Neutral Citation Number: [2019] EWCA Civ 1349

Case No: C1/2018/2857

IN THE COURT OF APPEAL (CIVIL DIVSION)
ON APPEAL FROM
Mrs Justice Andrews
CO/2907/18

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 August 2019

Before :

LADY JUSTICE KING
LORD JUSTICE BAKER
and
LADY JUSTICE SIMLER

- -

Between :

DJ (BY HIS MOTHER & LITIGATION FRIEND AJ)	**Appellant**
- and -	
THE WELSH MINISTER & OTHERS	**Respondent**

- -
- -

Ruth Henke QC & Christian Howells (instructed by **Watkins & Gunn Solicitors**) for the **Appellant**
Stephen Knafler QC (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 9 July 2019

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Approved Judgment

Lady Justice Simler:

Introduction

1. This appeal concerns a young adult, the Appellant, referred to as "DJ", who is now 22 and has severe and complex learning difficulties, and is assessed as such. He is also assessed by Cardiff City Council (the relevant local authority) as lacking capacity within the meaning of the Mental Capacity Act 2005. DJ's mother has acted throughout as his litigation friend.

2. DJ has successfully completed a three-year Foundation Education Programme at Coleg Elidyr (a specialist residential further education ("FE") college, co-funded by the Welsh Government and Cardiff City Council, and referred to below as "the College") where he made excellent progress and developed skills that will increase his independence and autonomy. His parents would like him to continue at the College, in order to benefit from an education and training programme that they consider will meet his residual needs, on a fully funded basis, until the end of the academic year July 2022.

3. However, by a decision dated 7 June 2018, the Respondent, the Welsh Ministers, refused to reassess DJ's educational and training needs following his successful completion of his third year of study at the College; and Careers Wales subsequently refused to make an application to the Welsh Ministers to fund an additional course of study for DJ at the College. Instead Cardiff City Council has determined (following an assessment of DJ's needs and completion of a care plan) that they can meet his educational and training needs locally in Cardiff. The Council has agreed to maintain and fund DJ's placement at the College on a temporary basis until suitable supported living accommodation (which has been identified for him in Cardiff – a house for him to live in with two or three other young people supported by live-in carers) has been purchased by the Council.

4. The Welsh Ministers have powers and duties in relation to the education of people with learning difficulties under the Learning and Skills Act 2000 ("the 2000 Act"). In April 2017 they published a policy, '*Securing provision for young people with learning difficulties at specialist further education establishments*' (referred to below as "the Policy") setting out how funding placement decisions will be taken for young people with learning difficulties at specialist educational establishments in accordance with their powers under the 2000 Act. Careers Wales is a wholly-owned subsidiary of the Welsh Government and submits applications to the Welsh Ministers asking them to fund specialist FE provision for those with learning difficulties in appropriate circumstances.

5. Although the principal target of DJ's judicial review challenge was the decision of the Welsh Ministers of 7 June 2018 not to have DJ's educational needs reassessed under s.140 of the 2000 Act as a precondition for funding an additional programme of study, it was DJ's case (among other things) that the Welsh Ministers took account of paragraphs 92 and 93 of the Policy in reaching the impugned decision, and if paragraphs 92 and 93 are an unlawful fetter on the discretion of the Welsh Ministers, then the decision itself must also be unlawful. Mrs Justice Andrews rejected that (and other) arguments, holding paragraphs 92 and 93 of the Policy did not unlawfully fetter the Welsh Ministers' discretion under s.41(3) of the 2000 Act or impose an unlawfully

elevated threshold test. Her judgment on those two issues is challenged on this appeal.

The legislative scheme

6. It is common ground that, in addition to duties and responsibilities for the education and training of people with learning difficulties imposed on the Welsh Ministers, the Education Act 1996, the Social Services and Well-being Act (Wales) 2014 ("the 2014 Act") and the Care and Support (Eligibility) (Wales) Regulations 2015 ("the Regulations") made pursuant to the 2014 Act all contain provisions which impose duties and responsibilities for similar matters on local authorities.

7. Part 4 of the Education Act 1996 sets out the duties of local authorities towards children aged two (or younger) to 19, with special educational needs. Section 324 (5) provides that where a local authority maintains a statement of special educational needs ("SSEN") then, unless the child's parent has made suitable arrangements, the authority shall arrange that the special educational provision specified in the statement is made for the child. In practice, this is arranged by the local education authority. DJ has had the benefit of a SSEN and special educational provision throughout his schooling whilst at compulsory school age.

8. Under the 2014 Act and the Regulations, authorities such as Cardiff City Council are under a statutory duty to assess the potential needs for "care and support" of a relevant adult, and to meet their "eligible needs" including needs relating to "involvement in work, education, learning or in leisure activities". Section 32 of the 2014 Act and the Regulations set out how the local authority goes about the discharge of its duties under the 2014 Act and s.34 of the 2014 Act affords wide powers as to how to meet the needs of relevant adults. For example, here, Cardiff City Council is meeting DJ's eligible needs currently by funding the additional year at the College; but has assessed that his needs can be met in future through a combination of supported living together with locally provided education and training.

9. The critical provisions for the purposes of this appeal, are contained in Part II of the 2000 Act, and concern the duty to secure the provision of education and training facilities for those aged 19-25, like DJ; and the power to fund that provision: in particular, ss.32, 34, 41 and 140 of the 2000 Act.

10. Section 32 of the 2000 Act, as amended, provides:

> "32 Education and training for persons over 19
>
> (1) The Welsh Ministers must secure the provision of reasonable facilities for –
>
> (a) education (other than higher education) suitable to the requirements of persons who are above compulsory school age who have attained the age of 19,
>
> (b) training suitable to the requirements of such persons…".
>
> "(3) In performing the duty imposed on them by subsection (1) the Welsh Ministers must –

> (a) take account of the places where facilities are provided, the character of facilities and the way they are equipped;
>
> (b) take account of the different abilities and aptitudes of different persons;
>
> (c) take account of the education and training required in different sectors of employment for employees and potential employees;
>
> (d) take account of facilities who provision the Welsh Ministers think might reasonably be secured by other persons."

11. Section 34(1) and (2) empower the Welsh Ministers to discharge those duties by the provision of financial resources to persons providing and/or receiving post-16 education or training, or by making arrangements for the provision of such financial resources by another body (such as a local authority), whether alone or jointly, including with the Welsh Ministers.

