Neutral Citation Number: [2020] EWCA Civ 518

Case No: C1/2019/1016

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
THE HON MR JUSTICE SUPPERSTONE
CO/1994/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/04/2020

Before :

LORD JUSTICE BEAN
LORD JUSTICE BAKER
and
MR JUSTICE COBB

- -

Between :

THE QUEEN ON THE APPLICATION OF AD (BY HIS MOTHER & LITIGATION FRIEND LH) & ORS	**Appellants**
- and -	
LONDON BOROUGH OF HACKNEY	**Respondent**

- -
- -

David Wolfe QC and Khatija Hafesji (instructed by **Irwin Mitchell LLP**) for the **Appellant**
Jonathan Auburn and Peter Lockley (instructed by **London Borough of Hackney**) for the **Respondent**

Hearing date: 26 March 2020 (on Skype for Business)

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Approved Judgment

Lord Justice Bean :

1. The Appellants are children who have special educational needs and disabilities ("SEND") and attend mainstream schools in Hackney. By a claim for judicial review issued on 21 May 2018 they challenged two policies operated by the Respondent ("the Council") in relation to the provision required to meet their special needs. They obtained permission to seek judicial review by an order of Lang J on 2nd July 2018. The substantive claim came on before Supperstone J at an oral hearing lasting three days. By a judgment handed down on 12 April 2019 ([2019] EWHC 9430 (Admin)) the judge dismissed the claim on all grounds. The Claimants applied for permission to appeal to this court. By an order made on 1 November 2019 Leggatt LJ granted permission on the issue of whether the Council was in breach of a duty to consult under s 27 of the Children and Families Act 2014 ("the 2014 Act") but refused permission on all other issues.

Factual background

2. Mr Andrew Lee, Assistant Director of Education Services at the Council, describes in his first witness statement the overall structure of central government funding for both maintained schools and academies and the specific structure of funding for children with SEND. The needs of most of this group of children are met using up to £6,000 of "notional SEND" budget per pupil, also known as "Element 2 funding". This per pupil amount is set nationally. Schools are allocated an "additional needs budget", from which £6,000 of "notional SEND" funding is drawn for all children with SEND, based on specific indicators of need in their area. Most SEND children's needs can be met by spending considerably less than £6,000 and as a result schools have a degree of flexibility on their overall SEND spending. For children with an education, health and care plan ("EHCP"), the school still contributes £6,000 of "notional SEN" funding, supplemented by "top-up" or "Element 3" funding. For children in mainstream schools, top-up funding from the Dedicated Schools Grant ("DSG") is available at one of five pre-set Resource Levels.

3. Mr Lee states (at para 10):

> "The fourth block of funding from the DSG is the High Needs Block. It is from the High Needs Block that the local authority funds that 'top up' or 'Element 3' funding that is allocated to individual pupils who have been assessed as requiring an EHCP. The High Needs block allocation to the local authority covers a wider range of responsibilities and spending than simply the top up (Element 3). In broad terms the Council allocates the funding to (1) Support Services – money that is spent on providing services to pupils, parents or schools and (2) Provision Budgets – money that is allocated to schools and settings (in this case, mainstream schools) to support provision for individual SEND pupils with EHCPs. …"

4. Mr Lee continues (at para 20):

> "In addition to the five resource levels, it is possible for additional funding above level 5, to be made available in

> exceptional cases to children who require it on an individual basis in mainstream schools. Fundamentally, the Council's obligation is to fund whatever provision is required to meet a child's needs as assessed in the EHCP. Where additional funding is required to achieve this, we provide it."

5. Mr Lee states that in the ten years he has been involved in the administration of SEND funding he believes that the majority of local authorities use some form of banding to allocate funds to schools (para 25). In his view the approach of costing individual provision would not be workable in practice (para 26). His statement continues:

> "29. To my knowledge the Council has never set its SEND budget each year by aggregating the exact, unique cost of each child's EHC Plan provision. I very much doubt this would be possible administratively. There are approximately some 1,850 young people with EHCPs at present in Hackney. It would simply be unworkable for the Council (and the settings) to keep track of its budget if it were required, in effect, to cost every single item of provision in each of these, as well as the variations to costs that would constantly arise as circumstances changed.
>
> 30. An approach of individually costing each element of Section F, according the individual and variable costs that each school or setting might dictate, would in reality impose a level of administrative burden which I do not think Hackney could cope with. I think most local authorities would find themselves in the same position. The construction of an individual and detailed costed plan for every child that is eventually assessed as needing a plan would engage both school staff and local authority staff to an extremely high degree, especially given that this would then be subject to annual (or more frequent) review. …"

6. Mr Lee states that additional funding is made available if a child's needs are not being met. He states (at para 39):

> "It is not the case that the banded approach leads to the under-funding of SEND provision. A child can move to a higher band, can have individual items of provision funded separately from the Resource Level funding if this is thought appropriate, or be awarded additional money above Level 5 funding where appropriate. The annual review process offers a regular opportunity for EHCPs to be reviewed in conjunction with parents and schools. This offers an opportunity for any concerns and issues to be raised and be addressed. In practice it is schools who raise issues when they think a resource level needs to change for a child. I know that this happened in respect of one of the claimants (AC), whose funding was increased to resource level 5 with effect from 10 March 2017 at the request of his school, following an Annual Review…"

7. At paragraphs 41-54 of his witness statement Mr Lee deals with the issue of costs pressures on High Needs funding in Hackney. Since 2014/15 the funding allocated by central government to the Council under the High Needs Block has remained virtually flat in absolute terms, and so has been eroded in real terms. He states (at para 43):

> "The fact that the Council has exceeded its budget in this way demonstrates that, contrary to the impression given by the Claimants, it is not operating within a fixed budget in relation to top-up funding for children and young people with EHCPs. Quite the opposite: it is spending what is necessary to make provision for the needs identified in all the EHCPs for children and young people in its area, and far exceeding its provision budget in the process. Irrespective of the budget pressures, the Council like every other public body has a duty to achieve value for money in spending public funds. The current level of budget pressure in SEND provision is not sustainable in the long term. The Council is therefore seeking to find efficiencies across the education service as a whole. As a part of that, and consistent with the requirement to meet identified needs in full, a review of spending for SEND provision was undertaken. While this was clearly prompted by budget pressure, nevertheless, the decision-making is determined by needs and not by seeking to constrain spend to an overall budgetary limit for provision."

