Neutral Citation Number: [2023] EWHC 1451 (Admin)

Case No: CO/789/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/06/2023

Before :

HIS HONOUR JUDGE AUERBACH
(Sitting as a judge of the High Court)

- -

Between :

THE KING (ON THE APPLICATION OF SWALCLIFFE PARK SCHOOL)	**Claimant**
- and -	
WOKINGHAM BOROUGH COUNCIL (1)	**Defendants**
FIRST TIER TRIBUNAL (SPECIAL EDUCATIONAL NEEDS AND DISABILITY) (2)	
- and -	
PQR (1) **XYZ (a minor by his litigation friend, PQR) (2)**	**Interested Parties**

- -
- -

David Lawson (instructed by **Sinclairslaw**) for the **Claimant**
Jack Anderson (instructed by **Joint Legal Team, Reading BC**) for the **First Defendant**
No appearance or representation for the **Second Defendant**
The **First Interested Party** attended the hearing but was not represented and did not appear
Charlotte Hadfield (instructed by **Watkins Solicitors**) for the **Second Interested Party**

Hearing date: 24 May 2023

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JUDGMENT

HIS HONOUR JUDGE AUERBACH:

Introduction

1. This is an application for judicial review relating to a child's education. The claimant is a residential special school. The first defendant is a local authority. The interested parties are PQR, the mother of XYZ, a teenage boy, now aged 16, who lives in the local authority's area, and XYZ himself, acting through PQR as his litigation friend. They have been anonymised in view of XYZ's age and disability, and the subject matter of the claim. The second defendant is the First-Tier Tribunal, Special Educational Needs and Disability (SENDIST). I will refer to the parties as the school, the local authority, the tribunal, and PQR and XYZ by those ciphers, or as the interested parties.

2. The school challenges: the decision by the local authority to name the school in XYZ's Education, Health and Care (EHC) plan, conveyed in a letter of 16 December 2021; a consent order made by the tribunal, on 21 January 2022, providing for an amended EHC plan for XYZ naming the school; and the decision of the tribunal, of 28 February 2022, declining the school's subsequent application for it to set aside the consent order.

3. The claim for judicial review was issued on 3 March 2022. The local authority and the tribunal were named as defendants and PQR as an interested party. At the outset the tribunal indicated that it wished to remain neutral and not participate in the proceedings unless ordered. Regrettably there was delay in progressing the matter, but following referral to a judge, permission was granted by an order of 14 February 2023. XYZ was added as an interested party in April 2023.

The legal framework

4. Part 3 Children and Families Act 2014 concerns children and young people in England with special educational needs or disabilities. It begins with section 19, which provides as follows.

> "In exercising a function under this Part in the case of a child or young person, a local authority in England must have regard to the following matters in particular—
>
> (a) the views, wishes and feelings of the child and his or her parent, or the young person;
>
> (b) the importance of the child and his or her parent, or the young person, participating as fully as possible in decisions relating to the exercise of the function concerned;
>
> (c) the importance of the child and his or her parent, or the young person, being provided with the information and support necessary to enable participation in those decisions;

(d) the need to support the child and his or her parent, or the young person, in order to facilitate the development of the child or young person and to help him or her achieve the best possible educational and other outcomes."

5. Pursuant to section 37, where it is necessary for special educational provision to be made for a child, the local authority must prepare and maintain an EHC plan. The form is prescribed by the Special Educational Needs and Disability Regulations 2014. The plan contains sections relating to different topics. These include section B, setting out the child's special educational needs, section F, which sets out the special provision to be made to meet those needs, and section I, which sets out the type of educational placement to be provided, and the specific named placement to deliver that special educational provision.

6. Section 38 requires the local authority to consult a parent about the draft plan, and to give them notice of their right to make representations and to request that a particular school or institution within section 38(3) be named in the plan. This applies, among others, to non-maintained special schools. In the course of dialogue and preparation the draft plan will go through a number of versions, and is referred to as the working document.

7. Section 39 provides:

"39 Finalising EHC plans: request for particular school or other institution

(1) This section applies where, before the end of the period specified in a notice under section 38(2)(b), a request is made to a local authority to secure that a particular school or other institution is named in an EHC plan.

(2) The local authority must consult—

(a) the governing body, proprietor or principal of the school or other institution,

(b) the governing body, proprietor or principal of any other school or other institution the authority is considering having named in the plan, and

(c) if a school or other institution is within paragraph (a) or (b) and is maintained by another local authority, that authority.

(3) The local authority must secure that the EHC plan names the school or other institution specified in the request, unless subsection (4) applies.

(4) This subsection applies where—

(a) the school or other institution requested is unsuitable for the age, ability, aptitude or special educational needs of the child or young person concerned, or

(b) the attendance of the child or young person at the requested school or other institution would be incompatible with—

(i) the provision of efficient education for others, or

> (ii) the efficient use of resources.
>
> (5) Where subsection (4) applies, the local authority must secure that the plan —
>
> (a) names a school or other institution which the local authority thinks would be appropriate for the child or young person, or
>
> (b) specifies the type of school or other institution which the local authority thinks would be appropriate for the child or young person.
>
> (6) Before securing that the plan names a school or other institution under subsection (5)(a), the local authority must (if it has not already done so) consult—
>
> (a) the governing body, proprietor or principal of any school or other institution the authority is considering having named in the plan, and
>
> (b) if that school or other institution is maintained by another local authority, that authority.
>
> (7)The local authority must, at the end of the period specified in the notice under section 38(2)(b), secure that any changes it thinks necessary are made to the draft EHC plan.
>
> (8) The local authority must send a copy of the finalised EHC plan to—
>
> (a) the child's parent or the young person, and
>
> (b) the governing body, proprietor or principal of any school or other institution named in the plan."