12. Section 41 provides:

> "(1) In discharging their functions under sections 31, 32 and 34 (1)… the Welsh Ministers must have regard –
>
> (a) to the needs of persons with learning difficulties, and
>
> (b) in particular, to any report of an assessment conducted under section 140.
>
> …
>
> (3) If the Welsh Ministers are satisfied that they cannot secure the provision of reasonable facilities for education or training for a person with a learning difficulty who has attained the age of 19 but not the age of 25 unless it also secures the provision of boarding accommodation for him, the Welsh Ministers must secure the provision of boarding accommodation for him."

13. Section 140 of the 2000 Act deals with assessments relating to learning difficulties, and provides that whereas it is mandatory for the Welsh Ministers to arrange for an assessment to be conducted at some time during a person's last year of compulsory schooling if they have a SSEN and it is believed by the Welsh Ministers that they will leave school at the end of the last year of compulsory schooling to receive post-16 education or training, the position is different for those who have learning difficulties but are over compulsory school age. In the case of this latter group, the Welsh Ministers:

> "140 (3) …may at any time arrange for an assessment to be conducted of a person –

> (a) …who is over compulsory school age but has not yet attained the age of 25,
>
> (b) who appears to the Welsh Ministers to have a learning difficulty ..and
>
> (c) who is receiving, or in the opinion of the Welsh Ministers is likely to receive, post-16 education or training…
>
> (4) For the purposes of this section an assessment of a person is an assessment resulting in a written report of –
>
> (a) his educational and training needs, and
>
> (b) the provision required to meet them."

The Policy

14. The Policy was issued to assist interested parties with the process and policy by which the Welsh Ministers fulfil the duties and responsibilities imposed by these (and other relevant) provisions in Part II of the 2000 Act, and determine the funding of placements for young people aged 16 to 25 with learning difficulties who require access to specialist education and training provision. The Introduction to the Policy explains that it sets out the considerations that will be applied when deciding "*whether to fund specialist placements, which duration to fund, whether to fund changes to programmes of study that have already commenced, and whether to fund additional programmes of study…".*

15. Paragraph 3 of the Introduction identifies the Welsh Government's funding policy as:

> "…to fund the specialist provision required for those young people with learning difficulties aged 16-25 who wish to undertake post-16 education but are not able to access the provision established as necessary to meet their identified educational and training needs through mainstream FE provision. This might also include boarding accommodation. The Welsh Government's policy is to fund the duration required based on the young person's capability to progress and achieve against their education and training outcomes. For the majority of young people accessing specialist provision, the duration will be comparable with the duration of provision within mainstream FE establishments, i.e. two academic years."

16. Paragraph 5 states that the document "*is not intended as a guide to the assessment of a young person's needs nor does it describe a set of rigid requirements which must be met. The Welsh Government will exercise their powers in a flexible and responsible way to achieve this objective."*

17. The process by which funding decisions are reached by the Welsh Ministers is described at paragraph 17 and following of the Policy. Paragraphs 17 to 19 set out an overview. Careers Wales carries out an assessment of the young person and produces a report of the individual's education and training needs and the provision required to

meet their needs. This should include the young person's desired outcomes linked to their future aspirations. The report, which is known as a Learning and Skills Plan ("the LS Plan") will contain a recommendation about the necessary provision and placement. Once the LS Plan is finalised, Careers Wales submits it to the Welsh Ministers, along with the young person's application for funding and other relevant supporting evidence. In deciding whether to fund a placement, the Welsh Ministers will take into account all information relevant to the funding application, and they will pay particular regard to the LS Plan.

18. At paragraph 21, the Policy sets out the principles and objectives applied by the Welsh Government in determining whether or not to fund placements at specialist FE establishments. These are:

> " - the Welsh Government's statutory obligations must be met (including consideration of availability of resources, where appropriate).
>
> - Young people will be treated fairly and equitably, and on a case-by-case basis.
>
> - The best interests of the individual will be considered.
>
> - The views and wishes of young people will be considered.
>
> - The provision available locally and across Wales is prioritised, where it is appropriate and reasonable to do so.
>
> - A balanced conclusion will be reached on the basis of the evidence and advice. …. . . "

The Policy however makes clear that although the wishes of the young person are considered, the Welsh Government does not have a legal duty to fund the specialist provision of their choice and nor does it have a legal duty to fund their programme duration of choice (see paragraph 22).

19. Paragraphs 24 to 38 deal with the s.140 assessment that results in a LS Plan. Paragraph 24 explains that the Welsh Government:

> "will generally commission an assessment to be undertaken, and have arranged for Careers Wales to conduct these assessments on their behalf. This usually forms part of the transition process during the last year of compulsory schooling for the young person. In making decisions about securing and funding a placement, the Welsh Government will take the report [LS Plan] of the assessment into account, together with all other relevant matters, including any information or evidence collated by Careers Wales throughout the assessment process."

20. Paragraph 25 provides that the starting point for the consideration of funding of a specialist placement is the assessment under s.140 of the 2000 Act. Paragraph 27 makes clear that for young people who are in school, such assessments are carried out during the last year of compulsory schooling and Careers Wales will automatically provide an assessment where the young person has a SSEN. For any other young person (see paragraph 28) they *may* approach the Welsh Government to request an

assessment be undertaken so long as the young person is believed to have a learning difficulty, is over the compulsory school age but under 25, and is in or about to start post-16 education or training.

21. Paragraph 32 explains the type of information and evidence relating to the young person's holistic needs that will be required by Careers Wales in order to complete the assessment. The young person and their parent/carer are free to provide any information they think is relevant to the assessment. This will be taken into account by Careers Wales in reaching an informed judgment about the young person's holistic needs and the provision required to meet them. Exceptionally, where there is insufficient or conflicting evidence available, the Welsh Government may arrange for an educational psychologist to undertake the s.140 assessment.

22. Where a s.140 assessment identifies a need for a placement within a specialist FE establishment, the Policy provides that Careers Wales *must* submit an application for funding together with the LS Plan and supporting evidence to the Welsh Government for its consideration (see paragraph 39 of the Policy).

23. Paragraph 40 of the Policy provides that, regardless of whether the LS Plan establishes that mainstream provision is required, (i.e. even if it suggests that there is no need for the young person to attend a specialist FE establishment) Careers Wales cannot refuse to submit an application for funding to the Welsh Government should the young person (or their parent/carer) wish. In these circumstances, the Welsh Government will give consideration to the application and the supporting evidence base, together with any additional relevant information, including any provided by or on behalf of the young person.

24. Paragraph 43 provides that the LS Plan should be based on up-to-date information. For this reason, the LS Plan and key supporting evidence should be as up-to-date as possible and preferably not more than one year old at the date the application is received.

