bodies unduly and unreasonably onerous.*

[103] *As to the second ground, the council was not under a duty to consult as to the contents of the EIA: although, of course, failure to have an awareness of issues potentially arising could vitiate the EIA as failing to demonstrate the appropriate regard for the relevant needs. In the present case officers of the council were plainly aware from the outset of, and they consulted as to, potential equality issues, including on race and ethnicity. The requirements of the 2010 Act were throughout in mind. As already stated, the EIA when finally produced—and it will have taken an amount of time to prepare—was a thorough document. It was then properly considered ….*"

105. That was a case where a policy decision was under challenge, unlike the present matter, and there was said to be a failure to consult. Wandsworth in the present case shared the characteristics of Brent which similarly, aware of the issues, had carefully reported and in its relevant dealings kept the 2010 Act requirements in mind. More was not required there, nor is it here.

106. More particularly, this is a case like *R (SG & Ors) v SSHD* [2016] EWHC 2639 (Admin), in which it was held at paragraph [333] that the PSED does:

"*not require more detailed consideration of a problem which had not been demonstrated to exist*"

such as might trigger a duty of inquiry under the PSED.

107. Wandsworth in fact have principled objections to carrying out such an exercise. They put it compellingly thus:

"*Such monitoring would in any event be open to significant objections on a number of grounds, among them the following:*

1. The group of transgender pupils/ students who also have EHCPs is likely to be very small, with the effect that the results of any monitoring would be of very questionable value;
2. The trans status of some such students, like the Claimant himself, will not be evident from the EHCPs so the question would arise how to link trans students to EHCP-related outcomes;
3. Monitoring would also have significant implications for the privacy rights of the pupils/ students concerned, particularly in cases in which they had transitioned or were transitioning "by stealth";
4. Where (as may well be the case with trans students aged 18-25) a trans person has a GRC, any disclosure of the person's sex at birth is likely to be an offence contrary to s22 of the Gender Recognition Act 2004.

The demand for such monitoring also presupposes that it will be clear in any given case whether an educational placement has broken down wholly or mainly because of misgendering or whether misgendering was one of many factors. It is perhaps unsurprising in these circumstances that the Claimant has not pointed to a single example of a local authority engaging in the type of monitoring he seeks to require the Defendant to undertake. As Ms Maffre points out in her Witness Statement (pp. 16-17 ***[464]-[465]****), the Defendant's inquiries to 32 other London Boroughs generated responses from 17 authorities not one of which had introduced any monitoring system to alert to discrimination, especially gender reassignment discrimination, taking place within schools or colleges. Nor does Stonewall advocate such monitoring.*"

108. The Claimant's case for monitoring must be rejected.

Claimant's evidential difficulties

109. As submitted by the Defendant this was not a case in which Wandsworth had ignored the question of gender reassignment. As recorded, there was no evidence at the time of carrying out the EINA into its SEND strategy that the Claimant, or indeed any other transgender child or young person with an EHCP might be subject to discriminatory barriers in accessing their educational provision. There was no trigger to an obligation to monitor and/or otherwise collect information on this issue.

110. Particularly, there was no evidence that the Claimant or any other child or young person with an EHCP issued by the Defendant has been subject to systematic discrimination.

111. The Claimant accepted that his case is not that a particular document is necessary in order for the conduct of a local authority to be lawful, it is a test of substance and not form. In my judgement the Claimant is not assisted by the form and content of the EINA, nor by

the existence of the Toolkit document based on a Brighton and Hove model with which Wandsworth did not proceed. These documents do what they say Wandsworth should do - they evidence the fact that the Defendant turned its mind to the issue, and noted an absence of information in a particular category. However, it is also the case as stated by their witness Ms Maffre, that Wandsworth carried out extensive work with schools designed to further LGBTQ+ inclusion and equality. Further, neither Brighton and Hove City Council nor any other local authority had put in place monitoring of discrimination in schools, either generally or for gender reassignment - whether generally, nor as is alleged should have happened here, in relation to children and young people with EHCPs or more. As mentioned, none of the 17 boroughs responding to a Wandsworth Freedom of Information request had adopted any policies, procedures or guidance to protect against gender reassignment discrimination in schools or colleges either, in addition to not monitoring to alert it to discrimination, especially gender reassignment discrimination as it was said Wandsworth should.

112. The Claimant suggested that it is generally known that there is a reluctance to communicate about these matters and the local authority were on notice about an issue because of him. Again, the nature of the EHCP is such that Wandsworth were justifiably confident that they would be alerted to those cases where a breakdown or difficulty was impacting a person in the cohort.

