

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

Case No. CO/4827/2022

NCN: [2023] EWHC 961 (Admin)

Bristol Civil Justice Centre
2 Redcliff Street
Bristol
BS1 6GR

Thursday, 2nd March 2023

Before:
THE HONOURABLE MRS JUSTICE STEYN DBE

B E T W E E N:

THE KING
on the application of RJ (by his litigation friend and mother, MK)

Claimant

and

DEVON COUNTY COUNCIL

Defendant

MR D GARDNER appeared on behalf of the Claimant
MS T JONES appeared on behalf of the Defendant

JUDGMENT
(Approved)

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MRS JUSTICE STEYN DBE:

Introduction

1. This is a claim for judicial review in which the claimant alleges that Devon County Council is failing to provide the claimant with suitable education in breach of its duty under section 19 of the Education Act 1992 ('the 1996 Act'), and is failing to secure the special educational provision for him required by his Education, Health and Care plan dated 13 October 2022 ('the EHCP'), in breach of its duty under section 42 of the Children and Families Act 2014 ('the 2014 Act').
2. By order made on 18 January 2023, HHJ Lambert ordered that pursuant to CPR 39.24, the identity of the claimant and his mother should not be disclosed. He declined to grant interim relief on the basis that the balance of convenience or, at least, a risk of injustice, lay in maintaining the status quo in circumstances where he was concerned that, in the circumstances, the claimant was seeking too much too soon.
3. Permission to apply for judicial review was granted, on the papers, by HHJ Keyser KC, sitting as a judge of the High Court on 27 January 2023. He also granted expedition. The three grounds that the claimant pursued and on which expedition was granted are:
 - a. the defendant has unlawfully failed to provide RJ with a suitable education as required by section 19 of the Education Act 1996;
 - b. the defendant has unlawfully failed to secure the educational provision required by the EHCP of 13 October 2022, contrary to duties under the Children and Families Act 2014;
 - c. the defendant has unlawfully failed to adequately consider the welfare of RJ, as a child and will treat his best interests as a primary consideration.

The agreement reached and scope of the remaining issue

4. The parties have, this morning, reached very substantial agreement as to the order that I am asked to make:
 - a. The preambles to the draft order include a preamble that the defendant considers that it used its best endeavours to make suitable educational provision available to the claimant but accepts, nonetheless, that it is in breach of its statutory duties under section 19 of the Education Act 1996 and section 42 of the Children and Families Act 2014.
 - b. The parties have agreed that the application for judicial review is allowed.
 - c. They have also agreed that it is declared that the defendant is in breach of its statutory duties under section 19 of the 1996 Act and section 42 of the 2014 Act.
 - d. In terms of mandatory orders, the parties have also agreed that the defendant shall, within 14 days, arrange for a suitably qualified and experienced occupational therapist and speech and language therapist to provide support for the claimant as required in the claimant's education, health and care plan.
5. In relation to paragraph four of the draft order, this is agreed, save for subparagraph (a). It reads:

“Pending the claimant moving to any suitable specialist placement, including but not necessarily limited to any transition period, and within 14 days of this order, the defendant shall arrange suitable education which complies with its duties under section 19 of the Education Act 1996 and section 42 of the Children and Families Act 2014, which shall include but not be limited to: (a) placement at Tubers Academy for the claimant, pending a move to any specialist educational placement; (b) tuition at home by a suitably qualified tutor”.

6. Paragraph (a), the placement of the claimant at Tubers Academy, pending a move to any specialist educational placement, is not agreed between the parties. The claimant seeks a mandatory order in those terms, which is opposed by the Local Authority.

The facts

7. Before I give my conclusions in relation to the mandatory order sought, it is, perhaps, helpful explain the factual background.
8. The claimant is an 11-year-old child. His litigation friend is his mother. He has a diagnosis of autistic spectrum disorder and associated anxiety, hypermobility, dyspraxia and sensory processing difficulties. He has had an EHCP since he was five years old, his first one having been issued by Bath and North East Somerset Council. The family moved to Devon in 2017 and responsibility has fallen to the defendant since then for maintaining his EHCP.
9. Until November 2021, the defendant arranged for the claimant to attend a mainstream school, first an infant school and then a junior school. His attendance at the junior school declined, and he has not attended on a consistent basis since April 2019.
10. From 2019, as his junior school could not secure his attendance, they made arrangements for him to attend Tubers Academy, which is centred around professional video production and digital media skills, for two days a week, and they also arranged some other activities such as dog agility lessons, a science club, a farm school and swimming.
11. In response to an expression of concern by the claimant’s junior school that they could not support the claimant and considered his needs would be better met by specialist provision, the defendant began a review of the claimant’s EHCP. Following the review and the production of draft EHCPs, a final version of the EHCP was produced on 26 October 2021. In the final EHCP, the Local Authority listed a specialist setting for the claimant, namely, Marland Primary School. As the defendant had made arrangements for the claimant to attend Marland School, the funding for his previous junior school (and, with it, the funding for his attendance at Tubers Academy) ceased.
12. The claimant’s mother appealed against the EHCP to the Special Educational Needs and Disability Tribunal (‘the Tribunal’) on 23 December 2021. While the appeal was pending, the claimant did not attend Marland School. The appeal hearing took place on 16 September 2022. The claimant’s mother sought “Education Other Than at School” (‘EOTAS’), supported by Tubers Academy. The defendant’s position was that Marland School was suitable.

