Neutral Citation Number: [2021] EWHC 281 (Admin)

Case No: CO/2185/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 February 2021

Before :

THE HON. MR JUSTICE MURRAY

- -

Between :

THE QUEEN on the application of	
(1) MI (by his mother and litigation friend, SI)	
(2) IR (by her mother and litigation friend, MR)	**Claimants**
- and -	
LONDON BOROUGH OF WALTHAM FOREST	**Defendant**

- -
- -

Mr David Wolfe QC and **Ms Khatija Hafesji** (instructed by **Irwin Mitchell**) for the **Claimants**
Mr Peter Oldham QC (instructed by **Waltham Forest Legal Services**) for the **Defendant**

Hearing dates: 29 and 30 July 2020

- -

Approved Judgment

I direct that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE MURRAY

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down are deemed to be 10:30 am on 12 February 2021.

Mr Justice Murray :

1. This is a "rolled-up" hearing of the claimants' application for permission to apply for judicial review and, if permission is granted, of the substantive application, seeking to challenge the decision of the defendant, the London Borough of Waltham Forest ("LBWF"), made on 19 March 2020 ("the Decision") to reduce by 10% with effect from 1 September 2020 funding for "Band E" and "Band F" top-up funding levels, being levels of additional funding intended to support the education provision specified in the Education, Health and Care Plans ("EHC Plans"), as defined in section 37(2) of the Children and Families Act 2014 ("the 2014 Act"), of certain children with special educational needs ("SEN") in the area for which LBWF is the relevant local authority ("Waltham Forest").

2. The claimants have also filed an application notice dated 20 July 2020 seeking to rely on additional witness evidence and an expert report dated 16 July 2020 prepared by Oxera Consulting LLP, an economics consulting firm ("the Oxera Report"), under the direction of Mr David Jevons, a partner of the firm. At the beginning of the hearing, it was made clear that the parties had agreed that all of the additional witness evidence should be admitted, but that the claimants no longer sought to have the Oxera Report formally admitted. As the application to admit the Oxera Report was withdrawn, I have not had regard to it *de bene esse* or otherwise.

The claimants

3. The claimants, who were each granted anonymity along with their respective litigation friends by order of Tipples J dated 1 July 2020, are children who have SEN and are currently in receipt of special educational provision ("SEP") in Waltham Forest to meet their identified needs. They are representative of the children affected by the Decision, who attend mainstream schools in Waltham Forest, some of which are maintained by LBWF and some of which are independent Academy schools over which LBWF has no direct influence or control.

4. Since having been put on notice that this claim would be issued, LBWF has agreed to provide the first claimant, MI, with funding at Band F and has encouraged IR's school to put in a formal request for additional funding. It is asserted by the claimants that the claimants' needs have not changed, but the top-up funding to meet those needs is reduced by 10% with effect from 1 September 2020.

5. MI is 6 years old and attends Hillyfield Primary Academy. He has autism spectrum disorder ("ASD") with a language impairment. He had been struggling at school since 2019, finding the environment to be emotionally challenging. He required the support of a one-to-one teaching assistant and input from an educational psychologist, however his Band E top-up funding level was considered by his school to be insufficient to secure the provision set out in his EHC Plan. In 2019, his school noted during the annual review process that an increase in his top-up funding from Band E to Band F was critical to his ability to remain in a mainstream school. The necessary funding increase was not, however, agreed by LBWF until after this claim was issued, some 16 months later.

6. The second claimant, IR, is 9 years old and attends Hillyfield Primary Academy. She has a diagnosis of ASD and is currently in receipt of Band E top-up funding. Until

September 2019, she had been receiving one-to-one support from a teaching assistant throughout the day. At the beginning of the new school year in September 2019, her teaching assistant support was reduced to "mornings only". The second claimant's mother was told by the school's former SEN coordinator that this was due to funding constraints faced by the school, rather than the provision having been reduced having regard to the second claimant's needs. Following LBWF's pre-action response to this claim, the school requested that the second claimant be moved from Band E to Band F top-up funding to secure the provision she requires. LBWF has since invited the school to make an additional funding request so that the matter can be considered further.

Factual background

7. The high needs block ("HNB") is one of the four blocks of funding comprising the dedicated schools grant provided to each local authority by the Secretary of State to pay for the provision of education. The other three blocks are the central school services, schools, and early years blocks. The HNB is funding to support (i) pupils with special educational needs and disability ("SEND"), (ii) alternative provision and (iii) a range of SEND services.

8. In May 2019 LBWF began a process of consultation in relation to a specific proposal for the allocation of its HNB funding, the consultation concluding in July 2019. Due to changes in central government funding and following engagement meetings between LBWF and stakeholders, LBWF decided not to continue with that proposal.

9. Instead, in late 2019 LBWF issued a consultation document seeking views from schools, parents/carers, and other stakeholders, on a revised proposal entitled "Further Consultation on Allocation of High Needs Budget (HNB) Funding 2020-21" ("the Consultation Document"). The Consultation Document explained that LBWF's projected spend on this budget area for 2020-2021 was approximately £45 million, whilst the central government's HNB funding allocation to LBWF was £42.38 million. According to LBWF, this left a funding gap of £2.67 million, in addition to forecast accumulated underfunding from previous years of £5.3 million. The Consultation Document stated that this accumulated underfunding created budget pressure on SEND provision that was not sustainable in the long-term. LBWF therefore issued the Consultation Document as part of its effort "to identify efficiencies across the education service to achieve the highest possible savings whilst still ensuring that we fulfil our legal obligations."

10. LBWF's views as to the drivers of the funding deficit, the need for change to the funding model and the aim of the exercise were set out in the following passage from the Consultation Document:

> "The deficit is being driven by the significant increase in the numbers of young people needing additional support, including raising the age of those supported to 25, along with previous decisions about the level of funding required to meet the needs identified at specific levels that were unrealistic and unsustainable in the longer term. Current figures show that Waltham Forest 'Level 1' funding is over two times higher than the average of other neighbouring Local authorities: £3,800,

> (Islington LA currently funds 'Level 1' at £1,175, whilst Hackney LA currently funds at £4,895).
>
> Our bandings mentioned above are historic figures, selected many years ago, that we believe do not reflect the current Educational climate, and do not reflect the content of our current Education, Health and Care Plans (EHCPs).
>
> An accumulated deficit of £5.3 million is at risk of breaching the ESFA's threshold of 1% of the total Dedicated Schools Grant (DSG) and the Local Authority would be required to report to the ESFA on its plans for bringing the DSG back into balance.
>
> In preparation for this requirement the Local Authority set about addressing and consulting upon its plans for allocating High Needs funding in 2020-21, with the aim of setting a balanced budget and aiming to ensure that the projected accumulated balance is not increased further."

11. The proposal set out in the Consultation Document contemplated:

    i) a transfer from the Schools budget for all schools to the High Needs Budget of 0.15%;

    ii) a transfer of 1.5% of the Special Schools funding to the rest of the High Needs Budget; and

    iii) changes to the top-up funding bands for EHC Plans.

12. The Consultation Document indicated that it would consult the Schools Forum on all three of these aspects of the proposal. The Consultation Document sought views specifically on aspect (iii), which relates to the banding system for top-up funding allocated by LBWF to support children and young people with an EHC Plan. This is also known as "Element 3" funding. "Element 1" funding is the funding allocated for all pupils who attend a school in the area for which a local authority is responsible (namely, core funding through the age-weighted pupil unit), and "Element 2" funding is the notional SEND funding allocated to schools in the relevant local authority based on a formula determined by reference to children at those schools meeting certain criteria (equating to up to £6,000 per child per year). Under the proposal Element 1 and Element 2 funding would each remain unchanged for individual children.

13. In addition to the foregoing, LBWF noted in the Consultation Document that all partners in the consultative process that preceded the issuing of the Consultation Document had indicated that they wished to see additional HNB funding allocated by central government, and LBWF indicated its commitment to continuing to seek such additional funding.

14. In the Consultation Document, schools, parents/carers, and other stakeholders were invited by LBWF to respond to the revised proposal to change the bandings applied to top-up funding for children with EHC Plans via an online survey that was open

between 4 November 2019 and 2 December 2019. The outcome of the consultation would be reported to the Schools Forum in December 2019 and subsequently presented to LBWF's Cabinet, which would take the decision as to what changes, if any, were to be made.

15. The Consultation Document set out two options, known as "Model A" and "Model B", to reduce the bands for the top-up funding element of the HNB in order to achieve the objective of a balanced budget. In both models the term "banding" was to be replaced by the term "resource ladder", but with no change of meaning intended.

16. For comparison, the Consultation Document set out the then current top-up banding thresholds at the lowest points:

"

	Level E	Level F	Level G	Level H	Level I
Primary Mainstream	£8,427	£15,177	£17,927	£21,677	£43,427
Primary SRP	£8,000	£14,750	£17,500	£21,250	£43,000
All through Mainstream	£7,137	£13,887	£16,637	£20,387	£42,137
Secondary Mainstream	£7,137	£13,887	£16,637	£20,837	£42,137
Secondary SRP	£8,000	£14,750	£17,500	£21,250	£43,000

"

17. Model A was similar to the proposal consulted on in the summer of 2019. Under Model A the current five levels from Band E to Band I would be replaced with four levels, and both primary and secondary schools would receive the same levels of funding. The proposed bands or resource levels under Model A showing the lowest points were:

"

Level 1 (currently known as Band E)	£5,000
Level 2 (currently known as Band F and G)	£15,000
Level 3 (currently known as Band H)	£21,000
Level 4 (currently known as Band I)	£43,000

"

18. Model B retained the differential in funding between primary and secondary schools and made a reduction in the resource levels of 10% to Band E and Band F only. Band G, Band H and Band I would be unaffected. The reduction would only apply to children in mainstream schools, excluding those in a mainstream school in "special resourced provision" ("SRP"). Children allocated these levels of support but who are

in special schools would not be affected by the cuts, and children who would be given an EHC Plan in the future would not be placed on these resource levels.

19. The proposed bands or resource levels under Model B showing the lowest points were:

"

	Current funding allocation	**Proposed funding allocation**
Primary Level E	£8,427	£7,854
Primary Level F	£15,177	£13,659
Secondary Level E	£7,137	£6,423
Secondary Level F	£13,887	£12,498

"

20. LBWF stated in the Consultation Document that it believed that each of Model A and Model B would enable LBWF to absorb the shortfall in funding without a negative impact on the provision for any child with an EHC Plan. Model B was stated to be LBWF's preferred option, because the level of reduction for each individual EHC Plan would be lower under Model B. The number of children on the Band E and Band F levels at the time of the Consultation Document was 1,374 (439 on Band E and 935 on Band F) out of a total of 1,643 children with EHC Plans.

