Neutral Citation Number: [2019] EWHC 2609 (Admin)

Case No: CO/5041/2018

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

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 07/10/2019

Before :

THE HONOURABLE MR JUSTICE LEWIS

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Between :

(1) NICO HEUGH SIMONE	**Claimants**
(2) BENEDICT McFINNIGAN and	
(3) DAKOTA RIDDELL	
- and -	
(1) THE CHANCELLOR OF THE EXCHEQUER and	**Defendants**
(2) THE SECRETARY OF STATE FOR EDUCATION	

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Jenni Richards Q.C., Stephen Broach and Katherine Barnes (instructed by **Irwin Mitchell LLP**) for the **claimants**
Sir James Eadie Q.C., Sarah Hannett and Eleanor Mitchell (instructed by the **Government Legal Department)** for the **defendants**

Hearing dates: 26 and 27 June 2019

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Approved Judgment

The Honourable Mr Justice Lewis:

INTRODUCTION

1. This is a claim by three claimants challenging decisions by the Chancellor of the Exchequer and the Secretary of State for Education relating to the provision of funding for special educational needs.

2. The claimants challenge the budget announced in October 2018 and what is described in the claim form as the ongoing failure to allocate sufficient resources, most recently on 16 December 2018, for the provision of special educational needs (referred to as high needs). The autumn 2018 budget did not include provision for additional allocations of funds for high needs expenditure and, in particular, did not allocate funds for a bid made by the second defendant for high needs capital spending (to create a specified number of additional places for children with special educational needs at state funded mainstream or special schools). The decision of the 16 December 2018 involved the allocation by the second defendant of £350 million comprising £125 million for high needs revenue funding in each of the years 20182019 and 2019-2020 and £100 million for capital expenditure to create approximately 1,600 new places for children with special educational needs.

3. The claimants challenge the decisions on four grounds. First, they contend that each of the defendants breached his duty under section 149 of the Equality Act 2010 ("the 2010 Act") to have due regard to certain specified equality matters in the exercise of their respective functions. Secondly, they contend that the second defendant, the Secretary of State for Education, breached the duty imposed by section 7 of the Children and Young Persons Act 2008 ("the 2008 Act") to promote the well-being of children in England. Thirdly, they contend that the decisions taken by each of the defendants are irrational. Fourthly, they contend that the defendants have breached Article 14 of the European Convention on Human Rights ("ECHR") read with Article 2 of the First Protocol ("A2P1") or Article 8 ECHR as they contend that the decisions involve differential treatment of children with special educational needs as compared with other children who do not have such needs and that the defendants cannot justify that differential treatment.

4. Lang J. ordered that the application for permission to apply for judicial review be adjourned to an oral hearing to be listed as a rolled-up hearing, so that the application for permission would be considered at that hearing and, if permission were granted, the substantive hearing of the claim would follow immediately. In practice, all the arguments, and all the evidence, were fully considered at the hearing on 26 and 27 June 2019.

THE LEGAL FRAMEWORK GOVERNING SPECIAL EDUCATIONAL NEEDS

5. There are statutory provisions contained in the Children and Families Act 2014 ("the 2014 Act") governing the making of provision to meet the special educational needs of children and young persons between the ages of 16 and 25 (see section 83 of the 2014 Act). In brief, the principal relevant provisions provide as follows.

6. A child or young person has special educational needs if he or she has a learning difficulty or disability which calls for special educational provision to be made for

him or her: see section 20 of the 2014 Act. Local authorities are under a duty to exercise their functions with a view to ensuring that all children and young people with disabilities in their areas are identified. The parent of a child, a young person, or other specified people may request an assessment of the educational, health care, and social care needs of a child or a young person (and there is a right of appeal against a refusal to assess): see section 36 and 51 of the 2014 Act.

7. Where, in the light of an assessment, it is necessary for special educational provision to be made, the local authority must prepare, and then maintain, an education and health and care plan (the "EHCP"). That will specify, amongst other things, any special educational provision: see section 37 of the 2014 Act. There are rights of appeal against the content of an EHCP (see section 51 of the 2014 Act).

8. Section 42(2) of the 2014 Act provides that the local authority "must secure the specified educational provision for the young child or person". It is well-established law, and accepted by all parties, that a local authority must ensure that the special educational provision specified in the EHCP is provided to the child or young person. Furthermore, that obligation is not dependent on available resources: the local authority is obliged to secure that the specified special educational provision is made available (see *R (N) v North Tyneside BC* [2010] EWCA Civ 135 and the reasoning, in relation to a different provision, of the House of Lords in *R v East Sussex County Council ex p. Tandy* [1998] AC 714).

THE FACTUAL BACKGROUND

9. The claimants are three children, acting through their mothers as their litigation friends. Their mothers are concerned from their own experience, and from the material assembled from local authorities, charities and others, that central government funding is inadequate to ensure that local authorities are complying with their duties to assess needs, prepare EHCPs, and to secure that educational provision is made.

10. The first claimant, Nico, is 15 years old. He has autism and other conditions. His mother describes in her witness statement his range of complex needs which require, amongst other things, the provision of a full-time individual needs assistant whilst in school. His mother describes the importance of the individual needs assistant to Nico. She describes the difficulties they have had over the years in ensuring that the local authority does provide the funding necessary to provide for the individual needs assistant (provision of which is specified in Nico's EHCP and, prior to that, in his statement of special educational needs). Ultimately, by one means or another, the assistant has been funded. Nico's mother is concerned that the arrangements are not robust or sustainable and, in future years, problems over funding the individual needs assistant will arise again.

11. The second claimant, Benedict, is 14 years old. He has diagnoses of post traumatic stress disorder, anxiety, depression and chronic insomnia. His mother describes, in her witness statement, the debilitating effect of these conditions on Benedict. She asked her local authority to assess B's needs and prepare an EHCP for him. The authority initially declined as it said that B did not meet the criteria for an EHCP. Benedict's mother describes the steps that she took to try and ensure that Benedict received some form of education. In August 2018, Benedict's mother says that she wrote to the authority indicating that she intended to appeal against the refusal to assess Benedict

and prepare an EHCP. Benedict's mother says that the authority replied in December 2018, agreeing to carry out an assessment which was completed in January 2019. Benedict's mother is concerned that sufficient funding is not being made available for the provision of special educational needs for children like her son and, as a result, is concerned that authorities are not assessing children's needs or providing them with the special educational provision which they need, and to which they are entitled.

12. The third claimant, Dakota, is 9 years old. Dakota is quadriplegic and has diagnoses of cerebral palsy and other conditions. Her mother describes, in her witness statement, the challenges that these conditions provide for her daughter and the level of support that Dakota needs at school. Her mother is anxious that the special educational provision currently being provided in practice by the school is not specified in Dakota's EHCP and that funding constraints might result in reductions in the provision made for Dakota. Her mother too expresses the hope that this claim will highlight concerns over the level of funding for children with special educational needs.

13. As part of their case, the claimants have adduced a large body of evidence which they say demonstrates that the funding specifically allocated for meeting the special educational needs of children and young persons is inadequate. The evidence includes but is not limited to the following. There is material from local authorities and others (such as the association of directors of children's services) indicating that local authorities' expenditure on special educational needs exceeds the amount included in the element of high needs funding specifically allocated for meeting special educational needs. As a result, local authorities are having to meet the shortfall by means such as transferring money from other parts of their budget or using reserves. By way of example, the association of directors of children's services indicates that 68 authorities had overspent their high needs allocation in 2017-2018 and this totalled £139.5 million. There is a witness statement from Gerald Almeroth who is the strategic director of resources at a London Borough and also the president of the society of London Treasurers which is an organisation representing directors of finance for all 32 London Boroughs. There are witness statements from Ian Noon and James Robinson who work, respectively, for the National Deaf Children's Society and Mencap and are involved with issues concerning the provision of education to those with disabilities. There are witness statements from others involved in working with, or representing those with, special educational and other needs arising from disability. They too indicate the financial pressures on local authorities.

14. The material also includes research commissioned by the Local Government Association on trends in special educational needs. That research indicates that expenditure on special educational needs provision has exceeded the amount of high needs funding since 2015-2016 and indicates that the deficit for local authorities overall in 2018-2019 was likely to be around £472 million (and could increase considerably in future years). The result has been that local authorities have transferred funds from other parts of the funding for schools, or used reserves, to bridge the gap. A number of contributory factors are identified. These include increases in demand for EHCPs following changes introduced by the 2014 Act, demographic changes and other factors. The claimants also rely upon material emanating from the second defendant. These include the business cases prepared by officials within the DfE to support bids, or possible bids, for additional funding and comments by the internal DfE committee which considered possible bids. The business cases indicate that there are serious concerns over the sufficiency of high

needs funding in both the long and the short term. The material indicates that the committee considering the proposed bids was persuaded that high needs was an issue that had to be considered urgently.

