

[2022] EWHC 2830 (Admin)
IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING AT CARDIFF

Case No. CO/2569/2022

Courtroom No. 15

2 Redcliff Street
Bristol
BS1 6GR

Monday, 10th October 2022

Before:
THE HONOURABLE MR JUSTICE CHAMBERLAIN

B E T W E E N:

THE KING ON THE APPLICATION OF DA, BY HIS LITIGATION FRIEND AND
FATHER, MA

and

BRISTOL CITY COUNCIL

MA (LITIGATION FRIEND) appeared In Person on behalf of the Claimant
MR D STEWART appeared on behalf of the Defendant

JUDGMENT
(Approved)

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MR JUSTICE CHAMBERLAIN:

1. Under an order made by Poole J on 19 July 2022, the claimant is referred to as “DA” and his father, and litigation friend as “MA”. No one may identify the claimant or his litigation friend directly or indirectly in any report of these proceedings. This is DA’s renewed application for permission to apply for judicial review, permission having been refused on the papers by HHJ Keyser KC on 15 August 2022.
2. DA is a 15-year-old child with special educational needs. He has severe autism and delayed development in receptive and expressive language, social contact, interactive play, attention and self-care. DA has been at several special schools over the years. In September 2018, he was placed at Venturers’ Academy, a special school which specialises in the education of students with autism spectrum condition, “ASC”. DA’s parents were not satisfied with the provision there, and during 2020 and 2021, Bristol City Council made enquiries with a number of other schools to see if they could meet DA’s needs. The responses were negative; in one case, because the school had no places, and in two others, because they could not meet DA’s needs.
3. On 2 August 2021, DA’s parents appealed to the First-Tier Tribunal (Special Educational Needs and Disability), “the FTT”, against the provisions specified in DA’s education and health and care plan, “EHCP”. There was a hearing on 1 April 2022. The FTT issued its decision on 15 June 2022, allowing the parents’ appeal in part, and ordering the Council to issue a revised EHCP. There was some delay before this was done because of a failure to send a key document to the Council but an amended EHCP was issued on 7 July 2022, and when MA pointed out some errors in it, a corrected version with no material alterations to the special educational provision was issued on 14 July 2022. In the meantime, on 28 June, MA had applied for permission to appeal the FTT’s decision, or a review, on 12 grounds. On 14 July, this was refused on all grounds bar one. As to occupational therapy, however, the matter was remitted to the FTT to consider further, and issue a new decision. It did so on 6 September 2022, revising the provision for occupational therapy. The Council amended the EHCP in accordance with this decision on 12 September.
4. MA sent a letter before action on 8 July challenging the holiday provision in the EHCP and asking for a response within 14 days. He sent a further letter before action on 11 July challenging the term-time provision in the EHCP. On 15 July, he issued this claim, challenging the Council’s failure to discharge its duty under section 42(2) of the Children and Families Act 2014 to secure special educational provision for DA. Three forms of relief were sought:
 - 1) A mandatory order requiring the Council to secure that provision immediately and during term time.
 - 2) A declaration that any flexibility written into the EHCP is to meet the needs of the child being home-schooled and for the parents to determine, in line with the defendant’s undertaking given before the FTT on 1 April.
 - 3) A declaration that the defendant is in breach of its duty.
5. The claimant issued an application for urgent consideration seeking interim relief, abridgment of time and consideration of permission within 24 hours. These were refused by the immediate judge, Poole J, on 19 July 2022. Permission was considered on the papers and refused by HHJ Keyser KC on 15 August 2022. He noted that the Council had signed off applied behaviour analysis, “ABA”, and speech and language therapy, “SALT”, to start from 25 July 2022, and that the position in relation to OT would have to await reconsideration by the First Tier Tribunal. Judge Keyser said this:

“In these circumstances, the proceedings are redundant as there is no realistic prospect of a mandatory order being made against the defendant. Perhaps recognition of this fact lies behind the application dated 20 July 2022 immediately after two orders by Poole J for clarification of the interpretation of section 42(2) of the Children and Families Act 2014. The application appears designed to overcome the futility of the mandatory relief sought and is refused on the grounds that it is academic and that no genuine issue of statutory interpretation has been identified, far less one that has a practical bearing on any matter of substance in this case”.

