Neutral Citation Number: [2024] EWHC 3362 (Admin)

Case No:AC-2024-MAN-000345

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

Manchester Civil Justice Centre,
1 Bridge Street West,
Manchester M60 9DJ

Date: 25 November 2024
Date Handed Down 23 December 2024

Before :

KAREN RIDGE SITTING AS A DEPUTY HIGH COURT JUDGE

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Between :

The King on the application of JSH (by his father and litigation friend RRB)	**Claimant**
- and -	
WESTMORLAND AND FURNESS COUNCIL	**Defendant**

- -
- -

Ollie Persey (instructed by Helen Barker of Irwin Mitchell LLP **Claimant**
James Cornwell (instructed by Westmorland and Furness Council Legal Services **Defendant**

Hearing date: 20 November 2024

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APPROVED JUDGMENT

Deputy High Court Judge Karen Ridge:

1. This is a claim for judicial review in which the Claimant (by his father 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 (or "the Act" as I shall refer to it). Throughout this judgment I shall refer to the Claimant as "the Claimant" or "J" and I shall refer to the Defendant as "the Defendant" or "the Council".

2. At the outset I must thank both Counsel for their helpful written and oral submissions.

3. The Claimant seeks permission to apply for judicial review and the following substantive relief: a declaration that the Defendant has breached section 42 of the Act and a mandatory order that the Defendant must secure all SEP as stated within Section F of the Claimant's EHCP within five weeks of the date of this judgment.

4. The Council does not accept that it is in breach of its section 42 duty, and it resists the making of an order. Alternatively, if the court finds that there is a breach, the Defendant's position is that it is a technical breach or not a material breach and there should be no mandatory order.

Background

5. J is 17 years old, with a diagnosis of profound autism, profound communication delay, severe learning difficulties and profound sensory processing disorder. Due to those needs, J's functioning is significantly reduced compared to that of young people of his chronological age and he is reliant on adults to meet the majority of his needs. His developmental age has been informally described as that of a "young infant".

6. J was placed as a day pupil at a school which I shall refer to as "UGS" on a 38 week per annum basis in 2014. UGS is a special school, offering both day and residential placements. Whilst at UGS, J initially received constant 1:1 adult support and then (as he grew older and stronger), from Year 7 he received

constant 2:1 support. The Defendant's intention had been that J would remain at UGS until the end of Year 14 (i.e. when he would be 19).

7. An annual review of J's then current EHCP dated 3 March 2023 was held on 9 October 2023. UGS noted that J's support needs had increased from 2:1 to 4 or 5:1 when he was upset and suggested that, in future, he required constant 3:1 support and asked the Council to consider this. The summary of the meeting noted that the EHCP was still appropriate and could remain unchanged. The Council did not agree to the request for 3:1 support, because officers were concerned that J's increasingly challenging behaviour was an attempt to communicate distress at his situation. On 9 April 2024 the Council issued a decision to maintain J's EHCP unamended.

8. On 16 April 24 UGS emailed the Council giving notice of termination of J's placement at the school with effect from the end of the summer term 2024. The reasons cited were the ongoing difficulties in managing J and providing staffing within the setting, and their conclusion that "this was a natural transition point in terms of his education provision at UGS."

9. There then followed a Child in Need meeting in May 2024 at which the parents indicated that they did not wish J to be placed in a residential placement and they wanted him to remain within two hours' drive of their home. A mediation meeting followed between the parents and the Council. This was, in turn, followed by a meeting on 8 July 2024 to provide UGS with the opportunity to inform the parents of the reasons for their conclusion that they could no longer provide for J's needs. Those reasons were confirmed in a letter to the parents sent on 15 July 2024 – the reasons included, the level of adult support which they considered that J required, and also the lack of an appropriate peer group and the fact that in the 2024/5 academic year his classroom peers would be moving to other settings and there would not be a group of peers that J could be taught alongside due to their age and learning needs.