15. A witness statement by Anthony Foot, the Director of Funding and Analysis for the Department for Education ("the DfE") explains the system of funding and this is considered below. Mr Foot explains that returns from local authorities for the financial years 2014-2015 to 2017-2018 have shown a substantial increase in expenditure on high needs provision and services. He says that many local authorities have exceeded their high needs funding allocation in recent years and have funded additional expenditure from reserves or transfers from other parts of their schools budget. He identifies a number of possible contributing factors. These include an increasing number of students aged 16 to 25 with special educational needs whose provision is being funded by local authorities. In January 2015, there were 25,540 young persons aged 16-25 with a statement of special educational needs and 32,180 with a learning difficulty assessment giving a total of 57,750 persons aged 16 to 25 having some form of assistance with education. In January 2018, there were 84,260 young persons aged 16 to 25 with EHCPs. Other factors increasing costs were thought to include increasing numbers of pupils with special educational needs being placed in non-maintained and independent special schools which on average are more expensive than special schools maintained by local authorities. Mr Foot says that there have been increasing numbers of pupils with special educational needs placed in state-funded special schools, rather than in state-funded mainstream schools, and again places at these special schools are on average more expensive. He says there also has been an increase in the costs per pupil with special educational needs who are placed in mainstream schools. His evidence is that, without changes in policy or practice, it is expected that costs would continue to increase. He considers that it is unclear what level of reduction in cost pressures could be achieved at the local level (for example, by a more efficient use of funds) or at national level, or what level of additional funding and in what form, is required. He says that that is being considered in the context of the spending review expected in 2019 as explained below.

16. It is against that background, and in that context, that this claim for judicial review is brought. The role of the court is not to assess or determine the merits of educational and social policy or to allocate resources between competing needs. The task of the court is to determine whether, in making particular decisions, or exercising specific functions, a public body has complied with its statutory duties and the relevant principles of public law which govern the exercise of such functions. In that regard, it is helpful to consider the system of funding for special educational provision in order to identify the decisions taken and the functions being exercised, and then to consider whether or not the four grounds of challenge have been established.

The Decision-Making Framework

17. The decision-making framework governing decisions on spending, and budget allocations, and the particular decisions taken in relation to the 2018 Budget and subsequently, are described in detail in the witness statements of Jean-Christophe Gray, the director of the public services group of Her Majesty's Treasury, and Mr

    Foot, and in the documents exhibited to those witness statements. In summary, the position is as follows.

Departmental Spending Reviews and the Budget

18. Departmental budgets (that is the amount of money that each government department can spend in specified years) are set at a spending review. The last spending review was conducted in 2015 and covers the financial years 2016-2017 to 2019-2020 (and for capital budgets to 2020-2021). In addition to fixing the overall budget for a government department, the spending review will set specific budgets for particular areas of departmental expenditure. The expectation is that each department will operate within the amounts fixed by the spending review for the period covered by that spending review.

19. Departmental spending, and departmental budgets, are not determined at the annual budget which takes place usually once a year. Depending on the view that the Chancellor of the Exchequer takes of changes in the economy and the fiscal position, additional allocations of funding for items of expenditure may, however, be made at a budget. In addition, funding can be allocated from Treasury reserves usually to fund emergencies or unforeseen pressures on a government department.

Expenditure on Schools and Special Educational Needs and Disability

20. The Secretary of State for Education provides funding for schools by, primarily, the Dedicated Schools Grant ("the DSG"). This is financial assistance provided pursuant to section 14 of the Education Act 2002. It is a condition of the DSG that local authorities spend the assistance only on the schools budget as defined in the relevant regulations. The DSG allocations are currently made in two stages. A provisional allocation is made in about the middle of the year and the final allocation is made towards the end of the year.

21. DSG allocations are divided into a number of funding "blocks". Those most relevant for present purposes are the schools block and the high needs block. These blocks contain the elements of the DSG which fund the majority of services and provision for children and young people with more complex needs. The schools block is expected to bear expenditure of up to £6,000 for special educational provision for each child with special educational needs and the high needs block provides funding for additional special educational needs provision.

22. Each year, the Secretary of State determines the relative size of each funding block within the DSG and that is then distributed between local authorities using the national funding formula. That formula was introduced for the schools and high needs blocks in the 2018-2019 allocations. The formula relating to high needs expenditure uses a series of factors such as population, deprivation, low attainment, health and disability to allocate funds to local authorities in a way which is expected to reflect anticipated expenditure by those local authorities. When statutory provisions were made extending the provision of EHCPs up to those aged 25, all funds previously supporting young people aged 16 to 25 were moved to the high needs block. In addition, additional sums (£272 million in 2013-2014, and £390 million in 20142015) were added to the DSG to take account of the extended age range. According to Mr Foot's evidence, the 2015 spending review capital expenditure amounts were based on an estimate of likely demand for special educational need provision which transpired to be an underestimate.

23. There is provision for a local authority to make a limited transfer of funds from one block to another. First, a local authority may, with the agreement of its schools' forum, transfer 0.5% of the schools block to the high needs block each year in order to fund expenditure on special educational needs provision. In the 2018-2019 financial year, about £80 million was transferred to the high needs block. Secondly, a local authority may apply to the Secretary of State for approval to transfer more than 0.5% from the schools block to the high needs block. For the 2018-2019 financial year, 27 local authorities pursued requests and of these 17 were fully or partially approved for transfers of about £26 million to the high needs block.

24. In addition to allocating the DSG, the Secretary of State may make further allocations of additional funds when funds become available within the department's budget for some reason. Additional funds most often become available because of changes in the data or forecasts which result in a difference between the funding allocated and the total funding required (for example, where the total number of pupils in a given year is less than anticipated).

25. Local authorities may have reserves and may have other sources of revenue such as council tax and business rates. Local authorities may use reserves and other sources of revenue to fund expenditure on special educational needs provision.

The DSG for the 2018-2019 financial year

26. On 19 December 2017, the Secretary of State determined the allocation of the DSG for the 2018-2019 financial year. That was based on the decisions taken in the 2015 spending review which determined the amounts of expenditure from 2016-2017 to 2019-2020 (for revenue) and 2020-2021 (for capital). In May 2018, an additional amount of capital funding of £50 million was allocated for special educational needs places in special and mainstream schools.

The Autumn 2018 Budget

27. The autumn budget 2018 was not intended to fix the amount of departmental expenditure for the 2018-2019 or 2019-2020 financial years. That had been fixed by the 2015 spending review. The next spending review, which would fix departmental budgets for 2020-2021, was scheduled to take place in 2019.

28. As part of the preparation for the budget, departments began preparing bids for the allocation of funding for additional expenditure. Mr Foot gives evidence that the DfE began its preparation in about May 2018. HM Treasury had indicated that the autumn 2018 budget was likely to be a relatively limited affair and that major funding decisions would be dealt within the 2019 spending review not the budget.

Preparation of bids by the Department for Education

29. Officials within the DfE prepared business cases for possible bids. The DfE's financial strategy unit put 17 proposals to the Secretary of State, together with advice (based on whether there was a strategic fit with the Secretary of State's priorities, deliverability, and likelihood that the Treasury would view the bid favourably). One was a bid for funding for high needs. It was not recommended that this be taken forward. The Secretary of State, however, indicated that he was interested in pursuing a high needs bid in recognition of the substantial cost pressures that the sector was facing. He indicated that he was interested in seeing options for capital and for revenue spending.

30. Following that, five business cases were commissioned. Two of the business cases were relevant to high needs expenditure. One became known as the high needs capital bid. The other became known as the high needs revenue bid. Other business cases (for example, for children's social care expenditure) were also prepared.

31. The business cases for the high needs capital and revenue bids should each be read in full. In brief summary, the high needs capital bid business case recommended a bid for funding of £216 million over two years (2019-2020 and 2020-2021) for additional school places in state special schools or special needs units within mainstream schools. The business case explained that the funding would enable local authorities to create places at state-maintained schools, thereby reducing the need to send pupils with special educational needs to schools in the non-state sector where places were more expensive. That would ease the pressures on local authority finances.

32. The high needs revenue business case proposed a bid for £140 million for revenue expenditure. The business case noted that the funding would promote the use of more efficient mainstream places for some pupils with high cost special educational needs, and promote the interests of disadvantaged children and young people by enabling pupils with special educational needs and disabilities to be educated in a mainstream school where that was the best choice for them, and enabling schools to reduce workload. The business case noted that local authorities were covering a gap in revenue funding by using up their DSG reserves (potentially storing up difficulties in future) or by using non-DSG income or general reserves or by transfers or by reducing costs.