8. The test in section 39(4)(b)(i) is not whether the attendance of the child at the nominated school would have *some* adverse impact on the efficient education of other children attending it, but whether any such impact would be "so great as to be incompatible with the provision of efficient education" for others (*per* Stadlen J in R (Hampshire CC) v SENDIST [2009] EWHC 626 at [48]). In NA v London Borough of Barnet [2010] UKUT 180 (AAC) Upper Tribunal Judge Mesher said, at [34], that the concept of efficient education indicates

> "…not the very highest desirable standard or the very basic minimum but something in between that I suggest the members of the First-tier Tribunal are uniquely qualified by their expertise and experience to recognise in particular cases. Although 'incompatible' is indeed a very strong word, indicating that there is no way of avoiding the admission of the single child involved reducing the quality of provided to some other children with whom he would be educated below that standard, its force must be applied in the context of that standard."

9. Section 43 provides that where certain types of school, including non-maintained special schools, are named in an EHC plan, the school must admit the child; but this does not affect any power to exclude a pupil.

10. Section 44 requires a local authority to review an EHC plan annually.

11. Section 51 gives the child's parent a right of appeal to the tribunal against, among other things, the school or institution, or type of school or institution, named in the plan, or a failure to name any school or institution. No right of appeal to the tribunal is given to a named school. However, the decision of a local authority to name a school is amenable to judicial review at the behest of the school. I was referred to the example of R (on the application of an Academy Trust) v Medway Council [2019] EWHC 156 (Admin).

12. For completeness I also note that the power of the Secretary of State to give a direction under section 496 Education Act 1996 was invoked in the local authority's acknowledgment of service as a potential alternative avenue of recourse, but the judge who granted permission rejected that argument.

13. Section 77 of the 2014 Act requires the Secretary of State to issue a code of practice, giving guidance to, among others, local authorities, about the exercise of relevant functions. They must have regard to the code, as must the tribunal, in relation to any provision of it that appears relevant to an appeal.

14. The applicable code is the *"Special educational needs and disability code of practice: 0 to 25 years"* issued in January 2015. Paragraph 9.80 applies where the parent has requested a particular school. It provides, in relevant part:

> "The school local authority **must** consult the governing body, principal or proprietor of the school or college concerned and consider their comments very carefully before deciding whether to name it in the child or young person's EHC plan, sending the school or college a copy of the draft plan."

15. More detailed provisions are made by the 2014 Regulations, including as to the powers of the tribunal in relation to an appeal. These include a power to require the local authority to substitute a particular school in the plan and to issue the amended plan within two weeks of an order to that effect.

16. The First-tier Tribunal (Health, Education and Social Chamber) Rules 2008 include the following rules.

> **"Substitution and addition of parties**
>
> **9.**—(1) The Tribunal may give a direction substituting a party if—
>
> (a) the wrong person has been named as a party; or
>
> (b) the substitution has become necessary because of a change in circumstances since the start of proceedings.
>
> (2) The Tribunal may give a direction adding a person to the proceedings as a respondent.
>
> (3) If the Tribunal gives a direction under paragraph (1) or (2) it may give such consequential directions as it considers appropriate.
>
> **Consent orders**

> **29.**—(1) The Tribunal may, at the request of the parties but only if it considers it appropriate, make a consent order disposing of the proceedings and making such other appropriate provision as the parties have agreed.
>
> (2) Notwithstanding any other provision of these Rules, the Tribunal need not hold a hearing before making an order under paragraph (1), or provide reasons for the order.
>
> **Setting aside a decision which disposes of proceedings**
>
> **45.**—(1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if—
>
> (a) the Tribunal considers that it is in the interests of justice to do so; and
>
> (b) one or more of the conditions in paragraph (2) are satisfied.
>
> (2) The conditions are—
>
> (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;
>
> (b) a document relating to the proceedings was not sent to the Tribunal at an appropriate time;
>
> (c) a party, or a party's representative, was not present at a hearing related to the proceedings; or
>
> (d) there has been some other procedural irregularity in the proceedings.
>
> (3) A party applying for a decision, or part of a decision, to be set aside under paragraph (1) must make a written application to the Tribunal so that it is received no later than 28 days after the date on which the Tribunal sent notice of the decision to the party."

Factual Overview

17. The teenage boy who is at the heart of these proceedings, XYZ, was born in 2006. He has special educational needs, arising in particular from Autistic Spectrum Disorder (ASD) and a developmental language disorder. The local authority which is the first defendant is responsible for his EHC plan.

18. In January 2020 the local authority issued a draft EHC plan for XYZ. In section I it named a specific mainstream school "until a special school is secured." PQR thereafter began an appeal to the tribunal.

19. The school is a residential special school for children and young people who have ASD. Although he alluded to a possible technical point in this regard, Mr Lawson confirmed that there is no dispute that the school falls to be treated as a non-maintained special school for the purposes of the 2014 Act.

20. In August 2020 both PQR and the local authority approached the school. The local authority sent the school the current version of the working document. On 15 September the school, having considered the working document and materials supplied to it, informed the local authority that it did not consider that it was suitable for XYZ due to the nature and severity of his challenging behaviours "which are not compatible with our student population".

21. After learning of that response in around December 2020, PQR took issue with this assessment and provided the school with further information. The school then informed her in March 2021 that it remained of the opinion that XYZ would not have a peer group he could relate to nor the curriculum and style of learning that would suit his needs.

22. PQR did not give up. She sent the school specialist reports relating to XYZ, including one prepared in March 2021 by a consultant child and adolescent psychiatrist, Dr Richard Soppitt. In June the school's consultant clinical psychologist interviewed PQR and XYZ. Having been apprised of developments the local authority approached the school again in August 2021. On 6 September 2021 it sent the school section F of the current working version of the EHC plan. It asked for confirmation of the cost, if XYZ were offered a placement, and the school responded with an annual figure. XYZ then had a three-day trial residential attendance later in September 2021, arising from which he was assessed by the school's multi-disciplinary team.

23. The school then informed the local authority that it had decided not to offer XYZ a place, in a video call and then an email of 30 September. It then sent an assessment report to the local authority on 8 October. It raised concerns about his interactions with other pupils during the stay. It gave accounts of various incidents. It concluded that the school would not be suitable for him.

24. At this time PQR's appeal to the tribunal was projected to be heard in January 2022. The school's assessment report was included in the bundle for the forthcoming appeal hearing filed with the tribunal later in October.

