Neutral Citation Number: [2022] EWHC 772 (Admin)

Case No: CO/3912/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/04/2022

Before :

NEIL CAMERON QC
sitting as a Deputy High Court Judge

Between :

THE QUEEN ON THE APPLICATION OF LB (a child, represented by her mother and litigation friend, LE)	**Claimant**
- and –	
SURREY COUNTY COUNCIL	**Defendant**

- -
- -

Gráinne Mellon (instructed by **Simpson Millar**) for the **Claimant**
Lindsay Johnson (instructed by **solicitor to Surrey County Council**) for the **Defendant**

Hearing dates: 15 and 16 March 2022
- -

JUDGMENT

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30 am 1 April 2022.

NEIL CAMERON QC (sitting as a Deputy High Court Judge):

Introduction

1. In this case LB, the Claimant, is a fifteen year old child with complex health and education needs. The Claimant, acting by her mother and next friend, LE, seeks declarations that the Defendant council failed to comply with the following duties:

   i) The duty to make arrangements for the provision of suitable education otherwise than at school ("EOTAS") for her as a child of compulsory school age who by reason of illness, or otherwise may not for any period receive suitable education unless such arrangements are made for them (section 19(1) of the Education Act 1996 ("the 1996 Act").

   ii) The duty to review an education health and care plan ("EHC plan") under section 44 of the Children and Families Act 2014 ("the 2014 Act") and Regulation 29(2) of the Special Educational Needs and Disability Regulations 2014 ("the 2014 Regulations").

   iii) The duty to secure the special educational provision for the child or young person specified in the EHC plan, under section 42(2) of the 2014 Act.

   iv) The duty to provide accommodation for children in need under section 20 of the Children Act 1989 ("the 1989 Act").

   v) The duty to assess LB's needs pursuant to section 17 of the 1989 Act.

   vi) The duty to assess whether LE, as a parent carer, has needs for support under section 17ZD of the 1989 Act.

   vii) The duty to review the Claimant's care and placement plan pursuant to regulation 6 of the Care Planning, Placement and Case Review (England) Regulations 2010 ("the 2010 Regulations").

2. By an order made on 16th November 2021 Morris J ordered that, pursuant to CPR 39.2(4) the identity of the Claimant and her mother should not be disclosed. Morris J also ordered that the Claimant's application for interim relief be listed for an oral hearing.

3. On 25th November 2021 Andrew Thomas QC sitting as a Deputy High Court Judge made an order granting interim relief. That order included the following:

> "Until such time as a suitable school placement is found, the Defendant shall provide for the Claimant to receive education otherwise than at school pursuant to Section 19(3) of the Education Act 1996 ('EOTAS'); and to give effect to that duty: -
>
> a. the Defendant shall by 4pm on 6th December 2021 file and serve a plan or statement of options for EOTAS provision and thereafter consult with the Claimant's mother; and

> b. the Defendant shall by 4pm on 4th January 2022 implement the EOTAS provision.
>
> The implementation date in paragraph 2b may be varied by agreement between the parties."

4. By an order made on 14th January 2022 Upper Tribunal Judge Ward sitting as a Deputy High Court Judge ordered that permission to apply for judicial review be granted, and that the hearing of the claim be expedited.

5. By an order made on 28th January 2022, Sweeting J ordered:

> "The Defendant shall, following consultation with LB's mother, implement EOTAS provision for the Claimant no later than 4pm on 4th February 2022."

Background Facts

6. I am grateful to counsel who, following the hearing, provided a chronology of relevant events.

7. The Claimant has complex health and educational needs. She has a diagnosis of Autism Spectrum Disorder ("ASD"), Attention Deficit Hyperactivity Disorder ("ADHD") with associated complex learning difficulties, social communication, emotional and sensory dysregulation, self-injurious behaviour and complex learning and language delay/disorder.

8. The Claimant has a 13 year old younger brother, VB. VB has a diagnosis of ASD and ADHD. VB lives in the family home and attends a special school for boys with communication and interaction needs.

9. The Claimant is a Looked After Child having been accommodated by the Defendant pursuant to section 20 of the 1989 Act since January 2015. From early 2015 until 8th April 2021 she was a student at Bradstow School in Kent. The placement at Bradstow School was for 52 weeks a year.

10. An Education Health and Care Plan has been prepared for LB. The most recent amendment of the EHC plan was made on 25th August 2020. The educational provision specified in the EHC plan includes a communication programme, directed 1:1 Sessions with a speech and language therapist, specified universal provision, a consistent (specified) routine with clearly defined learning opportunities, an individualised sensory diet, and support for preparing for adulthood. The social care provision specified was a 52 week residential placement that provides 'wraparound' care and education arrangements. Bradstow School is specified as the educational placement.

