Neutral Citation Number: [2020] EWHC 2916 (Admin)

Case No: CO/1800/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/10/2020

Before :

MR JUSTICE CAVANAGH

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Between :

THE QUEEN **(On the application of D,** **By his mother and litigation friend, J)**	**Claimant**
- and - **HAMPSHIRE COUNTY COUNCIL**	**Defendant**

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Charlotte Hadfield (instructed by **Sinclairslaw**) for the **Claimant**
Zoe Gannon (instructed by **Hampshire Legal Services**) for the **Defendant**

Hearing date: 13 October 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE CAVANAGH

Mr Justice Cavanagh:

Introduction

1. The Claimant, D, is eight years old. He was born on 18 June 2012. He last attended school on 27 September 2019. This is a claim for judicial review, in which it is contended that the Defendant local authority has acted unlawfully in refusing to provide alternative provision for him, out of school, under section 19(1) of the Education Act 1996.

2. The Claim Form set out two grounds for judicial review, in relation to the Defendant's ongoing refusal to provide alternative provision to D under section 19(1). Ground 1 was that the Defendant had unlawfully refused to make alternative provision for D, because the wrong legal test had been applied. Ground 2 was that the refusal to make alternative provision for D was unlawful, because the Defendant had failed to take account of relevant considerations, had taken account of irrelevant considerations, and/or had acted irrationally (this is often referred to by the shorthand of "**Wednesbury** unreasonableness").

3. At an oral permission hearing on 30 July 2020, Fordham J granted permission to apply for judicial review on Ground 2, but not on Ground 1.

4. At the heart of this claim is the contention that the Defendant has acted unlawfully because it has refused to accept the opinion expressed in reports and letters provided by a Consultant Child and Family Psychiatrist, Dr Richard Fry, to the effect that D is unable to attend school by reason of anxiety and other co-morbid conditions. Dr Fry was instructed privately by D's parents. The relationship between D's parents and the staff at D's school has broken down, but it is emphasised on behalf of D that this is not the reason why it is said that D is entitled to alternative provision under section 19(1). Rather, it is submitted that he falls within section 19(1) on health grounds. It is submitted on behalf of D that the Defendant has been side-tracked by a focus on who was responsible for the breakdown in relationships at D's school, when the real question is whether, as a result of anxiety, it is not possible, currently, for D to attend any school at all. It is further submitted that, even if the Defendant focused on the right issue, the conclusion that it arrived at was unlawful, because the Defendant took the wrong considerations into account, or acted irrationally.

5. The Defendant has resisted the claim on the basis that it was entitled to decline to accept Dr Fry's opinion and to conclude that D was able to attend school, despite his health problems. This was so, the Defendant submitted, in particular because of information provided by the staff at the school that D used to attend to the effect that D had coped and indeed, had been happy at the school. The Defendant accepts that relations have broken down between D's parents and staff at D's school, but considers that he would be able to attend another school.

6. The Claim Form is dated 15 April 2020. Since then, there have been further developments. In particular, D's family has obtained a report from Ms Vivienne Clifford, an Educational Psychologist, who shares Dr Fry's view that D is currently unable to attend school. The Defendant has obtained a report from another Educational Psychologist, Ms Julia Powell, which takes a different view. Ms Powell considers that D would be capable of coping in a mainstream primary school, if additional provision

was made which can be provided at such a school. This would consist of a total of 1 hour per week one-to-one with an appropriately trained adult, in order to help D to identify his emotions and to teach him strategies to regulate his emotions.

7. The parties are agreed that, in deciding this claim for judicial review, I should take account of the developments since the Claim Form was filed. The complaint is of an "ongoing failure" to make alternative provision under section 19(1). On behalf of D it is submitted that the Defendant was acting unlawfully, at 15 April 2020, in failing to make alternative provision in light of Dr Fry's opinion, and that the position has not changed since. Indeed, it is submitted that Ms Clifford's report, and a further letter from Dr Fry, reinforces the arguments for section 19(1) provision. The Defendant, on the other hand, submits that it was entitled, as at 15 April 2020, to take the view that D could cope in a mainstream school, and that the Defendant is still entitled to take that view, in light of subsequent developments. The Defendant acknowledges that the longer D stays out of school, the more difficult it will be for him to be reintegrated, but says that this is a reason for him to go back to a school, not a reason for him to be given alternative provision. The Defendant considers that it would be in D's best interests to return to mainstream schooling, with appropriate support, as soon as possible, but recognises and accepts that it would not be possible for him to return to his previous school, given the breakdown in relationships.

8. I agree that I should take account of developments since 15 April 2020. These proceedings are not purely a historic exercise in determining who was right or wrong, about six months ago. These proceedings may well have an impact upon the future provision for this young child who, as I have said, has been out of school since September 2019. In those circumstances, it would be wrong to ignore the current state of affairs.

9. The relief that is sought in these proceedings is for a declaration that the Defendant is in breach of section 19, and a mandatory order requiring the Defendant to make alternative provision for D under section 19(1). I asked counsel during oral argument what alternative provision is envisaged by D's parents. I was told that they hope and expect that arrangements will be made for the home tuition of D, but that, in the longer term, they hope that he will recover sufficiently to be able to return to the school environment.

10. D has been represented by Ms Charlotte Hadfield, and the Defendant by Ms Zoe Gannon. I am grateful to them both for their helpful submissions, both oral and in writing.

The legislative background

11. Section 7 of the Education Act 1996 provides as follows:

> "**Duty of parents to secure education of children of compulsory school age**.
>
> The parent of every child of compulsory school age shall cause him to receive efficient full-time education suitable –
>
> (a) to his age, ability and aptitude, and

(b) to any special educational needs he may have,

either by regular attendance at school or otherwise."

12. D is, of course, of compulsory school age. The clear intention and expectation of the legislation is that children shall, where possible, receive their education in school. Education in any other setting will be exceptional. This is made clear by the heading to section 19(1) of the 1996 Act, which provides:

> "**Exceptional provision of education in pupil referral units or elsewhere**.
>
> (1) Each local authority shall make arrangements for the provision of suitable education at school or otherwise than at school for those children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them."

13. In the present case, as I have said, it is contended on behalf of D that, by reason of illness, he is not fit to attend any school, and so he would not receive suitable education unless alternative provision is made for him. Therefore, it is submitted, the Defendant is under a legal duty to make alternative provision for D.

14. Provision can be made for children with illnesses, in appropriate cases, in the mainstream school setting. In particular, section 100 of the Children and Families Act 2014 imposes a duty on governing bodies of mainstream schools to make arrangements for supporting pupils at the school with medical conditions. Moreover, section 66(2) of the same Act provides that if a pupil at a mainstream school has special educational needs (which may, of course, result from ill-health), the governing body must use its best endeavours to secure that the special educational provision called for by the student's special educational needs is made. The Government has issued statutory guidance, dated December 2015, for governing bodies, about supporting pupils in schools with medical conditions. It is clear, therefore, (and perhaps is obvious) that not all children with ill-health need to be provided with alternative provision out of school. Most of them can be accommodated within the school setting.

15. So far as alternative provision is concerned, section 19 does not specify the factors or considerations that should be taken into account in determining whether alternative provision should be made under section 19(1), and, if so, what it should be, save that section 19(4A) provides that:

> "(4A) In determining what arrangements to make under subsection (1).. in the case of any child…. a local authority shall have regard to any guidance given from time to time by the Secretary of State."

16. Statutory guidance for illness cases has been set out in a document entitled "Ensuring a good education for children who cannot attend school because of health needs; statutory guidance for local authorities", dated January 2013 ("the Statutory Guidance"). The Statutory Guidance does not provide a list of factors that should be

taken into account when deciding that a child cannot attend school because of ill-health, and does not provide a list of sources of information that must be consulted. Moreover, the Statutory Guidance does not specifically address the possibility that there may be a disagreement between parents and a local authority, or between experts, as regards whether a child is unable to attend school because of illness.

