Neutral Citation Number: [2019] EWHC 943 (Admin)

Case No: CO/1994/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 April 2019

Before :

THE HONOURABLE MR JUSTICE SUPPERSTONE

- -

Between :

THE QUEEN **on the application of AD** **(by his mother and litigation friend LH) and Others**	**Claimants**
- and -	
LONDON BOROUGH OF HACKNEY	**Defendant**

- -
- -

Stephen Broach and Khatija Hafesji (instructed by **Irwin Mitchell LLP**) for the **Claimants**
Jonathan Auburn and Peter Lockley (instructed by **LB Hackney**) for the **Defendant**

Hearing dates: 31 October and 1 & 2 November 2018

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Approved Judgment

Mr Justice Supperstone :

Introduction

1. The Claimants attend mainstream schools within the London Borough of Hackney. They are all children who have special educational needs and disabilities ("SEND"). They challenge two policies operated by the Defendant local authority ("the Council") in relation to the provision required to meet their additional needs.

2. The first policy, referred to as the "Resource Levels policy", governs the way the Council funds schools to deliver the special educational provision ("SEP") specified in Section F of the Education, Health and Care Plans ("EHC Plans") it makes and maintains. By this policy the Council distributes the additional "top-up" element of this funding through five banded resource levels rather than, as the Claimants contend it should, by reference to the individualised cost of the provision specified in EHC Plans. In the alternative, if the Council is entitled to operate its Resource Levels policy, the Claimants challenge the decision of the Council made in February 2018 to reduce the value of the Resource Levels by 5% for the 2018-19 financial year ("the 5% reduction").

3. The second policy, referred to as "the Plan Format policy", is, the Claimants contend, one of "referencing" the special educational provision in Section F of EHC Plans to the outcomes in Section E, rather than to the educational needs identified in Section B. The outcome of this is, it is said, that there are needs in EHC Plans which are not matched by appropriate provision.

4. The Claimants contend that these policies are in breach of the Council's duty under s.42 of the Children and Families Act 2014 ("CFA 2014") to secure provision to meet the needs of children with SEND, and breach other statutory duties, duties of consultation and the public sector equality duty ("PSED").

5. On 2 July 2018 Lang J granted permission.

6. At the conclusion of the hearing on 2 November 2018 I directed that the parties may make written submissions dealing with the impact on the present claim of the decision of the then reserved decision of the Divisional Court (Sharp LJ and McGowan J) in *R (Hollow and ors) v Surrey County Council* ("*Surrey*"). The *Surrey* decision was handed down on 15 March 2019 ([2019] EWHC 618 (Admin)). Pursuant to my directions, I have received further written submissions from the parties.

Factual Background

7. Mr Andrew Lee, Assistant Director of Education Services at the Council, describes in his first witness statement (at paras 4-40) the overall structure of central government funding for both maintained schools and academies and the specific structure of funding for children with SEN. He describes how most children with SEN do not have an EHC Plan and their needs are met using up to £6,000 of "notional SEN" budget per pupil, also known as "Element 2 funding". This per-pupil amount is set nationally and schools are allocated an "additional needs budget" (from which £6,000 of "notional SEN" funding is drawn for all children with SEN), based on specific indicators of need in their area. Most SEN children's needs can be met by spending considerably less than

£6,000 and as a result schools have a degree of flexibility on their overall SEN spending. For children with EHC Plans, the school still contributes £6,000 of "notional SEN" funding, but this is supplemented by "top-up" or "Element 3" funding. For children in mainstream schools, top-up funding is available at one of five pre-set Resource Levels.

8. Mr Lee states (at para 10):

> "The fourth block of funding from the DSG is the High Needs Block. It is from the High Needs Block that the local authority funds that 'top up' or 'Element 3' funding that is allocated to individual pupils who have been assessed as requiring an EHCP. The High Needs block allocation to the local authority covers a wider range of responsibilities and spending than simply the top up (Element 3). In broad terms the Council allocates the funding to (1) Support Services – money that is spent on providing services to pupils, parents or schools and (2) Provision Budgets – money that is allocated to schools and settings (in this case, mainstream schools) to support provision for individual SEND pupils with ECHPs. …"

The "Support Services" budget includes Speech and Language Therapy ("SaLT") Service. This is the only element of SEN provision that is directly commissioned by the Council. It also includes (1) SEN Pupil Access to Learning. This is the equipment budget used to purchase specialist/individualised equipment required to allow a pupil to access the curriculum. (2) SEN Administration Team; and (3) Educational Psychology (EP) Service. The service in the main provides the statutory EP advice as part of the ECHP process and is also commissioned by schools for specific pieces of work (see Mr Lee's witness statement at para 11).

9. Mr Lee continues (at para 20):

> "In addition to the five resource levels, it is possible for additional funding above level 5, to be made available in exceptional cases to children who require it on an individual basis in mainstream schools. Fundamentally, the Council's obligation is to fund whatever provision is required to meet a child's needs as assessed in the EHCP. Where additional funding is required to achieve this, we provide it."

10. Mr Lee states that in the ten years he has been involved in the administration of SEND funding he believes that the majority of local authorities use some form of banding to allocate funds to schools (para 25). In his view the approach of costing individual provision would not be workable in practice (para 26). His statement continues:

> "29. To my knowledge the Council has never set its SEND budget each year by aggregating the exact, unique cost of each child's EHC Plan provision. I very much doubt this would be possible administratively. There are approximately some 1,850 young people with EHCPs at present in Hackney. It would simply be unworkable for the Council (and the settings) to keep

> track of its budget if it were required, in effect, to cost every single item of provision in each of these, as well as the variations to costs that would constantly arise as circumstances changed.
>
> 30. An approach of individually costing each element of Section F, according the individual and variable costs that each school or setting might dictate, would in reality impose a level of administrative burden which I do not think Hackney could cope with. I think most local authorities would find themselves in the same position. The construction of an individual and detailed costed plan for every child that is eventually assessed as needing a plan would engage both school staff and local authority staff to an extremely high degree, especially given that this would then be subject to annual (or more frequent) review. …"

11. Mr Lee states that additional funding is made available if a child's needs are not being met. He states (at para 39):

> "It is not the case that the banded approach leads to the under-funding of SEND provision. A child can move to a higher band, can have individual items of provision funded separately from the Resource Level funding if this is thought appropriate, or be awarded additional money above Level 5 funding where appropriate. The annual review process offers a regular opportunity for EHCPs to be reviewed in conjunction with parents and schools. This offers an opportunity for any concerns and issues to be raised and be addressed. In practice it is schools who raise issues when they think a resource level needs to change for a child. I know that this happened in respect of one of the claimants (AC), whose funding was increased to resource level 5 with effect from 10 March 2017 at the request of his school, following an Annual Review…"

12. At paragraphs 41-54 of his witness statement Mr Lee deals with the issue of costs pressures on High Needs funding in Hackney. Since 2014/15 the funding allocated by central government to the Council under the High Needs Block has remained virtually flat in absolute terms, and so has been eroded in real terms. He states (at para 43):

> "The fact that the Council has exceeded its budget in this way demonstrates that, contrary to the impression given by the Claimants, it is not operating within a fixed budget in relation to top-up funding for children and young people with EHCPs. Quite the opposite: it is spending what is necessary to make provision for the needs identified in all the EHCPs for children and young people in its area, and far exceeding its provision budget in the process. Irrespective of the budget pressures, the Council like every other public body has a duty to achieve value for money in spending public funds. The current level of budget pressure in SEND provision is not sustainable in the long term. The Council is therefore seeking to find efficiencies across the education service as a whole. As a part of that, and consistent

> with the requirement to meet identified needs in full, a review of spending for SEND provision was undertaken. While this was clearly prompted by budget pressure, nevertheless, the decision-making is determined by needs and not be seeking to constrain spend to an overall budgetary limit for provision."