11. The most up to date assessment of need (of LB) pursuant to section 17 of the 1989 Act was completed on 22nd December 2020.

12. LB returned home for Christmas in 2020. LE became concerned that if LB were to return to Bradstow School she would be likely to be infected with Covid-19. LB stayed

at home with LE from January 2021 until she returned to Bradstow School on 8th March 2021.

13. Between 8th March and 31st March 2021 LB was, from time to time, left unsupervised at school. During that time she caused herself significant injuries by hitting her head on a radiator and on the corner of a table. LE became concerned for LB's safety should she remain at Bradstow School, and on 8th April 2021, LB returned to LE's home.

14. The Defendant agreed a new placement should be found. On 23rd June 2021 LB moved to Southeo House which is run by Calcot Services. On 12th July 2021 LE was informed by Calcot that LB's placement was not stable.

15. A 'looked after review' was carried out on 12th July 2021. That review noted, amongst other things, that there was an urgent need for education to be in place for LB to commence in September 2021.

16. On 6th September 2021 Calcot told LE of their intention to terminate LB's placement on 3rd October 2021. On 10th September 2021 the Defendant began to search for an alternative placement for LB. As no alternative accommodation was found, the notice period was extended to 17th October 2021.

17. On 11th October 2021 LE wrote to the Defendant stating that she was prepared to have LB at home for a maximum of one week, provided that suitable support is put in place.

18. On 14th October 2021 the Claimant's solicitors requested that the Defendant conduct an assessment of LB's needs pursuant to section 17 of the 1989 Act. The Claimant's solicitors also noted that if a local authority considers that a parent carer of a disabled child may have support needs, they must carry out an assessment of the parent carer's support needs pursuant to section 17ZD of the 1989 Act.

19. LB moved back to LE's home on 18th October 2021. LB requires 2:1 support. Support was provided by Topaz care agency for 9 hours per day on weekdays, and 8 hours per day at weekends.

20. LB requires constant supervision. When LB is at home LE is not able to do anything other than supervise LB. LB and VB cannot be in the same room together. As a result LE has had to make alternative care arrangements for VB. VB often stays with friends.

21. On 22nd October 2021 a tutor from Nudge Education conducted a tuition session with LB. Nudge informed LE that the assigned tutor could not work with LB.

22. On 11th November 2021 the Defendant wrote to the Claimant's solicitors stating that a placement search was being carried out, and that the search related to interim and long term placements.

23. On 19th November 2021 LB was assessed by a speech and language therapist, who produced a report dated 2nd December 2021.

24. On 23rd November 2021 the Defendant made a referral to Fresh Start, an independent EOTAS tuition provider.

25. On 7th December 2021 LB was assessed at the Applewood centre by Fresh Start. LE expressed the view that the home would not be a suitable venue at which LB could receive tuition.

26. Topaz were unable to provide support on Christmas Day and Boxing Day 2021, and on 1st January 2022. An alternative care agency was identified, but they could only provide one carer. LE did not agree to one person caring for LB.

27. A functional assessment was carried out by a behaviour assessor on 7th January 2022.

28. On 17th January 2022 a meeting was held at which representatives of the Defendant and the Claimant's independent advocate were present along with LE and others. The Defendant's representative stated that Fresh Start tutors were available to start providing EOTAS but that there was difficulty in finding a venue. The Applewood Children's Centre was not suitable as it was not registered with OFSTED to provide education onsite.

29. Ms Scarsbrook of the Defendant states that, between 6th January 2022 and 26th January 2022 the Defendant sought to find suitable accommodation for EOTAS provision to be delivered.

30. On 18th January 2022 a social worker employed by the Defendant referred LE to Action for Carers requesting that a carer's assessment be undertaken. An assessment was arranged for the 4th February 2022, but had to be cancelled as the social worker was not available due to a bereavement.

31. On 21st January 2022 the Defendant's SEND Case Officer wrote to LE stating that she was working with Fresh Start to try and find a venue at which LB could receive education.

32. On 26th January 2022 the Defendant contacted an alternative education provider, Teaching Personnel, with a view to teaching in the home starting on 31st January 2022.

33. The tutor from Teaching Personnel agreed to provide tuition between 4pm and 7pm on Tuesday 1st February and Friday 4th February 2022. Ms Scarsbrook of the Defendant contacted Teaching Personnel and stated that teaching should not occur during those times.

34. A teaching room was secured at the Applewood centre for the following week and the first introductory teaching session with Teaching Personnel took place on 8th February 2022. The room at the Applewood centre was available until 23rd February 2022.

35. Arrangements were made for further teaching sessions to take place at the St Faith's centre in Leatherhead. The report from the independent advocate dated 7th March 2022 records that significant incidents resulting in property damage had taken place at St Faith's and at LE's home resulting in further interruption to EOTAS provision.