21. The Consultation Document concluded with the following passage:

> "As indicated the level of funding provided to schools to meet individual children's special educational needs is made up from different elements from the High Needs Budget that is provided to schools. If this model [Model B] is agreed, then the changes will apply to children in mainstream schools on the current levels E and F from April [2020]. A child can be moved to a higher band and can have individual items of provision funded separately from the Resource Level funding where this is thought appropriate. Schools may raise issues when they think a resource level needs to change for a child as can parents and carers. There is a legal obligation to meet assessed needs.
>
> In both of these options [Model A and Model B] the Council is making changes in order to meet the aim of setting a balanced budget. This is not the same as setting a capped budget over which no further funding would be available for individual children should they need it."

22. LBWF received 133 responses to the Consultation Document. 73% of respondents disagreed with Model A. 57% of respondents disagreed with Model B. The claimants

submit that all the substantive comments responding to the Consultation Document, including those received from schools, were negative.

23. LBWF put its preferred option, Model B, to the Schools Forum, which at a meeting on 15 January 2020 voted in favour of Model B (9 votes for, 3 against, 3 abstentions). The Schools Forum was not given the option to vote for an alternative approach. This lack of an alternative option was discussed at the meeting of the Schools Forum.

24. An Equality Impact Assessment ("EIA") was completed by LBWF on 19 March 2019. The EIA relied upon what it described as "undertaking of a sample audit of EHCPs for twenty-five children receiving 'E' band funding", in order to "fully understand the impact or implications of the banding funding levels being reduced." A similar exercise was undertaken in respect of twenty-five children receiving Band F funding under their EHC Plans. The EIA then stated that:

> "… based on the evidence reviewed, matching the support outlined in plans to costs, this exercise identified that in the majority of cases, the current support could be delivered at the proposed new funding levels. The LA has taken into account that schools have considerable operational flexibility in their daily use of resources in making the appropriate provision for pupils in their school"

25. The EIA emphasised that in other cases, where children would need to be moved up a band to secure the specified provision, LBWF would do that. Specifically, it stated:

> "The LA is confident that schools will manage within any reduced levels, as outlined above the sampling shows that only a minority of actual EHCPs would require sums over the new banding thresholds and there should be no circumstances in which schools reduce provision as a result of this proposal being implemented. The existing arrangements for EHCPs to come to the resource panel where their banding is not sufficient provides a safety net should funding issues of individual EHCPs arise. Where such EHCPs come to panel after 1st September 2020 funding decisions will be made on those cases based on actual need rather than automatic movement to a new banding as is currently the case."

26. LBWF's Children and Families Scrutiny Committee met on 12 March 2020 to consider LBWF's proposals regarding HNB funding. Having heard from an employee of LBWF, the Vice-Chair of the Schools Forum, a representative from the SEND Crisis Group and other members of the public, the Committee recommended that:

> "… the Cabinet defers the decision to make a reduction of 10% in the current funding for existing [EHCPs] at E and F level; writes to central Government seeking clarification on future funding top-ups; and bids for additional funding while investigating internal avenues for further funding."

27. All the information set out above was put to LBWF's Cabinet. On 19 March 2020, the Cabinet agreed:

> "…to the proposal that changes be made to the current Banding Levels as set out in Model B set out in paragraph 3.1.12 of the report which is to introduce a Resource Ladder that replaces the existing banding system, retains differentials between primary and secondary levels, but makes a reduction of 10% in the current funding bands for existing EHCPs at E and F level only to be implemented from 1st September[.]"

Procedural history

28. On 19 June 2020 the claimants lodged their application for urgent consideration together with their Claim Form and Statement of Facts and Grounds ("SFG").

29. On 23 June 2020 LBWF lodged its Acknowledgement of Service and Summary Grounds of Defence ("SGD").

30. On 24 June 2020 the claimants lodged a Reply to the SGD, although the judicial review procedure in CPR Part 54 does not provide for such a reply and such replies are not encouraged, as is made clear by para 7.2.5 of the Administrative Court Judicial Review Guide. It is left to my discretion to consider the Reply, and I have done so.

31. On 1 July 2020 on a review of the papers, Tipples J certified this matter as fit for expedition, adjourned the application for permission to apply for judicial review to a "rolled-up" hearing on 29-30 July 2020 and, as already noted, granted anonymity to the claimants and their litigation friends. She also gave case management directions.

32. On 15 July 2020 LBWF filed its Detailed Grounds of Resistance.

33. On 20 July 2020 the claimants filed the application notice referred to at [2] above.

The evidence

34. In support of their claim, the claimants have filed the following evidence:

    i) a witness statement dated 15 June 2020 from SI, the first claimant's mother and litigation friend, exhibiting (a) MI's annual review in March 2019, (b) an email dated 8 June 2020 from Hillyfield Primary Academy confirming an increase of MI's top-up funding level and (c) MI's EHC Plan finalised on 12 March 2018;

    ii) a witness statement dated 15 June 2020 from MR, the second claimant's mother and litigation friend, exhibiting IR's EHC Plan finalised on 29 December 2017;

    iii) a witness statement dated 16 June 2020 from Mr Ken Barlow, who is the father of a child with SEN and a founder of the Waltham Forest SEND Crisis group, a grassroots organisation inspired by the national SEND crisis movement, exhibiting (a) a copy of the summer 2019 edition of *Whitefield*

Academy News, a newsletter for parents from Whitefield Academy, which included a statement from Ms Elaine Colquhoun OBE, the Chief Executive Officer of Whitefield Academy Trust, regarding the adverse effect of proposed funding cuts and encouraging parents to lobby against them, (b) the response to the Consultation Document signed on behalf of the Waltham Forest SEND Crisis group by Mr Barlow together with LBWF's reply (the hearing bundle copy of each of these is undated), (c) a letter dated 16 June 2020 sent to Mr Barlow by Ms Jenny Smith, Head Teacher of Frederick Bremer School, a mainstream secondary school, enclosing the school's response dated 18 June 2019 to LBWF's initial HNB consultation launched in May 2019 and its response dated 14 November 2019 to the Consultation Document;

iv) a witness statement dated 15 June 2020 from Ms Esther Freeman, whose adopted daughter has developmental trauma and attachment issues, attends a mainstream primary school in Waltham Forest and has an EHC Plan with Band F top-up funding;

v) a witness statement dated 15 June 2020 from CL, approved but unsigned, whose daughter with Down Syndrome attends a mainstream primary school in Waltham Forest and has an EHC Plan with Band F top-up funding;

vi) a witness statement dated 15 June 2020 from Ms Korina Gerolazou, approved but unsigned, whose daughter with a diagnosis of ASD attends a mainstream primary school in Waltham Forest and has an EHC Plan with Band G funding;

vii) a witness statement dated 15 June 2020 from Ms Claire Bithell, whose son has a diagnosis of ASD, attends a mainstream school (but in SRP) and has an EHC Plan with Band F funding;

viii) a witness statement dated 15 July 2020 from Ms Caroline Barrett, Senior Associate Solicitor at Irwin Mitchell LLP, the claimants' solicitors; and

ix) a witness statement dated 20 July 2020 from Ms Smith, the Head Teacher of Frederick Bremer School referred to above.

35. The witness statements of MI, IR, Ms Freeman, CL, Ms Gerolazou and Ms Bithell provided evidence of the possible direct or indirect impact of the top-up funding cuts under the Decision from the perspective of a parent with a child with SEN at a mainstream primary school in Waltham Forest, although principally these were expressions of unparticularised apprehension. For example:

i) Ms Freeman (whose daughter's EHC Plan provides for a key worker, with specific training in developmental trauma and attachment issues, who gives full-time one-to-one support) said the following in her witness statement:

> "6. My overall concern with the Council's proposed reduction in funding would be that it may mean that my daughter cannot retain the level of support my daughter currently benefits greatly from. Any reduction in funding is going to place further strain on

> the school to deliver the full time dedicated 1:1 support worker that my daughter needs. …
>
> 7. Whilst the Council might say that they have a duty to secure the provision set out in my daughter's plan, the reality is that they may once again attempt to remove such specialist and expensive support from my daughter's plan. The process of challenging that decision would be time-consuming and in the meantime my daughter's progress would suffer."

ii) CL said the following in her witness statement:

> "7. With the proposed cuts to Bands E and F, my daughter will be receiving significantly less than she does now, which is not enough already. Based on my experience so far, I don't see how it will be possible for the reduced funding to cover my daughter's needs set out in the EHCP, as the school is already struggling to provide it at the moment under her current funding."

iii) Ms Bithell said the following in her witness statement:

> "9. I am extremely concerned about the 10% cut the Council has decided to make. Although the banding cuts apply to mainstream schools, I understand those currently in School Resourced Provision (SRP) will not be included in the changes. This applies to [my son], who is [in] an autism provision unit within the school.
>
> 10. Although on paper this might mean that [my son] would not appear to be impacted by the cuts as he is in a specialist unit, I still feel that there will be an indirect impact on him given that the overall funding being received by the school as a whole will have reduced. He also shares his teaching assistant with a child who is in the main school and not in the unit. We have been left feeling confused and concerned about what the impact on [his] provision might actually be."

36. These witnesses variously criticised the Decision, as well as the consultations carried out by LBWF, and the quality of communications by LBWF relating to those consultations. They also, of course, disagreed with the policy conclusions reached in the Decision.