13. At paragraphs 55-66 of his witness statement, Mr Lee deals with the 5% reduction in the Resource Level bandings. He states, so far as is material:

> "55. Against this background of severe and continuing cost pressures, in 2016 Finance and SEND officers undertook to analyse what savings could potentially be made from within the SEN budget, whilst still complying with our legal obligations. Working with Frank O'Donoghue, the Council's Head of Business Services, a range of possible scenarios were identified including those for reductions in the element 3 Resource Levels. The latter ranged from reductions of 30% to 5%. For each of these reductions, we modelled the % reduction in total SEN funding for each pupil (bearing in mind that there was no proposal to reduce element 2 funding), the impact on the total funding available to each school in the borough, as well as the likely saving to the SEN provision budget.
>
> 56. These scenarios and other options for reducing spend were extensively discussed within a series of operational working groups and at SLT meetings, during 2016 and 2017. Although these meetings and discussions were not formally minuted, I was present at many of them and I can recall the nature of the discussions, the conclusions of which are set… out below. It was our judgment that it was possible for Hackney's schools to absorb a funding reduction at this level without reducing or putting at risk the special educational provision of individual children.
>
> 57. Due to the scale of the costs pressures on SEND budgets, there was a desire to achieve the highest possible savings consistent with our legal obligations. It quickly became clear that higher levels of reduction that had been modelled would have a material impact on schools' ability to make adequate provision for pupils with EHCPs. However, the Council considered that a reduction of 5% could be absorbed by schools making efficiencies, without compromising the special educational provision of individual children.
>
> 58. One factor contributing to our view that a reduction of 5% (to element 3 only) was within the capacity of schools, is that schools have considerable operational flexibility in their day-to-day use of resources in making the correct provision for pupils in a class, or in a whole school setting. We felt that a 5% reduction to the element 3 funding band could be absorbed through efficiency, without compromising the special

educational provision of individual children. The provision made for a pupil with an EHCP in a mainstream school is not made in isolation from the rest of the staff or school, where personnel and resources are routinely switched or deployed between pupils, groups of pupils or classes. In this context, a funding change of between £249 and £833 for a pupil over the course of a year is in our view manageable. The lower sum of £250 for example might be equated to a day of cover for a teacher, and given the ability of schools to deploy staff internally to cover or provide support from a workforce of say 60-plus staff members, is both management and routine. There are many other day-to-day decisions on the deployment of staff and the use of resources through which this can be managed.

59. A second factor contributing to our judgment that the special educational provision for individual children could be maintained with a 5% reduction in Resource Levels was that the reduction in the overall funding available for an individual child arising from a 5% cut to the element 3 funding was lower than 5% in practice. It is in fact the range of 2.3-3.7%. This is because element 2 remained unchanged at £6,000. …

60. A third factor contributing to our view that a 5% reduction would not put at risk the special educational provision of any individual children was that the reduction would not be applied immediately to provision under existing EHCPs. Rather, the changes to the Resource Level amounts would be implemented at the point of the child's next Annual Review. Since the Annual Review is a vehicle for reviewing needs, provision and resourcing, it provides an opportunity for the local authority to consider what the right Resource Level is for the child that year. …

61. A fourth factor contributing to the Council's view that the 5% reduction was manageable for schools without putting at risk the special educational provision of individual children, was because it resulted in only a very small % reduction in the schools' overall budgets. I analysed the figures for every school in the borough… In most cases the reductions were in the region of a few thousand pounds per school with the two outlier schools receiving reductions of £20,000 (for a very large secondary school) and £499 (for a small primary school). This is in the context of overall budgets of a few million pounds for each school. Very roughly then, the impact on each school's total budget was in the region of 0.1%. …

64. Finally, the Council took account of the fact that the proposal was put to the Schools Forum for consultation in October 2017. Members of the Forum probed the proposal at a meeting on 8 November 2017. They asked questions about how it would work in practice. But they did not object to it. …

…

The Schools Forum

67. The Schools Forum is a representative body made up of Head Teachers and Chairs of Governors from schools in all education sectors, as well as a union representative. Its members are highly experienced in the governance and funding of schools and are able to provide expert advice and assistance to the Council in the often highly technical area of school funding. On some matters the Forum takes decisions on proposals put to it by the Council. On other matters its role is advisory.

…

69. Local authorities are required to consult Schools Forums on financial issues relating to arrangements for pupils with special educational needs, including the *arrangements* for paying top-up funding. The Council sought the views of Forum members on the proposed 5% reductions. A report was sent to Forum members in October 2017, enclosing a report for consideration at a meeting on 8 November 201[7]… At the meeting, there was a robust discussion during which Forum members probed Council members (including myself) about the practical implications of the proposal. This can be seen from the minutes. Forum members commented in general terms that a reduction in overall school funding would lead to a reduction in services. That was clearly a concern: that some services would be diminished. However, the Forum was not saying that the special educational provision in children's Plans would not be met. The outcome of the discussion was in fact that the Forum 'noted and received' the report.

70. Whilst formally the Forum's function is an advisory one, it is able to and sometimes does register an objection where it has serious concerns about a proposal put to it. Had the Forum chosen to do so in this case, I have no doubt that we would have reconsidered the 5% element 3 reduction.

Impact Assessment

71. The whole process that I have described above of assessing the effect of various proposed levels of reduction was a process of assessing potential impact. I did not carry out a more formal equality impact assessment of the 5% reduction. This is because I was constrained, throughout the process, by the fact that the Council is under an absolute obligation to make provision for identified need. I was well aware of that constraint. As a result, the whole purpose of the analysis that I carried out was to determine what level of reduction, if any, could be made while respecting this obligation – that is to say, while ensuring that

> children with SEN still had their special educational provision in their Plan provided to them. In doing so I had regard throughout the process to the need to eliminate discrimination against disabled children and young people and advancing equality of opportunity between disabled and non-disabled pupils. This was inherent in the exercise I was conducting, which was designed to ensure that children with SEN continued to receive the provision that meets their needs."

14. On 20 February 2018 the Mayor and Deputy Mayor wrote to "Parents, Carers and Activists" stating, so far as is relevant:

> "Please find below the responses to the formal questions that you raised with us last month.
>
> **11. With regard to the 5% cut to funding for EHC plans from April 2018, how was this decision made and who was consulted (beyond the Schools forum)?**
>
> The 5% reduction in the value of the top-up (element 3) of the plan i.e. the existing Resource Level from April 2018 was arrived at through a practical exercise balancing the need to work within a budget, with the need to ensure individual provision could continue to be provided with as little impact as possible on provision.
>
> There has been no reduction on element 1 or 2 of the funding for pupils with a plan, meaning the overall impact on funding per pupil is much less than 5% and as such is considered to be within the scope of efficiencies a school can make without undue impact on provision in the school. Ideally, we would of course prefer not to be making reductions to funding levels but experience has shown that where this is unavoidable, a reduction to school funding at this level made consistently cross the board, creates much less turbulence and inconsistency in the system and the provision of support to pupils than other options.
>
> The local authority is responsible to making decisions on funding formulae and values and is required to consult Schools Forum. The authority has followed this process in respect of this decision.
>
> **12. Were schools asked to provide information on the likely impact of this 5% cut?**
>
> Schools were not asked to provide information, and to clarify, this is not a cut of 5% to the school budget. There is an element of variation in funding pupil values for all schools each year.
>
> In respect of a child with a plan, the element 1 funding (all pupils) may vary in value for the school from year to year as a

> result of a variety of formula factors linked to the pupil profile of the school. For element 2 of the plan, the school funding for what is termed 'notional' SEN may also vary in value from year to year. For element 3 of the plan, this will also be varied this year by 5%, and in practice for a child funded at resource level 2 in primary this would have an impact on the three elements together. The value of the school budget allocation including the value of elements 1, 2 and 3 are issued to schools in January/February each year and schools are responsible for planning accordingly."

15. The factual background in relation to each claimant is set out in the witness statement of their litigation friends. The background to the claim is provided in the first witness statement of Ms Gillian Doherty, one of the lead campaigners who has been supporting the parents. The views of the litigation friends are summarised in the Claimants' grounds and statement of facts relied on as follows:

> "10. … Their litigation friends share concerns that:
>
> a. Needs set out in Section B of their EHC Plans are not all matched by provision in Section F; and
>
> b. Such provision as is specified in Section F is not always being arranged.
>
> 11. The litigation friends share the view that the problem in their own cases are not a result of individual errors in decision making but stem in large part from the policies challenged in these proceedings. For example, the First Claimant's mother states:
>
> '*It is astonishing to me that the Council would reduce the SEN budget for [AD] and other children by 5% when provision is already so poor. In addition, it seems to me that setting banding levels within which children are categorised and then allocated a pre-determined amount of funding does not allow provision to be made in a way which reflects each child's needs. I am concerned that the way the Council determines what provision is given to [AD] is influenced by these "Resource Levels", rather than determined solely on the basis of the needs that he actually has.'*
>
> ...
>
> 17. ... for a child with the most complex needs attracting 'Level 5' funding, the 5% reduction has led to their school having over £1,000 less per child per annum to implement Section F of their EHC Plan."