36. The witness statements of Susan Hirst (for the Defendant) set out the steps taken by the Defendant to seek to find residential accommodation for LB.

37. On 9th February 2022 the Defendant offered to arrange a meeting with LE on 25th February 2022 or 4th March 2022, in order to undertake a carer's assessment.

The Legal Framework

The Education Act 1996

38. Section 19 of the 1996 Act provides:

> "(1) Each [local authority] [in England] shall make arrangements for the provision of suitable [...] education at school or otherwise than at school for those children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them."
>
> …….
>
> (4A) In determining what arrangements to make under subsection (1) or (4) in the case of any child or young person a [local authority] shall have regard to any guidance given from time to time by the Secretary of State.
>
> (6)
>
> ……
>
> "suitable education" , in relation to a child or young person, means efficient education suitable to his age, ability and aptitude and to any special educational needs he may have (and "suitable full-time education" is to be read accordingly)."

39. LB is a child of compulsory school age as defined in section 8 of the 1996 Act.

40. The Secretary of State for Education has issued guidance entitled "Alternative Provision: Statutory guidance for local authorities, January 2013 ("the 2013 Statutory Guidance"). Paragraphs 1-27 of the document explain statutory powers and duties that apply in relation to alternative provision. The statutory guidance issued pursuant to section 19(4A) of the 1996 Act is set out at paragraphs 28-47.

    i) Paragraph 2, which does not form part of the statutory guidance, states:

    > "2. While there is no statutory requirement as to when suitable full-time education should begin for pupils placed in alternative provision for reasons other than exclusion, local authorities should ensure that such pupils are placed as quickly as possible."

    ii) Paragraph 30 forms part of the statutory guidance, to which local authorities shall have regard in determining what arrangements to make under section 19(1) and states:

    > "Good alternative provision is that which appropriately meets the needs of pupils which required its use and enables them to

> achieve good educational attainment on par with their mainstream peers. All pupils must receive a good education, regardless of their circumstances or the settings in which they find themselves. Provision will differ from pupil to pupil, but there are some common elements that alternative provision should aim to achieve, including:"
>
> good academic attainment on par with mainstream schools – particularly in English, maths and science (including IT) – with appropriate accreditation and qualifications;
>
> that the specific personal, social and academic needs of pupils are properly identified and met in order to help them to overcome any barriers to attainment;
>
> improved pupil motivation and self-confidence, attendance and engagement with education; and
>
> clearly defined objectives, including the next steps following the placement such as reintegration into mainstream education, further education, training or employment."

41. The duty imposed by section 19 of the 1996 Act was considered by the Court of Appeal in ***R (G) v. Westminster City Council*** [2004] EWCA Civ 45. Lord Phillips MR (when giving the judgment of the court) stated (at paragraphs 44 and 46):

> "44. …. This appeal has focussed on only one of these - the duty to arrange for the provision of suitable education. This is a duty to ensure that there is available for each child an efficient educational facility that is suitable for the child's age, ability and aptitude and any special educational needs that the child may have.
>
> ….
>
> 46. In any case where a child is not receiving suitable education it is necessary to consider the whole picture in order to decide in what respect, if any, this is attributable to a breach of duty by the local education authority. If there is no suitable education available that is reasonably practicable for the child, the authority will be in breach of section 19. If suitable education has been made available which is reasonably practicable, but for one reason or another the child is not taking advantage of it, the local authority may well be in breach of duty in failing to exercise its powers to ensure that the child receives that education. It will not, however, be in breach of section 19."

42. In ***R (S) v. Kent*** [2007] EWHC 2135 (Admin) at paragraph 21, Nicholas Blake QC (as he then was) considered Richards LJ's judgment in ***Westminster*** and stated:

> "In my judgment, those passages indicate that the focus of the section 19 duty is concerned with whether educational provision offered by the local authority is available, is possible and is accessible to the child, although the test is one of reasonable practicable as opposed to absolute impossibility. Nevertheless that is an objective and strict test."

43. It is for the local education authority to determine what is reasonably practicable in the circumstances and the court will be reluctant to intervene if a rational and sensible decision has been taken taking account of the particular needs of the child in question (***R (KS) v. Croydon LBC*** [2010] EWHC 3391 (Admin) at paragraph 36).

44. The point at issue in this case is whether the Defendant failed to make available for LB an efficient educational facility that is suitable for her age, ability and aptitude and her special educational needs, and was reasonably practicable for her.

Education and Health Care Plans – Children and Families Act 2014

45. Section 21(1) of the 2014 Act provides:

> "Special educational provision" , for a child aged two or more or a young person, means educational or training provision that is additional to, or different from, that made generally for others of the same age in—
>
> (a) mainstream schools in England,
>
> (b) maintained nursery schools in England,
>
> (c) mainstream post-16 institutions in England, or
>
> (d) places in England at which relevant early years education is provided."

