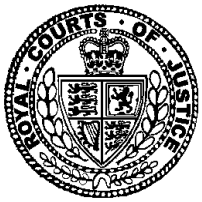

Neutral Citation Number: [2021] EWHC 1348 (Admin)

Case No: CO/4691/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/05/2021

**Before** :

**HHJ Coe QC (sitting as a judge of the High Court)**

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**Between :**

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| **The Queen (on the application of BA, by his litigation friend and father, PA)** | **Claimant** |
| **- and –** | |
| **Nottinghamshire County Council** | **Defendant** |

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**Miss C Hadfield** (instructed by **Sinclairslaw**) for the **Claimant**
**Mr J Anderson** (instructed by **Nottinghamshire County Council Legal Services**) for the **Defendant**

Hearing dates: 12th May 2021

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# APPROVED 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 20 May 2021.

**HHJ Coe QC :**

The Claim and Procedural History

1. On 12 May 2021 I heard the claimant's substantive application for judicial review seeking declaratory and mandatory relief in respect of the provision of services by the defendant pursuant to the Education, Health and Care Plan ("EHCP") it issued on 14 May 2020 following an appeal to the First-Tier Tribunal. It is alleged that the defendant is in breach of its duty under Section 42 of the Children and Families Act 2014 (“ Section 42”).

2. The claimant is a child born on 22 August 2010 with the complex health and educational needs described below. The claim, brought by his father and litigation friend, was issued on 16 December 2020, together with an application for interim relief. On behalf of the claimant an application was made pursuant to section 39 of the Children and Young Persons Act 1933 that the claimant's name is not included in any publication. The claimant also applied to anonymize the name of his litigation friend pursuant to CPR 39.2(4) as well as the name of the claimant's school. In its response to the application for interim relief, the defendant did not oppose the application for anonymity given that the claimant is a child and the application concerns special educational needs.

3. By order dated 30 December 2020, Mr Justice Lane refused the application for interim relief. Permission to apply for judicial review was granted by Mr David Lock QC, sitting as a deputy judge of the High Court, on 19 March 2021. The substantive hearing was expedited.

4. Neither order deals on its face with the application for anonymity. If such an order was made, I have not seen it, but this matter has proceeded on the basis that the claimant should have that anonymity. If no order was in fact made, then I make it now. The claimant will be known as “BA”, his litigation friend (and father) as “PA” and his school as “the school”.

5. Following the hearing on 12th May, I gave short oral reasons for my decision to grant the application, declaring that the defendant is in breach of its duty pursuant to Section 42,

requiring them by mandatory order to provide the services identified in the EHCP and ordering the defendant to pay the claimant's costs (the claimant has the benefit of public funding) to be the subject of detailed assessment if not agreed. For the reasons set out below, I allowed the defendant a brief period of time (four weeks) to comply with the mandatory order, save for the provision of special seating in respect of which I allowed the defendant six weeks.

6. Having given those brief oral reasons, I indicated that I would provide this short, written judgment. There is no need to rehearse the extensive detail of the matters set out in the documents and witness statements I have seen in light of the scope of these judicial review proceedings. That scope is limited to consideration of whether or not the defendant, despite the significant steps taken in the last few months, remained in breach of its statutory duty as at 12 May 2021 and does not, as I find, include consideration of past breaches, if any. Having said that, some consideration of the history/chronology here is necessary because it informed my decision to make the mandatory order sought.

Background

7. BA is now 10. He has a rare degenerative metabolic condition called Sanfilippo syndrome, otherwise known as mucopolysaccharidosis type IIIA. The syndrome is associated with global developmental delay and the claimant has significant physical and neurological symptoms. He also has a diagnosis of Leber’s amaurosis, which is a visual impairment by reason of which the claimant is registered blind. He is fed through a gastrostomy. In addition, the claimant has diagnoses of severe autistic spectrum disorder, significant hearing impairment (by reason of which he wears hearing aids), epilepsy and mood instability. He is wheelchair-dependent and has never learned to walk or crawl, nor is he expected to. His condition is degenerative and the claimant will inevitably become less active, and increasingly dependent on his wheelchair. His health will continue to deteriorate. Both his parents and the school have already noticed a decline in his general presentation.

8. Very sadly, the claimant's conditions are life-limiting and his life expectancy is early to mid-teens.

9. It is not in dispute, therefore, that the claimant has substantial, complex, severe long-term special educational needs and that the provision in his EHCP (Section F) reflects that which is necessary for him. It is also not in dispute that for BA every day is important, and as set out in the correspondence from the Society for Mucopolysaccharides Diseases dated 11th December 2020 it is important that the claimant is able to "make the most of the small windows of opportunity he has to learn, play, communicate and develop whilst this is still possible". The claimant's teacher identified on 6 January 2021, that "[BA]'s window of opportunity is closing". The claimant's father, PA, has eloquently detailed in his witness evidence, his own distress at the concept of BA not being afforded all of the provisions which he is entitled.

