

Securing SEND Provision in the context of stretched local authority budgets

By [Jim Hirschmann](#)

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1. Local Authorities are struggling to balance budgets. In some areas, discretionary funding is being cut. Mandatory spending is, with increasing publicity, not achieving compliance with mandatory legal duties. A recent BBC Article set out the following picture:

“The debt mountain at UK councils has reached staggering levels, posing a risk to local services, the Public Accounts Committee has said.

BBC analysis shows UK councils owe a combined £97.8bn to lenders, equivalent to around £1,400 per person.

[...]

A total of 38 councils (10%) had no borrowing at all - but at Woking the debt figure was nearly £19,000 per person, the highest in the country.”¹

2. Duties to children with Special Educational Needs and Disability are often not being met and the explanation given for this is often a shortage of necessary staff or placement. In this article I will cover the following:
 - a. What is the law where a mandatory duty applies but a public body fails to discharge it?

¹ ‘Councils in crisis: Town Hall debt levels staggering, MPs warn’ (BBC, 16th January 2024), <<https://www.bbc.co.uk/news/uk-67707156>> accessed 11th February 2024.

- b. Illustrations from the Local Government and Social Care Ombudsman;
- c. Conclusion.

What is the law where a mandatory duty applies but a public body fails to discharge it?

3. Where a mandatory duty has been imposed on a public body by Parliament it must be taken to be the case that the public body has the resources available to comply with that duty – see *R. (on the application of Imam) v Croydon LBC* [2023] UKSC 45 (“***Imam v Croydon***”) at §59.
4. As was stated in *Imam v Croydon* at §53-§54, where a mandatory duty is breached, the onus is upon the offending authority to provide “a detailed explanation of the situation in which it finds itself and why this would make it impossible to comply with an order” and the test is an objective one for the Court.
5. A mandatory duty must be complied with unless it is impossible. In *Imam v Croydon* at §45 (considering *Re The Bristol and North Somerset Railway Co* (1877) 3 QBD 10) the Supreme Court reminded itself that “where a court issues a mandatory order, that order produces legal consequences of its own over and above those inherent in the underlying statutory duty: the order does not simply replicate the effect of the underlying duty. It is appropriate that, when deciding whether to issue a mandatory order, the court should consider whether it is right to create those additional effects in all the circumstances of the case as it presents itself to the court.” At §66-§70 the Supreme Court set out that when considering whether to grant a mandatory remedy that it is relevant for the Court to consider (1) the budgetary means open to the offending authority (2) the length of notice to the offending authority (3) the impact on the individual concerned (4) the extent to which the offending authority is trying to rectify the breach (5) the impact of the Court’s exercise of a mandamus order upon others.
6. Serial breaches of a mandatory duty may be indicative of an unlawful system. *R. (on the application of W) v Hertfordshire CC* [2023] EWHC 3138 (Admin) concerned a failure of a local authority to complete an assessment within 20 weeks of agreeing to do so (as is required by regulation 2 of the Special Educational Needs and Disability Regulations

2014). In that case, the Judge (David Lock KC) noted that Claimants may wish to challenge the legality of systems adopted by public bodies where it is leading to serial non-compliance with legal duties. He set out that:

- a. the background to this case was an acceptance by the Local Authority that it had *“made an erroneous decision in 86% of cases”* in 2021/2022 (§11).
- b. That an argument that the wider system operated by the Local Authority would *“involve an examination as to exactly how the Local Authority took decisions when requests were made by parents and, having examined the basis for decision making, would examine whether that process led to any significant risk of unlawfulness applying cases such as R (A) v Secretary of State for the Home Department, [2021] UKSC 37 and R (BF (Eritrea) v Secretary of State for the Home Department [2021] UKSC 38.”* (§25).
- c. At §37 the Judge adjourned *“the remainder of this judicial review claim for 28 days to allow the Claimant to seek advice, if he is so minded. If he wishes to advance the wider, systemic case, he should file an Amended Statement of Facts and Grounds which sets out that case clearly and explains precisely the way in which he contends the Local Authority is acting unlawfully”*.

The Local Government and Social Care Ombudsman

7. The Local Government and Social Care Ombudsman has recently published a spate of reports recommending financial compensation to families who have not received the entitlement that the law prescribes. Examples sent in the Local Government and Social Care Ombudsman’s weekly update on the 8th February 2024 included the following (I have selected four which may be of particular interest to the reader):

[Cheshire West & Chester Council \(23 001 455\)](#)

Summary: Mrs X complained the Council failed to provide alternative education to her child, C, when she was unable to attend school due to health reasons. The Council was at fault because it failed to consider its statutory duty to provide alternative education, and this caused uncertainty and distress to Mrs X and to C. To remedy their

injustice, the Council will review the education C is receiving, apologise, pay Mrs X £2350 and review the relevant policy and process.

Hertfordshire County Council (22 009 530)

Summary: Mrs X complained about the Council's actions in relation to her child's, Y, Education, Health and Care Plan (EHC Plan) and how it managed her complaint. The Council was at fault. It failed to provide some provision as outlined in Y's EHC Plan. The Council has agreed to apologise to Mrs X and pay her £900 for some of the provision Y lost and for the frustration and uncertainty it caused to her. The Council was also at fault for poorly communicating with Mrs X in relation to her request for mediation and how it managed her complaint. The Council has already offered Mrs X a personal remedy and has made a service improvement. This was appropriate. The Council will also review with staff its complaints procedure to prevent a recurrence of fault.

Somerset Council (23 006 226)

Summary: There was fault by the Council. The Council did not provide weekly skills sessions named in an Education, Health and Care plan. The Council also did not provide a member of college staff for speech and language sessions. The Council's agreement to pay to make up for the lost sessions remedies the injustice.

Suffolk County Council (23 006 191)

Summary: Mrs B complained about excessive delay by the Council in issuing a final EHC plan for her son C following a needs assessment and in producing an amended EHC plan following an annual review. It also failed to properly investigate the matter when responding to Mrs B's complaint. We have found fault causing injustice to Mrs B and C. The Council has agreed to pay Mrs B £500 for herself, and £1250 for the benefit of C's education, in addition to completing the annual review process. The Council has also agreed to improve its procedures for the future.

8. These examples indicate that the Local Government and Social Care Ombudsman can be a powerful means of redress including, on occasion, awards for "*frustration and distress*"

that are not typically available through the Courts (as a general rule breach of statutory duty does not entitle a Claimant to financial compensation or damages).

Conclusion

9. Where genuine operational difficulties make it impossible for a public body to comply with a legal duty it should take all urgent steps that it can to resolve those operational difficulties. It should communicate the steps it is taking to prospective Claimants.

10. In the vast majority of occasions, informal resolution through open dialogue should be possible and tends to be preferable to legal action for all involved. However, where an impasse has been reached then legal action may be required.

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Jim Hirschmann

Barrister
3PB

020 7583 8055

Jim.hirschmann@3pb.co.uk

3pb.co.uk