16. In her witness statement the First Claimant's mother states:

> "15. … the new format of Hackney's EHC plans combines sections E and F so that provision (section F) is identified against outcomes (section E). The effect of this is that several of [the First Claimant's] specific needs, which are identified in section B of the EHC plan, are not given corresponding provision. Because of the combination of sections E and F, provision is only stipulated for those needs which are transposed into 'outcomes'. In [his] plan, the following needs are listed in section B and have no corresponding provision in section F.
>
> [his needs are set out]
>
> I have worked out that these needs had no corresponding provision in [his] EHC plan by considering the needs in section B against provision in section F. This was not a straightforward task as in the new format plan section E (outcomes) appears in the left-hand column of the table, and section F (provision) in the right hand column. The provisions set out in the right hand column corresponds directly to the outcomes and '*steps towards the outcomes*' in the left-hand column, even though it is misleadingly titled '*Special educational provision to meet the needs in Section B'*. I feel strongly that it should not be so difficult to tell from [his] plan whether or not provision has been stipulated for all his needs.
>
> …
>
> 17. Even where provision is identified in section F of his EHC plan, I do not believe that [he] is receiving all of it. …
>
> There is a general lack of transparency about what SEN support [he] is receiving, and I cannot be sure that [he] is receiving the other types of provision stipulated in section F, for instance his 9 hours of indirect speech and language therapist (SaLT) and 12 hours direct SaLT input."

17. There are various other witness statements from mothers and relatives of other Claimants dealing with their individual needs and their concerns.

18. Ms Norma Hewins, headteacher at Jubilee Primary School, which has 15 children with EHC plans out of a total number of just over 440 children in the school, comments in her witness statement on Mr Lee's statement that the approach of costing individual provision would not be workable in practice. She disagrees with this statement. She states:

> "4. … In my experience, schools alongside parents, carers and other professionals are able to assess a child's needs and to identify the provisions required to meet the children's needs and its costs. We undertake such exercises already and create provision maps for each child. It is something we are used to doing, and it does not create an overly burdensome system."

Ms Hewins continues (at para 7):

> "Mr Lee also states that the Council considers that a reduction of 5% could be absorbed by schools making efficiencies, without compromising the special educational needs of children. However, Jubilee Primary School has a shortfall in its SEN funding and does not have any scope at all to fund SEN provision from other source[s]. Our funding is already stretched to the maximum level and we cannot simply 'absorb' these reductions. The 5% cuts are already being applied after the date of a child's annual EHCP review and at the outset of a new ECHP. At the same time as these cuts we have been 'hit' by increases in pay awards both in 2018-19 and 2019-20."

Legal Framework

Children and Families Act 2014

19. The current SEN scheme is to be found in Part 3 of CFA 2014 which replaced the previous scheme in Part 4 of the Education Act 1996. CFA 2014 replaced the former statements of SEN with new EHC Plans.

20. The Explanatory Statement to CFA 2014 includes the following:

> "**Part 3: Children and young people in England with special educational needs or disabilities**
>
> 15. Part 3 of the Act contains provisions following the Green Paper *Support and Aspiration: A new approach to special educational needs and disability* published by the Department for Education on 18 March 2011 and the follow-up *Progress and Next Steps* published 15 May 2012.
>
> 16. The provisions are a major reform of the present statutory framework for identifying children and young people with special educational needs (SEN), assessing their needs and making provision for them. … Statements under section 324 of the Education Act 1996 and Learning Difficulty Assessments made under section 139A of the Learning and Skills Act 2000 are replaced by new 0-25 Education, Health and Care plans (EHC plans) for both children and young people. The provisions place a new requirement on health commissioners to deliver the health care services specified in plans."

21. Section 19 of CFA 2014 provides, so far as is relevant:

> "**19 Local authority functions: supporting and involving children and young people**

> 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—
>
> (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."

22. Section 27 ("**Duty to keep education and care provision under review**") provides:

> "(1) A local authority in England must keep under review—
>
> (a) the educational provision, training provision and social care provision made in its area for children and young people who have special educational needs or a disability, and
>
> (b) the educational provision, training provision and social care provision made outside its area for—
>
> (i) children and young people for whom it is responsible who have special educational needs, and
>
> (ii) children and young people in its area who have a disability.
>
> (2) The authority must consider the extent to which the provision referred to in sub-section (1)(a) and (b) is sufficient to meet the educational needs, training needs and social care needs of the children and young people concerned.
>
> (3) In exercising its functions under this section, the authority must consult—
>
> (a) children and young people in its area with special educational needs, and the parents of children in its area with special educational needs;
>
> (b) children and young people in its area who have a disability, and the parents of children in its area who have a disability;
>
> (c) the governing bodies of maintained schools and maintained nursery schools in its area;
>
> (d) the proprietors of Academies in its area;
>
> (e) the governing bodies, proprietors or principals of post-16 institutions in its area;
>
> (f) the governing bodies of non-maintained special schools in its area;

(g) the advisory boards of children's centres in its area;

(h) the providers of relevant early years education in its area;

(i) the governing bodies, proprietors or principals of other schools and post-16 institutions in England and Wales that the authority thinks are or are likely to be attended by—

(i) children or young people for whom it is responsible, or

(ii) children or young people in its area who have a disability;

(j) a youth offending team that the authority thinks has functions in relation to—

(i) children or young people for whom it is responsible, or

(ii) children or young people in its area who have a disability;

(k) such other persons as the authority thinks appropriate."

23. The duty to carry out an EHC needs assessment is imposed by section 36. Section 37 establishes the duty in relation to EHC plans:

"**37 Education, health and care plans**

(1) Where, in the light of an EHC needs assessment it is necessary for special educational provision to be made for a child or young person in accordance with an EHC plan—

(a) the local authority must secure that an EHC plan is prepared for the child or young person, and

(b) once an EHC plan has been prepared, it must maintain the plan.

(2) For the purposes of this Part, an EHC plan is a plan specifying—

(a) the child's or young person's special educational needs;

(b) the outcomes sought for him or her;

(c) the special educational provision required by him or her;

(d) any health care provision reasonably required by the learning difficulties and disabilities which result in him or her having special educational needs;

> (e) in the case of a child or a young person aged under 18, any social care provision which must be made for him or her by the local authority as a result of section 2 of the Chronically Sick and Disabled Persons Act 1970…
>
> (f) any social care provision reasonably required by the learning difficulties and disabilities which result in the child or young person having special educational needs, to the extent that the provision is not already specified in the plan under paragraph (e).
>
> (3) An EHC plan may also specify other health care and social care provision reasonably required by the child or young person.
>
> (4) Regulations may make provision about the preparation, content, maintenance, amendment and disclosure of EHC plans."

24. Section 42 ("**Duty to secure special educational provision and health care provision in accordance with EHC Plan**") provides, so far as is relevant:

> "(2) The local authority must secure the specified special educational provision for the child or young person.
>
> (6) 'Specified', in relation to an EHC plan, means specified in the plan."

25. Section 44 ("**Reviews and re-assessments**") provides, so far as is relevant:

> "(1) A local authority must review an EHC plan that it maintains—
>
> (a) in the period of 12 months starting with the date on which the plan was first made, and
>
> (b) in each subsequent period of 12 months starting with the date on which the plan was last reviewed under this section.
>
> (5) In reviewing an EHC plan maintained for a young person aged over 18, or deciding whether to secure a re-assessment of the needs of such a young person, a local authority must have regard to whether the educational or training outcomes specified in the plan have been achieved.
>
> (6) During a review or re-assessment, a local authority must consult the parent of the child, or the young person, for whom it maintains the EHC plan."

26. The regulations made by reference to section 20(4) are contained within the Special Educational Needs and Disability Regulations 2014 ("the 2014 Regulations"). Regulation 12 provides:

> "**12. Form of EHC plan**

(1) When preparing an EHC plan a local authority must set out—

(a) the views, interests and aspirations of the child and his parents or the young person (section A);

(b) the child or young person's special educational needs (section B);

(c) the child or young person's health care needs which relate to their special educational needs (section C);

(d) the child or young person's social care needs which relate to their special educational needs or to a disability (section D);

(e) the outcome sought by him or her (section E);

(f) the special educational provision required by the child or young person (section F);

(g) any health care provision reasonably required by the learning difficulties or disabilities which result in the child or young person having special educational needs (section G);

(h) …

(i) any social care provision which must be made for the child or young person as a result of section 2 of the Chronically Sick and Disabled Persons Act 1970 (section H1);

(ii) any other social care provision reasonably required by the learning difficulties or disabilities which result in the child or young person having special educational needs (section H2);

(i) the name of the school, maintained nursery school, post-16 institution or other institution to be attended by the child or young person and the type of that institution or, where the name of a school or other institution is not specified in the EHC plan, the type of school or other institution to be attended by the child or young person (section I); and

(j) where any special educational provision is to be secured by direct payment, the special educational needs and outcomes to be met by the direct payment (section J), and each section must be separately identified.

and each section must be separately identified."