17. Paragraphs 12-14 and 18 of the Statutory Guidance, under the heading "Identification and Intervention" state as follows:

> "12. Where they have identified that alternative provision is required, LAs [ie local authorities] should ensure that it is arranged as quickly as possible and that it appropriately meets the needs of the child. In order to better understand the needs of the child, and therefore choose the most appropriate provision, LAs should work closely with medical professionals and the child's family, and consider the medical evidence. LAs should make every effort to minimise the disruption to a child's education. For example, where specific medical evidence, such as that provided by a medical consultant, is not quickly available, LAs should consider liaising with other medical professionals, such as the child's GP, and consider looking at other evidence to ensure minimal delay in arranging appropriate provision for the child.
>
> 13. Once parents have provided evidence from a consultant, LAs should not unnecessarily demand continuing evidence from the consultant without good reason, even where a child has long-term health problems. Evidence of the continuing additional health issues from the child's GP should usually be sufficient. In cases where a LA believes that a consultant's on-going opinion is absolutely necessary, they should give parents sufficient time to contact the consultant to obtain the evidence.
>
> 14. The law does not specify the point during a child's illness when it becomes the LA's responsibility to secure for the child suitable full-time education. Schools would usually provide support to children who are absent from school because of illness for a shorter period, for example when experiencing chicken pox or influenza. In some cases, where a child is hospitalised, the hospital may provide education for the child within the hospital and the LA would not need to arrange any additional education, provided it is satisfied that the child is receiving suitable education. More generally, LAs should be ready to take responsibility for any child whose illness will prevent them from attending school for 15 or more school days, either in one absence or over the course of a school year, and where suitable education is not otherwise being arranged.
>
> ….

> 18. Where children have complex or long-term health issues, the pattern of illness can be unpredictable. LAs should discuss the child's needs and how these may best be met with the school, the relevant clinician and the parents, and where appropriate with the child. That may be through individual support or by them remaining at school and being supported back into school after each absence. How long the child is likely to be out of school will be important in deciding this. LAs should make provision available as soon as the child is able to benefit from it."

18. Though there is reference, in paragraph 13, to "Once parents have provided evidence from a consultant….", in my view it is clear that this does not mean that it is a precondition for alternative provision to be provided that the parents have obtained a consultant's report. There may be other ways in which the child's illness and inability to attend school come to the attention of the local authority. It is also clear from these passages, as it is from section 19(1) itself, that the responsibility rests with the local authority to identify when alternative provision is required for a child on health grounds: it is the local authority's decision. Furthermore, it is clear from these passages that the local authority should take account of as much evidence, medical or otherwise, as is available to it, when deciding whether alternative provision is necessary and, if so, what it should be. This will include discussing the matter with the parents and with the school that the child was attending.

19. The nature and scope of a local authority's duties under section 19(1) have been considered by the courts. The section 19(1) duty is a mandatory duty: **R v East Sussex County Council, ex parte T** [1998] ELR 251 (HL). The leading authority on its nature and scope is **R (on the application of G) v Westminster City Council** [2004] EWCA Civ 45; [2004] 1 W.L.R. 1113 (CA). In that case, the Court of Appeal said, at paragraphs 42-47:

> "42…Section 19 covers the situation where there exists at least one suitable school which, for one reason or another, a child is unable to attend. 'Illness', which is one of the specified reasons, is likely, if it prevents a child from attending a particular school, to prevent that child from attending any school. In such a situation, section 19 requires the local education authority to arrange for the provision of suitable education 'otherwise than at school'. 'Exclusion' prevents a child from attending a particular school. In that situation, section 19 requires the authority to make provision for suitable alternative education, 'at school or otherwise than at school'. In the case of both 'illness' and 'exclusion' the authority has to arrange for the provision of suitable education where it is impossible for the child to attend an existing school. It seems to us that 'otherwise', where used for the second time in section 19, is intended to cover any other situation in which it is not reasonably possible for a child to take advantage of any existing suitable schooling….

> 43.. This meaning of 'otherwise' is one that makes sense. If the local education authority has arranged for the provision of education which is suitable for a child and which it is reasonably practicable for the child to enjoy, it would not seem logical that the authority should be under a duty to provide alternative suitable education, simply because, for one reason or another, the child is not taking advantage of the existing facility.
>
> 44…. This is a duty to ensure that there is available for each child an efficient educational facility that is suitable for the child's age, ability and aptitude and any special educational needs that the child may have. If the local education authority makes available a school that does not please the parents, it is for the parents to arrange for alternative suitable education — see sections 438 and 440 of the Act. The primary duty of seeing that a child goes to school lies on that child's parents — see section 7 of the Act. If the parents fail to perform this duty, the local education authority has power to take coercive action….
>
> 46. In any case where a child is not receiving suitable education it is necessary to consider the whole picture in order to decide in what respect, if any, this is attributable to a breach of duty by the local education authority.
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> 47. The fact that parents have misconceived objections to their child attending a particular school does not make the situation one in which it is not reasonably practicable for the child to receive education so as to give rise to an obligation on the part of the authority to provide alternative arrangements: in assessing what is reasonably practicable, the parents' unreasonable objections must be disregarded."

20. It is clear from this passage that the duty under section 19(1) arises when it is not reasonably possible or not reasonably practicable for the child to take advantage of any existing suitable schooling. It is not enough that the parents have objections to the child attending a particular school, or that they have objections to the child attending any school, if those objections are misconceived.

54. In **R (DS) v Wolverhampton City Council** [2017] EWHC 1660 (Admin), Garnham J summarised the position by reference to five propositions, at paragraph 45 of his judgment:

> "(i) Section 19 is intended to cover circumstances in which it is not reasonably possible for a child to take advantage of existing suitable schooling.
>
> (ii) The fact that parents have misconceived objections to their child attending a particular school does not mean the authority is obliged to make alternative arrangements.

> (iii) There may be exceptional circumstances where there is no physical impediment to the child attending the school, but it is nonetheless not reasonable to expect the child to attend that school.
>
> (iv) Where the latter question arises, it is to be answered objectively, not by reference to the parents' view of the facts.
>
> (v) The acid test is whether educational provision offered by the local authority is available and accessible to the child. "

21. In the present case, it is common ground that the decision whether to provide alternative provision under section 19(1) rests with the local authority, and that the decision can now be challenged in these proceedings only on the basis that it is **Wednesbury** unreasonable.

The facts

22. D lives with his parents and younger brother, E. D suffers from Autistic Spectrum Disorder ("ASD"), asthma, and urinary incontinence. D started school at a large mainstream primary school in Reading. His parents then withdrew him from school and home-educated him for a year. They then moved to a village in Hampshire, and enrolled D in a small village primary school ("the School") in September 2018. The School is rated Good by Ofsted. D was placed in year 1, the year below his chronological year group, alongside his brother.

23. An asthma plan was put in place for D and staff received training in the use of D's inhaler. The School says that he only needed to use his inhaler five times over the course of the academic year 2018/2019. As for D's incontinence, the School's view was that it was not unusual for children of D's age, and the School said that it was managed by allowing D to go to the toilet whenever he wanted to do and to change his clothing when required. The School staff's opinion was that incontinence occurred when D was so excited playing outside that he would forget to go to the toilet. The School did not consider it necessary to refer D to the Continence Nurse.

24. D attended the School for the whole of the academic year 2018/2019, although the school had some concerns about his attendance during this period. In July 2019, the school made a safeguarding referral to the Multi-Agency Safeguarding Hub ("MASH"), because of concerns about increased absenteeism and as a result of information received by the School from Queen Alexandra Hospital. There was a meeting on 27 June 2019 between the Headteacher, Ms Kelly, the chair of governors, Mr Bassil, and J, D's mother, to discuss the safeguarding concerns. The Headteacher says that, following the school's referral to MASH, the relationship between the school and the parents became more challenging. Over the summer period, J started to express concerns that D did not want to come to school. The Headteacher did not share J's concerns in this regard. Ms Kelly did not think that D displayed the normal traits of a school refuser. Her view, and that of the teachers, was that, once in school, he was happy and settled, and did not appear distressed. He did not attempt to abscond from the School.

25. When the new term began in September 2019, J reported difficulties in persuading both D and his brother, E, to come to school. The School, for its part, was concerned that

on his first day back D had appeared dishevelled, and had not brought his PE kit. When J communicated her concerns, the School said that the boys were generally very good once in school, but agreed that they could come in at lunch-time for a week. The School made a further safeguarding referral at this stage.

26. On 15 September 2019, D was assessed for ASD by a consultant psychiatrist on behalf of an organisation called Psicon. He had been referred to Psicon by his GP when the family lived in Reading. The following day, D's parents provided the School with a very short letter from the psychiatrist which stated briefly that D had been diagnosed not only with ASD but also with Psychological Demand Avoidance ("PDA"). This was not, at this stage, a full medical report. The School had concerns about this report and consulted Child and Adolescent Mental Health Services ("CAHMS"). CAHMS said that Hampshire Clinical Commissioning Group ("CCG") did not support a diagnosis of PDA as per NICE guidance, and that Psicon had apologised for the letter, which it accepted was unprofessional. Psicon accepted that no diagnosis of PDA should have been made. Psicon had committed to reassessing D, using a different psychiatrist. Psicon subsequently provided D's parents with a report dated October 2019, setting out the views of the second psychiatrist, and a psychiatric report dated November 2019, which was prepared by the original psychiatrist. Both reports set out a diagnostic conclusion of ASD. The reports did not say where on the autistic spectrum D lies. Neither of these documents was provided to the School or the Defendant, but, as I understand it, the Defendant has not at any stage disputed the diagnosis of ASD.