10. An emergency EHCP review meeting was convened on 11 July 2024. At that meeting J's teacher for seven years set out her views as to J's needs and it was agreed that the EHCP needed to be amended, and that the Council would consult

potential providers following updates to the EHCP. In the meantime, on the 12 July 2024 J's mother submitted an appeal to the First Tier Tribunal (Health, Education and Social Care Chamber) (Special Educational Needs and Disability) ("the FTT") in relation to the existing EHCP.

11. A draft amended EHCP was sent to J's parents on 16 August 2024. This identified J's current school until July 2024 and then a different proposed placement from September 2024. That proposed placement was "Agreed Post 16 learning environment providing appropriate curriculum". At that point the Council believed that J's educational provision was likely to be in the form of education otherwise than at school (EOTAS). Following a request (on 29 August 2024) from J's parents the finalised amended EHCP was issued on 1 October 2024.

12. Section F of the current EHCP lists a series of measures to meet the SEP:

13. A communications passport to be created by a Speech and Language Therapist ("SLT");

14. Weekly visits from an SLT;

15. A personalised communication programme;

16. The use of symbols and objects of reference to request items;

17. Periods of intense interaction;

18. For those delivering the Claimant's education to work closely with and follow the advice of an SLT and Educational Psychologist ("EP");

19. Termly visits and advice when required from an EP;

20. A play-based curriculum which includes (amongst other things) messy and sensory play, playing on the swing or parachute, the use of technology, a highly predictable and structured learning environment;

21. The Claimant will be assessed using the MAPP continuum of skill targets;

22. A high level of staff support to access the full range of activities including off-site activities;

23. The Claimant will be constantly supervised at all times and will have 2:1 staff support with consistency of staffing;

24. Structured social activities;

25. Opportunities to learn the skills needed to make choices; and

26. A safe area close to his classroom where the Claimant can retreat to self-calm.

27. The Council says that it has taken various steps to attempt to put in place educational provision for J since his placement at UGS ended in July 2024. Those steps are set out in the witness statement of Josie Burrell. The Council explored the option of forcing UGS to continue to provide education for J on a temporary basis. However, on speaking to the school it was accepted that there were significant difficulties in the school making temporary provision due to staffing issues and J's peers had moved on and it was felt that it would be unfair to introduce new temporary arrangements which would have to be changed again. Social care undertook local and national searches, and they did not identify any suitable, available residential placement.

28. The Council also considered EOTAS provision whilst in a supported living placement. This provision could however only commence once the Supported Living Home (SLH) was available. In early September the Council decided that it should provide J with EOTAS provision at home as a short-term measure whilst a search for a long-term placement continued. This option was communicated to the parents by letter dated 6 September 2024. It was rejected by the parents the same day as unviable due to J's father working from home. That rejection is entirely reasonable, and the Council makes no criticism of the parents - it is founded on sound reasons. J's father was recovering from medical treatment for a serious medical condition and was working at home having had reasonable adjustments made by his employer.

29. During the hearing the Council accepted that the parents had in fact told them that EOTAS at home provision was not possible at the meeting on the 8 July 2024. The Council's search continued and various possible alternatives for providing EOTAS were explored and discounted due to various difficulties.

30. The current position is that J has not had any educational provision since the beginning of the September term. The Council's plan for securing educational provision for J is that this will be provided by way of EOTAS delivered at his new SLH in Carlisle by CQC staff (CQC is a care agency). Work is being done to make the house suitable for J and the Council estimates that it will be complete by 2 December 2024, although a Safe Place Bed is not due to be delivered until 12 December 2024 which means that overnight accommodation will not be available until that date.

31. The parents' position is that the Council has not consulted them about their proposed EOTAS package. The Claimant's parents are clear that it is not possible to deliver an EOTAS package in the family home as the father works from home due to cancer treatment and the proposed provider lacks adequate training. Although the Claimant's parents are positive about a potential residential placement for the Claimant in Cumbria, the precise timescales for that placement are unconfirmed (the best estimate is December 2024, but it could take longer) and securing the Claimant's SEP is urgent due to the significant adverse impact upon the Claimant.

