Neutral Citation Number: [2019] EWHC 156 (Admin)

Case No: CO/4839/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday 4 February 2019

Before :

PHILIP MOTT QC
Sitting as a Deputy High Court Judge

- -

Between :

THE QUEEN	**Claimant**
(on the application of AN ACADEMY TRUST)	
- and -	
MEDWAY COUNCIL	**Defendant**
- and -	
MR I	**Interested Party 1**
- and -	
MRS I	**Interested Party 2**
- and -	
SECRETARY OF STATE FOR EDUCATION	**Interested Party 3**

- -
- -

Aileen McColgan (instructed by **HCB Solicitors**) for the **Claimant**
Pavlos Eleftheriadis (instructed by **Medway Council Legal Services**) for the **Defendant**
Tom Cross (instructed by **Government Legal Department**) for **Interested Party 3**

Hearing dates: 23 & 24 January 2019

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Approved Judgment

Philip Mott QC :

1. This claim for judicial review concerns an eight year old boy who has been granted anonymity and is to be known in this action as "X". His father and mother are to be known as "Mr I" and "Mrs I" respectively. They are named as Interested Parties, but have taken no part in these proceedings. The Defendant is Medway Council, which I shall call "Medway". The Claimant is an Academy Trust which runs a school within the Defendant's area ("the School"). The Secretary of State for Education was represented before me and made submissions limited to the proper interpretation of the relevant statute.

2. In order to preserve the anonymity noted above, it is necessary to refer to the School's staff by the posts they hold, and also anonymise other schools within the Defendant's area.

3. The claim was issued on 5 December 2018, together with an application for urgent consideration. It comes before me on a "rolled up" hearing, by order made on 6 December 2018, to determine whether permission should be granted and, if so, whether the claim succeeds. It is a challenge to an Education, Health and Care Plan ("EHC plan") dated 5 September 2018 by the school named in Section I of that Plan.

4. Before me I had detailed submissions from three counsel experienced in this field, Ms Aileen McColgan for the School, Mr Pavlos Eleftheriadis for Medway, and Mr Tom Cross for the Secretary of State. I am grateful to them for their assistance.

5. At the conclusion of the hearing I indicated that I would make an order quashing the EHC Plan, for reasons to be set out in a written judgment to be handed down as soon as possible. This is that judgment. For the avoidance of doubt, the order will be dated on the day this judgment is handed down. The purpose of notifying the parties of the result in advance was to encourage planning for the next stage to begin as soon as possible, in the interests of X. I hope that there can be a level of cooperation and communication which has been sadly lacking hitherto.

The background

6. X suffers from Autistic Spectrum Disorder ("ASD"). He has delayed language, communication, play and social skills, as well as difficulties with his attention. However, he has many strengths, particularly in remembering patterns and sounds in music, and an amazing ability with computers, never having had any formal training.

7. In April 2018 his parents moved from Greenwich to Medway. At Greenwich X had the benefit of an EHC Plan. The latest version was issued on 29 December 2017 ("the Greenwich plan"). He was then being educated at a mainstream primary school with a resource unit for pupils with language and communication difficulties. The initial intention was that he would move schools on 23 April 2018, when his parents moved house, but it was later decided that he would stay at his Greenwich school until the end of the summer term.

8. Medway initially proposed to take over and retain the Greenwich plan. It asked the School to accept X. The School declined, saying that it considered itself unsuitable to provide for the needs identified in that plan. Rather than looking elsewhere for at least temporary schooling for X, Medway decided to amend the Greenwich plan and name

the School. As a result, the School would be legally bound to accept X, by virtue of section 43 of the Children and Families Act 2014.

9. When making amendments to the Greenwich plan, and converting it to Medway's style, Medway removed large sections of Section F, which specified the special educational provision to be made for X. The principal challenge is to the rationality of that decision, and therefore the lawfulness of the final amended EHC plan which named the School in Section I.

10. Medway's final draft amended EHC plan was sent out on 28 June 2018. Medway apparently intended to issue it 15 days later, on 13 July 2018, but due to an administrative oversight it was not issued as a final plan until 5 September 2018 ("the Medway plan").

11. Prior to this the School had attempted to get the Secretary of State to intervene, using powers under section 496 of the Education Act 1996. The delay in issuing the Medway plan meant that no progress was made on that request, and the file had been closed by the time the plan was finally issued. That led to further delay when documents had to be sent a second time to the Education and Skills Funding Agency ("ESFA"), which looks at such referrals on behalf of the Secretary of State.

12. The ESFA decision was sent out on 22 October 2018, declining to intervene. The School then sought legal advice, and a pre-action protocol letter was sent to Medway and to the Secretary of State on 8 November 2018, asking for a truncated response time. Both parties sought more time. Medway responded on 22 November 2018, the Secretary of State on 26 November 2018. The claim form was issued on 5 December 2018.

Delay

13. The order of 6 December 2018 directing this hearing specifically raises the question of delay, since the claim was not issued until the last day of the maximum three month period.

14. Mr Eleftheriadis drew my attention to the provisions of CPR 54.5(1) and section 31(6)(a) of the Senior Courts Act 1981. In *R (Burkett) v Hammersmith and Fulham Borough Council* [2002] 1 WLR 1593, at paragraph [18], Lord Steyn cited with approval a passage from the judgment of Mr David Pannick QC, sitting as a deputy judge of the High Court, in *R v Rochdale Metropolitan Borough Council, ex. p. B, C and K* [2000] Ed CR 117:

> "In my judgment, it is absolutely essential that, if parents are to bring judicial review proceedings in relation to the allocation of places at secondary school for their children, the matter is heard and determined by a court, absent very exceptional circumstances, before the school term starts. This is for obvious reasons relating to the interests of the child concerned, the interests of the school, the interests of the other children at the affected school and, of course, the teachers at that school."

15. I take this very much into account, and ideally the matter should have been settled before the new term started in September 2018. But the chronology set out above shows that substantial initial delay was caused by the administrative error on Medway's part.

The School wanted to involve the Secretary of State at a much earlier stage, but was unable to do so until the Medway plan had been formally issued. The delay in issuing this plan in turn led to additional delay in the ESFA dealing with the reference. It was therefore 22 October 2018, about half term, before proceedings could reasonably be issued.

16. Mr Eleftheriades sought to argue that these proceedings should have been issued before the ESFA decision, submitting that it was irrelevant, and certainly not an alternative remedy for which the School had to wait. But I have no doubt that any judicial review proceedings prior to the ESFA decision would have been met with the response that the School should first exhaust the alternative remedy. That, certainly, was the basis for refusing permission in another education case, as noted in *R (McCormack) v St Edmund Campion Catholic School* [2013] ELR 169, at paragraph [23]. Realistically, therefore, proceedings could only sensibly be pursued on receipt of the ESFA decision.