13. The Tribunal issued its decision on 21 September 2022. The Tribunal rejected the defendant's case that Marland School could meet the claimant's needs but the Tribunal also rejected the claimant's mother's contention that the claimant should be educated otherwise than at school. The Tribunal held that there was no robust evidence that the claimant should be educated via an EOTAS package, observing, "If anything, the Tribunal finds evidence that this would be limiting his education, not only academically but socially and emotionally".
14. There was, at the time, what the Tribunal described as a "complicating issue that the family had been served with an eviction notice and had no idea where in Devon they would be housed". In the event, the family have, in fact, remained in their home but it was in circumstances where a move was anticipated that the Tribunal stated:

"The Tribunal have no named school which they are able to name, and in the light of the imminent move of the family, the Tribunal name a type of setting, namely specialist, in order for appropriate schools to be identified and consulted with once the family are settled. There is a recommendation that the school be nurturing without the behavioural programme in use at Marland School and cater for primary children with ASD but with training and experience and working with children with anxiety-driven avoidant behaviours and extreme demand-avoidant behaviours".
15. The Tribunal accepted the evidence that "a significant amount of work needs to be put into any transition, but this could be undertaken by the correct setting". The Tribunal concluded that the claimant requires occupational therapy input as detailed within the occupational therapy report of Ms Ginty, dated 14 August 2022.
16. The Tribunal reminded the defendant "of its duty, in the meantime to provide [the claimant] with an education".
17. On 13 October 2022, the Local Authority issued a final (amended) EHCP, further to the decision of the Tribunal. The EHCP stated that the claimant would be educated at a specialist school, but at that stage a school had not yet been identified. In accordance with the Tribunal's decision, the EHCP provided for extensive input from an occupational therapist as well as more limited support from a speech and language therapist.
18. Following correspondence in October, on 28 November 2022, a letter before the claim was sent, challenging the failure of the Local Authority to provide education for the claimant and/or to secure the provision required in the EHCP.
19. On 12 December 2022, a response to the letter before the claim was sent which stated that the Local Authority had identified a specialist school for the claimant which he could begin attending on 20 February 2023. The identified school is called "On Track". The response also noted that alternative provision had been arranged with Inspire South West. The provision of occupational therapy and speech and language therapy support was not addressed in the letter.
20. The claimant's mother was formally notified on 13 December 2022 that a place was available for the claimant at On Track, Barnstaple. The letter stated that the school would be in touch to discuss starting arrangements and the EHCP would be amended to reflect the new school. Subsequently, the deputy head informed the claimant's mother that although On Track has two sites in Barnstaple, the claimant would be assigned to On Track in Bideford to enable the

opportunity for peer interactions as there were students of a similar age to him at the Bideford site.

21. A further letter before claim was sent on 15 December 2022. The defendant responded the following day that the placement at On Track was available and that it considered the provision from Inspire South West to be suitable education in the interim, and it was attempting to commission an occupational therapist. This claim was filed on 22 December 2022.
22. The claimant's first visit to On Track took place on 10 January 2023. He attended with his support worker from Inspire South West. The support worker was someone who, in the interim, has been working with the claimant for four hours per day on Mondays and Tuesdays each week, engaging in soft play and other activities to develop a relationship with him. The second visit to On Track with the Inspire South West support worker took place on 17 January 2023. A third visit was arranged to take place on 24 January 2023 but the claimant's mother's evidence is that he refused to attend on that occasion.
23. As of yesterday, an occupational therapist has been commissioned by the defendant Local Authority and the current position is that On Track is the specialist provision that the Local Authority has identified.