These proceedings

32. J's litigation friend approached solicitors on 24 May 2024 to provide advice in relation to this matter. The emergency EHCP review meeting and the mediation meeting of 29 June 2024 were thought to be appropriate vehicles to remedy the difficulties with SEP for J.

33. Once the termination letter from UGS was received by the Claimant's solicitors, Counsel's advice was sought, and a pre-action protocol letter was sent on 26 July 2024 because there was no SEP identified for September 2024. The response to that letter came on the 2 August 2024.

34. On the 19 August 2024 the claimant's solicitors asked for more details of the proposed bespoke package offered by the Council. A second pre-action protocol letter was sent on 29 August 2024 which asked for a response by 6 September. In its response, the Defendant stated that it was not possible for J to remain at UGS and therefore a placement search had been conducted in the local area which had been unsuccessful. The Council stated that it therefore planned to put in place a package of EOTAS provision in the home which would commence prior to 16 September 2024. That suggestion was rejected for good reasons - already set out. That proposal had in fact already been rejected by the parents at the meeting on the 8 July 2024.

35. Proceedings were filed on 30 September 2024 together with an application for urgent consideration. On the 2 October 2024 Robert Palmer KC sitting as a Deputy High Court Judge made an anonymity order and abridged time for service of the acknowledgement of service form to 10 October 2024 with time for a Reply by 14 October 2024.

36. The matter came before Richard Wright KC sitting as a Deputy High Court Judge on the papers who directed that the application for permission be adjourned to be listed in court as a rolled-up hearing. That hearing was listed before me last week on the 20 November 2024.

The Legal Framework

37. Provision for children and young persons with special educational needs ("SENs") in England is governed by Pt.3 of the Act 2014 (the Act), supplemented by the Special Educational Needs and Disability Regulations 2014. A young person is a person over compulsory school age but under 25 as defined in the Act. J is a young person for these purposes.

38. Where a young person, such as J, lacks capacity (within the meaning of the Mental Capacity Act 2005 – see s.80(5) the Act 2014), the young person's representative or their parent will stand in their place for the purposes of a number of the duties owed by a local authority.

39. Sections 26-44 of the Act makes provisions for the assessment of SEN, preparation of EHCPs and their reviews, with a right of appeal to the FTT included within section 51.

40. Section 42 of the Act provides, in material part, that:

> "**Duty to secure special educational provision and health care provision in accordance with EHC Plan**
>
> (1) This section applies where a local authority maintains an EHC plan for a … young person.
>
> (2) The local authority must secure the specified special educational provision for the … young person. …
>
> (5) Subsections (2) and (3) do not apply if … the young person has made suitable alternative arrangements.
>
> (6) "Specified", in relation to an EHC plan, means specified in the plan."

41. It is common ground that the duty is not simply a duty to use best endeavours *(R (N) v Tyneside Borough Council* [2010] EWCA Civ 135) and that the duty is an absolute one.

42. The High Court in *R (L) v Hampshire County Council* [2024] EWHC 1928 (Admin), the most recent judgment on section 42(2) the Act opines:

> "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 ("SENDR"), 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. 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.

44. Principles concerning the grant of a mandatory order were set out by the Supreme Court in *R (Imam) v Croydon London Borough Council* [2023] UKSC 45; [2023] 3 WLR 1178. The Court held that where a breach is established it is not for the court to modify or moderate the substance of that duty by routinely declining to grant relief to compel performance on the grounds of absence of sufficient resources. The Supreme Court further held that the court must exercise its discretion with principle and avoid arbitrariness and that the ordinary position following a breach is that a remedy should be granted. The Supreme Court cautioned that:

> "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."

45. The Supreme Court further endorsed the dicta in the Court of Appeal to the effect that:

> "… 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."