27. In her witness statement for these proceedings, J says that from the start of term in September 2019, D was having frequent meltdowns, and his parents became extremely worried about why he was behaving this way. She said that it was clear to her that D was very unwilling to attend school, and that he needed more support than was being provided to him. The School's Special Education Needs Co-Ordinator refused to put D on the SEN Register. J said that the Headteacher threatened to make a further referral to safeguarding, on the basis that J was making vexatious complaints about bullying of E by other children. J said that at some point in September, matters escalated to D trying to self-harm and saying that he wanted to kill himself.

28. On 25 September 2019, D's parents wrote to the School. They said that it seems likely that D and E "are suffering from a Mental Health condition called Anxiety Based School Avoidance". They said that it was reasonable to conclude that D's anxiety was linked to his diagnosis of autism and PDA and that this could be a strong indication that his special educational needs were currently not being met with the School. (At this stage they were unaware that the diagnosis of PDA was/would be withdrawn). They said that they had been advised to begin the process of applying for an Education, Health and Care Plan ("EHCP") for both boys. The parents said that the School was failing to meet the boys' needs, and that the Headteacher was continuing to deny and ignore the boys' needs. They asked for the School to arrange for an Educational Psychologist to assess the boys as soon as possible. The letter concluded as follows:

> "We hope that the detail of this letter offers evidence that we are doing everything possible to resolve those difficulties, and that this allows you to support us and authorise any absence on medical grounds."

29. On 27 September 2019, an incident took place at the School. This resulted in the police being called and in J making an allegation of assault against the Headteacher. The police investigated the allegation and decided to take no further action. The description of the events on this day given by J, on the one hand, and Ms Kelly the Headteacher, and the School Administrative Assistant, on the other, are very different. J said that when she brought the boys to school, they ran back out into the road. She brought them back and asked Ms Kelly for help, but the boys ran out again through the back door and Ms Kelly physically stopped J from following them. Ms Kelly said that J brought the boys to school, and, as she left, she failed to shut the door behind her. The children went out before the Administrative Assistant could stop them. The Assistant then ran across the playground to stop the boys running into the road, whilst J was doing nothing. At this point, J became aggressive towards the Assistant. Ms Kelly intervened and asked the Assistant to go back into the building. J then left the boys outside at the back of the School and came into the School to confront Ms Kelly and the Assistant outside the Administrative Office. J tried to push past Ms Kelly and the Assistant. Ms Kelly was concerned about the boys and asked J to go to the front door to collect them (not appreciating that J had left them at the back of the School). She suggested that they both went out to get the boys. Ms Kelly said that by this point J was very aggressive and screamed that she was being assaulted. J had left the boys alone at the back of the School, but they had walked around to the front on their own and were in the playground. Ms Kelly asked the Assistant to call the police, but J said that she would be calling the police herself. Ms Kelly was asked if she wanted to press counter charges against J, but declined to do so.

30. It is clear, therefore, that, by this stage, the relationship between J and the School had completely broken down. Following this incident, the School offered to meet D's parents in a neutral space, but this was declined.

31. J has not returned to school since 27 September 2019. E has been withdrawn from the School Roll, but D has not.

32. The Defendant was informed that D was not attending school and on 1 October 2019, Mr Harvey, the Inclusions Support Services Manager at the Defendant, emailed D's parents, setting out the options for D and E. He said that both boys could return to the School, with bespoke arrangements for handover at the start and the end of the day, and on the basis that the School would arrange for an Educational Psychologist's report. Alternatively, if they did not want the boys to return to the School, they had the right to apply for a place in another school, or to home-educate.

33. On 2 October 2019, an Early Help Hub meeting was held, at which, in accordance with normal practice, the parents were not present. This meeting resulted in an arrangement for a home assessment.

34. On 15 November 2019, the School provided the Defendant with detailed information about D and his time at the School, in the form of a document containing educational evidence for a request, made by D's parents, for a Special Educational Needs ("SEN") assessment. The document made clear that the School was not requesting an EHC plan for D, as the School did not think that there was enough evidence to support this. The document said that D had been anxious at first when he came to the School but then calmed down and was working fine in class. He was meeting age related expectations. He occasionally wetted when he concentrated on a task or became excited. He was a

bright, articulate, social, and friendly boy. He could worry but the more he was in school the more he settled, and he was very keen and focussed once in school. The document said that D's progress was being hindered by not being in school, and that he needs to be in school to meet age related expectations in all areas and to be a happy and involved child. The document referred to concerns about J's mental health, and said that the parents were refusing to meet with staff in School.

35. Later in November 2019, warning letters were sent to D's parents regarding his attendance, and they were invited to an Education Planning Meeting on 21 January 2020.

36. A consultant psychiatrist, Dr Fry, was asked by D's GP, at his parents' request, to carry out an assessment of D. Dr Fry did so on 3 December 2019. He wrote to the GP on the same day. In his letter, he said that D's mother was concerned that D may be suffering with the after-effects of some trauma occasioned by him not being properly accommodated at school in relation to his needs, by being asked to change for PE in front of his classmates. J had also said to Dr Fry that teachers were sometimes not particularly kind about his difficulties.

37. Dr Fry said that he suspected that D's ASD did not fringe into frank autism.

38. Dr Fry said that the family had moved to the village so that the small village school would be able to support D better, but that this had proven not to be the case. Dr Fry said that J had given him several examples of unhelpful incidents or approaches that appear to have been adopted with him since he joined the School. She said that the School had blocked an EHCP for reasons that are unclear.

39. Dr Fry carried out some Social Communication and Cues card testing with D.

40. In summary, Dr Fry said that:

> "D comes with a history of trauma and avoidance anxiety-type symptoms following aversive experiences at school recently. He is currently out of school and not well placed in his current setting at [the School], by all accounts."

41. The reference to "by all accounts" can only actually be a reference either to the account of J herself, of the accounts of other professionals who had, in turn, derived their information from D's parents.

42. Dr Fry said that D has underlying anxiety along with an Autism Spectrum-type presentation and that this is now being exacerbated by the adverse experiences at school in relation to bullying and his feeling ashamed of his urinary difficulties. He said that at this point it is reasonable to bestow a diagnosis of social anxiety on D, alongside a co-morbid diagnosis of Autism Spectrum and possible physical difficulties in relation to both his urinary and intestinal tasks. He said that he would enquire among his Associate network as to who may be available to see D in order to help him to begin to think about and master his anxiety in preparation for a return to some kind of school placement in the not too distant future.

43. The letter of 3 December 2019 did not in terms say that D was medically unfit to attend school, though, as I have said, it did refer to the hope that he could return to some kind of school placement in the future. It is common ground that Dr Fry did not have any information directly from the School when he prepared his letter.

44. In a "To Whom It May Concern" letter dated 4 December 2019, Dr Fry said that D was unable to attend school. He said,

> "This is to confirm that in my view the above has a diagnosis of ASD and probable PDA. He clearly has co-morbid anxiety alongside Social Communication difficulties. In combination with his associated physical problems to do with urinary continence this means he is currently unable to attend school.
>
> He is now extremely anxious about being in the company of other children following aversive experiences in relation to the above issues.
>
> He requires an urgent EHCP to assess his needs more fully in order that an appropriately supporting placement can be found."

45. On 9 December 2019, and having considered the information provided by the School, the Defendant decided not to conduct an EHCP Needs Assessment on D.

46. On 16 December 2019, a Professional Meeting took place at the School, attended by Ds parents, representatives of the School, medical staff, Children's Services and D's GP. D's parents brought the letters from Dr Fry to the meeting. It was not normal for parents to be present at such a meeting, but it was noted that there was a difference of opinion between the parents, who did not believe that the School could meet D's needs, and the School, which said that it could meet his needs and had strategies in place to do so. D's parents had therefore been invited. It was agreed that the relationship between the parents and the School had broken down. The options for the parents, namely returning to the School, choosing another school, or home schooling, were spelt out. D's parents maintained that he was not ready for school yet and that they were comfortable with him remaining at home for the time being.

47. On 19 December 2019, the Council was provided with copies of Dr Fry's letters. On 20 December, Mr Harvey emailed the parents and asked them to "ask Dr Fry to explain why D can't attend school and why he does not recommend any strategies to address the anxieties except an EHCP – what is it in the EHCP which will reasonably make the difference?" Mr Harvey added that the school will willingly adopt, if they reasonably can, any suggestions Dr Fry can make.