Education Act 2002

27. Section 175(1) of the Education Act 2002 ("EA 2002") provides that:

> "A local authority shall make arrangements for ensuring that the functions conferred on them [in Part 3 of CFA 2014] are exercised with a view to safeguarding and promoting the welfare of children."

Children Act 2004

28. Section 11 of the Children Act 2004 ("CA 2004") ("**Arrangements to safeguard and promote welfare**") provides in sub-section (2) that a local authority:

> "… must make arrangements for ensuring that—
>
> (a) their functions are discharged having regard to the need to safeguard and promote the welfare of children."

Equality Act 2010

29. Section 149 of the Equality Act 2010 ("EqA 2010") ("**Public sector equality duty**") provides 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."

Grounds of Challenge

30. The Claimants challenge the Resource Levels policy on seven grounds (**Grounds A-G**), and the Plan Format policy on three grounds (**Grounds H-J**):

    i) *Resource Levels policy*

        a) Failure to comply with the obligation in s.42 of CFA 2014 to ensure that the specific special educational provision for each child or young person with an EHC plan is secured (**Ground A**).

        b) Breach of the obligation to have regard to the need to safeguard and promote the welfare of children (EA 2002, s.175; CA 2004, s.11) (**Ground B**).

        c) Breach of the PSED in s.149 of EqA 2010 (**Ground C**).

        d) The 5% reduction further breaches the above duties (**Ground D**).

e) The 5% reduction was unlawful because of the absence of prior consultation with families, as required by statute and common law (**Ground E**).

f) Breach of the duty in s.27(2) of CFA 2014 to consider the sufficiency of provision before deciding to adopt the 5% reduction (**Ground F**).

g) The Resource Levels policy breaches the *Padfield* principle in that it fails to promote the policy and objects of the legislation (**Ground G**).

ii) *Plan Format policy*

a) The Council's new format EHC Plan is contrary to legislation and guidance which requires provision to be specified in Section F of an EHC Plan for each and every need specified in Section B (**Ground H**).

b) Breach of the duty to have regard to the need to safeguard and promote the welfare of children (EA 2002, s.175; CA 2004, s.11) (**Ground I**).

c) Breach of the PSED in EqA 2010 (**Ground J**).

The Parties' Submissions and Discussion

(A) Resource Levels policy (Grounds A-G)

Ground A: S.42 of CFA 2014

31. Mr Stephen Broach, on behalf of the Claimants, submits that the Resource Levels policy is unlawful because it is inconsistent with the absolute statutory requirement to secure the specified special educational provision in Section F of each child or young person's EHC plan. The duty in s.42(2) is for the local authority to "secure" the specified SEP (see para 24 above); there is nothing in the wording of the duty that permits a local authority instead to group children into broad "bands" and then fund their schools to secure the provision in accordance with a generic figure allocated to that band; rather it is for the local authority to ensure that the school setting for each child or young person has sufficient funding actually to secure the specified SEP for that individual child or young person.

32. The Claimants do not object to banding levels *per se* as part of the process but EHC plans are required to be quantified and specified, such that it should be possible, indeed, Mr Broach suggests, straightforward, to calculate the actual cost of the identified provision for each child.

33. Mr Broach submits that the fundamental error in the Council's approach is clear from the letter of the Mayor and Deputy Mayor (see para 14 above) which refers to "the need to work within a budget".

34. Ms Melanie Moodley, head of EHC Planning at the Hackney Learning Trust, which is the Council's education department, states in her witness statement (at para 15):

> "The council funds schools for children with ECHPs with overall amounts, and then entrusts the school to use the overall funds we

> provide them to meet the Section F provision of all the EHC Plans they are delivering. It is not intended to be a system exactly calibrated to each individual child. The funding referable to one child may be slightly more than needed for that child's Section F provision, and for another child slightly less. As each mainstream school has a number of children with ECH Plans, this system of estimation works, and the funding is sufficient overall."

35. Mr Broach submits that the error in the Council's approach is very similar to that identified by the Supreme Court in the adult social care context in *R (KM) v Cambridgeshire CC* [2012] UKSC 23. He accepts that the statutory scheme governing adult social care as at 2012 and the current statutory scheme governing SEND are of course different, however he contends that the absolute, non-resource dependent nature of the duty to secure necessary provision is in substance the same under both schemes. What *KM* demonstrates, he submits, is that a local authority can use a mechanism such as "Resource Allocation Schemes" ("RAS") or funding bands to generate "ball-park" figures, but they cannot substitute for a proper process where funding is ultimately calculated against the cost of services which will meet "eligible" needs, to use the language of adult social care, or here the SEP specified in Section F of an EHC plan.

36. I agree with Mr Jonathan Auburn, who appears for the Council, that the case of *KM* does not assist the Claimants, relating as it does to the different statutory system for adult social care which operates in a fundamentally different manner (see *KM*, at para 28). There is no legal requirement to have personal budgets as there is in the social care context. As Mr Auburn observes, the duty under s.42 is not a duty to cost, but to secure.

37. The decision in *R v London Borough of Hillington ex parte Governing Body of Queensmead School* [1997] ELR 331, on which the Claimants rely, also does not, in my view, assist them. Collins J found (at 347) that the LEA in that case was entitled to adopt a formulaic approach to funding.

38. I do not accept that there is the fundamental error in the Council's approach, suggested by Mr Broach. The Council accepts that it has a duty to meet all SEN provision in children's EHC plans. That this is so is clear from the evidence of Mr Lee (see paras 9, 12 and 13 above). It is thus common ground between the parties that the Council must meet the full SEN provision in each child's EHC plan.

39. However, Mr Auburn submits, and I agree, there is nothing in CFA 2014 (or the 2014 Regulations or Code of Practice) which prevents local authorities from administering their High Needs SEN funding through a system of bandings. Provided the funding system secures the child's overall SEN (Section F) provision in practice, it will not be unlawful.

40. I note that the DfE's High Needs Funding Operational Guide 2018-19 (January 2018) provides that banding may be used for this purpose, stating:

> "Local authorities should publish information about how the funding levels are set for different types of institution, including any banding or top-up funding values (para 61).

> Other factors that could impact on the way local authorities determine the top-up funding [are…] the extent to which local authorities and institutions agree on standardised rates, local banding arrangements and streamlined administration to reduce the need for detailed negotiation of different top-up funding amounts for each pupil or student." (para 73).

The 2019-2020 Guide identifies the benefits of banded funding:

> "Many local authorities have systems which indicate the range of top-up funding which might be provided for children and young people with a particular complexity of need (sometimes referred to as 'banded' funding systems). This can be helpful in providing clear and transparent funding arrangements for many types of need that may be met in a range of different institutions. …" (para 91).

41. Mr Auburn makes the point that the Council could lawfully discharge its duty by deploying elements of centrally-commissioned provision, rather than channelling the funding for those elements through schools.

42. Mr Auburn observes that there is no evidence of any council doing individual costing.

43. That being so this first ground of challenge is essentially a "systemic" challenge. Mr Broach and Mr Auburn referred to various authorities in support of their respective submissions as to the test for a systemic challenge, including the recent cases of *R (Woolcock) v SSCLG* [2018] EWHC 17 (Admin), and *Bayer plc v NHS Darlington CCG and others* [2018] EWHC 2465 (Admin).

44. Mr Broach relies on the judgment of Warby J in *Fox v Secretary of State for Education* [2015] EWHC 3404 (Admin) where (at para 8) he stated:

> "(2) 'It is well established that a policy which, if followed, would lead to unlawful acts or decisions, or which permits or encourages such acts, will itself be unlawful': *Tabbakh's* case [2014] 1 WLR 4620, para 46 (Richards LJ, summarising one ground of Cranston J's decision in that case [2014] 1 WLR 1022, without disapproval: see para 48); the *Letts* case, para 116. (3) A policy, or guidance, may encourage unlawful acts by dint of being 'not clear and unambiguous' and silent as to important circumstances, or 'materially unclear or misleading': the *Letts* case, para 119 citing *R (A) v Secretary of State for Health* [2009] PTSR 1680, paras 75, 78 per Ward LJ."