10. As part of the history, I note not only that PA successfully appealed to the First-Tier Tribunal against the contents of the EHCP made and issued on 9 April 2019 but also that he brought a successful complaint against the defendant through the Ombudsman (decision dated 3 April 2020) in relation to the defendant's: failure to provide the educational provision for BA in line with his EHCP;, delay in consulting on an alternative placement between September 2018 and March 2019;, failure to carry out a parent care needs assessment on PA and; failure properly to handle his complaints.

History/Chronology

11. As indicated, it is necessary to set out, in outline at least, the chronology in this matter since the issue of the EHCP on 14 May 2020. Given what was properly described as the "evolving" situation right up until the beginning of the hearing, I granted permission to the parties to rely on their most recent witness statements and exhibits (the second and third statements of Joanne Willis and the third statement from PA). The defendant applied for an extension of time to file detailed grounds of defence and in fact filed them later than the extension it had sought, but I granted that application, too. As I indicated

when I allowed those applications, the court is concerned with the up-to-date position, not the historic one and the recent information is important.

12. The First-Tier Tribunal Special Educational Needs and Disability decision was promulgated on 28 February 2020. Following the issue of the EHCP on 14 May 2020, the defendant provided copies of that document to the school and the relevant NHS bodies which it considered would ordinarily deliver the therapeutic provision contained in the plan in the defendant's area. Miss Willis indicates that the usual practice of the defendant would be that if the school or NHS did not consider that they could make the provision specified they would inform the defendant.

13. At the time the EHCP was issued, the claimant was not attending school in consequence of the national lockdown in place in response to the Covid-19 pandemic. He returned to school in September 2020. By letter dated 30 October 2020, the claimant's solicitors sent a pre-action protocol letter to the defendant contending that some of the speech and language training, occupational therapy and physiotherapy specified in the plan was not being provided. In consequence of this on 2 November 2020 the defendant's Integrated Children's Disability Service contacted the head teacher at the school to discuss the provision and on 9 November provided a template to identify any missing provision which the school returned on 11 November 2020.

14. On 31 October 2020 the second national lockdown, lasting four weeks, was announced and the claimant again was shielding at home.

15. The school indicated to the defendant that the sensory-integration trained occupational therapist whose services the school had been using would have to be engaged privately and the defendant asked the school to secure costings.

16. In its letter dated 13 November 2020, replying to the pre-action protocol letter, the defendant accepted that not all of the provision was yet in place, which it said had not been possible, both because of the pandemic restrictions and because the claimant had not been

in school. The defendant said that efforts were being made to implement all the provision set out in the plan, subject to the ongoing local and national restrictions. In the letter, the defendant set out that it was their view that "reasonable endeavours have been used since BA's EHCP was finalised to implement the SEN provision set out therein."

17. In the skeleton argument on behalf the defendant, it is set out what steps the defendant says it has taken since that letter to commission or put in place the provision required by the plan. It is submitted on behalf of the defendant that it has put in place arrangements with the school, the NHS and private providers under which all of the provision specified in Section F has been commissioned. Further, that "neither the school or the commissioned providers nor the NHS have indicated that they cannot (or are not) providing what they have been commissioned to provide."

18. The defendant has made efforts to implement the plan fully since then and up to the date of the hearing. The claimant relied upon provision said to be outstanding as identified in the 19 specific points at paragraph 2 of the skeleton argument filed on his behalf. These items are addressed on behalf of the defendant at paragraph 62 of its skeleton argument. The details of each party's case are contained in the witness evidence of Miss Willis and the exhibits thereto and in the evidence of PA. As indicated above, this is an evolving situation and updates as to the position with regard to provision were apparently still forthcoming from the defendant even after the end of the business day on 11 May 2021, the day before the hearing. There is a helpful document exhibited to Miss Willis' second statement (JW 41A) in the form of a schedule with each party's contentions set out clearly, although there have been developments even since then.

19. In terms of the legal proceedings, on 25 November 2020 the defendant emailed the claimant's then solicitor to enquire whether there was "anything that could assist in resolving the matter" without a claim for judicial review being issued. In response, the claimant's solicitors asked for the outstanding provision to be implemented "immediately or at any event by 4 December 2020". In response, the defendant indicated that it was "committed to ensuring that all the provision appropriate to [BA]'s needs as set out in

[BA]'s EHCP, will be in place at the earliest opportunity, in accordance with our legal obligations". In response to a question from the claimant's solicitor as to when the provision would be in place, the defendant replied on 8 December 2020, saying that it could not provide a specific date and that if the NHS could not offer the provision, private therapists would be commissioned. This was following a letter of 4 December 2020, in which the defendant had said that it considered that it would be detrimental to BA to change the professionals that he had already established a working relationship with and they were "concerned" about whether or not private professionals could work on an individual face-to-face basis when NHS therapists were not able to. Despite this, the defendant also confirmed that they had commissioned sensory occupational therapy from a private company and agreed funding.

