Neutral Citation Number: [2022] EWHC 493 (Admin)

Case No: CO13072020

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

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 8 March 2022

Before :

THE HONOURABLE MRS JUSTICE FOSTER DBE

- -

Between :

THE QUEEN
(on the application of)

L (by her litigation friend N)	**First Claimant**
M (by her litigation friend O)	**Second Claimant**
P (by his litigation friend Q)	**Third Claimant**
- and -	
Devon County Council	**Defendant**

- -
- -

Stephen Broach and **Alice Irving** (instructed by **Watkins Solicitors**) for the **Claimants**
Jack Anderson (instructed by **Devon County Council Legal Dept**) for the **Defendant**

Hearing date: 30 April 2021

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Approved Judgment

THE HONOURABLE MRS JUSTICE FOSTER DBE:

INTRODUCTION

1. L, M and P are all children in respect of whom the Defendant local authority has have prepared and maintained Education Health and Care plans ("EHC plans") pursuant to their obligations under the Children and Families Act 2014 ("the Act") and the Special Educational Needs and Disability Regulations 2014/1530 ("the Regulations") made thereunder.

2. Although in respect of the cases before the court, the individual matters had already been resolved, a decision on the point of statutory interpretation arising was directed to be heard by the Court of Appeal who reversed the previous trial judge's decision to the effect that the issue was academic and ought not to be determined.

3. In broad terms, EHC plans are the mechanism by which children and young people up to the age of 25 years who have special educational needs and/or disabilities, have them appropriately met by provision secured by the local authority. The authority has responsibility for monitoring the special education provision secured, including an annual review, and future planning for each EHC plan. Statutory guidance for local authorities, schools and colleges is set out in the Special Educational Needs and Disability Code of Practice: 0 to 25 years ("the Code").

4. It is common ground that a strict timetable exists for many of the steps taken in respect of special educational provision under the EHC plans process, and this case concerns the question of whether there is also a fixed timeframe in respect of steps in the amendment of a plan where a local authority accepts amendment is necessary, during the compulsory statutory annual review.

5. The Claimants argue that necessarily, as an annual review feature, an overarching time frame does exist, and that within 12 weeks of the annual review meeting, properly read, the statutory scheme requires a local authority to issue a final amended EHC plan. This is an important step because the issue of the final amended plan triggers a right to contest provision under the plan on appeal. The Statutory Appeal Tribunal exercises a *de novo* jurisdiction and will decide the suitability of provision for itself if provision is appealed. The decisions made affect which school is to be attended and what provision is made for children who may require significant specialist input for their welfare. Delays, and the local authority's interpretation of the time provisions, mean an issue may not get before a Tribunal in time for the new academic year. The Claimants argue there is an imperative to accomplish all the steps in the amendment process as soon as possible in the best interests of the child or young person in question. The Defendant, by contrast, argues the Regulations impose no express time-limit for this part of the plan process, accordingly, the law will read in only a reasonable time in which to accomplish the statutory obligation, and that will lawfully protect the relevant interests.

6. In the cases of L, M and P, there were what the Claimants' representatives submit were indefensible delays by the Defendant, particularly in respect of the finalisation of amended plans for the Claimants. The facts of the individual cases are set out in more detail at paragraph 16 to 18 below. In summary, the Claimants allege that the Defendant significantly breached a time limit of four weeks from the statutory review meeting for sending a notice confirming its proposals for amending their EHC plans. It took nine weeks for the defendant to provide requisite notification under the Regulations to L, fourteen weeks in respect of M and twenty-five weeks in respect of P. Following this notification, the Defendant stipulated that an eight week time-limit from the date of sending the proposed amendments applied for the production of the

finalised EHC plan thereafter. Mr Stephen Broach for the Claimants submitted with some force that delays are wholly undesirable in the context of education provision for persons with special needs. The children and young people necessarily are changing and developing rapidly and require appropriate provision to be made through time. He cites a significant impact upon the Claimants in this case. The delays in amending in turn delayed the ability of the Claimants' parents to appeal to the Tribunal to challenge deficiencies they saw in the finalised plans. The delay was said to have caused the parents of P to wait for the next annual review to seek to improve the plan for P, since it was too late to appeal effectively.

7. Mr Jack Anderson for the Defendant points to what he argues is the clear wording of the Regulations, in what he says is the operative provision, there is no express time limit, nor can one be read into the relevant part of the instrument.

8. The history of the case is unusual in that, although the substantive issue has not before been decided, the matter has been before the Administrative Court and before the Court of Appeal. Permission for the claim to proceed had been granted on two Grounds, only one of which is now in issue. By order of 7 August 2020 the Administrative Court dismissed them on the basis they were academic, since the delay in completing the statutory processes had ended and the court declined to reach a decision on the point of construction. The Claimants appealed that decision and on 16 March 2021, the Court of Appeal (Jackson LJ, Haddon-Cave LJ and Laing LJ) allowed the appeal, remitting the matter back to the Administrative Court for substantive determination of the issue of statutory construction in light of its importance to the practical operation of the scheme.

9. This is that substantive determination.

10. The Claimants' case is that the Regulations governing the process of amendment on review must be read as requiring the proposed amendments to be sent along with the local authority's statutory decision that an amendment is proposed. They argue in their written materials that accepted canons of statutory construction allow, indeed would compel, the court to give that reading to the provisions. They rely on a range of arguments including the terms of both the enabling domestic legislation and the provisions of international treaties to the effect that words may be read into the Regulations in order to achieve the outcome which they say Parliament must, in this sensitive context, have intended. Absent such robust confirmation, a local authority operates without time limits which protect the children and young people who are beneficiaries of the EHC plan scheme.

11. The Defendant's case is that a local authority must notify a child's parents within four weeks of an annual review meeting of their *intention* to propose amendments (stage 1), but the specific amendments will be notified only subsequently (stage 2). No specified time constraint applies to stage 2 of the process. Further, the subsequent issue of the finalised EHC plan (Stage 3), will take place as soon as practicable, and, in any event, within 8 weeks of sending the parents the proposed amendments under stage 2. The timing of the final issue of the plan depends (on their reading), upon when they have given effect to stage 2.

