



Neutral Citation Number: [2024] EWHC 1928 (Admin)

Case No: AC-2023-LON-003003556

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 July 2024

Before :

SARAH CLARKE KC
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

Between:

THE KING
(ON THE APPLICATION OF L, BY HIS
LITIGATION FRIEND AND MOTHER, LC)

Claimant

- and -

HAMPSHIRE COUNTY COUNCIL

Defendant

Mr Ollie Persey (instructed by SinclairsLaw) for the Claimant
Mr Leo Davidson instructed by Hampshire County Council for the Defendant

Hearing dates: 11-12 July 2024

Approved Judgment

This judgment was handed down at a remote hearing on 12 July 2024.

Sarah Clarke KC sitting as a Deputy Judge of the High Court:

Introduction

1. This is a claim for judicial review in which the Claimant (by his mother and litigation friend) challenges the Defendant's failure to secure the special educational provision ("SEP") contained in section F of his Education Health and Care Plan ("EHCP"), in breach of its absolute statutory duty imposed by section 42 of the Children and Families Act 2014 ("CFA").
2. The Claimant seeks the following substantive relief:
 - i. A declaration that the Defendant has breached section 42 CFA.
 - ii. A mandatory order that the Defendant must secure all special educational provision as stated within Section F of the Claimant's Education, Health and Care Plan forthwith and in any event by 9.00am on 15 August 2024.
3. The Defendant accepts that it is in breach of s.42 CFA and does not seek to defend the making of a declaration. However, it resists the making of a mandatory order.

Background

4. The Claimant is currently 11 years old. He is a disabled child who has diagnoses of Attention Deficit Hyperactivity Disorder ("ADHD"), Autistic Spectrum Disorder ("ASD") and an immune mediated component to a neurobehavioral disorder known as Paediatric Acute-onset Neuropsychiatric Syndrome ("PANS").
5. The Claimant has had an EHCP maintained by the Defendant since 23 April 2020. His current EHCP was issued on 11 September 2023 following the Claimant's successful appeal to the First-tier Tribunal (Special Educational Needs and Disability Tribunal) ("FTT"). In a decision issued on 7 August 2023, the FTT ordered that the Claimant must have Education Otherwise than in School ("EOTIS") as specified in section F of

his EHCP.

6. Nearly a year has elapsed since that FTT decision was issued and it has now been 10 months since the current EHCP was issued, however for much of this period very little of the EOTIS package has been secured. The EOTIS package is meant to be a “*carefully designed curriculum*” coordinated by an educational psychologist (“EP”).
7. The Claimant’s range of diagnosed conditions mean that he is unable to attend school and therefore he is dependent upon the provision of his EOTIS package for his education. This is important, not just because it is a statutory requirement imposed upon the Defendant to deliver it, but because education is a fundamental part of a child’s development. Disruption to a child’s education inevitably has an impact on the child’s wellbeing, which may well affect their ability to thrive and achieve their potential. In the Claimant’s case it is clear from the fourth witness statement of his litigation friend that the failure to provide his EOTIS package has had, and continues to have, a significant detrimental effect on his wellbeing, behaviour, mental state and of course his access to education.
8. Due to his diagnosed conditions, the Claimant has difficulty understanding why his EOTIS provision is not being delivered and is finding the ongoing uncertainty and delay particularly stressful. This triggers a “*fight or flight*” response in which the Claimant becomes distressed and hits out at or pushes his mother. His EHCP describes him as “*a significantly vulnerable and sensitive child*” who has, “*low self-esteem and high levels of anxiety*”. He is sad and starting to experience periods of depression and selective mutism in the mornings. Plainly, the longer it takes to secure the EOTIS provision to which he is entitled, the longer it may take to successfully transition him back into formal education, which is one of the key purposes of EOTIS.

Procedural background

9. The Claimant’s litigation friend approached Sinclairs law on 14 September 2023 and a pre-action protocol (“PAP”) letter was sent on 18 September 2023. The Defendant responded on 29 September stating that it was making every effort to secure an EP. The Claimant’s litigation friend agreed to provide the Defendant with time to take the

required steps rather than issue an application for judicial review at that stage.