113. The Defendant says they in fact have looked at the position - in 2020 and saw they had "no data" - there was no indication at all that it existed in respect of the particular cohort - namely SEND people with gender reassignment - in their schools etc. There is no evidence of complaints, nothing. In fact there was 2017 evidence backing *general* schools problems and not SEND pupils who are subject to the personalised attention and provision under statute that is designed to identify the issues and provide appropriately.

114. The Claimant complained about failure to take the EINA information further, but the Defendant reminded the Court that the EINA had considered the possible impact of the SEND strategy on the Defendant's pupils by reference to protected characteristics and indicated that:

"*the outcome of the EINA shows that there are no significant adverse outcomes for individuals and groups under the protected characteristics*".

115. The EINA reported that the relative impact of the SEND strategy by reference to gender reassignment was "*not known*". While the EINA records a "data gap" pertaining to "*protected characteristics of children and young people with SEN provision – sexual orientation, gender reassignment*" the plan to address this was to have:

"*… as part of ongoing service development … a requirement to maintain a comprehensive data set including appropriate information on protected groups but the main focus will be on gender / age / ethnicity / disability and where appropriate data on sexual orientation and gender reassignment*".

116. Wandsworth made clear that no conclusion had been reached that the collection of information on sexual orientation and gender reassignment was appropriate, much less necessary, in the exercise of the Defendant's PSED. They had not, nor was it necessary in order to act lawfully, to commit themselves to monitor SEND provision by gender

reassignment. Wandsworth submitted and I accept, there has been no change of policy nor other trigger event which ought to have caused them to anticipate a possible impact on one or other group of people identified by reference to a protected characteristic so as to require further investigation. Nor, absent any evidence of systemic or repeated problems such as are alleged on the Claimant's behalf, has a requirement to investigate been triggered.

New Evidence

117. The Claimant sought to adduce evidence giving views on the general position, and on certain statistical material - although not introduced as expert evidence.

118. I looked at the material in any event although the points about their admissibility were well made: this was opinion evidence, and thus expert evidence if anything. In truth, with respect to the care with which the exhibits and content had been compiled, and the palpable desire to improve the position of a disadvantaged and vulnerable sector, the evidence was not of any real assistance to the Court given its nature. (On occasion it formed a critique of the sufficiency of Wandsworth's EINA stating it would have liked to see it done differently).

119. Of course, there is no difficulty with the position asserted (though not detailed) by the Claimant's witness Mr Arnall, the Chief Executive Office of Just Like Us, a LGBT+ young people's charity, that the negative "*impact of misgendering on the mental health of trans children and young people*" may be very significant indeed – and is to be strenuously avoided where at all possible. The Defendant did not seek to say any different and their behaviour towards AI through their employees and their policy personnel made clear how seriously they take the position.

120. Mr Arnall said at one point:

"*The central issue with trans young people is not that we do not know how to support them, as in most cases the support they need is identical to that of any other child. It is also not that there are not resources to support them, as many schools can and do support trans young people. The issue is that there is huge inconsistency in whether or not trans young people are supported at all and whether there is the will to support them.*"

Given that the cohort in issue here are the very young people whose diagnoses are under consideration in the EHCP, and are likely to be known to the local authority (as AI's was), whilst the information is interesting, it is not relevant to the question before the Court save by way of general background.

121. However, as stated, the evidence of the Claimant (nor that from Mr Arnall) does not support the proposition that there are high levels of misgendering in schools - and certainly not that there are high levels of misgendering for the relevant cohort - transgender children and young people with EHCPs.

122. The Claimant asserts that "*87% of secondary school teachers have at least one transgender pupil*" is not supported by the survey on which the Claimant seeks to rely. In fact what it states is that 86% of the secondary teachers surveyed were at a school at

which at least one pupil had come out as transgender and that this was "*most common in schools serving affluent pupils the percentage falling through Q1 to Q4*".

123. It is asserted but not evidenced that "[i]*nevitably, a substantial proportion of this cohort will also have special educational needs*". Likewise, it is only an assertion that:

"*this is why Brighton and Hove City Council Trans Inclusion Toolkit explicitly recognises and makes provision for additional barriers experienced by transgender children and young people with special educational needs*".

124. Wandsworth take issue with the specificity of a number of the statements made by Mr Arnall, observing that:

"*His statement is not specific to trans children or young people, much less to the impact of misgendering on them. Nor does any of the material exhibited to Mr Arnall's Witness Statement indicate the extent of misgendering in educational settings*".

I am constrained to agree.

125. The position with regard to AI tells a different story. Any assessment under an EHCP must necessarily be entirely person-specific and crafted to the individual. The effect of the evidence is that the EHCP process necessarily comprehends particular consideration of any issue which may feed into the provision of appropriate education in a particular case, and the section 149 considerations.