33. There was a review of the possible bids (called a keyholder review report). That used what is called a traffic light system of marking the components as red, amber or green to assist in deciding whether the bid should be progressed. Green meant there was appropriate evidence to enable a decision to be made. Amber meant that there was sufficient evidence and analysis to enable a decision to be made but there were concerns that needed to be resolved. Red meant there were significant matters that needed to be addressed before a decision could be made. For the high needs capital bid, the strategic and financial elements were rated amber and economic elements were rated red and the bid overall was rated amber. For the high needs revenue case, the strategic, economic and financial cases were all rated red and the business case overall was rated red. Among the concerns leading to these ratings for the high needs revenue case were the lack of clarity about what the revenue funding would pay for, insufficient evidence of benefits and unclear cost assumptions.

34. The bids were then reviewed by a performance, risk and resources committee within the DfE ("the committee"). The paper prepared for the committee noted that it was thought unlikely that the high needs capital bid would secure funding at the budget. The paper noted that the officials who had reviewed the bids (the "keyholders") felt that the strategic case and theory of change were credible but that some of the assumptions in the economic case were questionable. It noted that, while the prospect of securing finding for the bid was lower than some of the other bids, there may be a strategic case for making a high needs bid in order to raise the profile of the pressures on high needs expenditure in advance of the next spending review. In relation to the high needs revenue bid, the paper noted that keyholders were persuaded of the case for change but felt that the evidence for the bid was insufficient.

35. The committee met on 13 August 2018. It recommended that the Secretary of State make the high needs capital expenditure bid for inclusion within the autumn 2018 budget but not the high needs revenue bid. The committee recommended that the team responsible for the high needs revenue bid continue working on the bid ahead of the autumn budget as the DfE may come under political pressure to act in this area. It also recommended making a bid aimed at managing demand for children's social care costs. A submission was made to the Secretary of State outlining these recommendations on 29 August 2018.

36. On 7 September 2018, the Secretary of State decided to accept the recommendations and to make the high needs capital bid but not the high needs revenue bid. He also made the bid for children's social care costs.

Consideration of bids by the Treasury

37. The Treasury received representations from external bodies or groups, or individuals about what they thought ought to be included in the budget. The Treasury also received and considered the departmental bids for additional allocations.

38. In the case of the DfE bids, the Secretary of State wrote to the Chief Secretary of the Treasury on 27 September 2018 outlining the bids that the DfE were making for additional allocations in the autumn budget. They included the high needs capital bid and the children's social care bid. The Secretary of State in his letter said that these were areas where the department should make targeted investments now to prevent acute financial pressure from escalating, in particular to "address the increasing pressures associated with some of our most vulnerable children and young people; those in the social care system and those with high needs". The letter explained the purpose of the high needs capital bid, how an increasing number of local authorities were overspending their high needs block and redirecting funding from the schools block to cope, and how the bid would enable a two-year programme to create new school places.

39. Internal documents emanating from officials at the Treasury on 5 October 2018 indicate that their advice was, on balance, that the DfE bid for high needs capital expenditure would be more appropriately considered at the 2019 spending review. The advice noted that the bid was a positive measure from the equalities perspective as it would help people with special educational needs which was a protected characteristic. Other advice indicated that, if the Chancellor wished to provide additional funding, priority should be given to the children's social care bid over the high needs funding bid. It seems that the children's social care bid was intended to provide for a two-year pilot scheme relating to the means of providing such services and, it seems, was considered beneficial in terms of acquiring information or evidence for the 2019 spending review.

40. The Chief Secretary, however, made a different recommendation. The high needs capital bid had included two components. One involved the provision of £155 million to fund 2,485 new places in mainstream and state special schools (to reflect demographic growth which had resulted in greater demand for places than had been anticipated in 2015). The other involved £61 million to provide funding for a further 958 special educational needs places. On 8 October 2018, the Chief Secretary wrote to the Chancellor setting out her view that there was a need to address financial sustainability concerns at the budget. That, she considered, could include the £155

million for high needs capital expenditure to create about 2,500 special educational needs places in mainstream and special schools in order to reduce the reliance on local authorities sending their pupils to significantly more expensive independent schools. The Chief Secretary also recommended that the children's social care bid be taken forward and announced at the budget. The Chief Secretary confirmed that she had considered equalities impacts among others.

41. The matter was then considered by the Chancellor who took the decision. He was provided with a number of documents which included (1) the letter of 27 September 2018 from the Secretary of State (2) the letter of 8 October 2018 from the Chief Secretary (3) advice from officials indicating that, if the Chancellor were minded to provide some additional funding for the DfE, priority should be given to the children's social care bid over the high needs capital bid and (4) a table of the bids made by different departments.

42. The Chancellor decided that the high needs capital bid should be considered at the spending review rather than additional funds being provided for this bid at the autumn budget. The Chancellor did approve the children's social care bid.

Additional Funding

43. In addition, the Chancellor announced an allocation of an additional £400 million for the 2018-2019 financial year for school equipment and maintenance. That arose in the following circumstances. There had been a significant improvement in fiscal forecasts. The Chancellor considered that meant that he could make additional expenditure on government priorities. That included providing additional funding for education. The high needs capital bid was not to be taken forward at the autumn budget but was to be considered as part of the 2019 spending review. None of the other bids involved expenditure on education.

44. Treasury officials developed options for a direct payment to schools. One aspect of this was consideration of the formula to be used to make such payments. Advice noted that overall additional funding for schools would have a positive impact for people with protected characteristics under the 2010 Act. There is also an e-mail indicating that the Chancellor would need to be aware of the equalities impact if he chose to make a flat rate payment for each school. The e-mail notes that the Chancellor should consider the equalities impact of the allocation on people with protected characteristics. In particular, special schools would have a higher number of pupils with disabilities than mainstream schools. A flat rate payment would fund special schools at the same rate as mainstream schools and would therefore be less beneficial to people with disabilities than options which used the existing DfE weightings for schools. Other issues were considered including (following discussion with officials at the DfE) making a revenue rather than a capital payment (but Treasury officials advised against this option primarily to limit recurring costs in future years as the payment was intended to be a one-off payment for 2018-2019).

45. Three options were presented to the Chancellor. He decided to make an allocation of £400 million for a one-off capital payment to schools. He selected the option which involved making the allocation to each school via a methodology which was weighted according to whether a pupil was in a primary school, a secondary school or a special school (rather than using the same flat rate for all schools). Some amendments were

made to the levels involved. As a result, special schools received a higher amount of funding than mainstream schools.

Further DfE Spending on Special Educational Needs Provision

46. Following the autumn budget, the Secretary of State has made further additional allocations of funding from within his existing budget for high needs revenue and capital expenditure. This occurred in the following way.

47. In November 2018, officials at the DfE developed proposals for expenditure on high needs funding including £125 million for high needs revenue funding for 2018-2019 and £100 million for additional capital expenditure. These amounts were available primarily, it seems, as pupil numbers for 2018-2019 were lower than anticipated with the result that less funding was required. The advice on the proposals referred to the public sector equality duty and the impacts on different groups covered by that duty. The advice noted that the package of measures was designed to have a beneficial impact on children and young people with a disability as around half of those with special educational needs also have a disability. The advice dealt with the impact on ethnic grounds. It noted that no adverse impacts on any of the protected groups had been identified. The Chief Secretary of the Treasury approved the proposals.

48. Further, in December 2018 it transpired that the number of pupils to be used for calculating the 2019-2020 DSG was lower than anticipated and, as a result, the funding required for 2019-2020 would be lower. That amounted to £175 million. The position is described in a submission dated 7 December 2018 which presented options for spending that £175 million on high needs funding in 2019-2020. Under the heading "Equalities Analysis" the submission also noted that there was no adverse impact on any protected groups from the options presented and the allocation of funding to the high needs budget for 2019-2020 would have a beneficial impact on children and young people with a disability as around half of those with special educational needs also have a disability.

49. On 12 December 2018, the Secretary of State decided to make the additional allocation of £225 million for high needs expenditure. He also decided to allocate a further £125 million of the £175 million of unallocated funding for high needs expenditure for 2019-2010 and to retain £50 million to meet potential pressures on funding that may arise in future. The Treasury agreed.

50. On 16 December 2018, the Secretary of State issued a press release announcing the additional funding (a written ministerial statement was made to the House of Commons on 17 December 2018). That announced funding of

    (1) £125 million for revenue expenditure for 2018-2019;

    (2) £100 million for additional capital expenditure;

    (3) £125 million of revenue expenditure for 2019-2020.

The Proceedings

51. This claim for judicial review was issued on 17 December 2018. By order dated 31 January 2019, Lang J. ordered that the application for permission be dealt with at an oral hearing as soon as possible after 1 May 2019, and, if permission were , the court,

would proceed immediately to the substantive hearing of the claim. The hearing took place over 2 days on 26 and 27 June 2019. In fact, the questions of permission and the substantive hearing were not dealt with separately. Rather, there was full legal argument, and consideration of all the relevant evidence. I deal below with whether permission should be granted and if so whether any of the grounds of challenge are established.