25. On 17 November 2021 the local authority's solicitors wrote to the school. They stated that on 10 November the local authority was informed that PQR put forward the school as one of her parental preference schools. They set out section 39(4) and asked "which of the above the school considers applicable" if its position was that it should not be named. They indicated that the tribunal would need further information and that the local authority would be assisted in knowing responses to ten questions which they then set out. The letter also set out PQR's solicitor's comments on the school's assessment and invited observations upon it. They also asked who would be available to attend the tribunal hearing, giving the current and alternative dates that had been raised.

26. Following this the school spoke to the local authority's solicitor. Then on 26 November 2021 the school responded. It referred to its assessment report and the important role the assessment process played in safeguarding. It said that the impact on other students had been a significant factor in its decision-making. With respect to section 39 it stated that XYZ's "attendance would be incompatible with the provision and efficient education for others".

27. On 16 December 2021 the local authority's solicitors wrote to the school informing it that it was now PQR's sole preferred school, and that the local authority had decided to name the school as the placement for XYZ from January 2022. They stated that the local authority was of the view that the information provided by the school was not sufficient to evidence any of the legal grounds to refuse to name the school in the plan, and that it did not have a legal basis to continue defending the appeal before the

tribunal. On 17 December the school spoke to its contact at the local authority about the letter.

28. On 20 December 2021 a draft consent order disposing of PQR's appeal to the tribunal, by adopting a version of the EHC plan which identified the school as the placement in section I, was tabled to the tribunal.

29. On 6 January 2022 the school wrote to the local authority's solicitors and PQR's solicitors that, having taken initial advice, it believed that the decision to name it was neither rational nor founded on evidence, and stating that, if the local authority proceeded to name it, it would take further advice to challenge the decision and have the EHC plan declared invalid.

30. On 10 January 2022 the tribunal issued an order noting the application for a consent order, vacating the hearing of the appeal that had at that point been listed for 4 February 2022, and indicating that a response to the request for a consent order should be expected within 20 working days.

31. On 13 January 2022 the local authority's solicitors wrote to the school reiterating its previous position, disputing that its decision was not rational or based on evidence, and stating that once the tribunal order had been made it would proceed to issue the final EHC plan naming the school.

32. The school's solicitors wrote on 13 January stating that they were preparing a letter and seeking an assurance that it would be passed to the tribunal. They wrote again on 17 January to the local authority's solicitors setting out the school's objections at length. They asked whether, if an application for a consent order had been made and was pending, certain documents had been laid before the tribunal. If the consent order had already been made, they asked the local authority to agree to take steps to apply to have it set aside.

33. The consent order was made on 21 January 2022.

34. On 25 January 2022 the local authority's solicitors replied to the school's solicitors informing them that the consent order had been made, enclosing the final EHC plan naming the school, and stating that it would not be applying to set aside the order. They responded to the 17 January letter point by point.

35. On 1 February 2022 the school's solicitor wrote to the tribunal asking it to set aside the consent order of its own motion and setting out its case that section 39(4) in both limbs ought to have been considered to have applied. Also in February he sent pre-action letters to the local authority and the tribunal. On 18 February the family's solicitor wrote a pre-action letter to the school.

36. On 28 February 2022 the tribunal wrote to the school declining to set aside the consent order.

37. The school has not hitherto admitted XYZ. The local authority has been making other provision for his education, not at a school, including online tuition. A recent statement from PQR expresses her concerns that this is not meeting his needs, and about the impact on him of these arrangements.

The Grounds of Challenge and the Issues

38. The local authority's defence, and Mr Anderson's written skeleton, advanced the contention that the claim is, or will soon be, academic, because the annual EHC plan review meeting, put back from April 2023, is now due to take place on 27 July 2023. The regulations relating to reviews make different provision for cases where the child either is or is not attending a school. Because the school has been named in the current plan, but XYZ is not, in fact, attending it, the local authority has taken the view that the latter regime applies, but that it would nevertheless invite the school to attend the July review meeting.

39. The position of both the school and XYZ, albeit for different reasons, was that this does not render the claim academic. In oral argument Mr Anderson confirmed that the local authority was not seeking a postponement of the judicial review hearing, and also accepted that the framework for an annual review is not the same as that for the initial determination of the contents of section I. While this contention was not abandoned, nor did he press it. I therefore do not need to consider the detail of the relevant rules. I am satisfied that the claim is not now academic. It may or may not become so. There is no guarantee that the annual review will resolve the issues raised by this claim.

40. Turning to the substantive grounds, ground 1 challenges the local authority's decision to name the school on the basis that it (a) failed to provide requisite information for the purposes of consultation; (b) took the decision without conscientiously considering the school's response to the consultation; (c) took a decision which was irrational because it lacked an evidential basis; and/or (d) failed to consider the school's safeguarding duties.

41. Ground 2 challenges the local authority's failure to inform the tribunal of the school's opposition to the placement, in particular by providing to it a copy of its solicitors' letter of 17 January 2022.

42. Ground 3 challenges the tribunal's making of the consent order and/or the tribunal's refusal to set it aside.

43. The local authority, as well as disputing the grounds on their merits, contends that, if the challenge to the decisions of the tribunal fails, then the naming of the school pursuant to the consent order must stand, so that the challenge to the local authority's decision must also consequentially fail. Alternatively, it relies on section 31(2A) Senior Courts Act 1981, which provides (subject to section 31(2B)) that the court must refuse to grant relief if it appears to be "highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

44. The interested parties take a broadly similar stance on the merits of the challenges to the decisions of the local authority and the tribunal, and also rely alternatively on section 31 of the 1981 Act. However, Ms Hadfield said that she did not contend, as such, that, if the challenge to the tribunal's decision failed, the challenge to the local authority's decision must also necessarily fail.

