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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF APPLICATION BY 'JR143' (A MINOR) ACTING BY HIS MOTHER AND NEXT FRIEND FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE EDUCATION AUTHORITY

Sinead Kyle (instructed by Nicholas Quinn Solicitors) for the applicant
Denise Kiley (instructed by the Education Authority Solicitors) for the respondent
Laura McMahon (instructed by the BSO Directorate of Legal Services) for the Belfast Health and Social Care Trust as notice party

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SCOFFIELD J

Introduction

[1] This is an application for judicial review brought by an 11 year old boy, acting by his mother and next friend, who has autism and a range of delays in his development including in his communication, social interaction, sensory appreciation, play skills and awareness of danger. The challenge is to decisions and actions of the Education Authority (EA) in relation to the provision which has – or, the applicant would say, has not – been made for him under his statement of special educational needs (SEN) of July 2014.

[2] The proceedings were launched in February of this year. There have been significant developments in the provision made for the applicant since that time, as these proceedings were case-managed to full hearing. The severely reduced level of provision which applied during the periods of school closure as a result of the Covid-19 pandemic has ended. The key issues for the court, as the application presently stands, are the arrangements for the applicant's return to school and the arrangements for when he refuses to attend school. As appears from the judgment

below, I consider that the applicant ought to be granted relief in respect of the educational provision made for him in the recent past; but do not consider that it would be appropriate for the court to interfere with the EA's present or future planning for his return to school at this time.

[3] The applicant was represented by Ms Kyle, of counsel; and the respondent by Ms Kiley, of counsel; whilst Ms McMahon, of counsel, appeared for the Belfast HSC Trust as a notice party. I am grateful to each of them for their helpful written and oral submissions.

Factual Background

[4] I do not propose to set out in exhaustive detail the shifting factual picture which is described in depth in the many and detailed affidavits which have been filed in the course of these proceedings. As noted above, there have been significant shifts in the applicant's situation over time; and it fluctuates daily. There are also a number of factual disputes about a range of occurrences or interactions which I could not hope to resolve on the affidavit evidence and which, in the main at least, are not central to the core issues in the proceedings. However, I endeavour to describe some of the key milestones and developments below.

[5] The starting point is the applicant's statement of special educational needs dated 17 July 2014 (the 'Statement'). This Statement was completed when the applicant was 4 years old. At that stage, he had a diagnosis of Autistic Spectrum Disorder but was not considered to have traits of Pathological Demand Avoidance (PDA), which have been identified by his consultant psychiatrist more recently. Part 3 of the applicant's Statement states that his special educational needs should be met by the following:

> "1. *Placement in a setting where the curriculum is delivered at a pace and in a manner suitable for pupils of a similar academic ability and aptitude.*
>
> 2. *Access to a favourable staff/pupil ratio in order to facilitate a high level of additional supervision and support.*
>
> 3. *Daily specialist teaching from a teacher who is qualified and experienced in teaching children who have developmental difficulties including Autistic Spectrum Disorder.*
>
> 4. *An intensive and individualised education plan which addresses each of [the applicant's] areas of special educational need, outline in Part 3(1).*

> 5. *Access to therapeutic support (eg speech and language therapy) as may be recommended through the Senior Clinical Medical Officer.*
>
> 6. *Regular liaison between home and school so that approaches implemented at school can be optimally augmented at home.*
>
> *He will have access to the Northern Ireland Curriculum through programmes of study which are relevant to his age, ability, aptitude and attainment.*"

[6] In Part 4 of the Statement, the applicant was placed in a special school. As is apparent from the title of these proceedings, the applicant has been granted anonymity in light of his age. I will refer to the school in which he has been placed as School A.

[7] The affidavit evidence filed on behalf of the applicant focuses on the applicant's last two years in School A. It states that (when the proceedings commenced) the applicant had not attended school for a full school day since Primary 5; and that he continued to have extremely poor school attendance thereafter, with attendance of 91 days out of a possible 244 days in the academic year 2019/20 (Primary 6); and only 6 days' attendance out of a possible 160 days from 1 August 2020 to 20 January 2021 (Primary 7). The respondent's evidence is that the applicant's attendance was good during Primary 5 (some 86%); but it is accepted that the applicant had begun to refuse to attend school at the beginning of Primary 6.

[8] The evidence from the applicant's mother is that she was unable to provide him with any meaningful education whilst he was not attending school. The applicant's disorder and associated behaviour issues mean that it is extremely hard to get him to concentrate and focus on a task, in particular where he considers that demands are being made of him. The applicant's mother has averred that the most she has been able to do in terms of education while he is at home "*is to sit for a few minutes to count through 2ps and 1ps.*" Although the applicant's school provided him and his mother with access to an online learning application and a pack of materials, the applicant did not engage with these. The applicant's mother contends that the provision of these home learning resources clearly fell, and falls, far short of substantial compliance with the educational provision specified in his Statement. The applicant's mother's evidence is that, whilst at home, he was receiving no education at all for his SEN and that he had "*severely regressed*" throughout the period of lockdown. In essence, she contends that she has brought these proceedings on the applicant's behalf in desperation given that, for most of the applicant's last two years in school he has received little or no education, despite the clearly identified needs and specified SEN provision set out in his Statement.

[9] The applicant's mother further contends that the EA ought to have been aware of his continuing difficulties from his very poor attendance. She highlights that concerns were raised on 10 December 2019 by the applicant's social worker with his school. Concerns were also raised by the applicant's consultant psychiatrist on 26 February 2020 with the school, which confirmed that there was a need for "*a bespoke approach according to [the applicant's] needs.*" Further concerns were raised directly by the applicant's mother with the EA on 11 May 2020 and by the Special Educational Needs Advice Centre (SENAC) on 26 June 2020.

[10] On 29 July 2020, the applicant's social worker emailed the principal of his school requesting an urgent multi-disciplinary meeting as she was "*trying to think creatively of how to ensure that [the applicant's] educational needs are met.*" She appreciated that his school had made efforts to support him; but her concern was that his school attendance remained low despite efforts from the school and his mother to encourage him to attend. The respondent's evidence accepts that at this time the applicant's social worker "*expressed ongoing concern in relation to the applicant's lack of school attendance.*"

[11] The applicant was able to attend school in November 2020 but only for a very brief period of time, as he then became upset and had a 'meltdown' when he was given certain work to do. It was planned that he would attend again in December 2020, which he did, but he was unable to stay in the classroom for longer than 10 minutes following an incident where he became distressed. On that date, a plan was put in place to have him return to school after the Christmas break for 10 minutes in the classroom, followed by break time, and then a further 20 minutes in class. However, the applicant's mother was not able to get him to attend. It was at this point that pre-action correspondence was issued to the EA, on 22 January 2021, requesting that the EA provide the applicant with an appropriate school placement to meet his special educational needs (*i.e.* to place him in a different special school which his mother had identified) and, in the meantime, to provide special educational provision for him at home.

[12] The respondent's evidence has been provided in a range of affidavits, most of which are from Ms Joann Guler, a Senior Advisor in the Special Education Department of the EA. Another detailed affidavit has been provided from Ms Lara Maclean, an Education Welfare Officer (EWO) in the EA who had a range of contact and interactions with the applicant's mother to try to support her in having the applicant attend school.

[13] As noted above, there are a range of factually contentious issues in the evidence which has been filed by the parties. There is also much which is common case but with each party having a very different interpretation of events. Two examples will suffice. First, it is clear that throughout 2020 there were a range of contacts between the applicant's mother on the one hand and the school principal and/or Ms Maclean on the other. The respondent considers these to have been reasonable efforts to secure the applicant's attendance at school and to support his

mother in this. The applicant's mother is more inclined to the view that there were a range of meetings and emails but that nothing of substance was actually done to improve the applicant's position.

[14] Second, it is also clear that for much of that year the applicant's mother was pressing for the applicant to be placed at a different special school (School B). On her case, she considered that this was better suited to the applicant's needs and there was a chance that he would be more eager to attend there. The respondent does not agree that School B would be a better placement for the applicant and considers that School A is in a position to meet his needs. Nonetheless, it consulted School B and there was no capacity for it to take the applicant. Indeed, the EA responded in November 2020 indicating that all special schools were "*at capacity*", including School B. However, there is more than a hint in the respondent's evidence that the applicant's mother was not fully cooperative in seeking to secure his attendance at School A because she had decided she no longer wished to send him there and would prefer School B instead.

[15] The Trust was also made a notice party to the proceedings in light of its prior involvement with the applicant and his mother, whom the Trust has been supporting for some time now, and the element of the challenge relating to the provision of therapies. An affidavit has been filed by a Principal Senior Social Worker which describes the Trust's engagement with the family over a number of years. The affidavit also sets out a timeline of liaison with the applicant's school in relation to his educational provision.