THE ISSUES

52. Against that background, and having regard to the claim form and the written and oral submissions made by the parties, the issues that arise can be conveniently analysed in the following way. The claim form seeks to challenge the autumn budget 2018 and the ongoing failure to allocate sufficient resources including most recently on 16 December 2018. The grounds of claim refer to the allocation of the overall DfE budget, and the proportion of that budget to be spent on funding special educational needs provision in England.

53. In fact, as the factual summary above sets out, the autumn 2018 budget did not allocate the overall DfE budget. That had been allocated in the 2015 spending review. The decisions taken by the Chancellor of the Exchequer relating to education include the decision not to allocate funding for the high needs capital bid made by the Secretary of State and to allocate £400 million to schools in the form of a one-off direct payment in 2018-2019 using a weighted formula.

54. In relation to the Secretary of State for Education, his decisions include the decision to bid for the inclusion of additional high needs capital expenditure, but not high needs revenue expenditure, in the autumn 2018 budget. They also include the decision to allocate an additional £350 million as announced on 16 December 2018. On occasions, in oral submissions, Ms Richards Q.C. for the claimants, sought to describe the functions, or decisions, in a broader way, referring for example, to the function of the Chancellor of the Exchequer in deciding what additional funding to provide to the DfE or, in the case of either defendant, deciding what to spend on special educational needs provision. In my judgment, in analysing the grounds of challenge, it is helpful to focus on the specific functions exercised and the specific decisions made.

55. The four grounds of challenge set out in the claim form raise the following issues:

    (1) Did the defendants comply with their duty under section 149 of the 2010 Act to have due regard to specified equality matters?

    (2) Did the second defendant, the Secretary of State for Education, comply with the general duty imposed by section 7 of the 2008 Act to promote the wellbeing of children in England?

    (3) Was the approach of the defendants to the allocation of funding for special educational provision irrational?

    (4) Has there been any unlawful discrimination within the meaning of Article 14 of the ECHR, read with either Article 2 to the First Protocol or Article 8 ECHR?

THE FIRST ISSUE – THE PUBLIC SECTOR EQUALITY DUTY

56. The grounds of claim contend that the first defendant acted in breach of the public sector equality duty set out in section 149 of the 2010 Act in allocating the overall DfE budget and the second defendant acted in breach of that duty in allocating the proportion of the DfE budget to spend on funding special needs educational provision in England. The grounds allege that the defendants could not provide evidence demonstrating that they had had due regard to the specific matters set out in section 149 of the 2010 Act, in particular the need to eliminate discrimination against, and advance equality of opportunity for, disabled children and young people, when the budget was set on 29 October 2018, or in the process leading up to the budget, or when additional funding was allocated on 16 December 2018 or at any other point when the defendants were exercising their functions in relation to the allocation of funding from central to local government.

57. The claimants also contended that the defendants were in breach of the duty of inquiry inherent in the public sector equality duty. They submitted that it was irrational for the defendants not to have made further enquiries as to the nature and extent of the gap between the cost of provision required from local authorities and the funding made available to them, the impact of not filling that gap, and the extent to which funding shortfalls were impairing the ability of local authorities to discharge their statutory duties.

58. In oral submissions, Ms Richards Q.C. for the claimants identified the function that the first defendant was exercising as deciding what additional funding to provide to the DfE. She submitted that there was a failure to comply with the public sector equality duty in deciding what the priorities for additional funding should be. She submitted that the Secretary of State was exercising the functions of deciding what bids to make and allocating or re-allocating funds within his departmental budget. She contended that, in looking at the process leading up to the relevant decisions, the first and second defendants had not complied with their duty under section 149 of the 2010 Act and had not obtained, or sought to obtain, the relevant information. Ms Richards relied upon a number of authorities including *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, [2014] EqLR 60 (CA), and the cases to which that decision referred, and *R (Hurley and Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin), [2013] ELR 297.

59. Sir James Eadie Q.C. for the defendants submitted that each defendant had paid due regard to the needs of children and young persons with special educational needs who were likely to have a disability. He submitted that the content of the public sector equality duty was context and fact-sensitive and, relying on the decision of the Divisional Court in *R (Hollow) v Surrey County Council* [2019] EWHC 618 (Admin);,[2019] ELR 329, that the "nature of the duty to have "due regard" is shaped by the function being exercised, and not the other way round". Sir James submitted that the context involved funding provision for a group of children and young people who were self-evidently disproportionately likely to share the protected characteristic of disability and the impact of the decisions taken on those children and young people with those characteristics necessarily formed part of the subject-matter of the decisions being taken. In the circumstances of this case, he submitted that that was sufficient to ensure due regard was given, relying on, amongst others, the decisions of the High Court in *R (AD) v London Borough of Hackney* [2019] EWHC 943 (Admin), [2019] ELR 296 especially at paragraphs 48 to 49, and *R(DAT) v West Berkshire*

Council [2016] EWHC 1876 (Admin) especially at paragraph 41. In relation to the second defendant, Sir James submitted that his decision-making was driven by the goal of securing additional funding for those with special educational needs and disabilities and that goal was based on his appreciation and consideration of the potential impact on those groups. That was sufficient to discharge the duty to have due regard to the matters referred to in section 149 of the 2010 Act. Furthermore, the second defendant had subsequently decided that further additional funding could be provided and, in reaching that decision, specifically considered the potential impact on children and young persons with special educational needs and disabilities.

Discussion

60. The provisions of section 149 of the 2010 Act on which the claimants principally rely provide that:

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to—
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
>
> "(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
>
> (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
> (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
>
> …..
>
> " (7) The relevant protected characteristics are—
>
> age;
>
> disability;
> ….."

61. The general approach to whether the public sector equality duty has been complied with is well-established. Relevant principles are set out in the decision of the Court of Appeal in *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345; [2014] EqLR 60, especially at paragraph 26. There, the relevant government department decided to close a fund operated by an independent nongovernmental body which, broadly, provided funding to assist disabled persons to lead independent lives. On the facts, the Court of Appeal concluded that the information provided to the relevant minister did not give her an adequate awareness

that the proposals would place independent living in serious peril for a large number of people and the Court concluded, in that particular case, that the minister had not complied with the public sector equality duty and quashed the decision. As the Court of Appeal has subsequently observed, that decision has to be read in context and the application of the public sector equality duty will differ from case to case depending upon the function being exercised and the facts of the case. Furthermore, courts should be careful not to read the judgment in *Bracking* as though it were a statute. See *Powell v Dacorum Borough Council* [2019] EWCA Civ 23, [2019] HLR 21 at paragraph 51.

62. The Court of Appeal in *R (Baker) v Secretary of State for Communities and Local Government* [2008] 2 P. & C.R. 6 has also given valuable guidance on assessing whether there had been compliance with section 71 of the Race Relations Act 1996 ("the 1996 Act"). Similar principles apply to the equivalent duty in section 149 of the 2010 Act: see *Hotak v London Borough of Southwark* [2016] A.C. 811 at paragraphs 73 to 74. In broad terms, the duty is a duty to have due regard to the specified matters, not a duty to achieve a specific result. The duty is one of substance, not form, and the real issue is whether the relevant public authority has, in substance, had regard to the relevant matters having regard to the substance of the decision and the public authority's reasoning. The absence of a reference to the public sector equality duty will not, of itself, necessarily mean that the decision-maker failed to have regard to the relevant matters although it is good practice to make reference to the duty, and evidentially useful in demonstrating discharge of the duty (see, e.g., *Baker* at paragraphs 36 to 37, and *Bracking* at paragraph 26). As Lord Neuberger observed at paragraph 74 of his judgment in *Hotak v London Borough of Southwark* "the weight and extent of the duty are highly fact-sensitive and dependant on individual judgment".

63. Furthermore, it is helpful to identify the specific functions that a defendant is exercising as it is in the exercise of its functions that a public authority is under a duty to have due regard to the specified matters. The question of what regard is due will be influenced by a number of factors including, but not limited to, the nature of the decision being taken, the stage of the decision-making process that has been reached and the particular characteristics of the function being exercised.

The First Defendant

64. Dealing first with the first defendant, the Chancellor of the Exchequer, he was not in the autumn of 2018 exercising the function of deciding or allocating the overall

budget of the DfE. That function had been carried out in 2015 and was due to be carried out again in 2019. In so far as the first ground at paragraph 48 of the claim form claims that the first defendant breached the public sector equality duty in allocating "the overall DfE budget", the ground of challenge is misconceived. That was not the function that the defendant was exercising in the autumn of 2018, as is clear from the evidence summarised above.

65. The Chancellor of the Exchequer was exercising the function of considering bids from departments (and also representations from groups and individuals) as to what additional funding for particular items he should make available if economic and financial circumstances (and his view of the appropriate level of matters such as taxation and borrowing) permitted. In relation to spending on special educational

needs, he received one bid for funding from the DfE, the high needs capital bid. In considering that bid for additional funding, the Chancellor had before him, amongst other things, the letter of 27 September 2018 from the Secretary of State to the Chief Secretary of the Treasury and the letter from the Chief Secretary dated 8 October 2018.