12. Since on the Defendant's case there is no timing requirement for sending the proposed amendments to the parents under stage 2, this has the effect says Mr Broach, that there is no specific timeframe by reference to the annual review meeting, within which a local authority must issue the final amended EHC plan following such a review meeting. The timeframe thus remains in the control of the local authority.

13. In a nutshell, the Defendant contends that it is not possible to read into the Regulations the meaning attributed by the Claimant through any recognised canon of construction or other legal imperative. Had the draughtsman intended a time limit of the kind argued for by the Claimants, he or she could have inserted one. Nothing of the nature of that relied upon appears in the relevant wording, whereas it does appear in respect of other aspects of the plan process. The Defendant says there is no risk of injustice, nor a risk that the purpose of the enabling statute will be frustrated by adhering to the plain meaning of the wording. The timeframe for this part of the process, namely the production of the proposed amendments to the EHC plan, is governed by the requirements of reasonableness at common law. A concern about timing and delay may be given effect to in the usual way by an application for judicial review.

14. The Claimants argue such an analysis would allow a defendant in the position of Devon County Council, to plead that its resource position was relevant to a challenge based upon failure to act "as soon as reasonably practicable", and that cannot be right in the current context in which there is a strong imperative for speedy resolution at all stages.

THE INDIVIDUAL CLAIMS

15. The factual background to each of these cases is stark in terms of the chronology of each of the Claimants' experience. Given the emphasis on time limits within the Regulations, although the individual cases have been resolved, and as Mr Anderson notes, this is not a generalised challenge in respect of delay, it is appropriate to set out what has happened in respect of each of these Claimants. The essential chronologies are as follows.

16. With regard to the First Claimant L, on 2 December 2019 there was an EHC plan review meeting. By 5 February 2020 L had sent a pre-action protocol letter asking for

a decision notice and for the proposed amendments, then on 6 February 2020 the Defendant issued notice of a decision to amend the EHC plan. Four days later they promised to provide the proposed amendments by 2 March 2020 but said "*The only obligation is … to issue the amended final plan within 8 weeks of the decision notice".* On 2 March 2020 a further pre-action protocol letter was sent requesting the proposals for amendment. They were issued the day after. L requested the Defendant ~~t~~o issue the final plan by 16 March 2020 but, on 17 March the Defendant said, "*we have 8 weeks from the date we issued the amends to [complete] this part of the process*". A further pre-action letter followed on 19 March 2020, requesting the final EHC plan. The next day the Defendant stated: "*the Council is endeavouring to issue the final plan within 8 weeks of its decision*". The final amended EHC plan was issued on 17 April 2020. This claim had been issued by 5 April. L lodged an appeal against the final amended plan on 15 May 2020, which appeal was allowed on 15 September 2020. L began the new school placement at the start of November. The final amended EHC plan, dated 18 December 2020 was received on 22 December 2020.

17. A review meeting was held in respect of the Second Claimant M on 29 October 2019. A pre-action protocol letter was sent on the 23 January 2019 requesting the amended EHC plan within two weeks. A notice of decision to amend was issued on 6 February 2020, and four days later proposed amendments were promised by 2 March 2020, and accompanied by the same statement about timings above. On 3 March 2020 the proposed amendments were sent. Six days later, L requested the final plan be issued by 13 March 2020. It was not, and a pre-action protocol letter on 23 March 2020, requested the decision by 27 March 2020. On that date the Council stated they were endeavouring to provide it within eight weeks of its decision. It arrived on 15 April 2020. This claim had been issued on 5 April 2020. An appeal of 1 May 2020 was

allowed on 30 October 2020, and on 6 November 2020 M began a new school placement. The actual final amended EHC plan dated 17 December 2020 was issued on 22 December 2020.

18. As to the Third Claimant P, on 15 February 2020, by mistake, a final amended EHC plan was issued, but without any consultation as required by section 44 (6) of the Act. On 12 March 2020 P made a challenge, on this basis, with a pre-action protocol letter dated 26 March 2020. The Defendant issued a notice of decision to amend the plan on 2 April 2020, and the next day indicated they would issue proposed amendments by 17 April 2020. Again, they stated that a timescale of 8 weeks applied to the amended EHC plan. The proposed amendments were issued on 17 April 2020, by which time P had applied to be joined to this claim. On 14 May 2020 the final amended plan was issued. On 11 November 2020 there was an annual review at which amendments were recommended. On 8 December 2020 proposed amendments were issued and a final amended EHC plan produced on 29 January 2021.

19. Fairly, and realistically, Mr Anderson for the local authority accepts that there was delay in issuing notification of the Defendant's decision whether or not to maintain, amend or cease the Claimants' EHC plans. The Defendant accepted in terms that even the statutory time limits which they accept, had not been met. But, correctly, he stated that this appeal was not about pure delay (which the Defendant squarely blamed upon resources).

THE LEGAL FRAMEWORK

20. The statutory system places on a local authority a duty to exercise its functions with a view to ensuring that all children and young people with learning difficulties or disabilities in their areas are identified. The parents of a child, or a young person may

request an assessment of the educational, health care, and social care needs of a child or a young person and there is a right of appeal against a refusal to assess. In the light of an assessment, if it is necessary for special educational provision to be made, the local authority must secure the preparation of an EHC plan and, once prepared, they must maintain it. This system of EHC plans replaced the previous Statements of Special Educational Need under the Education Act 1996.