25. Paragraph 49 makes clear that in determining an application for funding, the Welsh Government will apply the general principles and objectives set out in paragraph 21 of the Policy (see above) and in particular, will consider the application, the LS Plan and the supporting evidence and advice collated by Careers Wales, and any other evidence it considers relevant.

26. Paragraphs 72 to 97 of the Policy are particularly relevant to this appeal. They are headed "Procedure and considerations that apply to funding decisions". In terms of initial applications for funding, paragraphs 72 and 73 together make clear that provision at mainstream FE establishments usually spans two academic years and accordingly, the Welsh Government will generally fund placements within specialist FE establishments lasting up to a maximum of two academic years; and does not expect to receive applications for a programme of study lasting more than two academic years unless exceptional reasons relating to the individual young person's capability to learn are demonstrated. Paragraph 73 continues,

> "Even in these cases, funding is unlikely to be offered for more than two years in the absence of objective evidence demonstrating that the provision identified as necessary to meet

> the young person's established needs cannot realistically be provided by a study programme of two years."

27. Footnote 14 explains the reasoning behind the two-year funding policy: because specialist FE establishments are specifically set up to cater for the complex needs of the young people expected to attend them, the Welsh Government generally expects such establishments to design bespoke programmes of study comparable in duration to that provided by a mainstream FE establishment, and specifically targeted at the *"realistic level of education achievable in that duration for the general cohort of young people who attend these establishments."*

28. In this way, as the Policy makes clear, the Welsh Government seeks to create a level playing field so far as concerns the treatment of young adults with learning difficulties, and young adults without such difficulties who would usually receive no more than two years of funding at a mainstream FE establishment. Although funding of the former is likely to be considerably more expensive than funding of the latter (especially where residential requirements exist), parity of treatment is achieved by the provision of two years' funding as a general rule. Nobody has suggested this general limitation by reference to duration is unlawful.

29. There are three circumstances identified by way of exception to the general policy that funding will only be provided for two years:

    i) Where it is agreed at the outset that a longer programme of study should be funded because objective evidence shows that the provision identified as necessary to meet the young person's established needs cannot realistically be provided by a two-year course (see paragraph 73 of the Policy);

    ii) Where the Welsh Ministers agree to fund an extension of time to enable the young person to complete the originally agreed programme of study (see paragraphs 82 to 91);

    iii) Where the Welsh Ministers exceptionally agree to fund an additional programme of study, i.e. a different course from the course that was originally agreed (see paragraphs 92 to 97).

30. In DJ's case, a longer programme of study was agreed for him at the outset: three years instead of two. In addition he seeks funding for an additional programme of study within the third of these exceptions. It is the refusal of such additional funding that is challenged on this appeal, as it was below.

31. Paragraphs 92 and 93 of the Policy deal with the third exceptional circumstance: funding for an additional programme of study. They appear under the heading, "Requests to fund additional programmes of study" and read as follows:

> "92. In certain circumstances it may be necessary for a young person to undertake additional specialist provision over and above, and following completion of, the young person's original agreed programme of study. It is not the Welsh Government's policy to routinely fund continuous education and training up until the age of 25. The Welsh Government

> will not, therefore, usually fund a second/additional programme of study at any specialist FE establishment unless the previous funded programme of study cannot fairly be said to have afforded the young person effective access to further education, or unless very exceptional circumstances have resulted in the young person being objectively deprived of the educational value of the previous funded programme
>
> 93. These cases will be rare. Examples might include:
>
> - where the education or training provided by the specialist FE establishment fell so far below the expected standard for the young person that the establishment cannot objectively be said to have delivered the provision established as necessary to meet the young person's identified needs
>
> - where **exceptional** reasons relating to the **personal circumstances** of the individual have caused a demonstrable regression of the skills previously learned to such an extent that the young person has effectively been deprived of the educational value of the previous programme." [Emphasis as in the original].

32. Paragraph 94 confirms that in order to determine an application for funding an additional programme of study, "*the Welsh Government will usually need to arrange for a new section 140 assessment to be carried out in order to establish whether the additional programme of study is necessary to meet the education and training needs of the young person.*" (emphasis added). The Policy states that Careers Wales will undertake this assessment. Paragraph 95 states that applications for additional programmes of study are made by Careers Wales:

> "As before, Careers Wales cannot refuse to submit an application, but should draw the attention of the young person and their parent/carer to the contents of the [Policy]."

33. There are appeal and complaint procedures set out at paragraphs 98 to 106. Paragraph 98 provides that the "*Welsh Government will endeavour to act in accordance with the policy, set out in this document, and in adherence to the 2000 Act…*" A person who considers that the Welsh Government has not made a reasonable decision *"in line with this policy and/or the law*" can appeal under these procedures.

The Technical Guidance

34. The Welsh Government has also produced a document entitled, "Technical Guidance for Careers Wales" issued in November 2017, setting out advice and guidance on its expectations for the role of Careers Wales in the assessment process under s.140 of the 2000 Act (referred to below as "the Technical Guidance"). The document is principally aimed at Careers Wales, who are required to have regard to the advice and guidance set out within it. The Technical Guidance supplements the Policy but insofar as there is any inconsistency between them, it is common ground that the Policy has primacy.

35. It is unnecessary to set out in detail the terms of the Technical Guidance. It is summarised by Andrews J at paragraphs 38 to 45 of her judgment. It is sufficient at this stage to indicate that it summarises the circumstances in which the Welsh Ministers will commission assessments under s.140(3) of the 2000 Act, making clear that in certain circumstances it is in the Welsh Government's discretion whether or not to prepare an assessment and in other circumstances such an assessment must be carried out. For example, the Technical Guidance provides (with emphasis added):

> "43: In some circumstances, the Welsh Government may determine that it is appropriate for a young person to be assessed under section 140(3). These may include the following, but this is not an exhaustive list:
>
> … …
>
> (b) ..a young person who:
>
> - has previously received an assessment but whose circumstances have since changed (e.g. a young person with a deteriorating condition) to such an extent that a further assessment is necessary to ensure their learning needs are met; or … .".

36. Paragraphs 133 and 134 of the Technical Guidance explain (or paraphrase) paragraphs 92 and 93 of the Policy:

> "133. In certain circumstances, it may be necessary for a young person to undertake additional specialist provision over and above, and following completion of, the young person's original agreed programme of study.
>
> 134. These cases will be rare; examples might include (but are not limited to) where the education or training provided by the specialist establishment fell so far below the expected standard for the young person, that the establishment cannot objectively be said to have delivered the provision established as necessary to meet the young person's identified needs. Another example might be where **exceptional** reasons relating to the **personal circumstances** of the individual have caused a demonstrable regression of the skills previously learnt to such an extent that the young person has effectively been deprived of the educational value of the previous programme." (Emphasis as original).

he Factual background

37. The factual background in this case is set out at paragraphs 46 to 53 of the judgment of Andrews J which I have relied on heavily in what follows.