10. A further letter was sent to the Defendant on 6 October 2023 to which its solicitors replied on 13 October 2023 stating that they were awaiting information from the officer responsible. The Claimant's solicitors followed up on 17 October 2023 and received no response. The Claimant's solicitor sent a final letter on 23 October 2023. The claim for Judicial Review was issued on 30 November 2023. Permission was granted by Mr Justice Cavanagh on 21 December 2023.
11. A substantive hearing was listed to be heard on 14 February 2024. That hearing was adjourned by consent upon the Defendant's assurance (as recorded in the recital to the order) that the outstanding provision would be secured by 19 February 2024.
12. Unfortunately, it appears that this did not materialize such that it has now been necessary to relist the substantive hearing which took place yesterday.
13. By an Application Notice dated 3 July 2024, the Claimant sought permission to amend its Statement of Facts and Grounds ("ASOFG"). The ASOFG was also filed on 3 July 2024. A Consent Order signed by both parties and dated 17 June 2024 confirmed that there was no objection from the Defendant. The purpose of the ASOFG was to reflect the fact that although the Defendant (as it accepts) has been consistently in breach of s.42 CFA, the parts of the EOTIS that it has failed to secure have changed or evolved over time. The nature of the claim and the relief sought in substance therefore has not changed and I therefore approved the Consent Order on 9 July 2024.

The requirements imposed by the EHCP / EOTIS

14. The required EOTIS programme is set out in Section F of the EHCP. This states that the EOTIS is intended to achieve, "*A carefully designed curriculum that includes a range of learning styles and activities to allow for increased practical and hands on activities – especially during periods of heightened anxiety and transition. An ongoing flexible approach to planning activities to build on [the Claimant's] strengths and areas of interest - such as Coding and Forest School - whilst taking into account building levels of anxiety so that he feels safe and independent in his learning*

environment.”

15. Section F also requires that the EOTIS programme is to be led and coordinated by an EP for 1-2 hours per week.

16. The following special educational provision (“SEP”) is specified in section F:

- i. 3 hours per week of teaching from a dyslexia specialist tutor.
- ii. 1:1 support at all times.
- iii. 10 hours of direct teaching for core subjects per week by a qualified teacher.
- iv. A laptop or iPad for the Claimant’s sole use.
- v. A physiotherapy programme to be monitored indirectly by a physiotherapist and delivered by a learning support assistant (‘LSA’).
- vi. A programme of occupational therapy to be delivered directly by an occupational therapist (‘OT’) for 36 hours per year.
- vii. ‘at least’ 5 hours per week of physical exercise.
- viii. A communication programme designed by speech and language therapist, implemented by teaching staff on a weekly basis.

17. The first and fourth witness statements of the Claimant’s litigation friend and the witness statement of Christopher McFarland (the Claimant’s solicitor) set out the steps taken to remain in communication with the Defendant in an attempt to ensure that the Claimant’s EOTIS programme was secured as quickly as possible. Unfortunately, this was unsuccessful and although some parts of the EOTIS requirements were met and some were provided for periods of time, others remain unmet.

18. Although it cannot be said that the Defendant has made no attempts to implement the EOTIS programme, it is clear that overall there is some force in the Claimant’s submission that the Defendant’s efforts have been characterized by delay and drift. It is notable in this regard that the Defendant, in its Summary Grounds of Resistance (“SGOR”) dated 18 December 2023, accepted that some parts of the EOTIS still were not in place and accepted that there had been a delay in arranging some of the provision, although it contended that this delay was unavoidable and was due to the

lack of available professionals in particular an EP to co-ordinate the EOTIS provision. It is notable that the Defendant accepted that the failure to appoint the EP was not, “*due to any policy or financial reasons*”. It is also notable that in this document, the Defendant states that “*it is confident that the outstanding provision will be in place shortly*”.

19. In its SGOR and also witness evidence filed by the Defendant in respect of this Claim, the Defendant pointed to an extremely high demand for EP’s in the area and a shortage of EP’s which meant that none had availability to take on the Claimant’s case. The Defendant stated that it had therefore sought to commission a private educational psychologist but this too proved difficult. The SGOR however stated that an EP had now been identified who it was intended would start work after the Christmas break.
20. However, in the Defendant’s Detailed Grounds of Resistance (“DGOR”) filed on 15 January 2024 it stated that an EP had still not been appointed. The Defendant therefore indicated that if the provision remained unimplemented it would consent to the granting of declaratory relief but stated that a mandatory order would achieve no purpose because the Defendant had made and would continue to make, “*extensive efforts to secure the provision*” and would not be just “*where the Defendant is already making best endeavours to secure the provision.*”
21. The Claimant’s litigation friend set out extensively in her witness evidence the steps taken by her to keep progress moving and to assist with the process. She sent an email to the Defendant on 12 November 2023 informing it that she had identified two EP’s who were able to undertake the necessary work. The Defendant however responded that it had submitted a job description to advertise for the EP role and stated that it could not commission one of the EP’s found by the litigation friend because she was not “*on their framework*”. It is open to question why it took until November to advertise the EP role.
22. In the lead up to the substantive hearing date on 14 February 2024, the Defendant’s witness evidence informed the Court that it had now commissioned an EP who would commence work in the week commencing 12 February 2024. As stated above, the parties agreed by consent to this hearing being vacated upon the Defendant’s promise

to secure all outstanding provision. An EP was eventually appointed on or about 29 February 2024.