21. I take the following succinct encapsulation of the primary and secondary legislative framework from the judgment of Laing LJ in the Court of Appeal in this case ([2021] EWCA Civ 335):

> "*4. Section 37(1) of the Children and Families Act 2014 ('the Act') makes provision for EHC plans 'Where, in the light of an EHC assessment, it is necessary for special educational provision to be made for a child…in accordance with an EHC plan…'. Section 37(2) of the Act explains what must be specified in an EHC plan. Section 37(4) enables Regulations to be made 'about the preparation, content, maintenance, amendment and disclosure of EHC plans'. When a local authority maintains an EHC plan for a child, it must secure for the child the educational provision which is specified in the EHC plan (section 42(2)).*
>
> "*5. Section 44(1) requires a local authority annually to review a plan which it maintains. Section 44(2) provides for when a local authority must re-assess a child's needs. When a local authority reviews an EHC plan or re-assesses a child's needs, it must consult the child's parents (section 44(6)). Section 44(7) enables Regulations to make provision about reviews and re-assessments. Section 44(8) and (9) make further provision about such Regulations.*
>
> "*6. Section 51 of the Act confers a right of appeal to the First-tier Tribunal ('the FTT', known in this context as 'SENDIST') on the parent of a child against the matters specified in section 51(2). That right may be exercised after an amendment to an EHC plan (section 51(3)(b)).*
>
> "*7. Section 77(1) obliges the Secretary of State to issue a code of practice giving guidance about the exercise of their relevant functions to local authorities, among others. Local authorities,*

among others, must 'have regard to' the code when exercising those functions (section 77(4)).

"*8. The Regulations made under sections 37(4) and 44(7) of the Act are the Special Educational Needs and Disability Regulations (2014 SI No 1530) ('the Regulations'). Regulation 18 describes the circumstances in which a local authority is obliged to review an EHC plan. These include where a child is within 12 months of a transfer from one phase of education to another. In such a case, the local authority must review and amend the EHC plan by a specific date, which, in the case of children under 16, is 15 February in the calendar year of the transfer.*

"*9. When a local authority reviews the EHC plan of a child who goes to school, they must ensure that there is a review meeting, to which the child's parents, among others, must be invited (Regulation 20(1)). The local authority must ask the head teacher of the school to prepare a report setting out his or her recommendations for any amendments to the EHC plan and referring to any difference between those and the recommendations of others attending the meeting (Regulation 20(8)). That report must be sent out 'within two weeks of the review meeting' (Regulation 20(9)). The local authority must then decide whether it wants to amend the EHC plan and must notify the parent 'within four weeks of the review meeting' (Regulation 20(10)).*

"*10. Regulation 22 is headed 'Amending an EHC plan following a review'. A local authority which is 'considering amending an EHC plan' must comply with the obligations listed in Regulation 22(1). Where a local authority is 'considering amending an EHC plan' it must send the child's parent a copy of the EHC plan with 'a notice specifying the proposed amendments…' (Regulation 22(2)(a)) and give them at least 15 days in which to make representations on the draft plan (Regulation 22(2)(c)). Where a local authority 'decides to amend the EHC plan' after representations from the child's parent, it must send 'the finalised' EHC plan to the child's parent 'as soon as practicable, and in any event, within 8 weeks of' the date when the local authority sent a copy of the EHC plan in accordance with Regulation 22(2)(a) (Regulation 22(3)).*"

22. Paragraphs 9 and 10 above describe that part of the scheme with which this Court is concerned.

23. The relevant parts of the Regulations are as follows:

Reg. 20 Review where the child or young person attends a school or other institution

"*(ZA) This regulation applies where a local authority carry out a review of an EHC plan and the child or young person concerned attends a school or other institution.*

(1) As part of a review of a child or young person's EHC plan, the local authority must ensure a meeting to review that the EHC plan is held and in the case of a child or young person attending a school referred to in paragraph (12), can require the head teacher or principal of the school to arrange and hold that meeting.

(2) The following persons must be invited to attend the review meeting–
(a) the child's parent or the young person;
(b) the provider of the relevant early years education or the head teacher or principal of the school, post-16 or other institution attended by the child or young person;
(c) an officer of the authority who exercises the local authority's education functions in relation to children and young people with special educational needs;
(d) a health care professional identified by the responsible commissioning body to provide advice about health care provision in relation to the child or young person;
(e) an officer of the authority who exercises the local authority's social services functions in relation to children and young people with special educational needs.

(3) At least two weeks' notice of the date of the meeting must be given.

(4) The person arranging the review meeting must obtain advice and information about the child or young person from the persons referred to in paragraph (2) and must circulate it to those persons at least two weeks in advance of the review meeting…

…

(7) Where the child or young person attends a school referred to in paragraph (12), the local authority must ask the head teacher or principal of the school to prepare a written report on the child or young person, setting out that person's recommendations on any amendments to be made to the EHC plan, and referring to any difference between those

recommendations and recommendations of others attending the meeting.

(8) Where the child or young person does not attend a school referred to in paragraph (12), the local authority must prepare a written report on the child or young person, setting out its recommendations on any amendments to be made to the EHC plan, and referring to any difference between those recommendations and recommendations of others attending the meeting.

(9) The written report must include advice and information about the child or young person obtained in accordance with paragraph (4) and must be prepared within two weeks of the review meeting and sent to everyone referred to in paragraph (2).

(10) The local authority must then decide whether it proposes to –

(a) continue to maintain the EHC plan in its current form;
(b) amend it; or
(c) cease to maintain it,

and must notify the child's parent or the young person and the person referred to in paragraph (2)(b) within four weeks of the review meeting.

(11) If the local authority proposes to continue or to cease to maintain the child or young person's EHC plan, it must also notify the child's parent or the young person of [their right to appeal].

(12) Schools referred to in this paragraph are –

(a) maintained schools;
(b) maintained nursery schools;
(c) Academy schools;
(d) alternative provision Academies;
(e) pupil referral units;
(f) non-maintained special schools;
(g) independent educational institutions approved under section 41 of [the Children and Families Act 2014].