17. It is true that some further delay occurred thereafter. In part this was because both Medway and the Secretary of State asked for a full 14 days to respond to the pre-action protocol letter, and the School withheld proceedings until the responses were received. To the extent that the delay was due to the Claimant leaving it until late to obtain legal advice, it was very limited when compared to the delay stemming from Medway's failure to issue the final amended EHC plan. In the circumstances of this case it does not lead me to conclude that relief should be refused on discretionary grounds because of a failure to start proceedings promptly.

Preliminary matters

18. On the first morning of the hearing, Medway produced a statement from Wendy Vincent, its Head of Integrated 0-25 Disability Services, with a number of exhibits. This was very late, and no excuse was offered for the delay, merely an apology. It was agreed that I should receive this new evidence, although the weight to be attached to it might need to bear in mind that the School had no opportunity to deal with it in advance of the hearing.

19. In the result, the School has not been prejudiced by this additional evidence, nor has it thrown up the need for further inquiries.

The Statutory Framework

20. Part 3 of the Children and Families Act 2014 now deals with children with special educational needs or disabilities. Section 19 provides as follows:

> "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 –
>
> (a) The views, wishes and feelings of the child and his or her parent, or the young person;
>
> (b) the importance of the child and his or her parent, or the young person, participating as fully as possible in decisions relating to the exercise of the function concerned;

> (c) the importance of the child and his or her parent, or the young person, being provided with the information and support necessary to enable participation in those decisions;
>
> (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."

21. Section 21(1) defines "special educational provision" (insofar as it applies to this case) as "educational or training provision that is additional to, or different from, that made generally for others of the same age" in mainstream schools in England.

22. Section 33 creates a qualified duty in cases such as this to secure mainstream education. The relevant parts read as follows:

> "(1) This section applies where a local authority is securing the preparation of an EHC plan for a child or young person who is to be educated in a school or post-16 institution.
>
> (2) In a case within section 39(5) or 40(2), the local authority must secure that the plan provides for the child or young person to be educated in a maintained nursery school, mainstream school or mainstream post-16 institution, unless that is incompatible with –
>
> (a) the wishes of the child's parents or the young person, or
>
> (b) the provision of efficient education for others.
>
> (3) A local authority may rely on the exception in subsection (2)(b) in relation to maintained nursery schools, mainstream schools or mainstream post-16 institutions in its area taken as a whole only if it shows that there are no reasonable steps that it could take to prevent the incompatibility.
>
> (4) A local authority may rely on the exception in subsection (2)(b) in relation to a particular maintained nursery school, mainstream school or mainstream post-16 institution only if it shows that there are no reasonable steps that it or the governing body, proprietor or principal could take to prevent the incompatibility.
>
> (5) The governing body, proprietor or principal of a maintained nursery school, mainstream school or mainstream post-16 institution may rely on the exception in subsection (2)(b) only if they show that there are no reasonable steps that they or the local authority could take to prevent the incompatibility."

23. Section 37 deals with EHC Plans. It explains that:

> "(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;

…"

24. Section 39 deals with finalising EHC plans where there has been a request for a particular school or institution (as was the case here):

> "(1) This section applies where, before the end of the period specified in a notice under section 38(2)(b), a request is made to a local authority to secure that a particular school or other institution is named in an EHC plan.
>
> (2) The local authority must consult –
>
> (a) the governing body, proprietor or principal of the school or other institution,
>
> (b) the governing body, proprietor or principal of any other school or other institution the authority is considering having named in the plan, and
>
> (c) if a school or other institution is within paragraph (a) or (b) and is maintained by another local authority, that authority.
>
> (3) The local authority must secure that the EHC plan names the school or other institution specified in the request, unless subsection (4) applies.
>
> (4) This subsection applies where –
>
> (a) the school or other institution requested is unsuitable for the age, ability, aptitude or special educational needs of the child or young person concerned, or
>
> (b) the attendance of the child or young person at the requested school or other institution would be incompatible with –
>
> (i) the provision of efficient education for others, or
>
> (ii) the efficient use of resources.
>
> (5) Where subsection (4) applies, the local authority must secure that the plan –
>
> (a) names a school or other institution which the local authority thinks would be appropriate for the child or young person, or

> (b) specifies the type of school or other institution which the local authority thinks would be appropriate for the child or young person.
>
> (6) Before securing that the plan names a school or other institution under subsection (5)(a), the local authority must (if it has not already done so) consult –
>
> (a) the governing body, proprietor or principal of any school or other institution the authority is considering having named in the plan, and
>
> (b) if that school or other institution is maintained by another local authority, that authority.
>
> (7) The local authority must, at the end of the period specified in the notice under section 38(2)(b), secure that any changes it thinks necessary are made to the draft EHC plan.
>
> (8) The local authority must send a copy of the finalised EHC plan to –
>
> (a) the child's parent or the young person, and
>
> (b) the governing body, proprietor or principal of any school or other institution named in the plan."

25. Section 42 creates a duty to secure provision in accordance with an EHC plan. It provides, as far as relevant to this case:

> "(1) This section applies where a local authority maintains an EHC plan for a child or young person.
>
> (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."

26. Section 43 imposes a statutory duty on the governing body, proprietor or principal of a school named in an EHC plan to admit the child or young person for whom the plan is maintained.

27. Section 44 relates to reviews and re-assessments. Subsection (2) states that a local authority must secure a re-assessment of the EHC plan if a request is made by the governing body, proprietor or principal of the school which the child attends.

28. Section 51 provides for an appeal to lie to the FTT against various matters, including the child's special educational needs as specified in an EHC plan. Such an appeal may be brought when the EHC plan is first finalised or following an amendment or replacement of the plan. But importantly, that right of appeal is restricted to the child

or parent. There is no such appeal open to a school named in an EHC plan in the face of objections.

Regulations

29. The Special Educational Needs and Disability Regulations 2014 were made under the 2014 Act. Part 2 deals with children and young people with special educational needs. It sets out the procedure for assessments, EHC plans, reviews and re-assessments, and appeals, among other matters.