23. However, by 13 March 2024, significant parts of the EOTIS provision were still outstanding. The Claimant therefore submitted to this Court that this matter should be relisted for a substantive hearing. The Claimant's solicitor expressed concern at the continued drift and delay such that the Claimant could not rely on the Defendant's imprecise timescales particularly given the history of delay and the urgent need to secure the outstanding provision. However, in the Defendant's position statement it requested an extension of 2 weeks in order to "*get all the provision in place*".
24. The Claimant referred me to a long chain of correspondence between 8 April 2024 and 22 May 2024 between the Claimant's solicitor and the Defendant chasing for updates on outstanding parts of the EOTIS including a personal budget payment of £100 per week for purchasing of educational resources. During this chain of correspondence, the Defendant represented to the Claimant's solicitor on 1 May 2024 that this payment had been agreed and would be paid, "*by the end of the week*". However, by 22 May 2024 the Claimant's solicitor was still chasing for payment. On 4 July 2024, the Defendant stated that the resources payment was "*awaiting authorisation which should be due very shortly*", however no timescales were provided. On 9 July 2024, an email to from Defendant stated that personal budget for resources "*is being resolved*". This payment has never been paid to this day (other than a few payments made direct to a SEP provider (ABC Education ("ABC"))).
25. Another outstanding personal budget item was for the provision of sports lessons. This was raised in a letter from the Claimant's solicitor on 17 June 2024. As at 4 July 2024, the Defendant's position was that this was also "*awaiting authorisation*". I understand that this payment has still not been agreed or issued.
26. It appears that during the period between February and May 2024, some of the outstanding provision was secured and a company – ABC was appointed to provide the educational provision including LSA support, dyslexia tuition and specialist teaching. However, this company terminated its services with immediate effect on 3 May 2024. It appears to be accepted by both parties that this development was

unexpected and no fault is attributed to either side. However, the Defendant has not secured alternative provision. Again, the Claimant's litigation friend kept in regular contact with the Defendant and actively sought updates, however she was informed that the Defendant intended to recruit replacements but no concrete timescales were given. Given the lack of educational provision, the appointed EP indicated that she was unable to continue her oversight role until an alternative teaching team was appointed.

27. The Claimant's litigation friend's 4th witness statement dated 2 July 2024 and filed in respect of this hearing states that a replacement SEP provider had still not been secured. She stated that she had been contacted by two potential providers including a company called Fresh Start in Education ("FSE") who informed her that they had written a report which she had not seen, and that they did not have any staff immediately available, therefore staff would have to be recruited and the provision would likely commence from September 2024. In the meantime, the Claimant remained without provision of significant parts of his EOTIS programme and no EP oversight.
28. The Defendant's witness evidence filed on 4 July 2024 accepted that there had been significant delays but continued to attribute these to the difficulty in finding and appointing an EP and then to ABC's sudden termination of the SEP provision. It stated that the Defendant had made "*continual efforts to secure an alternative*". It also stated that it was informed by the Claimant's solicitor on 22 May 2024 that the litigation friend was no longer attempting to secure the provision by way of a personal budget and therefore the Defendant needed to do this by way of direct instruction with the provider. As to this, I am unclear why the Defendant considered that it was the Claimant's role to secure this important provision. The Defendant informed the Court that since 22 May 2024 it had secured the required SEP services but "*a start date is awaited*".
29. On 10 July 2024, the Court received copies of emails from the Claimant's litigation friend with FSE who had informed the Claimant's litigation friend on 9 July 2024 that they had identified two tutors available to deliver provision to the Claimant, subject to a venue being identified. However, the email from FSE does not specify exactly what

provision these two tutors intend to deliver to the Claimant and the Claimant's Litigation Friend has therefore sought clarification of the same. In addition, the Claimant's litigation friend has had email correspondence with another provider who appears to have been approached by the Defendant, in which it confirms they can deliver 10 hours of Maths and English teaching per week. The Court was also informed that the Claimant's dyslexia tuition commenced on 10 July 2024 and therefore this provision is no longer in dispute for the purposes of the substantive hearing. The Claimant's solicitor expressed concern that there was still no clarity as to which provider would be providing the SEP support and when this would commence.