…

"**Reg. 22 Amending an EHC plan following a review**

…

> *(2) Where the local authority is considering amending an EHC plan following a review it must –*
>
> *(a) send the child's parent or the young person a copy of the EHC plan together with a notice specifying the proposed amendments, together with copies of any evidence which supports those amendments…*
>
> …
>
> *(3) Where the local authority decides to amend the EHC plan following representations from the child's parent or the young person, it must send the finalised EHC plan to –*
>
> *(a) the child's parent or to the young person…*
>
> ...
>
> *as soon as practicable, and in any event within 8 weeks of the local authority sending a copy of the EHC plan in accordance with paragraph (2)(a)…*
>
> …
>
> *(5) When sending a finalised EHC plan to child's parent or young person in accordance with paragraph (3) … the local authority must also notify them of*
>
> *(a) ...their right to appeal..."*

24. Regulation 21 (not set out) deals with review of a plan where the child or young person does not attend a school or other institution and broadly mirrors Regulation 20. Regulation 24 states that a local authority does not need to reassess where it has carried out an assessment or reassessment within the period of six months prior to the request or, where it is not necessary. Where a reassessment is requested, there is a 15 day time limit under Regulation 25 for notifying the parents or the young person of whether or not it is necessary – and rights of appeal inhere. Regulation 27 imposes a long stop of 14 weeks for the notification to the parents (et cetera) of an amended or replaced plan following a re-assessment.

25. Local authorities must have regard to the Code. Both sides rely on the Code to support their interpretation. Relevantly, the Code provides:

> "*9.176 … Within four weeks of the review meeting, the local authority must decide whether it proposes to keep the EHC plan as it is, amend the plan, or cease to maintain the plan, and notify the parent or the young person and the school or other institution attended… If the plan needs to be amended, the local authority should start the process of amendment without delay (see paragraph 9.193 onwards) …*
>
> *"9.193 This section applies to amendments to an existing EHC plan following a review, or at any other time a local authority proposes to amend an EHC plan other than as part of a reassessment. EHC plans are not expected to be amended on a very frequent basis. However, an EHC plan may need to be amended at other times where, for example, there are changes in health or social care provision resulting from minor or specific changes in the child or young person's circumstances, but where a full review or re-assessment is not necessary.*
>
> *"9.194 Where the local authority proposes to amend an EHC plan, it must send the child's parent or the young person a copy of the existing (non-amended) plan and an accompanying notice providing details of the proposed amendments, including copies of any evidence to support the proposed changes. The child's parent or the young person should be informed that they may request a meeting with the local authority to discuss the proposed changes.*
>
> *"9.195 The parent or young person must be given at least 15 calendar days to comment and make representations on the proposed changes, including requesting a particular school or other institution be named in the EHC plan, in accordance with paragraphs 9.78 to 9.94 of this chapter.*
>
> *"9.196 Following representations from the child's parent or the young person, if the local authority decides to continue to make amendments, it must issue the amended EHC plan as quickly as possible and within 8 weeks of the original amendment notice. If the local authority decides not to make the amendments, it must notify the child's parent or the young person, explaining why, within the same time limit.*
>
> *"9.197 When the EHC plan is amended, the new plan should state that it is an amended version of the EHC plan and the date on which it was amended, as well as the date of the original plan. Additional advice and information, such as the minutes of a review meeting and accompanying reports which contributed to the decision to amend*

> *the plan, should be appended in the same way as advice received during the original EHC needs assessment. The amended EHC plan should make clear which parts have been amended. Where an EHC plan is amended, the following review must be held within 12 months of the date of issue of the original EHC plan or previous review (not 12 months from the date the amended EHC plan is issued).*
>
> *"9.198 When sending the final amended EHC plan, the local authority must notify the child's parent or the young person of their right to appeal and the time limit for doing so, of the requirement for them to consider mediation should they wish to appeal, and the availability of information, advice and support and disagreement resolution services.*"

26. The statutory duty to consider whether special educational provision is necessary under an EHC plan is governed by section 36 of the Act. It provides a system with a demanding timetable and a continuing obligation. For example, it includes a duty of reassessment where a child or young person has not been assessed during the previous six months. Where the authority holds the opinion a child has or *may* have special educational needs and the plan *may* be necessary it *must* secure an assessment.

27. Section 44 of the Act governs reviews and reassessments and requires a review in the period of twelve months from when a plan was first made, and then each subsequent twelve months, with a discretion to review where necessary at any other time.

28. Certain aspects of the system are immediately striking: short timescales attach to each material step – the opportunities for disapplying the time strictures are limited. By way of example, exceptions exist in respect of requests made during a time of school closure for 4 weeks or more, or exceptional personal circumstances pertaining to the child or family (see for example Regulation 5(4)(a) or (c)). Under Regulation 10(4) where the local authority decides not to secure an EHC plan, it has a long stop-time limit to give notification of 16 weeks from the request for an assessment in accordance with section 36(1) of the Act, or the local authority becoming responsible for the child or young

person in question. Regulation 13 follows a similar pattern with regard to sending a draft plan to the child's parents or to the young person, imposing a long-stop of 20 weeks for sending the finalised plan to the relevant parties, from the date of request for assessment under section 36(1) of the Act.

29. Time limits for steps to be taken within the process are not always detailed nor explicit. For example, Regulation 3 requires a local authority to consult the child's parent or the young person "as soon as practicable" after receiving a request for a needs assessment and before determining whether special educational provision under a plan is necessary. It does not on its face give a more defined time-limit. However, Regulation 4 does indicate a "6 weeks from request" time-limit for notifying parents or the young person of a negative determination. Such determination must have been reached on the basis of the Regulation 3 consultation. This conditions the time-limit for the consultation to a time within the 6 weeks, which must incorporate time for the local authority's consideration. The processes, whether of making an assessment of needs, initiating a plan, or reviewing one, involve significant evidence gathering and consultation. Notwithstanding these obligations, the timescales for decision-making are throughout, relatively short.

30. As was argued by the Claimants, in fact Regulations 5, 8, 10 and 13 all stipulate timeframes when a request for an EHC needs assessment is first received.

31. The framework shows there are three possible outcomes to an annual review-

i) everything continues as before and the EHC plan continues unchanged

ii) the EHC plan continues but is amended

iii) the EHC plan ceases.

32. The plan process also involves an opportunity to challenge the substantive decisions made at each stage. Where a simple continuation or cessation is in issue, the appeal right incepts at once (see Regulation 20(11)).

33. The nub of the problem is whether or not a time limit is given in, and if not, should be read into, the provisions governing the notification of proposed amendments to an EHC plan following review.