48. On 20 December 2019 the Council received a letter from D's solicitors requesting alternative provision under s.19(1) of the Education Act for D. In my judgment it is clear from this letter, and also from the position that they had taken at the 16 December 2019 meeting, that D's parents were of the opinion that the Council was obliged, in light of the views expressed by Dr Fry, to accept that D was medically unfit to attend school and so that he was entitled to alternative provision under s19(1). This is also borne out by the contents of an email sent by J to Mr Harvey on 17 January 2020.

49. On 6 January 2020, the Defendant responded to D's solicitors' letter. This is an important letter, because Ms Hadfield suggests, on behalf of D, that the contents of the letter shows that the Defendant was failing to take relevant considerations into account and was taking irrelevant considerations into account. In the key passage in this letter, the Defendant said as follows:

> "The Local Authority has considered Dr Fry's letter but do not accept his conclusion that D is unable to attend school. Dr Fry is a psychiatrist who has assessed D privately at the request of his parents. Dr Fry is not an educational psychologist; so, whilst the local authority agree he is professionally qualified to diagnose anxiety we are not aware of his professional expertise around educational provision. Dr Fry does not explain how D presented in his consultation. Dr Fry has not contacted D's school to understand properly the provision they can and have put in place. He has not explained the reason why he considers that D's anxiety and physical needs are best addressed by not attending school and how this is in D's best interests. Dr Fry does not explain what provision he considers D needs in order to attend school and address his anxiety. The only provision he recommends is an "urgent Education Health Care Plan (EHCP)" but he does not have an understanding of the EHCP process as an EHCP cannot be put in place on an urgent basis and it is unclear therefore as to why he suggested this. He also does not explain what it is about an urgent EHCP that will enable D to return to school."

50. The letter said that the Defendant's view is that it is in D's best interests to return to school with a staged approach, and with good support and appropriate adaptations, and this was reasonably practicable with the support of D's parents. The letter also said that it would be helpful if D's parents would invite Dr Fry to the forthcoming Education Planning Meeting on 21 January 2020.

51. D's parents declined to invite Dr Fry to the meeting (they would have had to pay him to do so) and suggested that the Defendant should contact Dr Fry directly. The Defendant tried to do so but without success. I do not know the reason for this, but it may be that Dr Fry was uncomfortable about talking about D to third parties when he had been instructed privately by D's parents. In the event, the meeting was postponed to 3 March 2020, at the request of D's parents. The meeting did not go ahead on 3 March 2020 because D's parents were self-isolating, and, though the Defendant proposed two further dates, the meeting has not taken place. In my judgment, it is clear that the lack of faith that D's parents have in the School and the Defendant has meant that they are not prepared to engage in this process.

52. On 19 February 2020, D's solicitors sent a formal Pre-Action Protocol ("PAP") letter to the Defendant, enclosing a further "To Whom It May Concern" letter from Dr Fry, dated 13 January 2020. This did not follow on from a further meeting with D, but referred back to the examination on 3 December 2019. Many of the passages in the 13 January letter repeated points made in the earlier letters. The summary in the 13 January letter is almost, but not quite, identical to the summary in the 3 December letter. It states:

> "D comes with a history of trauma and avoidance anxiety-type symptoms following aversive experiences at school recently. He is currently out of school and not well placed in his current setting at [the School], by the account I have received."

53. The only difference from the equivalent passage in the 3 December 2019 letter is in the final few words, when the wording "by all accounts" has been replaced with "by the account I have received." This services to emphasise, in my judgment, that Dr Fry was relying on the account that he had received from J.

54. At the end of his letter, Dr Fry said that,

> "If he is forced to attend school without sufficient modification and an appropriate Educational placement being considered/provided the Local Authority will have to bear responsibility (and liability) for the consequences of any further adverse effects upon D."

55. Whilst this letter contains a blunt warning for the Defendant, it did not state in terms that D was not medically fit to attend school. Rather, it suggested that D would be able to attend the right school with sufficient modification. The letter also said that "The parents are keen for D to attend the right kind of school and environment." The letter did not give advice about the type of support that should be put in place for D.

56. In his first witness statement, Mr Harvey said that the Defendant considered Dr Fry's letter of 13 January 2020, but did not consider that it gave grounds to accept that D needed alternative provision under s19(1). He noted that Dr Fry did not say that D was unable to attend any school. The Defendant replied to the PAP letter on 28 February 2020. The Defendant expressed concern about the lack of "triangulation", by which was meant the failure on the part of Dr Fry to make any effort to contact the School and seek their views on how D coped when he was there. The letter said that the School's professional opinion was that D had never shown any stress in School, but had presented as a happy, inquisitive, confident and friendly child. The letter said that the School took issue with some of the information provided to Dr Fry by J. Contrary to Dr Fry's understanding, D had been allowed to change for PE in a separate room from his classmates. It was not the case that teachers were unkind about his difficulties. It was not true that the asthma plan had not been followed. D had not been bullied in School.

57. D's parents privately obtained a partial Paediatric Occupational Therapy Report from ACE Children's Occupational Therapy Ltd, which was finalised on 3 March 2020, following an assessment on 8 January 2020. This was obtained in connection with D's parents' intention to appeal the decision not to proceed with an EHCP assessment.

58. The Claim Form was filed on 15 April 2020.

59. Subsequently, D's parents obtained an Educational Psychologist's report from Ms Clifford. Ms Clifford's report is dated 30 April 2020. This report recommended that D be placed in a specialist school for children with Autism, and that, in the meantime, he should be provided by D with home tuition until a suitable school placement was found. Ms Clifford's report was not based on observations of D in the classroom: it

would not have been possible as D had been withdrawn from school, and, in any event, schools were closed because of the Covid-19 Pandemic. However, Ms Clifford had not contacted the School to discuss D's presentation at School. The Defendant has also expressed doubts about Ms Clifford's understanding of provision available in Hampshire mainstream schools. In response, Ms Clifford said in her second witness statement for these proceedings that she has a very good knowledge of the support that is available in mainstream schools, though she does not say that she has knowledge of the provision that is available in Hampshire schools, specifically.

60. Though she did not contact the School, Ms Clifford had been provided by J with an unsigned and undated report that she was told had been prepared by the School for Psicon in July 2019 (this report had also been provided to Dr Fry in December 2019). This report took a somewhat more negative view of D's experience in School than the other evidence from the School suggested. For example, it said that he had frequent wetting accidents, and was below age-related expectations in many respects. It also said that he does not appear very relaxed about being back in school. There is some mystery about this report. The School does not recognise it and, as I have said, it is not entirely consistent with the other reports/evidence from the School. The member of school staff who would normally be responsible for preparing such reports does not remember preparing it. I find, on the balance of probabilities, that this report was prepared by someone working at the School, even though no-one can now recall doing so. I reject the possibility that it was forged or doctored by D's parents (a possibility that I should emphasise was not put forward by the Defendant). It is clear to me that D's parents would not do such a thing.

61. However, I do not think that the contents of this report undermine the reliability of the evidence that was given by Ms Kelly about D's experiences in the School, or the contents of the other reports, such as the 15 November 2019 report. To the extent that there is a difference I prefer the evidence in the 15 November 2019 report, and Ms Kelly's witness statement. The writer of the unsigned report is unknown. The more negative tone of the July 2019 report is not consistent either with the information provided by the School in the Autumn term 2019, nor with a short report which the School prepared on 26 February 2019, at J's request, and which is in the bundle. This report said, "D has settled well and has made progress since September [2018]… D can be reluctant to come into school some mornings, although this has improved recently.. Once he is in class and engaged with what is planned for the day he seems relaxed and enjoys the curriculum.". In any event, the difference between this unsigned and undated report and the other evidence is just a difference of degree. It tends to accentuate the negative, but the overall impression is not substantially different. In particular, the report said that though D could be unsettled when he returned after being away, this would usually settle down after a day or two, and that he would be reluctant to leave school at the end of the day. Still further, the information provided in the 15 November 2019 report, and the statement of Ms Kelly, took account of how D was coping in the new term in September 2019. For obvious reasons, a report prepared in July 2019 could not do so.

62. Furthermore, there is no evidence that this unsigned report was shown to the Defendant. The Defendant could only take account of the material that was provided to it.