8. At paragraphs 55-66 of his witness statement, Mr Lee deals with the 5% reduction in the Resource Level bandings. He states, so far as is material:

> "55. Against this background of severe and continuing cost pressures, in 2016 Finance and SEND officers undertook to analyse what savings could potentially be made from within the SEN budget, whilst still complying with our legal obligations. Working with Frank O'Donoghue, the Council's Head of Business Services, a range of possible scenarios were identified including those for reductions in the element 3 Resource Levels. The latter ranged from reductions of 30% to 5%. For each of these reductions, we modelled the % reduction in total SEN funding for each pupil (bearing in mind that there was no proposal to reduce element 2 funding), the impact on the total funding available to each school in the borough, as well as the likely saving to the SEN provision budget.
>
> 56. These scenarios and other options for reducing spend were extensively discussed within a series of operational working groups and at SLT [Speech and Language Therapy] meetings, during 2016 and 2017. Although these meetings and discussions were not formally minuted, I was present at many of them and I can recall the nature of the discussions, the conclusions of which are set… out below. It was our judgment that it was possible for Hackney's schools to absorb a funding reduction at this level without reducing or putting at risk the special educational provision of individual children.

57. Due to the scale of the costs pressures on SEND budgets, there was a desire to achieve the highest possible savings consistent with our legal obligations. It quickly became clear that higher levels of reduction that had been modelled would have a material impact on schools' ability to make adequate provision for pupils with EHCPs. However, the Council considered that a reduction of 5% could be absorbed by schools making efficiencies, without compromising the special educational provision of individual children.

58. One factor contributing to our view that a reduction of 5% (to element 3 only) was within the capacity of schools, is that schools have considerable operational flexibility in their day-to-day use of resources in making the correct provision for pupils in a class, or in a whole school setting. We felt that a 5% reduction to the element 3 funding band could be absorbed through efficiency, without compromising the special educational provision of individual children. The provision made for a pupil with an EHCP in a mainstream school is not made in isolation from the rest of the staff or school, where personnel and resources are routinely switched or deployed between pupils, groups of pupils or classes. In this context, a funding change of between £249 and £833 for a pupil over the course of a year is in our view manageable. The lower sum of £250 for example might be equated to a day of cover for a teacher, and given the ability of schools to deploy staff internally to cover or provide support from a workforce of say 60-plus staff members, is both management and routine. There are many other day-to-day decisions on the deployment of staff and the use of resources through which this can be managed.

59. A second factor contributing to our judgment that the special educational provision for individual children could be maintained with a 5% reduction in Resource Levels was that the reduction in the overall funding available for an individual child arising from a 5% cut to the element 3 funding was lower than 5% in practice. It is in fact the range of 2.3-3.7%. This is because element 2 remained unchanged at £6,000. …

60. A third factor contributing to our view that a 5% reduction would not put at risk the special educational provision of any individual children was that the reduction would not be applied immediately to provision under existing EHCPs. Rather, the changes to the Resource Level amounts would be implemented at the point of the child's next Annual Review. Since the Annual Review is a vehicle for reviewing needs, provision and resourcing, it provides an opportunity for the local authority to consider what the right Resource Level is for the child that year….

61. A fourth factor contributing to the Council's view that the 5% reduction was manageable for schools without putting at risk the special educational provision of individual children, was because it resulted in only a very small % reduction in the schools' overall budgets. I analysed the figures for every school in the borough… In most cases the reductions were in the region of a few thousand pounds per school with the two outlier schools receiving reductions of £20,000 (for a very large secondary school) and £499 (for a small primary school). This is in the context of overall budgets of a few million pounds for each school. Very roughly then, the impact on each school's total budget was in the region of 0.1%. …

64. Finally, the Council took account of the fact that the proposal was put to the Schools Forum for consultation in October 2017. Members of the Forum probed the proposal at a meeting on 8 November 2017. They asked questions about how it would work in practice. But they did not object to it. …

The Schools Forum

67. The Schools Forum is a representative body made up of Head Teachers and Chairs of Governors from schools in all education sectors, as well as a union representative. Its members are highly experienced in the governance and funding of schools and are able to provide expert advice and assistance to the Council in the often highly technical area of school funding. On some matters the Forum takes decisions on proposals put to it by the Council. On other matters its role is advisory…..

69. Local authorities are required to consult Schools Forums on financial issues relating to arrangements for pupils with special educational needs, including the *arrangements* for paying top-up funding. The Council sought the views of Forum members on the proposed 5% reductions. A report was sent to Forum members in October 2017, enclosing a report for consideration at a meeting on 8 November 201[7]… At the meeting, there was a robust discussion during which Forum members probed Council members (including myself) about the practical implications of the proposal. This can be seen from the minutes. Forum members commented in general terms that a reduction in overall school funding would lead to a reduction in services. That was clearly a concern: that some services would be diminished. However, the Forum was not saying that the special educational provision in children's Plans would not be met. The outcome of the discussion was in fact that the Forum 'noted and received' the report.

70. Whilst formally the Forum's function is an advisory one, it is able to and sometimes does register an objection where it has serious concerns about a proposal put to it. Had the Forum

> chosen to do so in this case, I have no doubt that we would have reconsidered the 5% element 3 reduction.
>
> *Impact Assessment*
>
> 71. The whole process that I have described above of assessing the effect of various proposed levels of reduction was a process of assessing potential impact. I did not carry out a more formal equality impact assessment of the 5% reduction. This is because I was constrained, throughout the process, by the fact that the Council is under an absolute obligation to make provision for identified need. I was well aware of that constraint. As a result, the whole purpose of the analysis that I carried out was to determine what level of reduction, if any, could be made while respecting this obligation – that is to say, while ensuring that children with SEN still had their special educational provision in their Plan provided to them. In doing so I had regard throughout the process to the need to eliminate discrimination against disabled children and young people and advancing equality of opportunity between disabled and non-disabled pupils. This was inherent in the exercise I was conducting, which was designed to ensure that children with SEN continued to receive the provision that meets their needs."