30. Regulation 12 specifies more detail about the form of an EHC plan:

> "(1) When preparing an EHC plan a local authority must set out -
>
> (a) the views, interests and aspirations of the child and his parents or the young person (section A);
>
> (b) the child or young person's special educational needs (section B);
>
> …
>
> (e) the outcomes sought for him or her (section E);
>
> (f) the special educational provision required by the child or young person (section F);
>
> …"

31. Regulation 15 deals with the transfer of EHC plans between one local authority and another:

> "(1) This regulation applies where a child or young person in respect of whom an EHC plan is maintained moves from the area of the local authority which maintains the EHC plan ("the old authority") into the area of another local authority ("the new authority").
>
> (2) The old authority shall transfer the EHC plan to the new authority ("the transfer") on the day of the move or, where it has not become aware of the move at least 15 working days prior to that move, within 15 working days beginning with the day on which it did become aware.
>
> (3) From the date of the transfer –
>
> (a) the EHC plan is to be treated as if it had been made by the new authority on the date on which it was made by the old authority and must be maintained by the new authority; and
>
> (b) where the new authority makes an EHC needs assessment and the old authority has supplied the new authority with advice obtained in pursuance of the previous

> assessment the new authority must not seek further advice where the person providing that advice, the old authority and the child's parent or the young person are satisfied that the advice obtained in pursuance of the previous assessment is sufficient for the purpose of the new authority arriving at a satisfactory assessment.
>
> (4) The new authority must, within 6 weeks of the date of the transfer, inform the child's parent or the young person of the following –
>
> (a) that the EHC plan has been transferred;
>
> (b) whether it proposes to make an EHC needs assessment; and
>
> (c) when it proposes to review the EHC plan in accordance with paragraph (5).
>
> (5) The new authority must review the EHC plan in accordance with section 44 of the Act before the expiry of the later of –
>
> (a) the period of 12 months beginning with the date of making of the EHC plan, or as the case may be, with the previous review, or
>
> (b) the period of 3 months beginning with the date of the transfer.
>
> (6) Where, by virtue of the transfer, the new authority comes under a duty to arrange the child or young person's attendance at a school or other institution specified in the EHC plan but in the light of the child or young person's move that attendance is no longer practicable, the new authority must arrange for the child or young person's attendance at another school or other institution appropriate for him or her until such time as it is possible to amend the EHC plan."

32. Regulation 22 is accepted as governing the amendment of X's EHC plan in the present case, as a result of the operation of regulation 28 which requires amendment without a review to be conducted as if it were proposed after a review.

Code of Practice

33. Statutory guidance is given in a Code of Practice issued in January 2015. EHC plans are dealt with specifically in Chapter 9.

34. Paragraph 9.69 specifies what should be included in each section of the EHC plan. In relation to section F it provides as follows (emphasis in the original):

- "Provision **must** be detailed and specific and should normally be quantified, for example, in terms of the type, hours and frequency of support and level of expertise …

- Provision **must** be specified for each and every need specified in section B. It should be clear how the provision will support achievement of the outcomes

- …

- There should be clarity as to how advice and information gathered has informed the provision specified. Where the local authority has departed from that advice, they should say so and give reasons for it

- In some cases, flexibility will be required to meet the changing needs of the child or young person …

- The plan should specify:

    - any appropriate facilities and equipment, staffing arrangements and curriculum

    - any appropriate modifications to the application of the National Curriculum, where relevant

    - ..."

35. Paragraphs 9.78 to 9.94 deal with requests for a particular school. I need not set them out in full here. Likewise, amending an existing plan is dealt with from paragraph 9.193 onwards.

The EHC Plans

36. The key sections of an EHC plan for present purposes are sections B, E and F. The combination of section 37, regulation 12 and the Code of Practice paragraph 9.69, which I have set out above, make clear that the special educational needs of the child should be identified in section B. This should lead to a consideration in section E of what progress can reasonably be looked for in respect of each need, and in section F of what special educational provision is required to meet each need. With this analysis of required provision, an informed choice can be made about what school should be named in section I.

37. The wording of section B is the same in both the Greenwich and the Medway plans. The only difference is in the formatting. It is sufficient, therefore, to set out here the needs identified in the Medway plan in section B:

> <u>Cognition and Learning</u>
>
> [X] finds it hard to recall new vocabulary.
>
> [X] finds transitions difficult to manage and needs preparation and instructions to be given one at a time, with plenty of time to

> process in order to complete tasks successfully. He has an individual workstation within the classroom and uses visual supports to help him understand what he is being asked to do.
>
> Communication and Interaction
>
> [X] benefits from being given clear simple instructions supported by visuals, signing and gesture, and processing time before being expected to respond. He can become frustrated if given too much information or too many instructions or if they are excessively repeated.
>
> [X] finds it difficult to communicate with others, particularly those who do not know him well. He uses some signing, gesture and early stage PECS [Picture Exchange Communication System] independently to support his communications.
>
> Sensory and Physical
>
> [X] experiences an extreme level of sensory sensitivity.
>
> [X] can display a range of repetitive sensory behaviours which can be very upsetting, such as hitting himself on the head even when calm, banging his chest and flapping his hands. He gets upset when he hits himself as it hurts.
>
> Social, Emotional and Mental Health
>
> [X] is not yet showing an interest in playing with or alongside his peers. He needs adult support to encourage him to watch others play and extend his ability to communicate with other children. He has some difficulty with turn taking and waiting for his turn.
>
> [X] can find it difficult to clearly communicate his needs, and may become frustrated and show signs of distress such as screaming or hitting his head. He is not yet able to regulate this behaviour or communicate why he is upset. Changes in routine and not being able to pursue what he wants can lead to inappropriate behaviour.
>
> Independence and Community Involvement
>
> [X] is able to request food items at lunch, although he becomes upset when not allowed more food or is prompted to eat the food on his plate."

38. In the Greenwich plan sections E and F are put into columns alongside each other. Both are detailed. It is sufficient for these purposes for me to set out the provision specified in section F:

> A broad and balanced curriculum, which includes the National Curriculum and is differentiated to meet [X's] individual needs.

An environment with a high level of visual, tactile and practical educational experience.

A structured teaching day where changes of activity are signalled by visual cues.

A carefully differentiated teaching approach characterised by:

- Task analysis;
- Frequent repetition and reinforcement;
- Detailed assessment intervention;
- Precise monitoring review.

Use of an individual workstation and support to develop workstation routines. The workstation being organised with activity pack, now and next pack, choosing pack and finished tray.

ASD Outreach support to provide examples of workstation activities and attention autism techniques for [X].

Adult support to develop attention and listening skills.

Use of visuals on a key chain to support and pre-warn transitions, with additional processing time.

A high level of visual support to facilitate understanding of instructions and routine in the classroom.

An individual visual timetable and visual and verbal support such as a 'now and next' board to support [X's] understanding and learning across the curriculum.

Use of a timer to visually define the length of choosing times.

Opportunities to incorporate singing into activities to support language acquisition.

A sensory activity schedule including sensory circuits and sensory breaks throughout the day, and the use of the sensory room, as advised and supported by ASD Outreach Services.

An environment which promotes the personal development, social integration and independence of children with learning difficulties, language delay and social and communication difficulties.

Speech, language and communication targets worked on regularly as prescribed by speech and language therapy services.