34. As set out, a statutory obligation is imposed upon a local authority to review plans on a regular basis, namely within each 12 month period. This regular review which may produce amendments to a plan is the subject of this case. There is another channel of ad hoc amendment within the scheme under the Act and Regulations: by Regulation 28 amending an EHC plan without a review or reassessment:

> *"If, at any time, a local authority proposes to amend an EHC plan it shall proceed as if the proposed amendment were an amendment proposed after a review."*

35. On the annual review route, following an annual review meeting, the local authority must decide what it proposes to do in relation to the child or young person's EHC plan and notify the child's parents (or the young person) of this decision "within four weeks of the review meeting" (Regulation 20(10)). If it proposes to keep the EHC plan in its current form or to cease to maintain the EHC plan it must, at the same time, notify the parents or young person of their right to appeal (Regulation 20(11)).

THE ARGUMENTS

35. The substance of the Claimants' complaint is that in their situation, the proposed amendment should have been served at the same time as the local authority gave notice that they proposed to amend the EHC plan. If this were so, the obligation to notify of

the decision to amend and the proposed amendments would be served on them within four weeks of the review meeting.

36. I note that in his detailed and compelling correspondence, Dr Lomax, solicitor on behalf of the Claimants, has consistently urged the local authority that this is an appropriate reading of the Regulations. He said Regulations 20(10), 22(2)(c) and 22(3) *combined* allowed up to 12 weeks from annual review to service of the final amended EHC plan.

37. Mr Broach reminds the Court that the Code emphasises the time scale is tight and submits it is consistent with a coterminous obligation to notify both an intention to amend and the proposed amendments. The Defendant by the same token, points to paragraph 9.176 which indicates that the local authority should start the process of amendment without delay if the plan needs to be amended. The Defendant says this underscores the distinction between a decision to amend and a decision to continue or cease to maintain a plan, which are separate and treated differently.

38. Paragraph 9.194 indicates that where the local authority proposes to amend the plan it must send the parent or the young person a copy of the existing unamended plan and an accompanying notice providing details of the proposed amendments. The Claimants say this supports their reading; the Defendant says it supports theirs, and argues the paragraph refers to the later transmission of the actual proposed amendments.

39. Mr Broach argues that a purposive construction of Regulation 20 consistent with the Act is available. He suggests the scheme is incoherent if it is read so as to omit a time-limit for this particular part of the plan function, pointing to the stipulations elsewhere that create termini for the various obligations upon the local authority. These are consistent with the over-arching child-protective purpose of the 2014 Act and

Regulations and that purpose would be served by reading a time limit into the Regulations here. Mr Broach reminded the court that it could glean the purpose for which a particular power was conferred and its ambit either explicitly or implicitly from statute (*R v Secretary of State for the Environment, Transport and the Regions ex parte Spath Holme Ltd* [2001] 2 AC 349 at 396F).

40. He describes one of the policy objectives of the scheme is offering help at the earliest possible point and that policy objective is achieved by timeframes for each of the steps in the planned process. He relied upon the Code as exemplifying these policy objectives and also, as a legitimate aid to interpretation (as set out in Bennion on Statutory Interpretation (seventh edition) at section 24.17). Further, he relied on the authority of *City of York Council v Grosset* [2018] EWCA Civ 1105, for the proposition that a statutory code might be considered a proper aid to interpretation of the Act under which it was promulgated. In that case, which involved an appeal in the employment context where the court was called upon to construe the word "treats" in the Equality Act, Sales LJ, whilst declining to find an ambiguity, reflected that it was common practice in the EAT to use the relevant code of practice as an aid to interpretation. The fact that the Code had been issued soon after the promulgation of the Act and had been deliberated upon by the sponsoring department meant it might be seen as of assistance for determining the proper application of the scheme.

41. *Grosset* was not however, in my view, in truth a case which supported the proposition that the Code was an aid to *interpretation* in that case (see a little further on from the passage cited by the Claimants). A Code could, however, assist with determining the statutory objective, and with the practical application of a statutory scheme; I consider it in that light.

42. On my reading of the Code it provides some, but not overwhelming support for the Claimant's position. There is nothing, in my judgement that is of much assistance to either side from it. It is effectively neutral, even had it been a tool for interpretation. It is however consistent with the Claimants case that the operation of the scheme is time sensitive and in the course of its application a parent or a young person would expect to receive details of proposed amendments sooner rather than later. The reference in paragraph 9.196 to issuing an amended plan "*within 8 weeks of the original amendment notice*" may tend to support the Claimants.

43. Mr Broach further relies upon case law which reflects what is uncontroversial, namely that the court's task is to ascertain the meaning of the words as used in their context, having regard to other permissible aids to interpretation including relevant presumptions, legislative history and background material. See as a recent example of this *The Secretary of State for Work and Pensions v Johnson* [2020] EWCA Civ 778. Mr Broach describes the construction for which he argues as the only reasonable construction available in this context. He notes the Explanatory Memorandum as reflecting the statutory purpose which speaks at paragraph 7 of offering help at "the earliest possible point".

44. He took the Court to the helpful paragraphs in Bennion on the need to construe legislative materials so as to avoid harm where possible and to choose amongst available meanings so at to achieve that effect. The Claimants also note the dictum of Lord Briggs at paragraph [110] in *Project Blue Ltd v HMRC* [2018] UKSC 30 where it was said: "*If on balance the consequences of a particular construction are more likely to be adverse than beneficent this is a factor telling against that construction.*"

45. Mr Broach referred to international treaty obligations protecting the rights of the child and advances an argument that what he characterises as an "ambiguity" must be resolved in favour of the Claimants' interpretation. For reasons that I will come to, it is not necessary to go down the pathway of an ambiguity in the present case.

46. Mr Anderson argued the Regulations are clear on their face and do not say what the Claimants want them to say, nor could it be said there was any ambiguity. The plain meaning of the language of the Regulations and their structure does not favour the Claimants' interpretation. There was no absurdity in the obvious plain meaning. Regulation 22 governs notifying and gives no time requirement. It is not that there is an unlimited time for local authorities to send a Regulation 22 notice, but the function must be exercised within a reasonable period of time as is well established in administrative law: in the absence of the statutory time limit, that is the position. He made particular reference to the other provisions which deal with re-assessments. Section 44 (2) obliges a local authority to obtain a reassessment of needs if a request is made, subject to limitations set out. By Regulation 24 this need not happen, as set out above, where there has been a reassessment during the last six months. Nothing in this system supports the imposition of a time limit for serving proposed amendments.