45. *Bayer* concerned a challenge to the lawfulness of a policy headed "Treatment for Age-related Macular Degeneration" adopted by 12 clinical commissioning groups ("CCGs"). Considering the test to be applied in determining whether policy is lawful, Whipple J said (at para 196):

> "The correct approach in a case like this must be to ask whether the policy is capable of lawful implementation… If… there are

> realistic methods by which the Policy can be lawfully implemented, then the Policy is not itself unlawful. Individual decisions made pursuant to it may be capable of challenge in due course."

46. The test for such a challenge was, in my view, correctly stated by Wyn Williams J in *R (Suppiah) v Secretary of State for the Home Department* [2011] EWHC 2 (Admin) at para 137:

> "I am content to accept that as a matter of law a policy which cannot be operated lawfully cannot itself be lawful; further, it seems to me that there is clear and binding authority for the proposition that a policy which is in principle capable of being implemented lawfully but which nonetheless gives rise to an unacceptable risk of unlawful decision-making is itself an unlawful policy."

47. As Mr Auburn observes, the decided cases largely concern challenges to procedural rules of policies, where it is asserted that the rule is inherently likely to lead to procedural unfairness in individual cases. However, I agree with him that the relevant principles summarised by Hickinbottom LJ in *Woolcock* at para 68 may be applied to the present claim, in which it is alleged that the Council's substantive policies lead inevitably to a substantively unlawful outcome, namely breach of the s.42 duty.

48. In *Woolcock* Hickinbottom LJ (with whom Lewis J agreed) stated at para 68, so far as is relevant:

> "(iii) An administrative scheme will be open to a systematic challenge if there is something inherent in the scheme that gives rise to an unacceptable risk of procedural unfairness.
>
> (iv) … there is a conceptual difference between something inherent in a system that gives rise to an unacceptable risk of procedural unfairness, and even a large number of decisions that are simply individually aberrant. The former requires, at some stage, consideration and analysis of the scheme itself, and the identification of what, within the scheme, gives rise to the unacceptable risk. As Garnham J properly emphasised recently in *R (Liverpool City Council and others) v Secretary of State for Health* [2017] EWHC 986 (Admin), … para 57 and following, the risk identified must be of, not simply some form of illegality, but of *procedural* unfairness. Despite the difficulties of distinguishing an inherent failure in the system and individual instances of unfairness which do not touch upon the system's integrity, that is a distinction which the court is required to draw, e.g. by distinguishing examples which signal a systemic problem from others which, no matter how numerous, remain cases of individual failure.
>
> (v) … Of course, the larger the number or proportion of aberrant decisions, the more compelling the evidence they may provide

> of an inherent systematic problem. … Nevertheless, in many cases, the number or proportion of aberrant decisions alone will not in itself satisfy the burden of showing that they result from something inherent in the system.
>
> (ix) The threshold of showing unfairness is high…
>
> (x) Where the system has an element that may lead to a risk of procedural unfairness…, then an important question may be whether the system has inherent within it the capability of reacting appropriately to ensure that the reducible minimum standard of procedural fairness is maintained…"

49. Mr Auburn submits that there is a fundamental factual deficiency in the claims in that no prejudice to the Claimants is shown to arise from the policies under challenge. Having considered the Claimants' evidence, which includes the witness statements to which I have referred, and other statements submitted during the course of these proceedings, I have come to the conclusion that Mr Auburn is correct in his submission that none of the Claimants can demonstrate that there has been a failure to secure provision in his or her case because of the Resource Levels policy. Their concerns about provision are either disputed with contrary evidence, or attributable to some other cause, or both.

50. I am satisfied that the Council's evidence demonstrates that the Resource Level policy does not lead to the underfunding of SEN provision (see the Council's "Summary of specific issues with ECH Plans of individual children" and the references therein). Mr Auburn accepts that it is possible that on occasion schools have not done what they should have done, but in the main proper assessments have been conducted. Even if the Claimants had demonstrated a shortfall and this was attributable to the existence of banding, schools have a degree of flexibility in the way provision is delivered and in how they manage their budgets. There are flexibilities built into the Resource Levels policy: first, bandings are used in the context of a system in which the SEN provision for each child must be individually reviewed every year. Children can be allocated a higher Resource Level when provision is reviewed at the Annual Review (or during the year); and second, the Council can and does allocate additional funding in between bands, and above the highest band, where necessary (see paras 9-11 above).

51. In my judgment the Resource Levels policy is not unlawful (whichever test for a "systemic" challenge is adopted). I am satisfied that there is nothing inherent in the policy that gives rise to an unacceptable risk of unlawful decision making (*Suppiah*) or unfairness (*Woolcock*); and there are realistic methods by which the policy can be lawfully implemented (*Bayer*). The Claimants have fallen far short of making out a systemic challenge in this case.

Ground B: Children's welfare (EA 2002, s.175 and CA 2004, s.11)

52. If the Council is permitted, contrary to the Claimants' primary submission, to operate its Resource Levels policy, the Claimants contend that it has been adopted and maintained without compliance with a number of statutory duties. Section 175 of EA 2002 (in relation to education functions) and s.11 of CA 2004 (in all other respects) require local authorities to have regard to the need to safeguard and promote the welfare

of children in carrying out all their functions. The Claimants contend that there is no evidence that the Council had any regard to the need to safeguard and promote their welfare and the welfare of other children with SEN in the Borough in adopting and maintaining the Resource Levels policy. In *Nzolameso v Westminster CC* [2015] UKSC 22, Lady Hale said:

> "It has been held that s.11 [of CA 2004] applies, not only to the formulation of general policies and practices, but also to their application in an individual case."

53. However, both duties are duties to "make arrangements for ensuring" that the necessary regard is had in the discharge of functions. The relevant function here is s.42 of CFA 2014 and so the duty under s.175 and s.11 was to make arrangements to ensure that operational decisions about SEN provision are made with due regard to children's welfare.

54. Mr Auburn accepts that s.175 and s.11 duties also directly require individual decisions to be taken with the necessary regard (see *R (Castle) v Metropolitan Police Commissioner* [2011] EWHC 2317 (Admin) at para 51, approved by the Supreme Court in *Nzolameso* at para 24). However, the challenges in this case are to policies, pursuant to which operational decisions for individual children are taken, and not to individual operational decisions themselves. The welfare of children is the very statutory purpose of the statutory function. The decisions in the present case inherently involve children's welfare (unlike in *Castle* or *R (TW and others) v Hillingdon LBC* [2018] PTSR 1678).

55. I accept Mr Auburn's submission that the evidence amply demonstrates that the Council did have "a view to" (s.175) and "regard to" (s.11) children's welfare when adopting the Resource Levels policy (and the 5% reduction). It seems to me that the Council in adopting or maintaining the policies under challenge plainly focussed on determining the appropriate arrangements for SEN provision for children, and thus the Council properly focussed on the arrangements for promoting the welfare of children. I agree with Mr Auburn that if the Council shows, as in my view it has done, that this approach to funding SEN provision meets the duty in s.42 of CFA 2014 it is unreal to say that it can nonetheless be said to have failed to meet a wider duty to consider the welfare of children. Where the decision is in itself about children's welfare, as is meeting needs of SEN children, there is in my view no additional duty to explain how children's welfare was taken into account, above and beyond explaining why needs will be met.

Ground C: Breach of the PSED (s.149 of EqA 2010).

56. The Claimants contend that the Council's adoption and maintenance of the Resource Levels policy also breaches the PSED. Again, the Claimants' case is the Council cannot show that it had "due regard" to the specified "needs" in adopting and maintaining this policy. The most relevant need here is the need to "advance equality of opportunity" for "disabled" children, which will include all the Claimants and the vast majority of children with SEND. There is, Mr Broach submits, nothing to suggest that officers or members have given any consideration to whether this policy advanced equality of opportunity for disabled children.