The application for a mandatory order

24. The parties agree that the test in determining whether or not to make a mandatory order in the terms sought by the claimant is whether or not a placement at Tubers Academy in the interim is the "sole justifiable response": see *R (on the application of Raja) v London Borough of Redbridge* [2020] EWHC 1456 (Admin).
25. Mr Gardner, counsel for the claimant, submits that I should make the mandatory order sought in circumstances where the EHCP includes a requirement for:

"...regular access to a social group facilitated by an adult with skills and expertise in working with children who have communication and interaction needs. The focus of this group should be upon developing RJ's social, communication and interaction skills whilst providing him with an opportunity to experience the enjoyable connecting and fun engagement with peers".
26. Mr Gardner contends that that clearly shows that such access to a social group is required. That is not an element that will be met by the tuition referred to in paragraph 4(b) of the draft order. There is evidence before the Court that Tubers Academy would be able to admit the claimant, and Mr Gardner submits that it would provide the social group that he requires, on an interim basis. The evidence shows that it is a place where the claimant is most comfortable and he refers to a report from Dr Copp that was before the Tribunal in which it was recommended that Tubers Academy should be reinstated. That is a report from 2021 in which it was suggested that it would be helpful to reinstate it to provide the best prospects for him transitioning.

27. Mr Gardner observes that the specialist placement will need to be considered by the occupational therapist now that they have been engaged, and, so, it is for that reason that paragraph four of the draft order refers to “any suitable specialist placement” as opposed to identifying a particular specialist placement. It is possible that the occupational therapist may disagree with the Local Authority’s assessment as to the suitability of On Track.
28. The Local Authority opposes the proposed placement, in the interim, at Tubers Academy. Ms Jones, counsel for the Local Authority, notes that the claimant’s mother sought precisely the setting that is now proposed as interim provision in the appeal before the Tribunal, and submits that she is now, in effect, seeking to appeal that decision in which the Tribunal did not agree that the claimant should be given education other than at school (EOTAS).
29. Ms Jones does not go so far as to say that the Tribunal rejected Tubers Academy as unsuitable, in the interim, but she says nor did they find that it was suitable and, so, the Tribunal’s judgment does not assist the claimant in submitting that it is suitable interim provision.
30. Ms Jones states that the specialist provision that the Local Authority has identified for the claimant, namely, “On Track”, have a speech and language therapist on site and her submission is that the speech and language therapist from On Track would be able to assist in meeting the need for social interaction which is required in the interim.
31. She submits that the duty would be complied with by a combination of the education which is to be provided through home tuition and the social support being provided by the speech and language therapist who is at On Track, organising such provision.
32. Ms Jones points out that the evidence shows that the claimant has been very reluctant to start in a new specialist setting, and part of his reluctance has been that he feels that it is the existence of the new setting that resulted in his placement at Tubers Academy, which he enjoyed attending, being taken away. Ms Jones submits that there is a real risk that reinstating his attendance at Tubers Academy, with a view to then taking it away a second time when the transition to the new specialist full-time provision is instituted, would increase his unwillingness to attend that placement. He would, again, see the new placement as being the institution which is responsible for his attendance at Tubers Academy being taken away.

Decision

33. I recognise the clear need for the claimant to be given education, including the social interactions referred to in the EHCP in the interim, pending his placement in a specialist school. The Tribunal was very clear as to the significant amount of work that would need to be put into any transition, and, so, the identification of a specialist school is really only the start of that process. It is clearly important that any such institution is able properly to put in place a transition programme.
34. I am not persuaded that making a mandatory order requiring the Local Authority to provide a placement at Tubers Academy in the interim is the sole justifiable response open to the Local Authority in the circumstances that I have described. In my judgment, the Local Authority’s concerns as to the real risk of increasing the claimant’s unwillingness to engage with and enter into a new specialist school if he were, in the interim, to attend Tubers Academy is a very real one which, in my view, is substantiated on the evidence that I have read. It is clear

that it was a factor in his unwillingness to attend Marland School, albeit I acknowledge that the Tribunal found that that placement could not meet his needs.

35. Although I appreciate what Mr Gardner says about what occurred on that occasion having been the result of the very abrupt way in which Tubers Academy was withdrawn from the claimant and that it could be undertaken in a different way in the context of a transition programme, nevertheless, it does seem to me, on the evidence, that there is a very real risk that if the claimant, on an interim basis, was to be given, essentially, the education otherwise than at school that his mother has sought, and to be put into the placement where he wishes to be, despite the fact that the Tribunal has concluded that he should be in a specialist school, it seems to me, there is a real risk that it would exacerbate the difficulties in persuading him to re-engage and begin attending the specialist placement that has been found.
36. I am not persuaded that the sole justifiable response is to order a placement at Tubers Academy. Ms Jones has informed me, on instructions, that On Track has the speech and language therapist. I accept, of course, that a speech and language therapist will not, themselves, be a group but, nevertheless, it is plain that a speech and language therapist at On Track where there are peers with whom the claimant could engage would be able to put in place a group in order to fulfil the requirements in that regard in the claimant's EHCP. Accordingly, I make the order sought in the terms of the draft order, save for the removal of subparagraph (a) within paragraph four.

End of Judgment.

Transcript of a recording by Ubiquis
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This judgment has been approved by the judge.