20. The application for permission to claim judicial review was issued on 16 December 2020 and the claimant's solicitors indicated that they had contacted private providers who could provide the physiotherapy and occupational therapy from January 2021 and suggesting possible speech and language providers. The defendant contacted the proposed providers on 18 December 2020 and filed submissions in response to the application for interim relief on 27 December 2020, saying it had now commissioned occupational therapy and physiotherapy to begin in January 2021 and was waiting to hear from speech and language providers.

21. The third national lockdown commenced on 6 January 2021 and the claimant remained at home. A private physiotherapy provider indicated it was unable to fulfil the commission in light of a physiotherapist having been diagnosed with long Covid. An alternative provider was contacted on 15 January 2021 by the defendant. Save with regards to the oral taster programme, by 3 February 2021 the defendant had commissioned the speech and language training.

22. The claimant returned to school on 22 February 2021. On 25 February, the claimant indicated, enclosing a witness statement from the PA (page 202 in the bundle) that there were a large number of specific items of provision in the plan, which were still not being

provided at that time. Permission to apply for judicial review was granted on 19 March and the defendant filed detailed grounds of defence on 21 April.

23. The defendant invited the claimant to withdraw the claim on the basis that it had now made arrangements to secure all of the therapeutic provision at issue and that there was no "gap" in provision. The defendant contended that all that remained to be done was to facilitate a further discussion between the private therapists and the NHS to ensure appropriate joined up working and that work was not being duplicated.

24. That meeting was scheduled very recently (27 April 2021) following which the providers' (school, NHS, Trent Valley Physiotherapy, Children's Sensory Therapy, and Talking2SALT), areas of responsibility in the EHCP were identified. Exhibit JW 45, to Miss Willis' second statement dated as recently as 5 May 2021 shows the detail of each provider's role shown by colour highlighting.

25. Miss Willis' third statement dated 11 May 2021 following sight of PA's third statement dated 10th May 2021, exhibited some further updating information from the providers to include the plans and programmes going forward.

26. It is the defendant's case that this shows that all the provision is now in place whereas the claimant identifies that there are still specific outstanding items which are not in place.

Law

27. There is no real dispute between the parties about the legal principles applicable here. Section 42 imposes a duty on local authorities to secure the special educational provision specified in an EHCP created by the Children and Families Act 2014. It is an absolute and non-delegable duty (see *R (on the application of N)* v *North Tyneside Borough Council* [2010] EWCA Civ 135). There is no "best endeavours" defence. It is right to note that between 1 May 2020 and 31 July 2020, following emergency Coronavirus legislation, there was only a reasonable endeavours duty on the defendant to discharge those obligations. However, that does not affect my decision at the present time. As Sedley LJ observed in

the *North Tyneside* case,

> "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."

Submissions

28. I am grateful to both counsel for their helpful written skeletons and oral submissions.

29. The first question for me to answer is whether or not as of now, the local authority has actually "secured" the provision set out in the claimant's EHCP. On behalf of the defendant, it is submitted that the answer is "yes", because all the features have been commissioned and are being implemented and there is a program of action going forward identified by the therapists. The defendant further submits that in accordance with general statutory interpretation, it has to comply within a "reasonable time" not "immediately" or "forthwith". Further, that I have to consider the actions of the local authority in context and in this case, that includes the fact of the pandemic. It contends that I have to bear in mind practical realities such as the claimant not being in school, the inability because of the pandemic of practitioners to operate face-to-face, and the fact that the defendant cannot compel NHS or other providers to supply the services. Moreover, there has to be liaison and interaction with the school and logistical difficulties arise because of the school's own timetable.

30. The defendant further submits that if in some particular the provision has not been secured, there is nonetheless no need for a mandatory order in circumstances where it is clear that the defendant is and always has been seeking to secure that provision. It is not analogous to some of those cases where a local authority is unwilling to make the provision. The

defendant argues that in this case it can be trusted to continue to work to ensure that all the provision is in place.

31. Insofar as there has been any breach in the past, the defendant urges me not to review those past matters because that is a purely academic exercise and the court will not determine academic claims save in very exceptional circumstances (see *Rehoune* v *London Borough of Islington* [2019] EWCA Civ 2142), which do not apply here. I am urged therefore to focus on issues as they are now and that considering what the defendant has achieved at this point, I should dismiss the claim or take no action.