37. Some also gave examples of past frustrations, difficulties and delays dealing with LBWF in relation to matters affecting their children and their EHC Plans. For example:

i) SI said in her witness statement that she and MI's school determined in June 2019 that MI's Band E funding was insufficient to secure the provision set out in his EHC Plan, after the school had completed an annual review of MI's needs in March 2019. The annual review determined that an increase in his funding from Band E to Band F would be critical for him to be included in a mainstream school. She was not, however, informed until 8 June 2020, after the pre-action protocol letter had been sent on behalf of the claimants in relation to this claim, that the request for Band F funding for MI had been approved by LBWF. SI also complained that an occupational therapist as specified in Section F of MI's EHC Plan has not been provided. She had a further complaint about absences by MI's regular teaching assistant during the then current academic year.

ii) MI said in her witness statement that one-to-one support previously had been provided to IR all day, but it was reduced to "mornings only" at the beginning of the academic year commencing in September 2019. She was told by the school's former special educational needs coordinator that this was due to funding constraints faced by the school rather than a reduction in provision in accordance with IR's needs. (I bear in mind that this evidence as to the reason for the reduction is hearsay.) MI also complained that there had been no annual review of IR's EHC Plan since December 2017. IR's school had requested as of 3 June 2020 that her top-up funding band be increased to secure the SEP in her EHC Plan, but she had not yet heard any detail as to the basis of the request and was not sure what the process for requesting additional funding entailed or how long it would take. She also said that she found LBWF's consultation that closed on 9 January 2020 to be confusing. She felt that LBWF had not explained clearly how and why LBWF felt that schools could "absorb" the proposed reductions in funding under Model A or Model B.

iii) Ms Freeman said in her witness statement that LBWF had made some attempts, when her daughter's EHC Plan was being finalised, to remove the requirement for her daughter's one-to-one keyworker to have specific training in developmental trauma and attachment, despite this having been the recommendation of the adoption agencies involved in her daughter's adoption. She said, "I am acutely aware that funding is already very tight and we therefore had to really push and fight to keep this provision within her EHCP."

iv) CL said in her witness statement that agreeing her daughter's EHC Plan with LBWF was "extremely difficult". It took 6 months to agree that Section F of the EHC Plan should specify that her daughter needed support from a teaching assistant. CL also noted that the EHC Plan does not specify one-to-one support all day (instead merely stating "small group or 1:1 work to target particular areas of learning"), but it was her view and that of the school that it should. They intended to challenge LBWF regarding this at her daughter's next review with a view to getting her EHC Plan changed. CL also complained that her daughter requires occupational therapy but has never had any specialist input since she has been at the school, although it is provided in Section F of her EHC Plan that she should have an occupational therapy programme devised by a paediatric occupational therapist. CL noted, however, that because her daughter's one-to-one learning assistant has some occupational therapy

experience, they had been managing so far. They intended to follow up, however, to ensure that her daughter gets specialist input as she is approaching the transition to secondary school. CL also complained that LBWF's SEND Officer never attends her daughter's annual reviews at the school. She also found LBWF's consultation reflected in the Consultation Document to be confusing. She further complained that LBWF "continually miss[ed] statutory timescales in relation to the preparation of the EHCP" and did "not seem to understand the importance of the EHCP as a being a legal document".

v) Ms Gerolazou in her witness statement said her daughter's EHC Plan specified that her daughter required occupational therapy in the form of "continuous sensory integration therapy". LBWF did not, however, have any qualified sensory integration therapists, and LBWF's occupational therapists discharged her from the service as they were not suitably qualified to provide the specific form of occupational therapy she needed. Ms Gerolazou had funded this privately but noted that it was LBWF's obligation to secure this. Ms Gerolazou also complained that the path to getting and EHC Plan had not been easy. She claimed that LBWF had not observed the statutory timescales in respect of this process. Only twice in five years had a Council SEND Officer attended her daughter's EHC Plan annual review meeting. The amendments to her daughter's EHC Plan had, on all occasions, taken much longer than the statutory timescale for completing them. Ms Gerolazou gave an example in relation to her daughter's annual review in October 2019. They were not seeking additional funding at that time, but they had sought amendments to some of the provision in the EHC Plan, which fortunately her daughter's school was able to provide, despite LBWF having delayed completion of the EHC Plan.

vi) Ms Bithell in her witness statement said that it "has taken a huge amount of effort with significant back and forth between ourselves and the Council to make sure [her son's] EHCP is specific and relevant to [his] needs". She gave an example of LBWF having failed to provide the speech and language provision specified in her son's EHC Plan, for which LBWF eventually apologised and "after a very protracted complaint process" agreed to refund the cost of the private speech therapist that had been hired for her son. She also complained about having to fight with LBWF at each annual review to get the right provision for her son and to chase for changes to his EHC Plan. She gave the example of her son's annual review that had been due to take place in November 2019 but was delayed until 30 January 2020, following which there had been no response from LBWF "for months". After complaining to LBWF's Director of Children's Services on 24 April 2020, noting that LBWF was in potential breach of its legal duties for not responding and updating the EHC Plan, they were finally sent an amended EHC Plan for her son on 18 May 2020. Ms Bithell also complained more generally that SEN Officers from LBWF were "very difficult to reach" and rarely responded to email. It was often necessary to email someone "very senior" with a complaint letter, following which a SEN officer would then be instructed to respond. She gave an example of how funding pressures at the school meant that they had not pressed for their son's EHC Plan to be formally amended to specify full-time one-to-one teaching support, even though they and the school felt that he

> needed that support, because there seemed to be no real prospect that LBWF would increase their funding for that. Ms Bithell noted that their son's autism teacher had submitted an emergency request to LBWF for additional funding for their son's EHC Plan, the idea having been to move him to Band G. She had heard nothing further about this since July 2019. On the basis of this experience and the need to "pick their battles", they had made the pragmatic decision to focus on other deficiencies in their son's provision, their immediate focus being to ensure that he received occupational therapy.

38. Mr Barlow, a parent of a child with SEN attending a primary school in Waltham Forest, focused his evidence on the views and position of the Waltham Forest SEND Crisis group generally.

39. In his witness statement, Mr Barlow described the cuts set out in the Decision to top-up funding under Bands E and F as having "a potentially devastating financial impact on schools in the borough, and by extension, the children who attend those schools – not just children with special educational needs, but all children".

40. Mr Barlow criticised LBWF, in particular, for acknowledging in its consultations the need for a "comprehensive review" of funding for EHC Plans and the need to undertake "a system-wide evaluation of processes" in its 2019 consultations and then failing to carry them out before reaching the Decision. He described what he considered to be the potential impacts of the cuts, including by reference to the views of others, and made a number of specific criticisms of the consultation process, which he said was "badly organised and badly communicated, and left parents deeply distrustful of the Council's intentions in terms of listening to their concerns".

41. I note, in relation to the evidence of Mr Barlow, as well as of some of the other parent witnesses, criticising LBWF's consultations or related communications, that there is no formal challenge in this claim to the consultations carried out by LBWF before making the Decision.

42. Finally, Mr Barlow criticised LBWF for failing to engage meaningfully with the concerns of the Waltham Forest SEND Crisis group despite the group's having communicated its concerns to LBWF, which communications included "multiple emails and letters outlining our concerns, participation in the stakeholder engagement group, two petitions, three presentations to the Children and Families Scrutiny Committee, a presentation to the Schools Forum, and a presentation to the Council Cabinet." As I have already noted, Mr Barlow exhibited to his witness statement a copy of the Waltham Forest SEND Crisis group's response to the Consultation Document and LBWF's reply to that response.

43. Ms Barrett's witness statement dealt with the chronology of filing of the claim in response to LBWF's objection in the SGD to the lack of promptness of the claim under CPR rule 54.5(1)(a) and/or undue delay and detriment to administration under section 31(6) of the Senior Courts Act 1981 ("the 1981 Act").

44. Finally, in relation to the evidence provided by the claimants, Ms Smith's witness statement addresses, principally, LBWF's assertions in the SGD and Detailed Grounds of Resistance, as well as in the witness evidence provided by LBWF:

i) that schools have operational flexibility to absorb the 10% cuts to Band E and Band F top-up funding; and

ii) that where a child with an EHC Plan with Band E or Band F funding requires additional funding as a result of the Decision, the child's school can apply for additional top-up funding to secure the SEP in the EHC Plan.

45. In response to the claim, LBWF provided the following evidence:

i) a witness statement dated 13 July 2020 by Mr Duncan James-Pike, Strategic Finance Advisor for LBWF, exhibiting correspondence with the Secretary of State concerning measures to ameliorate the deficit in HNB funding;

ii) a second witness statement dated 22 July 2020 by Mr James-Pike;

iii) a witness statement dated 15 July 2020 by Mr David Kilgallon, Director of Learning and Systems Leadership for LBWF, exhibiting various documents relating to meetings and consultations in 2019 and 2020 on HNB funding and on proposals for change, as well as related analysis set out in tables and Excel spreadsheets, email correspondence, draft reports prepared by Mr Kilgallon and two short reports dated 16 September 2019 and 28 February 2020 prepared by an external consultant, Ms Nina Cromwell, on SEND support in Waltham Forest; and

iv) a second witness statement dated 24 July 2020 by Mr Kilgallon, exhibiting various documents.

46. Mr James-Pike wrote the "Financial Implications" section of the report to Cabinet to which the Cabinet had regard in reaching the Decision. He assisted with the two consultations on HNB funding carried out by LBWF in 2019 and prepared various reports to the Schools Forum regarding proposals to consult on the deficit in HNB funding and proposals for addressing that deficit.

47. Mr James-Pike's first witness statement dealt with the mechanism of funding of high needs provision in mainstream schools, the budgetary pressures on that funding, how a deficit in HNB expenditure had developed and increased, attempts to date to address that deficit, at least in part, and the conditions imposed by the Secretary of State on LBWF to cooperate with the Department for Education in various ways to address the deficit. It concluded with the following paragraphs:

> "19. The Defendant must meet the assessed needs of children with EHCPs and it therefore continues to be the case notwithstanding the requirements to both address deficits and aim to achieve a balanced budget. In reality this means this is not a 'capped' budget and any overspend increases any deficit which must be carried forward.
>
> 20. The decision to make changes to the existing Resource Ladder and recommendations to introduce a new Resource Ladder system from 1 September 2020 for children who are assessed post 1 September 2020 are in line with the aim of

> stabilising expenditure on high needs and providing a suitable context for longer-term management of the historic deficit."

48. Mr James-Pike's second witness statement responded to the evidence of Ms Smith.

49. Mr Kilgallon has been Director of Learning and Systems Leadership in the Families & Homes Directorate of LBWF since December 2016 and has been responsible for LBWF's SEND Service since October 2018. Since 1981 he has had a variety of education-related roles, including various head teacher roles, among others, as a head teacher in a maintained special needs school, and various local authority roles relating to education, including SEND-related roles.

50. Mr Kilgallon's first witness statement set out the background to the Decision, the decision-making process that led to it, including the principal meetings and consultations that occurred, the sampling exercises that were carried out, the basis for his recommendation to the Cabinet that Model B be adopted, how in Mr Kilgallon's experience operational flexibilities could be achieved by schools to mitigate the impact of the 10% reduction to Band E and Band F top-up funding, the consideration of the consultation outcome by the Schools Forum, the Cabinet's meeting on 19 March 2020 and the Decision.

51. Mr Kilgallon also discussed in his evidence by way of background (as it was not under challenge in this claim) the new resource ladder agreed by the Cabinet on 19 March 2020 for all new EHC Plans created from 1 September 2020. Finally, in his evidence, Mr Kilgallon sought to address various specific points raised by the claimants generally and specific points raised in some of the witness statements filed on behalf of the claimants.