9. On 20 December 2017 the Mayor and Deputy Mayor of Hackney held a meeting in the Town Hall with a group of parents, carers and activists concerned with the issue of provision for children with SEND and using the collective self-description (at least for the purposes of e-mail correspondence) of "hackneyspecialeducationcrisis". The group then sent a letter on 8 January 2018 to the Mayor and Deputy Mayor which included 15 formal questions. On 20 February 2018 the Mayor and Deputy Mayor replied stating, so far as is relevant:

> "Please find below the responses to the formal questions that you raised with us last month.
>
> **11. With regard to the 5% cut to funding for EHC plans from April 2018, how was this decision made and who was consulted (beyond the Schools forum)?**
>
> The 5% reduction in the value of the top-up (element 3) of the plan i.e. the existing Resource Level from April 2018 was arrived at through a practical exercise balancing the need to work within a budget, with the need to ensure individual provision could continue to be provided with as little impact as possible on provision.
>
> There has been no reduction on element 1 or 2 of the funding for pupils with a plan, meaning the overall impact on funding per pupil is much less than 5% and as such is considered to be within the scope of efficiencies a school can make without undue impact on provision in the school. Ideally, we would of course

> prefer not to be making reductions to funding levels but experience has shown that where this is unavoidable, a reduction to school funding at this level made consistently cross the board, creates much less turbulence and inconsistency in the system and the provision of support to pupils than other options.
>
> The local authority is responsible to making decisions on funding formulae and values and is required to consult Schools Forum. The authority has followed this process in respect of this decision.
>
> **12. Were schools asked to provide information on the likely impact of this 5% cut?**
>
> Schools were not asked to provide information, and to clarify, this is not a cut of 5% to the school budget. There is an element of variation in funding pupil values for all schools each year.
>
> In respect of a child with a plan, the element 1 funding (all pupils) may vary in value for the school from year to year as a result of a variety of formula factors linked to the pupil profile of the school. For element 2 of the plan, the school funding for what is termed 'notional' SEN may also vary in value from year to year. For element 3 of the plan, this will also be varied this year by 5%, and in practice for a child funded at resource level 2 in primary this would have an impact on the three elements together. The value of the school budget allocation including the value of elements 1, 2 and 3 are issued to schools in January/February each year and schools are responsible for planning accordingly."

10. Ms Norma Hewins, headteacher at Jubilee Primary School, which has 15 children with EHC plans out of a total number of just over 440 children in the school, comments in a witness statement served on behalf of the Claimants on Mr Lee's evidence that the approach of costing individual provision would not be workable in practice. She disagrees, saying:

> "4. … In my experience, schools alongside parents, carers and other professionals are able to assess a child's needs and to identify the provisions required to meet the children's needs and its costs. We undertake such exercises already and create provision maps for each child. It is something we are used to doing, and it does not create an overly burdensome system."

Ms Hewins continues:

> "7. Mr Lee also states that the Council considers that a reduction of 5% could be absorbed by schools making efficiencies, without compromising the special educational needs of children. However, Jubilee Primary School has a shortfall in its SEN funding and does not have any scope at all to fund SEN provision

> from other source[s]. Our funding is already stretched to the maximum level and we cannot simply 'absorb' these reductions. The 5% cuts are already being applied after the date of a child's annual EHCP review and at the outset of a new EHCP. At the same time as these cuts we have been 'hit' by increases in pay awards both in 2018-19 and 2019-20."

The statutory framework

11. The current SEND scheme is to be found in Part 3 of the 2014 Act which replaced the previous scheme in Part 4 of the Education Act 1996.

12. Section 19 of the 2014 Act provides, so far as is relevant:

> "**19 Local authority functions: supporting and involving children and young people**
>
> In exercising a function under this Part in the case of a child or young person, a local authority in England must have regard to the following matters in particular—
>
> (d) the need to support the child and his or her parent, or the young person, in order to facilitate the development of the child or young person and to help him or her achieve the best possible educational and other outcomes."

13. Section 27 ("**Duty to keep education and care provision under review**") is at the heart of the present appeal. It provides, so far as relevant:

> "(1) A local authority in England must keep under review—
>
> (a) the educational provision, training provision and social care provision made in its area for children and young people who have special educational needs or a disability, and
>
> (b) the educational provision, training provision and social care provision made outside its area for—
>
> (i) children and young people for whom it is responsible who have special educational needs, and
>
> (ii) children and young people in its area who have a disability.
>
> (2) The authority must consider the extent to which the provision referred to in sub-section (1)(a) and (b) is sufficient to meet the educational needs, training needs and social care needs of the children and young people concerned.
>
> (3) In exercising its functions under this section, the authority must consult—

(a) children and young people in its area with special educational needs, and the parents of children in its area with special educational needs;

(b) children and young people in its area who have a disability, and the parents of children in its area who have a disability;

(c) the governing bodies of maintained schools and maintained nursery schools in its area;

(d) the proprietors of Academies in its area;

(e) the governing bodies, proprietors or principals of post-16 institutions in its area;

(f) the governing bodies of non-maintained special schools in its area;

(g) the advisory boards of children's centres in its area;

(h) the providers of relevant early years education in its area;

(i) the governing bodies, proprietors or principals of other schools and post-16 institutions in England and Wales that the authority thinks are or are likely to be attended by—

(i) children or young people for whom it is responsible, or

(ii) children or young people in its area who have a disability;

(j) a youth offending team that the authority thinks has functions in relation to—

(i) children or young people for whom it is responsible, or

(ii) children or young people in its area who have a disability;

(k) such other persons as the authority thinks appropriate."

14. Section 30 of the 2014 Act creates the concept of a "local offer", which is a term of art describing information which each local authority is required to publish about SEND provision. It states:

"30 **SEN and disability local offer**

(1) A local authority in England must publish information about—

(a) the provision within subsection (2) it expects to be available in its area at the time of publication for children and young people who have special educational needs or a disability, and

(b) the provision within subsection (2) it expects to be available outside its area at that time for—

(i) children and young people for whom it is responsible, and

(ii) children and young people in its area who have a disability.

(2) The provision for children and young people referred to in subsection (1) is—

(a) education, health and care provision;

(b) other educational provision;

(c) other training provision;

(d) arrangements for travel to and from schools and post-16 institutions and places at which relevant early years education is provided;

(e) provision to assist in preparing children and young people for adulthood and independent living.

(3) For the purposes of subsection (2)(e), provision to assist in preparation for adulthood and independent living includes provision relating to—

(a) finding employment;

(b) obtaining accommodation;

(c) participation in society.