[16] The EA's Autism Advisory and Intervention Service (AAIS) have also provided guidance, which included inviting the applicant to return to school gradually with no real demands being placed upon him. In addition, the EA's Education Welfare Service have sought to assist the applicant to return to school, principally through the involvement of Ms Maclean. So too have his mother and the school itself. However, the applicant's mother's evidence is that, at least at the date of the commencement of these proceedings, all attempts had been ineffective in having the applicant attend school at all or for any more than a very brief period. In those circumstances, and in light of her inability to provide any effective education to him at home, she was seeking home tuition for him from a qualified and experienced specialist teacher provided by the EA.

[17] The EA's response to the pre-action correspondence in this case denied that it was acting unlawfully in terms of the provision being made for the applicant. It also stated that School A remained an appropriate placement for him and that it supported him by, *inter alia*, the use of an individual education plan, communication passport, and a risk assessment, as well as additional support provided by the EA including through the AAIS. As to the request that the applicant be provided with exceptional teaching arrangements (ETA) at home, the response on behalf of the EA noted that ETA provision would only be for 4.5 hours of teaching *per* week but that, in any event, to avail of ETA "*it is necessary to have a recommendation from CAHMS*

Consultant/Team Lead or arising out of a Statutory Assessment." The applicant complains that this policy is unduly restrictive both in terms of eligibility for ETA and the limits of its provision. She argues for equivalent provision at home to that which is specified in the applicant's Statement, namely daily specialist teaching at home which will deliver the full curriculum.

[18] The evidence describes at some length the difficulties there have been in having the applicant attend at school and, when he does so, keeping him in school. These difficulties arise largely as a result of the applicant's autism and the fact that it includes traits of PDA, the main characteristic of which is avoidance of everyday demands and expectations to an extreme extent. As a result of this, the applicant has difficulties following instructions, doing what he is told and regulating his behaviour. He can frequently have 'meltdowns' which can in turn result in his hitting and kicking out at those around him.

[19] There have been some encouraging, although still tentative steps in more recent days towards the applicant's re-engagement with, and re-introduction into, his school. These follow upon the plan set in place after a significant multi-disciplinary meeting was held on 14 April 2021, leading to the establishment of a 'Core Group' with a view to encouraging the applicant back to school and planning for this and facilitating it. The Core Group first met on 29 April 2021, attended by a range of personnel from the Trust, including social workers and both a consultant psychiatrist and clinical psychologist, as well as staff from Children's Nursing Learning Disability (CNLD); and from the education authorities, including the relevant school principal, a senior educational psychologist, the relevant EWO (Ms Maclean), a senior adviser (Ms Guler), and a SEN link officer.

[20] At this first Core Group meeting an action plan was agreed for the applicant's reintegration into School A. A core element of this was the allocation of a key adult to the applicant, who would be his classroom assistant. Their relationship was initially built over video meetings, with a view to the applicant coming into school to do some activities with her. The initial steps went very successfully, with the applicant engaging well, and culminated in the applicant visiting school for around an hour on 14 May 2021, during which time he played with some of his classmates in the playground. He then agreed to attend again on 18 May and this too went very positively, with the applicant being introduced back into the classroom for some periods of time.

[21] In fact, the applicant requested to attend school every day in that week and began to attend successfully for increasing periods of time, carrying out preferred activities with his classroom assistant and attending class for short periods. The applicant's mother was involved in the process and supported by the school principal and the EWO. The applicant's clinical psychiatrist (Dr McKenna) was involved in the Core Group and considered the progress to be good and that the child-centred and flexible approach being used was appropriate. In light of

progress, plans were being made for further integration of the applicant next year, in Year 8.

[22] The evidence shows that the applicant was able to attend school, for instance, for five days on 14 May 2021 (for 1 hour); on 18 May 2021 (for 2 hours); on 21 May 2021 (for 2 hours); on 25 May 2021 (for 1 hour); and on 1 June 2021 (for 2 hours) respectively. By the time of the Core Group meeting on 20 May 2021, the applicant's mother was reporting that she was very happy about school. Similarly, at the 3 June 2021 Core Group meeting it was noted that the applicant had made significant progress; had established a great relationship with his classroom assistant; and was expressing a desire to attend school regularly. This is reflected in the applicant's mother's third affidavit, of 4 June 2021. In it, she indicates that the applicant had told her that he enjoyed going to school. She expresses the view that his key adult had been "*really amazing with him*" and that she (the applicant's mother) was "*in shock with the headway that has been made.*" Whatever the key worker was doing was clearly working and it was really great to see. This is a world away from the averments in the applicant's mother's second affidavit, when she did not envisage that she could ever get her son to attend school again. In early June, however, she still remained concerned about those days when her son did not attend school and about contingency planning if he refused to attend again in future.

[23] However, during the week commencing 7 June 2021, the applicant displayed instances of (what Ms Guler has termed) "*agitation and dysregulation.*" He attended school from 10.00 am to 3.00 pm on 8 June 2021, although on that date he had several outbursts and it was agreed that he should only attend school until 1.15 pm as opposed to the later time of 3.00 pm in the following days. However, he refused to attend school on 9 June. He did attend again on 10 June at 9.50 am and "*seemed happy to attend*"; but at noon on that day the applicant's mother was requested to pick the applicant up from school as he had "*gone for*" two staff members. It was thought that the applicant reacted in this way as his key adult was due to go on her lunch. As the applicant was leaving school that day he ran towards his teacher and grabbed her. The Core Group minutes refer to the applicant being "*aggressive*" at school that day, including making aggressive moves towards the classroom assistant and other children. They continue that, "*The other pupils are becoming very nervous of [the applicant], as well as the classroom assistant and there are concerns that [the applicant] is trying to rule things.*" The applicant did not attend school the following day, Friday 11 June.

[24] There was then an emergency Core Group meeting to discuss the recent developments. At the meeting it was noted that the applicant's grandfather, a very important figure in his life, had been attending hospital for tests. It was considered that the applicant may be aware of this issue and that the stresses of this might have contributed to his behaviour during the week. The Core Group nonetheless felt that the progress which had been made could continue to be built upon.

[25] The applicant did not attend school on Monday 14 June but was to attend on Tuesday 15 June. He did not want to go but was persuaded to attend by his mother. He did attend on 15 June from 9.50 am to 12.00 noon, although he would not set foot in the classroom. He has, however, refused to attend school on every day since then: 16-18 June; 21-25 June; and 28-29 June. His key adult enquired on each of those days by text if he was willing to attend but, on each occasion, he did not wish to attend. As a result, the applicant's mother says that she feels that she is "*no further on.*" The EWO has arranged to send out wellbeing items to the applicant by post over the summer and the applicant is reported to enjoy receiving post. She is also to make weekly calls to the applicant's mother to support her; and the school will be sending out cards and news on different weeks. There is uncertainty, however, about how things will progress again come September.

[26] The applicant's mother was unable to attend the Core Group meeting on 11 June due to her father being hospitalised. As noted above, this gentleman, the applicant's grandfather, is a very important figure in his life and the Core Group are concerned about the potential impact which his health difficulties may be having on the applicant's presentation. Meanwhile, it appears that more recently the applicant is presenting with increasing levels of aggression within the home. The applicant's social worker considers that the applicant's mother is afraid to waken him in the morning.

[27] A further Core Group meeting was convened on 24 June 2021 and I have been provided with a minute of this. Consideration is being given to further ways in which the applicant might be supported, for instance by introducing 2:1 support for certain activities and/or introducing a male classroom assistant. There is ongoing liaison between the professionals involved in the group to review the position and discuss the applicant's needs further.

[28] The most recent summary of the position on affidavit from Ms Guler on behalf of the EA is as follows:

> "*The EA recognises that there have been set backs recently but, as I have expressed previously, that is to be expected with a child who displays the complex presentational needs such as the Applicant. The EA is also mindful of the recent difficult domestic stresses relating to the Applicant's grandfather's ill health. The EA continues to consider that the progress made by the School to date is positive. We note the important of the relationship between the Applicant and his classroom assistance and that has not broken down. The EA considers that progress can still be made in re-integrating the Applicant to [School A]. The approach may need to be refined, and the EA will consider any updated advice provided by Dr McKenna following her review of the Applicant. On receipt of further comment from Dr McKenna EA officers will meet the School Principal to discuss any further provision or adaptations to be made. The*

possibility of 2:1 support was discussed at the Core Group with the Principal suggesting that the Applicant may respond to a male classroom assistant. If as a result of the meeting with the School (with the benefit of Dr McKenna's advice) it is agreed that the Applicant would benefit from 2:1 support, the EA will arrange that.