52. At paragraph 78 of his first witness statement, Mr Kilgallon acknowledged that the witness statements provided by the claimants highlighted delays and other difficulties in the Council's processes faced by parents, carers, and schools. He also acknowledged that the reports dated 16 September 2019 and 28 February 2020, which he had commissioned, prepared by the external consultant, Ms Cromwell, on SEND support in Waltham Forest highlighted areas of concern in relation to those processes and areas to be improved upon.

53. Mr Kilgallon's second witness statement responded to the evidence of Ms Smith and addressed points raised by the claimants' skeleton argument.

The legal framework

54. The legal framework is helpfully set out by the claimants in the SFG. That summary is not disputed by LBWF.

55. This case concerns an aspect of LBWF's budgetary process. An important part of that process is the determination of the local authority's council tax requirement. Section 31A of the Local Government Finance Act 1992 ("the 1992 Act") requires each local authority to make certain calculations in relation to determination of its council tax requirement for each year.

56. Section 31A(2) of the 1992 Act requires the local authority to calculate the aggregate of, broadly speaking, its reserves and outgoings, whilst section 31A(3) requires the local authority to calculate the aggregate of, broadly speaking, its revenue. Section 31A(4) provides:

> "If the aggregate calculated under subsection (2) above exceeds that calculated under subsection (3) above, the authority must calculate the amount equal to the difference; and the amount so calculated is to be its council tax requirement for the year."

57. This exercise, according to the claimants, is commonly referred to as "balancing the budget".

58. The process by which a local authority sets its education budget is summarised by HHJ Cotter QC, sitting as a High Court Judge, in *R (KE) v Bristol City Council* [2018] EWHC 2103 (Admin) at [18]-[19] as follows:

> "18. There are a number of stages before an education budget, which forms part of the overall budget, is set. At the head of the process lies the allocation of a grant from central government to the Defendant. By reason of regulations 9 and 10 of the Schools Forum (England) Regulations 2012 the Defendant must then consult with the Schools Forum (which comprises a number of head teachers and school governors) in respect of its funding proposals. However, regulation 8 of the School and Early Years Finance (England) Regulations 2018 provides for a Schools Forum to have very limited powers of approval, irrelevant to this case.
>
> 19. The proposed education budget is then considered by the executive as part of its proposals to the full council in respect of an overall budget for the year. Eventually, the full council sets a budget having regard to the executive's proposals."

59. It is the full Council of a local authority, consisting of elected representatives, which sets the education budget, as well as the overall budget, based on proposals put forward to it by the executive, consisting of the Mayor and Cabinet or, as in the case of LBWF, the Leader and Cabinet.

60. This case concerns the claimants' challenge to the Decision, which affects the claimants as well as other children with SEN. The law affecting such children experienced a major reform in 2014 with the enactment of the 2014 Act. One of the most noteworthy changes was a shift from the use of "statements" of special educational needs to the use of EHC Plans, which are designed to look at the needs of a child holistically rather than simply at their SEN.

61. Section 19 of the 2014 Act sets out general principles to which a local authority must have regard in relation to each child or young person in its area, including at section 19(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. "

62. The basic definitions relating to SEND and SEP are set out in sections 20 and 21 of the 2014 Act. Section 20 provides that:

i) A child or young person has "special educational needs" if they have a "learning difficulty" or disability that calls for "special educational provision" to be made for them;

ii) a child or young person has a learning difficulty if they have significantly greater difficulty in learning than most others of the same age; and

iii) a child has a disability that calls for SEP if their disability prevents or hinders them from making use of the facilities of the kind generally provided for others of the same age in mainstream schools in England.

63. Section 21(1) of the 2014 Act defines "special educational provision" as educational or training provision that is additional to, or different from, that made generally for others of the same age in mainstream schools in England.

64. Under section 24 of the 2014 Act, a local authority is responsible for a child or young person in its area who has been identified as having or possibly having SEN or who has been brought to the local authority's attention as having or possibly having SEN. A local authority has a statutory obligation under section 26 of the 2014 Act, together with its partner commissioning bodies, to make arrangements about the education, health and care provision to be secured for children and young people for whom the authority is responsible and who have SEN and/or a disability. In relation to certain children or young persons, this involves securing an "EHC needs assessment" for the child or young person, defined at section 36(2) as an assessment of the education, health care and social care needs of the child or young person.

65. Section 36(7) of the 2014 Act requires the local authority to notify a child's parent or a young person, as the case may be, if it is considering securing an EHC needs assessment in relation to the child or young person, and the child's parent or the young person, as the case may be, has the right to express views and submit evidence in response.

66. Section 36(8) of the 2014 Act provides:

> "The local authority must secure an EHC needs assessment for the child or young person if, after having regard to any views expressed and evidence submitted under subsection (7), the authority is of the opinion that—

> (a) the child or young person has or may have special educational needs, and
>
> (b) it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan."

Not all children who have an EHC needs assessment will ultimately have an EHC Plan.

67. Section 37 of the 2014 Act sets out the test which the local authority must apply when considering whether to secure an EHC Plan for a child or young person:

> "(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.
>
> (5) Regulations under subsection (4) about amendments of EHC plans must include provision applying section 33 (mainstream education for children and young people with EHC plans) to a case where an EHC plan is to be amended under those regulations."

68. Regulations have been made under section 37(4) of the 2014 Act and form part of the Special Educational Needs and Disability Regulations 2014 ("the 2014 Regulations"). Sections 37(2)-(3) of the 2014 Act and Regulation 12 of the 2014 Regulations provide that the EHC Plan must specify in a prescribed form, among other things, the "outcomes" that are sought for the child or young person, the SEP they require, any health care provision they may reasonably require and any social care provision they may reasonably require, or which must be made under section 2 of the Chronically Sick and Disabled Persons Act 1970.

69. The local authority is under a statutory duty to secure the SEP as specified in the child or young person's EHC Plan. Section 42 of the 2014 Act provides:

> "(1) This section applies where a local authority maintains an EHC plan for a child or young person.
>
> (2) The local authority must secure the specified special educational provision for the child or young person.
>
> (3) If the plan specifies health care provision, the responsible commissioning body must arrange the specified health care provision for the child or young person.
>
> (4) 'The responsible commissioning body', in relation to any specified health care provision, means the body (or each body) that is under a duty to arrange health care provision of that kind in respect of the child or young person.
>
> (5) Subsections (2) and (3) do not apply if the child's parent or the young person has made suitable alternative arrangements.
>
> (6) 'Specified', in relation to an EHC plan, means specified in the plan."

70. As enacted, the duty under section 42 of the 2014 Act to secure the SEP of a child or young person is absolute. It is not qualified by reference to a local authority's budget or available resources. Under section 38(1) of and para 5 of Schedule 17 to the Coronavirus Act 2020 the Secretary of State has temporarily suspended the absolute nature of the duty, treating it as discharged where a local authority has used reasonable endeavours to discharge the duty.

71. Section 51 of the 2014 Act grants a child's parent or a young person the right to appeal to the First-Tier Tribunal ("FTT") in relation to certain matters, subject to mediation under section 55, including, among other matters:

    i) a decision of a local authority not to secure an EHC needs assessment for a child or young person;

    ii) a decision of a local authority, following an EHC needs assessment, that it is not necessary for a SEP to be made for the child or young person in accordance with an EHC Plan; and

    iii) certain matters specified in an EHC Plan or the fact that no school or other institution is named in it.

    The FTT has no jurisdiction to hear a challenge to the failure of a local authority to secure the SEP for a child or young person. Such a failure may only be challenged by way of judicial review proceedings.

72. Some children with EHC Plans will be educated in a "special school" but many are educated in a "mainstream school", a term defined in section 83(2) of the 2014 Act to mean a maintained school that is not a special school or an Academy school that is not a special school. A "maintained school" is defined in section 83(2) as a community, foundation or voluntary school or a community or foundation special school not established in a hospital.

73. While a maintained school is "maintained" by a local authority, an "academy school" is an independent school that contracts directly with the Secretary of State and over which the local authority for the area in which it operates has no direct control, including as to the provision the academy school makes for children with SEN at the school.

74. Section 33 of the 2014 Act provides, in effect, that a child with SEN has a right to mainstream education. Section 33 provides in relevant part as follows:

> "(1) This section applies where a local authority is securing the preparation of an EHC plan for a child or young person who is to be educated in a school or post-16 institution.
>
> (2) In a case within section 39(5) or 40(2), the local authority must secure that the plan provides for the child or young person to be educated in a maintained nursery school, mainstream school or mainstream post-16 institution, unless that is incompatible with—
>
> (a) the wishes of the child's parent or the young person, or
>
> (b) the provision of efficient education for others.
>
> …"

75. Section 27 of the 2014 Act requires a local authority to keep education and social care provision under review. It 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 subsection (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.

(4) Section 116B of the Local Government and Public Involvement in Health Act 2007 (duty to have regard to assessment of relevant needs and joint health and wellbeing strategy) applies in relation to functions exercisable under this section.

(5) 'Children's centre' has the meaning given by section 5A(4) of the Childcare Act 2006."

76. The section 27 duty was recently considered by the Court of Appeal in *R (AD) v London Borough of Hackney* [2020] EWCA Civ 518. Bean LJ wrote the principal judgment with which Baker LJ and Cobb J agreed. Key points emerging from that judgment are that:

i) subsections (1) and (2) of section 27 create a single duty to keep all SEND provision (education, training, and social care provision) under review ([41]);

ii) in keeping the provision under review, the local authority must consider the extent to which the provision is sufficient to meet the needs of the children and young people concerned ([41]) and must consult all those listed in subsection 3 ([43]);

iii) section 27 is concerned with consideration at a strategic level of the global provision for SEND made by a local authority ([44]); and

iv) the duties imposed by section 27 are to be performed from time to time, as the occasion requires, with no particular "trigger" for the duty specified ([44]).

77. Bean LJ, whilst holding that the duty had not been triggered on the facts of that case, stated in *R (AD) v LB Hackney* at [48] that he "would leave for another day the issue of what level of major budget cuts or transformation of a local authority's SEND provision would trigger a wider duty to consult either under s 27 or at common law".

78. In *R (AD) v LB Hackney* at [46] Bean LJ approved the observations of Swift J in *R (ZK) v London Borough of Redbridge* [2019] EWHC 1450 (Admin) at [63]-[64] that the section 27 duty was in the nature of a strategic obligation and that a local authority should be best placed to decide for itself what the elements of a review should be, subject to review by the courts against *Wednesbury* standards. He considered that it was not necessary to decide whether Swift J was right to say in *R(ZK) v LB Redbridge* that section 27 required local authorities to take "some sort of programmatic approach" to reviewing and assessing the sufficiency of their SEND provision or that a "mix of higher level and lower-level exercises" would collectively demonstrate compliance with section 27.