63. On 5 May 2020, following an application to the SENDIST by the parents, the Defendant agreed to assess D for an EHCP.

64. Dr Fry provided a further report dated 11 June 2020, following an online meeting with D on the same day. This report said that, generally speaking, D continues to be exactly as he was previously and react as he did previously. Dr Fry said that D requires specialist provision and is not well enough to attend school. He said,

> "I continue to be of the view that, having tried two Mainstream placements in which he was clearly unable to cope, there is no reason to believe that he would be any different if a third such Mainstream placement was attempted….
>
> …. At present, as before, he is unfit to attend any school as he is so unwell with the anxiety…."

65. This report was considered by Mr Harvey but did not lead to the Defendant changing its mind on the issue of the necessity for alternative provision. The Defendant set out its concerns about the report in a letter dated 19 June 2020. Inter alia, the report said that D's anxiety had been exacerbated by adverse experiences at school in relation to bullying, when the reports from the School were to the effect that there were no reported incidents of bullying whilst D was at the School. In fact, he was a sociable child who got on well with his peers. J's allegation of bullying had been scrutinised by Ofsted following a complaint by J in October 2019, but no evidence of bullying had been found. Again, the report said that D had found School to be a stressful environment, when the view of the School's professionals was that he had settled in well and had not exhibited high levels of anxiety. Dr Fry had said that D had been clearly unable to cope at the School, when this was contradicted by the views of the School's professionals. The Defendant was also concerned that the report was primarily based on D's parents' views of his behaviour, that the report did not record what D thinks about going to school, and that Dr Fry did not attempt to obtain D's views in the absence of his parents. In addition, the Defendant was concerned as to whether D had the necessary expertise to recommend educational provision, as he did, and did not consider that the conclusions reached by Dr Fry as regards D's ability to cope in a mainstream school were supported by the information that was actually in the report. The Defendant did not think that this information demonstrated that D was a child who was so unwell as to be able to attend any school.

66. On 22 June 2020, D was assessed by a Mental Health Professional to determine whether he met the threshold for CAHMS. J requested that CAHMS should not contact the School as part of this assessment. The Multi-Disciplinary Team decided that further input from CAHMS was not required. It was considered that Early Help provision should be tried first. The decision said that "Once D is back in an education environment, anxiety management strategies that the school could use should be tried in the first instance."

67. On 6 August 2020, D was examined by Ms Powell, the Defendant's Educational Psychologist, who also spoke to his parents and to the School. She also looked at the report for Psicon and took account of Ms Clifford's report. She provided a report dated 10 August 2020. She also provided advice for the EHC Needs Assessment. This report did not say that D was not able to cope in a mainstream school. Rather, it recommended steps that would assist D in a mainstream school, including a total of 1 hour one to one with an appropriately trained adult per week.

68. Following this report, a draft EHCP report was issued to D's parents. This report adopted Ms Powell's recommendation of a weekly session, one to one, with an appropriate trained adult in the school environment. The provision set out in the draft EHCP report can all be delivered in school. This is the provision that the Defendant considers that D needs.

Discussion

69. I begin by reminding myself of three well-established legal principles.

70. First, it is not for me to substitute my own view as to whether or not D should have alternative educational provision, out of school. The decision is vested in the local authority, under s19 of the 1996 Act. In the absence of any error on the part of the local authority as regards the legal principles to be applied, the Court can only set aside the local authority's decision if it was **Wednesbury** unreasonable, that is, if it was irrational, in that no reasonable public authority, acting reasonably in all the circumstances, could have taken the decision, or if the local authority took into account an irrelevant consideration or failed to take account of relevant considerations.

71. Second, save to the extent that the relevant considerations are specified by statute, it is for the public authority to decide which considerations are relevant and which are not, subject only to the caveat that the decision as regards considerations must not be one that no reasonable authority could have reached: see **Re Findlay** [1985] 1 AC 318 (HL) (approving the approach of the New Zealand Court of Appeal in **CREEDNZ Inc v Governor-General** [1981] NZLR 172), and **R (Khatun) v Newham LBC** [2005] QB 37, at paragraph 35, per Laws LJ. In the present case, as I have said the only specified consideration, under section 19(4A), is that the Defendant was required to take account of the Statutory Guidance that was issued in 2013. There is no suggestion that the Defendant acted contrary to any specific part of that Guidance.

72. As for the weight to be attached to a particular consideration, that is for the public authority to decide, provided only that its decision is not irrational: **R (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council** [2010] UKSC 20, [2011] 1 AC 437, at paragraph 70, per Lord Collins JSC. This applies even if the public authority considers but decides to attach no weight to a particular consideration: **Tesco Stores Ltd v Secretary of State for the Environment** [1995] 1 WLR 759, HL, at page 784, per Lord Hoffmann.

73. Third, a public authority which has been vested by statute with a decision-making power, is not obliged by law to defer to an expert's opinion on the matter which the public authority has to decide. The public authority must take account of the decision, but it will not automatically err in law if it declines to accept the view of the expert, provided that there are rational grounds for doing so, and that the considerations that the public authority has taken into accounts are legitimate ones.

The contention that the Defendant addressed the wrong issue

74. On behalf of D, Ms Hadfield submitted that the Defendant has consistently mischaracterised the basis for D's parents' request for alternative provision under section 19(1). She submitted that the request was characterised as being based on the proposition that D could not reasonably be expected to attend the School, specifically,

because of failings on behalf of the School and its staff. Ms Hadfield said that this was a mischaracterisation, because the real basis for the request for alternative provision was that D is not currently well enough to attend any school, not just the School. As a result of this mischaracterisation, the Defendant addressed the wrong issue.

75. This is an aspect of a broader submission made by Ms Hadfield on behalf of D, to the effect that the Defendant had taken account of irrelevant considerations, because it had focused on the perceived rights and wrongs of the causes of the breakdown in relationship between D's parents and the School. Rather than do this, Ms Hadfield submitted, the Defendant should have focused on whether or not D is unfit to attend any school. If he is unfit to attend any school, then it does not matter what the underlying causes might be, or where the responsibility, if any, may lie: one way or another, he is unfit on health grounds to attend school, and so alternative provision should be made under section 19(1).

76. I do not accept this submission, either in its narrower or in its wider form. In my judgment, it is clear from the documents emanating from the Defendant throughout the relevant period that the Defendant appreciated that the question, for section 19(1), was whether D was unable as a result of anxiety and his other health conditions, to attend any school that would otherwise be suitable for him. It was clear, and understood by the Defendant, throughout the relevant period, that D's parents' request was on the basis that D was unable for health reasons to attend any school at all, not just the School. This is made clear, for example, in the Defendant's letters of 6 January and 28 February 2020 (considered in detail below). The Defendant made clear to D's parents, on several occasions, that they had the option of finding him a place in a different school.

77. It is clear that the School had a different perspective from D's parents on the causes of the breakdown in relationships between D's parents and the School, and, in particular, a different picture of the events of 27 September 2019. It is also clear that the Defendant sympathised with the School's position, and accepted the School's version of events. Nonetheless, this does not mean that the Defendant fell into the obvious trap of thinking that it should decide whether D should have alternative provision under section 19(1) on the basis of an apportionment of blame for what went wrong during D's time at the School. It is plain that the Defendant did not do so.

78. The course of events during D's time at the School, and, in particular, the question whether he had been unable to cope or thrive at the School, was, in my judgment, plainly relevant to the question that arises under section 19(1), namely whether he is unfit on health grounds to attend any school. It follows that the mere fact that the Defendant has, quite properly, taken account of information provided by the School about D's time in the School, when considering whether D is unfit to attend any school at all, is not a sign that the the Defendant was asking itself the wrong question, or was taking irrelevant considerations into account.

The contention that the Defendant took the wrong considerations into account and/or reached a conclusion which was irrational

79. Ms Hadfield further submitted that, even if the Defendant focused on the right issue, namely whether D is unfit on health grounds to attend any school, the Defendant's decision that he was not unfit was unlawful, because the Defendant took the wrong considerations into account and/or reached a conclusion which was irrational. She

submitted that the only lawful conclusion that the Defendant could have reached, in light of the material before it, both as at 15 April 2020, the date when the Claim Form was filed, and at present, is that D is unfit to attend any school and so should receive alternative out-of-school provision under section 19(1) of the 1996 Act.

80. The basis for this submission is that the Defendant has been provided with the letters from Dr Fry. He has said explicitly that D is unfit because of his anxiety and other symptoms (but primarily because of anxiety) to attend any school. Dr Fry is a consultant psychiatrist, and this is the only medical evidence that the Defendant has before it. Ms Hadfield submitted that there are no rational grounds for the Defendant to dispute it or to decline to follow it. In particular, each of the reasons given by the Defendant in its letters dated 6 January 2020 and 28 February 2020 for declining to accept Dr Fry's view on the matter was irrational. The Defendant does not have an opinion from a health professional which disputes or contradicts Dr Fry's view.