The EA is committed to responding to the Applicant's needs in a bespoke and sensitive way. The EA considers that the approach in place at present does represent suitable educational provision for the Applicant now, bearing in mind his particular needs and what he can manage now. The approach in place also involves regular multi-disciplinary review so that, when the Applicant is able to manage more, provision can be progressed according to his needs.

The EA continues to be strongly of the view, supported by clinicians, that teaching within the home is not appropriate, as outlined in earlier affidavit evidence."

[29] I should also mention that the EA issued an amendment notice to the applicant's Statement on 9 March 2021. This is because the applicant is due to transfer to post-primary education in September of this year. The amendment notice contains a copy of the draft statement which the EA proposes to make. The applicant's mother has an opportunity to make representations on it. Although the EA's current plan appears to be for the applicant to remain at the school which he presently attends, the draft statement does not yet name a school, since the applicant's mother has a statutory right to express a preference for a school, which must then be explored. Ultimately, this could be the subject of appeal to the Special Educational Needs and Disability Tribunal (SENDIST).

The applicant's challenge

[30] The applicant's challenge is summarised in the skeleton argument provided on his behalf in the following terms, namely a challenge to:

"1. The EA's continuing failure to provide for the applicant's special needs as described in his Statement of Special Educational Needs dated 17th July 2014.

2. The EA's decision that the applicant's school is appropriate to meet his special educational needs when the applicant is not able to attend his school.

3. The EA's decisions that the provision of home learning for the applicant provides for the special educational provision the applicant requires and as is set out in his

Statement of Special Educational Needs dated 17th July 2014.

4. *The EA's failure to make any interim provision for Exceptional Teaching Arrangements/Education Other Than At School while the applicant is not attending school.*

5. *The EA's Exceptional Teaching Arrangements/Education Other Than At School policies that mean the applicant is not able to avail of any educational provision to meet his special educational needs while he is not able to attend school unless he has 'a recommendation from CAHMS Consultant/Team Lead or arising out of a Statutory Assessment.'"*

[31] I propose to deal with the arguments in the order, and in the terms, in which they were advanced in the applicant's skeleton argument, namely to first consider the statutory duty to arrange for special educational provision pursuant to article 16(5) of the Education (Northern Ireland) Order 1996; second, to consider the alleged failure to provide any access to therapies set out in the applicant's Statement; third, to consider the statutory duty to provide for a child who is unable to attend school pursuant to article 86 of the Education (Northern Ireland) Order 1998; fourth, to consider the EA's policies relating to teaching otherwise than at school; and, finally, to address the applicant's Convention rights. As appears from the discussion below, various elements of the challenge overlap with each other.

The obligation to provide for special educational needs

[32] Article 16 of the Education (Northern Ireland) Order 1996 ('the 1996 Order') provides for statements of special educational needs. If, in the light of an assessment made under article 15 of the 1996 Order of a child's educational needs and of any representations made by their parent, it is necessary for the EA to determine the special educational provision which any learning difficulty he may have calls for, the Authority shall make and maintain a statement of his special educational needs: see article 16(1). The statement shall be in such form and contain such information as may be prescribed: see article 16(2) and the Education (Special Educational Needs) Regulations 2005 (SR 2005/384). However, the statement must give details of the EA's assessment of the child's special educational needs and "*specify the special educational provision to be made for the purpose of meeting those needs*": see article 16(3).

[33] The 'specification' of the educational provision to be made must also include certain particulars. In particular, article 16(4) provides as follows:

"*The statement shall –*

> (a) *specify the type of school or other institution which the Authority considers would be appropriate for the child,*
>
> (b) *if the Authority is not required under Schedule 2 to specify the name of any grant-aided school in the statement, specify the name of any school or institution (whether in Northern Ireland or elsewhere) which it considers would be appropriate for the child and should be specified in the statement, and*
>
> (c) *indicate any provision for the child for which it makes arrangements under Article 10(1)(b) otherwise than in a school or institution and which it considers should be indicated in the statement.*"

[34] This case principally concerns the extent of the obligation to *deliver upon* the specification of special educational provision which is contained in the statement. In this regard, the applicant relies on article 16(5) of the 1996 Order, which is in the following terms (insofar as material):

> "*Where the Authority maintains a statement under this Article –*
>
> (a) *unless the child's parent has made suitable arrangements, the Authority –*
>
> (i) *shall arrange that the special educational provision indicated in the statement is made for the child, and*
>
> (ii) *may arrange that any non-educational provision indicated in the statement is made for him in such manner as it considers appropriate, and*
>
> (b) *if the name of a grant-aided school is specified in the statement, the Board of Governors of the school shall admit the child to the school.*"
>
> [underlined emphasis added]

[35] The applicant is right to say that the article 16(5)(a)(i) obligation is mandatory in nature. *Prima facie,* the EA must arrange the special educational provision indicated in the statement. However, that is not the end of the matter, since case-law establishes that there is not an absolute duty of compliance.

[36] In particular, this obligation was discussed by Kerr J in *Re ED's Application* [2003] NI 33, a case in which a father alleged that the relevant education board was not providing education in the small group setting which his statement of special educational needs prescribed. In that case – the converse of the present application –

the applicant's complaint was that education was being provided at home rather than in school. After consideration of a variety of authorities in relation to the interpretation of statutory provisions as either mandatory or directory in nature, or some mix of both, Kerr J held as follows (at paragraphs [14]-[16]) in relation to the provision which is central to the applicant's case in these proceedings:

> "*I consider that the duty imposed by art 16(5) of the order does not require of the board literal compliance with the provisions of the statement of special educational needs throughout its currency. It cannot have been the intention of the legislature that every aspect of the statement be strictly adhered to if, for instance, it became clear that to enforce those provisions would be against the interests of the child or would pose a risk to other children. In the nature of things the educational requirements of a child such as the applicant may change in the course of the period covered by a statement. It could not be right that the prescribed regime must be adhered to irrespective of the damage that this might do to the child or other classmates or teachers.*
>
> *The intention of the legislature in enacting art 16(5) was, in my opinion, to require the relevant authority to provide the educational facilities stipulated in the statement <u>where it is practicable to do so</u>. It cannot have been in the contemplation of Parliament that the Board and the school should be powerless to modify the educational arrangements for the applicant where a change in his circumstances made it unsuitable to continue those arrangements. To impose such a literal requirement would lead, in my opinion, to substantial public inconvenience.*
>
> *In my judgment, art 16(5) requires of the board and the school substantial compliance with the terms of the statement. They may not ignore those requirements and they are bound to fulfil them unless it is either impractical to do so or the full implementation of the terms of the statement would put staff or other pupils at risk. The provisions of the statement must therefore in general be scrupulously observed but the school is not bound to follow those terms slavishly where it is plainly impracticable to do so.*"
>
> [underlined emphasis in original]

[37] Precisely the same approach was taken by Treacy J in *Re A's Application* [2012] NIQB 106, a case in which very little was being provided to the applicant by way of education in terms of hours of provision *per* week and where, as here, the applicant contended that the provision actually being made did not match that to which he was entitled under his SEN statement: see paragraphs [40]-[47] of Treacy J's judgment.

[38] As appears from the above, case law in this jurisdiction has proceeded on the basis that – although the duty to make the special educational provision specified in the statement is mandatory – it is not completely absolute and there are some limits to its reach. Kerr J described this as a requirement of "*substantial compliance.*" He also considered that the authority was not bound to fulfil the specified requirements where it was "*impractical to do so*" or full implementation would put staff or other pupils at risk. It is clear from his judgment that there may be circumstances where the interests of the very pupil to whom the statement relates dictate that strict or literal compliance with the terms of the statement ought to be excused. Plainly, the duty to make the required special educational provision is not a target duty or merely an obligation of 'best endeavours'; but the above authorities establish that it is an obligation which allows for some element of non-compliance where legitimate grounds for this can be shown. It is also important to note from the statutory text itself that the authority is relieved of its obligation to arrange provision where "*the child's parent has made suitable arrangements.*"

[39] In my view, the approach taken by Kerr J in *Re ED* also accommodates and recognises the fact that the provision of education for a child with special educational needs will in many cases be a complex and ongoing exercise. Depending on the child's needs, there may be some periods of greater success than others. Indeed, in the case of a child with complex needs, such as the present applicant, their circumstances may fluctuate on a daily basis rather than over a period of months. In those circumstances, I agree with Kerr J's analysis that Parliament could not have been blind to the practical difficulties which may arise with an obligation of strict, ongoing compliance.