Discussion and Conclusions

45. I will consider first the points of challenge raised by ground 1.

46. The first limb asserts that the local authority's consultation duty was triggered by PQR nominating the school in November 2021. In accordance with paragraph 9.80 of the code it should then have enclosed with its letter of 17 November 2021 a copy of the current version of the working draft of the EHC plan, but did not do so. The draft that it was given in 2020 did not state that XYZ had an adjustment disorder and generalised anxiety disorder, and the current draft no longer contained references to statements by XYZ's previous school about concerning behaviours. Mr Lawson submitted that, without sight of the latest version of section B, the school did not know that those references had been removed, nor what the local authority made of the additional diagnoses. That was a material breach of the consultation duty.

47. The local authority refers to the fact that the school had been sent the full plan in August 2020, and the current version of section F on 6 September 2021, and had been provided in April 2021 with the report of Dr Richard Soppitt which made the diagnoses of adjustment order and generalised anxiety disorder. Having had the earlier draft plan, the school was aware of what XYZ's previous school had said about instances of concerning behaviour. Having regard to all of that, it is submitted, there was no material failure to comply with the duty to consult. The school had all the information that it needed.

48. My observations on this strand of ground 1 are as follows.

49. In R (Moseley) v London Borough of Haringey [2014] UKSC 56; [2014] 1 WLR 3947 at [25] Lord Wilson endorsed the criteria accepted by the court in R v Brent London Borough Council ex p Gunning (1985) 84 LGR 168, as to the basic requirements of a proper consultation process. The second of these is that "the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response." What is required to fulfil that standard in the given case is highly fact and context sensitive.

50. In principle, sections B, F and I of a plan work in harness. It is the identification of the child's special educational needs which informs the identification of the provision required to meet those needs, which informs the identification of the appropriate setting in which that provision is to be made and finally the nominated provider. A school being contacted for the first time and asked whether it might be able to take a new pupil, might therefore reasonably need sight at least of all those sections of the current working draft, whether or not it would need to see every other section.

51. However, in this case the letter of 17 November 2021 was *not* the first contact the school had had with the local authority in relation to XYZ, nor with him and PQR. In August 2020 it had been provided with the then current working document. It had subsequently been provided with reports including Dr Soppitt's report, giving the additional diagnoses. Its specialist had interviewed XYZ in June 2021. It had been provided with the latest version of section F; and it had had the experience of the three-day trial, and the assessment of its own multi-disciplinary team.

52. The school therefore knew what the local authority's current assessment was, of the provision that needed to be made in order to meet XYZ's needs; it also knew that PQR (and XYZ himself) considered that the account of his behaviours at his last

school was inaccurate and unfair. It also had Dr Soppitt's report, on which PQR relied, which, in essence, opined that the behaviours observed in the last school were reactive to treatment by peers, rather than entrenched; and it had had the opportunity to assess him itself.

53. Further, while the duty was, in principle, on the local authority to provide the requisite documentation without needing to be asked, it is also noteworthy that the school had not raised any issues on the current version of section F after receiving it; nor had it asked for the latest version of section B prior to the three-day residency or completing its own assessment in October, nor after the local authority's solicitors wrote on 17 November 2021. It did not indicate that it needed this further information to be able to respond to that letter.

54. I conclude that the local authority was not in material breach of the consultation duty by failing in November to provide the complete current EHC plan. This did not mean that there could not be a meaningful consultation.

55. I turn to the second strand of ground 1. This contends that the local authority failed conscientiously to consider the school's response, before coming to its decision to name the school and to agree with PQR the terms of a consent order to enable that to be put into effect. This invokes the fourth *Gunning* criterion, which is that "the product of consultation must be conscientiously taken into account" in finalising the proposal. Mr Lawson also relied upon the stipulation in para. 9.80 of the code, that the comments of the school must be considered "very carefully" before deciding whether to name it.

56. The code is not itself a statute or a statutory instrument. However, it has been issued pursuant to section 77 of the 2014 Act, which provides that local authorities "must" have regard to it. In any event, what conscientious consideration in accordance with *Gunning* requires depends on the particular context. The context here was one in which the school would, if named, be required by law to accept XYZ as a pupil. The words of the code appear to me to capture what conscientious consideration required in that context.

57. Did the local authority meet that standard? Mr Anderson noted that the 2014 Act did not impose any duty on the local authority to give reasons to the school for its conclusion that section 39(4) was not engaged, and hence for the decision to name it. Nevertheless, as he was bound to accept, the court still needs to be satisfied by evidence that there was in fact the required conscientious consideration of the school's response to the consultation.

58. Mr Lawson noted that there was before the court no statement from any witness for the local authority, nor any internal memo or email recording the decision or the reasoning in support of it. He submitted that this was a case where the local authority's legal team was driven to construct a case as to what its reasoning *could* have been, by submission and "from various bits of mosaic" (R v Southwark LBC ex p Campisi [1999] 1 HLR 560 at 565).

59. Mr Anderson confirmed that there were no such internal records to disclose. However, he submitted that the correspondence from the local authority's solicitors, plainly written on instructions, itself showed that conscientious consideration had

been given to the school's position. This also had to be placed in the context of the evidence of the wider ongoing process in which the local authority had been, and was, engaged, in view of PQR's stance.

60. I turn, then, to consider the relevant communications in more detail.

61. The school's October 2021 report noted that on initial reading of the referral information it had had concerns about XYZ's behaviour; but PQR had then provided additional information which it accepted, and it had then agreed to proceed to the next stage of the assessment process. There was an assessment meeting in June followed by the three-day visit in September. The report then set out XYZ's educational history and needs. It described the tutor group that he had joined and set out the timetable for the three days. It then discussed what came out of the visit under various headings, giving in these sections, accounts of a number of particular incidents or episodes.