47. The Defendant in arguing that the only standard is reasonableness, accepted that the court will take into account the importance of any amendment that has been recommended in an annual review. It will also consider the quality of the report provided, the evidence in support, the need for any further evidence and also, the resources of the Defendant. It is a flexible standard and, he argues, intentionally so, given the variation of factual circumstances that may obtain.

48. He stated that other and important functions of local authorities are not subject to strict statutory time limits for their exercise: of itself the absence of a time-limit here is not anomalous and therefore, there is good reason the timescale should be flexible. Decisions may not necessarily be straightforward and may involve a large volume of information. In answer to the arguments that it is incoherent to omit a time-limit for this particular part of the plan function, he submits there is a material difference between decisions to maintain an EHC plan as it is, or to cease it and deciding as he puts it "to embark upon a process of amendment", this is a separate process and subject to its own Regulation. He refers to the statement in the Code that where a plan needs to be amended the local authority should start the process "without delay". Whilst the Claimant might argue it may be clearer or otherwise preferable for an express time-limit to have been included, the draughtsman did not include one, and there is no basis upon which the court may insert words which do not appear.

49. Mr Anderson, in answer to questions, suggested that the provisions of Regulation 28 support his argument. He disputed that it was appropriate to read Regulation 20 with Regulation 22. Regulation 28 provides:

> "*28. Amending an EHC plan without a review or reassessment.*
>
> *If, at any time, a local authority proposes to amend an EHC plan, it shall proceed as if the proposed amendment were an amendment proposed after a review.*"

50. He says this shows that it makes no sense to read Regulation 22 in conjunction with Regulation 20: it follows on from Regulation 20, whose process terminates at 20(10). Where there is no Regulation 20(10) notification, as in a Regulation 28 situation, the process has no timetable and is crafted to deal with a very urgent change in circumstances. It requires, so he submits, for you to "look back into the Regulation 22 process". You cannot read this with Regulation 20 – there is no review meeting, and

were you to read Regulation 20 as part of the overall process you would have to strike through that part of Regulation 20. There is no final decision to amend the plan until after considering the representations under 22(2)(a).

CONSIDERATION

51. It has been seen that in the circumstances of a plan review, the three options are: cessation, continuation, or amendment of the EHC plan. It seems to me that if the Claimants' submissions were correct the scheme would work in the following way where there is to be a proposed amendment, rather than a cessation or a continuation.

52. It is mandated under Regulation 20(1) that there be a meeting. From the date fixed for that meeting, a local authority will be obliged to count back in time in order to ensure that pursuant to Regulation 20(3) at least two weeks' notice of the date of it has been given. The local authority may direct that someone else (i.e. the head at the relevant school) should arrange and hold the meeting (Regulation 20(1)). If, (let us say), the notional meeting was on 1st March, the latest date for notification of it would be 15th February. Furthermore, it will have been necessary to arrange prior to that February date, for certain information to be prepared. By Regulation 20(4), whoever is arranging the review meeting is obliged to obtain advice and information about the child or young person in question from the list of relevant people invited to attend. That list includes a provider of early years education or a head teacher or principal, an officer of the authority exercising a local authority's education functions for special needs children and young people, a healthcare professional to provide advice about healthcare provision, and an officer of the authority exercising their social services' functions with regard to special needs. That information must be circulated at least two weeks in advance of the review meeting under Regulation 20(4) – that is to say it would have to

be circulated at the latest on 15th February in the proposed schema. This represents significant front-loading of the system of review that must start well before the meeting timetable commences. I observe that the obligations are also not dealt with chronologically within the Regulation.

53. All of this material is gathered and circulated at least two weeks before the meeting to review under Regulation 20(1). Thereafter a meeting is held. Under Regulation 20(7) the local authority is obliged to ask the head teacher or principal to prepare a written report setting out their recommendations for any amendments and referring to any difference between those recommendations and the recommendations of others attending the meeting. That written report (by Regulation 20(9)) includes advice and information which has been gleaned "in accordance with paragraph (4)" – in other words from the relevant officers of the local authority et cetera. That report must be prepared "within two weeks of the review meeting", that is to say on this paradigm of a meeting on 1st March, latest by 15th March. It is sent to everybody who is referred to as one of the relevant officers or officials.

54. The Regulations then express the next step thus:

> "*20(10) the local authority must then decide whether it proposes to:*
> *(a) continue to support the EHC plan in its current form;*
> *(b) amend it; or*
> *(c) cease to maintain it,*
> *and must notify the child's parents or the young person and the person referred to in paragraph (2)(b) within four weeks of the review meeting.*"

55. Plainly, when the time comes for the local authority to "*then decide whether…it proposes to…amend*" all of the materials will have been gathered: the meeting will have taken place, and the school will have reported in order to assist the local authority in its decision. The authority then has from the (notional) 15th March date until 29th

March to "notify" the parents or young persons under Regulation 20(10) - i.e. "within four weeks of the review meeting". Each stage of the process has been afforded a timescale.

56. The word "notify" in Regulation 20(10) is not defined, nor is the object of the notification further stated. Regulation 21 deals with a child or young person not in school, but reading on, in my judgement, assistance is to be gained as to the scope of the obligation from Regulation 22.

57. Regulation 22 is, headed "*Amending an EHC plan following a review*". It states that "when considering amending a plan" [emphasis added] the local authority must comply with requirements (inter alia) to consider evidence (Regulation 22(1)), and, by Regulation 22(2)(a) "*send the child's parent…a copy of the EHC plan together with a notice specifying the proposed amendments, together with copies of any evidence* [et cetera]". Under Regulation 22(2)(c) the local authority must also when considering amending a plan after a review, give the parents at least 15 days beginning with the day when the draft plan was served upon them so that they may make representations. In our notional calendar that period ends on 13th April.