30. On the same day (10 July 2024) the Court received a further witness statement from the Defendant confirming that the dyslexia tuition is in place and would continue over the summer holidays. The witness statement also exhibited email chains between the Defendant and FSE. However, the email chains exhibited appear to commence on 14 June 2024 – suggesting that it was on or about this date when FSE was first contacted by the Defendant. No explanation has been provided for why this delay occurred – which is nearly 6 weeks after ABC's termination. The Defendant was well aware that the Claimant was not receiving any of the SEP lessons to which he is entitled and that this also meant that the EP was not involved. The urgency was (or should have been) obvious.

31. Also notable is that the email chain shows that on 20 June 2024 – FSE confirmed that it would be able to provide the Claimant with the provision required but raised queries on certain issues. It took the Defendant until 26 June 2024 to respond to this email and then the response from the Defendant's employee was that she would need to consult with her manager. Despite FSE chasing for updates, it appears from the emails that the meeting with the employee's manager did not happen until 4 July 2024 (ie: over 2 weeks after FSE's email). Given the obvious urgency of the situation and the impending substantive hearing, it is concerning that the Defendant's employee did not treat the matter rather more urgently.

32. As of today, the following provisions are not in place:

LSA support and specialist teaching

33. The Claimant has been without SEP provision for over two months, meaning that he has received little academic tuition in that time, which is one of the most fundamental parts of the EHCP. It has still not been confirmed whether FSE will provide the necessary programme and if so, when this will start.
34. There has been no LSA 1:1 support during this time either. This is a critically important part of the EHCP package as the LSA support is required to help the Claimant communicate effectively with his tutors and participate in lessons. The current situation is that the Claimant's parents have been using respite carers for this purpose but the budget for this is nearly exhausted and the respite carers are untrained for this role.
35. The Defendant has provided limited evidence to demonstrate what is being done to resolve these critically important parts of the EHCP provision. Mr Davidson accepted that these parts of the EHCP provision were not being provided. He stated that as regards the SEP and LSA provision, it is hoped that FSE would be providing these but there are still outstanding issues to be resolved including liaison with the Claimant's litigation friend regarding various matters. He informed me that the 4 July 2024 meeting with the manager employed by the Defendant did not result in a decision to engage FSE and that there were "*still practical issues being ironed out.*" He was unable to provide me with any information about the other potential providers but did say that "*Fresh Start in Education are understood to be the most promising prospect.*" He was unable to provide any timescale as to when this would be resolved and a provider engaged and said that there was no guarantee that all practical issues will be resolved.

Educational Psychologist's coordination

36. The EP cannot complete her oversight role of the Claimant's EHCP without the SEP and LSA being in place. Therefore, although at the moment the EP remains ready and willing to resume her role once the SEP provisions are in place, there is a concern that the longer this drags on, the more likely it is that the EP will feel unable to continue.

Personal budget

37. A (revised) personal budget was issued on 22 May 2024 and is intended to secure parts of the SEP in section F of the Claimant’s EHCP:

- i. Section F of the Claimant’s EHCP provides for 5 hours of sporting activities per week however, the personal budget limits use of the funds to swimming and tennis. The Claimant’s litigation friend explains that this is impracticably rigid and contrary to the Tribunal’s order, however this issue remains unresolved, and the payment has not been made.
- ii. A resource budget of £100 that was to be provided by a direct payment within a week of 1 May 2024 has not been provided other than limited provision made to ABC for a short period.

38. It can be seen therefore that very significant parts of the Claimant’s EHCP are not being met and have not been met for over 2 months (in addition to the other periods when his provisions were not being met as I have already identified).

Ground of challenge

39. The Claimant advances one ground of challenge – namely that the Defendant is in breach of its absolute duty under section 42 CFA because key provisions in his EHCP have still not been secured.

The Law

40. The Court of Appeal has emphasised that in cases concerning the education of children or young people “*speed must be of the essence*”, see *H v East Sussex County Council* [2009] EWCA Civ 249; [2009] ELR 161 per Waller LJ at [13] (“*H v East Sussex*”), “*all I do say is that if the issue relates to the education of a child as at the beginning of a school year, at every stage speed must be of the essence.*”