[40] That does not mean, however, that the court's supervisory jurisdiction in a case such as the present is rendered nugatory. As Kerr J went on to explain in *Re ED*, at paragraph [17] of his judgment, the court will still examine the reasons proffered by the education authorities for failing to observe the specific requirements of the statement. It will do so by inquiring into whether the conditions that the authorities claim prompted the departure from the statement in fact existed; and by deciding whether the judgment made by the authorities should be upheld. In assessing the authorities' judgment, the court must recognise that it does not share the expertise of the educational professionals involved; nor must it substitute its own judgment for theirs; but it must nonetheless examine critically the decisions they have reached, varying the intensity of review as appropriate to the particular factual circumstances. Treacy J's judgment in the *Re A* case mentioned above is an example of the court concluding that the authorities had gone beyond the bounds of what was permissible by way of departure from the child's statement (largely because their tolerance of the applicant's wilful non-attendance at school cut against the grain of a foundation pillar of the statutory scheme for education, namely compulsory education for those of school age).

[41] Although in a slightly different context, the importance of the general duty owed by the EA to children with SEN was also recognised by the Court of Appeal in

this jurisdiction in *Re JR62's Application* [2013] NICA 51. In particular, at paragraph [33], Coghlin LJ said that:

> "*Education is fundamental to the fulfilment of personal, social and career potential and in any just and fair society every reasonable and practical effort should be made to ensure those with special educational needs are not disadvantaged thereby.*"

[42] Coghlin LJ was not there addressing the legal issue which had been raised in *Re ED* but, nonetheless, I consider his description of making "*every reasonable and practical effort*" to provide for those with SEN to be consonant with Kerr J's description of complying substantially with a statement of SEN, unless it is impractical or unsafe to do so. Although some of the English authorities to which reference was made in the course of these proceedings appear to suggest a less forgiving approach to the delivery of the provision set out in a statement of SEN, I ought to follow the established approach of the High Court in this jurisdiction unless persuaded that it is clearly wrong. Notwithstanding Ms Kyle's attempts to do so, I am not so persuaded. On the contrary, I consider the analysis set out in the judgment of Kerr J in *ED*, and applied faithfully by Treacy J in *Re A*, to be consistent with the realistic intention of Parliament in making the relevant provisions.

Has the article 16(5) obligation been breached in this case?

[43] Turning back to the facts of the present case, I have little hesitation in concluding that the specified educational provision set out in Part 3 of the applicant's Statement was not provided to him for much of the period from December 2019 to May 2021. The key elements which were not provided were "*placement in a setting where the curriculum is delivered*" in a manner suitable for his needs and "*daily specialist teaching from a teacher who is qualified and experienced in teaching children who have developmental difficulties including Autistic Spectrum Disorder.*" The Statement envisages that the applicant's SEN will be "*met by*" the identified provision. In that context, it cannot be the case that the EA has delivered the required placement (and the required teaching) simply by having a place *available* for the applicant in School A, if he was not attending school through no fault of his own or of his parents.

[44] An analogy may be drawn here with the authorities (discussed below) relating to the provision of education otherwise than at a school. This may be appropriate where it is not reasonably possible or practicable for a pupil to attend school (*i.e.* they have a legitimate basis for non-attendance) but will not generally be appropriate where they have no such basis (*e.g.* simply through parental preference to keep them at home or from attending a particular school). In the present case, I have little doubt that there were periods when the applicant's mother would have preferred him to go to School B and where her enthusiasm for encouraging his attendance at School A was undermined or waned. However, I consider the dominant reason for his non-attendance to be the very condition which gives rise to

his SEN in the first place. That is what resulted in his initial refusal to attend school and the difficulties faced by his mother in securing his attendance. In those circumstances, the mere availability of a place in School A cannot have been sufficient to discharge the EA's obligations under article 16(5) of the 1996 Order. Any such construction would entirely undermine the effectiveness of the system for children who have legitimate difficulties with school attendance.

[45] The question remains, however, whether this *prima facie* failure to make the required provision may be excused on any of the bases outlined in *Re ED*, namely whether it was impractical or unsafe to make the relevant provision, including that being against the applicant's own best interests. I preface the discussion below with the observation that, in my view, the court ought to exercise a relatively intense level of review where the impracticality relied upon by the authority is alleged impracticality arising from the applicant's own needs. The purpose of the SEN system is to address and meet children's needs; and only in rare circumstances should the child's own difficulties be accepted as justifying a failure to provide the provision designed to meet their needs. The correct approach where it becomes clear that the provision made in a statement is unrealistic or undeliverable in light of the complexity of the child's needs is to amend the statement to reflect a more appropriate level of provision. Not only does that approach promote clarity and transparency but it also allows an appeal on the merits to a specialist tribunal against any change in provision.

[46] The applicant in this case makes the point that the respondent's evidence does not rely on it being impractical to comply with his Statement. Rather, the EA makes the case that the applicant's named school "*continues to be an appropriate placement to meet those needs*" and that the applicant is "*supported*" at school. In short, the respondent asserts compliance with its obligation to make the required provision, rather than seeking to justify non-compliance, or some element of non-compliance. I have already rejected the case, to the extent it is made by the respondent, that mere theoretical provision of a place at School A is sufficient to discharge its obligations. Taking the respondent's evidence and submissions in the round, however, it is clear to me that the EA *does* rely on the impracticability of the applicant attending school for much of the period when he was absent. It does so on two bases: first, his own unwillingness to attend, allied with his mother's failure to engage sufficiently pro-actively to secure his attendance; and, second, school closure as a result of the lockdown restrictions related to the Covid-19 pandemic.

[47] Dealing with the second of these issues first, I accept that there will have been periods during the last two academic years where it was impracticable to provide the full teaching which the applicant would be entitled to expect under his Statement (even assuming no difficulties with his willingness to attend) as a result of the pandemic and associated public health restrictions. Many children, both those with SEN and without, have had their educational provision significantly curtailed over the course of the pandemic. The evidence before me is that School A closed on 23 March 2020 as a result of the pandemic and learning moved online. There is some

limited discussion in the evidence about the fact that the applicant's mother did not request him to be accommodated as a vulnerable pupil, which suggests that he might have been able to attend school on that basis; to which her riposte is that she was unaware of the ability to request attendance on this basis until later receiving legal advice to that effect, and that she cannot understand why the school or EA would not have drawn this to her attention in light of their knowledge of her circumstances. If there was an opportunity for the applicant to attend school on this basis during periods when schools were generally closed and this was not actively explored with the applicant's mother, that is both unfortunate and concerning. In any event, I accept that there will have been some periods of school closure where it was impracticable for the school and EA to make the normal provision set out in the applicant's Statement.

[48] On the second issue, I do not accept that the applicant's difficulties with school attendance can provide a justification for the entirety of the period when he remained absent from school. Aside from a handful of short attendances, he was absent from school for essentially all of 2020 and January to mid-May 2021. I have already indicated that reliance on the applicant's own difficulties should rarely justify the non-provision to him of the SEN specified in his Statement, at least not on a long-term basis. In a child with needs as complex as those of this applicant, I entirely accept that there will be periods when the full level of educational provision specified in the Statement simply cannot be provided; and nor should it be forced on the applicant. However, the extent of the period during which the applicant was left with little or no educational provision leads me to conclude that every reasonable and practical effort was not made to ensure he received the provision to which he was entitled. I have reached this view both in terms of the efforts made to try to encourage and support the applicant in attendance at school and in terms of the ineffectiveness of the provision made for him whilst he was at home. Put another way, although the difficulties presented by the applicant's unwillingness to attend school existed, the respondent's judgment that they justified his non-attendance at the school placement designed to meet his SEN for such a period, in the absence of more determined efforts to secure his reintegration to school and in light of the ineffectiveness of the educational provision made for him at home during this period, was outside the range of legitimate responses open to it.

[49] I have not found this element of the applicant's case entirely easy to resolve. That is because I recognise that, during the restrictions arising from the Covid-19 pandemic, education providers and the respondent have been operating under incredible pressure, with limited resources and limitations upon their work which are unprecedented in recent times. I do not doubt the commitment or good faith of any of those involved. It is also the case that some efforts were plainly made, including in particular by Ms Maclean and the school principal in November-December 2020, to encourage and support the applicant to recommence attendance at school. I have also taken into consideration the fact that the applicant's mother's enthusiasm for encouraging attendance at School A, when she would have preferred a new placement in School B, may have faltered.