38. DJ was born on 19 August 1996 and is now 22 years old. Between the ages of 3 and 18, he was educated in special schools (with the benefit of a SSEN under the

Education Act 1996). In his final year of education at school, the Welsh Ministers arranged for Careers Wales to complete an assessment under s.140(3) of the 2000 Act. The LS Plan that resulted from this assessment is dated 27 January 2015. It summarised DJ's future education and training needs and the provision required to meet them. Among the identified needs, it stated:

> "to ensure [DJ] can fulfil his academic potential he should have access to a suitable and meaningful curriculum that will help him to develop his basic skills and develop and engage his interests in fulfilling vocational studies".

In the passage which identifies the provision required to meet those needs, the LS Plan stated:

> "[DJ] will benefit from having access to a suitable and appropriate curriculum. He has been assessed at Coleg Elidyr and [they] deemed it appropriate for [DJ] to work towards the F3 Foundation Programme. This course will allow [DJ] to continue to develop his basic skills in numeracy and literacy as well as develop his independent living and social skills. These will be vital for [DJ] to reach his full potential and to live as independent a life as possible, with some support. [DJ] should also have the opportunity to develop interest and skills in vocational areas such as gardening and working with animals that will not only be fulfilling to him academically but also help with his independence and overall personal development."

39. Cardiff City Council and the Welsh Ministers co-funded DJ's study on the Foundation Programme at the College for a period of three years, ending in July 2018. As I understand the position to be (though it may not matter for the purposes of this appeal) Cardiff City Council has since then, fully funded both the educational element of his continuing placement there and the residential and support needs element. In other words, DJ has been and continues to be fully funded at the College.

40. Before the end of the three-year course at the College, on 2 November 2017 the Welsh Ministers instigated transition planning for DJ. The College proposed that DJ (by now aged 21) should progress onto its Trainee and Transition Programme, an additional two-year personalised programme for students who have completed the earlier Foundation programme and require further support to develop the skills acquired to successfully live and work within their communities after completion of education. The College described the course as "*providing a stepping-stone to increased independence and autonomy to enable individuals to live fulfilling lives and make a positive contribution to their community*". It confirmed that DJ had made "excellent progress" on the Foundation course.

41. DJ's parents asked Cardiff City Council for funding, but by letter dated 27 November 2017, Cardiff City Council said they could meet his needs locally and were ready to start planning to do so. A transition meeting took place on 29 November 2017.

42. On 22 December, solicitors for DJ wrote a letter before action to Cardiff City Council intimating a challenge to the decision to refuse funding for the two-year programme at

the College. One of the complaints made was that the local authority had not properly carried out an objective comparison of the College programme as against the supported living placement in the community in Cardiff. Following further correspondence, Cardiff City Council accepted the need for further assessments to consider all potential solutions, and agreed to conduct an objective comparison of the type described by DJ's solicitors.

43. In January 2018, DJ's parents approached Careers Wales to discuss making an application to the Welsh Minsters for funding of the education element of the additional programme of study at the College. By a formal request application dated 29 March 2018 Careers Wales submitted a request to Welsh Ministers within Technical Guidance paragraph 43b on the basis of changed circumstances to such an extent that a further assessment was necessary. The request was prepared after receiving input from DJ's parents, and sought permission to update his s.140 assessment. The changed circumstances were said to be DJ's success on the Foundation Programme at the College which had "*opened up opportunities for the meaningful development of his employability and life skills…* [and] *… the progress he has made necessitates a reassessment as he has responded so effectively to his current learning environment.*"

44. The Welsh Ministers responded on 15 May 2018 inviting the provision of additional information relating to the reasons and basis for the request for an updated assessment.

45. The additional information (approved by DJ's mother) was provided by Careers Wales to the Welsh Ministers by email dated 21 May 2018. It included the following:

> "DJ has 'successfully achieved the programme's accredited and unaccredited units'. This evidence is that the desired outcomes of the original funded programme of study have been met. DJ has not over or under achieved, but rather progressed in accordance with that which was expected.… Such achievements cannot however sensibly be construed as 'changes', but rather the successful completion of his studies as anticipated within the original assessment of need.
>
> Additional information: this information was presented to demonstrate that as a consequence of the successful completion of his programme, DJs needs now require reassessment as they have changed with regard to the fact that DJ now has the extra confidence and abilities he's been taught as a result of the course; DJ's successful completion of the programme also demonstrates that further training will deliver even more beneficial changes."

46. In relation to his ability to self-regulate and manage his anxieties, it was stated that his skills had improved in this area through the Foundation Programme and that his methods of learning would need to change – for example he needed to learn how to manage his hypersensitive responses to stimulus in the environment around him; and to improve his flexibility of thinking. These were described as new types of learning that he would not have been able to achieve when he came to the College.

47. By letter dated 7 June 2018, the Welsh Ministers made the first decision under challenge, refusing permission to update the s.140 assessment. The letter stated that the information and additional information provided had been considered but was not

strong enough to support the request. It continued that the information provided evidenced "*that the desired outcomes of the original funded programme of study has been met*.…" but such "*achievements cannot however be construed as 'changes', but rather successful completion of his studies as anticipated with the original assessment of need*." In other words, the information did not provide evidence as to how DJ's circumstances had changed to such an extent that a further assessment is required.

48. DJ's parents appealed that decision pursuant to the appeals process set out at paragraphs 98 to 104 of the Policy. This is a two-stage process; the first stage is an internal appeal, and the second stage is an appeal to an independent and impartial person who acts as an independent assessor. In DJ's case that person was an independent educational psychologist. Both appeals were unsuccessful.

49. The second appeal decision was made on 24 August 2018. The independent educational psychologist concluded that guidance and policy governing the decision to refuse the requested update of the s.140 assessment were applied correctly in the light of the evidence provided. He stated that "*the guidance is clear that such an update should occur when needs have changed to such an extent that it is warranted"* and that although it was very satisfying to know that DJ had made good progress and had developed some skills which seemed hard to envisage in 2015, "*progress, in itself, does not constitute evidence of a "**change to such an extent**" that an update is required"*. He said it was entirely reasonable for Welsh Ministers to conclude that the progress DJ had made was the kind of progress they would expect him to have made at the College:

> "The evidence suggests that [DJ] has not outpaced his original learning goals to such an extent that the original s.140 is not meaningful or useful… the progress reports provided do not suggest that [DJ] has reached a point where his learning needs are not being met, or challenged, by the courses. It is therefore not reasonable to propose that his good progress, which was also quite reasonably expected, constitutes a **change of great extent**". (All emphasis as in the original).