57. Mr Broach emphasised the statement of McCombe LJ in *R (Bracking and others) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 (at para 26(6)):

> " '[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria' (Per Davis J (as he then was) in *R (Meany) v Harlow DC* [2009] EWHC 559 (Admin) at [84], approved in this court in *R (Bailey) v Brent LBC* [2011] EWCA Civ 1586 at [74-75])"

Mr Broach submits that Mr Lee (at para 71, see para 13 above) has not had proper regard to the welfare of children. The Council did not conduct a proper analysis of the impact on children.

58. In my view the observations of Lord Brown in *R (MacDonald) v Royal Borough of Kensington and Chelsea* [2011] UKSC 33 at paras 23-24 provide the answer to this ground of challenge:

> "23. … As Dyson LJ held in an analogous context in *Baker v Secretary of State for Communities and Local Government (Equality and Human Rights Commission intervening)* [2009] PTSR 809, 'due regard' here means 'appropriate in all the circumstances'…
>
> 24. … Where, as here, the person concerned is ex-hypothese disabled and the public authority is discharging its functions under statutes which expressly direct their attention to the needs of disabled persons, it may be entirely superfluous to make express reference to [the predecessor to s.149] and absurd to infer from an omission to do so a failure on the authority's part to have regard to their general duty under the section. That, I am satisfied, is the position here. The question is one of substance, not of form."

59. I agree with Mr Auburn that the Claimants' challenge effectively asks where, apart from the Council's decision making here as to SEN provision, was the consideration of advancement of equality of educational opportunity and elimination of discrimination in education? The answer is that this was present throughout the Council's decision making because that is the very matter that the Council's decision making was addressing. The Council's policy in the present case of meeting all of the identified needs of SEN children is specifically targeted at removing the disadvantages such children might otherwise suffer if their needs were unmet.

Ground D: The 5% reduction further breaches the above duties

60. The Claimants contend that it was open to the Council to avoid making the 5% reduction, either by successfully obtaining permission to transfer funds from the Schools Block to the High Needs Block or by allocating funds to SEN provision from its general funds.

61. As for the first option, Mr Lee states (at para 3 of his second statement) that the application made to the Secretary of State was refused. Ms Irwin (at paras 5-6 of her third statement) suggests that the application by the Council failed to comply with the evidential requirements set down by the Department for Education; hence the Council

did not properly take advantage of an option open to it which would have avoided the need to make the 5% reduction.

62. As for the second option, Mr Lee (at para 5 of his second statement) says that the potential to allocate general funds is "true in theory, but hopelessly naive in practice". The Claimants accept that "All budget lines within the Council are under pressure", but contend that decision makers were required at least to consider whether further cuts could be made elsewhere to protect the level of expenditure on services for this particularly vulnerable group of children.

63. In relation to the 5% reduction in resource levels Ms Anne-Marie Dawkins, in her witness statement on behalf of Hackney Independent Forum for Parents/Carers of Children with Disabilities (HIP) states (at para 16):

> "We are concerned that the Council's use of Resource Levels may result in children not being given the correct amount of funding to meet their individual needs. HIP through our work with parents/carers and our ongoing close dialogue with the Council, are well aware that schools do not have any spare funding to meet the needs of children with SEN. We are therefore extremely concerned that the 5% reduction in Resource Levels will have a detrimental effect on provision for children with SEN."

64. The 5% reduction needs, the Claimants contend, to be considered in context. First, if a limited amount of funding is reduced there is a high degree of likelihood that this will impact negatively on the provision being made for children with SEN. Second, the 5% reduction must be seen against a background of "real terms" decrease in the value of each Resource Level (see para 3 of Ms Irwin's third statement). The Claimants do not accept Mr Lee's assertion (at paras 57-66 of his first statement, see para 13 above) that the 5% reduction would not compromise the provision made to children. The Claimants contend that for a child with the most complex needs attracting "Level 5" funding, the 5% reduction has led to their school having over £1,000 less per child per annum to implement section F of their EHC plan. This amounts to a reduction in funding for schools by the Council of about £333,000.

65. Having regard to all these matters the Claimants contend (i) the breach of the specific duty to secure the provision in Section F of each and every EHC plan (s.42 CFA 2014) is made even more obvious when the available funding for each resource level is reduced by a not insignificant amount; (ii) there is no evidence to suggest that in determining to reduce the funding allocation for each resource level by 5% the Council's officers and/or members paid any regard to the need to safeguard and promote the welfare of children (s.175 EA 2002 and s.11 CA 2004); and (iii) there is nothing to suggest that officers or members paid any regard to the need to advance equality of opportunity for disabled children in reaching the decision to reduce funding for each resource level (s.149). Indeed, Mr Broach submits there was no analysis of what a 5% reduction may mean in practice.

66. Mr Auburn submits that, again, the claim that the 5% reduction in Resource Levels breaches s.42 must be a systemic challenge. Section 42 says nothing about the level at which funding must be set. Therefore, for the 5% reduction to be unlawful under this

ground there must be something inherent in reducing the banded resource levels by 5% that gives rise to an unacceptable risk that the Council will breach the s.42 duty.

67. The evidence of Ms Hewins (see para 18 above) does not demonstrate that any individual child did not receive proper SEND provision due to the 5% reduction.

68. I am satisfied, having regard to the evidence of Mr Lee, that the Council did give careful consideration to the 5% reduction (see para 13 above and Mr Lee's second witness statement at paras 6 and 7), and that it was a change to Resource Levels that could be absorbed without compromising provision in individual cases (unlike the position on the facts in *ex parte Queensmead*). In particular I have had regard to Mr Lee's evidence as to the flexibility in the way schools deliver provision in a child's EHC plan, that there is flexibility in the way schools account for spending across different budget lines, and that the reduction in funding for the Claimants' schools ranges from 0.1% to 0.3% of their overall budgets. Further, there is the additional safeguard that at the statutory annual review the reviewing professional chooses the right Resource Level to meet the child's provision, as a result of which there may be movement between levels, or additional funding where necessary (see para 11 above).

Ground E: The 5% reduction was unlawful because of the absence of prior consultation with families;

Ground F: Breach of the duty in s.27(2) of CFA 2014 in relation to the 5% reduction

69. In the light of the recent *Surrey* decision I consider it convenient to deal with these two grounds of challenge together.

70. It is common ground that the Council did not consult with families prior to deciding upon the 5% reduction. The question therefore is whether it was required to do so.

71. In Ground E the Claimants contend that the obligation to consult with families arises from three sources: first, s.27(3) of the CFA 2014; second, the "duty of inquiry" inherent in the PSED; and third, the common law requirement of procedural fairness.

72. In Ground F the Claimants contend that a 5% reduction in funding will permit schools to purchase less educational provision for children with SEN. As such, prior to deciding upon the funding reduction the Council was required to consider the sufficiency of educational provision for the children with SEN for whom it is responsible in accordance with s.27(2) of CFA 2014. There is no evidence of any such consideration.

S.27 of CFA 2014

73. In *Surrey* the Divisional Court heard full argument on s.27 and gave detailed consideration in its judgment (at paras 87-107) to the section. In the material parts of its judgment the Court stated:

> "98. As Mr Moffett QC submits, and we agree, s.27 of the 2014 Act is concerned with consideration at a strategic level of the global provision for SEN made by a local authority, or which is accessed by children for whom it is responsible. It both complements the general duties imposed on local authorities by

Chapter 3 of Part I of the Education Act 1996 and 'feeds in' as he puts it, to the local offer that must be published pursuant to s.30 of the 2014 Act.

99. As Mr Moffett QC also submits, an examination of the structure of s.27 makes this clear. First it imposes a duty on a local authority to review the provision that is made in its area for children with SEN and the provision that is made outside its area for children with SEND who are from its area. Secondly, when reviewing the relevant provision, the local authority must consider whether it is sufficient. Thirdly, the duties are to be performed from time to time, as the occasion arises. In this connection, no specific 'trigger' for the duty to review is provided. Thus by s.12(1) of the Interpretation Act 1978, the power may be exercised, or the duty is to be performed, from time to time as occasion requires. Fourthly, when reviewing the relevant provision and considering whether it is sufficient, the local authority must consult a wide range of persons and bodies who are likely to have an interest in the relevant provision, namely all those bodies or individuals specified in s.27(3) of the 2014 Act.

…

101. We would add that although the drafting of s.27(3) is not abundantly clear, in our view, the duty of consultation applies compendiously to the functions described by sections 27(1) and (2). That is, we do not consider that what is contemplated is consultation in relation to the review, pursuant to s.27(1) and (3) and then a further consultation in relation to the sufficiency of provision, pursuant to s.27(2) and (3).