[50] Nonetheless, after these proceedings had commenced, significant further progress was made in this regard when a new and more determined approach was introduced which in my view could, and should, have been introduced earlier. These measures have had some level of success, albeit that problems still remain. In my view there is no sufficiently good reason why they should not have been provided earlier. Indeed, the evidence provided by the Trust in these proceedings suggests that the applicant's social worker was pressing for action in this regard earlier. Although there was a meeting of relevant multi-disciplinary personnel in February 2020 with regards to reintegration into school – after disengagement in December 2019 – the plans made at this point did not seem to progress very far. I accept that this was to a large extent because of the impact of the Covid-19 pandemic which became all-consuming in or around March 2020. However, various attempts to arrange meetings with the relevant personnel after that point seem to have failed, for a variety of reasons, until November 2020. This resulted in the applicant attending school again for various short periods in November to December 2020 but with limited success. Following that, there was a further period of stasis before and after these proceedings were commenced. The meeting on 16 April 2021, after these proceedings had been issued, which involved both relevant Trust staff and EA and school staff, appears to have represented a step-change in the level of determination and support focused on reintegrating the applicant to school; as did plainly the subsequent establishment of the Core Group to guide this process.

[51] All the while in the meantime, the home learning provision which had been made was simply not working. Although his class had access to an online learning app ('Seesaw') and packs of learning materials from his class teacher, the reality for this applicant is that he was not receiving any significant educational provision at home. This is not a criticism of his mother, since his SEN statement recognises that he requires educational provision to be made for him in a specialist setting, with a high level of supervision and support, and specialist teaching from a professional who is qualified and experienced in the field. Throughout the course of the pandemic home-schooling has been difficult for many parents. It is difficult to overestimate how challenging it must have been for the applicant's mother, as a single parent, to seek to provide an education for him given his complex needs and developmental difficulties. In my view, it is not reasonable for the applicant or his mother to expect, nor would it be practicable for the EA to arrange, anything like the equivalent of a full school regime to be provided at home on each occasion the applicant is unable or unwilling to attend school. At the same time, I agree with the thrust of the case made by the applicant that, for a considerable period, the educational provision available to him was clearly and obviously inadequate to meet his needs.

[52] On balance, it seems to me that this is a case where – at least in relation to the period January 2020 to April 2021 – I should make a declaration that the respondent has failed to discharge its obligation under article 16(5) of the 1996 Order to arrange

that the special educational provision indicated in the applicant's Statement was made for him.

[53] I would not make any declaration in relation to the present situation. Leaving aside for a moment the fact that it is presently the summer holidays for school children in Northern Ireland, at the end of last term the applicant had begun to successfully reintegrate into school. There were extremely promising signs in late May and early June. The new dynamic provided by the Core Group was beginning to see some results, albeit that there were some setbacks. The periods of non-attendance from mid-May to the end of term were of a different order of magnitude to those in respect of which I propose to grant declaratory relief; and the Core Group is now actively seeking to address the issues which have arisen and to plan new strategies for the forthcoming academic year. Put another way, every reasonable and practical effort is now being made to secure the SEN provision to the applicant to which he is entitled.

[54] As appears further below, I also accept the broad thrust of the EA's case that SEN should generally be met, insofar as possible, by means of a placement in a school or other educational institution. This appears to me to follow naturally from the text of article 16(4) of the 1996 Order and its emphasis on specifying the type of school or other institution which the EA considers would be appropriate for the child. As article 16(5) indicates, there may be circumstances where the child's parent has made their own arrangements which are suitable but, in the absence of that, SEN provision will generally be made by specifying the name of a school or other educational institution which can best cater for the child and the focus of their educational provision should be in that setting rather than at home.

[55] Before leaving the topic of the article 16(5) obligation, I should also mention the further 'exemption' referred to in *ED*, namely the risk of injury to other staff or students. The applicant suggests that the respondent has not placed reliance on this factor. That may have been the case in respect of the EA's response to pre-action correspondence. However, as the evidence has developed, it would be wrong to say that the issue of risk to staff and other students is not relevant in this case. There is ample evidence that the applicant has previously been aggressive and violent. Those behaviours are part of the applicant's condition which require to be managed. The Trust's evidence confirms that the applicant "*displays challenging behaviour which includes oppositional behaviour and outward aggression*", although this is primarily directed towards his mother.

[56] Some of the previous incidents of aggression outlined in the evidence indicate extremely worrying and dangerous behaviours which clearly raise the risk of injury. It is also clear that the relevant education authorities have become more acutely aware of some of these issues and previous incidents from the evidence provided, particularly by the Trust, in the course of these proceedings. As noted above, these are generally directed at the applicant's mother but there have been occasions where others, including others coming into the applicant's home, are the subject of the

applicant's aggression. There have also been incidents of aggression towards school staff or other pupils although, fortunately, these have been less frequent and less serious. Although the risk of violence or injury does not appear to have been a major factor in the school's thinking until more recently, I am satisfied that the applicant's school and the EA are right to have some concerns about the risk of injury posed by some of the applicant's behaviours and that risk to others has legitimately played a role in some of the more recent instances where the applicant's attendance at school has been discouraged. This factor may also in future provide a justification for the absence of full compliance with the requirements of the applicant's Statement. However, it did not justify – nor was it seriously advanced as justifying – the prolonged absence of educational provision in respect of which I propose to make a declaration.

Provision of therapies

[57] The applicant also complains about the non-provision to him of various therapies to which he says he was and is entitled under the terms of his Statement. That arises from the reference in Part 3 of the Statement to the applicant's needs being met including by "*Access to therapeutic support (e.g. speech and language therapy) as may be recommended through the Senior Clinical Medical Officer.*"

[58] The applicant makes the point that the body of his extant SEN Statement from 2014 makes clear that he has therapy needs; and further submits that this is also indicated in the amendment notice in relation to the Statement of 9 March 2021. In particular, the applicant says that these assessments note his speech and language needs, social interaction and play skill needs, motor skill needs and sensory needs. The applicant asserts that, as a matter of fact, the respondent is making no therapeutic provision for any of his special educational needs at present. It is submitted that this a further breach of its obligations under article 16(5) of the 1996 Order.

[59] I cannot accept the submission made on behalf of the applicant that article 16(5)(a)(ii) of the 1996 Order "*<u>requires</u> the EA to arrange any non-educational provision it considers appropriate*" by way of a mandatory obligation which is similar to that contained in article 16(5)(a)(i) in respect of special educational provision. That flies in the face of the statutory language used, which distinguishes between educational provision which the authority "*shall*" arrange and the non-educational provision which the authority "*may*" arrange. Article 16(5) recognises that there are some elements of provision which are not strictly educational in nature but which it would make sense for the relevant education authority to arrange and provide. They are given a discretion to do so; but are not obliged to make provision which is outside their core function of the provision of education.

[60] Where the provision of therapies is in issue, therefore, it is important to ascertain whether they represent an element of *educational* provision which falls within article 16(5)(a)(i) or some form of *non-educational* provision (for instance,

medical provision) which falls within article 16(5)(a)(ii). It might well be that this division is often not clear cut. However, it is also clear that some therapies which were provided to the applicant could represent educational provision, with speech and language therapy perhaps being an obvious example in the circumstances of this case. (*R v Lancashire County Council, ex parte M* [1989] 2 FLR 279 confirms that such therapy is capable of being special educational provision. *R (N) v North Tyneside Borough Council* [2010] EWCA Civ 135 is another example, where the court specifically drew attention to the dichotomy between the mandatory provision of therapies which were educational in nature and the discretionary arrangement of non-educational provision.) The authority on which Ms Kyle relied in support of the contention that an education authority could not merely request the provision of therapy from a health authority and then contend that it had fulfilled its duty to arrange for the provision of the therapy – *R v London Borough of Harrow, ex parte M* [1997] ELR 62 – is a case in which it was accepted that the therapies in issue were educational provision. In those circumstances, the education authority's obligation under the SEN statement to make the provision was non-delegable. The first question, however, is whether the therapeutic provision is educational provision or non-educational provision.

[61] In the present case, the reference to the recommendations of the Senior Clinical *Medical* Officer might tend to suggest that the therapeutic support referred to in the applicant's Statement is non-educational in nature. On the other hand, the reference to therapies is included in Part 3 of the applicant's Statement, which specifically deals with educational provision to meet his needs, not in Part 6 of his Statement which deals with non-educational provision (where only transport is identified). Moreover, in the course of the hearing before me, the respondent accepted that some of the therapies which were in issue *were* educational in nature. Accordingly, they might be subject to the mandatory duty to provide them (subject to the caveats set out in *Re ED*) which is contained in article 16(5)(a)(i) of the 1996 Order.