46. Section 37(1) of the 2014 Act provides:

> "(1) Where, in the light of an EHC needs assessment, it is necessary for special educational provision to be made for a child or young person in accordance with an EHC plan—
>
> (a) the local authority must secure that an EHC plan is prepared for the child or young person, and
>
> (b) once an EHC plan has been prepared, it must maintain the plan."

47. Section 42(1) and (2) of the 2014 Act provide:

> "(1) This section applies where a local authority maintains an EHC plan for a child or young person."
>
> (2) The local authority must secure the specified special educational provision for the child or young person.

48. Section 44 of the 2014 Act provides (so far as relevant):

> "(1) A local authority must review an EHC plan that it maintains—"
>
> (a) in the period of 12 months starting with the date on which the plan was first made, and
>
> (b) in each subsequent period of 12 months starting with the date on which the plan was last reviewed under this section.
>
> (2) A local authority must secure a re-assessment of the educational, health care and social care needs of a child or young person for whom it maintains an EHC plan if a request is made to it by—
>
> (a) the child's parent or the young person, or
>
> (b) ……..
>
> …….
>
> (7) Regulations may make provision about reviews and re-assessments, in particular—
>
> (a) about other circumstances in which a local authority must or may review an EHC plan or secure a re-assessment (including before the end of a specified phase of a child's or young person's education);
>
> ……."

49. Regulation 29(2) of the Special Educational Needs and Disability Regulations 2014 provides:

> "(2) Where a child or young person under the age of 18 is not receiving education or training, the local authority must review the EHC plan in accordance with regulations 18 and 19 and amend it in accordance with regulation 22 where appropriate, to ensure that the young person continues to receive education or training."

50. In ***R (on the application of N) v. North Tyneside Borough Council*** [2010] EWCA Civ 135 the Court of Appeal considered the predecessor provision to section 42(2) of the 2014 Act (section 324(5) of the Education Act 1996). Section 324(5) provided:

> "(5)(a) unless the child's parent has made suitable arrangements, the authority—
>
> (i) shall arrange that the special educational provision specified in the statement is made for the
>
> child, and
>
> (ii) may arrange that any non-educational provision specified in the statement is made for him in such manner as they consider appropriate…"

51. At paragraphs 5 and 6 Elias LJ summarised two principles concerning the application of the sub-section:

> "5. ……..The first is that the duty to arrange for the specified provision is a mandatory one. There can be no excuse if there are financial or other practical difficulties in giving effect to the terms of the statement: see the decision of Turner J in R v LB Harrow ex parte M [1997] ELR 62.
>
> 6. The second principle is that the statement should not identify the educational provisions in terms which confer upon the LEA the power to alter the provision unilaterally without any need formally to amend the statement, even after consultation. The statement should be cast in terms which are sufficiently specific to require the LEA to amend it if they think that the educational provision should be changed. If this were not so, the individual would be deprived of his or her right of appeal under the legislation: see the observations of Bell J in E v Rotherham Metropolitan Borough Council [2001] EWHC Admin 432 at para 34."

52. At paragraph 17 Sedley LJ stated:

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

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

> "27. here is no real dispute between the parties about the legal principles applicable here. Section 42 imposes a duty on local authorities to secure the special educational provision specified in an EHCP created by the Children and Families Act 2014. It is an absolute and non-delegable duty (see *R (on the application of N) v North Tyneside Borough Council* [2010] EWCA Civ 135). There is no "best endeavours" defence."

Provision of Accommodation for Children: section 20 of the Children Act 1989

54. Section 20(1) of the 1989 Act provides:

> " (1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of—
>
> (a) there being no person who has parental responsibility for him;
>
> (b) his being lost or having been abandoned; or
>
> (c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care."

55. Section 22C of the 1989 Act (so far as material) provides:

> "(1) This section applies where a local authority are looking after a child ("C").
>
> (2) The local authority must make arrangements for C to live with a person who falls within subsection (3) (but subject to subsection (4)).
>
> (3) A person ("P") falls within this subsection if—
>
> (a) P is a parent of C;
>
> (b) P is not a parent of C but has parental responsibility for C; or
>
> (c) in a case where C is in the care of the local authority and there was [a child arrangements order] in force with respect to C immediately before the care order was made, P was a person [named in the child arrangements order as a person with whom C was to live] .

> (4) Subsection (2) does not require the local authority to make arrangements of the kind mentioned in that subsection if doing so—
>
> (a) would not be consistent with C's welfare; or
>
> (b) would not be reasonably practicable.
>
> (5) If the local authority are unable to make arrangements under subsection (2), they must place C in the placement which is, in their opinion, the most appropriate placement available."