126. Necessarily in the case of AI his manifold adjustment and other mental difficulties, his chequered educational history and also factors of autism and gender dysphoria were part of the picture. As the Defendant has articulated, in order properly to comply with its duty to produce an EHCP, a local authority must consider a very personalised, tailored provision. It would be impossible to fulfil the duties arising without properly assessing and, where possible, accommodating each and every one of the aspects of the individual's needs.

127. Although it is clear from the manner in which AI makes his case, that he retains a view that failures regarding his gender identity and the inability of the Defendant properly to deal with them have caused, to some extent, the breakdown of placements he has enjoyed, he accepts (in his statement and in his claim in terms) that the gender dysphoria issue is not the sole cause of breakdown. In my judgement the contemporaneous evidence does not begin to support a case that Wandsworth were responsible for any failures around his gender diagnosis that caused or materially contributed to the failure of his placements. There are a number of reasons for my view.

    a. The attention paid to the Lambeth incident as reflected in the notes in his EHCP against a background of awareness of his particular difficulties, his treatment programme.

    b. Further, as Wandsworth states, because the obligation imposed by section 42 CAFA is absolute for AI, the Defendant is either compliant with that obligation or not.

There is nothing which the PSED could add here to the requirements of section 42 at the individual level.

128. As to a systemic challenge, the PSED might apply in the event of challenge to a systemic approach or policy which arguably had the effect that the authority placed itself in breach of the section 42 duty towards individual children or young people. Wandsworth says here, and I agree, that, as in *SG*, the PSED does "*not require more detailed consideration of a problem which had not been demonstrated to exist*".

129. The Claimant argued that this was an example of "*putting the cart before the horse*", as referred to in *Bridges* at paragraph [105]. The Court of Appeal at paragraph [182] held that such an approach is flawed in that the:

"*whole purpose of the positive duty (as opposed to the negative duties in the Equality Act 2010) is to ensure that a public authority does not inadvertently overlook information which it should take into account*".

130. I do not accept this argument. This is not an occasion of overlooking information because of the very nature of the section 42 exercise and the manner in which the EHCP was crafted and reviewed by the Defendant who necessarily looked at the very issues that are required to be examined in the case of a person with the characteristics of this Claimant.

131. Nor is there any evidence that transgender children or young persons with EHCPs are more likely than other children with EHCPs to have their placements break down, (by contrast with the position in *R (DMA) v SSHD* [2002] EWHC 3416 (Admin), [2021] 1 WLR 2374).

132. I add that in my judgement there was no failure of candour in this case. The exhibited document was not the material, posted document, and it was marked through with the words "draft". It was stated by Wandsworth, and I accept on the evidence, it was used in individual cases (here in 2017,) and was not a general policy. It was thus not an obvious piece of material to discover on an initial trawl. Further, it was, in my view, of assistance to Wandsworth as showing their minds were addressed to the issues- it did not compel a conclusion that absent a document in this form, Wandsworth was acting unlawfully.

In summary

133. In very broad summary, Ms Braganza KC argued:

a. There was no evidence that due regard had been paid – however, for the reasons given above that is not the case.

b. That misgendering was a material cause of AI's placement breakdown - that was not the position on a fair view of the facts.

c. There were multiple times AI had been misgendered in his placements – but the contemporaneous evidence did not support this case, further, unintended misgendering (particularly on an occasion by a mentally impaired pupil) is not without more evidence of a failure by Wandsworth in its duties to the Claimant.

d. That the evidence received by Wandsworth required them to take further steps even where there was no evidence of particular instances of transgender issues or other misgendering. In fact, in the context of section 42 and Wandsworth's approach to its duties, it was not *Wednesbury* unreasonable not to make further inquiry.

e. The existence of the Toolkit demonstrated a section 149 failure by Wandsworth – whereas, in the context of this case, it was not evidence that there was something wrong requiring further action or the generation of a new Toolkit - given the scope of the issue in this case which was met by the personalised and detailed section 42 duty to AI. The Toolkit did not in fact advocate monitoring.

f. That an anti-bullying policy and the EINA awareness, the Strategy, and the EHCP provision were insufficient to demonstrate an awareness and proper consideration of the issues – however, for the same reasons this was not the case.

g. The duty in *Tameside,* which includes monitoring was not fulfilled: that is not so in circumstances where there is no suggestion that Wandsworth had in fact overlooked anything, or, given the procedures in place, were likely to in respect of this cohort.

134. In all these circumstances and for the further reasons given above, the Claimant's claim must fail.