[62] Notwithstanding this, the respondent relies upon the fact that the obligation in relation to the provision of therapies in the applicant's Statement is conditional. It is an obligation only to provide access to such therapeutic support "*as may be recommended through the Senior Clinical Medical Officer.*" The EA's central point is that no such therapeutic support is presently recommended. It points to the fact that the applicant was discharged from Speech and Language in 2016/17 and that Occupational Therapy has not contributed to his annual review since the same year. The discharge letter from Speech and Language states that it is open to the applicant's mother to refer him back to the service if she had any concerns in future; but it does not appear that she has done so. The EA therefore says it has no evidence to suggest the applicant presently needs therapies. As part of the proposed amended SEN statement, the reference to the applicant having access to therapeutic support has been removed "*to reflect the updated circumstances*".

[63] I accept the EA's case that, as drafted, and in light of the present situation whereby no therapeutic support appears to have been recommended by the Senior Clinical Medical Officer and has not been for some time, the respondent is not presently under an obligation to provide therapies under the terms of the applicant's Statement. I therefore do not find any breach of the respondent's obligations in this regard.

[64] I would, though, make one further comment on this element of the case before proceeding. The objectives set out in Part 3 of the applicant's Statement clearly suggest that he has speech and language needs, amongst other needs. This remains essentially unchanged in the respondent's proposed amended statement, although in the proposed amended statement the reference to therapeutic support is intended to be removed. It would be better, in my view, for a statement to make clear how such needs are to be met, including whether they can be met in the classroom without specific therapeutic intervention or whether dedicated therapy sessions are required. Relatedly, when therapeutic intervention is required it should also be made clear whether this is intended to represent educational provision or non-educational provision. It is in everyone's interests to know with precision what the statement requires and why. Some of the authorities considered in the course of this application explain that a SEN statement should not be drafted in a way which allows the relevant education authority to exercise discretion as to what it should or should not provide at any given time. It should be clear as to what is required of it and should not be able to dilute that in a way which avoids the protections for children which are built into the formal assessment and review process. That is no doubt why the reference to therapeutic support in the applicant's Statement is to be governed by the recommendations of the Senior Clinical Medical Officer (whom I assume to be an officer of the Trust, rather than the EA). Insofar as possible, however, it would be better to avoid requirements which have a significant element of flexibility and discretion. Regular review and amendment of the statement, as necessary, should allow for changing circumstances to be reflected.

Education otherwise than at school and the EA policy on ETA

[65] Much of the contention in this case arises because of opposing views between the applicant's mother and the EA as to where his education should be provided for significant periods. Leaving aside the question of whether placement in School A or School B is more appropriate, the EA says that it has provided the applicant with a suitable school placement which meets his needs and that his education should be provided *there* (with the primary focus being on improving his attendance and reintegrating the applicant back into school). The applicant's mother says that it is simply unrealistic to expect the applicant to be at school all the time and that, therefore, when he is at home, he should be provided with his education *there* (with the primary focus being on providing him the education he needs wherever he happens to be). Since the applicant has been at home and not attending school for significant periods over the last number of years, the applicant's mother has (understandably) been seeking that he be educated at home.

[66] As I have already recognised, the situation in the present case is complicated by the fact that for significant periods in the last year and a half, schools have been closed (or operating at very reduced capacity) as a result of the Covid-19 pandemic and public health restrictions which have been introduced to combat it. However, there is also an objection in principle on the part of the EA to providing the applicant with education at home for reasons which appear to me to be valid. Ms Guler's evidence emphasises that the EA does not consider ETA by way of individual home schooling for the applicant to be appropriate. It is considered that this "*may serve to reinforce the PDA behaviours which are leading the applicant to refuse to come to school.*" In the respondent's view, "*it is better by far to try to encourage the applicant to attend school and give him strategies to manage the behaviours which are leading him to refuse to come to school.*" Moreover, the respondent relies on the fact that it has no evidence to suggest that the applicant would engage with individual home schooling or that it would achieve a better outcome than the current provision given his complex difficulties.

[67] I accept that the respondent is acting in good faith in reaching the view that providing significant education at home for the applicant might ultimately be harmful to his education and development by reinforcing his behaviours and decreasing the possibility of his reintegration with school, which would be far better in his own interests. This is also a judgment which it is for the education authorities to make. In addition, I have serious concerns that significant educational provision in the applicant's home, such as the applicant's mother seeks when he is unable or unwilling to attend school, would be ineffective. Ms Kiley made a powerful common sense point that if the applicant does not wish to engage in learning at a certain point, it is unlikely that more success in this regard would be had whether he was in school or at home. There is also more evidence of the applicant being aggressive within the home setting than there is at school. The applicant's mother's response is that home schooling has not been tried and cannot be discounted in those circumstances. If, for instance, the applicant's objection was not to school attendance and learning but merely to *travel* to school, the respondent's concern would be undermined.

[68] Education 'otherwise than at school' (known as 'EOTAS') is provided for in article 86 of the Education (Northern Ireland) Order 1998 ('the 1998 Order') under the heading '*Exceptional provision of education.*' Article 86(1) provides as follows:

> "*Each board shall make arrangements for the provision of suitable education at school or otherwise than at school for those children of compulsory school age who by reason of illness, expulsion or suspension from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them.*"

[69] By virtue of article 86(3), in determining what exceptional arrangements are to be made in the case of any child, the authority must have regard to any guidance given by the Department. The obligation under article 86(1) is obviously designed to ensure that, in exceptional circumstances, the provision of "*suitable education*" is arranged for children. That is then defined in article 86(4) in the following terms: "*In this Article… "suitable education", in relation to a child, means efficient education suitable to his age, ability and aptitude and to any special educational needs he may have.*"

[70] An analogue provision to article 86 of the 1998 Order was considered by the English Court of Appeal in *R (G) v Westminster City Council* [2004] EWCA Civ 45. The court construed the words "*or otherwise*" in the phrase "*by reason of illness, expulsion or suspension from school or otherwise*" and held that they could cover any situation other than the two specified cases of illness and exclusion where it is not reasonably practicable for the child to take advantage of any existing suitable schooling (see paragraph [42] of the judgment of Lord Phillips MR). That seems to me plainly right. That approach was also followed in *R (DS) v Wolverhampton City Council* [2017] EWHC 1660 (Admin), *per* Garnham J at paragraph [36]. The provision can embrace a wide variety of reasons for non-attendance at school, where objectively attendance is not reasonably possible or practical; but does not include mere parental preference.

[71] I accept the applicant's case that he does fall within the category of children who, by reason either of illness or otherwise, may not receive a suitable education (including an education suitable to his SEN) unless exceptional arrangements are made for him. However, there are two points which ought immediately to be made. The first is that the entire SEN system is itself an example of arrangements being made for the provision of suitable education for children who would or might otherwise not receive a suitable education. The second point is that the exceptional arrangements are not *required* to be delivered otherwise than at school (for instance, in the child's home). That is one option; but so too are arrangements for the provision of suitable education *at* school. What is appropriate in each case will require an element of judgment, including an element of judgment as to what is "*suitable*" for the child and, indeed, "*efficient*." That follows from the definition of "*suitable education*" as "*efficient education suitable to [the child's] age, ability and aptitude and to any special educational needs he may have.*" These are matters in respect of which the court has little expertise and will defer, at least to a significant degree, to the judgment exercised by the relevant specialist authority.

[72] The reference to the provision of 'efficient' education also appears designed to introduce an element of judgment as to the proportionality of certain types of educational provision, provided they each provide suitable education for the individual child. At first blush, one might have thought that the reference to "*efficient*" education introduced the issue of the EA's resources into the question of what was suitable education for the child. That notion was comprehensively dismissed by the decision of the House of Lords in respect of the equivalent English provision in *R v East Sussex County Council, ex parte Tandy* [1998] AC 714. What is

suitable education is to be determined purely on the basis of educational considerations; although Lord Browne-Wilkinson emphasised that if there is more than one way of providing suitable education, the authority would be entitled to have regard to its resources in choosing between different ways of providing suitable education.

[73] The present case boils down to what the applicant should be provided with during periods when he is objectively unable to attend school because of the condition with which he presents; and whether what he has been provided with amounts to suitable education during those periods. This is largely a question of judgment and of fact and degree. It will be dependent in large measure on the length of time during any particular period when the applicant is absent from school. For instance, if the applicant attended school in the morning and then became distressed and had to go home at lunchtime, it would be nonsensical to suggest that he had not been provided with suitable education that day because he was not provided with education at home in the afternoon. Similarly, as has happened in recent times, if the applicant attended school for a day and became agitated and a view was taken that he should not attend the next day, or for a couple of days, in order to facilitate his re-attendance thereafter, that would not in my view represent a failure to provide a suitable education to him for those short periods. On the other hand, if the applicant was not able to attend school for a long period of time and was effectively receiving no education in the meantime, that is likely to represent a breach of the article 86 obligation. I have essentially found that to be the position for much of the period from January 2020 to April 2021: see paragraphs [48]-[52] above.