62. The concluding section of the report included the following passage:

> "It was evident across the three days that he has significant social communication difficulties which impact on his ability to integrate successfully within a peer group and a school setting. This was very apparent within our environment, where we have a socially and emotionally vulnerable school community.
>
> During and following his visit staff received a number of concerns from current students indicating their anxieties about his communication styles and behaviour. He was deemed to be overly assertive and questioning of the school rules and general expectations. Examples of this include repeatedly asking for a young person's phone number even when he had been told no and suggesting to a young person that he should get up on the roof of one of the buildings. This behaviour was then exhibited by the young person the following week.
>
> Similar concerns were also raised by staff, who acknowledged the issues [XYZ] encounters in terms of social communication but felt that these were significantly different to our current student group. It was unfortunate that his communication style had an unsettling impact on some of our current students.
>
> Whilst the individual concerns of staff and students, on their own may not be enough to make a decision not to offer a place, it was the aggregation of issues that led us to this decision.
>
> It was felt that these concerns would significantly influence [XYZ's] 'impact risk assessment' for his introduction into the school, to the point where this would not be viable from our current students' perspective.
>
> We acknowledge that [XYZ] does require specialist support to develop appropriate social skills, expected behaviours and support to understand his impact on others. However, unfortunately we do not feel that our student

> group, approach and expectations are a good match for him in which to do this."

63. The local authority's solicitors' letter of 17 November 2021 identified that PQR had now named the school, triggering section 39. It asked which part of section 39(4) the school considered applied. While noting the school's position, it indicated that the tribunal would require further information "around whether the school will be able to make available the provision in the EHCP (as amended in the Working Document) and enable [XYZ] to make appropriate progress"; and it set out a list of ten questions. It also conveyed PQR's comments, via her solicitors, that the school's assessment lacked the detail required to satisfy the tribunal not to name it and "seems to rely and focus on incidents/misunderstandings despite the fact that some of these incidents were not generated by [XYZ] and were as a result of other students who have similar needs …".

64. In its reply of 26 November 2021 the school referred specifically to its October report, and to the three days that XYZ had spent at the school with a view to its considering "whether we could meet his needs" and, to the assessment process also playing "an important role in safeguarding all young people who are currently on our school role". In relation to section 39 it referred to the school's conclusion that his attendance "would be incompatible with the provision and [*sic*] efficient education for others." It went on to refer to "hearing student voice" being an important consideration, which in this case was supported by observations of the staff, to XYZ's style of communication and ideas having "unnerved" a number of students, who felt very strongly that they would not wish to continue attending should he be admitted. It stated that our "impact risk assessment would not allow us to make provision for him".

65. The local authority's solicitors' letter of 16 December 2021 referred again to the October report and to the letter of 26 November. It set out comments from XYZ's solicitor, who confirmed that the school was the parental preference. They had also observed that the school had not stated that they could not meet XYZ's needs, and that the local authority would be aware of the PEN portraits of other children attending the school which were similar to XYZ's.

66. The letter continued that the local authority had

> "…carefully considered the points you have raised in your two aforementioned documents. The Local Authority notes your position that you have taken into account the student voice and that a number of concerns were raised supported by observations made by staff and that unfortunately [XYZ's] style of communication and the ideas he articulated unnerved a number of your current students who felt very strongly that they would not wish to continue attending school should [he] be admitted."

67. The letter continued that it did not consider that these amounted to "lawful reasons", citing the section 39(4) tests; and the "information you have presented to date is not sufficient to evidence" any of the legal grounds to refuse to name parental preference. It added: "The Local Authority considers that the points you have stated could easily be resolved by making reasonable adjustments and providing information and education to other students about past behaviours." The letter also noted that the

school "have not provided any of the information requested in our letter dated 17 November 2021."

68. The school's solicitors' letter of 17 January 2022 ran to some nine pages and 19 numbered points. They said that during the trial XYZ had exhibited behaviours more extreme than those described in the plan. They indicated that the school had not previously answered all of the specific questions raised, because, having set out their substantive position, they considered it academic. They also stated that, taking its communications together, the school had broadly identified that both limbs of section 39(4) applied.

69. They went on to give a description of the bespoke changes that the school would have to make specifically to cater for XYZ, if forced to take him, both in the classroom and in relation to his residential support. The school was being asked to become something it was not and to deploy skills it did not have. That was not reasonable. As the school had already made its decision known, it had not responded to the question about how much this would cost. Nor had it been asked for its views on the current EHCP. However, the letter gave an annual figure for funding the bespoke provision that it had set out.

70. On 25 January 2022 the local authority's solicitors replied that the consent order had been made, enclosing the final EHC plan naming the school, and stating that it would not be applying to set aside the order. They responded to the 17 January letter point by point. They noted that the school had not provided the requested information, but stated that the local authority had been able to base its decision on publicly available information (the OFSTED report, SEN Information Report and the school's published policies) as well as its own prior working with the school and knowledge of XYZ.

71. They took issue with the school's view of the severity of the behaviours it had seen. The October report had stated that XYZ had voiced an intent to carry out risky behaviours, but that he did not act on these. The local authority did not consider that the school's concerns amounted to a safeguarding concern such as to preclude XYZ's admission, and maintained that they could be resolved by reasonable adjustments and the provision of information. They did not agree that the school had previously said that it did not have the requisite skill set to support XYZ. They maintained that it had not previously indicated that XYZ would require provision in excess of the current EHC plan, nor the revised costing now set out. They had not provided any evidence in support of this. Costings and SEN profiles of the peer group had been requested in the questions in the 17 November 2021 letter but not provided.

72. My conclusions on this strand of ground 1 follow. I start with some general contextual points.

73. First, while section 39 and the formal duty to consult were only triggered by the communication from PQR of 10 November 2021, the context was, to repeat, one in which there had been considerable prior interaction and exchange of information and views between the school, PQR, XYZ and the local authority. It is also apparent from the contemporaneous emails, and the witness evidence from the claimant, that the same lead officer dealing with the school's CEO in September and October was still involved in the case. She was the person to contact identified in the 16 December letter. The school spoke to her after receiving it. It is apparent that there had been a

cordial and constructive direct channel of communication between the CEO and that lead officer, both before the residential trial, and immediately following it.

74. Secondly, the consistent theme of the communications from the school in the period from first contact in 2020, through to the aftermath of the residential trial, was the concerns about the issue of XYZ's behaviours and interactions with peers. The main theme post the three-day trial was that the school's initial concerns, which PQR had then sought to rebut and allay, had unfortunately been borne out by that trial. It was this issue which the school itself indicated drove its decision then not to offer XYZ a place.