6. Section 42(2) of the 2014 Act imposes a duty on local authorities to secure the provision specified in an EHCP. The duty is absolute and non-delegable. There is no “best endeavours” defence: see *R (on the Application of N) v North Tyneside Borough Council* [2010] EWCA Civ 135, [2010] ELR 312, at paragraph 17. In *R (on the application of BA) v Nottinghamshire County Council* [2021] EWHC 1348 (Admin), at paragraph 27, it was argued that given that the Local Authority has five weeks from the FTT’s decision to issue the EHCP, this is the preparation period for the implementation of the plan. HHJ Coe KC did not say whether she accepted that submission. At paragraph 37, she said this: “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”. As can be seen, the delays, in that case, were longer than those here.
7. MA has filed a helpful skeleton argument dated 3 October 2022 and has made submissions in person before me. He has explained that the main educational provision specified in the new EHCP, as issued on 7 July and amended on 14 July had not been secured at the time when proceedings were issued on 15 July, nor when permission was refused on the papers on 15 August, nor today. If the position had been as it was before Poole J, or before HHJ Keyser, I would have considerable sympathy with the Council’s position. Certainly, by the time matters were considered by Poole J, there had been only a very short period of time which had elapsed since the date of the amended EHCP. The position today is, however, different. MA has explained to me in his oral submissions what happened since the issue of the amended EHCP on 14 July. At that point, DA was receiving six hours of ABA tutoring per week on one day per week. That had been the position for some time. Initially, MA had been paying for that ABA tutoring himself. Indeed, he continued to pay for ABA tutoring on two days per week until he had to reduce that to one day per week because his finances would not permit any more than that. When ABA tutoring was included in the amended EHCP issued in its amended form on 14 July, the Local Authority made arrangements to provide some ABA tutoring. Mr Darren Stewart for the Local Authority has told me that an email was received from the Council’s contractor on 27 July to say that it would take some six weeks to fix up an ABA tutor. I interpolate here that the new EHCP provides for 30 hours of ABA tutoring per week; that is to say on five days per week.
8. Despite saying that it would initially take six weeks to fix up an ABA tutor, that tutor has not yet been provided. The first person who had been hired to deliver the tutoring withdrew, and a second therapist who had been identified had to withdraw because he or she was allergic to cats, and the family has a cat. It is now 10 October. If DA had been in school, his education would have started by this point; indeed, he would have received a significant amount of education since the start of the new term. As it is, he has not received any tutoring from the ABA tutor despite the provision which is made in the EHCP. Mr Stewart was not able to explain to me at this permission hearing, in detail, why that is.

9. The position before me as permission judge is as follows: on the one hand, it is clear that the claim, when it was issued, was seeking to secure compliance with the EHCP over a shorter timescale than perhaps was reasonable. The claim, after all, was issued only one day after the amended EHCP had been produced. Three months on, however, given that the authorities indicate that the duty to secure the provision in the plan is an absolute and non-delegable one, it does seem to me to be arguable that that duty is not currently being discharged.
10. It may be that the Local Authority has an answer to the claim. If so, that answer has not been deployed before me today. It would have been helpful if the Local Authority had sent someone able to give instructions to Mr Stewart during the course of today's hearing but they decided not to do so. In the circumstances, it seems to me that the correct disposal is to grant permission to apply for judicial review and to give directions for an expedited substantive hearing to determine this claim. I very much hope that it will not be necessary for that hearing to take place. If the provision which is set out in the plan is delivered by the time that hearing takes place, then it ought not to be necessary for the hearing to go ahead. If, on the other hand, it has not, then it will be necessary for this Court to consider whether to grant substantive relief.

End of Judgment.

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