46. Finally, the Supreme Court set out five factors relevant to a consideration of the application of the duty, which can be summarised as follows:

> - The need for contingency planning in terms of allocation of resources to deal with unexpected calls for expenditure.
>
> -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.
>
> -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.
>
> -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.
>
> -The need not to cause unfairness to others by prioritising the Claimant.

47. I have also been referred to several High Court decisions in which mandatory orders have been made. The case of *R (L) v Hampshire County Council* [2024] EWHC 1928 (Admin), being the most recent judgment on section 42(2) CAFA 2014

Grounds of Challenge

48. Initially there were three grounds of challenge; ground 1 is an alleged failure to secure SEP and is the only ground pursued. The two other grounds have fallen away during these proceedings.

Claimant's Submissions

49. For the Claimant Mr Persey submitted that the Council was in breach of its statutory duty. He contends that the breach is clear because J has an EHCP and SEP has not been delivered for the entire school term. The impacts on J are severe, there has been an eight-fold increase in his self-injurious behaviour.

50. Mr Persey referred me to the construction of the word 'secure' in a housing case heard in the Court of Appeal. In *Elkundi v Birmingham City Council:* [2022] EWCA Civ 601 at para 77, the court held that the words 'shall secure accommodation in the Housing Act 1996 meant that the local authority must be responsible for ensuring that accommodation is available for occupation. He relies on the Court of Appeal confirming that the duty to secure accommodation, means that accommodation must be available for occupation; not that it will become available within a reasonable period of time. By extrapolation Mr Persey says that the duty in section 42 to secure SEP is similarly immediate, non-deferrable and unqualified. Mr Persey submits that the Council should have conceded that it was in breach of statutory duty and invites the court to deprecate the Council's reluctance to accept that breach.

51. As to relief, Mr Persey says that the Claimant is entitled to declaratory relief at the very least as to the breach of duty. Secondly, Mr Persey seeks a mandatory order to secure the SEP and suggests that a five-week period in which to secure it is in line with the provisions of securing amendments to EHCPs made following successful appeal to the FTT. Pragmatically it is accepted that there is little point in an order requiring SEP to be secured for the rest of the autumn term given that the term will come to an end in the next few weeks.

52. Mr Persey contends that there are very good reasons for a mandatory order borne of concern that the SEP will not in fact be secured at the Carlisle placement by December 2024. This is for two reasons: firstly, the Council's breach of section 42(2) in the autumn term (and its unreasonable position

maintaining that it is not in breach) and secondly, the lack of progress in securing SEP to commence in December 2024.

Defendant's Submissions

53. On behalf of the Council, Mr Cornwell submitted that the Council is already doing the only thing, in the present circumstances, that is realistically likely to secure SEP for J, albeit there will be a period of a few weeks more before SEP can be provided to him. J's SEP will be provided by way of EOTAS delivered at a new SLH that is currently being prepared for him and will become available for him within two weeks of the hearing.

54. Mr Cornwell contends that there is either no breach of the duty under section 42 in the very specific and unusual circumstances of this case, or, if there is a breach, it is a technical and unavoidable one which does not warrant the grant of permission or substantive relief. Mr Cornwell says that the allegation of breach should be assessed by reference to what the Council has actually done, and what else it could realistically have done, in the circumstances of the case. There are only a limited number of options by which SEP might have been, or might be, secured for J following UGS's termination of his placement there. None of those options are viable and/or could have proved capable of resulting in SEP being provided to J any faster than the approach which the Council is already undertaking.

55. Mr Cornwell says that the Council accepts that, since the start of the autumn term in September 2024, J has not been provided with the SEP specified in his 2023 EHCP or (since 1 October 2024) that specified in his amended EHCP. It is contended that there can be no alleged breach before the beginning of the autumn term as J was attending UGS until the end of the summer term 2024 (and so receiving the specified SEP) and, thereafter, there was the normal school holiday period.

56. Mr Cornwell submits that in the specific and highly unusual circumstances of this case, the Council has done, and is doing, everything that it could do to secure SEP for J and it is in the process of securing the delivery of the specified SEP for J as soon as is practicable in the circumstances. The Council is not

suggesting that it has merely used its best endeavours, rather it is already doing the only thing realistically likely in the present circumstances to secure SEP for J, albeit that SEP is not yet actually being delivered.