75. The tenor of the school's evidence was that, when initially informed in the video call of its decision, following the September trial, not to offer XYZ a place, the local authority had been understanding and had not pushed back. Although the local authority's solicitors later indicated that they did not accept the school's solicitors' account of that call, I had no witness evidence from the local authority about it. However, what is clear is that at that point PQR had not yet been told of the school's decision. Indeed how best to manage imparting the news to her was discussed on the call. At this point there would have been no specific need to discuss in any detail the implications were she to maintain her position. It remained to be seen whether she would.

76. It was then PQR's decision on 10 November to formally nominating the school (among others) which plainly led directly to the letter of 17 November 2021. The school's response, in the 26 November 2021 letter, was essentially to maintain its position, and to refer back to, and repeat, what it had already said, in particular in the October report. Consistently with this, in response to the question about section 39(4), the letter of 26 November cited the wording of section 39(4)(b)(i). It appears from the evidence I have that, notwithstanding how PQR had responded, it hoped or believed that, it having firmly reiterated its position in this way, PQR, and the local authority, would now have to accept that the way forward was to look elsewhere.

77. The grounds of review, and Mr Lawson in submissions, contend that the school's stance in the 26 November letter "called out" for further investigation. The local authority's solicitors postulated in the 16 December letter that reasonable adjustments could be made, without explaining what it had in mind. It had no specific evidence about XYZ's class mates, and if not persuaded by the reply, should have made further enquiries. Mr Lawson also submitted that the 16 December letter gave an inaccurate summary of the school's position, and that the local authority's solicitors having asked what the grounds called general and mechanical questions about resources, was symptomatic of its failure to engage with the specifics of the school's case.

78. Mr Anderson submitted that the 17 November letter squarely put the school on notice that section 39 was now engaged, and what the school needed to do if, despite this, it remained opposed to admitting XYZ. It had the opportunity to provide any further information or evidence it wished. Having received that response, the local authority was not obliged to ask for more information. It had the school's account of the incidents which had informed its position, and was in a position to decide whether that showed that section 39(4) applied.

79. I come to my conclusions on this strand of the challenge. I start with two particular features of the wider circumstances and context.

80. First, as I have already noted, immediately following the residential trial, and prior to November 2021, the communications between the school and the local authority focussed on the reasons for its decision not to offer a place. But PQR's decision to nominate it meant that the question of whether it should nevertheless be named, on the basis that its concerns did not give rise to any issues that could not be satisfactorily addressed, then needed to be the subject of further dialogue between the school and the local authority.

81. Secondly, when PQR made her nomination in November, there was already a live tribunal appeal, the hearing date of which was approaching. Of course, even had there not been an appeal already on foot, the local authority's decision would still have been susceptible to an appeal by PQR if her chosen school was not named. Nevertheless, it appears to me that this context did make a difference to how matters then unfolded. Following PQR's decision, the next communication was not from the local authority's lead officer, but, for the first time, from the solicitors acting in the tribunal proceedings. It addressed the matter exclusively in the context of those proceedings.

82. I certainly accept that the 17 November 2021 letter reflected the local authority's instructions. But it did not refer to consultation, nor did it advance any proposition from the local authority, in the changed circumstances triggered by PQR, as to how the school's previously-voiced concerns could be met. The ball was put wholly into the school's court to make its case. I have no witness statement from the local authority's lead officer at the time, or any other witness from it, to explain why, for example, there was no further proactive or direct contact made by her at this point with the school's CEO, even on a twin track with the solicitors raising the matters that they set out needed to be addressed in the context of an appeal.

83. The 16 December 2021 letter, by contrast, specifically described the 8 October report and 26 November letter as "consultation responses". It also stated that the local authority had "carefully considered" the points raised in them. This appears to me to be a deliberate signalling that it had fully in mind its duty to consult. But, while these statements show that the local authority was alive to that duty when coming to its decision, the court must still decide, on the available evidence, whether it indeed fulfilled it.

84. As to its substantive content, the 16 December letter referred to the comments by PQR's solicitor, and the particular points that the school had highlighted in its 17 November letter, and it set out the local authority's view that these points could easily be resolved by making reasonable adjustments and providing information and education to other students. But it raised that suggestion for the first time, and did not explain what those adjustments might be, how they might be put into effect, nor invite any response from the school to that suggestion.

85. Similarly, while the school had not answered the list of questions or explained why not, nor had it refused to do so. This was its first response following the change of circumstances caused by the parental nomination. Consultation is a process of dialogue. I have no evidence as to whether the local authority considered asking why

the school had not replied to the questions, reflected on what information it already had, or considered raising that, apart from the requirements of the tribunal, it needed more information specifically about the profiles of peers in order to engage with the school's concerns. The 16 December 2021 letter did not adopt that approach. It merely highlighted the absence of a reply and went on to state that the decision had now been made.

86. I recognise that there was some pressure created by the impending tribunal hearing and indeed because a new term would begin in January. The school was also now the sole parental preference. But on the evidence I have, it would appear that there was still enough time for further dialogue following the school's 26 November letter, in particular on the subject of "reasonable adjustments" including what they might be, whether they might be effective, and the obvious question of what they would cost. If the local authority had something particular in mind, over and above providing information and education to other students, it could and should at least have given some indication of what it might be, so that the school could then respond.

87. Going that extra mile might or might not have led the school agreeing that it would after all admit XYZ in the new year. It would not have precluded the local authority, had the school maintained its opposition, from still taking a view as to whether that stance was defensible or not, in section 39(4) terms. In my judgment the consultation duty required that further proactive engagement before the decision was taken. I have no evidence before me to explain or show a good reason why that did not happen.

88. I do see force in the local authority's point that the school could, for its part, whether or not with the benefit of legal advice, have itself responded differently than it did to the 17 November letter. But I come back to the point that consultation requires dialogue and engagement, and the evidence before me does not demonstrate that there was a good reason why, following the 26 November letter, there could not have been more dialogue and it instead had to proceed directly to a decision.