(4) Information required to be published by an authority under this section is to be known as its "SEN and disability local offer".

(5) A local authority must keep its SEN and disability local offer under review and may from time to time revise it.

(6) A local authority must from time to time publish—

(a) comments about its SEN and disability local offer it has received from or on behalf of—

(i) children and young people with special educational needs, and the parents of children with special educational needs, and

(ii) children and young people who have a disability, and the parents of children who have a disability, and

(b) the authority's response to those comments (including details of any action the authority intends to take).

(7) Comments published under subsection (6)(a) must be published in a form that does not enable the person making them to be identified.

(8) Regulations may make provision about—

(a) the information to be included in an authority's SEN and disability local offer;

(b) how an authority's SEN and disability local offer is to be published;

(c) who is to be consulted by an authority in preparing and reviewing its SEN and disability local offer;

(d) how an authority is to involve—

(i) children and young people with special educational needs, and the parents of children with special educational needs, and

(ii) children and young people who have a disability, and the parents of children who have a disability, in the preparation and review of its SEN and disability local offer;

(e)the publication of comments on the SEN and disability local offer, and the local authority's response, under subsection (6) (including circumstances in which comments are not required to be published).

(9) The regulations may in particular require an authority's SEN and disability local offer to include—

(a) information about how to obtain an EHC needs assessment;

(b) information about other sources of information, advice and support for—

(i) children and young people with special educational needs and those who care for them, and

(ii) children and young people who have a disability and those who care for them;

(c) information about gaining access to provision additional to, or different from, the provision mentioned in subsection (2);

(d) information about how to make a complaint about provision mentioned in subsection (2)."

15. The duty to carry out an EHC needs assessment is imposed by s 36. Section 37 establishes the duty in relation to EHC plans:

"37 **Education, health and care plans**

(1) Where, in the light of an EHC needs assessment it is necessary for special educational provision to be made for a child or young person in accordance with an EHC plan—

(a) the local authority must secure that an EHC plan is prepared for the child or young person, and

(b) once an EHC plan has been prepared, it must maintain the plan.

(2) For the purposes of this Part, an EHC plan is a plan specifying—

(a) the child's or young person's special educational needs;

(b) the outcomes sought for him or her;

(c) the special educational provision required by him or her;

(d) any health care provision reasonably required by the learning difficulties and disabilities which result in him or her having special educational needs;

(e) in the case of a child or a young person aged under 18, any social care provision which must be made for him or her by the local authority as a result of section 2 of the Chronically Sick and Disabled Persons Act 1970…

(f) any social care provision reasonably required by the learning difficulties and disabilities which result in the child or young person having special educational needs, to the extent that the provision is not already specified in the plan under paragraph (e).

(3) An EHC plan may also specify other health care and social care provision reasonably required by the child or young person.

> (4) Regulations may make provision about the preparation, content, maintenance, amendment and disclosure of EHC plans."

16. Section 42 ("**Duty to secure special educational provision and health care provision in accordance with EHC Plan**") provides, so far as is relevant:

> "(2) The local authority must secure the specified special educational provision for the child or young person.
>
> (6) 'Specified', in relation to an EHC plan, means specified in the plan."

Previous legislation

17. The duty on a local authority to keep special educational provision under review was first introduced by s 2(4) of the Education Act 1981 which provided:

> "It shall be the duty of every local authority to keep under review the arrangements made by them for special educational provision."

18. This provision was re-enacted in s 159 of the Education Act 1993, which introduced a duty to consult, in these terms:

> "A local authority shall keep under review the arrangements made by them for special educational provision and, in doing so, shall, to the extent necessary, consult the funding authority and the governing bodies of county, voluntary, maintained special and grant-maintained schools in their area."

19. This was later consolidated with minor amendments in s 315 of the Education Act 1996, which provided as follows:

> "(1) A local education authority shall keep under review the arrangements made by them for special educational provision;
>
> (2) In doing so, the authority shall, to the extent that it appears necessary, or desirable for the purpose of co-ordinating provision for children with special educational needs, consult the funding authority and the governing bodies of county, voluntary, maintained special and grant-maintained schools in their area."

Explanatory Notes to the 2014 Act

20. Section 27 is contained in Part 3 of the 2014 Act. The Explanatory Notes to the 2014 Act explain at paras 15 and 16 the new provisions in Part 3 in these terms:

> "15. Part 3 of the Act contains provisions following the Green Paper *Support and Aspiration: A new approach to special educational needs and disability* published by the Department for Education on 18 March 2011 and the follow up *Progress and Next Steps* published 15 May 2012.

> 16. The provisions are a major reform of the present statutory framework for identifying children and young people with special educational needs (SEN), assessing their needs and making provision for them. They require local authorities to keep local provision for children and young people with SEN and disabilities under review, to co-operate with their partners to plan and commission provision for those children and young people and publish clear information on services they expect to be available. The provisions set out the statutory framework for identifying, and assessing the needs of, children and young people with SEN who require support beyond that which is normally available. Statements made under section 324 of the Education Act 1996 and Learning Difficulty Assessments made under section 139A of the Learning and Skills Act 2000 are replaced by new 0-25 Education, Health and Care plans (EHC plans) for both children and young people. The provisions place a new requirement on health commissioners to deliver the health care services specified in plans."

21. In relation to s 27, the Explanatory Notes state:

> "**'Duty to keep education and care provision under review**
>
> 186. This section requires local authorities in England to keep under review the educational and training provision and social care provision made in their area for children and young people with special educational needs or disabilities and the provision made outside their area for children and young people with special educational needs for whom they are responsible and for those with disabilities.
>
> 187. Local authorities must consider the extent of provision and whether it is sufficient to meet children and young people's educational needs, training needs and social care needs. This complements the local authority's duties under section 14 and section 15ZA of the Education Act 1996 to secure sufficient schools and suitable education and training for young people.
>
> 188. When keeping their provision under review local authorities are required to consult with children and young people with special educational needs and disabilities, parents of children with special educational needs and disabilities, the bodies named in subsection (3) of the section and any other such people as the local authority thinks appropriate."

The grounds of challenge

22. The Appellants' sole ground on which they had permission to appeal to this court alleges that the 5% reduction was unlawful because the Council was in breach of a duty to consult under s 27 of the 2014 Act..