Grounds

79. The grounds on which the claimants are seeking to challenge the Decision are that:

    i) Ground 1: the Decision is irrational; and

    ii) Ground 2: the Decision breaches section 27 of the 2014 Act.

Grounds of Defence

80. LBWF in its SGD, as supplemented by its Detailed Grounds of Resistance, says that permission should be refused on each of the following grounds:

    i) there is no reasonably arguable claim;

    ii) the claim lacks practical purpose because LBWF has always accepted that if the funding indicated by a Band is insufficient to pay for provision required by an EHC Plan, then it must fund the difference;

    iii) there has been a lack of promptness by the claimants under CPR 54.5(1)(a) and undue delay causing detriment to good administration under s 31(6) of the 1981 Act; and

    iv) even if LBWF erred as alleged, it is highly likely that the outcome for the claimants would not have been substantially different: sections 31(3C) and (3D) of the 1981 Act.

Ground 1: irrationality

81. Mr David Wolfe QC, for the claimants, began his submissions by objecting to the reliance by LBWF on the witness evidence of Mr David Kilgallon, LBWF's Director of Learning and Systems Leadership, on the basis that Mr Kilgallon raised a large number of new points and provided information not previously raised by LBWF and which was not before LBWF's Cabinet when it made the Decision.

i) Mr Wolfe submitted that a decision-maker, such as a Minister or a Cabinet, is not to be taken to know what their officials or other people may have known unless that information was part of the materials provided for the purpose of the decision-making. In support of this proposition, he relied on the judgment of Leggatt J (as he then was) in *R (MN and KM) v London Borough of Hackney* [2013] EWHC 1205 (Admin) at [26] and the cases referred to by Dove J in *Stephenson v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 519 (Admin) at [36]-[40] (during the course of Dove J's summary of the submissions of Mr Wolfe, who was counsel for the claimant in that case), namely: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 66 ALR 299 (Brennan J), an Australian case; *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 (Sedley LJ), which considers the *Peko-Wallsend* case; *R (Buckinghamshire County Council) v Secretary of State for Transport* [2013] EWHC 481 (Admin), [2013] PTSR D25 (Ouseley J); and *R (Kohler) v Mayor's Office for Policing and Crime* [2018] EWHC 1881 (Admin) (Lindblom LJ and Lewis J in the Divisional Court).

82. Mr Wolfe submitted that the Decision must be considered solely on the basis of the Report to the Cabinet entitled "Outcome of Consultation on Proposed Changes to the High Needs Block Funding Bands for Education Health Care Plans 2020", authored by Mr Kilgallon ("the Cabinet Report"), which was presented to the Cabinet at its meeting on 19 March 2020 by Councillor Grace Williams (Portfolio Lead Member for Children, Young People and Families), and the Annexes to the Cabinet Report, which were:

i) the Consultation Document (Appendix 1);

ii) the Consultation Response Report (Appendix 2);

iii) the Consultation Response Summary Report (Appendix 3);

iv) the Specifically Asked Consultation Questions Document (Appendix 4);

v) the Alternative Proposal from Waltham Forest SEND Crisis Group and the Council's Response (Appendix 5);

vi) the Schools Forum Minutes (Appendix 6);

vii) the Equality Impact Assessment (Appendix 7); and

viii) School Funding (Appendix 8).

83. From these documents, Mr Wolfe drew the following propositions, which he submitted formed the basis on which the Cabinet took the Decision:

i) that the purpose of the proposals was to achieve a balanced budget;

ii) that LBWF was currently using historic banding levels the basis of which it did not understand;

iii) while a majority of the relevant children would be unaffected by the cuts because schools had sufficient operational flexibility to meet their needs with reduced funding, a minority of children would be affected by the cuts; and

iv) that for that minority LBWF would provide additional funding given the duty falling on it under section 42 of the 2014 Act to secure the SEP for each child set out in their EHC Plan.

84. In other words, the Cabinet recognised that the reduced Band E and Band F levels would leave a problem of underfunding for some children but considered that problem solved by a combination of operational flexibility within each school and the possibility of extra funding being provided for an individual child. This conclusion of the Cabinet, Mr Wolfe submitted, was flawed because of the uncontradicted evidence provided by the claimants in relation to failures in LBWF's processes for dealing with requests for additional funding, as highlighted in the evidence of SI, Ms Gerolazou, Ms Bithell and Ms Smith. In addition, the minutes of the Schools Forum meeting on 15 November 2019 included the following comment by one attendee:

> "I have battled for the last three months for a child who we were consulted on. It has taken 3 months to get Level F funding. I've heard from other headteachers its becoming increasingly difficult to get anything above E Level funding and I worry that we agree to things and it's a double whammy, not only are we agreeing to a reduction in funding, but we are going to get very few children who absolutely require F Level funding, and I shouldn't have to battle for three months."

85. Mr Wolfe submitted that LBWF did not even have a written policy for dealing with the problem created by the Decision, namely, underfunding of EHC Plan provision in its area. Mr Kilgallon had referred to a document entitled "Making a Request for Additional Funding" ("the Additional Funding Guidance"), which includes at page 20 reference to an additional funding request form designated "SENDRF1", as LBWF's relevant policy. However, that, Mr Wolfe submitted, is wrong. That document deals with funding requests for meeting the needs of children without EHC Plans, and the Form SENDRF1 is clearly only intended for use to request additional SEN funding for children without an EHC Plan.

86. Mr Wolfe referred to the evidence of Ms Smith, who in her witness statement said, "the process of applying for funding is itself complicated and unclear". The best opportunity to do this, she said, is at a child's annual review, which "can sometimes mean we are waiting several months with insufficient funding". The lack of a standard procedure for seeking additional SEN funding meant that the process and information required depended on the case worker assigned by LBWF to deal with the request and led to delay, with the whole process taking up to 20 weeks.

87. Mr Wolfe submitted that the Decision, on the claimants' evidence and even on LBWF's own evidence, will result in the SEP for some children not being secured for potentially significant periods in breach of LBWF's duty to secure the SEP. The Decision is therefore irrational, giving rise to an unacceptable risk of unlawful outcomes when it comes to LBWF's obligations to children with EHC Plans in its

area: see *R (Suppiah) v Secretary of State for the Home Department* [2011] EWHC 2 (Admin) at [137].

88. Finally, Mr Wolfe submitted that:

i) the scale of the problem was exacerbated by the fact that LBWF, according to Mr Kilgallon's evidence, does not understand why the present bands were set as they were; and

ii) LBWF's position that schools have sufficient operational flexibility to address the consequences of underfunding is based on an "unevidenced assertion" by one of LBWF's officials (Mr Kilgallon), which was not subject to any proper consultation and is contradicted by the evidence of Ms Smith.

89. Mr Oldham's preliminary submission on Ground 1 was that the claimants' case as formulated in the claimants' skeleton argument and presented by Mr Wolfe at the hearing differed from the pleaded case. As now presented, the case on Ground 1 rested principally on the basis that the Decision posed an unacceptable risk that LBWF would not comply with its duty to secure the SEP required by the EHC Plans of individual children in its area due to potential delays in securing funding for children adversely affected by the Decision.

90. Mr Oldham submitted, however, that that basis was not properly pleaded by the claimants. It did not appear in the SFG, where instead a series of six irrationality points were pleaded in relation to Ground 1. Those six points, in summary, were as follows:

i) LBWF admitted that it did not at the time of the Decision understand how the bandings it was seeking to reform corresponded to the actual needs of the affected children;

ii) LBWF claimed to have carried out an analysis of a random sample of existing EHC Plans at Band E and Band F levels, but that analysis failed to provide an adequate basis for any reasonable decision-maker to make a rational assessment of the needs of the affected children;

iii) given that LBWF's own analysis shows that some affected children will require more funding than the reduced Band E and Band F levels will allow, LBWF cannot rationally hope to achieve its objective of eliminating the HNB funding deficit and balancing the budget through its Decision;

iv) it is irrational for LBWF to argue that schools have sufficient operational flexibility to absorb the cut in top-funding for the Band E and Band F levels where many schools, both on the Schools Forum and outside of it, strongly dispute this;

v) although LBWF relied in its pre-action protocol response on the first instance decision in *R (AD) v LB Hackney* ([2019] EWHC 943 (Admin)), where Supperstone J rejected a judicial review challenge to a cut in Element 3 funding by the London Borough of Hackney ("LBH"), where LBH had relied on operational flexibility, the maintenance of Element 2 funding, the fact that

the reduction was a small percentage of schools' budgets and the delay in implementation of the change in defence of the challenged decision, that case can be distinguished because LBH delayed the relevant cuts until an affected child's annual review was held (so that relevant needs, provision and resources were considered together and an appropriate resource level selected), whereas LBWF was implementing the cuts from 1 September 2020 without any assessment of individual need, relying on parents and schools actively to request additional funding where required; and

vi) the Decision undermines the right of a child with an EHC Plan to mainstream education, as provided in section 33 of the 2014 Act.

91. Mr Oldham accepted that there were references to delays in securing funding in paragraph 60 of the SFG (in the context of the fourth irrationality point above) and in paragraph 8 of the Reply (where there is an express reference to "a risk of … unlawful outcomes as a result of the Defendant's decision"), but these are both in the context of the claimants' pleaded contention that the Decision was irrational because LBWF could not be sure it would lead to savings, given that some children with EHC Plans would need to seek additional funding due to the Decision.

92. Mr Oldham referred me to the judgment of the Court of Appeal in *R (Talpada) v Secretary of State for the Home Department* [2018] EWCA Civ 841 where at [68]-[69] Singh LJ, in the context of his call for greater procedural rigour in public law litigation, deprecated the practice of grounds of challenge "evolving" during the course of proceedings, for example, when a skeleton argument comes to be drafted, so that grounds are advanced at a hearing that were not properly pleaded or where permission has not been granted to raise them. In reliance on *Talpada* and the normal rules of fair litigation, Mr Oldham submitted, permission on Ground 1 could and should be refused.

93. Mr Oldham said that he remained uncertain whether the six irrationality points pleaded in the SFG were maintained by the claimants or were now relied on as simply part of the background facts. Accordingly, he proposed first to address what he described as the claimants' primary irrationality point as now presented and would then deal with the six pleaded irrationality points more briefly.