56. Section 20(1)(c) is to be given a broad and purposive interpretation. The words "prevented … for whatever reason" are to be interpreted widely (***R (G) v. London Borough of Barnet*** [2004] 2 AC 208 at paragraph 24).

57. In this case there is no dispute that the section 20(1) duty is owed by the Defendant to the Claimant.

58. In his skeleton argument on behalf of the Defendant, Mr Johnson stated that the Defendant did not accept that the provision of accommodation in the family home with support "cannot amount to discharge of the section 20 duty." In that skeleton argument it was further submitted that as there were efforts to ensure that support was in place to enable LB to live with LE, those actions were sufficient to discharge the section 20 duty. Those arguments are no longer pursued.

59. Section 22C of the 1989 Act sets out, in order of priority, the nature of the arrangements which a local authority must make for the accommodation and maintenance of a looked after child. Subsection (2) imposes a duty to make the arrangements to live with a person who falls within subsection (3) (which includes a parent); that duty is subject to subsection (4). Subsection (4) provides that the duty imposed by subsection (2) does not require the local authority to make arrangements for the looked after child to live with a person who falls within subsection (3) if doing so would not be consistent with the child's welfare or would not be reasonably practicable.

60. In this case it is accepted that it would not be consistent with LB's welfare for her to live with LE, and that it is not reasonably practicable for her to do so. Accordingly the Defendant has not discharged the section 20 duty to provide accommodation for LB by placing her in LE's home.

<u>The duties to assess needs under section 17 and section 17ZD of the 1989 Act</u>

61. Section 17 of the 1989 Act provides:

> "(1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)—
>
> (a) to safeguard and promote the welfare of children within their area who are in need; and
>
> (b) so far as is consistent with that duty, to promote the upbringing of such children by their families,

> by providing a range and level of services appropriate to those children's needs."

62. It is implicit in section 17(1) that a local authority will take reasonable steps to assess for the purposes of the Act the needs of any child in their area who appears to be in need, and failure to carry out that duty may attract a mandatory order in an appropriate case (***R (G) v. LB of Barnet*** [2004] 2 AC 208 at paragraph 32).

63. The duty under section 17 is an ongoing one (***R on the application of U and U) v. Milton Keynes Council*** [2017] EWHC 3050 (Admin) at paragraph 27). If an authority has assessed a child not to be in need, and there is then a relevant change in circumstances or further material information comes to light which suggests that the child may be in need, an authority may have to reassess, or make inquiries in order to decide whether a reassessment is required. Similarly, if a child is assessed to be in need, and there is a change in circumstances which has a material bearing on the extent or nature of the assessed need, an authority may have to re-assess, or at least, make inquiries to determine whether a reassessment is required.

64. Section 17ZD of the 1989 Act provides (so far as relevant):

> "(1) A local authority [...] must, if the conditions in subsections (3) and (4) are met, assess whether a parent carer within their area has needs for support and, if so, what those needs are.
>
> (2) In this Part "parent carer" means a person aged 18 or over who provides or intends to provide care for a disabled child for whom the person has parental responsibility.
>
> (3) The first condition is that—
>
> (a) it appears to the authority that the parent carer may have needs for support, or
>
> (b) the authority receive a request from the parent carer to assess the parent carer's needs for support.
>
> (4) The second condition is that the local authority are satisfied that the disabled child cared for and the disabled child's family are persons for whom they may provide or arrange for the provision of services under section 17.
>
> (5) An assessment under subsection (1) is referred to in this Part as a "parent carer's needs assessment."

65. Regulation 6(1) of the 2010 Regulations provides:

> "6.—
>
> (1) The responsible authority must keep C's care plan under review in accordance with Part 6 and, if they are of the opinion some change is required, they must revise the care plan or prepare a new care plan accordingly."

The Grounds and Conclusions on each Ground

66. The Claimant relies on four grounds of challenge:

i) Failure to provide suitable interim education pursuant to the duty imposed under section 19 of the 1996 Act;

ii) Breach of sections 40 and 42 of the 2014 Act in relation to the EHC plan;

iii) Failure to comply with the duties imposed by section 20 of the 1989 Act;

iv) Failure to carry out assessments under section 17 and 17ZD of the 1989 Act.

67. The Claimant argues that the duties referred to are continuing duties.

68. The Defendant council accepts that they are in breach of the following duties:

i) The duty, under section 44 of the 2014 Act, to undertake a review of LB's EHC plan.

ii) The duty, under section 42(2) of the 2014 Act to secure (for LB) the special educational provisions specified in the EHC plan.

iii) The duty imposed upon them by section 20(1)(c) of the 1989 Act to provide accommodation for LB.

Ground 1

69. There is no dispute between the parties that the duty imposed by section 19(1) of the 1996 Act is engaged in this case. Further there is no dispute that the applicable duty is a duty to make arrangements for the provision of suitable education otherwise than at school.