41. The legal framework is contained in s.42 CFA which imposes an obligation on local authorities to secure special educational provision in EHCP's. S.42(2) CFA provides that, "*the local authority must secure the specified special educational provision for the child or young person that they are responsible for.*"
42. This is an absolute and non-delegable duty not merely a "*best endeavours obligation*" (*N v North Tyneside Borough Council* [2010] EWCA Civ 135). In *R(BA) Nottinghamshire County Council* [2021] EWHC 1348 (Admin) at [37] ("*R(BA) v Nottinghamshire*"), the Administrative Court confirmed that the 'bulk' of provision should be put in place within five weeks of an EHCP being finalised. The basis for this is the requirement in Regulation 44(2)(e) of the Special Educational Needs and Disability Regulations 2014/1530 ("SEND Regulations"), which provides that where the FTT requires a local authority to take action, and where the required action is to amend the SEP specified in an EHCP, this shall be done within 5 weeks of the order being made.
43. On an application for judicial review, s.31 of the Senior Courts Act 1981 provides this Court with the power to make a declaration and also a mandatory order.
44. A mandatory order is a discretionary remedy, however as observed by the Hon Sir Michael Fordham in his Judicial Review Handbook, section 24.3, "*the Court will need a cogent reason if it is to exercise its residual discretion, to decline the Claimant a practical and effective remedy, in a case establishing a material public law error on the part of the Defendant public authority.*"
45. The starting point for the Court's consideration of whether to grant the mandatory order sought in this Claim, is the decision of the Supreme Court in (*R*)*Imam v Croydon London Borough Council* [2023] UKSC 45; [2023] 3 W.L.R. 1178 ("*Imam*"). In that case, the Claimant applied for judicial review of the Defendant's failure for some five years, to fulfill its mandatory duty under the Housing Act 1996 to provide her with suitable accommodation. The Defendant accepted that it was in breach of the statutory requirement but resisted the making of a mandatory order. The Administrative Court allowed the Claim but declined to make a mandatory order. The Court of Appeal allowed the Claimant's appeal, and the Defendant then appealed to the Supreme Court.

46. The Supreme Court held at [40]:

“40. When it is established that there has been a breach of such a [statutory] duty, it is not for a court to modify or moderate its substance by routinely declining to grant relief to compel performance of it on the grounds of absence of sufficient resources. That would involve a violation of the principle of the rule of law and an improper undermining of Parliament’s legislative instruction.”

47. At [43]:

“43 Where a remedy is discretionary, it is incumbent on a court to exercise its discretion in accordance with principle and to avoid arbitrariness. Otherwise, the rule of law would be undermined to an unacceptable degree. Where a breach of the law is established, the ordinary position is that a remedy should be granted. A court should proceed cautiously in exercising its discretion to refuse to make an order and should take care to ensure that it does so only where that course is clearly justified. But different types of order are available, and it may be that due enforcement of the law can be sufficiently vindicated by some order other than a mandatory order.”

48. At [52], the Supreme Court explained that:

“It is not just a question of what resources are available to the housing authority immediately or after a period, but also of whether, and to what extent, it would be appropriate for a court order to be made which may have the effect of disrupting existing plans for the allocation of the authority’s resources. At the same time, it is the court’s role to enforce the law. The issue is how to balance these various considerations.”

49. At [53] – [54]:

“53. It is appropriate to start with the requirements that effect be given to the will of Parliament and that the law be enforced in an appropriate manner. The Court of

Appeal was right to hold that where the housing authority is in breach of its duty under section 193(2) the onus is on the authority to explain to the court why a mandatory order should not be made to ensure that it complies with its duty. In order to provide the court with reasons to justify the exercise of its discretion not to make such an order, the authority has to provide a detailed explanation of the situation in which it finds itself and why this would make it impossible to comply with an order.”

“54. As the Court of Appeal said, the authority has to show that it has taken all reasonable steps to perform its duty. Since it is the court which has to be satisfied that it is not appropriate to grant a mandatory order, the question whether the authority has taken all reasonable steps is an objective one for the court to determine, not a matter of application of the test of reasonableness or rationality in the Wednesbury sense from the perspective of the authority itself.”

50. At [65] the Court set out the proper approach to the exercise of the Court’s remedial discretion:

(iv) The proper approach to the exercise of the court’s remedial discretion

65 The considerations set out above indicate that ordinarily, when judging whether particular conduct is possible or impossible for an authority for the purposes of deciding how the court’s remedial discretion should be exercised, the court should refer to the authority’s position as it exists at the time of the proceedings. However, this is not an absolute rule and its application may have to be qualified in light of the specific circumstances of a particular case.

51. At [66] – [70] the Supreme Court set out five (non-exhaustive) factors that were relevant to the application of the Court’s discretion in that case. These can be summarized as follows:

- i. The need for contingency planning in terms of allocation of resources to deal with unexpected calls for expenditure.

- ii. Whether the authority had been on “*notice in the past of a problem in relation to the non-performance of its duty but failed to take the opportunity to react to that in good time.*”
- iii. The impact on the individual to whom the duty is owed. “*It is the vindication of their right which is being denied, and if the impact on them of the failure to comply with it is very serious and their need is very pressing, this may justify the court in issuing a mandatory order despite the wider potentially disruptive effects it may have.*”
- iv. Whether the authority had been taking steps to remedy the situation, “*if there is no sign as things stand at the time the matter is before the court that the authority is moving to rectify the situation and satisfy the individual’s rights, that is a factor pointing in favour of the making of a mandatory order. In such a case, the imperative to galvanise the authority into taking effective steps to meet its obligations more promptly will be stronger.*”
- v. The need not to cause unfairness to others by prioritising the Claimant.