66. It is clear from those documents that it was apparent that the money was sought to alleviate the increasing pressures associated with what were described by the Secretary of State as "some of our most vulnerable children and young people; those in the social care system and those with high needs". The letter dealt with the high needs capital bid for special educational needs and the bid for children's social care. In relation to the high needs capital bid, the letter of 27 September 2018 explained that, due to increasing demand and a lack of suitable state provision, more and more pupils were being educated in independent settings and an increasing number of local authorities were overspending their high needs block funding allocation and redirecting funds from elsewhere to cope. It was made clear that many pupils with special educational needs and disabilities could flourish equally well in the state sector and at a lower cost to the public purse. The bid, therefore, was for additional funds to create additional places in the state sector so that children and young persons with special educational needs and disabilities could be accommodated in the state sector rather than the independent sector, thereby resulting in cost savings. The letter of 27 September 2018 set out the view that the measure should be undertaken now to maximise savings.

67. The Chancellor knew, therefore, that the bid was concerned with the funding of special educational provision for children and young persons with special educational needs and disabilities. He knew the impact on that group of not adopting the measure. They would continue to receive special educational provision but that would be provided in more expensive independent schools rather than in state mainstream schools or special schools. He knew that the DfE made the bid for this funding now "to prevent acute financial pressures from escalating", as the Secretary of State put it in his letter of 27 September 2018, and that a number of local authorities were overspending their high needs block and redirecting funds from the schools block to cope. The Chancellor knew, therefore, the impact of not allocating the funding requested for high needs capital expenditure. He decided, however, that the question of funding was better dealt with in the spending review due in 2019. In reaching that conclusion, given the function he was exercising, the nature of the decision he was taking, and the information he had, the Chancellor did have due regard to the specific

matters identified in section 149 of the 2010 Act, including the need to advance equality of opportunity for children and young persons with special educational needs and disabilities.

68. Furthermore, the Chancellor did have sufficient information to enable him to assess the impact of not accepting the bid and not allocating the additional funding sought in the 2018 budget. There was no breach of any duty of inquiry. The claimants accept that there would only be a breach of the duty of inquiry said to be inherent in the section 149 duty if it was irrational for the first defendant not to make further inquiries. It was not irrational for the first defendant to take the view that he had been provided with sufficient information to enable him to decide that the high needs capital expenditure bid was more appropriately considered in the 2019 spending review rather than by way of allocating additional funds in the autumn 2018 budget.

69. The other decision that the Chancellor of the Exchequer took in relation to schools was to allocate £400 million funding for the making of a one-off direct payment for 2018-2019 to each school. It is clear from the documents that he took account of the potential impact on those with special educational needs and disabilities when deciding whether, and how, to allocate that additional funding. The advice, referred to above, reminded the Chancellor of the Exchequer that, under the public sector equality duty, he should consider the impact of his allocation decision on persons with protected characteristics. It was pointed out that special schools were likely to have a higher number of pupils with disabilities than mainstream schools, and a flat rate payment of the same amount to each school would be less beneficial to people with disabilities as compared with using a methodology which weighted the amount of funding so that special schools received more money. The Chancellor was presented with different options which included allocating payments by a formula which resulted in more money being allocated to a special school. He did, in fact, opt for such a formula. It is clear that the Chancellor did have due regard to the matters specified in section 149 of the 2010 Act, and the need to advance equality of opportunity for children and young people with disabilities, when taking this decision.

70. The first defendant did, therefore, comply with his duty under section 149 of the 2010 Act when he exercised functions in deciding whether to accept the bid for high need capital expenditure and when making an allocation of funding for a direct payment to state schools.

The Second Defendant

71. In the process leading to the 2018 autumn budget, the Secretary of State for Education was exercising the function of determining what bid or bids to make for further allocations of funding. He expressly required officials to prepare business cases for both a high needs capital expenditure bid and a high needs revenue bid. He did so, quite clearly on the evidence, because of his view of the financial pressures on local authorities in making provision for those with special educational needs and disabilities. The preparation and consideration of bids was done with a view to the best means of funding provision for those with special educational needs and disabilities. The Secretary of State did, therefore, did pay due regard to the matters specified in section 149 of the 2010 Act and, in particular, the need to advance equality for opportunity for children and young persons with special educational

    needs and disabilities, in the process leading to the making of departmental bids for additional funding.

72. In terms of the individual decisions taken, the business case for high needs revenue identified that the proposal supported three of the Secretary of State's priorities, namely providing for excellent school resource management, promoting outcomes of disadvantaged children and young people (by enabling those with special educational needs and disabilities to be educated at a mainstream setting where that was the best choice for them) and enabling schools to reduce the workload for frontline staff (by supporting mainstream schools where they are educating pupils with special educational needs and disabilities). The business case explained how the high needs revenue bid would achieve that. The Secretary of State, ultimately, did not make a bid for high needs revenue funding to the Chancellor because there were weaknesses in the bid and he did not consider that it would be likely to be successful. In requiring the bid to be prepared, and in deciding whether to make the bid, it is clear, however,

that the Secretary of State did pay due regard to the matters specified in section 149 of the 2010 Act.

73. The high needs capital expenditure case set out the case for expenditure to create additional places at state mainstream and special schools and the benefits that would accrue as a result. The material, read fairly, shows that the aim was to ensure that a greater number of pupils would (where appropriate in their case) be educated in state schools, rather than at more expensive independent schools, and the benefits that would accrue from easing the financial pressures on local authorities in that way. Again, it is clear that the purpose of this bid was to maximise resources (by effecting savings) in a way that would benefit local authorities and, in that way, the children and young persons with special educational needs and disabilities for whom they made provision. In making the bid, it is clear that the Secretary of State did pay due regard to the matters specified in section 149 of the 2010 Act and, in particular, the need to advance equality of opportunity for children and young persons with special educational needs and disabilities.

74. Furthermore, the Secretary of State did have sufficient information to enable him to assess the impact of making, or not making bids. In particular, the Secretary of State was aware of the increasing numbers in specialist provision, and the pressures on local authority budgets and the increasing number of local authorities over-spending their high needs allocation. Those matters are referred to, by way of example only, in the business case for the high needs revenue bid. He was well aware of the implications of making particular bids and not making others. There was no breach of any duty of inquiry. As the claimants accept, that there would only be a breach of the duty of inquiry said to be inherent in the section 149 duty if it was irrational for the Secretary of State not to make further inquiries before deciding on which bids to make. It was not irrational for him to take the view that he had sufficient information to enable him to decide which bids to make.

75. The other decision challenged is the decision of the second defendant announced on 16 December 2018 to make further allocations of £350 million for special educational provision. In reaching that decision, the Secretary of State had advice which drew attention to the public sector equality duty and indicated that the measures were intended to have a beneficial impact on children and young persons with a disability and that no adverse effects had been identified. It is clear that, in deciding in December 2018 whether to make additional allocations and, if so, how much, the Secretary of State did pay due regard to the matters specified in section 149 of the 2010 Act and, in particular, the need to advance equality of opportunity for children and young persons with special educational needs and disabilities. He ultimately decided on the amount of the allocation having regard, amongst other things, to the money available to him and what he considered prudent to retain to meet potential financial pressures in future. In reaching that decision, the Secretary of State did have sufficient information including, amongst other things, the financial pressures on local authorities, and it was not irrational for him to reach the decision that he had sufficient information to take the decision. There was no breach of the duty imposed by section 149 of the 2010 Act.

THE SECOND ISSUE – SECTION 7 OF THE 2008 ACT

76. Ms Richards contended that the Secretary of State for Education was in breach of his duty under section 7 of the 2008 Act. As the claim form puts it at paragraph 63, it is

alleged that the Secretary of State failed to promote the well-being of children in allocating the proportion of the overall DfE budget to be spent on funding special educational provision in England. The claimants' skeleton argument makes it clear that that breach is alleged to include the decisions on allocation of funding to local authorities including the decision in December 2018 to allocate a further £350 million. Ms Richards contended that the section imposed a substantive duty on the second defendant to promote the welfare of children. She submitted that the second defendant had put forward no evidence that the second defendant complied with this duty, or had the duty in mind when the relevant decisions were taken. She submitted that it was plainly not self-evident that the current level of funding promotes the wellbeing of children but rather that the evidence showed the reverse. Alternatively, Ms Richards contended that section 7 of the 2008 Act made the promotion of the wellbeing of children a relevant material consideration which it was mandatory for the second defendant to take into account and which he had not done so.