58. Under 22(3) where the local authority decides to amend the plan following representations, it must send the finalised EHC plan "*as soon as practicable, and, in any event within eight weeks of the local authority sending a copy of the EHC plan in accordance with paragraph 2(a)*". That means that if it takes 15 days for the parents to make their representations, counting eight weeks from the notification under Regulation 20(10), namely 29th March, the authority has until 24th May. If the obligation to "notify" under 20(10) is as explained under 22(2)(a), and includes the proposed amendments, this last date of 24th May will see a finalised plan in place by

12 weeks from the review meeting. Such a timescale is in my judgement wholly consistent with the structure of the scheme, in light of its subject matter and the timescales provided elsewhere in the framework.

59. Submissions were advanced on either side as to the practicality of a shortened timetable. For operational reasons the local authority preferred that the form of proposed amendments was not subject to the tight timescale proposed by the Claimants. However, in my judgement the overall context of the scheme which is "front loaded" with advance preparation and information gathering, accommodates the pressure of timescales of the order of those seen in Regulations 20 and 22. There is strength in the Claimants' submission that in this context, arguments to support the absence of a time limit where resources are under pressure, have little weight. In my judgement the whole context of the EHC plan system is prompt evidence gathering, tight timetables and coexistence with the school curriculum timetable which necessarily runs in terms, forming the academic year. It is no accident that the compulsory review is a 12 monthly exercise.

60. The Claimants' timetable would be entirely consistent with the purpose of the Act and the other timetables set down within the Regulations and is the product of, reasonably in my judgement, reading Regulation 22(2) as an explanation of what must happen (and when) when the authority "is considering amending" an EHC plan. As noted, the format of fuller explanation of how an aspect of the scheme operates being given by a later Regulation is seen elsewhere in this Statutory Instrument.

61. Most importantly, and decisively for this appeal, in my judgement the plain meaning of "notify" in Regulation 20 in context must mean this, it does not mean only

"notify…the parents we are considering the possibility of amendments, as yet unspecified".

62. What the notification obligation entails depends upon the upshot of the local authority's proposed decision. In my judgement, in order to be meaningful, the notification must include the gist of the way forward. The gist of the way forward in a continuation scenario is no more than the extant EHC plan. No further material requires to be provided for the parents to know what is proposed. The gist of the way forward in a cessation scenario, likewise, is no more than the absence of the extant EHC plan. Proposed amendments are the gist of the way forward under (b), and require to be notified.

63. The necessity for input from the relevant persons means no immediate right of appeal arises (hence this category is omitted from the requirement to notify the right of appeal) but urgent steps do require to be taken as much for this category of child or young person as the others. There is considerable necessary fact-handling in support of the review work: this takes place weeks in advance of the review meeting, by which time views will be formulated and will be further discussed. It makes a nonsense for there to be suddenly at the crucial stage of promulgating the suggested amendments, no timescale for that. I agree with Mr Broach, this would be anomalous in the context of the scheme.

64. The Code, whilst in my judgement not determinative, is consistent with such an interpretation. Paragraph 9.194 describes that where a local authority proposes to amend it must send the existing plan and an accompanying notice providing details of the proposed amendments including copies of evidence et cetera. The parents or young person must be informed that they may request a meeting.

65. In my judgement there is no need to resort to the Explanatory Memorandum, nor to look beyond the principle which Mr Broach derives from *Johnson* (supra) and to the statutory purpose which may be derived from the terms of the Act and the subordinate instrument.

66. I have carefully considered Mr Broach's interesting further arguments. However, in my judgement there is no need to resort to their technical detail. I accept however, that he is correct on the meaning of the Regulations.

67. To suggest there is a lacuna in the drafting assumes what the Claimants seek to prove, namely that a time limit should be present but is not. Mr Anderson submitted had the draftsman intended a time limit it could have been made express on the face of Regulation 20 – or indeed 22. None of the canons of construction referred to would in his submission allow it to be written in. Much of his argument on the wording depended on reading Regulation 22 as applying after the events of Regulation 20 have played out. In other words, that there is a sequential and chronological logic to the numbered Regulations. Whilst it may have been desirable to have had this chronological approach, that is not what the draftsman of the Regulations has done in my view.

68. In my judgement there is also no ambiguity in the drafting of the Regulations (as Mr Anderson, in his elegant submissions, correctly argued). It is not necessary to resort to a purposive or other construction, since the time provisions under Regulation 22 in my view, apply as necessary, to the steps taken under Regulation 20. In particular, they deal with this situation under Regulation 20(10)(b) where an obligation to "notify" the relevant people arises. The canons of construction apply, if they need to, to the word "notify" in Regulation 20, to this extent that in context its plain meaning is that it

encompasses the notification of the local authority's proposed way ahead: namely, here, the draft amendments.

69. What that obligation to notify entails, depends upon the upshot of the local authorities proposed decision. Regulation 22 also applies where that decision is to propose amendment. In my judgement, in order to be meaningful, the Regulation 20(10) notification must include the gist of the way forward.

70. Regulation 20(10) should therefore be read as meaning:

> "*the local authority must then decide whether it proposes to… [and each option is then set out]… and must then notify [as is appropriate for each case] the child's parent or the young person… within four weeks of the review meeting.*"

71. In other words, the word "notify" in Regulation 20 applies to each of (a) to (c) in that Regulation, and Regulation 22 gives the detail of what is required under (b) "*where the local authority is considering amending an EHC plan following a review*".

72. Another way of expressing this is to say Regulation 22 is putting flesh on the bones of Regulation 20 and describing the nature of the notification that must take place within four weeks of the review meeting in circumstances where the option taken, is to amend. Amendment is an option necessarily different from the ceasing or continuing of the same options, as it involves further process and input. However, it too gives rise to an appeal, and for it also, time is of the essence.