52. In the specific statutory context of duties to disabled children with SEP, the High Court granted six mandatory orders in *R (LB (A Child)) v Surrey County Council* [2022] EWHC 772 (Admin) [2022] 3 WLUK 537. At [114], the Court was “*mindful of Sedley LJ’s statement at paragraph 17 in North Tyneside that “In a margin of intractable cases there may be reasons why a court would not make a mandatory order, or more probably would briefly defer or qualify its operation”*. The Court further held that at [115], “*...in view of the difficulties faced by the Defendant in securing educational provision and accommodation for LB it is appropriate to make orders that the Defendant carry out their duties, but to allow them time to do so.*” The time provided to the local authority in that case was 30 days from the date of the Court order.

53. I was referred by the Claimant to a recent case of *R(HXN) v London Borough of Redbridge* [2024] EWHC 443 (Admin) (“*HXN*”), in which this Court endorsed the approach set out in *Imam* in the context of section 42 CFA and granted a mandatory

order with a five week period in which to comply. The Court stated at [82]:

“In my judgment, a local authority bears the burden of proving that it is doing all it can to meet the legal duty to secure for a child the special educational provision to which he is entitled. Unless the local authority can so prove, it is likely to find itself ‘rowing against a very strong current’ if it is nonetheless seeking to persuade a court that no relief should be granted in respect of a prolonged failure to comply with its duty.”

Submissions

The Claimant

54. Mr Persey for the Claimant submitted that the Court should make a mandatory order because:

- i. S.42 CFA is an absolute duty not a best endeavours duty. Time is of the essence when it comes to the provision of EHCP’s to vulnerable children who without the implementation of these provisions, are effectively shut out of education with consequent impacts on their education, development, health and future. In the Claimant’s case, the impact on him has been (and is) serious and is only likely to be alleviated once the full EHCP provision is in place for him. The situation is therefore urgent.
- ii. The only meaningful way to ensure that the Defendant complies with this duty is by the making of a mandatory order. The Claimant has been reasonable in allowing the Defendant time to comply but the delay and drift that has occurred and the uncertainty that remains are all unacceptable and cannot continue. History shows that if a mandatory order is not made this drift is likely to continue. If the Court wishes to give the Defendant more time, then this can be achieved by a qualification that the mandatory order should not come into effect until after a certain period of time.

- iii. At no point since August 2023 has the Defendant secured all the provision in the Claimant's EHCP. The Defendant has known that it would need to secure replacement LSA and SEP provision since ABC's departure in early May 2024 and yet over two months later the Defendant has no concrete options for delivery.
- iv. The Defendant's engagement in these proceedings has also been poor as has its assurances given to the Court that the EHCP provisions would be secured in February 2024 which did not then materialise.
- v. The Defendant has not provided clear information about what steps it has taken (and when) to secure the necessary provision and appears to regard its absolute duty only as a best endeavours duty.
- vi. A declaration will therefore be insufficient and only a mandatory order will ensure compliance.
- vii. The Defendant can be given a period of time to comply with a mandatory order which Mr Persey submitted should be 5 weeks. This would mean that all provisions should be in place by mid-August, leaving sufficient time to prepare the Claimant for the transition before the start of the next school year.

55. In terms of the five *Imam* criteria, Mr Persey submitted that:

- i. Contingency planning: the failure to provide LSA and SEP provisions could not be characterised as due to a shortage of available providers and nor has the Defendant raised any issues of resourcing or provided any evidence of the same.
- ii. The Defendant has been on notice for nearly a year and there has never been a time during that period when all the elements of the EHCP have been in place. Thus, the Defendant has never been in compliance with its mandatory duty. The Claimant has been reasonable and has allowed time for compliance and has proactively liaised and co-operated with the Defendant, however this

has only resulted in more delay and drift.

- iii. The impact on the Claimant is serious and will only get worse while this situation continues.
- iv. The Defendant's steps to remedy its non-compliance have been woefully insufficient. It is notable that even now, the Defendant has delayed in securing the outstanding provision and is unable to provide the Court with a timescale of when these issues will be resolved. This is consistent with the Defendant's conduct throughout these proceedings. The Claimant's litigation friend has lost confidence in the Defendant's assurances and considers that without a mandatory order their delay and drift will simply continue.
- v. As regards unfairness to others by prioritising the Claimant: There is no evidence from the Defendant about this and no suggestion that this is a real issue in this case. A mandatory order with a period of 5 weeks to comply will allow the Defendant time to meet its duty to the Claimant as well as its other service users.