Case law: West Berkshire and Bristol

23. The first case in which s 27 was considered in a reported decision of the Administrative Court was *R (DAT) v West Berkshire Council* [2016] EWHC 1876 (Admin) in which Elisabeth Laing J said at paragraph [30]:-

> "Section 27(1)(a) of the 2014 Act imposes a duty on a local authority to keep under review, among other things, its social care provision for children with disabilities. Section 27(2) requires it to consider the extent to which that provision is sufficient to meet the social care needs of the young people concerned. Section 27(3) of the 2014 Act imposes a duty on a local authority to consult with a wide range of local bodies when it exercises the functions imposed by section 27. I have not been referred to any statutory guidance or other material which explains the purpose of these duties, or the frequency with which they are expected to be exercised. In the absence of such material, and despite my misgivings about the practical consequences of a such a view, I am driven to the conclusion that they must bite, where, as here, a local authority makes a decision which will necessarily affect the scope of the provision referred to in section 27."

24. In *R (KE) v Bristol City Council* [2018] EWHC 2103 (Admin) Judge Cotter QC said:-

> "112. In my judgment, …….given that the section [s 27] must have some utility the starting point taken that the Defendant was, by statute, under a duty to review educational provision for children and young people who have special educational need and, specifically, to consider the extent to which it is sufficient. So some review was necessary. The frequency and adequacy of any system of review is not a matter in issue in this case; rather whether a specific proposal triggered a duty to consult. "
>
> 113. In my judgment a potential decision to significantly reduce provision (which axiomatically follows from a decision to significantly reduce the budget) plainly brings into question, and therefore requires consideration of, the adequacy of what would be the remaining provision……..If there is a clear issue requiring review as to the future adequacy of provision then, in exercising its functions of review, an authority is mandated to consult with children and young people in its area with special educational needs, and the parents of children in its area with special educational needs. Rhetorically, if the duty does not arise in such circumstances when would it arise? I am wholly unpersuaded on the facts before me (and given the consultation undertaken and also the additional requirement to consult the Schools Forum in any event) that consultation with relevant children and their parents would have been of "enormous breadth" or unworkable."

The Surrey case

25. The hearing of the present case before Supperstone J took place from 31 October to 2 November 2018. The judge delayed giving judgment because it was known to him and to the parties that a Divisional Court comprising Sharp LJ and McGowan J had reserved judgment in a very similar, though not identical, case about s 27 of the 2014 Act: *R (Hollow) v Surrey County Council* [2019] EWHC 618 (Admin); [2019] PTSR 1871. Judgment in the *Surrey* case was handed down on 15 March 2019. The court said:-

> "98. As Mr Moffett QC submits, and we agree, section 27 of the 2014 Act is concerned with consideration at a strategic level of the global provision for SEN made by a local authority, or which is accessed by children for whom it is responsible. It both complements the general duties imposed on local authorities by Chapter III of Part I of the Education Act 1996 and "feeds in" as he puts it, to the local offer that must be published pursuant to section 30 of the 2014 Act.
>
> 99. As Mr Moffett QC also submits, an examination of the structure of section 27 makes this clear. First, it imposes a duty on a local authority to review the provision that is made in its area for children with SEND and the provision that is made outside its area for children with SEND who are from its area. Secondly, when reviewing the relevant provision, the local authority must consider whether it is sufficient. Thirdly, the duties are to be performed from time to time, as the occasion arises. In this connection, no specific 'trigger' for the duty to review is provided. Thus by s 12(1) of the Interpretation Act 1978, the power may be exercised, or the duty is to be performed, from time to time as occasion requires. Fourthly, when reviewing the relevant provision and considering whether it is sufficient, the local authority must consult a wide range of persons and bodies who are likely to have an interest in the relevant provision, namely all those bodies or individuals specified in section 27(3) of the 2014 Act.
>
> 100. These are children and young people in its area with special educational needs, and their parents; children and young people in its area who have a disability, and the parents of children in its area who have a disability; the governing bodies of maintained schools and maintained nursery schools in its area; the proprietors of Academies in its area; the governing bodies, proprietors or principals of post-16 institutions in its area; the governing bodies of non-maintained special schools in its area; the advisory boards of children's centres in its area; the providers of relevant early years education in its area; the governing bodies, proprietors or principals of other schools and post-16 institutions in England and Wales that the authority thinks are or are likely to be attended by children or young people for whom

it is responsible, or children or young people in its area who have a disability; a youth offending team that the authority thinks has functions in relation to (i) children or young people for whom it is responsible, or (ii) children or young people in its area who have a disability and such other persons as the authority thinks appropriate.

101. We would add that although the drafting of section 27(3) is not entirely clear, in our view, the duty of consultation applies compendiously to the functions described by sections 27(1) and (2). That is, we do not consider that what is contemplated is consultation in relation to the review, pursuant to section 27(1) and section 27(3) and then a further consultation in relation to the sufficiency of provision, pursuant to section 27(2) and section 27(3).

102. The claimants' case that section 27 of the 2014 Act is engaged by the decision under challenge must carry with it the proposition that the extensive duties of consultation made mandatory by section 27(3), of the many different parties who must be consulted, are engaged whenever a local authority makes any alteration to SEND services, including budgetary decisions of the kind taken by the Council in this case. This is an interpretation that we are unable to accept. We do not consider Parliament can have intended that the extensive and onerous duties of consultation made mandatory by section 27, should be undertaken on a "rolling basis" let alone, that it would be triggered every time a change is made to the provision of SEN. Such an interpretation would be capable of leading to absurd results, adversely affecting both the ability of local government to carry out its business, and the amount of resources available to meet the needs of those the legislation is designed to protect.

103. In our view, there is nothing in the legislation, or legislative history for that matter, to support such an interpretation, or to indicate that this was Parliament's intention. On its face, and when read in the statutory context to which we have referred, in our view, the legislation imposes a duty on local authorities, which arises from time to time, to consult at reasonable intervals, those identified in section 27(3) in order to keep the provision referred to under review, in which connection local authorities must consider the extent to which the provision referred to is sufficient to meet the educational needs, training needs and social care needs of the children and young people concerned.