> Use of communication modes alternative to speech including objects of reference, picture cards, photographs, PECS.
>
> Regular one-to-one, paired and small group work to develop both language skills (understanding and spoken language) and social skills (for example turn-taking), set by a speech and language therapist and delivered daily by support staff in school.
>
> Regular support from ASD Outreach Services with regards to the use of a picture exchange communication system (PECS). [X] will receive a Level 1 intensive block of support to reintroduce PECS. Outreach Advisory Teachers will support staff in the use of PECS, colourful semantics and visual supports.
>
> Use of colourful semantics to develop [X's] ability to answer 'wh' questions and build sentences.
>
> Adults who use 'Who/What/Where' questions.
>
> Use of concepts in pictures 'Language for Thinking'.
>
> Expression of choice and personal preference as an integral part of the school day. This may require objects of reference and visual cues, for example.
>
> Teaching approaches which have a high visual nature and which employ techniques appropriate to pupils with social and communication difficulties including TEAACH.
>
> Adult support to develop imaginative play skills.
>
> Opportunities for [X] to be paired with a peer who has similar interests and encouragement to share attention with a toy or game.
>
> Use of Lego Therapy to develop small group interaction and turn taking skills.
>
> Use of Social stories.
>
> Adult support to develop self-help skills particularly with dressing, toileting and feeding.
>
> Use of visual schedules, visual prompts and chaining.

39. In stark contrast to the Greenwich plan, the Medway plan had a short series of outcomes in section E linked to Key Stage 2 (though at the time X was working only at the much lower P levels). Section F was even more truncated. In the first draft plan, save for a short passage about careers advice and guidance for the longer term, the entire section F provision was as follows:

> **Curriculum**
>
> [X] will have access to a broad and balanced curriculum. The curriculum will be differentiated to take account of [X's] particular needs and modified appropriately to ensure the maximum flexibility and attention to [X's] academic and personal development.
>
> All staff working with [X] must be fully aware of his particular needs and there must be uniformity and continuity of approach to his teaching throughout the school.

40. The final version of the Medway plan added the following:

> **Type of school provision**
>
> Whilst in mainstream school, [X] will be supported for 22.5 hours per week both on an individual and group level. This is in addition to other resources available to [X] and other pupils in the school.
>
> The support hours will be reviewed on at least an annual basis through the PCAR process and may change according to progress against outcomes.

41. It would therefore appear as if X's identified needs could be met by a teaching assistant for 22.5 hours per week, together with some "differentiation" (i.e. adaptation) of the existing curriculum of the School.

Communications between the parties

42. The first communication from Medway to the school about X was by email on 12 March 2018. It appears to have attached the Greenwich plan, together with at least some of the underlying advice and information listed in section K. It stated that the School was a parental preference, that Medway thought the School was "appropriate", and set out the effect of section 39(3) and (4) of the 2014 Act.

43. The School replied by letter of 22 March 2018. It stated that the School would not be able to meet all X's needs. In particular it pointed out that:

> "We do not have a sensory room, we do not have the facilities to support the listening of garage music. We do not have a music room, and we do not have Ipads, we do not offer lego therapy or have the resources or funding for this and we do not have the staffing to offer 1:1 throughout the day, and even with top up funding this would not cover the cost of employing an additional member of staff."

44. In effect, although not explicitly, the School was saying that it was "unsuitable" in terms of section 39(4). The email continued by expressing concern that "some of our children can throw chairs and tables if they are upset and some of [X's] behaviours would trigger some of our children to react negatively". This might support a further submission that attendance by X would be incompatible with the provision of efficient education for

other children. In the end Ms McColgan did not pursue this as a separate basis of challenge, and I do not need to examine it further.

45. Medway's response came in a letter of 5 April 2018. It repeated the tests in section 39(4), pointing out "the strong legal presumption in favour of mainstream education" and that "the legal threshold of incompatibility is a very high one". It continued:

> "In the current EHCP issued by the London Borough of Greenwich, the provision in Section F, with the exception of Lego Therapy, can be replicated in a Medway state-funded mainstream school with support and guidance from the Autistic Outreach Service and the Speech and Language Therapy Service.
>
> As you are aware, if the cost of supporting [X] exceeds £6,000 per year you are able to apply to the Medway SEN team for top up funding.
>
> [X's] current plan will be put into Medway format as soon as we have received advice from the speech and language therapy service. It is likely that Lego Therapy will be removed from the proposed amended plan.
>
> In the meantime, we write to advise you that the Local Authority intends to name [the School] in an amended final Educational Health and Care Plan, based on the current Plan, for [X]."

46. The expectation, therefore, was that section F of the Medway plan would replicate the Greenwich plan, save for amendments to the formatting and removal of the Lego Therapy. The expected advice from the speech and language therapy service was not obtained prior to the Medway plan being issued. As an aside, I note that the advice from the Speech and Language Therapist dated 7 January 2019, attached to the statement from Wendy Vincent, recommends:

> "Regular opportunities to practice [sic] turn taking and develop his social interaction skills with peers. He may benefit from structured group activities such as 'Lego Therapy'."

47. An email of 18 April 2018 records an attempt by the School to contact Medway by telephone on 16 April. At that stage it was still intended that X would start school in Medway on 23 April 2018. When that changed, and X remained at his Greenwich school for a further term, things went rather quiet.

48. The next contact is by email of 3 July 2018 from the School. This records the receipt of an EHC plan for X. It is not clear whether this was the first draft plan, with the very short section F, or a second version with section F as it was in the final Medway plan. It is not necessary to resolve this uncertainty for the purposes of this judgment. The email adds the following information:

> "… we called his current school which has a specialist provision attached, and [X] spends most of his time in there, he has to have 2 adults 1:1 because he is so demanding it is too much for 1 person and he gets naked as part of his needs.

> I am more than happy to attend a meeting with parents and the [Medway] SEN team to discuss his provision but we cannot meet all of his needs here, as per the SEN Code "The placement would be unsuitable in respect of a child's age, ability and aptitude any [sic] special educational needs that the child has or the attendance of the child at the school would be incompatible with the provision of efficient education for the children with whom he would be educated or the efficient use of resources." The new Medway version of his plan does not cover half of what he currently receives and having spoken to the school they do not feel that our school would be the best place for [X]. They are aware that parents may not be fully acceptant of how high [X's] needs are.
>
> Can you please advise on your next steps or if you can arrange a meeting for us altogether."

49. By email of 17 July 2018 Medway informed the School that X's mother had rejected an offer of specialist placement for X, and said:

> "Therefore, we must place [X] at [the School] in line with her choice. Can I suggest that you send in a costed provision map as soon as possible …? I would also suggest that an early annual review is arranged for the end of November / beginning of December".

50. The School replied the same day to say that they were "Happy to look at putting a provision map together but I am currently having issues with this as your formula is not working and we are unable to correct the errors". By this I understand that the online spreadsheet format for a costed provision map was not working properly.

51. On the same day, 17 July 2018, the School wrote to the Secretary of State for Education, effectively asking him to intervene. I will deal with the status of this approach in a separate section of this judgment. The letter said:

> "We explained to his current provision [i.e. the Greenwich school] that we do not have anything near the provision here and have explained to Medway council, who simply said that they would remove things from his EHCP plan – which they have!! To the extent that almost none of the current plan is in place."