102. … We do not consider Parliament can have intended that the extensive and onerous duties of consultation made mandatory by s.27, should be undertaken on a 'rolling basis' let alone, that it would be triggered every time a change is made to the provision of SEN. Such an interpretation would be capable of leading to absurd results, adversely affecting both the ability of local government to carry out its business, and the amount of resources available to meet the needs of those the legislation is designed to protect.

103. In our view, there is nothing in the legislation, or legislative history for that matter, to support such an interpretation, or to indicate that this was Parliament's intention. On its face, and when read in the statutory context to which we have referred, in our view the legislation imposes a duty on local authorities, which arises from time to time, to consult at reasonable intervals, those identified in s.27(3) in order to keep the provision referred to under review, in which connection local authorities must consider the extent to which the provision referred to is sufficient

> to meet the educational needs, training needs and social care needs of the children and young people concerned."

74. The Court continued by considering an observation made by Elisabeth Laing J in *R (DAT and BNM) v West Berkshire Council* [2016] EWHC 1876 (Admin) and a finding by HHJ Cotter QC, sitting as a deputy High Court judge in *R (KE) v Bristol CC* [2018] EWHC 2103 (Admin), that a specific duty to consult under s.27 of CFA 2014 arose on the facts of that case. The claimants in *Surrey* relied on the decision in *KE* and the observation of Elisabeth Laing J, as do the Claimants in the present case.

75. The Court stated:

> "104. … In *DAT*, it was held that the duties imposed by s.27 must bite where a local authority makes a decision which will necessarily affect the scope of the provision referred to in s.27. However, in the short passage in her judgment, at para 30, where s.27 was considered, the judge gave no reasons for her conclusion, and expressed misgivings about it, in particular because, as she said, she had heard limited, if any argument on the point, and had not been referred to any material which explained the frequency with which the duties were expected to be exercised. In that connection the judge was not referred to s.12(1) of the Interpretation Act 1978 to which we have referred.
>
> 105. We think the judge was right to express those misgivings. If her reluctant interpretation were to be correct, the results would be startling indeed. This would mean that every time a local authority makes a decision that will affect the scope of provision made in its area for children with SEND or the provision that is made outside its area for children with SEDN who are from its area, no matter how small, it must review the entirety of its provision both in and outside its area. It must consider whether the entirety of its provision is sufficient and it must consult the wide range of persons and bodies identified (including children with SEND) whether the decision is to reduce the scope of provision or increase it, regardless of the interest that such consultees, such as youth offending teams, might have in any change.
>
> 106. The decision in *KE* which referred to and relied on the decision in *DAT*, carries the Claimant's case in this regard no further; the judge in *KE* did not refer to the terms of s.27, referring only to a duty to consult 'relevant children and their parents' without reference to the actual breadth of the consultation requirement. In the circumstances, and with great respect to the judges concerned, we consider their interpretation of s.27 of the 2014 [Act] was wrong, and we would decline to follow it…"

76. Mr Broach submits that the judgment in *Surrey* is clearly wrong in relation to s.27 and he invites me to decline to follow it (see *R v Greater Manchester coroner ex p Tal* [1985] QB 67 at 81).

77. Mr Broach suggests that the Divisional Court did not recognise that the sufficiency duty in s.27(2) is new; and that the Explanatory Notes to CFA 2014 referred to by the Court (at paras 92 and 93) and the sections from the Code of Practice (at paras 94-97) shed no light on the proper construction of the s.27(2) duty. Mr Broach submits that s.27(2) creates a discrete duty which falls to be complied with whenever decisions are taken which may impact upon the sufficiency of the relevant provision; sub-section (2) is not parasitic on sub-section (1).

78. Further, Mr Broach submits that the consultation duties in sub-section (3) relate to the exercise of functions under the section. Thus, where the local authority is exercising its functions under sub-section (2) only (and in this case it would involve considering whether the educational provision, after a 5% reduction to the Resource Levels, is sufficient to meet the educational needs of the children and young people affected by the reduction), then the local authority must only consult those bodies under sub-section (3), which are relevant to the consideration of the sufficiency duty in that regard.

79. I agree with the Divisional Court's analysis in *Surrey* of s.27. I am not persuaded that there are grounds for departing from it. I do not consider that s.27(2) is engaged in the present case, nor that the s.27(3) duty to consult arises.

The PSED duty of inquiry

80. Mr Broach refers to *R (Hurley and Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin), where Elias LJ set out at para 89 (at the very least, he submits, without disapproval) the submission that "the combination of the principles in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 and the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required".

81. Further, Mr Broach relies on the decision in *KE* where the judge stated (at para 52) in relation to the PSED that "There is, by implication, a duty of inquiry upon any decision maker who must take reasonable steps to inquire into the issues, so that the impact, or likely impact, of the decision upon those of the listed equality needs who are potentially affected by the decision, can be understood. On appropriate facts, this may require no more than an understanding of the practical impact on the people with protected characteristics who are affected by the decision. … However, it may require much more, including consultation. Context is everything."

82. The Claimants contend that, as in the case of the proposed cuts to SEN funding in *KE*, the Council's proposal here to reduce the funding for each resource level by 5% was a context where consultation was required to discharge the "duty of inquiry" under the PSED.

83. What constitutes "due regard" will depend on the circumstances (*Surrey* para 80). Moreover, the "duty of inquiry" is an application of the *Tameside* duty on a public body

to take reasonable steps to acquaint itself with the relevant information necessary to enable it properly to perform the relevant function (*Tameside* at 1065). It will only be unlawful for a public body not to undertake a particular inquiry if it was irrational for it not to do so.

84. In my view no such duty of inquiry arose in the present case so as to require Mr Lee to consult families on what was a technical issue of funding levels. He had adequate information to be able to carry out his analysis of the 5% reduction; and he had sought the views of the Schools Forum, a body which had the relevant expertise in managing budgets and delivering SEN provision (see para 13 above). Further, the Council was not under any duty to review the impact of the Resource Levels policy separate from the analysis of the 5% reduction which it carried out.

Common law procedural fairness

85. It is clear on authority that it would be unfair and unlawful for a local authority to withdraw a benefit or service without consulting with those affected (see *R (LH) v Shropshire Council* [2014] EWCA Civ 404). The Claimants contend that it must be equally unfair and unlawful for a public authority not to consult families before reducing funding which will at least inevitably risk impacting on the services being provided to a vulnerable group of children. In *KE v Bristol* the deputy judge (at para 125) held that it was unfair at common law for the local authority to have made funding cuts to SEN provision without consultation. The Claimants accept that the relevant test is one of "conspicuous unfairness" (see *R (Plantagenet Alliance) v SSJ* [2014] EWHC 1662 (QB) at para 98(2)), and contend that this is an exceptional case, and the test is met on the facts.

86. I do not accept these submissions. There was, in my view, no duty on the Council to consult with families imposed by common law.

87. The common law does not impose any general duty on decision makers to consult before they take decisions (see *R (BAPIO Action Ltd) v SSHD* [2007] EWCA Civ 1139 at paras 43-45, per Sedley LJ). The common law will only impose a duty to consult in limited circumstances, where people hold a procedural legitimate expectation of consultation. The Claimants have not made out a procedural legitimate expectation. There has been no promise nor any practice for consulting parents before determining the level of Resource Levels, as opposed to consulting schools through the Schools Forum. Schools forums were established specifically for the purpose of consultation on issues such as those presently under consideration (see School Standards and Frameworks Act 1998, s.47A(3)).

88. I do not consider that any of the cases referred to by Mr Broach assist the Claimants' case in this regard. *KE* is particularly relied on by the Claimants. However, as the Court in *Surrey* noted (at para 78) that case was concerned with a concrete budgetary decision by the Full Council to reduce provision and "to cut the extent of services to a defined group", so that it was "axiomatic" that some elements of the service "would reduce or even cease".

89. In any event, even if the Claimants were able to establish a duty to consult, they have not shown that the absence of consultation gave rise to any substantial prejudice (see *R (Plant) v Lambeth LBC* [2017] PTSR 453 at paras 85-87).

90. The evidence does not support a case of conspicuous unfairness.

Conclusion on Grounds E and F

91. In my judgment the Claimants have failed to establish that the 5% reduction was unlawful because of the absence of prior consultation with families, or that the Council have acted in breach of s.27(2) of CFA 2014 in relation to the 5% reduction.