94. In his reply, in relation to this pleading point, Mr Wolfe maintained that his case was as set out in the claimants' skeleton and as put by him at the hearing, which I have summarised above, and that it was consistent with the case as pleaded. He made clear that the claimants were not pursuing the point at paragraph 32(b) of his skeleton, where LBWF's reliance on sampling exercises to support the Decision was criticised as insufficiently robust, in relation to which the claimants had made, and have now withdrawn, their application for the Oxera Report to be admitted.

95. Mr Wolfe said that the claimants did rely on paragraphs 60 and 64 of the SFG as well as paragraph 8 of the Reply, which Mr Wolfe submitted properly and sufficiently clearly pleaded the basis on which they were now relying that there was an unacceptable risk of unlawful outcomes due to the new funding levels determined by the Decision not meeting the needs of affected children in light of the evidence provided by the claimants of delays in the SEND Panel process for approving increases in funding. There was no unfairness to LBWF of the type referred to by

Singh LJ in *Talpada*. The nature of the claimants' case was perfectly understood by LBWF, which has had sufficient opportunity fairly to address it.

96. In relation to this pleading point, it seems to me that Mr Oldham's criticism that the claimants' pleadings do not properly frame the principal basis on which the claimants rely in relation to Ground 1 has some force. I note that paragraph 23 of the SGD demonstrates that LBWF interpreted the SFG as not presenting a challenge to the lawfulness of the Decision based on delay:

> "23. The Claimants point to evidence showing that it can take time for parents to obtain more EHCP funding if there is a dispute about it. This does not affect the analysis of whether the decision challenged is unlawful. The question in this claim is whether this specific proposal – the reduction in the lowest level of bands E and F – will lead to unlawful decision making. *Even if the Council delayed about a funding decision in the case of a particular child, to the extent that it acted unlawfully, that is a different issue: such unlawfulness would not arise because of the decision now challenged, but because of administrative delay. In fairness to the Council, it should also be pointed out there is no challenge based on delay before the Court.* The Council's SEND Panel at which funding decisions are taken meets weekly and decisions should be sent out within 3 days. The delay in MI's case has now been remedied (grounds of claim, para 2)." (emphasis added)

97. The issue of delay in the securing of additional funding is raised in the pleadings, as already noted, but in the context of two different points, namely:

i) that the Decision is allegedly irrational because it cannot achieve the savings that are its putative aim (paragraph 60 of the SFG and paragraph 8 of the Reply); and

ii) the decision of Supperstone J in the first instance decision in *R (AD) v LB Hackney*, where LBH's cut to Element 3 funding was upheld, can be distinguished from this case (paragraph 64 of the SFG).

98. Undoubtedly, the claimants have evolved and refined their challenge during the course of preparing for this hearing. That is to some extent natural. The question is at what point evolution and refinement lead to unfairness because the case then advanced no longer reflects the case original put. In this case, it seems to me that fairness does not require that permission be denied on the basis that the principal point now relied on was not directly pleaded. The issue of delays in the process of applying for additional funding was raised by the pleadings, in particular in paragraph 60 of the SFG. The claimants' principal position now, in relation to Ground 1, is not a wholly new point, but rather a reorientation of the focus of the delay point. LBWF have had the opportunity to consider and address the case as now formulated. In my view, fairness favours the resolution of this ground by reference to the substantive arguments of the parties.

99. In relation to the claimants' objection to the evidence of Mr Kilgallon, Mr Oldham submitted that this is a challenge to the adoption of a policy and not to the treatment of an individual. It is therefore a "systemic challenge". As now formulated by the claimants, the issue is whether the Decision creates an unacceptable risk of unlawful outcomes: *Suppiah* at [137]. Accordingly, it is for the court to determine whether the Decision gives rise to an unacceptable risk. In the "systemic challenge" case of *R (Medical Justice) v Secretary of State for the Home Department* [2010] EWHC 1925 (Admin) at [39], involving a challenge to a policy of the Secretary of State for the Home Department, Silber J said that:

> "In this case, the court is obliged to interpret and assess the policy in light of all the prevailing circumstances as well as any available actual evidence as to its likely or actual consequences."

100. Given the nature of the challenge, it seems to me that the principle articulated by Silber J in the *Medical Justice v SSHD* case resolves this question. The question, as now formulated by the claimants, is whether the Decision poses an unacceptable risk of unlawful outcomes. Any available actual evidence as to the likely or actual consequences of the Decision is potentially relevant and admissible to that question. The cases cited by Mr Wolfe are, accordingly, off-point. They are concerned with what a decision-maker needs to know and/or to consider in order lawfully to make a decision and whether knowledge of an official in the body for which the decision-maker is responsible can be attributed to the decision-maker to satisfy the relevant knowledge requirement.

101. Mr Oldham's principal submission in relation to the claimants' primary irrationality point, as the case is now put, was that the claimants have provided no proper evidence that the Decision presents an unacceptable risk of unlawful outcomes in the form of breach of LBWF's section 42 duty to secure the SEP specified in the EHC Plans of children currently allocated Band E or Band F top-up funding.

102. The evidence on which the claimants rely, Mr Oldham submitted, is not about actual or threatened failure to provide the SEP specified in any individual EHC Plan but is rather about delays in obtaining an EHC Plan, disagreements about the form an EHC Plan has taken and fears about what might happen if funding were cut. In this regard, he referred to the evidence of SI, MR, Mr Barlow, Ms Freeman, CL, and Ms Bithell. Mr Oldham accepted that the matters raised were serious, although it was possible for there to be a legitimate disagreement, for example, about whether a child should have an EHC Plan and, if so, what its contents should be. But none of these concerns, he submitted, provides evidential support for the principal irrationality point because the Decision does not bear on these concerns. In any event, they are not the alleged unlawful outcome on which the claimants rely.

103. Mr Oldham acknowledged that in the witness statements of CL and Ms Gerolazou, a concern is raised about one aspect of the EHC Plans of their respective children, namely, in relation to occupational therapy, but there is no evidence that the difficulty is insufficient funding. None of the evidence demonstrates a link between levels of SEN funding and any failure to provide specified SEP, still less an unacceptable risk of such a failure because of the Decision. It is important to bear in mind, Mr Oldham

submitted, that LBWF fully accepts its duty to secure the SEP in relation to each EHC Plan.

104. Mr Oldham submitted that LBWF's evidence showed that the Decision posed no unacceptable risk of an unlawful outcome in relation to the securing of the SEP for children with Band E and Band F top-up funding. This conclusion is supported by the following:

i) the fact that the loss of funding is at levels of under 0.5% of schools' overall budget and with no impact on funding Elements 1 and 2;

ii) the sampling exercises supporting the Decision;

iii) the fact that schools have operational flexibilities to allow absorption of any funding pressures resulting from the Decision;

iv) evidence of current relatively high numbers of EHC Plans and high funding levels for those EHC Plans in Waltham Forest;

v) the fact that the Schools Forum voted 9-3 to accept the proposals;

vi) the ability of schools and families to seek funding at a new Band level;

vii) LBWF's repeated confirmation of its understanding of its duty to fund the SEP in each EHC Plan and its repeated assertion that it will do so in all circumstances; and

viii) the numerous reforms and improvements in the SEND service under Mr Kilgallon's leadership, which service is being significantly re-shaped to be more responsive to families.

105. In relation to the six pleaded irrationality points that no longer seem to be pursued except as supportive background for the claimants' primary irrationality point, Mr Oldham made brief submissions (not being certain whether those points were now withdrawn), which I attempt to summarise even more briefly:

i) the fact that LBWF does not understand how the bandings that it seeks to reform were originally set is irrelevant to the question of whether it is irrational to adjust them;

ii) the claimants have provided no evidential basis for disputing the sampling evidence presented by Mr Kilgallon, particularly in light of the appropriate deference that the court will give to a specialist educational professional such as Mr Kilgallon, who has been a SEN teacher, head teacher and SEN administrator;

iii) the fact that LBWF's objective of cutting expenditure by making the Decision may not be achieved does not make the Decision unlawful, given that a public body can never be sure in advance that unforeseen effects might reduce or eliminate savings, and, in any event, the Decision also has the objective of "[allocating] resources within the available budget envelope transparently" (Cabinet Report, paragraph 3.1.5) and introducing "a transparent, responsive,

flexible and adaptable system to meet needs and to enable budgetary objectives to be realised" (EIA, p 7, hearing bundle p 596);

iv) there is no basis on which the claimants can say that what is said in the Cabinet Report (at paragraph 3.1.14) and in Mr Kilgallon's evidence, given his experience and expertise, cannot rationally be taken into account to support the view that schools have operational flexibilities to allow absorption of funding pressure from the Decision;

v) the fact that the decision of Supperstone J in *R (AD) v LB Hackney* at first instance can be distinguished does not mean that the Decision was irrational, given that the approach taken by LBH in that case is not the only way in which a cut to SEN funding can lawfully be made; and

vi) there is no evidence to support the contention of the claimants that the Decision undermines the right of a child with an EHC Plan to be educated in a mainstream school.

106. In my view, it is not arguable that the Decision poses an unacceptable risk of unlawful outcomes nor is it otherwise irrational. Even without regard to Mr Kilgallon's evidence, looking only at the materials considered by the Cabinet before making the Decision, it is clear that the Cabinet reached the Decision after a long and careful process that included various consultations and consideration of a wide range of relevant matters and after a vote in favour of the proposed Model B by the Schools Forum.

107. The claim as currently formulated on Ground 1 is that the Decision poses an unacceptable risk of unlawful outcomes for the following reasons:

i) it is admitted by LBWF, for example, in the EIA, that some children with EHC Plans will be adversely be affected by the proposed 10% reduction to the Band E and Band F levels of top-up funding; and

ii) the evidence provided by the claimants of past delays in LBWF's processing of requests for additional funding (and delays in dealing with other aspects of the SEND process in relation to individual children) demonstrates that there is an unacceptable risk that those children will for a substantial period of time not have sufficient funding to secure the SEP specified in their EHC Plans.

The unlawful outcomes produced by these factors are said by the claimants to be that LBWF in relation to those children could be for a significant period of time in breach of its duty to secure their SEP under section 42 of the 2014 Act. It is therefore irrational for LBWF to have made the Decision.

108. The fact, however, that there have been some delays in relation to some individual children in relation to requests for additional SEN funding (much less in relation to other aspects of the SEND process) does not establish an unacceptable systemic risk caused by the Decision in relation to future SEN funding requests. It does not appear to be said by the claimants, and cannot be said, that there is a *prima facie* breach of the section 42 duty from the moment that a parent or school considers that their child needs additional Element 3 funding due to the Decision or otherwise.