73. The local authority, having decided to amend, it is wholly unlikely they have no idea at all what a proposed amendment might look like: indeed, in my view, they could not reasonably know whether they proposed amendment, (rather than retaining the status quo or ceasing a plan), *unless* they had articulated for themselves the potential change. Especially since it is the case that two weeks before the meeting giving rise to the

decision to amend, the relevant materials or most of them will have been gathered. This is a timetable to which Mr Broach understandably gave prominence.

74. I am fortified in that analysis by the mechanism of Regulations 6 and 8 to which Mr Broach referred me. Regulation 6 contains no time limit for production of materials by the persons or bodies named therein: but Regulation 8 does. They must be read together. The same applies here in my judgement with Regulations 20 and 22, as I have said, and I referred earlier to Regulations 3 and 4.

75. I then ask rhetorically whether is there anything in Regulation 22 which is inconsistent with this analysis. In my judgement there is not. I am unpersuaded by Mr Anderson's arguments based upon a "problem" arising under Regulation 28. The exhortation in the latter Regulation is that it be treated *"as if the proposed amendment were an amendment proposed after a review"*. To state that this Regulation has no time limit, is in my judgement to beg the question in issue. The "own motion", power of amendment stated to be for emergency use in Regulation 28, does no more than tap into the decision-making process at the point after the local authority has decided it ought to amend. It does not deem this own motion power to be a post-review decision, rather provides a process by which information must be communicated subject to the same timetable where appropriate.

76. There is no mandate in the rules to read Regulations 20 and 22 in strict chronological order in any event, quite the reverse. The obligation to obtain information necessarily comes before the meeting and probably must be fulfilled before notice is given of the meeting. Yet the order of the required actions in the Regulations does not reflect this. Regulation 20 is itself, as also previously stated, not chronological.

77. This makes sense read with the other particular requirements such as the 15 days beginning with the day on which the draft plan was served – which will have taken place under Regulation 20, read with Regulation 22. It is obvious in my judgement that the draughtsman did not produce Regulations with an inexorable chronological progression. Regulation 22 refers back to steps which are set out in Regulation 20.

78. Returning to the standard construction arguments that were advanced, it is well-established that I must begin with the presumption that Parliament has intended a rational and reasonable scheme in the Act and Regulations. Similarly I must start from the presumption that Parliament does not make mistakes. (See Bennion on Statutory Interpretation (seventh edition) at section 9 point 3: "*Presumption of ideal, rational legislature"*.) This includes the presumption that legislation (including delegated legislation) has been competently drafted. This presumption is useful in seeking the meaning of a disputed construction. It is of course the case, however, that the presumption set out above may not apply with similar force in the case of delegated legislation; this is well recognised (see *R v (Skipton Properties Limited) v Craven District Council* [2017] EWHC 534 (Admin) per Jay J cited by the Claimant. The judge there said as follows:

> "*61. Were the 2012 Regulations primary legislation, the interpretive exercise would have to proceed on the assumption that Parliament is all-knowing and infallible, and that they can only be viewed as an entirely coherent entity without any internal inconsistencies. No doubt secondary legislation aspires to like standards, but in my view the same assumption does not have to be made. Inconsistencies and anomalies may exist. It is often a question of the lesser of two evils***."**

79. The reading of Regulation 22 as giving further detail of the "notify" obligation under Regulation 20(10) in a 20(10)(b) situation does however, in my judgement, no violence to the language whatsoever, but gives coherence to the scheme which is undeniably

highly time sensitive. The Court does not need to resort to more sophisticated arguments.

80. I am of the clear view that the scheme can be read so as to impose the obligation to notify not only of the intention to amend, but also of the proposed substance, at the same time. It has a number of features that support Mr Broach's outcome as being correct. The scheme contained within the Act and the Regulations is crafted to ensure the speedy ascertainment and meeting of a child's needs and provides a timetable at each material stage of important decision-making that ensures a clear framework for the parent or young person who might wish to challenge the relevant decision.

81. The perceived absence of a time limit for notifying amendments has in my judgement, allowed the Defendant County Council to act inconsistently with the statutory objective, which must be understood as including the time sensitive determination of the developing requirements of children and young people with special educational needs.

82. In spite of the resource implications of a time-limited amendment process, I am unconvinced that there is a particular reason for this stage of the process not to be subject to the exacting timetable which obtains elsewhere in the scheme. The need for a parent or young person to achieve certainty (either by acceptance in good time, or by way of appeal) is as acute in respect of amendments as it is on the initial provision of a plan. Evidence shows that where a very extended period is taken to produce certainty, serious prejudice may result. Mr Anderson argued that amendment was different from cessation or continuation. Therefore, because many more materials are required to be considered, it ought not to be time limited. I disagree, for the reasons I have given.

83. As a footnote, it appears that the provisions of the predecessor Regulations directed that the detail of the proposed amendment was to be sent at the same time as the notice indicating an intention to amend. This fortifies the conclusion on the current regulations. There is (*pace* Mr Anderson's submissions), no coherent reason why this change should be introduced, albeit that the Education Act 1996 scheme was necessarily different from that under the 2014 Act. On my reading, there is in any event no omission of the time limit in the current regulations.

SUMMARY OF CONCLUSIONS

84. The central question of the timescale for submitting the proposed amendments to the parents or the young person where the local authority is considering amending an EHC plan is as the Claimants argue it to be. Regulation 20 must be read with Regulation 22; the plain meaning of the word "notify" in Regulation 20 in the context of this statutory scheme means notify the relevant people of the substance of the proposed way forward. In the case of an amendment, that substance includes a draft of the proposed amendments.

85. The Claimants do not need the international treaties which were prayed in aid, nor indeed the interesting jurisprudential materials on ambiguity and construction. The context of this scheme, its imperative timeframe and the other provisions of the Act and the Regulations, compel the meaning of "notify" in Regulation 20(10).

86. The court is not without sympathy for the resource-led arguments of a local authority, however, the whole of the scheme could be described as resource heavy, and time dependent. That is a clear deduction from the statutory framework, the Regulations and the Code. It is clear that there is throughout this legislation a tension between timing and available resources. That inheres as a result of Parliament's choices, it

cannot condition what in my judgement is the clear meaning of the statutory instrument in question.

87. Accordingly, this judicial review succeeds.