81. Ms Hadfield was at pains to emphasise that she was not submitting that, as a matter of law, the Defendant was bound to accept the opinion that had been expressed by a medical expert such as Dr Fry on the question of whether a child was unfit, on health grounds, to attend any school. She accepted that the decision rests with the Defendant, and not with a medical expert. However, she submitted that, in the circumstances of this case, there was no rational basis upon which the Defendant could decline to accept the opinion of Dr Fry on the section 19(1) issue.

82. During oral argument, I asked Ms Hadfield whether there would have been any circumstances in which the Defendant could have rejected the opinion expressed in Dr Fry's letters. She said that the Defendant could have done so if the Defendant had evidence from someone with equivalent expertise to Dr Fry who said that there was a fundamental error in Dr Fry's report. She said that it would otherwise have been very difficult to displace or disregard Dr Fry's opinion, unless he had said something outrageous. She said that they key point in the present case was that there was no evidence to contradict the view of Dr Fry that D has anxiety which means that he is unable to attend school. This is akin to receiving medical advice that a child is unable to attend school because he or she has a broken leg: in such circumstances, a local authority could not disregard the medical evidence.

83. It is convenient to consider this contention first by reference to the position at the date when the Claim Form was filed on 15 April 2020, and then by reference to the up-to-date position.

The position at 15 April 2020

84. Before the Claim Form was filed on 15 April 2020, the Defendant had received three letters that had been written by Dr Fry.

85. The first one was the letter (in fact, a report) of 3 December 2019. This letter referred to J's expressed concern that D "may be suffering from the after-effects of some trauma occasioned by his not having been appropriately accommodated at school in relation to his needs." J referred to several examples of unhelpful incidents or approaches adopted by the School. She had given a specific example of D being required to change for PE in front of classmates. Dr Fry refers to her concerns about D's interactions with friends at the School, and how teachers were not particularly kind to him about his difficulties

– referring to a particular incident where a receptionist was brusque with him about the use of the toilet after school. She also referred to an incident on which the asthma plan had not been followed and D had been given 34 puffs of asthma medication within three hours. Dr Fry also recorded that J had said that the School had blocked an EHCP for reasons that are unclear. He said that D's underlying anxiety along with an Autism Spectrum-type presentation was being exacerbated by D's adverse experiences at school in relation to bullying and his feeling ashamed of his urinary difficulties.

86. Dr Fry said, "Understandably, the parents' confidence in that school has receded." The use of the word "understandably" in that sentence shows that Dr Fry was accepting the version of events that J had given him as accurate. Similarly, Dr Fry said that D "comes with a history of trauma and avoidant anxiety-type symptoms following aversive experiences at school recently. He is currently out of school and not well placed in his current setting at [the School], by all accounts." The reference to "by all accounts" can, in fact, only be a reference to the account of D's mother, J. Once again, it is clear that Dr Fry was basing himself on J's account.

87. This letter did not express a view, in terms, as regards whether D was medically fit to attend any school.

88. The second letter, which followed a day later, was Dr Fry's short "To whom it may concern" letter of 4 December 2019. This letter stated unequivocally that D was currently unable to attend school because of the combination of co-morbid anxiety, alongside Social Communication difficulties, and his urinary continence difficulties. The letter said that D "is now extremely anxious about being in the company of other children following aversive experiences in relation to the above issues." Once again, therefore, reference was made to D's experiences at the School.

89. Dr Fry's next "To whom it may concern" letter, dated 13 January 2020 is not so clear-cut. In this letter, Dr Fry said, "If he is forced to attend school without sufficient modification and an appropriate Educational placement being considered/provided, the Local Authority will have to bear responsibility (and liability) for the consequence of any adverse effects upon D." This did not state unequivocally that D was not fit to attend school, though it does mean, in my view, that Dr Fry was saying that, for the time being, and until appropriate modifications or a suitable placement were found, D was not fit to attend School. Moreover, given that this letter followed on from the letters of 3 and 4 December 2019, and did not purport to depart from the views expressed in those letters, I take the view that the right interpretation of this letter (though it might have been more clearly expressed) was that Dr Fry remained of the view that D was currently unfit to attend any school.

90. In my judgment, the later letter of 13 January 2020 did not add significantly to the views and conclusions that had been set out in Dr Fry's earlier letters. In essence, he was repeating in this letter the views that had been set out in the December letters. Indeed, it is clear that substantial parts of the 13 January letter had been cut-and-pasted from the 3 December letter. However, in this letter, Dr Fry was clearer that his sole source of information about D's experience at the School had come from J. In the 3 December letter, he had said that D was not well-placed at the School "by all accounts". In the 13 January letter, he corrected this to "by the account I have received." This can only be a reference to the account that he had received from J.

91. In my judgment, it is clear from Dr Fry's letters of 3 and 4 December 2019, and his further letter of 13 January 2020, that Dr Fry regarded D's experiences at the School as being relevant to his conclusion that D was not currently fit to attend school. In my judgment, he was right to do so. It is equally clear that Dr Fry relied upon D's mother's description of D's experience at the School, and of his treatment by the School staff, when arriving at this opinion.

92. In support of her submission that the Defendant acted irrationally and/or took the wrong considerations into account when refusing to accept and act on Dr Fry's opinion that D was unfit to attend any school, Ms Hadfield focused on the paragraph in the Defendant's letter dated 6 January 2020, in which the Defendant sets out its reasons for declining to accept Dr Fry's conclusion that D was unable to attend school, and on the contents of the Defendant's response, dated 28 February 2020, to the PAP letter on behalf of D . In my judgment, this is an appropriate starting point for considering the submissions on behalf of D. It is true that, since the first letter was written on 6 January 2020, it could not take into account the observations made in Dr Fry's letter of 13 January 2020, but, as I have said, the views expressed in the letter of 13 January 2020 were not materially different from the views expressed in the earlier letters. In any event, the Defendant had received Dr Fry's letter of 13 January 2020 by the time that the PAP response letter was sent on 28 February. I bear in mind, however, the point made by Ms Gannon, on behalf of the Defendant, that the language in the correspondence should not be analysed and dissected as if it were the wording of a statute. The contents are relevant only to the extent that they shed light on the reasoning of the Defendant.

93. In its letter of 28 February 2020, the Defendant said that its view was that children are best educated in school when they are able to access school, and that it is in children's best interests that evidence to the contrary is properly scrutinised. In my judgment this is undoubtedly correct, and is consistent with the statutory framework as set out in the Education Act 1996. Children benefit enormously from being educated in school, and this is what should happen unless there is an insuperable obstacle to education in school. Put another way, it is an exceptional step, a last resort, for a child to be provided with educational provision out of school.

94. In her skeleton argument and submissions, Ms Hadfield referred to nine respects in which she said that the letters of 6 January and 28 February 2020 demonstrated that the Defendant's decision was **Wednesbury** unreasonable because it discounted relevant factors, took into account irrelevant factors, and/or was irrational.

95. The first was that, whilst accepting that Dr Fry was qualified to diagnose anxiety, the Defendant took the view that he was not qualified to assess whether or not a child with anxiety was fit to attend school.

96. In my judgment, this is not a valid criticism. It is a reference to an observation in the letter of 6 January 2020 to the effect that "whilst the Local Authority agree [Dr Fry] is professionally qualified we are not aware of his professional expertise around educational provision." The Defendant did not say that Dr Fry was not qualified to assess whether a child was fit to attend school. The Defendant was entitled to take the view that, simply because Dr Fry was a well-qualified psychiatrist, it did not follow that he was aware of the types of arrangements that a local authority such as the Defendant could make to assist a child with anxiety to attend school. The Defendant had not been

made aware of the extent of Dr Fry's professional expertise in relation to education provision and section 19(1) decisions.

97. The second point was that the Defendant considered Dr Fry's expert opinion to be unreliable because he had been privately instructed by D's parents. It is true that, in each of the letters, the Defendant noted that Dr Fry had been privately commissioned by D's parents. However, I do not accept that the Defendant concluded that, for this reason alone, Dr Fry's opinion was unreliable and should not be followed. It was simply a statement of fact. It was a legitimate observation to make but it was not a major consideration in the Defendant's decision-making. The fact that Dr Fry had been commissioned by D's parents was relevant because it meant that the principal source of information that Dr Fry had access to was from D's parents themselves.

98. The third point relied upon by Ms Hadfield was that the Defendant acted **Wednesbury** unreasonably in considering that Dr Fry lacked the necessary expertise to assess D's ability to take advantage of schooling because he is not an educational psychologist. She said that this was plainly wrong as Dr Fry is a consultant psychiatrist with expertise in the mental health of children and adolescents. His assessment that D was unable to attend school was based upon his clinical assessment of D's medical condition and its severity, which was firmly within his competence.