70. On behalf of the Claimant, Ms Mellon submits that section 19 of the 1996 Act imposes a mandatory duty and 'dictates' that suitable education be provided.

71. Ms Mellon submits that no education was provided from at least the 17th October 2021 until 7th February 2022. She submits that education was put in place on 8th February 2022 but stopped on 3rd March 2022.

72. Mr Johnson submits that the mandatory duty is not to provide education but to make arrangements for the provision of suitable education. He further submits that the Defendant has made such arrangements.

73. The section 19(1) duty cannot be approached in a manner which assumes that the EOTAS can be provided immediately the need arises, however it does impose a mandatory duty to make arrangements for the provision of suitable education.

74. The duty to make arrangements for the provision of suitable education is not a duty to attempt to make arrangements. As was made plain by Richards LJ in the ***Westminster***

case, it is a duty to arrange for the provision of suitable education. It is a duty to ensure that there is available for each child an efficient educational facility that is suitable for the child's age, ability and aptitude and any special educational needs that the child may have (as defined in section 19(6) of the 1996 Act). The question to be asked is whether educational provision is available, is possible, and is accessible to the child.

75. Southeo House gave notice on 6th September 2021 that the placement was not suitable for LB. The notice was due to expire on 3rd October 2021 but was extended to 17th October 2021.

76. In the period between 6th September 2021 and 17th October 2021 the Defendant failed to make arrangements to ensure that the Claimant received suitable education when she left Southeo House. No educational provision was made available for the Claimant when she left Southeo House.

77. LB started living with LE at home on 18th October 2021.

78. On the 22nd October 2021 a tutor from Nudge Education had a tuition session but decided that she was not the right person to deliver education which met LB's needs.

79. It was not until 23rd November 2021 that the Defendant made a referral to Fresh Start.

80. On the 7th December 2021 LB was assessed by Fresh Start. LE expressed the view that provision of education should not take place at home. It was not until the 6th January 2022 that the Defendant started to search for an appropriate location to deliver the education.

81. The Defendant was under a duty to make arrangements for the provision of suitable education.

82. No such arrangements were in place from the 17th October 2021 to 8th February 2022. The reason why such arrangements were not in place is because the Defendant's officers failed to take the necessary steps to put such arrangements in place. It is clear from the chronology that significant periods of time were allowed to elapse once it had been ascertained that a particular approach would not result in suitable education being provided. When it became apparent that Nudge were not able to work with LB it took more than a month before a referral was made to Fresh Start. Similarly, when it became apparent that it was not appropriate to provide tuition in the home, it took almost a month before the search began in earnest for suitable premises in which to deliver education.

83. On the basis of those facts, in my judgment it is clear that the Defendant failed to make arrangements for the provision of suitable education as required by section 19(1) of the 1996 Act.

84. Even if the section 19(1) duty were to be construed as a duty to make arrangements within a reasonable period, in my judgment the Defendant failed to do so.

85. For those reasons the Claimant succeeds on ground 1.

Ground 2

86. The Council has conceded that they are in breach of the duties to review the EHC plan and the duty to secure the special educational provision for LB as specified in the EHC plan.

87. Those concessions are well made. The EHC plan was last amended in August 2020 when LB was at Bradstow School. The EHC plan specifies a series of detailed provisions to meet the Claimant's needs. Very little, if any, educational provision (as specified in the EHC plan) has been provided since at least October 2021.

88. On the basis of those concessions the Claimant succeeds on Ground 2.

Ground 3

89. In this case it is agreed between the parties that the duty imposed by section 20 of the 1989 Act applies (it is agreed that LB requires accommodation as a result of circumstances falling within section 20(1)(c)).

90. In his skeleton argument Mr Johnson sought to argue that provision of accommodation in the family home with LE satisfied the duty imposed on the Defendant by section 22C(2) as LE was a parent of LB and therefore was a person falling within section 22C(3)(a) of the 1989 Act. That point is no longer pursued by Mr Johnson, and it is accepted that the Defendant acted unlawfully when LB was placed with LE. The Defendant accepts that there is a duty on them to provide accommodation other than at LE's home. It would appear that the initial submission failed to take into account the provisions of section 22C(4)(a), which provides that subsection (2) does not require the local authority to make arrangements for a looked after child to live with a parent if doing so would not be consistent with the child's welfare or would not be reasonably practicable.

91. On the basis of the concessions made by the Defendant, this ground is made out.

Ground 4

92. This ground has two limbs.

93. The Claimant contends that there is a breach of:

    i) The duty to assess LB's needs pursuant to section 17 of the 1989 Act.

    ii) The duty to assess whether LE, as a parent carer, has needs for support under section 17ZD of the 1989 Act.