Ground G: Breach of the Padfield principle

92. The Claimants contend that the Resource Levels policy and the 5% reduction to funding for each level breached the *Padfield* principle in that the Council has failed to promote the policy and objects of Part 3 of CFA 2014. Mr Broach submits that the express purpose of the allocation of funding to banded levels is to seek to control expenditure on SEN provision and protect the Council's budget. In support of this submission the Claimants rely on the wording of the Mayor and Deputy Mayor's letter dated 20 February 2018 (see para 14 above), and the report for the Schools Forum in November 2017, which noted that "The adjustment [5% reduction] will still take place from April 2018 even if the revised funding arrangement is not implemented. This is in order to address significant ongoing costs pressures".

93. I reject this submission. For the reasons I have given in relation to Ground A, I am of the view that it is not in breach of the s.42 duty, or otherwise unlawful in itself, to use bandings to administer SEN funding to schools. Further, I am of the view that the evidence of Mr Lee makes clear that the Council properly considered whether the 5% reduction could be implemented whilst still complying with its s.42 duty. In those circumstances there is no basis for an improper purposes challenge.

(B) Plan Format policy (Grounds H-J)

Ground H: The Council's new format EHC plan is contrary to legislation and guidance

94. Ms Toni Dawodu, Head of the Council's Special Educational Needs and Disabilities Service department, in her witness statement (at paras 28-34) explains the development of the Council's new format EHC plan. Ms Dawodu states:

> "28. At the start of the SEND Reforms, with no national standardised template for EHCPs, the Council found that Plan Co-ordinators were sometimes incorrectly writing the provision into Section E rather than Section F. The Council also received feedback from parents, carers and SENCOs that its initial ECHP template was not particularly clear nor helpful.
>
> 29. As a result, the Council decided to conduct a review of its EHCP template…
>
> …
>
> 32. … on 24 May 2016, the Council held a focus group with parents and carers that was planned in conjunction with 'HiP' (the Hackney Independent Parent) to discuss what did and did not [work] well with the Council's EHCP process and Plan

> template. Examples of other local authority templates were looked at. Feedback from parents and carers was that there was a benefit to setting out Sections E and F next to each other…
>
> 33. Following this meeting the EHCP team worked to develop the Plan template, including setting Sections E and F side by side. There were [a] further two workshops with SENCOs on 6 July 2016. These proposals were discussed and agreed.
>
> 34. In August 2016, I approved the new EHCP template. It has been used since the start of the new academic year in September 2016. Until this claim we have had no complaints about the revised EHCP template. I am not aware of any complaints having been made to the SEND team about the EHCP template to date. There were no complaints about this issue through the Council's complaints mechanism. When Ofsted reviewed our SEND services in November 2017, they gave positive feedback on the EHCP template, and no indication that the EHCP template was inappropriate or unlawful."

95. The Claimants contend that the fundamental problem caused by the Council's new format EHC plan is succinctly summarised in the second statement of the Second Claimant's grandfather (at para 14): "The concern behind the conflation of sections E and F in the Council's EHCPs is that specific provision is being generalised into vague outcomes."

96. Other witnesses for the Claimants speak of confusion and lack of transparency when Sections E and F are combined. Ms Zoe Thompson, proprietor and head of development at Bright Futures School, a special school for children with autism in Oldham, states in her witness statement:

> "3. … It would be much clearer for everyone involved in the HCP process if needs, provision, outcomes and aspirations were outlined separately in the EHC plan in a table which allowed each need to be individually mapped to its corresponding provision, outcome and aspiration. I do not think sections should be combined, but rather directly linked to each other.
>
> 4. These measures would not only promote clarity but also scrutiny and accountability, as young people, parents and schools would be able to see when provision was not identified for a specific need, making it easier to bring this to the attention of the local authority…"

97. Ms Dawkins also states (at para 5) that they did not understand that the focus group meeting in May 2016 "would lead to a change in the format of the plans". Further she states (at para 8) that "There should be a 'golden thread' linking sections B, E and F – outcomes flow from provision which flow from need – which means that each section should be separate. This was not explained by the Council at the focus group".

98. Statements filed on behalf of the parties set out differing versions of what was discussed and agreed from which the Claimants invite the court simply to note that the Council cannot properly evidence support from parents for its Plan format policy.

99. Mr Broach submits that the Council's new format EHC plan is contrary to the legislation and guidance which requires provision to be specified in Section F of an EHC plan for each and every need specified in Section B, and for each section to be separately identified.

100. In support of this submission Mr Broach refers to regulation 12 of the 2014 Regulations (see para 26 above) which requires that Section F must include "the special educational provision required by the child or young person". The SEND Code of Practice confirms that "Provision **must** be specified for each and every need specified in section B. It should be clear how the provision will support achievement of the outcomes". Regulation 12 also requires that each section of a Plan "must be separately identified".

101. Mr Broach submits that by conflating Sections E and F, the Council's Plan format policy runs contrary to the statutory obligation. Section F is not "separately identified" in a number of the EHC plans; it is amalgamated with Section E.

102. Ms Alison Fiddy, Chief Executive of Independent Parental Special Education Advice (IPSEA), states in her witness statement (at para 16):

> "Even when the provision in section F of an ECH plan is specified and quantified, if a funding band is then allocated which dictates the amount of money a school will receive to deliver the provision, there is no guarantee that the funding allocated will be sufficient to deliver all of the specified provision."

Ms Fiddy continues (at para 21):

> "IPSEA's position is that outcomes cannot be the basis for determining provision, rather outcomes should be devised according to the provision which an individual child or young person requires to meet each and every need identified during the ECH needs assessment. In short, provision must flow from needs, and outcomes must flow from provision."

103. The Council has offered to separate out sections E and F, but Mr Broach says that is only a minor matter and that the real complaint is the lack of "flow" from sections A to F.

104. The Claimants contend that provision must be determined by reference to needs, with the outcome then being a "function" of that provision (see *S v Worcestershire CC* [2017] UKUT 92 (AAC) at para 84).

105. I do not accept the Claimants' contention that the new format plan is inconsistent with the statutory scheme. CFA 2014 and the relevant regulations require that EHC plans have specified content (referred to as "sections") which are "separately identified". I agree with Mr Auburn that they leave the presentation of those sections within the plan

to the discretion of the local authority. The Code of Practice also does not prescribe the particular format that an EHC plan must take (see para 9.62).

106. The Council's plan format complies with the requirements set out in s.37(2) and (4) of CFA 2014 and regulation 12(1) of the 2014 Regulations to have specified content which is separately identified within the document. I do not accept that Sections E and F have been conflated, as Mr Broach suggests. Further, as Mr Auburn observes, it does not follow that because sections E and F are presented together, the reader cannot turn back the page to read section B.

107. I conclude that the Council is not prevented by CFA 2014 or the 2014 Regulations or the Code of Practice from adopting a plan format that has outcomes and provision next to each other on the page, which enables the reader to see what the provision was trying to achieve for the child.

Ground I: Breach of the duty to have regard to the need to safeguard and promote the welfare of children (EA 2002 s.175; CA 2004 s.11)

Ground J: Breach of the PSED (EqA 2010)

108. I agree with Mr Broach that these two grounds of challenge can conveniently be dealt with together.

109. The Claimants contend that the new format EHC plan has been adopted and maintained contrary to the duty to have regard to the need to safeguard and promote the welfare of children (EA 2002 s.175; CA 2004 s.11); and contrary to the PSED.

110. Mr Broach submits (1) first, that the duties are engaged because adopting and maintaining this new format, which creates a real risk that needs identified in Section B will go unmet by provision in Section F, is plainly inimical to children's welfare, and (2) second, in the absence of evidence of compliance the court should find that these duties have not been met. In essence the Claimants repeat the submissions that they advanced under Grounds B and C in respect of breach of these duties (see paras 52 and 53, and 56 and 57 above) on these grounds.

111. For the reasons given under Ground H I am satisfied that the Council's new plan format promotes the welfare of children subject to EHC plans (see paras 105-107 above). In any event, the evidence makes clear that the Council's objective in reviewing and amending its plan format was to assist parents and carers and children by producing better EHC plans (see para 94 above). In so doing I am satisfied that the Council had regard to promoting children's welfare as required by EA s.175 and CA s.11. I am similarly satisfied that the needs set out in the PSED to advance the interests of disabled persons and SEN children specifically, were given due regard in the considerations that led to the change in the format of the Council's EHC plans.

Conclusion

112. For the reasons I have given none of the grounds of challenge are made out. Accordingly, this claim is dismissed.