104. The case for the claimants rests here on an observation made by Laing J in *DAT* and on a finding in *KE* that a specific duty to consult under section 27 of the 2014 Act arose on the facts of that case. In *DAT,* it was held that the duties imposed by section 27 must bite where a local authority makes a decision which will necessarily affect the scope of the provision referred

> to in section 27. However, in the short passage in her judgment, at para 30, where section 27 was considered, the judge gave no reasons for her conclusion, and expressed misgivings about it, in particular because, as she said, she had heard limited, if any argument on the point, and had not been referred to any material which explained the frequency with which the duties were expected to be exercised. In that connection the judge was not referred to section 12(1) of the Interpretation Act 1978 to which we have referred.
>
> 105. We think the judge was right to express those misgivings. If her reluctant interpretation were to be correct, the results would be startling indeed. This would mean that every time a local authority makes a decision that will affect the scope of provision made in its area for children with SEND or the provision that is made outside its area for children with SEND who are from its area, no matter how small, it must review the entirety of its provision both in and outside its area. It must consider whether the entirety of its provision is sufficient and it must consult the wide range of persons and bodies identified (including children with SEND) whether the decision is to reduce the scope of provision or increase it, regardless of the interest that such consultees, such as youth offending teams, might have in any change.
>
> 106. The decision in *KE* which referred to and relied on the decision in *DAT,* carries the claimants' case in this regard no further; the judge in *KE* did not refer to the terms of section 27, referring only to a duty to consult "relevant children and their parents" without reference to the actual breadth of the consultation requirement. In the circumstances, and with great respect to the judges concerned, we consider their interpretation of section 27 of the 2014 was wrong, and we would decline to follow it (for this purpose, see *R v Greater Manchester Coroner, ex p Tal* [1985] QB 67, 81).
>
> 107. In the circumstances, in our judgment, both the claimants' substantive and procedural case under section 27, namely that it gave rise to a duty to consult, must fail."

26. On this aspect of the case which was before Supperstone J, he agreed with the Divisional Court's analysis in *Surrey* of s 27 and was not persuaded that there were grounds for departing from it. He did not consider that s 27(2) was engaged in the present case, nor that the s 27(3) duty to consult arose.

The Redbridge case

27. The most recent case cited to us was the decision of Swift J in *R (ZK) v London Borough of Redbridge* [2019] EWHC 1450 (Admin). As in the present case at first instance, Redbridge's SEND provision was challenged on a number of grounds. One of these was a failure to consult under s 27 about the sufficiency of SEND provision at any time

between 1st September 2014 (the date on which s 27 came into force) and the issue of proceedings in late 2017, with two exceptions of consultations concerning: (a) a High Needs Review in preparation for a revised national funding formula for the 2018-19 academic year, and (b) an annual review of provision for the support of visually impaired pupils in mainstream schools.

28. Swift J noted that:-

> "57. The Claimant's case under section 27 of the 2014 Act is distinct from the earlier grounds of challenge. It is to the effect that since the commencement of section 27 (1st September 2014) Redbridge has failed to discharge its obligations under subsections (1) and (2) by failing to conduct a review of the arrangements it had in place with JCES for the provision of support to pupils in mainstream education who are affected by visual impairment. The Claimant relies on the judgment of Elisabeth Laing J in *DAT v West Berkshire Council* (2016) CCL Rep 362. There, she concluded that the section 27 obligations arose and fell to be discharged whenever a local authority *"makes a decision which will necessarily affect the scope of the provision referred to in section 27"*.
>
> 58. Strictly speaking the Claimant does not need to rely on that dictum at all. It is not the Claimant's submission in this case that some event has occurred that triggered compliance with the section 27 duties. The Claimant's case is simply that Redbridge has done nothing since 1st September 2014 that amounts to compliance with section 27, and that it is about time that it did."

29. Swift J then referred to the *Surrey* case and observed that the Divisional Court had there taken a different view from the one reached by Elisabeth Laing J in *DAT* as to whether the s 27 obligations were triggered by specific events. Having cited paragraphs 102-105 of *Surrey,* Swift J continued:-

> "60. In my view that general conclusion as to the circumstances in which the section 27 duties fail to be performed, is correct. It is notable that section 27 is formulated differently from duties, for example the section 149 Equality Act 2010 public sector equality duty, which attach to general decision-making. Language such as in section 149(1) of the 2010 Act which ties the obligation under that section to *"the exercise of functions"* is singularly absent from section 27 of the 2014 Act. For the reasons given by Sharp LJ there is no sustainable basis for reading that sort of requirement into Section 27. "
>
> 61. Rather, in *Hollow*, the court relied on Section 12 of the Interpretation Act 1978 as a sufficient explanation of when the section 27 obligations will arise
>
> > "(1) Where an Act confers a power or imposes a duty it is implied, unless the contrary intention appears, that the

> power may be exercised, or the duty is to be performed, from time to time as occasion requires."

62. This does not, however, address the substantive content of the section 27 duties – i.e. what is required to discharge the obligations imposed. As I see it, this is point [*sic*] that arises in the present case. The outcome of the section 27 argument in this case does not depend on whether or not the section 27 duty is triggered by events in like or similar manner to the public sector equality duty. On the facts of this case the Claimant does not point to any specific trigger event.

63. I consider that in substance, the section 27 duty is in the nature of a strategic obligation. Section 27 is a more sophisticated and subtle function than many which are imposed on local authorities. As formulated, section 27 suggests local authorities ought to take some sort of programmatic approach to the review and assessment of their general provision for children who are disabled or who have special educational needs. I do not suggest that what is required is a written programme. Section 27 is directed to substance not form. What is required is something programmatic in the sense that in the course of a sensible period of time, a local authority monitors and evaluates the provision it makes, leading overall to reconsideration of whether that provision ought to be the provision that continues to be made.

64. It is likely that from time to time, a range of different steps may be appropriate if a local authority is to review and consider the sufficiency of the provision it makes available. Any local authority may in the first instance decide for itself what steps should be taken and when they should be taken. Section 27 does not contain obligations of the sort that lend themselves to an overly prescriptive approach by the courts. A "one size fits all" approach ought not to be the objective. Local authorities should be best-placed to determine for themselves what the elements of a review programme should be, subject always to review by the courts against the well-known *Wednesbury* standards of purpose, relevance and rationality. What a local authority might do in discharge of its section 27 obligations could include general strategic review exercises; it might also include more specific exercises prompted by particular decisions or circumstances. Such actions, perhaps a mix of higher level exercises and lower level exercises, perhaps a range of interlocking steps, will collectively, demonstrate compliance with the section 27 duties.