94. In addition the Claimant contends that the Defendant failed to review her care and placement plan pursuant to regulation 6 of the 2010 Regulations.

95. The Claimant submits that the most recent assessment of the Claimant's needs was completed on 22nd December 2020. At the time that the December 2020 needs assessment was completed the Claimant attended Bradstow School. The Claimant argues that the Defendant has failed to carry out a further needs assessment and care

and placement plan following her move to Southeo House and her subsequent placement with her mother.

96. The Claimant places reliance upon the Working Together to Safeguard Children guidance (July 2018) ("the 2018 Guidance") and Volume 2 of The Children Act 1989 guidance and regulations (July 2021) ("the 2021 Guidance").

97. The 2018 Guidance states:

i) At paragraph 51:

> "Assessment should be a dynamic process, which analyses and responds to the changing nature and level of need and/or risk faced by the child from within and outside their family."

ii) At paragraph 58:

> "High quality assessments: "
>
> …
>
> •are a continuing process, not an event"
>
> ...

98. The 2021 Guidance states (at paragraph 2.33):

> "The process of review is ongoing and starts from the monitoring of an existing care plan. It is important to distinguish between reviewing as a process of continuous monitoring and reassessment, and the case review, which is the event when a child's plan may be considered, reconfirmed or changed, and such decisions agreed and recorded."

99. The Claimant further submits that the need for a carer's assessment was triggered when LB moved back to live with LE in October 2021.

100. The Defendant submits that:

i) The Claimant's needs were assessed in December 2020. That assessment remains extant.

ii) When LB returned to live with her mother, the duty imposed by section 17ZD(1) of the 1989 Act to undertake a parent carer's needs assessment arose. The Defendant submits that the obligation imposed upon a local authority is to undertake such an assessment within a reasonable time and that an assessment is in progress.

101. The duty to review the provision of services under section 17 of the 1989 Act is a continuing one. The extant care plan was produced in December 2020. The care and placement plan is dated 12th July 2021. There has been a material change in circumstances since the care plan and care and placement plan were produced. At the

time that the care plan was produced LB was at Bradstow School on a 52 week placement. LB ceased to live at Bradstow School on 8th April 2021. On 23rd June 2021 LB went to live at Southeo House. LB left Southeo House in October 2021 and went to live with LE. All those events were material, and were each capable of triggering the need to consider whether to review the care plan or the care and placement plan. In my judgment there has been a material change of circumstances triggering the need to review LB's care plans. In breach of the duty imposed by section 17 of the 1989 Act, and regulation 6(1) of the 2010 Regulations, the Defendant failed to keep the care plans under review, and failed to consider whether to review the plan when a material change of circumstances occurred.

102. Section 17ZD(1) of the 1989 Act provides that a local authority must, if the conditions in subsections (3) and (4) are met, assess whether a parent carer within their area has needs for support, and if so, what those needs are. The Defendant accepts the conditions set out in subsections (3) and (4) are satisfied.

103. On behalf of the Defendant, Mr Johnson submitted that the duty was complied with by the Defendant. In making that submission, Mr Johnson relied upon the fact that, on 18th January 2022, the Defendant's social worker referred the Claimant to an assessor and requested that an assessment be completed.

104. The duty imposed by section 17ZD is mandatory. Once the conditions set out in subsections (3) and (4) are met, the local authority must assess whether a parent carer has needs for support, and if so, what those needs are. That duty must be carried out within a reasonable period. The period which is reasonable will depend on all the facts and circumstances of the case. In this case LB, a young person with complex needs was returned to live with LE, as the Defendant could not find an appropriate placement. The arrangement for LB to live with LE was seen as a temporary measure in response to an emergency.

105. Before LB moved back to live with LE, the Claimant's solicitors, in their letter dated 14th October 2021, drew attention to the section 17ZD duty.

106. The Defendant was aware that LB was to move back to live with LE as a temporary measure. The Defendant had been put on notice of the section 17ZD duty. In my judgment, in the particular circumstances of the case, given LB's complex needs, and the particular strain that caring for LB placed on LE, by waiting until 18th January 2022 (some three months after LB returned to LE's home) the Defendant failed to institute, let alone undertake, an assessment under section 17ZD within a reasonable period.