77. In oral submissions, Ms Richards submitted that the duty imposed by section 7 of the 2008 Act required the second defendant to have the interests of children at the forefront of his mind. She submitted that he had to have a proper understanding of what she described as the crisis in funding so that he could reach a balanced and informed decision on whether a course of action would promote the well-being of children. In terms of the specific decisions taken, it was submitted the decision not to make the high needs revenue bid involved a breach of section 7 as the second defendant had not gone through the process of deciding whether that bid would promote the well-being of children. In relation to the decision in December 2018, the claimants' position in relation to the £50 million which the second defendant retained from the unallocated funding was not clear. There was a complaint that the second defendant had not properly assessed, or considered, and had not reached an informed decision on, whether the £50 million should have been allocated for special educational provision in order to promote the well-being of children rather than retaining it (or, at least, that the second defendant had not demonstrated that he had done so). Whilst the claimants say in their skeleton argument that they do not contend that section 7 of the 2008 Act required that any particular sum of money be allocated in any particular way or at any particular time or in any particular budgetary decision, there were occasions, it seemed, when Ms Richards was submitting that not allocating

the £50 million from unallocated funding involved a breach of section 7 of the 2008 Act. Ms Richards relied upon a number of authorities including, principally, *Nzolameso v Westminister City Council* [2015] UK SC 22, [2015] LGR 215 especially at paragraph 37; the obiter dicta at paragraphs 17 and 43-46 in *R (HC) v Secretary of State for Work and Pensions* [2017] UKSC 73, [2017] 3 WLR 1486 dealing with section 11 of the Children Act 2004; *R (Davey) v Oxfordshire County Council (Equality and Human Rights Commission and another intervening)* [2017] EWCA Civ. 1308, [2018] PTSR 281 at paragraph 49 dealing with sections 1(1) and (2) of the Care Act 2014, and *R (DAT) v West Berkshire Council* [2016] EWHC 1876.

78. Sir James submitted that the duty imposed by section 7 of the 2008 Act is what is often referred to as a target duty. Its function was to identify the general objectives by reference to which the Secretary of State must exercise his functions. He submitted that it did not impose a legally enforceable obligation on the Secretary of State to take any particular step or achieve any particular result. Sir James submitted that the decisions taken in the present case fell well within the scope of the judgment left to the Secretary of State and there was no breach of section 7 of the 2008 Act.

Discussion

79. Section 7 of the 2008 Act provides as follows:

> **"7 Well-being of children and young persons**
>
> (1) It is the general duty of the Secretary of State to promote the well-being of children in England.
>
> (2) The general duty imposed by subsection (1) has effect subject to any specific duties imposed on the Secretary of State.
>
> (3) The activities which may be undertaken or supported in the discharge of the general duty imposed by subsection (1) include activities in connection with parenting.
>
> (4) The Secretary of State may take such action as the Secretary of State considers appropriate to promote the well-being of—
>
> (a) persons who are receiving services under sections 23C to 24D of the 1989 Act; and
>
> (b) persons under the age of 25 of a prescribed description.
>
> (5) The Secretary of State, in discharging functions under this section, must have regard to the aspects of well-being mentioned in section 10(2)(a) to (e) of the Children Act 2004.
>
> (6) In this section—
>
> *"children"* means persons under the age of 18; and
>
> *"prescribed"* means prescribed in regulations made by the Secretary of State."

80. The matters referred to in section 10(2) of the Children Act 2004 are:

> "(a) physical and mental health and emotional well-being;
>
> (b) protection from harm and neglect;
>
> (c) education, training and recreation;
>
> (d) the contribution made by them to society;
>
> (e) social and economic well-being."

81. Dealing first with the nature of the obligation imposed, that, ultimately, is a question of the proper interpretation of section 7 of the 2008 Act. The section is not intended to give rise to an obligation owed to an individual, and enforceable in the courts, to take specific steps. In particular, in the context of determining the allocation of funding, including funding for special educational needs provision, section 7 of the 2008 Act does not give rise to an obligation on the Secretary of State to make specific allocations of funding or to make specific bids for particular funding from the Treasury which are enforceable by an individual claimant through the courts. I reach that conclusion primarily from the wording and the context of section 7 of the 2008 Act.

82. First, the duty is expressed to be a "general" duty. Secondly, the duty is expressed to be to promote the well-being of children in England generally, not a duty creating

obligations owed to an individual child. Thirdly the subject matter of the duty – the promotion of well-being – necessarily involves questions of evaluation and discretion and does not lend itself to enforcement in the courts. The duty relates not simply to the promotion of special educational provision. It may involve a wide range of other matters as appears from the aspects of well-being set out in section 10(2) of the Children Act 2004. What actions may be appropriate to promote well-being, and how different and competing claims are best resolved, involve difficult questions of judgement which the courts are not equipped to determine. All those factors indicate that Parliament did not intend section 7 of the 2008 Act to give rise to an obligation owed to an individual and which an individual could enforce through the courts by asking the courts to determine what specific steps the Secretary of State should take to promote the well-being of children in England.

83. Rather, the duty is concerned with stating a general principle and setting out a broad aim that the Secretary of State is to have in mind rather than creating an enforceable duty owed to an individual, as the House of Lords recognised in relation to the closely analogous duty in section 17(1) of the Children Act 1989 which imposes a general duty on local authorities to safeguard and promote the welfare of children in need within its area. See generally, *R (G) v London Borough of Barnet* [2004] 2 AC 208 especially per Lord Hope at paragraphs 80 and 83 to 85, Lord Millet at paragraphs 107 to 109, and per Lord Scott at paragraphs 114 to 115. Whilst there are differences between section 17 of the Children Act 1989 and section 7 of the 2008 Act, there are strong similarities in wording and context, in particular, the phrasing of the duty as a "general duty", the fact that it relates to all children in England not specific individuals and the fact that the duty is expressed in broad aspirational terms which would not easily lend themselves to mandatory enforcement. An appropriate summary of the nature of the duty is that it "identifies the general objectives by reference to which the Secretary of State must exercise his functions": see the observations of Lord Wilson in *R (A) Secretary of State for Health (Alliance for Choice and other intervening)* [2017] UKSC 41, [2017] 1 WLR 2492 albeit dealing with a differently worded duty contained in section 1 of the National Health Service Act 2006 to continue to promote a comprehensive health service.

84. However the nature of the duty is described, it is clear in my judgment that, on the facts of this case, there is no basis for concluding that the action taken by the second defendant involves any breach of the general duty imposed by section 7 of the 2008 Act to promote the well-being of children in England. The allocation of the departmental budget, including the high needs block funding, had been determined by the first defendant in 2015. In the run up to the 2018 autumn budget, the second defendant was considering bidding for additional funds for funding high needs capital and revenue expenditure (and also children's social services). It is apparent from the contemporaneous documentation that the purpose of doing so was to increase funding available for special educational needs provision and to reduce the financial pressures on local authorities. In the course of doing that, the Secretary of State arranged for bids to be prepared for both high needs revenue and capital. All of that was done with a view to improving the funding position of local authorities in relation to special educational needs provision. Those actions are self-evidently consistent with, and do not involve a breach of, section 7 of the 2008 Act.

85. The Secretary of State ultimately decided not to make the high needs revenue bid. The reasons were that the bid was considered weak and unlikely to succeed and the experience of the Secretary of State was that making fewer, better evidenced bids was

more likely to result in the allocation of additional funding. There is, in my judgment, no basis for saying that the decision not to make a bid which the Secretary of State judged was unlikely to succeed, and which might have jeopardised other bids for funding for special educational needs provision, involves a breach by the Secretary of State of the duty in section 7 of the 2008 Act.

86. In relation to the decision in December 2018, the Secretary of State did propose to allocate an extra £225 million for special educational needs provision. Then, when a further £175 million became available due to unallocated funding as a result of lower pupil numbers, he allocated a further £125 million for special educational needs provision. He did so, knowing of the financial pressures on local authorities and the fact that a number of local authorities had overspent their high needs block allocation and were making up the shortfall from other sources. The decision to allocate a

further £350 million was done to improve the funding position for special educational needs provision and is self-evidently consistent with the duty in section 7 of the 2008 Act.

87. The fact that the second defendant did not allocate a further £50 million out of the unallocated expenditure but retained that to meet any future financial pressures does not involve any failure to appreciate the section 7 duty or any breach of that duty on the part of the second defendant. The evidence demonstrates that the second defendant was considering what further funds he could reasonably allocate from within his existing budget to ease the pressures on special educational needs provision. He made a careful decision on what amounts he could allocate to that aim and what amounts he should prudently retain to meet any future pressures. He did so in full awareness of the position of local authorities in relation to funding special educational provision. The obligation in section 7 of the 2008 Act does not require him to allocate all sums available to one particular aspect of children's well-being (special educational provision). Indeed, the claimants' skeleton argument appears to accept that section 7 of the 2008 Act does not impose an obligation to pay any particular sum, in any particular way, at any particular time. On the facts of this case, as they emerge from the evidence summarised above, there is no basis for concluding that the second defendant was in breach of the general duty imposed by section 7 of the 2008 Act.