52. Medway signed and issued its plan on 5 September 2018. That is the decision subject to this challenge, and what happened thereafter could therefore not be in the mind of the decision maker. I can take matters relatively shortly.

53. On 17 September 2018 there was a meeting at the School with X's parents, at which X was present. It is dealt with in the statements from the Headteacher and the Inclusion Manager at the School, and described in a contemporaneous attendance note. It is not necessary for me to set out the details here, but the School was confirmed in its view that it was not suitable to cater for X's needs.

54. The School wrote to Medway by email on 20 September 2018 objecting to the final Medway plan:

> "The final plan is no different to the draft and is full of contradictions and does not inc[lude] many of the identified needs, interventions or facilities that were in [X's] original plan making it look as if his needs are not extreme. Having meet [sic] with [X] and spoken directly to his previous provision [the Greenwich school] it is very clear [X] has higher level of needs than Medway's plan would suggest."

55. The response from Medway, also on 20 September 2018, It stated:

> "I spoke to [X's] former school in London yesterday. [X] was not placed in the specialist resource provision – he was a mainstream pupil.
>
> We updated amended [sic] the ECHP [sic] in accordance with the assessment that had been undertaken by Greenwich. We can update the EHCP as required following a PCAR.
>
> Regardless of the parental reason for choosing [the School] this remains their choice by which we must abide."

56. On 26 September 2018 the School wrote giving costings for top up funding, if it was obliged to take X. It proposed a figure of £34,285.89. This would be on top of the standard £6,000 Element 2 funding, making a total in excess of £40,000. It covered the following:

- An additional Teaching Assistant (though the Greenwich school had two, one for the morning and one for the afternoon, with an overlap at lunchtime)
- The cost of a workstation suitable for an ASD child
- The cost of training a minimum of 3 staff in the PECS system and then the cost of purchasing the resources
- The cost of a small amount of sensory equipment plus the cost of a room and soft cushions (though they did not have the space, so a purpose built room would be required, at additional cost)
- The cost of a signer to teach staff to sign
- The cost of ASD support from the teams at two other Medway schools which did have specialist provision on site
- Speech and language and occupational training assessments
- Cost of a tablet computer with downloads of games and videos

57. By that date, Medway had offered a total of £9,151 additional funding, making a total of £15,151 with the standard £6,000 element. The only response to the Schools costings seems to have been an increase in the top up funding offered from £9,151 to £15,151, making a total of £21,151 with the standard £6,000. No documents have been produced to support this, but the skeleton arguments on both sides put this revised offer at 8 November 2018, the date of the School's pre-action protocol letter. The statement of Wendy Vincent, in paragraph 25, gives the date of 10 October 2018, but I understand that this must be wrong. Whatever the date, the offer was little more than half the School's costings, and no reasons seem to have been given for the difference. One of the problems may have been that there was no detailed list of required provisions in section F of the Medway plan which could define the "map" to be costed.

58. During October 2018, whilst waiting for the ESFA decision, Medway investigated the possibility of placing X with two other primary schools in its area, if the naming of the School was overturned. The responses of these schools are attached to Wendy Vincent's statement. One school ("School B") estimated additional costs of approximately £22,000, including the £6,000 standard provision. School B, it appears, was a primary school which already had some specialist provision, and was one of the schools named in the School's costings as having an ASD support team.

59. The other school stated that it was not suitable, citing amongst other things concerns echoing matters already raised by the School in this case:

> - The plan states that [X's] main form of communication is signing and use of the pecs system. At the moment we do not have any members of staff trained in using these systems. The cost of training for this would far exceed the offered £9,000 in top up funding.
>
> - We are a medium sized school in a built up area. We do not have access to a large outside area, with no grass areas at all. It was stated in the plan that [X] makes use of the trim trail at his current school every day and we do not have facilities of this nature to help reduce his anxieties when he needs it. The same is said for the sensory room that [X] enjoys using regularly. We do not have the capacity to use a spare or quiet room that could be turned into a sensory room due to lack of space and no spare rooms.
>
> - The plan states that 22.5 hours of support is required. Again with only £9,000 offered in funding this means that we would not have sufficient staff to support [X] for the other 10.75 hours of the school week as he would require.

The School's case on suitability

60. The statement from the Headteacher, in paragraph 31, sets out six reasons why he says the School is unsuitable for X's special educational needs:

> "a. We do not currently have any staff with the skillset to support him. For example, none of our staff are trained in the use of British Sign Language, PECS or catering for pupils with severe Autism.
>
> b. [X] is functioning at a low level in terms of his communication skills and Medway have not provided any provision for this or recognised the full extent of his needs in his EHCP.
>
> c. [X] is used to, and needs, a sensory room for an hour a day. We do not have a sensory room or the space to install one.
>
> d. We do not have the curriculum to teach [X] at his low level of functioning. We are a Junior school only – starting at age 7 [in contrast to a Primary school taking children from the age of 4 or 5]. [X] is functioning at P-levels which is considerably below any of our other pupils.
>
> e. [X] will not have access to an appropriate peer group. There are no pupils within [X's] peer group that work at his low level or who require access to the level of intervention that he requires.
>
> f. We fear for [X's] personal safety when he has a meltdown as being in a mainstream classroom there are lots of potential dangers and the environment is not adapted to meet his needs."

Reference to the Secretary of State

61. A school named in an EHC plan has no right of appeal to the specialist First-tier Tribunal, which hears appeals by parents and may direct a local authority to make amendments to various parts of an EHC plan. Save for judicial review, an aggrieved school only has the option of asking the Secretary of State to intervene.

62. Where the Secretary of State considers that a local authority has acted unreasonably in the exercise of its education functions, he has the power under section 496 of the Education Act 1996 to issue a direction to the local authority. That is a discretionary power, and the process cannot properly be described as an appeal.

63. In the present case, the ESFA, acting on behalf of the Secretary of State, considered information provided by the School and Medway, and based on that was satisfied that Medway had acted reasonably in naming the School in X's EHC plan. It was not submitted on behalf of Medway that I should treat this as determinative of the issues in this case. Indeed, Mr Eleftheriadis submitted that the request to the Secretary of State was irrelevant, and certainly not an alternative remedy.

64. It is clear from the ESFA letter, with its Annex, that it was working on assertions provided by both parties. It is not clear to what extent the ESFA was provided with, or studied, the underlying documentation before me.

65. In these circumstances, I can give little or no weight to the conclusion reached by the ESFA. It certainly does not provide any bar to the present challenge, nor is that the submission of Medway, or indeed the Secretary of State.