32. On behalf of the claimant, it is submitted that there is a breach of duty here because BA is still not getting the programmes/provision he needs. I am reminded that the provision in Section F of the EHCP sets out what is necessary. The defendant's contention where matters are “in train" it has fulfilled its obligation is therefore untenable. The claimant refers to a series of promises of dates for provision which have not been met and matters which are still not in place, in particular by reference to JW41A, for example, that the speech and language training is only due to commence on 13th May.

33. Given that the local authority has five weeks from the date of the tribunal decision to the issue of the plan, the claimant argues that this is the preparation period for the implementation of the plan. The plan was issued on 14 May 2020, which is now almost exactly a year ago, and yet therapists were only properly in place by the end of March, with evidence of programmes still being compiled in the last few days. If, contrary to his argument that the statutory scheme builds in time the purpose of which is to put the provision in place, the claimant submits that even on the defendant's argument, a “reasonable” time cannot be one year.

34. The claimant argues, therefore, that I should grant the relief sought, which is a declaration that the defendant has been and is in breach of its duty and a mandatory order, requiring it to comply with its statutory duty.

Analysis/conclusion

35. By reference to JW41A in a number of specific respects I find that the defendant has not implemented the provision it is required to do by Section F of the EHCP. Some elements cannot be described as having been "secured". There has not been a determination of a communication system for BA. The training of all staff by the speech and language therapist has not yet happened. The sensory occupational therapy programme was supplied late on 11 May and while there have apparently been demonstrations and sessions with the occupational therapist, the staff have not yet been trained. BA has no appropriate chair (the chair provided at the beginning of 2020 is non-functioning) and BA's postural seating needs are therefore not being managed. Some further assessment is planned for 17 May 2021. The lack of the chair has caused delay to the 24-hour postural care exercise program. There are outstanding issues in relation to the devising of the rebound programme, the gait training and the physiotherapy training, in particular in relation to the stretching routine. There is a conflict in the evidence as to whether or not BA is having the requisite amount of time in his standing frame, but I do not need to make a decision on that point. There are a number of items which I have identified which are not being provided and the defendant is therefore in breach as at the date of the hearing.

36. I do not consider that I need to decide whether there has been any past breach, but it is apparent that there has in light of the history/chronology. I only make the declaration, however in relation to the current breach(es).

37. I find that even if the defendant is entitled to a reasonable time to implement the provision and even in the context of a pandemic, one year is not a reasonable period of time. I agree with the claimant's contention that the five week period built into the statutory scheme is to allow preparation for implementation, and that the bulk of the programme at least should have been in place within that five week period. Moreover, the date of the tribunal hearing was in fact February and the plan was issued in May. I accept that there may have been some matters which may have taken a little longer in the context of BA not being in school and the coronavirus restrictions. I accept that at the time of the first lockdown, everyone

was in a novel situation. The impact of the pandemic on the defendant's ability to implement this plan was in fact, as I find on the evidence, quite limited. It meant that the claimant was not in school until September 2020, it prevented any use of the hydro pool (about which the claimant takes no point anyway) and it meant that a replacement physiotherapist had to be found in January 2021.

38. I accept and I find that the defendant has made real strides in recent weeks to put the plan/programmes into place. I further accept that the outstanding elements are now limited and/or "in train". However, I consider it is necessary to make the mandatory order given the history of this matter. To that extent, I do take into account past events and the excessive delay which I find there has been. As set out at paragraph 8 of the skeleton argument on behalf of the claimant, when it issued the plan on 14 May 2020, the defendant knew that it contained significant additional therapy, not previously specified in BA's EHCP and not previously provided to him. In particular, sensory occupational therapy input, direct speech and language therapy and extensive and detailed physiotherapy. Further, it required plans to be devised by the therapists who were then to train the staff working with the claimant to carry those plans out daily or weekly, and to review the plans, periodically. The lack of implementation of the provision was complained of to the defendant in October, but the initial response was that the defendant was essentially doing all it could to implement the EHCP. The issuing of the claim in these proceedings, the grant of permission and then the impending hearing date did all, as I find encourage the defendant to take proactive and constructive steps to secure provision, including commissioning private therapy where appropriate. It is in BA's interests that that impetus is not lost and for that reasons, I consider that this is a case in which there should be a mandatory order, but as in the dicta of Sedley LJ. I think it is appropriate for there to be a brief period of deferral. The defendant is therefore required to implement the EHCP in full (save in one regard) by four weeks from 12th May 2021. The one outstanding matter is in relation to the claimant's chair. A part is required in order for it to function properly and safely, and that needs to come from the manufacturer. In the circumstances that part of the provision must be completed by six weeks, although if there is a good reason/reasons, the defendant can of course make an

application in writing to the court and I have indicated that I would reserve any such application to myself.

39. In the circumstances, the claim succeeds, and the defendant should pay the claimant's costs to be the subject of detailed assessment if not agreed.