57. On behalf of the Defendant, it is contended that, either:

1) There has, in the very particular circumstances of this case, been no material breach of the duty under section 42(2) of the Act 2014 due to the impossibility of the Council actually doing anything that would better, or faster, to discharge that duty; or

2) Alternatively, if (contrary to the above submission) there is a breach of the section 42(2) of the Act 2014 duty, then it is a technical one and no purpose would be served by the Court granting permission. The "court will not beat the air in vain" (see Supperstone, Goudie and Walker, *Judicial Review* (7th ed., 2023), §18-78) – but that is precisely what this claim seeks.

58. Mr Cornwell distinguishes the *Hampshire* case on the basis that the Defendant in this case is actively implementing a bespoke solution and therefore the stance taken in not conceding breach of duty is a reasonable one.

59. As to the question of relief, Mr Cornwell submits that any relief should be refused. His primary submission is that there was no beach of duty, and that permission should be refused as the proceedings serve no purpose.

60. If the court does find a breach, Mr Cornwell submits that relief in public law proceedings is discretionary. If there is a breach of duty, this is a case where a mandatory order should not be made. The Council is already taking all the realistic steps it can, given the complexity of J's SEN and learning disabilities, to bring about the provision to him of SEP. To expect it to do so any faster than it already is doing would be requiring the impossible. This is one of those "intractable cases", referred to by Sedley LJ in *North Tyneside* at paragraph 17, where a mandatory order is not required.

Discussion

61. I can deal with the question of whether permission should be granted in short terms. Mr Cornwell has sought to persuade me that in the reported cases, all of the local authorities conceded that there had been a breach of statutory duty and that the circumstances which have arisen in this case are unusual and mean that there is nothing to be practically served by granting permission and allowing the claim to proceed.

62. However, I am reminded of the importance which the Court of Appeal attached to cases concerning the education of children or young people - speed must be of the essence. In this case J is not currently receiving the SEP set out within either the original EHCP or the amended EHCP. He has not had any provision since the beginning of the September 2024 term. It is clearly arguable that there has been a breach of statutory duty and therefore permission is granted.

63. I turn now to consider the substantive merits of the claim. Certain matters are not contentious; both parties agree that the duty to provide SEP is an absolute duty, it not a duty to use best endeavours to make such provision. This is a claimant who has had SEP since 2014 on a continuous basis in accordance with the EHCP in force at the relevant time. That provision was interrupted at least from the beginning of the September 2024 term when no arrangements were in place following termination of the place at the UGS.

64. I make no criticism of the Council's decision not to direct the school to make temporary provision whilst a solution was found. That decision was based on sound and cogent reasons; J's peers had moved on; the school had confirmed that it could not meet his requirements; and there had been a few incidents which had given rise to staffing issues. In short, a forced temporary period at UGS was not in J's best interests.

65. I agree with Mr Cornwell's contention that this case must be adjudicated on its own facts, and it is distinguishable on the facts from the *Hampshire* and *Nottinghamshire* cases.

66. The question of whether there was a breach of statutory duty appears to me to be a binary question: the question has there been a breach leads to either a yes or no answer. There can be no qualification in terms of that answer. Any such

qualification goes to the question of relief. As such I do not favour use of the terms 'material breach' or 'technical breach'.

67. The statutory duty requires SEP to be secured in accordance with the EHCP. In this case it is accepted that J has not had SEP in accordance with the EHCP since the commencement of the autumn term in September 2024. So much is indisputable.

68. There were submissions as to whether the duty to provide SEP is an immediate duty. The statute is silent as to any possible period of grace during which arrangements for SEP could be put in place after the finalisation or amendment of an EHCP. I note that the legislation provides for a five-week period after the FTT have issued its decision on appeal to enable a local authority to prepare its revised EHCP. Here the Council were aware of the need to revise the EHCP early, the review meeting was convened on 11 July 2024 and a draft amended EHCP was sent on 16 August 2024.