89. I conclude that the evidence has not satisfied me that the requisite standard of conscientious consideration was met before the decision was taken.

90. I turn to the other two strands of the challenge to the local authority's decision mounted by ground 1, which I take together, being that it took a decision which was irrational, because it lacked an evidential basis, and that it failed to take into account the school's safeguarding duties.

91. Mr Lawson submitted that the evidence was "all one way". It came from the school's assessment of XYZ over three days leading to a meeting of its multi-disciplinary team. The school had concluded from this that it could not make the required provision for XYZ's needs and that his attendance would be contrary to its duties to other pupils. The local authority had no other evidence on the basis of which it could gainsay the school's position. General reliance on the prospectus and Ofsted report did not answer the particular points about XYZ. No specific reasonable adjustments were identified by the local authority. PQR had not personally witnessed the interactions with other pupils and did not have any information herself about their particular needs.

92. This challenge faces the high hurdle of *Wednesbury* unreasonableness. It does not, in my judgment, surmount it. The evidence before the court shows that the local authority was not solely reliant on the school's report and assessment arising from the three-day visit. It had other material to draw upon that was specific to XYZ, arising from its lengthy engagement with him, his mother and his case, including expert opinion, such as the report of Dr Soppitt. It had the information about the school not just that was publicly available, but also from the October report and its engagement with the school in 2020 and 2021.

93. The local authority does not appear to have doubted the school's essential factual account of the particular incidents that it described. Where it disagreed was as to the evaluation of the seriousness and manageability of such behaviours, against the benchmark of the section 39(4) test. This was an evaluative question of judgment on which the local authority was not bound to agree with the school.

94. The fact that the school considered that the behaviours could not be addressed by explaining them to other students, and that no other particular adjustment was suggested by the local authority, again does not mean that the local authority was bound to agree with the school. I cannot conclude from that, that the locally authority was bound to accept that there was no step that could reasonably be taken, which would address the school's concerns.

95. The school disagreed with Dr Soppitt's assessment of XYZ's behaviours, and the most suitable type of setting to address his needs. But that did not mean that the local authority was bound to accept the school's view of that. The fact that the school considered that a different type of placement would work better does not mean that it was not itself an appropriate placement.

96. I also do not agree that the local authority did not consider the safeguarding duty, and/or had no evidential basis to disagree with the school about it. The October report and 26 November letter both raised it, and it was not suggested (nor would it be plausible) that the local authority was unfamiliar with the legal framework in this regard. The reply of 16 December plainly conveyed the local authority's view that the risk was not of a nature or magnitude such as to give rise to an insuperable safeguarding problem.

97. These further strands of the challenge do not therefore succeed.

98. Drawing together the threads in relation to ground 1, I uphold it because I conclude that the local authority should have done more to respond to, and follow up on, the 26 November letter, before coming to its decision. I do not consider, however, that there was a material failure to provide the school with all parts of the EHC plan, nor that it was irrational for the local authority not to accept the school's case, as thus far advanced, that section 39(4) applied.

99. I turn to section 31(2A) Senior Courts Act. As has been pointed out, the "highly likely" test is a high threshold, and it requires the court to assess what might have happened on a counterfactual scenario. (See: R (Adamson) v Kirklees MBC [2019] EWHC 1129 (Admin) at [142]; R (Plan B Earth) v Secretary of State for Transport [2020 EWCA Civ 214 at [273].))

100. In this case I do have the evidence as to what was said in the further exchanges in January 2022. But that was after the local authority had taken its decision, and the parties were heading for litigation. It is not a reliable guide to how matters might have unfolded had there been further dialogue of the sort I have described, before the decision was taken. Had this been attempted, the outcome *might* have been exactly the same. I am doubtful that it would have led to the school persuading the local authority that section 39(4) demonstrably applied. But another scenario would be one in which the school agreed ultimately to take XYZ on the basis of some measure of adjustment funded by the local authority, such as to amount to a "substantially different" outcome. I therefore do not find that section 31(2A) applies.

101. Grounds 2 and 3, though directed at different defendants, both raise issues relating to the particular context of the tribunal appeal. I address two particular aspects of that context before turning to each ground specifically.

102. First, as Ms Hadfield (as well as Mr Anderson) particularly highlighted in her submissions, the statutory framework, and the respective voices and roles which Parliament has given to the parent(s), the local authority and the school in the process, and decisions of this type, is unambiguously clear. The primacy of the views of the parent (and child) is spelled out by sections 19 and 39 of the 2014 Act. Unless one of the limbs of section 39(4) applies, the local authority is obliged to comply with a parental nomination. The school does not have a right of veto, and, once named, has a statutory duty to comply.

103. Parliament has therefore specifically taken the view as a matter of policy that schools which are within the purview of section 39 may be required to take a pupil against their own preference, subject to strictly limited exceptions. Consistently with that approach, Parliament has given a right of appeal, to the specialist tribunal which stands in the local authority's shoes, to the parent but *not* to the school. The role of the school, if at all, before the tribunal, would ordinarily be confined to providing witness evidence in a contested case. It would be contrary to that policy for the school to be enabled effectively *de facto* to exercise a right of appeal to the tribunal of its own.

104. Secondly, Ms Hadfield and Mr Anderson both rightly accepted that the wording of rule 29 of the 2008 Rules, empowering the tribunal to make a consent order, only if it considers it "appropriate", and the relevant authorities, make clear that the tribunal is not just a rubber stamp. Nevertheless, the fact the parties are agreed is plainly a central consideration, particularly in a forum where the original adjudicator is also one of the parties to the appeal. The nature of the task is also different from the task of adjudicating a disputed application following a contested hearing. The rule also unsurprisingly provides that the tribunal does not have to hold a hearing before making a consent order (though it might). It also, perhaps more strikingly, provides that it does not have to provide reasons for doing so.

105. I turn then to ground 2. This asserts that the local authority wrongly failed to draw to the attention of the tribunal the school's solicitor's letter of 17 January 2022. Mr Lawson submitted that it was plainly a relevant consideration that the school opposed the nomination. He referred to the overriding objective, and to R (JF) v Croydon [2006] EWHC 2368 (Admin) in which it was said that a local authority has a duty, in

such proceedings, to place all its cards on the table. It should therefore have given the tribunal the letter.