107. For those reasons the Claimant succeeds on ground 4.

Relief

108. The Claimant submits that the court should make the following orders:

i) A declaration that the Defendant has failed to provide the Claimant with any education from 17 October 2021- 7 February 2022 and is on an ongoing basis in breach of their obligations pursuant to the 1996 Act;

ii) An order that the Defendant make arrangements for the Claimant to be provided with education in school or otherwise than in school pursuant to their obligations under the 1996 Act;

iii) An order that the Defendant conduct a review of the Claimant's EHC plan urgently;

iv) A declaration that the Defendant is in breach of their duty to provide the Claimant with accommodation pursuant to section 20 of the 1989 Act;

v) An order that the Defendant provide the Claimant with suitable accommodation pursuant to section 20 of the 1989 Act forthwith;

vi) A declaration that the Defendant has failed to conduct a re-assessment of the Claimant's needs under section 17 of the 1989 Act and of the Claimant's mother's needs as a carer;

vii) An order that the Defendant conduct a re-assessment of the Claimant's needs under section 17 of the 1989 Act and of the Claimant's mother's needs as a carer;

viii) A declaration that the Defendant has failed to maintain up to date, and regularly review, the Claimant's care plan;

ix) An order that the Defendant shall review and prepare an up to-date care plan for the Claimant forthwith;

109. The Defendant submits that relief should be refused

i) As there is no residential accommodation available and no educational setting available.

ii) If there has been a breach, it arises as a result of the impossibility of compliance with the various duties and it is highly unlikely that any relief would result in a substantially different outcome. In making that submission Mr Johnson relied upon section 31(2A) of the Senior Courts Act 1981 and on the judgment of Coulson LJ in ***R (Gathercole) v. Suffolk County Council*** [2021] PTSR 359 at paragraphs 36 and 38.

iii) Judicial review is a discretionary remedy and the discretion extends to refusing relief altogether.

iv) Any relief granted would serve no practical effect.

110. In my judgment, and for the reasons I have given when considering each ground, there have been serious and substantial breaches of duties imposed upon the Defendant by statute. Those duties relate to the provision of accommodation, education and care to a young and vulnerable person.

111. This is not a case where it can be said that it is highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. If the Defendant had acted in accordance with the duties imposed upon

them, the Claimant would have been provided with education, and with appropriate support and accommodation. In addition LE would have been provided with appropriate support.

112. Further the submission made by Mr Johnson, at paragraph 53 of his skeleton argument, that " … it would be highly unlikely that any relief would result in a substantially different outcome;" does not address the question that section 31(2A) requires the court to answer. The question is not whether any relief would result in a substantially different outcome, but whether it is highly likely that the outcome for the Claimant would not have been substantially different if the unlawful conduct of the Defendant had not occurred.

113. This is not a case where the relief sought would serve no practical purpose. The Claimant is in need of education, care and accommodation. It is the Defendant's duty to provide such education, care and accommodation and an order of the court is necessary to ensure that the Defendant complies with the duties imposed upon them by Parliament. For those reasons I do not exercise my discretion to refuse relief.

114. I am 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."

115. In my judgment, given my findings that the Defendant has failed to carry out the duties imposed upon them by statute, it is appropriate to make the declarations sought. 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 court will not order a party to do the impossible, however a court will order a local authority to carry out the duties imposed upon them by statute.

116. I make the following orders:

i) A declaration that the Defendant failed to provide the Claimant with education from 17 October 2021- 7 February 2022 in breach of the duty imposed on them by section 19 of the Education Act 1996.

ii) An order that the Defendant make arrangements for the Claimant to be provided with education in school or otherwise than in school pursuant to their obligations under section 19 of the Education Act 1996, and that they make such arrangements as soon as possible and in any event within 30 days of the date of this order.

iii) An order that the Defendant conduct a review of the Claimant's EHC plan, and that such a review be carried out as soon as possible, and in any event within 30 days of the date of this order.

iv) A declaration that the Defendant is in breach of their duty to provide the Claimant with accommodation pursuant to section 20 of the Children Act 1989;

v) An order that the Defendant provide the Claimant with suitable accommodation pursuant to section 20 of the Children Act 1989 as soon as possible and in any event within 30 days.

vi) A declaration that the Defendant has failed to conduct a re-assessment of the Claimant's needs under section 17 of the Children Act 1989 and of the Claimant's mother's needs as a carer.

vii) An order that the Defendant conduct a re-assessment of the Claimant's needs under section 17 of the Children Act 1989 and of the Claimant's mother's needs as a carer under section 17ZD of the Children Act 1989, and that such assessment be carried out as soon as possible and in any event within 30 days of the date of this order.

viii) A declaration that the Defendant has failed to maintain up to date and regularly review the Claimant's care plan.

ix) An order that the Defendant shall review and prepare an up to-date care plan for the Claimant as soon as possible, and in any event within 30 days of the date of this order.

117. In addition, and in order to make practical arrangements to allow the matter to be considered by the court if for some reason provision for LB and LE cannot be made within the periods allowed by the court, I will allow the Defendant liberty to apply to the court before the expiry of the maximum periods I have set for compliance.

118. I invite the parties to agree a draft order which reflects my conclusions. I anticipate that the parties will be able to agree an appropriate order for costs in the light of my conclusions, but if a costs order is not agreed, the parties are to make written submissions on costs.