The issues

66. The Amended Statement of Grounds pleads the challenge under five heads, briefly as follows:

    i) Medway irrationally, unreasonably and unlawfully amended X's previous [Greenwich] EHC plan without any evidential basis so to do, removing necessary provision.

    ii) Medway failed to give conscientious consideration to the School's response to its consultation in relation to X's placement, and thereby acted unfairly at common law.

    iii) Medway misdirected itself as to the operation of sections 33 and 39 of the 2014 Act, and/or reached a decision as to X's placement which was irrational and unreasonable, and/or failed to give any or any sufficient reasons for its decision.

    iv) Medway breached the *Padfield* principle, in that it failed to further the policy and objects of the relevant primary legislation.

    v) Medway breached section 175 of the Education Act 2002, section 149 of the Equality Act 2010 and/or section 19 of the 2014 Act in failing to have regard to the matters specified under those sections.

Ground 1

67. The School's primary case is a simple one. The Medway plan "eviscerated" the special educational provision set out in section F of the Greenwich plan. Whilst a new local authority could lawfully form a different view of the provision required, without some change in evidence such a wholescale and fundamental revision would be irrational.

68. The Defendant's Grounds, in paragraph 10, assert that Medway "transferred the EHCP from Greenwich into the Medway Council format and [sic] with the exception of Lego Therapy and the sensory room". It further asserts that there was no substantive expert evidence behind the Greenwich plan that required either of these provisions.

69. In the face of that pleading, as a response in Ms McColgan's skeleton argument, though not as a primary case, the School points to the established legal requirements for sufficient specificity in section F of an EHC plan.

70. Section 37 of the 2014 Act and regulation 12 clearly require section F to set out or specify the special educational provision required by the child. Details of what this means are found in paragraph 9.69 of the Code of Practice.

71. The specificity required in section F, i.e. that the provision required to meet each identified need should be clearly set out in the section, is also well established by authority, see *R v Secretary of State for Education and Science, ex.p. E* [1992] 1 FLR 377; *L v Clarke and Somerset County Council* [1998] ELR 129; *E v Newham LBC* [2003] ELR 286; *JD v South Tyneside Council* [2016] UKUT 0009 (AAC).

72. None of this was disputed by Mr Eleftheriadis. If the bare words of section F in the Medway EHC plan were intended to cover all the matters in the Greenwich plan, save for Lego Therapy and the Sensory Room, the Medway plan would clearly fail this test of specificity and be unlawful.

73. At the hearing before me, Mr Eleftheriadis disavowed this pleaded case. He stated that where provision was removed (or more accurately not transferred) from section F of the Greenwich plan, and did not find its way into the Medway plan, this was a deliberate change as a result of a considered re-evaluation of the same evidence. He agreed that Medway's section F could not be read as a transfer of all of the Greenwich section F except for Lego therapy and the sensory room, as the Summary Grounds of Defence asserted.

74. That assertion is surprising, in view of the expert evidence backing up the Greenwich plan and detailed in section K of both plans. I take one example, the need for signing and PECS to be used. That need is clearly set out in section B of the Medway plan. Mr Eleftheriadis accepted, as he had to, that some use of signing and PECS would be necessary, and this would require training of suitable staff and additional resources. Yet that provision is nowhere to be found in Medway's section F.

75. Mr Eleftheriadis attacked the suggestion in the School's Headteacher's statement that British Sign Language would be required, stating correctly that there was no reference to BSL in any of the supporting evidence. I accept that this may be a misunderstanding by the Headteacher. BSL, as I understand it, is generally used with those who are deaf. For those with hearing, but difficulty in processing words, other forms of signing such as Makaton are more usual. It does not matter which of the very many systems of signing is to be used. There is an undoubted need to discover that from the former school, and to train those who will be working with X in this form of signing at the new school. That provision, which is without doubt required to meet the need set out in section B, should appear in section F but does not.

76. It is not difficult to see other examples of omissions in section F of the Medway plan. There is no mention of a workstation, nor of sensory circuits (which I was assured are separate from a sensory room). All these require some provision, even though some would be easier to meet than others.

77. One of the needs highlighted in section B of both plans is the X "is not yet showing an interest in playing with or alongside his peers". This is the context in which Lego Therapy is recommended. It is not, as I understand it, that Lego blocks have any magical ability in themselves to transform someone with X's difficulties. It is that they can be used, as set out in Greenwich's section F, "to develop small group interaction and turn taking skills". What is strikingly absent from Medway's section F is any provision to meet this need for group interaction and playing alongside his peers.

78. It is not for me to reach any conclusion from the underlying material. I note, however, that in June 2016, when X was chronologically aged 6, his interaction with others was assessed as equivalent to the 16-26 months age group, something like 4 years below his chronological age. One question, which should have been grappled with and specified in section F, is whether that meant he needed the opportunity to play in a group of children functioning at a similar age (i.e. substantially below his chronological age) or whether the group interaction could be arranged with children of his chronological age. If the former, the School would have been unsuitable as it is a Junior school, not a Primary school, and therefore the youngest children would only have been a year

younger than X in chronological terms. This is one of the problems highlighted by the School which was never addressed because the required provision was not specified in section F of the Medway plan.

79. Mr Eleftheriadis drew my attention to the high threshold of the rationality test, relying on *D v Birmingham City Council* [2009] All ER (D) 113, at paragraphs [21] to [23]. He submits that Medway was entitled to take a different professional view on the same material, a proposition which Ms McColgan would accept.

80. There may well be a margin of appreciation between the judgments of different local authorities on the same evidence. But the difference between the Greenwich section F and the Medway section F is so great as to be way outside such a difference of interpretation or judgment. In my view it shows that one or other must be irrational. I do not need to form a view about the Lego Therapy or the Sensory Room. I am prepared to assume for these purposes, without deciding, that they could rationally have been removed from section F. But looking at the underlying material, it is clear that most if not all of the other provisions specified by Greenwich are supported by evidence as being required, not just part of an ideal wish list.

81. Perhaps that is why Medway's initial response, both to the pre-action protocol letter and in the Grounds of Defence, was that they should be assumed to be included. As explained above, this is no longer Medway's case. If it were, section F would fail the specificity test. As it is now asserted that the deletions were considered and deliberate, I am bound to conclude that Medway's removal of so much, without any change in the evidence, was irrational and unlawful.

82. That does not directly undermine the naming of the School in section I of the Medway plan, which is the real target of this challenge. The School was requested by the parents. Section 39(3) therefore required Medway to name the School in the EHC plan unless any of the exceptions in section 39(4) applied. The one argued by the School is that it was unsuitable for X's special educational needs. Medway states that it decided the School was not unsuitable.

83. The first problem which Medway faces over this assertion is that there is absolutely no contemporary evidence nor any witness statement to that effect. There are even parts of the correspondence set out above, particularly the email of 17 July 2018, which tend to suggest that Medway considered itself bound to move straight from the expression of parental preference to the naming of the School, bypassing consideration of section 39(4) completely. In addition, there is nothing directly explaining why Medway's section F was so different from Greenwich's section F.