50. Meanwhile on 3 May 2018, Cardiff City Council, as the responsible local authority under the 2014 Act, completed its own "wellbeing assessment" of DJ's needs. This replaced an assessment it had carried out in January which was challenged by DJ's parents. The wellbeing assessment is the subject of a separate claim by DJ for judicial review against Cardiff City Council which has been stayed pending the outcome of these proceedings.

51. While the appeals were in train, Cardiff City Council completed their care and support plan for DJ on 4 July 2018. By email dated 12 July 2018 Careers Wales made the final decision that was challenged on judicial review: they said they were unable to proceed with a funding application for an additional programme of study as this process is initiated by the production of an updated assessment and LS Plan. If the Welsh Government upheld the appeal for an updated assessment, they would update the LS Plan as a matter of urgency to expedite the application process as efficiently as possible.

52. On 20 July 2018, DJ issued these proceedings for judicial review as already outlined. The hearing took place on 5 October 2018. On 15 October 2018, in response to an issue that had arisen during the hearing, the Welsh Ministers supplied Andrews J with details of decisions made under s.140 of the 2000 Act since 2017. The application for judicial review was dismissed by Andrews J on 19 October 2018.

53. On 9 November 2018 Cardiff City Council's Director of Social Services, Ms Clare Marchant, wrote to DJ's parents stating, '*I am confident that the social work and care plan show that [DJ's] agreed outcomes can be met locally. The city has a wide range of independence, social and vocational opportunities. We can also offer good quality supported living options and have assisted many young people leaving college to successfully transition to their own tenancies'.* She also said however, *'My concern is to ensure we work together in the short and longer term so that [DJ] has the very best opportunities to achieve the wellbeing outcomes. The distress [DJ] is currently experiencing is greatly concerning and as discussed in the meeting a temporary placement in the residential service at Coleg Elidyr, whilst suitable supported living is identified, will allow for the necessary transition work to be done to prepare him for the next step in his life….[The Council has arranged a] further period in Coleg to 21 July 2019, at the latest, to enable this work."*

The judgment of Andrews J

54. In her clear and careful judgment, Andrews J rejected the argument that paragraphs 92 and 93 of the Policy amounted to an unlawful fetter on the discretion of the Welsh Ministers. She held as follows:

> "67. I cannot accept any of those submissions, which fly in the face of the language of the Policy and the approach set out in the technical guidance. Paragraphs 92 and 93 are not rules, nor do they lay down criteria which have to be fulfilled in order to qualify for additional funding. Paragraph 92 articulates *exceptions* to the general underlying policy of providing funding for two years (or exceptionally, three years) only, and that general approach to the fulfilment of the Welsh Ministers' statutory duty under sections 32 and 41 of the 2000 Act is accepted to be lawful.
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> 68. It is not unlawful for a policy to indicate the type of circumstances that would normally need to be demonstrated to justify a departure from the general position on funding articulated in the Policy, and why, so long as it is made clear that they are not the only circumstances. The word "usually" serves that function here, and I can see no justification for treating it as meaningless. It is in the nature of a general residual discretion that the circumstances in which it will arise cannot be foreseen or characterised in advance.
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> 69. Against a background in which:
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> i) The statutory duty is to provide reasonable facilities for FE, having had due regard to the needs of a young person with learning disabilities;
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> ii) The 2000 Act left it to the Welsh Ministers to exercise a political, social and economic judgment about the period of funding that would be provided in order to fulfil their statutory duty;

> iii) The policy of the Welsh Government, consistent with the statutory duty, is normally to fund for two years only, for a single FE programme identified and agreed in the initial LSP which has determined that that programme will address the individual's identified educational and training needs; and
>
> iv) A different public authority (in DJ's case, Cardiff City Council) has a statutory duty to provide for the needs of a young person in the circumstances identified in paragraph 92 of the Policy, i.e. when it is necessary for that person to undertake additional specialist provision over and above and following completion of the young person's agreed programme of study;
>
> v) The approach in paragraph 92 of the Policy, namely, that further funding will not usually be forthcoming unless the previous funded programme cannot fairly be said to have afforded the young person effective access to further education, or unless in very exceptional circumstances, the young person has been objectively deprived of the educational value of that programme, is consistent with the underlying policy and the relevant statutory duties."

55. On the question whether paragraph 92 imposed an unlawfully elevated threshold that is inconsistent with the 2000 Act, she held:

> "70. There is nothing in the characterisation of the latter situation as arising in "*very exceptional circumstances*" that creates a threshold, let alone turns the guidance into an inflexible rule. In context the phrase "very exceptional" does no more than signify that the second category of recognised exception referred to in paragraph 92 will rarely arise. In any event, there are numerous examples of lawful policies in which stringent requirements are laid down for a discretion to be exercised, exceptionally, in circumstances in which the rules are not met, most notably in the field of immigration."

The appeal

56. The grounds of appeal challenge those central conclusions and raise two main issues:

i) First, is the Policy unlawful because it operates (by paragraphs 92 and 93) as an unlawful fetter on the statutory discretion available to the Welsh Ministers pursuant to s.32 read together with s.41 of the 2000 Act, to provide reasonable facilities for the education of young persons, having regard to the needs of persons with learning disabilities and/or because it sets too high a threshold for exceptions that is inconsistent with the 2000 Act?

ii) Secondly, was the decision made in DJ's case unlawful because the Policy was applied rigidly and inflexibly and the decision failed to have regard to his individual circumstances?

57. I deal first with the lawfulness of the Policy by reference to the two main arguments advanced on behalf of DJ. Given their overlap, I deal with them together. I then turn to the approach adopted by the Welsh Ministers in DJ's particular case.

Issue 1 – is the Policy unlawful in one or other of the respects relied on by DJ?

58. Ms Henke QC, who appears with Mr Howells for DJ, contends that the obligation (by operation of ss.32 and 41 of the 2000 Act) to provide reasonable facilities for education and training that are suitable for the needs of a person aged 19 or above (with learning difficulties) requires the Welsh Ministers to determine what is "reasonable" and "suitable". This requires a consideration of the person's individual needs under s.41, but she accepts that these may have to be weighed against other considerations. Ms Henke does not quarrel with issuance of the Policy setting out how the Welsh Ministers' obligations will be discharged, or that the Policy creates a general rule that a single programme of study for two years will meet those obligations, provided there is a wide residual discretion for the decision-maker to determine applications for additional study programmes on their individual merits.