[74] If and insofar as the respondent has taken the view that alternative education under article 86 will *only* be provided to children who are unable to attend school in the usual way due to *medical* problems, that would be a misdirection in law. On its face, the requirement to make exceptional provision extends beyond such cases (including, for instance, those who have been expelled or suspended from school). Such a limited view of the arrangements which can and should be provided under article 86 is not expressed in the respondent's affidavit evidence. Although Ms Guler makes the point that ETA provision is not designed to be the answer to complex situations such as the present applicant's case and is designed to be a short-term solution for children who are unable to attend school for medical reasons, she does not say that it is limited to these situations. Similarly, although it is stated in the respondent's evidence that individual teaching at home is usually only entered when deemed absolutely necessary and based on psychological advice in respect of the individual child, the respondent's evidence does not limit such provision to those circumstances only.

[75] The applicant's concern about the respondent fettering its discretion in terms of EOTAS under article 86 arises principally from the terms of its response to pre-action correspondence and the ETA guidance which it has published in the form of a leaflet. The former stated that, "*ETA provides 4.5 hours of teaching per week. The*

EA is of the view that the best place for children is in school and while we appreciate that there can be different reasons as to why a child is not in school, to avail of ETA it is necessary to have a recommendation from CAHMS Consultant/Team Lead or arising out of a Statutory Assessment." In turn, that reflected the guidance leaflet which has been published by the EA entitled 'Exceptional Teaching Arrangements (ETA) Guidance 2020/2021.' The guidance document defines ETA as "*a service that assists schools to deliver education to young people who for medical reasons are temporarily unable to attend school for a period of time lasting more than 20 days*" and describes it as "*a time-limited, temporary service with the clear intention of supporting and encouraging each young person back to their full-time educational placement*", making clear that it is not an alternative to full-time school attendance. Where the service is to be used as a result of physical illness, medical evidence will be required from a hospital consultant or specialist, a community paediatrician or a GP (in certain circumstances). Where it is required on the basis of mental health, medical evidence will be required "*normally*" from those mentioned in the EA pre-action response. The guidance goes on to explain that ETA can offer "*up to 4.5 hours teaching per week*" and states that "*cases will be closed when the pupil returns to school*."

[77] If the ETA service was the *only* provision made by the EA under article 86, the applicant's case on fettering of discretion (or misdirection in law as to the extent of possible requirements under article 86) would be well-founded. However, Ms Kiley submitted that the EA's potential provision under article 86 was not so limited and that the respondent was both aware that there would be cases where provision was required under article 86 which was not catered for by the ETA scheme and that it was open to making that provision where necessary. In short, the ETA service was the 'normal' provision available under article 86 which catered for the majority of cases where EOTAS was required; but it was not the only EOTAS provision which could or would ever be made under article 86 by the EA.

[78] This position is perhaps not as clearly explained in the respondent's affidavit evidence as it ought to have been. Nevertheless, I accept the respondent's submission that it is borne out by the facts of this case. At the initial Core Group meeting on 29 April, consideration was given to whether it was appropriate to continue to work towards the applicant's reintegration in School A. The minutes note that, "*It may be necessary to look at a possible home liaison programme similar to ETA, or maybe individual work in another location before building up to re-integration within the class*", although this was ultimately not deemed the best course. This issue was raised again at the urgent Core Group meeting on 11 June. Ms Guler's fourth affidavit contains the following averments:

> "*The group discussed ETA and the importance of differentiating between the ordinary arrangements provided through EA's usual ETA service and the type of exceptional teaching arrangements which are required to meet the complex needs of pupils such as the Applicant. It was once again felt that exceptional teaching arrangements should be a last resort*

for the applicant. In light of the significant progress that has been made to date I firmly believe that the plan to re-integrate the Applicant to [School A] remains appropriate. No one at the emergency Core Group meeting expressed a contrary view."

[79] This is supplemented by the following averments:

> "*The EA considers that the flexible approach in place at present does represent suitable education for [the applicant] now, bearing in mind his particular needs and inability to cope with a full school day etc. at this time. The EA considers the bespoke and child led arrangements which allows the Applicant to attend school on the days that he can manage, for the length of time that he can manage, is suitable bearing in mind the Applicant's needs at this particular time. EA acknowledge that progression is likely to be gradual, and recognise that there may be set-backs, but that is to be expected with a child who displays such complex behaviours. That does not mean that the plan is no longer suitable. The EA will continue to work closely with the School and the Trust to support the Applicant's re-integration to [School A].*"

[80] In summary, therefore, there has been a clear willingness to consider exceptional teaching arrangements being provided to the applicant in his home and the EA does not consider itself bound to provide such arrangements only when and to the extent permitted by the published leaflet relating to its usual ETA service. There is a recognised distinction between the "*usual ETA service*" and other exceptional teaching arrangements which may be required or appropriate to be provided under article 86 in the circumstances of some other case. The issue in the present case is that teaching within the home was not considered appropriate on its merits; not that it was precluded by the application of the ETA policy. Now that this is clear, it might be useful, to avoid confusion in the future, if the EA made clear that its ETA service, as described in its published guidance, is not the only exceptional teaching arrangement which can ever be provided but that it will generally cater for the majority of circumstances where such arrangements are required. The reference to the ETA guidance in the EA's pre-action response has proven unfortunate in that it seems to have promoted a misunderstanding as to the basis on which home teaching was not provided in this case.

[81] The applicant nonetheless still challenges the view that he has been, and is being, provided with education that is suitable for him by virtue of the arrangements which have been maintained. I accept Ms Kiley's submission that the determination of what is "*suitable*" education for the applicant is essentially a judgment for the EA to make. This is supported by the English Court of Appeal's consideration of this phrase in an analogous context in *R (C) v Brent London Borough Council* [2006] EWCA Civ 728. That was a case where the claimant was expelled from school and placed in a Pupil Referral Unit. She challenged her placement there on the basis that the unit

was not suitable for her, given her circumstances. In the course of its judgment, the court considered section 19 of the Education Act 1996 ('the 1996 Act'), which is in materially similar terms to article 86 of the 1998 Order. It applied in that case because the claimant had been excluded from school. At paragraph [45] of her judgment Smith LJ said this:

> "*I have considerable sympathy with the point of view of C and her parents. They see things differently from the way in which they are seen by the defendant. They may even be right, but that is not the point. The defendant is entitled, indeed bound, to form its own view of what is suitable education for C after her exclusion. In doing so it must of course pay attention to C's views and those of her parents, but in the end it is for the defendant to form a professional judgment. If that judgment and the action taken in pursuance of it is sensible and rational and takes into account C's personal needs, it cannot be impugned by judicial review simply because C and her parents profoundly disagree with it.*"

[82] Both Laws LJ and the Master of the Rolls agreed with this judgment, with Laws LJ (at paragraph [52]) emphasising the importance of the rule that the court should not usurp the role of a statutory decision-maker, especially where that role includes elaboration of expert judgment in a delicate and difficult area.

[83] In turn, Ms Kyle for the applicant placed significant reliance on the case of *R (Y) v London Borough of Croydon* [2015] EWHC 3033 (Admin), which was suggested to have some similarities to the facts of the present case. The claimant in that case was a 13 year old autistic boy with learning difficulties and behavioural issues who was the subject of a statement of SEN. Y was refusing to attend school and became violent when attempts were made to get him to attend. The case came before the court as a claim for urgent interim relief on the basis that the local education authority was failing in its obligation to provide suitable education for the claimant. Leggatt J was concerned that any mandatory order should set out with precision what the education authority should provide. An order merely that the authority provide "*suitable education*", as it was obliged to do by statute in any event, would not be appropriate: see paragraph [10] of the judgment.

[84] It was accepted for the purpose of the application that the school in which Y had been placed provided suitable education; but the difficulty was that he would not attend by reason of his condition and behavioural issues. In those circumstances the obligation to provide suitable education otherwise than in school came into play. Attempts had been made to have Y return to school which had failed; and the judge accepted that, in light of this, it was not reasonably practicable for him to take advantage of the education provided at the school in which he had been placed. He was concerned that no further, alternative plan had been formulated (see paragraph [19] of the judgment). This led him to the unavoidable conclusion that the authority

was in breach of its obligation under section 19 of the 1996 Act (see paragraph [22]). Nonetheless, it was still not appropriate for the court itself to seek to dictate what suitable education would comprise of in the circumstances (see paragraph [23]). The judge specifically declined to order the home tuition and therapies which the claimant wished to be the subject of a mandatory order. Rather, he directed a further assessment to be carried out in order that the authority would itself examine what could and should be provided in light of the finding that it was not reasonably practicable for the claimant to attend school.

