# No ‘best endeavours’ defence to failure to secure special educational provision (R (BA) v Nottinghamshire County Council)

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**Local Government analysis: A High Court ruling about the nature of the duty on a local authority, imposed by section 42 of the Children and Families Act 2014 (CFA 2014), to ‘secure’ the special educational provision in an Education, Health and Care Plan (EHC Plan) maintained by that authority. Written by Hannah Lynch, barrister, St Pauls Chambers.**

*BA, R (on the application of) v Nottinghamshire County Council [2021] EWHC 1348 (Admin)*

## What are the practical implications of this case?

This case demonstrates that local authorities are vulnerable to judicial review challenge where they have not secured the special educational provision in an EHC Plan since it was issued, even in circumstances where a local authority has been working to secure that provision, but not yet succeeded in securing all of it.

This case makes clear that the five weeks allowed for by the Special Educational Needs and Disability Regulations 2014, SI 2014/1530, for an amended EHC Plan to be issued after a decision of the First-Tier Tribunal (SEND), is ‘to allow preparation for implementation’ of the provision specified in section F, as well as simply to make the amendments to sections B and F and re-issue the Plan. Lengthy delays beyond this five-week period, in securing the provision listed as necessary in section F of a child’s EHC Plan, will be considered a failure by a local authority to meet its duties under CFA 2014, s 42.

## What was the background?

### Factual background

BA, a ten-year-old child with a rare metabolic degenerative condition, was in receipt of an EHC Plan issued by the defendant local authority. The version of the EHC Plan at issue was the one dated 14 May 2020, which was issued following a tribunal decision of 28 February 2020.

BA’s father and litigation friend PA brought a claim for judicial review against the local authority, on the grounds that it had failed to secure the provision in section F of BA’s EHC Plan, since it was issued. PA sought mandatory and declaratory relief in respect of these alleged failings.

The local authority’s case was that it had used all best endeavours to arrange the provision in section F. That which had not been secured for a lengthy period was, in the main, highly specialist therapeutic provision which could not be delivered by local NHS therapy teams and had to be separately commissioned. The local authority submitted that difficulties caused by the coronavirus (COVID-19) pandemic and various national lockdowns had prevented it from securing some of the provision in section F more quickly. The factual situation was an evolving one, but as at the date of the hearing the local authority’s case was that it had ‘secured’ all the provision in section F, within the meaning of CFA 2014, s 42. Or that, if any was still not in place, it would shortly be so and therefore that mandatory orders were unnecessary.

### Issues before the court

- whether all the provision in section F had, in fact, been arranged by the date of the hearing of the claim for judicial review
- the effect of the coronavirus pandemic and the various lockdowns on the local authority’s obligations and its ability to ‘secure’ the necessary provision
- whether it could be said there had been a failure to comply with CFA 2014, s 42 in these circumstances

- whether a mandatory order was necessary, given that the local authority was attempting to arrange any provision not yet in place

**What did the court decide?**

The duty on local authorities under CFA 2014, s 42 is an absolute and non-delegable duty. There is no 'best endeavours' defence—*R (on the application of N) v North Tyneside Borough Council* [2010] EWCA Civ 135 applied (para [27]).

The emergency coronavirus legislation meant that, between 1 May 2020–31 July 2020, there was only a 'reasonable endeavours' duty on the defendant local authority. However, that period of time was relatively short-lived and did not affect the decision that the court had to make at the time of the judicial review claim (para [27]).

The defendant had not implemented all the provision in section F—there were some elements that still could not be described as having been 'secured' (para [35]).

Even if the defendant were entitled to a reasonable time to implement the provision and even in the context of a pandemic, the delays in this case (of up to a year) were not a reasonable period of time. The five-week period built into the statutory scheme is to allow preparation for implementation, and the bulk of the programme at least should have been in place within that five-week period (para [37]).

On the facts, the impact of the pandemic on the defendant's ability to secure the provision in BA's EHC Plan was quite limited (para [37]).

It was held necessary to make a mandatory order but, accepting that the implementation of the outstanding provision in section F was 'in train', the effect of the mandatory order would be deferred for four weeks, by which time the provision in section F must be implemented in full (para [38]).

The local authority was ordered to pay the claimant's costs, to be the subject of detailed assessment if not agreed.

**Case details:**

- Court: Administrative Court, Queen's Bench Division, High Court of Justice
- Judge: Her Honour Judge Coe QC (sitting as a judge of the High Court)
- Date of judgment: 20 May 2021

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