84. Secondly, section F as drafted by Medway clearly falls very far short of the provision required to meet the needs of X identified in section B, as I have explained. Without a structured set of provisions in section F, Medway had no clear and safe basis for taking a decision on the section 39(4) question of whether the School was unsuitable for X. The issue of group interaction makes it clear that the potential difficulties to be addressed in a proper EHC plan are not merely financial, but may also require a comparison with the cohort of other pupils at the school under consideration.

85. It therefore seems to me to follow inevitably from the deficiencies of section F in the Medway EHC plan that the decision under section 39(4) was flawed. Medway was left with no proper basis for explaining and justifying its decision, if indeed that is what its decision was.

Ground 2

86. The lack of a properly structured section F also meant that it was impossible to engage in any proper consultation with the School to enable the decision about suitability under section 39(4) to be fairly debated. The School tried to identify the parts of the Greenwich provision which it could not meet. The response did not acknowledge the need for such provision, or consider whether it could be met with added time and funding.

87. I was referred to *R (Moseley) v London Borough of Haringey* [2014] 1 WLR 3947, at paragraph [25], where Lord Wilson endorsed criteria put forward by Stephen Sedley QC (as he then was) in *R v Brent London Borough Council, ex.p. Gunning* (1985) 84 LGR 168. It seems to me that Medway fails most if not all of those criteria. In particular, it failed to give sufficient (or any) reasons for the removal of so much of the section F provision, and it failed to show any sign of taking the School's objections into account or to explain why they were rejected.

88. Mr Eleftheriadis submitted that the fault lay with the School, for failing to provide a costed provision map. That argument fails for various reasons. First, as set out above, the School did attempt to fill in the costed provision map on 17 July 2018, but was unable to do so because of a failure in the online spreadsheet system. Secondly, paragraph 22 of Wendy Vincent's statement, together with documents produced by her, show that the costed provision map is usually completed after the school has been named in an EHC plan. Thirdly, when figures were supplied by the School, on 26 September 2018, they were ignored by Medway until a revised funding offer was made on 8 November 2018 at about half the level put forward by the School, with no explanation for the shortfall in the evidence before me. Although these costings came after the Medway plan had been issued, X had not yet joined the School, and the whole process could have been brought to an end by a reconsideration of the wisdom of the plan.

"Highly likely" in relation to the s.39(4) decision

89. Mr Eleftheriadis relied on section 31(2A) of the Supreme Court Act 1981. This requires me to refuse relief if it appears "to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred". It seems to me that this assessment is required at two stages of the judgment process. The first is when considering whether a different, and proper, Medway plan would still have led to the same conclusion as to whether the School was unsuitable under section 39(4) of the 2014 Act.

90. If Medway had specifically included most or all of Greenwich's section F, except for the Lego Therapy and the Sensory Room, would it have been "highly likely" still to conclude that the School was "not unsuitable" for X? I cannot accept that on the evidence. It is not for me to decide on a judicial review application what the correct conclusion would have been. But it seems to me at least arguable that the School was unsuitable for at least two reasons:

    i) It was a Junior school, taking children between the ages of 7 and 11. X had been in a Greenwich primary school, with children between the ages of 4 or 5 and 11. X was functioning, at least in social and play terms, at a much younger level than his chronological age. There were no children at the School being taught at P levels. That means that there was no existing curriculum which could merely

be "differentiated" to meet X's needs. There may also have been no children at the School of appropriate age to introduce to structured play sessions, whether with Lego or some other form of play.

ii) The School had no staff trained in signing or PECS. Not only would additional teaching assistants be required, as envisaged in Medway's section F, but also these and other staff would need additional training. That would produce logistical as well as financial issues. With a proper section F, identifying that such provision was required, Medway would have had to consider both the time required to recruit and train staff, and the cost of doing so, in deciding whether the School was suitable or unsuitable under section 39(4). Without such express provision, that assessment would not arise, and there is no evidence that it was ever considered by Medway in reaching its conclusion.

91. I therefore conclude on the evidence before me that it is, if anything, more likely that a proper consideration of section 39(4) would have led to the conclusion that the School was unsuitable for X.

The inter-relationship between sections 33 and 39 of the 2014 Act

92. The inter-relationship between section 33 and section 39 of the 2014 Act is important not only as a further and separate ground of challenge, but also because it is Medway's case that even a finding of unsuitability under section 39(4) would have led to the School being named in the amended EHC plan by virtue of the operation of section 33. That is the second stage at which the "highly likely" test must be applied.

93. I had the benefit of clear and focussed submissions from Mr Cross for the Secretary of State on the theoretical legal position which, in the end, were accepted by all parties. He did not put forward any submissions on their practical application to the present case.

94. First I should set out the legal route through what can at first glance seem to be the minefield of sections 33 and 39 of the 2014 Act.

i) The only route to section 33 is via section 39(5) or section 40(2). Section 40(2) deals with the case when there has been no request for a specific school, so does not apply here.

ii) Section 39(5) is not engaged unless subsection (4) applies. Subsection (4) only applies where one of two conditions is satisfied:

a) The school requested is unsuitable for the age, ability, aptitude or special educational needs of the child; or

b) The attendance of the child at the requested school would be incompatible with the provision of efficient education for others [meaning other children at that school], or the efficient use of resources.

iii) In all other cases, where subsection (4) does not apply, section 39(3) imposes an absolute duty on the local authority to name the requested school.

iv) Section 39(5) requires a local authority to name a school (if it names one, rather than merely specifying a type of school) which is "appropriate" for the child.

That obligation must be looked at, not in the context of the section 39(4) exceptions relating to the school, but in the context of the section 33(2) duty on the local authority. That is a duty to provide for mainstream schooling unless that is incompatible with the wishes of the parents (which will not arise in a section 39(5) case as that section deals with cases where the parents have requested a particular school), or is incompatible with the provision of efficient education for others (again, meaning other children at the same school).

v) There is no "suitability" exception in section 33(2). Nor is there an "efficient use of resources" provision as a free-standing exception. Indeed, if education of the child in a mainstream school is currently incompatible with the efficient education of other children there, the local authority will be under a duty to spend money to overcome that incompatibility up to a reasonable level. This is, in short, the effect of the "reasonable steps" requirement in subsections (3), (4) and (5) of section 33, together with section 42.

vi) In support of this interpretation I was referred to two Upper Tribunal decisions, *Bury Metropolitan Borough Council v SU* [2011] ELR 14 and *Harrow Council v AM* [2013] UKUT 0157 (AAC). I have also considered the Court of Appeal decision in *R (MH) v The Special Educational Needs and Disability Tribunal and London Borough of Hounslow* [2004] EWCA Civ 770, cited in both Upper Tribunal decisions. In view of the agreement among counsel in this case, I need not set out those decisions extensively. However, they appear to me amply to support the conclusions urged upon me by Mr Cross.