59. What is objectionable however, is first, the fact that the residual discretion to extend funding to an additional programme of study is curtailed by paragraph 92 of the Policy to two rigid, self-contained exceptions from the general rule: (i) where there has not been effective access to education and (ii) where 'very exceptional circumstances' have deprived the person of the educational value of the course. She submits that a fair reading of paragraphs 92 and 93 shows there is no further scope for considering the merits of an individual application outside those two categories. Properly construed, the exceptions amount to a rule that unlawfully fetters the discretion available to the Welsh Ministers and restrict their ability to consider the individual merits of an application which falls outside those two categories.

60. Secondly, Ms Henke contends that the elevated threshold imposed by the second exception to the general rule (in (ii) above) is inconsistent with the statutory obligation of making 'reasonable' provision that is 'suitable' for the purposes of the requirement under s.32(3) to take account of the different abilities and aptitudes of different persons. She compares and contrasts the use of the phrase 'exceptional circumstances' elsewhere in the Policy (for example at paragraphs 83 to 84) to create an exception to a general rule in relation to extensions to courses of study and contends that it must follow that the use of the phrase 'very exceptional' must mean something different; in other words, it creates an elevated threshold.

61. Ms Henke submits that "exceptional" would be consistent with "rare" but "very exceptional" implies something over and above that. The use of the word 'very' indicates to the decision-maker that they must identify something more than "exceptional" and that is inconsistent with a wide, unfettered discretion and goes beyond signifying that the recognised exceptions to paragraph 92 "will rarely arise". She submits that whether an additional course is reasonable in an exceptional case is an evaluative judgement for the decision-maker. It is unnecessary and unlawful to introduce an elevated threshold to be met by young people with learning difficulties. When read alone or together with the stringent nature of the two exceptional categories identified in paragraph 92, the Policy is therefore unlawful.

62. Moreover, Ms Henke submits there is no evidence that the Policy was in fact operated flexibly notwithstanding its rigid terms that admit of no other exceptions. In support of that submission she relies on the information provided by the Welsh Ministers following the hearing before Andrews J. The information provided shows that of 33 requests for additional funding for education and training programmes made since

January 2017, 19 updated assessments under s.140 of the 2000 Act were arranged. Of these, 14 were not regarded as relevant requests and can be ignored. However, of the remaining five requests, funding was granted in all cases, but they all fell into one of the two specific categories identified at paragraph 92 of the Policy without a single departure, underlining the fact that the two categories identified are rigidly applied and admit of no other exception.

63. Ms Henke further submits that the Welsh Ministers' approach to DJ's case itself demonstrates a rigid and inflexible application of the Policy. She submits that as a result of the exceptionally good progress DJ has made at the College, he now has higher learning skills and therefore, higher learning needs. That makes him exceptional, but the Policy does not cater for this, and the Welsh Ministers failed to consider his exceptionality and simply applied paragraphs 92 and 93 of the Policy in deciding to refuse a further s.140 assessment in his case.

64. The Welsh Ministers resist these arguments and contend that Andrews J was correct to conclude that the Policy is lawful for broadly the reasons she gave. In short summary, Mr Knafler QC who appears on their behalf, submits that on an objective construction of paragraphs 92 and 93 of the Policy, it is not unlawful because the exceptions are not rigid or exhaustive, and no elevated threshold is imposed. In any event, he submits that even if the Policy is expressed in inflexible terms, it is in fact operated flexibly, and is not unlawful. Further, as a matter of fact, the evidence demonstrates that careful consideration was given to the individual circumstances in DJ's case and these form the basis of the impugned decision.

65. I prefer the submissions of the Welsh Ministers and, like Andrews J, do not accept the arguments advanced on behalf of DJ for the following reasons.

66. First, it is not in doubt that the statutory duty on the Welsh Ministers, pursuant to s.32 of the 2000 Act, is to secure the provision of reasonable facilities for education (other than higher education) that is suitable for the needs of the general cohort of young adults aged 19 or above, taking account of the relevant facilities available, the differential abilities and aptitudes of different people, the educational and training requirements within different employment sectors and the relevant facilities that might be secured by others. In discharging their function of securing that provision, they must also (pursuant to s.41(1)) have regard to the needs of persons with learning disabilities and any assessment conducted under s.140 of the 2000 Act. I accept that involves some individual consideration of the young person's particular needs.

67. The 2000 Act however, leaves it open to the Welsh Ministers to determine how to discharge their statutory duty; i.e. what precisely to provide by way of reasonable and suitable facilities for those aged 19 and over, provided the mandatory considerations are taken into account in answering that question. The mandatory considerations involve a weighing of considerations about what facilities are available or might be secured elsewhere, what skills are needed and available, and the needs of a person with learning difficulties. In other words, there is, under the 2000 Act, a social, economic and needs-based judgment to be exercised in reaching a discretionary decision about funding education and training.

68. The exercise of discretion carries with it a duty to promote the objects of the statute and in doing so, to take account of all relevant considerations (including mandatory

ones). However, it is well-established that it is lawful for a public authority to formulate a policy that sets out how the authority will fulfil its duty and exercise its discretion in doing so. Such a policy has the advantage of promoting fairness, consistency and efficiency; and encouraging transparency in decision-making. In general, such a policy should not be framed in absolute terms that have the effect of debarring from consideration a person who falls outside the terms of the policy rule but within the statute itself: see for example **British Oxygen Co Ltd v Board of Trade** [1971] AC 610 at 625. It is common ground in other words, that in general, the exercise of a statutory discretion must not be unlawfully fettered.

69. There can accordingly be no objection by reference to the 2000 Act or otherwise, to the Welsh Ministers promulgating one or more policies that explain how they will exercise their powers and duties under ss.31 to 34 and 41 of the 2000 Act, and no objection is taken.

70. The Policy fulfils that function. Consistently with the duties on the Welsh Government under the 2000 Act, it sets out a general policy that the Welsh Government will initially fund placements within specialist FE establishments lasting up to a maximum of two academic years. As set out above, this removes an historical injustice, by increasing the FE provision available for young people with learning difficulties funded by the Welsh Ministers, to a level equivalent to what has hitherto been provided and funded for the same cohort of young people without learning difficulties, recognising that the provision in the former case is more expensive (often significantly so) than in the case of the latter cohort. That the general rule is designed to duration rather than individual need is not objectionable and not challenged by Ms Henke. It represents the balance struck between needs and resources in the vast majority of cases, and adjudged by the Welsh Ministers to be appropriate. There is nothing irrational in that, particularly given the other sources of funding that are available.