The Defendant

56. On behalf of the Defendant, Mr Davidson accepted that the Defendant is under an absolute duty to secure the provision in the EHCP and that it was obliged to implement the changes to the EHCP directed by the FTT within 5 weeks (Regulation 44(2)(e) SENDR).

He also accepted that the Defendant has not complied with this duty.

57. He submitted however that the Court should not exercise its discretion to grant a mandatory order because:

- i. The Defendant has made consistent efforts to secure the EHCP provisions but has been hampered initially by the lack of available EP's and then by ABC's sudden termination. The situation is in flux and the Defendant remains optimistic that its continuing efforts will soon rectify the breach.

- ii. It is conceded that there have been occasions when the delay and failure to provide EHCP provisions was due to lack of productivity by the Defendant or perhaps due to lack of attention. However, Mr Davidson sought to caveat this by stating that this does not mean that reasonable steps have not been taken. Mr Davidson submitted that this EHCP is a “*large and complex plan*” which has made it difficult for the Defendant to “*keep all the plates spinning*” and comply with its duty to provide it. He pointed to the fact that the way in which the Defendant has been in breach of its duty has changed over the life of this Claim – in that different parts of the EHCP have not been provided at different times.
- iii. A mandatory order would be undesirable because either the Defendant would continue its efforts as it is doing now and resolve the outstanding issues, in which case the order would be of no effect, or (for reasons outside its control), it would be unable to do so in which case it may be facing contempt of Court proceedings which would be unfair if the reasons for non-compliance are not the Defendant’s fault.
- iv. A mandatory order may prevent the Defendant from being able to review the EHCP to determine whether it is workable and to amend it if necessary. It would not be in either party’s interests to issue a mandatory order that would prevent this.

58. Mr Davidson referred me to *HXN* at [95] – [96] in which the Administrative Court summarised the principles set out by the Supreme Court in *Imam*. Addressing some of these Mr Davidson submitted that:

- i. The Defendant’s breaches of its obligation have related to different aspects of the EHCP and in part have not been its fault but were instead due to the lack of EP availability and the sudden termination of ABC – both of which were beyond its control.
- ii. The Defendant accepts that the impact on the Claimant is severe.

- iii. Although the Defendant accepts that it has been on notice of its breach throughout, it is not the case that it is not taking its obligation seriously. It would be unfair to the Defendant to impose a mandatory order in circumstances where non-compliance may be the fault of third parties which are beyond the Defendant's control.
- iv. He pointed to *Imam* [65] as set out in *HXN* [94(vi)]: “*If there is no sign as things stand at the time the matter is before the court that the authority is moving to rectify the situation and satisfy the individual's rights, that is a factor pointing in favour of the making of a mandatory order.*” He submitted that this is a case where the Defendant has, “*a credible plan*” and there is a strong prospect of the breach being brought to an end without the grant of a mandatory order. It is to be hoped that this can be achieved by mid-August. The Defendant is optimistic that the current discussions with FSE will lead to that outcome but cannot be sure that it will and equally the Defendant cannot be sure that this will be a sustainable solution given the dependence on third parties. In that event the Defendant would have to come back to Court to amend the order or be facing contempt proceedings. This would be to no-one's benefit and not a good use of the Defendant's resources.
- v. Mr Davidson submitted that instead of making a mandatory order, the Court could stay the proceedings for a period of time to give the Defendant time to comply.

Discussion

59. The starting point is that s.42 CFA imposes an absolute and non-delegable duty on the Defendant to provide the Claimant's EHCP. This is not a “*best endeavours obligation*” (*R(BA) v Nottinghamshire* at [37]) – although the Defendant's submissions appear to suggest that this is how it regards it. In cases concerning the education of children “*speed must be of the essence*” (*H v East Sussex* at [13]) given the critical impact of lack of educational provision on a child's wellbeing and future. The Defendant accepts that the impact on the Claimant is severe. It is for the Defendant to demonstrate why a

mandatory order should not be made.

60. The Claimant's EHCP was ordered by the Tribunal in August 2023 and has been in force since September 2023. At no point since then has the Defendant complied fully with its requirements. As a result, nearly a year after the Tribunal's order, the Claimant is still being denied critically important educational provision.

61. I accept that in part this is not due to the fault of the Defendant as regards the shortage of available EP's and the sudden termination of ABC, however it is clear from the evidence with which I have been provided, that the Defendant has not been proactive at resolving these issues and that it is apt to describe their conduct as characterised by drift and delay.