THE THIRD ISSUE - RATIONALITY

88. Ms Richards submits that the defendants' approach to the allocation of funding for the education of those with special educational needs, including in particular the decisions taken in October and December 2018, was irrational. She submits that the defendants knew, or should have known, of the shortfall in funding for special educational needs which, she submitted, was having a detrimental impact on children with special educational needs and the ability of local authorities to discharge their statutory obligations. She submitted that this meant that the problem required resolution in the short and long term. She further submitted that it was irrational for the defendants to decide to deal with the issue by, amongst other things, deferring matters to the 2019 spending review. She further submitted that it was irrational to decide in December 2018 to reserve £50 million of the unallocated funding for future use rather than allocating it to funding special educational needs provision. Further criticisms were made including a claim that it was irrational for the first defendant not to assist the Secretary of State by providing further funds or the eligibility for special educational needs provision under the 2014 Act to have been widened without a commensurate

increase in funding. Further, Ms Richards submitted that the first defendant failed to make sufficient inquiries and lacked relevant information about, amongst other things, the rising demand for special educational provision and the number entitled to such services, the nature and extent of the gap between the cost of provision and the funding available and the difficulties in children and young persons obtaining special educational provision and hence, it was said, breached the duty of reasonable inquiry recognised in *Tameside v Secretary of State for Education and Science* [1977] A.C. 1014. She further submitted that the defendants acted unlawfully by failing to take into account that those factors were material to the decisions under challenge.

89. Sir James submitted that there was nothing irrational in the defendants' approach to funding. The first defendant was making decisions on which measures to include within the autumn budget 2018 spanning the range of government spending. There was nothing irrational in deferring consideration of the high needs capital expenditure bid to the 2019 spending review. He took account of the matters referred to and reached decisions he was entitled to reach. Similarly, the second defendant reached decisions that were rationally open to him to reach. There was no failure to make reasonable inquiries.

Discussion

90. The approach adopted to allocating funding and, in particular the decisions taken in the autumn budget 2018 and subsequently, was rational. The allocation of funding for special educational needs had been done in the 2015 spending review. The next spending review was due in 2019. It was in that context that the first defendant was considering additional bids for funding in the autumn budget in all areas of government funding. He was deciding what bids for additional funding it would be appropriate to include in the autumn budget given the state of the public finances and his judgement on the proper balance between taxation and expenditure. He decided that the high needs capital expenditure bid (the only bid he received for expenditure

related to special educational needs provision) was better considered in the spending review due in 2019. That was a conclusion that he was rationally entitled to reach.

91. Furthermore, he reached that conclusion knowing that the Secretary of State considered that there were acute and increasing financial pressures associated with high needs, and knowing how it was said that the high needs capital expenditure would reduce those pressures (by providing places at state mainstream and special schools rather than at more expensive schools). He had advice from the Chief Secretary on what she considered appropriate and received advice from officials. The first defendant was only obliged to take such steps to obtain information as were reasonable. A court will intervene if no reasonable public body could rationally conclude that it had sufficient information to enable it to take the relevant decision: see *R (Pharmaceutical Services Negotiating Committee and another) v Secretary of State for Health* [2018] EWCA Civ 1925, especially at paragraphs 55 to 57 and *R (Khatun) v Newham London Borough Council* [2005] QB 37 at paragraph 17. Given the context and the nature of the decision that the first defendant was taking (which bids for additional allocations of funding should be accepted and funding provision included in the budget), the first defendant was entitled to take the view that he had sufficient information to decide that question. There was no obligation on the first defendant to seek to obtain further information of the sort referred to by the claimant before deciding that the high needs capital expenditure bid would more appropriately

be considered in the 2019 spending review rather than the 2018 autumn budget. Having taken that decision, and given that the Chancellor wished to provide some additional funding for education, there was nothing irrational in him allocating £400 million for a one-off direct payment to schools in the 2018-2019 financial year (and to do so in a way that gave more funds to state special schools). Given the resources that he considered available to him, that was a rational decision.

92. The second defendant was well aware of the position relating to the funding of special educational needs provision including, amongst other things, the fact that demand for EHCPs had exceeded expectations and the fact that many local authorities had spent more on special educational needs than provided for in the high needs funding block. Those matters appear, from example, in the business case for the high needs revenue bid that was prepared. In the context of seeking additional funding in the autumn budget, the second defendant acted rationally in making the bids that he judged most likely to succeed, including the high needs capital bid and the children's social services bid, and not making bids which he considered were unlikely to succeed. Further, there was nothing unlawful or irrational in deciding subsequently to allocate a further £225 million to special educational provision from within the departmental budget. There was nothing illogical or irrational in deciding, when it transpired that the department had further unallocated spending of £175 million because of lower than anticipated pupil numbers for 2019-2020, to allocate a further £125 million for special educational needs provision whilst reserving £50 million to meet potential future financial pressures. Those were decisions that were essentially ones for the Secretary of State to make as to how to allocate funding within the scope of his departmental budget. None of the decisions were irrational.

THE FOURTH ISSUE – ARTICLE 14 ECHR

93. Ms Richards submitted that the defendants are in breach of Article 14 ECHR read with A2P1 or Article 8 ECHR because, as it is put at paragraph 54 of the claimants' skeleton argument, the defendants have treated similarly persons who are in relevantly different situations. The claimants say, in particular, that in allocating what they describe as grossly insufficient funding for the education of children with special educational needs, the defendants have failed to treat children with special educational needs "sufficiently differently" as compared with children without such needs. Ms Richards also contends that the defendants have failed to make reasonable accommodation for children with special educational needs.

94. Sir James submitted that the decisions under challenge do not fall within the scope, or ambit of either A2P1 or Article 8 ECHR and so, Article 14 is not applicable to the situation. In any event, he submitted that children with special educational needs have not been treated similarly to children without such needs. The 2014 Act imposes specific legal obligations requiring local authorities to treat children with special educational needs differently from children without such needs. The funding mechanism, including the development of the high needs block within the DSG and the development of the formula for allocating the budget to schools, demonstrates that the defendants systematically treat children and young people significantly differently in terms of school funding. In so far as it necessary to do so, Sir James contends that the defendants can demonstrate that any differential treatment is objectively justifiable.

Discussion

95. Article 14 ECHR provides that:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

96. A2P1 and Article ECHR respectively provide as follows:

> **"Article 2**
>
> **Right to Education**
>
> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the rights of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions." and
>
> **"Article 8**
>
> **Right to respect for private and family life**
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public body with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well--being of the country, for the prevention of disorder or crime, or for the protection of the rights of others."

97. In considering whether the situation in the present case involves a breach of Article 14 read with or A2P1 or Article 8 ECHR, it is necessary to consider whether (1) there is differential treatment (2) on grounds of some other status (3) in relation to a matter falling within the scope, or ambit, of Article 8 or A2P1 ECHR and (4) which the defendant cannot show is objectively justified.

98. Differential treatment includes treating persons who are in a similar position differently. It also includes treating persons who are in relatively different situations in the same or a similar way. The principle is expressed by Lord Wilson at paragraph 48 of his decision in *R (DA and others) v Secretary of State for Work and Pensions (Shelter Children's Legal Services and others intervening)* [2019] UKSC 21, [2019] 1 WLR 3289 in the following way:

> "48. In *DH v Czech Republic (2007) 47 EHRR 3* the Grand Chamber of the ECtHR said in para 175 that "discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations". Re-cast to cover the type of discrimination recognised in the *Thlimmenos* case, the proposition is that it means treating similarly, without an objective and reasonable justification, persons in relevantly different situations. In *Carson v United Kingdom (2010) 51 EHRR 13* the Grand Chamber explained in para 61 what was meant by the absence of objective and reasonable justification: "in other words, if it does not pursue a legitimate aim or if there

is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised."

99. The situation in the present case does not begin to amount to differential treatment. Children and young persons with special educational needs are not treated in the same or a similar way to others who do not have such needs. They are treated in a fundamentally different way both legally and factually. Legally, there is a particular legal regime contained in the 2014 Act aimed at identifying those with special educational needs. The parents of children, or young persons, may request an assessment of their needs. If appropriate, local authorities must prepare, and maintain, EHCPs specifying, amongst other things, the special educational provision that needs to be made for the children and young persons concerned. There are rights of appeal against a refusal to assess or against the content of an EHCP. A local authority is obliged to secure that the special educational provision specified in the EHCP is provided (and cannot refuse to do because of lack of resources). Factually, the funding system provides for additional funding through the high needs funding block. That is currently over £6 billion a year. In addition, if local authorities need more money to ensure that special educational provision is made, they will need to transfer money from other parts of their budget or from reserves. Recognising the financial pressures on local authorities to meet their legal obligation to provide the specified special educational provision, the second defendant has, from time to time, made additional funds available specifically for special education needs as he did with the allocation of an additional £350 million in December 2018. The 2019 spending review will address the budget for special educational needs for future years.