99. In my judgment, this submission reads too much into a passing comment in the letter of 6 January 2020. This observation that Dr Fry is not an educational psychologist, was made as an introductory comment to the statement that the Defendant was not aware of his professional expertise around educational provision. The Defendant was not suggesting that a psychiatrist was not competent to express a view about whether a child was unfit to attend school for anxiety or other mental health reasons. However, the Defendant was fully entitled to take the view that its evaluation of Dr Fry's view should take account of the extent of his knowledge of what had gone on when D was at the School and of the types of in-school arrangements that the Defendant could make for a child who suffers from anxiety.

100. Indeed, in this part of her submissions, Ms Hadfield was straying close to the submission – which she had previously disavowed – that the Defendant was legally bound to defer to Dr Fry's view, because he is a medical expert and the Defendant had received no other medical evidence. As I have already said, in my judgment is it clear that the decision-maker in a section 19(1) case is not legally obliged to accept a medical expert's opinion as regards whether a child can go to school. The issue is not simply whether the child is unwell, but is, rather, whether the child's ill-health means that he is not fit to attend school. Ms Hadfield referred to the example of a child with a broken leg, but even in such a case the local authority would not be obliged to accept the medical expert's view on the section 19(1) issue. Whether a child with a broken leg was able to attend school would depend partially on medical evidence about the nature and severity of the break, but also on information about whether it would be possible for the child to go to school, such as whether the layout of the school would enable the child to get around with crutches or a wheelchair.

101. The fourth point, and, in my view, the most important one, was that the Defendant acted unlawfully in discounting Dr Fry's assessment because he had not spoken to staff at the School.

102. I observe, as a preliminary point, that the word "discounting" is perhaps inapt here. The Defendant did not discount Dr Fry's assessment in the sense that the Defendant treated it as unworthy of any consideration. Rather, the Defendant engaged with and considered Dr Fry's opinion, but came to the conclusion that his opinion should not be accepted, for reasons that the Defendant was able to articulate.

103. In my judgment, the Defendant was fully entitled, when evaluating Dr Fry's opinion, to take account of the fact that Dr Fry had not made contact with the School or taken any steps to obtain information from the School or the Defendant about D's experiences at the School. Similarly, the Defendant was fully entitled to take account of the fact that it was clear that Dr Fry's understanding of D's experiences at the School was entirely (or almost entirely) based on the information that had been provided by D's mother, J, and that the School disputed the accuracy of that information. Furthermore, the Defendant was entitled to seek information directly from the School to see if the description of D's experiences as described by J was confirmed by the School staff.

104. It was, in my judgment, obviously of central importance, when considering whether an eight-year-old child was unfit, on health grounds, to attend school, for the Defendant to seek information from the school which he had been attending until recently about the child's experiences there. Ms Hadfield submitted that information about how D had been doing at the School would have been of no value, because D had stopped attending the School on 27 September 2019, just over two months before Dr Fry wrote his first letters. I do not agree. Two months is not a long time, and the information about D's experience at the School was the most direct and up-to-date information available to decision-makers about how he could cope in school.

105. Ms Hadfield further submitted that it is unfair to criticise Dr Fry for failing to "triangulate", as the Defendant put it. This is a reference to the fact that he did not seek to verify the information that he was being provided with by J by seeking information from the School itself. She says that medical professionals are entitled to rely upon the information that is provided to them by the patient or, where the patient is a child, by the patient's parents. That may be the case, but it misses the point. The point is that the public authority which is charged by statute with taking a decision, and which is considering whether to accept the opinion stated in a medical report, is not obliged automatically to accept the opinion. The public authority is entitled to take account of the extent and reliability of the information upon which the medical opinion was based.

106. In the present case, it was clear that Dr Fry's opinion was dependent, in large part, on the information that he had been given about D's experiences at the School. This led him to believe that D had been very anxious at the School as a result of traumatic and aversive-type experiences there.

107. After being provided with Dr Fry's letters of 3 and 4 December 2019, the Defendant sought information from the School itself. As the letter of 28 February 2020 made clear, the information received by the Defendant from the School was that the information about D's experience at the School, upon which Dr Fry's opinion was substantially based, was not accurate, and gave a misleading impression. The Defendant said that it disputed the accuracy of the information provided by J to Dr Fry.

108. The letter of 28 February recorded that the professional opinion expressed by the School was that D had never showed any stress in School and had presented as a happy,

inquisitive, confident, and friendly child. He worked well in group work, and had great negotiating skills for problem solving. He particularly enjoyed science and experiments, and arts and craft. The School said that there was significant evidence in School of D interacting with his peers in class: for example, he played a lead role in the Nativity play and took part in sports day. The School said that D did get very excited at playtime, running around with his friends, and his behaviour, though sometimes boisterous, was within the bounds of normal playground behaviour for children of his age. D did suffer sometimes from urinary incontinence: during a couple of lunchtimes, he let the supervisor know that he had wet himself and asked if he could go and change. He did so independently and then came back out to play. D did not need his asthma inhaler for PE, or on sports day, though it was always available. The School told the Defendant that it had never observed D having any problems eating in School. The School reported that D had not been bullied in school. He had been separated from a younger child because of rough play on both sides, but this was not bullying. The School pointed out that bullying was never mentioned by D's parents until a referral to the Attendance Legal Panel was made.

109. The letter of 28 February 2020 also referred to information provided by the School about steps that had been taken to make D feel comfortable at School. The School told the Defendant that excellent pastoral support was provided, and that D had a positive relationship with staff. He was in a class of 17 children, and was in the focus teacher group with a teacher, teaching assistant, and a teaching assistant for a child with an EHCP. The School denied that teachers were not kind about D's difficulties. The letter of 28 February said that, contrary to what Dr Fry had been told, D had been allowed to change for PE in a separate room during year 1 and, following discussions with the new class teacher, he was able to do the same in his next class. The School said that it was simply not true that the School gave D 34 puffs of his asthma medication during a three-hour period, or that his asthma plan was not followed. The asthma plan was followed carefully.

110. In my judgment, the Defendant was fully entitled to check with the School as to whether the information on which Dr Fry's report was largely based was accurate or not. Indeed, it would have been remiss for the Defendant to fail to do so. Having done so, the Defendant was entitled to come to the view that the information that it had been provided with by the School was truthful and accurate. There was no evidence to contradict it, apart from the statements made by J to Dr Fry. It was reasonable for the Defendant to decide to prefer the version provided by the School. As a result, it was apparent to the Defendant that the information which underpinned Dr Fry's opinion was inaccurate. In these circumstances, it was **Wednesbury** reasonable for the Defendant to decide that it was not persuaded by Dr Fry's opinion to draw the conclusion that D was unfit to attend any school.

111. The fact that Dr Fry had some information about D's time at the School is beside the point. The fact remains that he had not checked J's description of D's recent experiences at the School, which was his primary source of information, with the School itself.

112. Ms Hadfield submitted that even if Dr Fry had obtained information from the School, this would not have helped, because it is all too clear from the Headteacher's witness statement that the School had substantially underestimated D's difficulties in general. I do not accept this submission. It is true that Ms Kelly's perception of how D was

getting on at the School, and that of J, D's mother, are very different. But I do not accept, on the evidence before me, that it was "all too clear" that Ms Kelly and her colleagues at the School had substantially underestimated D's difficulties. There is no reason for me to doubt that Ms Kelly's statement of her view of how D was doing at the School was truthful, or that it was not a reasonable view to hold. Unlike J, Ms Kelly was at the School during the school day, whilst D was there and was able to observe how he was coping. Equally, I have no doubt that J's stated views about how D was doing are genuinely held, but that does not mean necessarily that they are right, or that they had to be preferred to the School's.

113. It is worth noting that the Defendant sought to make contact with Dr Fry before reaching a decision on whether D required educational provision out of School. He was invited to the Education Planning Meeting on 21 January 2020, and, when D's parents said that they would not bring him, the Defendant tried, albeit without success, to contact him. In the absence of any direct contact with Dr Fry, the Defendant was reasonably entitled to reach its conclusion on the section 19(1) issue on the basis of its decision about how much weight to place on the views expressed in the letters from Dr Fry.