65. In the present case the Claimant's case is that since September 2014 when section 27 came into effect, Redbridge has not acted so as to comply with its requirements. In fact, the section 27 duty is not as new as that submission might be taken to suggest: see the judgment in *Hollow* at paragraphs 88-90. In respect of the arrangements for special educational needs

> provision there were precursors to section 27 of 2014 Act in section 2 of the Education Act 1981, section 159 of the Education Act 1993, and section 315 of the Education Act 1996.
>
> 66. In this case Redbridge points to two matters indicating compliance with section 27. The first is a High Needs Review undertaken in response to the introduction of a new national formula for the 2018/19 academic year. The review covered the whole of what is referred to as the "High Needs block" which comprises services provided to children and young persons up to the age of 25 who are assessed as having high needs as a result of disability or special educational need. In scope, the High Needs Review covered all expenditure on special educational needs funded through the High Needs budget. The work of the Review included discussion with those involved in the provision of services, and consultation with those who have EHCPs and their parents. The second matter Redbridge relies on is the annual process by which it determines in relation to the provision of the support for VI pupils in mainstream schools, the nature and extent of services it buys-in from JCES. This process is specific to a single area of service provision. It may well not 67. entail any, or any significant consultation with those in receipt of those services. It does include review of provision by the Council's officers, and approval by elected members of the arrangements proposed for the following year.
>
> 67. The Claimant's response is to the effect that the JCES reviews do too little as they only concern provision of outreach services for visually impaired pupils in mainstream schools, while exercises such as the High Needs Review do too little because they are too broad and insufficiently focused on matters such as outreach provision for pupils with visual impairments.
>
> 68. In the context of the section 27 obligations as I have sought to describe them, I do not consider that either criticism is valid. Compliance with the section 27 duties will not necessarily rely on single, set-piece, comprehensive exercises. A mix of generic and specific actions is capable of being sufficient, so long as the overall consequence is the progressive review and assessment of the provision that a local authority makes. In the present case, I do not consider there to be any sufficient evidence to make good the submission that Redbridge has failed to comply with its section 27 obligations."

The Appellants' submissions

30. Mr David Wolfe QC submitted that *Surrey* did not directly concern s 27 and that the conclusions of the Divisional Court in relation to s 27 were *obiter*; but in any event submits that their interpretation of the section was wrong in a number of respects. The duty is not to "review" the Council's provision for SEND but to "keep under review" that provision. It was accordingly wrong to say (by reference to s 12 of the Interpretation

Act 1978 or otherwise) that s 27 only requires a local authority to carry out a strategic review "from time to time" (the 1978 Act wording) or "at reasonable intervals" (the phrase used by the court in *Surrey*). What s 27 requires is an ongoing process by which the local authority is alert to any changes which may require it to consult about the sufficiency of the SEND provision in the borough.

31. Mr Wolfe also takes issue with the finding of the Divisional Court in *Surrey* at [98] that s 27 is "concerned with consideration at a strategic level of the global provision for SEN made by a local authority …". He submits that the words "strategic" and "global" do not appear in the text of s 27. The section does not impose an obligation to carry out a review of all the authority's SEND provision at the same time. The Appellants do not, therefore, accept the finding in *Surrey* at [105] that a small change in one aspect of SEND provision would require a local authority to review the whole of its provision, both in and outside its area.

32. The Appellants argue that a careful reading of subsections (1) and (2) of s 27 makes it plain that these are independent provisions. If they were intended to be carried out together, they would either form part of the same subsection, or s 27(2) would begin with the words "in exercising its functions under subsection (1)" or something similar. The use of the plural word "functions" in s27(3) leaves open the potential for the obligation to keep under review pursuant to s 27(1) and the consideration of sufficiency pursuant to s 27(2) to arise separately. Mr Wolfe argues that by treating the latter as being linked to the former, and the former as being only a periodic obligation to carry out a global or strategic review, the Divisional Court has interpreted the duties in a way in which there could be many substantial changes to local SEND provision but no consultation upon any of them until the next strategic review happened to take place, which might be long after the impact of the changes had been felt by the children and young people concerned. Mr Wolfe accepted, however, that (as the Divisional Court held in paragraph [101] of *Surrey*) s 27 does not require one consultation in relation to a review under s 27(1) followed by a further consultation in relation to the sufficiency of provision under s 27(2).

33. It was also submitted that there is no obligation under s 27(3) to consult every person or organisation in the list of subsections: it would be sufficient for the local authority only to consult those people or bodies identified in s 27(3) which are relevant to the function being exercised.

34. Mr Wolfe argued that the Appellants' interpretation of the section would not lead to "absurd results" as the Divisional Court suggested. The obligation would only arise if a change was proposed that was capable of affecting the sufficiency of SEND provision. A *de minimis* change (Mr Wolfe instanced the reduction of a budget item by £1) would not require consultation. But, he argued, the budget reduction in this case was not *de minimis*: on the contrary, the gist of Mr Lee's evidence was that a reduction of anything more than 5% in the relevant element of the SEND budget would have been unacceptable; 5% was therefore to be seen as a "tipping point"; and consultation under s 27 was therefore essential.

The Respondent's submissions

35. Mr Auburn, in his concise and compelling response on behalf of the Council, submitted that s 27(1)-(2) of the 2014 Act impose a single duty. This is shown, for example, by

the use of the definite article at the start of subsection (2). "The authority" referred to in subsection (2) is the one fulfilling its obligation under subsection (1) to keep SEND provision under review. When doing so it must consider the extent to which that provision is sufficient to meet the needs of the children and young people concerned.

36. Mr Auburn submits that this construction is supported by the Explanatory Notes to the 2014 Act as well as by the 2015 Code of Practice. Paragraph 186 of the Explanatory Notes (cited above) says that s 27 requires local authorities in England to keep the SEND provision under review. Paragraph 187 says that they must consider the extent of the provision and whether it is sufficient to meet children and young people's educational, training and social care needs. Paragraph 188 then says that "when keeping their provision under review local authorities are required to consult…". The draftsman of this paragraph clearly regarded the preceding two paragraphs as forming part of a single duty. In the 2015 SEND Code of Practice issued jointly by the Department for Education and the Department of Health, paragraph 4.19 makes this point even more clearly by saying that [emphasis in the original]:-

> "Local authorities *must* keep their educational and training provision and social care provision under review and this includes the sufficiency of that provision……."