109. Circumstances change. Needs change. A perceived need for additional SEN funding for a child with an EHC Plan may arise for any number of reasons. There is a process for parents, carers, and schools to apply for additional SEN funding in an appropriate case. A breach of the section 42 duty could, of course, arise, by reason of unreasonable administrative delay in determining and/or approving and allocating additional top-up funding, where that is the fault of LBWF. That does not mean that the breach arose as a systemic effect of the Decision.

110. I noted at [85] above Mr Wolfe's submission that LBWF did not have a written policy for dealing with underfunding of EHC Plans, denying that the Additional Funding Guidance represented such a policy and noting that the Form SENDRF1 referred to on page 20 of that document was appropriate for use to request additional funding only for children without an EHC Plan. At [86] above, I summarised the evidence of Ms Smith as to a lack of a standard procedure for requesting additional funding for children with EHC Plans and associated delays, which the claimants relied upon in support of their primary irrationality point.

111. In his second witness statement, Mr Kilgallon gave the following evidence in reply to these points, which had been raised in the claimants' skeleton argument:

> "3. In paragraph 27(d) of the Skeleton Argument the Claimants refer to paragraph 16 of the statement of Jennifer Smith in which she asserts that the process for applying for additional funding is complicated and unclear. In paragraph 28 of the Skeleton Argument the Claimants assert that the Guidance document provided in response to their letter before claim at [page 444 of the hearing bundle, which is entitled "Making request for additional funding"] is not the process for requesting additional funding for children with EHCPs. The Claimants Skeleton Argument at paragraph 29 goes on to state that the Defendants have no written policy for dealing with underfunded EHCP provision. These assertions and statements are incorrect for the reasons I now set out.
>
> 4. The document provided and which is referred to in the Defendants Grounds of Resistance [paragraph 43 of the SGD] was indeed a document that was put in place some years ago (as can be seen it is dated 2014) in order to gain additional funding for children but it became the mechanism by which funding of children with or without an EHCP has operated. As indicated on page 20 of the guidance 'Forms and templates' the process refers to the completion of the form 'SENDRF1'. The form referred to at 'D[K]14' remains the form used for the seeking of additional funding and has been and is the form used for both non EHCPs and for seeking additional funding where an EHCP exists already. The schools also complete a document called

> a 'Provision Map' and have been provided with a Provision Map example which is at 'D[K]15'.
>
> 5. The documents are the operational documents which were provided to schools and are dated 2014/2015 and schools continue to complete and have these completed since 2014/2015 – these are well known and well used by schools. Requests for increase in funding is received through the SEND officer allocated to particular schools and are presented at SEND panel (which meets weekly). This can be either as part of consultation process of an EHC plan or outcome of annual review process, or schools making a request. For each of these processes schools are expected to submit the provision map and SENDRF1 form that they are all familiar with.
>
> …
>
> 7. In relation to the guidance document provided to the Claimants, this document was sent as stated in the [pre-action protocol] letter of response from the Defendant at [page 431 of the hearing bundle] in order to assist the Claimants.
>
> 8. It is absolutely not the case that we have no policy or procedure or mechanism in place for the making of requests for additional funding for those with existing EHCPs. This document is available through the hub which is the Defendant's website for school related information that is used by all schools and the forms … as I have said are well known to schools and used by them. I do not agree at all with the statements made by Ms Smith where she appears to suggest that there is no clear process that schools follow, nor can it be said that there is not a mechanism that provides a safety net."

112. At the hearing, Mr Wolfe sought to rebut this evidence by reference to the text of the Additional Funding Guidance and of the SENDRF1 form, saying that various references in the Additional Funding Guidance make it clear that it relates to funding for children without EHC Plans and the SENDRF1 form includes questions that are not necessary or appropriate for a child with an EHC Plan.

113. The subtitle of the Additional Funding Guidance is "Guidance for schools, and interested parties for step 1 of the pathway". The pathway is set out diagrammatically on page 8 of the Additional Funding Guidance. Step 1 is the first step, where, the document says, the majority of children with SEND will stay:

> "[Step 1] provides support and resources through the Local Offer for education health and care through universal and

> targeted services available without the need for a statutory EHC Plan."

114. As a matter of form, Mr Wolfe is clearly correct that the Additional Funding Guidance was originally drafted with a focus on children without EHC Plans. It includes, however, detailed guidance on funding for SEN and sets out a process that, on its face, is capable of being used also by schools in relation to children with EHC Plans, as Mr Kilgallon states in his evidence. Similarly, although perhaps not originally intended for use with children with EHC Plans, and therefore including questions that are not strictly necessary or appropriate in such a case, there is nothing on the face of the form to gainsay Mr Kilgallon's evidence that the practice is that the Form SENDRF1 is used in such cases.

115. In relation to the conflict between the evidence of Ms Smith and the evidence of Mr Kilgallon, and bearing in mind that the claimants did not apply to cross-examine Mr Kilgallon, Mr Oldham submitted that as a matter of general principle the court should prefer the evidence of LBWF, given that it is the respondent to this application for permission. He referred to the judgment of McCullough J in *R v Camden LBC, ex parte Cran* [1995] RTR 346 (QBD) at page 353H. In that case the court was asked to decide whether an order made by the defendant, Camden London Borough Council, to create a controlled parking zone was lawfully made. The proceedings were not judicial review proceedings, but "akin" to them. There were numerous issues of fact in dispute, some of which were relevant to the defendant's decision-making process and had to be resolved "before the course of the decision-making process can be ascertained". No witnesses gave live evidence in the proceedings and there were no applications to cross-examine any witness. The claimant, Mark Cran QC, was appearing in person. McCullough J concluded that:

> "unsatisfactory though it is for the court as well as the parties, the court must, in the circumstances, fall back on the principle that where a relevant dispute cannot be resolved on the written material alone the facts must be assumed to be those which favour the respondent."

116. In relation to the factual disputes arising in this case, I agree. I accept the evidence of Mr Kilgallon in relation to the written policy and process for requesting additional funding for children with EHC Plans. Given their original purpose, neither the Additional Funding Guidance nor the SENDRF1 form is wholly adapted for such use, but there is no challenge in this claim to the Additional Funding Guidance itself or to the use of Form SENDRF1 for the purpose of seeking additional funding for children with EHC Plans.

117. Ms Smith does not make clear in her evidence why the "best opportunity" to apply for additional funding for a child with an EHC Plan is at the child's annual review, which, she says, "can sometimes mean we are waiting several months with insufficient funding". Mr Kilgallon made it clear that such a request does not need to wait until the child's annual review. It is also noted in paragraph 23 of the SGD that additional funding requests are considered by LBWF's SEND Panel, which meets weekly, and decisions should be sent out within 3 days. But, in any event, if a school decides to delay applying for additional funding for a period of a few months, waiting

for what it considers to be the "best opportunity" to apply for additional funding, namely, the annual review, that delay cannot be blamed on LBWF.

118. I do not underestimate Ms Smith's professional experience or question the honesty of her evidence, but it is not wholly consistent with Mr Kilgallon's evidence. Mr Kilgallon also has highly relevant experience as a former SEN teacher and head teacher and as a SEND administrator. To the extent there is a conflict between the evidence of Ms Smith and the evidence of Mr Kilgallon on this point, I prefer Mr Kilgallon's evidence, for the reasons I have given. Mr Kilgallon does acknowledge that there have been difficulties in individual cases and that there are various aspects of the SEND process in LBWF that can be improved. But that acknowledgement by Mr Kilgallon is not evidence that provides material support for the proposition that the Decision raises an unacceptable risk of unlawful outcomes in relation to LBWF's duty under section 42 of the 2014 Act.

119. Similarly, I prefer the evidence of Mr Kilgallon to the evidence of Ms Smith as to whether LBWF can rationally rely on the possibility of operational flexibilities to ameliorate the potential impact of the 10% cuts to Band E and Band F top-up funding in relation to the SEP of children with EHC Plans receiving top-up funding at Band E or Band F. In this regard, I also note the evidence of Mr James-Pike who, in his second witness statement at paragraph 8, said the following:

> "8. Ms Smith says at paragraph 15 [of her witness statement], 'there is no operational flexibility for us – we are not going to be able to find this money from elsewhere and "make up the difference".' However, the operational flexibilities which the Council has referred to are not only financial, but also in the way teachers and others in schools work."

120. If it is eventually successfully established on behalf of a relevant child with an EHC Plan that additional SEN funding is needed, then it may be, in that individual case, that an excessive delay in agreeing to and providing that additional funding is a breach of the section 42 duty, although whether there is, in fact, such a breach will be highly fact-specific. A handful of such individual examples, which are due to changes in circumstances and needs of individual children preceding the Decision, as are reflected in the evidence provided by the claimants, is not sufficient to demonstrate that the Decision as a systemic matter creates an unacceptable risk of unlawful outcomes. It is worth bearing in mind the observation of Hickinbottom LJ in *Woolcock*'s case at [68(ix)] (quoted by Supperstone J in *R (AD) v LB Hackney* at [48]) that the threshold of showing unfairness in a systemic challenge is high. The challenge raised by this claim does not, in my view, come close to that threshold, even arguably.

121. I acknowledge the sincerity and the strength and depth of feeling of the claimants' witnesses regarding difficulties and frustrations they have experienced and continue to experience with the SEND process in LBWF and in relation to SEN funding more generally, and their fears in general for the future of SEN funding, which they believe the Decision portends. There is a clear and strong disagreement by the claimants with the Decision as a matter of policy. But that policy disagreement, however strongly and sincerely held, does not mean that the Decision is unlawful.

122. LBWF clearly acknowledges and addresses in the materials supporting the Decision the possibility that some children with EHC Plans who currently receive Band E or Band F top-up funding may need additional funding. LBWF has given reasons why that risk can rationally be addressed by a combination of operational flexibilities at individual schools and the ability to apply to LBWF for additional funding, for example, to move to a higher band for top-up funding. LBWF has repeatedly confirmed its understanding of its section 42 duty and its commitment to securing the SEP for individual children. The cuts to the Band E and the Band F levels do not, in any sense, operate as "caps" on the funding available to any individual child with an EHC Plan.

123. LBWF, through Mr Kilgallon, has acknowledged and apologised for some of the delays and difficulties highlighted by the claimants' witnesses, for example, by SI in her evidence about the length of time it took to get MI's top-up funding increased from Band E to Band F. LBWF has also set out in some detail in the SGD and in its evidence the budgetary difficulties and constraints that have led to the Decision. It has given reasons for the Decision that were open to LBWF, has taken into account relevant matters and has not, to a material extent, taken into account any irrelevant matter as a basis for the Decision. There is no arguable public law irrationality in the Decision.