100. In those circumstances, there is no reasonable basis for concluding that the defendants are treating children and young persons with special educational needs in a similar way to other children who are in a different position as they do not have such needs.

101. The claimants also contend in their skeleton argument that there has been a failure to make reasonable accommodation for persons with disabilities. They rely on the decisions in *Cam v Turkey (App 51500/08)* and *Enver Sahin v Turkey* (App. No 23065/12) as establishing that Article 14 ECHR includes a right to reasonable accommodation for students with disabilities. *Cam* involved a blind student who had been refused admission to study at a music academy because of her blindness. It was in that context that the European Court of Human Rights considered that Article 14 ECHR should be read as requiring reasonable accommodation to be made in respect of a disabled student. Reasonable accommodation was to be understood, in the light of international instruments, as requiring necessary and appropriate modifications and adjustments without imposing a disproportionate or undue burden where needed in a particular case. *Sahin* involved a first-year student who was injured in an accident and lost the use of his lower limbs. The university authorities refused to make the necessary physical adjustment to the university buildings to enable the student to continue with his studies. It was in that context that the Court referred again to the obligation to provide reasonable accommodation to a person with disabilities and concluded that there was a breach of Article 14 read with A2P1 of the ECHR as the authorities had not reacted with the requisite diligence to ensure that the student was able to exercise his right to education on an equal basis with other students. Relying on these authorities, the claimants contend that the additional funding made available for special educational needs provision was insufficient to amount to the required reasonable accommodation.

102. The context of the present case is very different from those two cases. The entirety of the situation needs to be considered. The legal regime provides for special educational needs, and the appropriate provision, to be identified. Thereafter, local authorities are required to secure that the provision is made available (irrespective of their resources). The funding system provides specifically for high needs funding. It is recognised by the second defendant that many local authorities are spending in excess of their allocation and are funding that from other sources. The second defendant has made additional funding available in December 2018. The question of funding for future years is to be considered in the 2019 spending review. There is no reasonable basis for concluding that the situation that applies here involves any breach of the need for reasonable accommodation for disabled students when needed in a particular case, as recognised in *Cam* and *Sahin.*

103. Finally, the claimants contended that their interpretation of Article 14 ECHR is reinforced by Article 24(2)(b) of the United Nations Convention on the Rights of the Disabled ("the UN Convention"). Article 24(1) recognises the right of persons with disabilities to education. Article 24(2)(b) provides that in realising that right, contracting states shall ensure that:

> "Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live."

104. Ms Richards also referred to paragraphs 52 and 53 of a report prepared by the UN Committee on the Rights of Persons with Disabilities. That report, published in about August 2017, noted the Committee's concerns about the persistence of a dual system which segregated children with disabilities in special schools and the increasing number of persons in special schools.

105. The provisions of the UN Convention are not part of the law of England and Wales and are not directly applicable in domestic courts as such: see *R (JS) v Secretary of Work and Pensions* [2015] 1 W.L.R. 1449 per Lord Reed at paragraph 82, per Lord Carnwarth at paragraphs 114 and 115, and per Lord Hughes at paragraph 137. Provisions of international law, such as the provisions of the UN Convention, may depending upon the circumstances be relevant to the interpretation of rights derived from the ECHR : see, by way of example, the observations in *R (JS) v Secretary of Work and Pensions* [2015] 1 W.L.R. 1449 of Lord Reed at paragraphs 83 to 86, per Lord Carnwarth at paragraph 116, and per Lord Hughes at paragraph 141. See also the observations of Lord Wilson in *Mathieson v Secretary of State for Work and Pensions* [2015] 1 W.L.R. 3250 at paragraph 43.

106. The real issue here is whether the provisions of Article 24 of the UN Convention do offer any assistance on the interpretation of Article 14 ECHR in this particular context. Here, the issue is whether there is similar treatment of persons in a different position (i.e. similar treatment of children and young persons with special educational needs and those without such needs) and whether there is a need to make reasonable accommodation by providing additional funding to ease the financial pressures on local authorities which must provide the special educational provision specified in an EHCP. The provisions of the UN Convention on the right of disabled persons to access to an inclusive, quality and free primary and secondary education are primarily addressed by the provisions of the 2014 Act (including the rights of appeal in cases of disagreement over appropriate provision). The provisions of Article 24 of the UN

Convention do not assist with the interpretation of Article 14 ECHR in any way which helps resolve the issues as to the scope of Article 14 ECHR so far as identifying the concept of differential treatment or reasonable accommodation so far as the facts of this particular case are concerned.

107. In all the circumstances, therefore, there is no differential treatment within the meaning of Article 14 ECHR on the facts of this case. It is not necessary, therefore, to consider whether any such treatment falls within the scope of A2P1 or Article 8 ECHR nor, if there had been such treatment, whether that was on the grounds of any other status. Nor is it necessary to consider whether the defendants could objectively justify any differential treatment. Indeed, given that there is, in truth, no differential treatment as alleged by the defendants, any attempt to determine whether or not such treatment could be objectively justified would be highly artificial.

SUBSEQUENT EVENTS AND ANCILLARY MATTERS

108. The defendants, very properly, drew attention to events that occurred after the hearing of this claim but before judgment was handed down by means of a further witness statement of Mr Foot. The claimants made written submissions on that further written material and also very properly drew attention to, and made written submissions on, the judgment in *R (Drexler) v Leicestershire County Council* [2019] EWHC 1934 (Admin) lest it be considered relevant to the parties' submissions on Article 14 ECHR. In the event, I do not consider that that judgment alters the conclusions I have reached.

109. The further material referred to by Mr Foot includes announcements made from 30 August 2019 onwards about the allocation of additional funding for special educational needs for 2020-2021 and, it seems, 2022-2023. It also includes the decisions taken in the spending review, announced to Parliament on 4 September 2019, fixing departmental spending (including spending by the Department of Education) for 2020-2021. That included the amounts of additional funding for 20202021 announced earlier. The further material also included a decision by the second defendant to conduct a review of special educational needs. In the event, those decisions did not assist in determining the legality of the decisions taken some 8 or 10 months earlier, in October and December 2018, which form the subject matter of this challenge. Mr Foot, again very properly, referred to and exhibited a report by the National Audit Office published on 9 September 2019 on how well pupils with special educational needs and disabilities were supported. That report confirmed that local authorities were increasingly overspending their budgets for special educational needs and identified possible reasons and made recommendations. The report does not materially alter the evidential position referred to above and does not alter my conclusions on the legality of the decisions challenged in these proceedings.

110. More generally, the claimants have relied upon a number of documents and a number of legal points were made by counsel for all parties in their written and oral submissions. I have sought in this judgment to deal with what I consider to be the principal points raised and the principal evidence relating to those matters. All the claimants, and the defendants, can be assured, however, that I have carefully considered all the points made and all the documents relied upon.

PROCEDURAL ISSUES

111. The oral hearing was ordered to deal with both the question of whether permission to apply for judicial review should be granted and, if so, whether any of the grounds of claim were established. In the event, the court considered all the evidence and arguments at the hearing. It is necessary, now, to consider whether or not permission should be granted. In some ways that is an artificial exercise where all the arguments and evidence has been considered but the issue can have consequences in terms of, for example, the rules governing appeals and costs.

112. Permission to apply for judicial review should be granted if a claimant shows that the one or more of the grounds gives rise to an arguable case that a reviewable error exists and there is no discretionary or other bar to bringing the claim. An arguable case requires that a point exists which merits investigation at a full hearing with all parties represented and with all relevant evidence and arguments on the law. On balance, I am just satisfied that, considering the claim form and the original summary grounds in this case, that each of the four grounds set out in the claim form was arguable in that there were points which existed which merited full investigation at a hearing. I therefore grant permission to apply for judicial review of the decisions identified in the claim form dated 17 December 2018 on each of the four grounds identified in that claim form.

113. That conclusion should not, however, be seen as an indication that similar challenges in this context – that is, to the budgetary decisions of central government - will be granted permission in other cases. That will be a matter for the judge considering any application for permission on the facts of those cases. Furthermore, this judgment sets out th decision-making process for determining the allocation of departmental expenditure at a spending review and the role of the budget. The judgment also demonstrates the importance of identifying the decision under challenge and identifying the legal error said to have been made in relation to that decision. The likelihood is that many grounds of challenge to decisions involving the allocation of expenditure will not give rise to arguable grounds of challenge.

CONCLUSION

114. The claim for judicial review is dismissed. The defendants complied with their duty to have due regard to the matters specified in section 149 of the 2010 Act. There was no breach of the general duty to promote the well-being of children in England set out in section 7 of the 2008 Act. The defendants reached decisions that they were entitled to reach on the material before them and did not act irrationally. There was no unlawful discrimination within the meaning of Article 14 ECHR.