62. It is also notable that even after this Claim was issued, the Defendant has provided updates to the Claimant's litigation friend and the Court which have essentially amounted to assertions that progress is being made and that outstanding issues will shortly be resolved, but these resolutions have not then materialised. The fact that even today, the Defendant has been unable to provide the Court with any detail regarding the current state of discussions with FSE and when the outstanding provisions of the EHCP will be resolved is concerning. The Court notes that yet again the Defendant's position appears to be that more time is needed, but is unable to provide much more than a hope that all outstanding matters will shortly be resolved. Given the history, the Claimant's litigation friend understandably has no confidence in this and regrettably I do not consider that it is an assurance upon which the Court can safely rely either.

63. The Defendant has not provided any evidence of a lack of financial resource and nor does it state that it is impossible to comply with its statutory duty. Instead, the focus of its submissions has been that it has encountered difficulties which in the case of the EP issue and ABC's termination are not its fault and not within its control and also that the Claimant's EHCP is large and complex which has made this difficult to keep all moving parts in place. I accept this up to a point, but I also note that the Defendant accepts that it has not been proactive enough at times and that there has been a lack of attention in some respects. I consider that this concession underestimates the extent of the Defendant's lack of urgency and proactivity – both of which are amply demonstrated in

the evidence I have summarised in this judgment.

64. The Defendant has been on notice of its failure to comply for a significant period and this Claim has been ongoing for many months. The Defendant has therefore had the opportunity to put contingency plans in place if necessary and to move proactively to resolve issues including (for example) exploring other ways to obtain EP support (perhaps via the private market) and to move much faster than it has in order to find another provider to replace ABC.
65. I cannot accept the Defendant's submission that a Court should not impose a mandatory order just because the Defendant is reliant on third parties to provide the provisions. If this were the case, then it would follow that the Court could never impose a mandatory order in most education cases (but also in many other spheres), where delivery of an EHCP would often rely on a Defendant engaging the services of third-party providers. To the contrary, the case law makes clear that although a mandatory order is a discretionary remedy, cogent reasons are required as to why a court should decline a Claimant a practical and effective remedy in a case where the Defendant admits to being in fundamental breach of an absolute duty to provide him with his EHCP. In *Imam* at [42] the Supreme Court held that, "*Where a breach of the law is established, the ordinary position is that a remedy should be granted. A court should proceed cautiously in exercising its discretion to refuse to make an order and should take care to ensure that it does so only where that course is clearly justified.*"
66. I also do not accept that the Defendant has taken all reasonable steps to comply with its obligation, nor do I accept, given the paucity of information I have been given, that (absent a mandatory order), it will be compliant with its obligation in a short space of time. My view is amply demonstrated by the history so far and the fact that it is not the first time that the Court has been given such assurances, only for these to prove illusory.
67. I also do not accept that a mandatory order would serve no purpose or be counter-productive, as submitted by the Defendant. It will compel the Defendant to comply with its absolute obligation. If the Defendant complies with its obligation, then it will not face the consequences of non-compliance. If it does not, then should contempt proceedings be brought, it will be for the Defendant to explain to the Court that its

failure to comply is not due to its fault and to satisfy the Court of the proactive steps it is taking to resolve matters. The alternative of a stay of proceedings to give time for compliance (as urged by the Defendant), has been tried before to no effect.

68. I also do not accept that a mandatory order should not be made because it may prevent the Defendant from being able to review the EHCP to determine whether it is workable and to amend it if necessary. There are mechanisms for reviewing and amending an EHCP in the future, but this Court is concerned with the present position and the present, urgent need for this Claimant to be provided with the educational provision to which he is statutorily entitled, and which has been denied to him for a significant period of time.
69. The Court has not been provided with any evidence that prioritising the Claimant will cause injustice to others. I accept the general proposition that the Defendant does not have finite resources and that it has other calls on those resources, but there is no evidence before me that this is an operatively relevant consideration in this Claimant's case.

Conclusion

70. For the reasons I have given, this claim for judicial review succeeds. I will make the following orders:
- i. A declaration that the Defendant is in breach of its statutory obligation under s.42 of the Children and Families Act 2014 in that it has failed to secure the special educational provision specified in the Claimants EHCP.
 - ii. A mandatory order that the Defendant by no later than 5 weeks from today (16 August 2024) must provide the Claimant with the full provision to which he is entitled under his EHCP. This will give a reasonable period for the Defendant to comply.

Costs

71. The Defendant shall pay the Claimant's reasonable costs of the claim, to be assessed if

not agreed.

72. There should be a detailed assessment of the Claimant's publicly funded costs in accordance with the Civil Legal Aid (Costs) Regulations 2013.