vii) The result of this is that "appropriate" in section 39(5) is not a shorthand for "not excused by section 39(4)". In other words, it does not import a present suitability provision by implication. An "appropriate" school instead refers to one which allows the local authority to comply with its very strict, though not absolute, obligation under section 33(2).

viii) That conclusion is inconsistent with the provisional view of Upper Tribunal Judge Jacobs in *ME v London Borough of Southwark* [2017] UKUT 0073 (AAC), at paragraphs [13] and [14]. But that view was expressed without argument, and in my judgment does not stand up to the argument presented to me by Mr Cross, which I hope I have shortly but accurately encapsulated above.

ix) It follows that, as a matter of legal theory, a requested school which escapes being named under section 39(3), as a result of being unsuitable in the terms of section 39(4)(a), could still be named as an appropriate school under section 39(5) which is subject to the constraints imposed by section 33.

95. My initial instinct was to the contrary, and accorded with the provisional view of Judge Jacobs. How could a school which was "unsuitable" for the special educational needs of the child in question be "appropriate" for that same child? To be appropriate, a school must be able to match what the child needs (see per Thorpe LJ in *C v Buckinghamshire CC & Special Educational Needs Tribunal* [1999] ELR 179). The answer is that the right to mainstream schooling is a stronger right than the right to request a particular school. The right to request a school can be displaced where that school is unsuitable. The duty to provide mainstream schooling somewhere cannot be displaced by the unsuitability of a particular school, or even of all schools in the area. The local authority has to make a school appropriate, if necessary by spending money to do so. So a school which is currently "unsuitable" may nevertheless become "appropriate" once upgraded.

96. No doubt in many cases, where the particular local authority has within its area another school which is already suitable, the requested school is likely to escape being named, because the cost of making it "appropriate" (which to that extent imports a suitability criterion at the end of the upgrading process) would be unnecessary. But there may well be circumstances where the requested but unsuitable school would nevertheless be named in the final EHC plan. Two examples may suffice, though they are by no means exhaustive.

    i) If the local authority has a number of mainstream schools, none of which is currently suitable for the particular child, that is no answer to its duty under section 33 to provide mainstream schooling. One of the schools must be made suitable, and therefore appropriate, at the local authority's cost. The decision as to which school should be chosen for this process will be a matter for the local authority. It has no duty to choose the one requested by the parents of the particular child, but it may do so. What it cannot do is to consider each school in turn against the section 39(4) criteria and, discarding them one by one, announce that no school in its area is left to be considered appropriate under section 39(5).

    ii) The requested unsuitable school may be less suitable than another school in the same area. That other school may be suitable without modification, but may be full. The local authority, looking at its broad duties to provide mainstream schooling, may lawfully decide that it is time to upgrade another school to cater for an increasing cohort of children with special educational needs, or for children with a particular type of educational need. That may lead it in due course to name the requested school as being appropriate, despite it escaping automatic naming under section 39(3) by being currently unsuitable within section 39(4).

Ground 3

97. That is the position in legal theory. The first question that arises in practice in this case is whether Medway misdirected itself as to the inter-relationship between sections 33 and 39.

98. There are some indications in the correspondence that it did, in particular the emails of 17 July and 20 September 2018. Overall I do not see that there is enough of a consistent theme to draw the inference that there was a misdirection, as in other correspondence the correct test is set out. Moreover, I do not need to resolve this in the light of my conclusions on Grounds 1 and 2.

99. Accordingly, although it would be right to grant permission on Ground 3, I shall refuse relief.

"Highly likely" in relation to the s.39(5) decision

100. Mr Eleftheriadis submits that relief should be refused on all grounds because, even if the School should properly have been considered unsuitable under section 39(4), and therefore not named under section 39(3), it was "highly likely" to have been named under section 39(5) in view of the lack of a suitability criterion under section 33. He submitted that if a school is presently unsuitable, it can still be an appropriate school if there is a plan of action which would make it suitable in time.

101. That may be so, but in my judgment it ignores the realities of this case. The documents attached to Wendy Vincent's statement, at page 33, show that School B was prepared to accept X. School B already had some specialist provision in place, as a result of which it calculated that the overall cost of making provision for X's needs would be about £22,000. That would require top up funding from Medway of about £16,000 by my calculation, after deduction of the standard £6,000 element. Of course there could have been reasons why the School in this case would be chosen instead, but in the absence of any evidence from Medway to explain why, it seems much more likely that School B would have been chosen as appropriate under section 39(5), and therefore named in the final EHC plan, if Medway had to make such a choice.

Grounds 4 and 5

102. I can dispose of these grounds relatively quickly. In view of my conclusions above they become academic. In any event Ms McColgan did not press them strongly. She put them forward as alternative ways of showing that parental choice of a school was not a trump card which overrides everything else. In the end the agreed analysis of the inter-relationship between sections 33 and 39 shows that parental choice is a powerful factor, but not overriding. Equally, the presumption of mainstream schooling is very powerful, but not absolute.

103. Section 19 of the 2014 Act is important in setting out the general principles, but it cannot alter or override the specific provisions of the same Act. Equally, section 175(1) of the Education Act 2002 (which requires a local authority to ensure that its education functions are exercised with a view to safeguarding and promoting the welfare of children) and section 149 of the Equality Act 2010 (imposing the public sector equality duty) do not change the clear wording of sections 33 and 39 of the 2014 Act. It is not Ms McColgan's submission that I should read them down or declare incompatibility.

104. There may be decisions in a case like this which involve the exercise of discretion. It might be that the choice of which school should be named as "appropriate" under section 39(5) is one, depending on the factual circumstances. But what has been challenged here is not the exercise of a discretion, so the *Padfield* principles are not engaged. Ms McColgan acknowledged that, and reworked her submissions accordingly.

105. In the circumstances of this case as I find them there is no need for Grounds 4 and 5, they are now academic, and I refuse permission in respect of them.

Conclusion

106. For the reasons set out above, I have concluded that I should grant permission on Grounds 1 to 3 only. I will make an order quashing the Medway plan.

107. As a result, it seems to me, the Greenwich plan is revived as the subsisting plan, to be treated as if made by Medway on 29 December 2017 by virtue of regulation 15. That regulation requires Medway to review the plan, and such a review is already a little out of time. That review can, and should, take into account the most recent reports, and may require further reports. In the meantime Medway has a duty under regulation 15(6) to arrange for X's attendance at an appropriate school. Until a school is named in a properly made EHC plan, such an arrangement must be by agreement between Medway and the school, rather than under the compulsion of section 43 of the 2014 Act.

108. I shall invite the parties to agree the terms of the order in this case. Any further applications should be made in writing.