124. It appears that the six pleaded irrationality points in the SFG have been subsumed in the principal irrationality point, with which I have already dealt. The rationality challenge to the sampling exercises has been withdrawn. In relation to the other five points, I agree with Mr Oldham's submissions, which I have summarised at [105] above. None of those rationality points are, in my view, arguable.

125. If I am wrong that Ground 1 is not arguable on any of the bases advanced, including the principal basis, which I have referred to as the "principal irrationality point", then I dismiss the claim on Ground 1 for the reasons I have given.

Ground 2: breach of section 27 of the 2014 Act

126. In relation to Ground 2, Mr Wolfe submitted that LBWF has breached its duty under section 27 of the 2014 Act to keep education, training and social care provision for children and young people with SEND under review and has failed to consider the sufficiency of that provision and to consult in a specified way on the matter in order lawfully to inform the Decision and in any event.

127. Mr Wolfe noted that in *R (AD) v LB Hackney*, the Court of Appeal held at [44] that section 27 of the 2014 Act:

> "is concerned with consideration at a strategic level of the global provision for SEND made by a local authority … and … that the duties are to be performed from time to time as the occasion requires, with no particular 'trigger' for the duty being specified."

128. Mr Wolfe further noted that in that case at [48], the Bean LJ made it clear that a cut in SEND funding could trigger a wider duty to consult either under section 27 or at common law, although Bean LJ declined to address on that occasion the question of

the level at which a funding cut would trigger such a duty. In that case, the Court of Appeal found that the cut of 5% made to top-up funding for children with EHC Plans was not considered sufficient, however in the Decision in this case LBWF made a cut of double that amount. Mr Wolfe submitted that, given that the Cabinet through the EIA was informed that the scale of the cut would mean a shortfall in funding for some children, the cut implemented by the Decision was sufficient to trigger the section 27 duty.

129. Mr Wolfe submitted that the foregoing is reinforced by the fact that LBWF has never carried out a review under section 27 since the enactment of the 2014 Act. LBWF has admitted that its bandings are 8 to 10 years old and that it does not understand the rationale for them, their relationship with the level of current needs in the area which have changed significantly over the intervening period, or the rationale for the differential between primary and secondary schools. Mr Wolfe submitted that these factors alone are enough to trigger the section 27 duty even if LBWF were not proposing to change its current funding arrangements or the organisation of SEND provision, as contemplated by the Decision.

130. Mr Wolfe submitted that in the Consultation Document LBWF acknowledged that "the current system of allocating funding through the Education Health Care Plans (EHCPs) is in need of a comprehensive review since it is based on data, practice and contextual statistics from nearly ten years ago" and that the current resource ladder was not "fit for purpose". It is plain therefore that LBWF is in breach of its duty to keep provision for children with SEND under review and to review its sufficiency.

131. Mr Oldham submitted that the judgment of the Divisional Court in *R (Hollow) v Surrey County Council* [2019] EWHC 618 (Admin) at [91]-[93] made it clear that section 27 of the 2014 Act imposed a single duty on a local authority to review, from time to time, the education, training and social care provision made in its area for children with SEN and made outside its area for children with SEN from its area and, in doing so, to consider whether the provision is sufficient. For these purposes, the local authority was required to consult the various consultees listed in section 27(3). The Divisional Court rejected at [102] the submission that this duty arises whenever a local authority makes any budgetary or other alteration to SEND services.

132. Mr Oldham submitted that the section 27 duty is extremely wide-ranging, given that:

i) it is concerned not only with educational provision, but also with training provision and social care provision;

ii) the local authority is required to address these issues both in its own area and outside it;

iii) the local authority is required to consult with an extensive list and wide range of consultees; and

iv) the local authority, in discharging its functions under section 27, is also required to have regard to assessment of relevant needs and joint health and wellbeing strategies as required by sections 116-116B of the Local Government and Public Involvement in Health Act 2007.

133. Mr Oldham noted that Bean LJ in the Court of Appeal in *R (AD) v LB Hackney* at [46] made it clear that the section 27 duty was in the nature of a strategic obligation and that a local authority was best placed to decide for itself what the elements of a review should be, subject to review by the courts against *Wednesbury* standards. At [48] of the same judgment, Bean LJ declined to decide what level of major budget cuts or transformation of a local authority's SEND provision would trigger a wider duty to consult under section 27 or at common law. Mr Oldham submitted that Bean LJ was not deciding that even in such situations a section 27 review was entailed. It was not arguable, however, he submitted that the Decision was in any way "transformative" nor was it arguable that it was a "major budget cut". In any event, it cannot be said that such a view is irrational.

134. Mr Oldham submitted that there was nothing on the facts of this case that suggested that, in taking the Decision, LBWF had to review the entirety of relevant education, training and social care provision in and outside its area to the full extent required by section 27 because it would be irrational not to do so.

135. Mr Oldham submitted that the fact that LBWF had not carried out a review under section 27 could not on its own trigger an obligation to do so. Such a proposition, advanced by the claimants, was not supported by any case law. On the contrary, the Divisional Court, in *Hollow* at [99] and [104], relying on section 12 of the Interpretation Act 1978, held that the section 27 duty was to be performed from time to time as occasion requires. Mere passage of time, he submitted, was not an "occasion", which is something happening at a particular time.

136. In his submissions, Mr Oldham raised an additional point, which he asked my permission to raise for the court to consider, at any rate *de bene esse*, regarding the power of the Secretary of State under section 496 of the Education Act 1996 and related provisions to decide whether a section 27 review was needed and, if so, what form it should take and to give appropriate directions. In light of this, he submitted, the court should be reluctant to intervene as the Secretary of State was far better placed than the court to make the relevant determinations. This could be considered an alternative remedy, he submitted. He acknowledged that this point has not been raised in any relevant cases to date.

137. In relation to Ground 2 of this claim, in my judgment it is not arguable that LBWF is required to carry out a review under section 27 simply because it has not yet done so. As noted by Bean LJ in *R (AD) v LB Hackney*, the duties under section 27 are to be performed from time to time, as the occasion requires, with no particular "trigger" for the duty specified in the statute or, I might add, in relevant case law. I agree with Mr Oldham's submission that the passage of time alone cannot be an "occasion" requiring the section 27 duty to be performed.

138. Having regard to the principles set out by the Court of Appeal in *R (AD) v LB Hackney*, there is no basis on which it is arguable that the duty to carry out such a review has been triggered by the Decision. As Bean LJ said in that case at [44], in agreement with the Divisional Court in the *Hollow* case, the section 27 duty is concerned with consideration at a strategic level of the global provision for SEND made by a local authority (including, as Mr Oldham noted, not only its education provision, but also its training and social care provision).

139. The fact that the Administrative Court and the Court of Appeal in *R (AD) v LB Hackney* rejected the argument that a 5% cut in Element 3 funding as a trigger for a section 27 review does not mean that a 10% cut in relation to two Bands of Element 3 funding in this case would trigger such a review. The Court of Appeal in *R (AD) v LB Hackney* specifically rejected the argument that had been made for the claimants in that case that 5% was a "tipping point". In any event, there are other relevant factual differences between that case and this one. The Court of Appeal in that case declined to address what level of "major budget cuts" or "transformation of a local authority's SEND provision" would trigger a wider duty to consult under section 27. I agree with Mr Oldham's submission that the Decision is neither "transformative" nor "a major budget cut". As Mr Oldham noted, the loss of funding is at levels of under 0.5% of schools' overall budgets and has no impact on funding under Elements 1 and 2.

140. I reject Mr Wolfe's submission that LBWF's admission that it does not understand the basis on which its original Element 3 bandings, which are 8 to 10 years old, were made or their relationship with the level of current needs in the area or the rationale for the differential between primary and second schools is sufficient, without more, to trigger the duty to carry out a review under section 27.

141. I also do not accept Mr Wolfe's submission that LBWF's acknowledgement in the Consultation Document that "the current system of allocating funding through the Education Health Care Plans (EHCPs) is in need of a comprehensive review since it is based on data, practice and contextual statistics from nearly ten years ago" is an indication that LBWF is in breach of its duty under section 27.

142. Mr Wolfe also submitted that LBWF had acknowledged in the same passage of the Consultation Document that the current resource ladder was not "fit for purpose". I note that what the Consultation Document actually says in that regard is that a new resource ladder working group would be established to carry out a comprehensive review of the system of allocating funding through EHC Plans and that same group:

> "… will be tasked with identifying any further changes needed to the Resource Ladder to establish a fit for purpose system which, subject to any consultation obligations and decision making, is intended would be implemented from September 2020."

That is not quite the same thing as saying that the present system is not fit for purpose, although I accept that there is an implication to that effect.

143. In any event, none of these pragmatic acknowledgements necessarily entails the conclusion that "the occasion requires" LBWF to carry out the wide-ranging review of education provision, training provision and social care provision required by section 27. It remains a strategic obligation of LBWF, the necessity for which it is better placed than the court to assess.

144. In my view, it cannot have been Parliament's intention that the wide-ranging, costly and resources-intensive review required by section 27 of education provision, training provision and social care provision should be triggered by a relatively narrow and focused cut to two Bands only of Element 3 funding for children with EHC Plans, particularly where LBWF has reached a conclusion, that is not arguably irrational,

that the adverse impact of that funding cut on some children with EHC Plans in mainstream schools can be addressed by a combination of operational flexibilities within individual schools and the ability of parents and schools to apply for additional Element 3 funding.

145. As noted at paragraph 36 of the SGD, the Decision has nothing to do with the organisation of educational functions or institutions, has no direct relevance to either its training provision or its social provision and has nothing or virtually nothing to do with a number of the statutory consultees involved in a section 27 review.

146. In light of my conclusion that this Ground 2 is not arguable, it is not necessary for me to reach a view on Mr Oldham's point regarding section 496 of the Education Act 1996.

147. If I am wrong that Ground 2 is not arguable, I reject the claim on Ground 2 for the reasons I have given.

Promptness/delay and whether the claim lacks a practical purpose

148. In light of my conclusions on the merits, it is not necessary for me to decide whether permission should be refused on the grounds of lack of promptness in issuing it or on the basis that there was undue delay causing detriment to good administration under section 31 of the 1981 Act. Had there been merit in the claim, I am likely to have found that the evidence of Ms Barrett provided a sufficient basis for not refusing to consider it on the basis of lack of promptness or undue delay.

149. It is not necessary for me to consider whether the claim lacks a practical purpose or, even if LBWF had erred as alleged, whether the outcome for the claimants would not have been substantially different.

Conclusion

150. Permission to apply for judicial review is refused on both grounds. If, in relation to either ground, I am wrong that it is not arguable, then I dismiss the claim on that ground for the reasons I have given.