71. There are three exceptions to the general two-year limit set out in the Policy. DJ has already benefitted from the first of these – a longer programme of study was agreed at the outset in his case. The question is whether the third exception, relating to funding additional programmes, (set out at paragraph 92 of the Policy) is so narrowly and rigidly confined as to be an unlawful fetter on the statutory discretion available.

72. The proper approach to construing the Policy is not in doubt. It must be read as a whole and construed objectively bearing in mind that it is not a statute, but an expression of administrative policy.

73. Adopting that approach, in my judgment it is not so rigidly and narrowly confined as to be an unlawful fetter. Starting with paragraphs 3 and 5 of the Policy, the general rule (namely to fund two academic years) is described, but making clear that this applies in the majority of cases; and the Policy does not describe "a set of rigid requirements which must be met". Instead paragraph 5 emphasises that the Welsh Government will exercise their powers "in a flexible and responsible way" to achieve the statutory objective. Paragraph 21 of the Policy makes clear that in determining whether or not to fund placements at specialist FE establishments, the Welsh Government's *statutory obligations* must be met, including consideration of available resources, and ensuring the fair and equitable treatment of young people on a case-by-

case basis. As the Policy makes clear however, there is no legal duty to fund specialist provision of an individual's choice or a programme duration of choice.

74. Consistently with the underlying two-year policy and its rationale, paragraph 92 recognises that additional specialist provision over and above two academic years might be necessary in certain cases, but states it is not the policy of the Welsh Ministers to provide routine funding for continuous education and training up to age 25. That too is not challenged, and no doubt reflects the existence of a variety of sources of funded educational provision available for young people with learning difficulties.

75. Given that continuous education and training up to the age of 25 is not routinely funded, paragraph 92 articulates *exceptions* to the general policy of providing funding for two (or exceptionally, three) years only, and Ms Henke accepts that general approach to the fulfilment of the Welsh Ministers' statutory duty under ss.32 and 41 of the 2000 Act is lawful.

76. Paragraph 92 provides, "*The Welsh Government will not, therefore, usually fund a second/additional programme of study … unless*" one of two criteria are fulfilled. Ms Henke's construction of this phrase requires the words 'not … usually' to be read as 'not … ever' or simply ignored. That is untenable. The word 'usually' is significant, and is not narrowed or curtailed by the word 'unless' as Ms Henke submits. To the contrary, it means (consistently with the earlier paragraphs to which I have referred) that even where neither of the two circumstances that are expressly identified are fulfilled, the Welsh Ministers may nevertheless fund an additional programme, although they will not 'usually' do so. The Technical Guidance also supports this construction.

77. Nor does this phrase create an inflexible rule that must be met in order to qualify for additional funding. Rather, paragraph 92 indicates in broad terms what circumstances would normally (or usually) need to be demonstrated to justify a departure from the general position on funding articulated in the Policy, and why those circumstances are likely to do so (namely, because the benefits expected to have been obtained upon completion of the initial, or extended, study programme have not been obtained). Again, that reflects a rational judgment about the need for and allocation of funding, recognising inevitable limitations on the availability of Welsh Government resources, and that other sources are (or may be) available. But paragraphs 92 and 93 make clear as a matter of ordinary language, that these are not the only circumstances that can ever justify such a departure.

78. Neither the exceptions nor the examples given are expressed to be exhaustive or to preclude other cases or examples that might fall within exceptional circumstances justifying a departure from the general rule (or precluding the exercise of a residual discretion).

79. Rather, the two examples given in paragraph 93 simply illustrate particular scenarios that *might* fall within each of the two broad categories identified in paragraph 92, as the introductory words used in paragraph 93 make clear. True it is that the second specific example relates to a deterioration in the young person's previous learning skills. However I can see nothing in the wording used and no reason to interpret the Policy as being confined to situations of a negative change as opposed to including

also positive changes. It is significant in this regard that the Welsh Ministers did not reject out of hand the application made on DJ's behalf for an updated assessment because it relied on positive changes (and not negative ones); but instead, invited the provision of additional information from Careers Wales in order to determine the application. I also note, as Andrews J did, that the independent adjudicator did not interpret the policy so narrowly on appeal.

80. As Andrews J observed it is not difficult to conceive of other examples that might fall within the recognised categories of exception in paragraph 92. Indeed, the information about the five cases since January 2017 (in which successful requests for an updated s.140(3) assessment as a preliminary step to applying for funding for an additional programme of study), involved situations treated as falling within one or other of the two broad paragraph 92 categories. The examples involved changed needs as a result of a deteriorating eye condition; late-diagnosed autism; where occupational therapy should have been delivered as part of the programme, but was not; where a young person's skills regressed as a result of a serious family illness; and in a case where there were higher emotional and social needs. What this material does not do however, is evidence the Welsh Ministers refusing to consider cases involving new or unusual circumstances merely because they are perceived to be outside the confines of paragraphs 92 or 93. Nor was consideration of DJ's own case refused on this basis.

81. It may be difficult to conceive of circumstances falling outside the two broad categories described by paragraph 92 and exemplified in paragraph 93 that might qualify as an exception to the general two-year funding rule, however the Policy expressly allows for that possibility to be demonstrated. On its proper construction, there is nothing in the Policy (or paragraphs 92 and 93) that precludes a decision-maker from considering an application for a further assessment or an application for additional funding on its merits and by reference to the individual circumstances, where those do not fall within the parameters of the examples given.

82. As for the challenge to the words 'very exceptional circumstances' in the second type of excepted circumstance in paragraph 92, I agree with Andrews J that this does not create a threshold, still less does it turn the guidance into an inflexible rule. I read it as doing no more than emphasising to the reader that the second type of recognised exceptional circumstance will rarely arise.

83. This conclusion is reinforced by the second bullet-point in paragraph 93 which gives as an example that might be included in the 'very exceptional circumstances' where 'exceptional reasons' (<u>not</u> 'very exceptional reasons') relating to the young person's personal circumstances have caused a regression of the skills previously learned, effectively depriving him or her of the educational value of the programme. The accompanying Technical Guidance, at paragraph 134 also suggests that no difference was intended between 'exceptional' and 'very exceptional'.

84. I agree with Mr Knafler that the material sent to Andrews J following the hearing also reinforces this conclusion. The examples (summarised above) show that in practice, the Welsh Ministers exercised the discretion in paragraph 92 as a result of a young person's needs changing for varying and different reasons, but none of these looks on the face of it to be 'very exceptional'.