106. Mr Anderson submitted that the school was not entitled to rely on the local authority to convey its position to the tribunal, and could have done so itself. In any event the local authority did not in fact take any positive decision not to do so. Further in any event, it had already placed the October report, which set out the school's opposition to admitting XYZ, in the tribunal's bundle. The present case was in no way analogous to JF v Croydon, a case in which misleading information had been given to the tribunal.

107. I can state my conclusion on this ground shortly. That is because I am not satisfied on the evidence before me that there was a specific decision taken by the local authority not to place the 17 January letter before the tribunal ahead of receipt of the consent order. There is no express evidence that it refused to do so, nor that it was deliberately slow to act. I was not asked to draw such an inference, nor, given in particular the short time intervals, could I do so. As I do not find that there was a deliberate act or omission the ground must fail.

108. I turn to ground 3, being the challenge to the consent order, and to the tribunal's response to the school's letter of 1 February 2022.

109. As I will describe, because ground 1 has been allowed it is necessary consequentially to set the consent order aside. But I would not otherwise have disturbed it. The parties were in agreement and both were professionally represented. In the wider context of this particular statutory regime, the tribunal did not err by not concluding that the fact that (as evidenced by the October report) the school had declined to offer XYZ a place meant that it was not appropriate to make the consent order.

110. I turn to the challenge to the tribunal's 28 February 2022 response to the 1 February letter. I need first to say more about the content of both letters.

111. The school's solicitor's letter of 1 February opened by submitting that "the interests of justice demand that the Tribunal on its own motion set aside" the consent order. It then set out its reasons, including that the local authority had failed to exercise its duty of candour, and that its decision to name the school was "unreasonable unlawful and irrational". It gave a detailed account of how events had unfolded from September, including of the correspondence of November, December and January. It set out further arguments, including summarising the points raised in the 17 January letter to the local authority. It submitted that "section 39(4)(a)(b)(i) and (ii) ought to have been considered to have applied." It concluding by inviting the tribunal to set the consent order aside "if possible within the next 3 days".

112. The reply of 28 February came from the Deputy Chamber President. After noting why there had been a delay in the letter reaching her, she made a number of points. Neither party had applied for the consent order to be set aside, and the school had not applied to be made a party. As to the tribunal setting aside the order of its own motion, she observed that the submissions made assumed that it would reach the same conclusion on the evidence as the school, being that it should not be named. She continued and concluded:

> "The grounds upon which you seek to encourage the use of that power strays into a contested issue, which the parties do not support. In those circumstances, it would be necessary for the Tribunal to reopen the proceedings in order to consider setting aside the order. This does not appear to be a proportionate approach given that the parties to the proceedings are content with the current position.
>
> The Tribunal will not therefore exercise its power to set aside the consent order. That was the final order in the appeal and the proceedings are now concluded.
>
> Your client's remedies lie against the Local Authority and not against the Tribunal, since the Local Authority have made and maintain the Education Health and Care Plan and would be responsible for any amendments to it."

113. Mr Lawson submitted that this was a case where the regulation 45(2) condition was met, at least because a relevant document – the 17 January letter – was not sent to the tribunal. Further, the school had *not* made the assumption that the tribunal would agree with the school. The issue was whether its letter was relevant or whether ignorance of it was a source of unfairness: A v Kirklees MBC [2001] EWCA Civ 582; [2001] ELR 657 at [20]. The tribunal's reply did not assert that its position was immaterial; and it could not rightly be viewed as disproportionate to consider material information. This would not necessarily involve the need to hold a hearing. Nor was it sufficient to point to the remedy available against the local authority. It was necessary for the school, in order to challenge the local authority's decision, also to challenge the order which gave effect to it.

114. I am not persuaded by the challenge to this decision. My reasons follow.

115. First, this was the exercise of a judicial discretion involving an evaluative judgment, and it was, moreover, the decision of the specialist tribunal in the field, and indeed of the Deputy Chamber President. Those features do not make the decision immune from challenge, but they are reason for the court to be particularly circumspect about the invitation to interfere.

116. Secondly, in the context of the regime that I have described, it was entirely proper for the judge to highlight that it was clear that neither party was seeking for the consent order to be set aside and to attach considerable weight to that.

117. Thirdly, the school's request was, in terms, for the consent order to be set aside. It was not merely arguing that the order needed to be reviewed, revoked, and the decision whether or not to grant it taken afresh. The whole thrust of its application was that, in light of the points made, there was only one correct and proper outcome, which was that the school should not be named in the plan. In light of that, the judge's observation about the assumption made by the submissions appears to me to have been a fair one.

118. Fourthly, the judge did not err by saying that it would be necessary for the tribunal to reopen the proceedings in order to consider setting aside the order, whether or not that would have necessitated a hearing. The judge correctly observed that at present the proceedings had been concluded by the order.

119. Fifthly, a central plank of the school's application was that the local authority was at fault for not bringing its letter of 17 January to the tribunal's attention before the consent order was made. However, the school's letter of 1 February set out its case at some length. The judge had it before her.

120. Finally, given the overall regime that I have described, the judge's concluding observations were not out of place.

Outcome

121. I come, finally, to the interaction of my conclusions on the three grounds, and the overall outcome.

122. I do not agree with Mr Anderson that the failure of ground 3 means that the challenge to the local authority's decision must fail. While the tribunal was not wrong, as such, to grant the consent order, nor to refuse the 1 February application, the local authority's decision to seek the order, in the circumstances and at the point when it did, was itself wrong; and the order was a necessary part of the mechanism of implementation of that decision.

123. I will therefore grant the application for judicial review in respect of the local authority's decision to name the school, and quash it, and, consequentially, will grant the application in respect of the consent order and quash it.

124. This means that (a) the parties must now pick up and complete the consultation process, which plainly is more urgent than ever; (b) the decision as to whether or not to name the school must then be taken afresh; and (c) the tribunal proceedings revive.