[85] Perhaps the finding in the *Y* case which is of greatest assistance to the applicant in the present case is that the obligation to provide a suitable education is one which is ongoing and not merely one to be met on a long-term basis (see paragraph [25] of the judgment). In other words, there will be occasions when stop-gap measures require to be taken during periods where a plan is being formulated or will take time to be fully implemented. As I have mentioned above, whether the gap in provision is sufficiently lengthy and serious to engage a requirement that home teaching be provided in order to maintain the provision of suitable education is a matter of fact and degree (see paragraph [73] above). In making that assessment, the education authorities will also be entitled, as they have here, to consider whether home teaching will actually undermine the provision of suitable education in the medium to longer term by discouraging re-engagement with the child's school placement.

[86] For essentially the same reasons as I have considered that the respondent failed to meet its obligations under article 16 of the 1996 Order in this case, I have also reached the view that it has failed to provide a suitable education for the applicant for a period of time under article 86 of the 1998 Order. I do so reluctantly because, as I have already made clear, I accept that those involved were acting in good faith, that they were not inactive and that they faced a range of exceptional challenges both generally and as a result of this applicant's complex needs. I also accept that the respondent is to be afforded a large margin of discretion in the judgments it makes as to what is, or is not, suitable education for a child at a particular time. Nonetheless, I cannot escape the conclusion that for a period approaching a year and a half, the applicant was left without any meaningful educational provision. I accept his mother's evidence that what she was able to achieve with him at home was pitiful. The court cannot sanction a judgment that the applicant's education during that period was suitable.

[87] None of that is to say that the EA, much less the applicant's school, was required to make the equivalent provision at home as the applicant would expect to be provided in a full day at his special school. As noted above, the SEN provisions are designed to secure a statemented child's education in an appropriate setting rather than at home. EOTAS is very much the exception rather than the rule. Suitable education for that purpose must take into account the applicant's special educational needs but, although those needs should be the starting point, in my view the obligation under article 86 of the 1998 Order is more diluted than the obligation

under article 16 of the 1996 Order to deliver the arrangements set out in the child's statement. Therefore, where it is impracticable for a child such as the applicant to attend their school placement in a manner which results in no breach of Article 16 because of the limits of that duty explained in *Re ED*, the authority will still be obliged to provide a suitable education but not in the precise terms which would be provided if the child was attending their special school. In this case, the applicant's mother's expectations as to what could and should be provided at home are in my view unrealistic; nor do they reflect the EA's legal obligations as explained in this judgment. However, she was entitled to expect that her son would be provided by way of education with more than he was. I will grant a declaration to reflect this.

[88] Going forward, I trust the respondent will continue to recognise that its powers and duties under article 86 of the 1998 Order may require provision which falls outside its usual ETA service. It may need to show more flexibility in this regard, whilst continuing to exercise its judgment about what is best for the applicant in all the circumstances and about when his non-attendance at school may be considered to reach a level where a suitable education for him is no longer being provided. The process of assessment and review of the applicant's Statement, consequent upon the amendment notice which has been issued, may provide a helpful forum for some further exploration of these issues.

[89] Ultimately, the difference between the parties in this case is perhaps not so stark as it immediately appears. The respondent has arranged placement for the applicant in a school which it considers meets his educational needs when he is able to attend; but recognises that attendance will not always be possible in light of the applicant's particular conditions. On those occasions, the respondent relies on it being impractical to provide the specified educational provision. That will be acceptable provided that proper and sustained efforts are made to encourage continued attendance at school and provided that gaps in attendance are not permitted to result in the applicant falling below receipt of a suitable education overall. The applicant's mother accepts that, in general, it would be best for the applicant to have his educational needs met in a special school (albeit she has expressed a preference for a different school to that specified in the applicant's Statement). She also considers that he should be encouraged to attend school and has been pleased when he has been able to do so successfully. Her primary concern is the lack of provision for the applicant on those (frequent) occasions when he is unable to attend school because of his particular difficulties. She must recognise that there will be times when it is appropriate and acceptable for the applicant to be at home without home teaching, and that the EA is entitled to exercise judgment about whether and when home teaching is appropriate. That is to be governed by an assessment of whether the provision, looked at in the round, has fallen below a point where a suitable education is being provided. I am not persuaded that that is the current position in light of the recent progress which has been made; but the court will be prepared to grant relief where the EA's view is unsustainable, as I have found in respect of a period in the recent past.

Convention grounds

[90] Finally, I can deal with the Convention grounds briefly. The focus of the parties' submissions was on the provisions of domestic law. This is partly because the protection afforded by the right not to be denied education in Article 2 of the First Protocol to the Convention (A2P1) is a relatively weak right. Ms Kyle accepted this in principle but, nonetheless, contended that in the circumstances of this case the applicant had been and was being denied any effective education. She relied upon the observation of Lord Bingham in *A v Head Teacher and Governors of Lord Grey School* [2006] 2 AC 363, at paragraph [24], that: "*The test, as always under the Convention, is a highly pragmatic one, to be applied to the specific facts of the case: have the authorities of the state acted so as to deny to a pupil effective access to such educational facilities as the state provides for such pupils?*" In paragraph [25] the question in that case resolved to whether the child had been denied "*effective access to such educational facilities as this country provides.*"

[91] Ms Kiley relied on the *R (C) v Brent LBC* case (*supra*) in support of her contention that there was no breach of Convention rights in the present case. In *C*, Smith LJ went on to hold (at paragraph [49] of her judgment) that the claimants Convention rights "*do not in any way add to her right to suitable education*" under the relevant statutory provisions. If there was no breach of the right to a suitable education, it followed that there was no breach of Article 2 of the First Protocol. Ms Kiley also relied upon the observations of Lord Bingham at paragraph [24] of the *A v Lord Grey School* case to the effect that there was no right to education of a particular kind or quality, other than that prevailing in the state, and no Convention guarantee of education at or by a particular institution. In summary, the respondent contended that A2P1 did not provide the applicant or his mother a right to choose the type or location of education he wanted and that, provided the obligation to provide an education suitable to him had been met, there could be no question of breach of his Convention rights.

[92] It seems to me that my conclusion on this issue must be driven by the conclusions I have reached above as to the respondent's non-compliance with its obligations under article 16 of the 1996 Order and article 86 of the 1998 Order for the period from January 2020 up to the end of April 2021. During that period the respondent was not providing the special education provision specified in the applicant's Statement and was not excused from that obligation by reason of the matters it has relied upon. Nor in my view was the threshold level of suitable education being provided in that period. Put another way, the applicant did not have effective access to educational facilities in that period either by way of his school placement or education otherwise than at school. In light of those findings, I consider that the applicant has made out a breach of his A2P1 rights in respect of that period. I do not consider that there is presently an ongoing breach of those rights in light of the new regime established in May which is presently in place. I would also consider the findings in this judgment to represent just satisfaction in relation to the breach of the applicant's A2P1 rights.

Conclusion

[93] The applicant's position has improved significantly since the commencement of these proceedings. There have been setbacks in the initially very encouraging steps to reintegrate him back into the school which is judged by the EA as appropriately meeting his special educational needs. It is to be profoundly hoped that further significant progress can be made in that regard in the forthcoming academic year. For what it is worth, I see significant force in the EA's position that the applicant's needs will be best met by his attendance at a special school which is equipped for that task, just as his Statement envisages. I encourage all parties to continue to work, with the requisite patience and energy, towards that end.

[94] The correct forum for a debate about whether another school would be more appropriate to meet the applicant's needs is within the statementing process itself. That is also, in my view, the correct forum for a detailed and informed debate about what contingency arrangements should be put in place for periods of sustained non-attendance at school by the applicant where it is impracticable for him to attend. That debate might well include the issues of when the threshold will be met for the use of some other form of exceptional teaching arrangements in light of a sustained period of non-attendance; what those arrangements may look like; and how they could be provided without undermining the core aim of providing the applicant's special educational provision within a suitable placement at a special school. Hopefully the parameters of any such debate will be informed by the analysis of the EA's legal obligations which is set out in this judgment. Within those parameters these are largely matters of judgment for the Education Authority, subject to the supervision of the SENDIST. There is nothing which has been raised before me which would remotely enable me to conclude that the applicant's present school placement is unsuitable; nor to dictate what contingency measures were appropriate when the applicant was unable to attend school for sustained periods. The guiding light in respect of this latter question must be the provision of a suitable education for the applicant, taking into account the needs and objectives set out in his SEN Statement.

[95] The relief to be granted to the applicant will be declaratory only; and I invite the parties to seek to agree the wording of appropriate declarations to reflect the findings above in respect of the (now historic) identified breaches of the two core provisions of domestic law. I will also hear the parties on the issue of costs.