37. Mr Auburn further submits that the consultation obligation imposed by s 27(3) is indivisible. When the authority carries out a consultation under s 27(3) it must consult each of the bodies or persons on the list in subparagraphs (a) to (j), together with such other persons as the authority thinks appropriate (s 27(3)(k)). The statute does not allow the authority to consult only some of the persons or bodies listed.

38. Mr Auburn points out that there are three levels of decision-making relevant to SEND provision for children and young people. The first is individual decisions. These require each individual child or young person to be provided with a draft EHCP which must (s 38(2) of the 2014 Act) be the subject of individual consultation with each young person or a parent of each child.

39. At the next level up there has to be annual consultation with schools conducted through the local Schools Forum. The Schools Forums (England) Regulations 2012, reg 10 provides so far as material that:-

> "(1) The authority must consult the schools forum annually in respect of the authority's functions relating to the school's budget, in connection with the following:
>
> (a) arrangements for the education of pupils with special educational needs, and in particular,
>
> (i) the places to be commissioned by the local authority in different schools and other institutions and
>
> (ii) the arrangements for paying top-up to schools and other institutions."

Hackney carried out consultation with the Schools Forum on 8 November 2017.

40. The third and broadest level of decision-making is that required by s 27. Mr Auburn submitted that the Divisional Court in *Surrey* was right to find that this was a global or strategic review to be carried out from time to time and on which the very extensive consultation required by s 27(3) would have to take place. Not every budget decision affecting SEND provision engages s 27. The Schools Forum is the statutory basis for consultation on the type of decision under review in the present case, namely a modest reduction in part of the budget for the forthcoming financial year.

Discussion

41. I accept the submission of Mr Auburn that s 27(1)-(2) create a single duty. Each local authority to which the section applies must keep its SEND provision (not only educational but also training and social care provision) under review, and in doing so must consider the extent to which that provision is sufficient to meet the needs of the children and young people concerned. This seems plain to me from the wording of s 27(2), with its use of the definite article in the phrase "the authority" as well as the further reference back to s 27(1)(a)-(b); and the absence of any word such as "also" before "consider".

42. Since the interpretation of the section is in my opinion clear and unambiguous without recourse to external sources, it is unnecessary to rely on the Explanatory Notes to the Act or the 2015 Code of Practice. Mr Wolfe did not seek to advance the traditionalist view that such documents, in particular a Code of Practice, are not a legitimate aid to statutory interpretation. (This view is now rather outdated, and I note that both documents were cited in the *Surrey* case, apparently without objection, and referred to in the judgment.) What they do show is that in each case the drafters of the documents – presumably parliamentary counsel for the Explanatory Notes and Departmental civil servants for the Code of Practice – *thought* that s 27(1)-(2) created a single duty: which is at least some reassurance to me that my reading of the statute is not an eccentric one.

43. I also agree with Mr Auburn that the duty to consult imposed by s 27(3) is indivisible. Again this is the plain construction of the words used. There is no limitation of the duty to consult each of the people and bodies on the list created by s 27(3)(a)-(j). The local authority can add to the list (s 27(3)(k)) but not subtract from it.

44. The decision in *Surrey* is not binding on this court; and it is therefore an academic question whether the Divisional Court's interpretation of s 27 was essential to the decision or merely *obiter.* Whichever it was, I agree with it, in particular with the finding at [98] that s 27 is concerned with consideration at a strategic level of the global provision for SEND made by a local authority; and with the observation at [99] that the duties are to be performed from time to time, as the occasion requires, with no particular "trigger" for the duty being specified.

45. It follows that, like the Divisional Court in *Surrey,* I respectfully disagree with the observation of Elisabeth Laing J, in the final sentence of paragraph [30] of her judgment in *West Berkshire* (albeit with misgivings, as she made clear), that a duty to consult under s 27(3) arises whenever a local authority makes a decision which will necessarily affect the scope of its SEND provision; and with paragraph [113] of Judge Cotter's decision in *Bristol*.

46. I agree with the observations of Swift J in paragraphs [63]-[64] of *Redbridge* that the s 27 duty is in the nature of a strategic obligation and that local authorities should be best placed to decide for themselves what the elements of a review should be, subject to review by the courts against *Wednesbury* standards. It is not necessary to decide in this case whether Swift J was right to say that s 27 requires local authorities to take "some sort of programmatic approach" to reviewing and assessing the sufficiency of their SEND provision, or that a "mix of higher level and lower level exercises" will collectively demonstrate compliance with s 27.

47. I reject Mr Wolfe's argument that the reduction of 5% in the Element 3 Resource Level funding (a lower reduction overall, as Mr Lee explains in paragraphs 59-61 of the witness statement cited above) was so close to the "tipping point" that consultation with parents, carers and young people affected was required by law. The argument, with respect, is circular. Mr Lee says at several points in paragraphs 55-61 of his statement that the Council took the view that a 5% reduction in Element 3 could be "absorbed" by schools making efficiency savings without compromising SEND provision for individual children; that it was "within the capacity of schools"; that SEND provision for individual children "could be maintained" despite the 5% reduction; that it would "not put at risk" such individual provision; and so forth. Nothing in his evidence suggests that 5% was a "tipping point". It cannot be the case that if a local authority rationally concludes that a particular level of saving on SEND provision can be achieved without a significant adverse impact, but that a more drastic budget reduction (which it is not proposing to implement) might well have such an impact, that is enough to bring s 27 into play.

48. I do not consider that this modest reduction in one element of SEND funding was sufficient to trigger a strategic review under s 27(1)-(2) with the consequent requirement of widespread consultation under s 27(3). It did necessitate consultation with the Schools Forum under the 2012 Regulations, which is what occurred. I would leave for another day the issue of what level of major budget cuts or transformation of a local authority's SEND provision would trigger a wider duty to consult either under s 27 or at common law.

49. It is therefore unnecessary to consider Mr Auburn's fallback defence, under s 31(2A) of the Senior Courts Act 1981, that even if the consultation which the Claimants argue was required by s 27(3) had occurred, it is highly likely that the outcome for the Appellants would not have been substantially different.

50. I would accordingly dismiss this appeal.

Lord Justice Baker:

51. I agree.

Mr Justice Cobb:

52. I also agree.