69. In this case, it is also material that the Council have been providing SEP for a number of years in accordance with EHCPs subject to annual review. They were well aware of the complex needs and potential difficulties in making provision for J's education. They were on notice on 16 April 2024 of the termination of the placement at UGS. The provision at UGS ended in August 2024, and nothing was in place at the beginning of September. The finalisation of the revised EHCP was delayed. However, there can be no doubt that the local authority knew what needed to be provided much earlier in the process.

70. The termination notice of 24 April 2024 is when matters crystallised and the Council knew that alternative provision had to be made. That should have been sufficient to galvanise the Council into action. Of course, it must be the case that, following termination, it was unlikely that the Council was going to make alternative provision available immediately. However, at the point of termination they still had arguably a period of four months before commencement of the September 2024 term to put in place alternative provision.

71. The fact that there has been no SEP since September 2024 means that the simple answer to the binary question is yes, there has been a breach of statutory duty. That breach began in September 2024, and it is continuing to date.

72. The breach could have been anticipated well before September 2024 when the options were narrowing due to an inability to find alternative provision and the breach was clear and obvious at the beginning of September 2024. It is unfortunate therefore that the Council did not accept the breach within these proceedings and focus on remedying it. Notwithstanding the failure, I do pause to observe that because this was listed as a rolled-up hearing, it is unlikely that the failure to acknowledge breach has caused any material delay in the resolution of the substantive matter which is the grant of relief.

73. Having found that there was a breach which is continuing, the starting point is the ordinary position that a remedy should be granted. I turn now to consider each of the five factors in *Iman*. The first factor is said to relate to the need for contingency planning in terms of allocation of resources to deal with unexpected calls for resources. There does not appear to be an issue with resourcing the necessary funding for any SEP provision for J. Whilst the costs are high, there is an agreement that they are divided as to two thirds social care and one third health and there has been no suggestion that unexpected calls for expenditure are a barrier to provision in this case.

74. The second factor is whether an authority which has been on notice of a problem in the past as to potential difficulties with the performance of its duty and has failed to take the opportunity to react to that in good time. In this case, difficulties with the current provision at UGS crystallised on the 24 April 2024. Up until that point the intention of the Defendant had been that J would remain at UGS until he was 19. On 24 April 2024 it would have been clear to the Council that it needed to make alternative provision at least from September 2024. That is a period of some four months in which to explore alternatives, make a decision and put the educational provision in place.

75. It was quickly realised that directing UGS to make temporary provision was not appropriate. Whilst there was some activity between May and July 2024 in

terms of a Child in Need meeting, mediation and a letter as to why UGS could not accommodate J, it was only on 11 July 2024 that an emergency EHCP review meeting was convened. In the meantime, on the 14 June 2024 the Council undertook framework searches for places and then searches in relation to 17 possible placements again on 27 August 2024. That is some time after the notice of termination.

76. Given that other institutions were likely to have been the first alternative option to be considered and given that the Council was aware of J's complex needs, the Council were slow off the mark in investigating these alternative options after the termination notice were served. It could and should have anticipated that it would need to commence an immediate and thorough search for alternatives at the point when it received the termination notice.

77. On behalf of the Claimant there are criticisms of the consultation work undertaken and concerns that the searches were not targeted and did not take into account the parents' views. It further appears that the parents were unaware as to the schools which were being consulted showing a failure in communication with the parents.

78. The draft amended EHCP was sent out on 16 August 2024 but that was some two weeks before the commencement of the new term. At that point there was a proposal for EOTAS in the family home supported by a bespoke package of learning curated by the schoolteacher most familiar with J's needs. The Council previously claimed that they only became aware of the parents' position of refusing to have EOTAS at home in early September 2024. However, at the hearing last week it was conceded that the parents had notified them that EOTAS in the family home was not feasible at the meeting of 8 July 2024. The Council should have been aware of this and discounted this option earlier in the process.