114. The fifth point made by Ms Hadfield in support of her contention that the School's decision was **Wednesbury** unreasonable was that the Defendant wrongly rejected Dr Fry's assessment because he had not stipulated what special educational provision D needed in order to attend school. Once again, in my judgment, this reads too much into an observation which was not a central plank in the Defendant's decision not to adopt Dr Fry's opinion. In any event, however, it was a relevant and legitimate consideration. If Dr Fry had been able to specify the special educational provision that D required, it would have been an indication that Dr Fry was an expert in the field of educational provision for children suffering from anxiety. The fact that he did attempt to do so did not encourage the Defendant to think that it could rely on his opinion. Also, if Dr Fry had spelt out the special educational provision that D required, then the Defendant would have been able to consider whether or not it was able to make such provision available within a school setting, or whether D would require provision out of school.

115. The next point made by Ms Hadfield is that the D acted **Wednesbury** unreasonably in discounting Dr Fry's evidence in part because of his observations regarding the suitability of the School and his view that D regarded an urgent EHC Plan. Ms Hadfield submitted that the Defendant fell into error because the question whether D could carry on at the same School, and the question whether D was unfit to attend any school were different matters. She said that Dr Fry's observations as to the future suitability of the School could not reasonably be considered to affect the validity of his clinical assessment that D was unfit to attend school.

116. I do not accept this submission. The response of the Defendant to Dr Fry's opinion was focused on his view as to whether D could attend any school at all, not whether D could attend the School specifically. The letter of 6 January 2020 said,

> "The Local Authority's position is that we consider it is reasonably practicable for D to attend school. He has a place at [the School] and if parents do not wish him to return to that school, they can explore other local schools with places."

117. It is true that, in the 6 January 2020 letter, the Defendant said that it was unclear why Dr Fry suggested an urgent EHCP, when an EHCP cannot be put in place on an urgent basis, but this did not play any significant part in the Defendant's decision. The only significance is that it was another reason why the Defendant was unconvinced that Dr Fry had any special expertise in the educational field.

118. The seventh point made by Ms Hadfield is that the Defendant said, wrongly, that Dr Fry did not describe how D presented in his consultation. She says that this was simply wrong. In my judgment, this was, once again, a minor issue. This was not a major reason why the Defendant decided not to act in accordance with Dr Fry's opinion. In any event, however, the comment was not "simply wrong". It is true, as Ms Hadfield points out, that Dr Fry had described the outcome of some Social Communication and Cue cards testing that he carried out with D. However, it is also the case that Dr Fry did not refer more generally to how D presented in his consultation.

119. The eighth point is that the Defendant's decision was **Wednesbury** unreasonable because there was no evidence to support the Defendant's conclusion that Dr Fry's assessment of D's health was based upon parental reports of the School. In fact, Ms Hadfield says, Dr Fry had information from a number of different sources and from his own observations of D.

120. In my judgment, this complaint is misconceived. The central issue was not the purely medical question of the state of D's health. The central issue for determination by the Defendant was whether, in light of D's health difficulties, he was unfit to attend any School. In relation to this issue, an important matter to take into account was evidence about how D had actually been coping at School in the recent past. All the Defendant was saying it its letters was that, so far as this matter was concerned, Dr Fry's understanding was entirely based on the information supplied to him by D's parents (in fact, his mother). This was correct.

121. The final point relied upon by Ms Hadfield in relation to the contents of the letters of 6 January 2020 and 28 February 2020 is that the Defendant was wrong to rely in the 28 February letter upon a comment allegedly made by D's GP, Dr Bush, at the meeting on 16 December 2019. This was that, whilst Dr Bush had read the report from Dr Fry, she did not agree that she believed that D was unfit for school.

122. The 28 February 2020 letter said that at the meeting "D's GP advised that she had read the report from Dr Fry but did not agree that she believed D was unfit for school." The Defendant's minute of the 16 December 2019 meeting recorded "CB [Dr Bush] read the report from Dr Fry and did not think it suggested D was unfit for school." D's parents had queried the part of the minutes of the 16 December 2019 meeting which recorded Dr Bush saying this. Dr Bush has replied on 10 January 2020 to say, "I said I did not think that Richard Fry categorically stated in his [report] that D could not go to school ad infinitum. I think that he was referring to the point in time when he saw D."

123. In my view, Dr Bush's observation about what Dr Fry was saying was accurate. Indeed, it was borne out by what Dr Fry subsequently said in the letter of 13 January 2020. It follows that the reference in the Defendant's letter of 28 February 2020 to Dr Bush's comment was inaccurate. She was not purporting to disagree with Dr Fry's opinion. However, this is a trivial point. It played no significant part in the Defendant's decision,

which was reached on the basis of the Defendant's view, not the Defendant's understanding of Dr Bush's view. It does not come anywhere close to rendering the Defendant's decision **Wednesbury** unreasonable.

124. For the above reasons, I do not accept that, as at 15 April 2020, the Defendant acted unlawfully, in public law terms, in declining to make alternative out-of-school provision for D. The Defendant acted rationally in deciding that D's health problems did not mean that he was unable to attend school, and the Defendant did not take account of irrelevant considerations or fail to take account of relevant considerations.

The up-to-date position

125. Ms Hadfield submits that, since the Council's decision was first taken, the further evidence that has been obtained overwhelmingly supports J's contention that D's needs were complex and were not being met. She submits that it is **Wednesbury** unreasonable for the Defendant to decline to provide educational provision out of School in light of the current state of the evidence.

126. There have been five main developments since the Claim Form was filed. I will deal with them in turn.

127. First, D's parents obtained an Educational Psychologist's report from Ms Clifford, dated 30 April 2020. Ms Clifford did not specifically address the section 19(1) issue, but she recommended that D should be provided with home tuition until a suitable school placement was found at a specialist school for children with autism. In my judgment, this report did not mean that it was irrational for the Defendant to continue to take the position that D could be educated at a school. As with Dr Fry, Ms Clifford had not spoken to the School staff, and she had not had the opportunity to see how D could function in a school environment.

128. Second, on 5 May 2020, the Defendant agreed to assess D for an EHCP. This does not mean that it was irrational for the Defendant to continue to hold its line in relation to the section 19(1) issue. The agreement that D should be assessed for an EHCP did not necessarily mean that such a Plan would be entered into, and even if he did receive an EHCP, this did not mean necessarily that D was unable to be educated in the school environment. Many children with EHCPs are educated in school (one such child was in the same class as D at the School).

129. Third, Dr Fry examined D again in June 2020, and supplied another letter, dated 11 June. As stated above, he said,

> "I continue to be of the view that, having tried two Mainstream placements in which he was clearly unable to cope, there is no reason to believe that he would be any different if a third such Mainstream placement was attempted….
>
> …. At present, as before, he is unfit to attend any school as he is so unwell with the anxiety…."

130. This letter was considered by the Defendant, but the Defendant decided that it did not alter the Defendant's view that D could, notwithstanding his health problems, be

educated in a school. The reasons for this view are set out at paragraph 65, above, and so I will not repeat them here. In my judgment, the Defendant was plainly rationally entitled to maintain its view, and the Defendant did not either fail to take account of relevant considerations, or take account of irrelevant considerations. In particular, the extract from Dr Fry's letter set out in the preceding paragraph serves to emphasise that he was influenced by his understanding that D had been unable to cope in his two mainstream placements. The Defendant was entitled to take the view that this was a misunderstanding, because D had in fact been able to cope in his most recent mainstream placement.

131. The fourth development was that, in June 2020, a decision was made by a Multi-Disciplinary Team that further input from CAHMS was not required. Though perhaps of lesser significance than the other developments, this did not serve to suggest that the Defendant's decision in relation to section 19(1) was wrong.

132. Finally, in August 2020, D was assessed by Ms Powell, the Defendant's Educational Psychologist. Unlike Dr Fry or Ms Clifford, Ms Powell spoke both to D's parents and to the School. She did not take the view that D could not be educated in school. Once again, therefore, this did not suggest that D's decision in relation to section 19(1) was wrong.

133. Accordingly, in my judgment, none of the developments since 15 April 2020 mean that the Defendant's decision not to provide D with education out of school was **Wednesbury** unreasonable.

Conclusion

134. For the above reasons, I reject the arguments on behalf of D that the Defendant has acted unlawfully in failing to accept that D must be provided with educational provision out of school. The Defendant has taken relevant considerations into account, has not taken irrelevant considerations into account, and has acted rationally at all material times.

135. Accordingly, this claim for judicial review is dismissed.

136. I make one final observation. This is that it is clear to me that everyone concerned in this case, D's parents, the Defendant, the School, and all of the professional advisers, has D's best interests at heart. It must be of great concern to all of them that D has had no educational provision for over a year now. I express the hope that D's parents will be able to set aside their reservations and that all concerned will be able to work constructively together as soon as possible, in order to provide D with the education that he so sorely needs.