85. In DJ's own case, additional funding was not declined because he failed to meet a very high threshold but because, on careful examination, his case was a 'paradigm case' of a programme of studies (funded for three not two years) achieving all that it was designed to achieve. His case was exactly the kind of case where additional funding should not be provided and did not have any unusual or new features that might require special consideration under a residual discretion, so as to make it appropriate to arrange for a further statutory assessment under s.140(3). If DJ's situation were treated as a sufficient basis for applying for a further statutory assessment under s.140(3), it would, as Andrews J observed, drive a coach and horses through the underlying policy as it would mean that any young person who had successfully completed their two (or three) year course, and thereby achieved what their LS Plan set out to achieve, could demand a fresh assessment of their current educational and training needs with a view to making an application for funding for a further course as a matter of routine.

86. For all these reasons, Andrews J was correct for the reasons she gave, to conclude that the Policy is not unlawful in any of the respects advanced on behalf of DJ. This ground of appeal accordingly fails.

Second issue – application in DJ's case

87. I can take this issue shortly in light of my conclusions on the first issue. It is quite clear from a plain reading of the decision taken by the Welsh Ministers that they did not approach this case on the basis that paragraphs 92 and 93 of the Policy fettered their discretion. Nor did they apply an elevated threshold when considering whether exceptional circumstances justifying a further assessment under s.140(3) as a precondition to an application for funding of an additional course had been identified.

88. It is significant, as I have already explained, that the Careers Wales' request for an updated assessment (of 29 March 2018) was not dismissed out of hand, or without consideration because of a rigid application of the categories and examples given in paragraphs 92 and 93 of the Policy. Instead, the Welsh Ministers sought additional information relating to that request, no doubt so that the additional information could be considered and assessed on an individualised basis, to determine whether he had in fact made exceptional progress that took his case out of the ordinary and led to it being exceptional and not a paradigm case.

89. Having considered the information in the s. 140 update request, together with the additional information provided on 21 May, the Welsh Ministers refused to arrange a further assessment under s.140(3) of the 2000 Act, but only because the evidence provided on DJ's behalf did not show that his circumstances had changed to such an extent that a further assessment was required (see the letter of 7 June 2018 referred to above). In other words, they made a decision based on the specific facts and the evidence provided. Looked at as a whole, the process adopted and decisions taken demonstrate that the Welsh Ministers plainly contemplated throughout the possibility that, notwithstanding the earlier assessment, DJ's circumstances might have changed to such a positive extent that a further assessment was necessary to ensure that his learning needs would be met. That approach is consistent with an objectively correct understanding of their discretion, both as a matter of statute and the Policy.

90. This is further supported by a consideration of the decisions taken on appeal. As set out above, DJ's parents pursued the two-stage appeal process. At stage 1, the internal appeal stage, the Welsh Government concluded that the evidence provided was "*not strong enough to support the request*" for an updated assessment. In other words, there was no evidence of exceptional circumstances.

91. At stage 2, the independent educational psychologist, acting as independent assessor, concluded that the Welsh Ministers made a "*correct decision in line with guidance and policy*" when refusing to update DJ's s.140 assessment. He accepted that the Welsh Ministers gave due regard to the evidence when reaching their determination and were correct in refusing to update the assessment and correct in refusing the stage 1 appeal. His detailed reasons include the following:

> "….. The guidance is clear that such an update should occur when needs have **changed to such an extent** that it is warranted. The change could be negative (as in the "*deteriorating condition*" example given, or it could be positive where a learner's progress has far outpaced expectations).
>
> To establish that a change of this extent has happened would require evidence. For [DJ], his progress on his current course (including new skills developed) is offered as evidence. It is very satisfying to know that DJ has made good progress and has developed some skills which seemed hard to envisage in 2015.
>
> However, I agree with [the Welsh Ministers] that progress, in itself, does not constitute evidence of a **change 'to such an extent'** that an update is required. [DJ's] End of Year Report 2016-17 and Interim Report (December 2017) highlight many areas where he has made good progress. It is however entirely reasonable for [the Welsh Ministers] to conclude that this is the kind of progress that they would expect DJ to make at [the College]. The college, in accepting [DJ] in 2015 felt able to teach him in a manner that would promote good progress. That they have achieved this in many areas is excellent news but it is also an entirely reasonable expectation of a specialist provision.
>
> … The evidence suggests that [DJ] has not outpaced his original learning goals to such an extent that the original section 140 is not meaningful or useful. It appears that [DJ] has done well but the evidence does not show that he has either underachieved or overachieved on this course. The progress reports provided do not suggest that [DJ] has reached a point where his learning needs are not being met, or challenged, by the courses. It is therefore not reasonable to propose that his good progress, which was also quite reasonably expected, constitutes a **change of great extent**."

92. In short, there is simply no evidence that the Welsh Ministers approached the exercise of their discretion to award additional funding in the highly restrictive manner suggested by DJ, whether in his case or indeed, in other cases.

93. DJ made excellent progress on the Foundation Programme at the College, which was open to many students, and not customised for him personally. Excellent as that progress was, however, there is no evidence that it went beyond what was reasonably expected of such specialist education and training provision. His was a paradigm case that, on careful examination, so clearly fell for refusal under the Welsh Ministers'

Policy at paragraphs 92 and 93 that it would have been inappropriate to arrange for a further statutory assessment under s.140(3). That is not to underestimate the extent of his achievement, particularly given his complex needs and learning difficulties. It is simply to recognise that the evidence did not (and does not) demonstrate circumstances that would justify a departure from the usual position applicable in the majority of cases, because there is nothing about his changed circumstances that makes the change unusual or exceptional.

94. For all these reasons, I agree with the judgment of Andrews J, which is not arguably wrong or in error of law, and the appeal must therefore fail.

Conclusion

95. In conclusion there is nothing unlawful in paragraphs 92 and 93 of the Policy. These paragraphs articulate exceptions to the general policy of providing funding for two years only, by way of lawful fulfilment of the statutory duty on the Welsh Ministers under ss. 32 and 41 of the 2000 Act. Nothing in the language used precludes the Welsh Ministers from exercising their residual discretion in an appropriate case that would justify a departure from the normal two-year funding policy. Nor is there a threshold, still less an inflexible threshold created by the phrase "very exceptional" in the second example given. The impugned phrase merely signifies that the second recognised exception will rarely arise. Finally, the Welsh Ministers considered the application for an updated assessment in DJ's case lawfully and properly, and their decision cannot be impugned on public law grounds.

96. Accordingly, I would dismiss this appeal.

Lord Justice Baker:

97. I agree.

Lady Justice King:

98. I also agree.