79. I appreciate that the consideration of alternatives may require a sequential search in terms of preferred options being considered and discounted first, before then moving on to consider other options. However, in circumstances where a young person's education is at stake, when that person has complex

needs and the local authority is on notice as to the current placement being terminated, it would have been preferable to have had in mind all options at the outset and to discount those which could be easily discounted.

80. Following the refusal of EOTAS at home, the Council explored the option of locating EOTAS in the local area on an interim basis, but this option was not pursued for a variety of reasons including incompatibility with existing Ofsted registration, difficulties with insurance cover or availability being limited. These appear to be issues which would have been readily apparent had an early exploratory enquiry been made much earlier on in the process. That is good contingency planning.

81. The final preferred option is the setting up of a rented SLH in Carlisle by CQC staff and with education provision to be provided within that home.

82. After considering the sequence of events and enquiries which have led to the solution of SLH it is evident that the local authority was slow to react to the difficulties in making alternative suitable provision for this young person with complex needs. Given that it was on notice on the 24 April 2024 as to the need to make alternative provision, I have concluded that the Council did not act with all due expedition.

83. The third factor in *Iman* is the impact of the lack of provision on J and his needs. J has complex needs; the type of specialist provision is set out clearly in the EHCP. The need for him to have structure and routine is high on the list of priorities, J enjoys the predictability the school day brings. The EHCP refers to the need for regular routine and quiet reassurance and praise. The first witness statement of J's father sets out the effects that the change of routine has had on J. He knows something is different and he is more anxious. The amount of self-injurious behaviour has increased around eight-fold since he finished school and there are about two incidents per week. At school it was quiet which he likes. Outside the family home it is noisy, and this upsets him. The carers only come in at night so that he sees other people and he misses interaction with other adults.

84. The impact of the breach of duty is significant in this case and the needs of this claimant are pressing. These factors weigh heavily in favour of the grant of mandatory relief.

85. With regards to the fourth factor, it is apparent that the Council are taking steps to remedy the situation. The house in Carlisle has been located and is having alterations and it is anticipated that it will be ready within the next two weeks during the daytime and once the specialist bed has arrived a week later, it will be available for overnight as well.

86. The fifth factor is the need not to cause unfairness to others by prioritising the claimant but there has been no suggestion of such unfairness in this case.

87. The Claimant's parents have expressed their confidence that the Carlisle property is progressing but are concerned that nothing is in place for J's proposed EOTAS placement following his move to the property. There remain questions about the details and staffing of that package and matters still to be resolved and finalised. There is no evidence before the court as to contracts being signed.

88. The starting point is that a mandatory order should be granted. In this case there are no cogent reasons not to grant such an order. This is not an intractable case where provision is not possible. The Council claims that the relief will be provided in the next two to three weeks in any event and they may ask what purpose such an order would serve. But there remain several final matters to be resolved.

89. It is now some seven months since notice of termination was given and whilst alternative provision may appear to be within touching distance, there are sufficient doubts to require an order to provide certainty that the breach will be remedied in a short timeframe. The impetus which a mandatory order will provide is necessary in this case where there is a vulnerable claimant suffering profound consequences of the absence of provision since the beginning of the September 2024 term.

90. In terms of the length of any mandatory order, the Claimant has suggested a 5-week period. That is the period which the legislation provides for in circumstances where the FTT has issued its decision, and a local authority has to amend the EHCP. The Council says that it will have made full provision in December 2024 which would be within that timeframe. I therefore consider that a mandatory order for 5 weeks is appropriate.

91. Having regard to all matters, I have concluded that it is appropriate to grant the following relief:

(1) A declaration that the Defendant has been in breach of its statutory duty from the commencement of term in September 2024 and that breach is continuing to the present day

(2) A mandatory order requiring the Defendant to provide the Claimant with the SEP set out in the current EHCP; and by no later than 5 weeks from today.

92. That is my judgment.