Neutral Citation Number: [2020] EWHC 2216 (Admin) Case No: CO/2133/2020

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

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 14/08/2020

Before :

THE HON MR JUSTICE KERR

- -

Between:

THE QUEEN on the application of

(1) AMBER SHAW **Claimants**
(a child, by her mother and litigation friend DEANNE SHAW)

(2) ABC
(a child, by his mother and litigation friend XYZ)

– and –

SECRETARY OF STATE FOR EDUCATION

Defendant

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Mr Justice Kerr:

Summary

1. The claimant disabled children challenge decisions of the defendant Secretary of State by statutory notices and secondary legislation, taken in April, May and June 2020 in the light of the current coronavirus pandemic, to modify and reduce the obligations on local authorities to make statutory educational and health care provision for children and young people with special educational needs and disabilities (**SEND**) in England.

2. The decisions challenged are as follows. The **first decision** is to enact the Special Educational Needs and Disability (Coronavirus) (Amendment) Regulations 2020 (**the 2020 Regulations**), temporarily amending the Special Educational Needs and Disability Regulations 2014 (**the 2014 Regulations**), by relaxing various time limits for the completion of steps to be taken in the preparation of Education, Health and Care (**EHC**) assessments and plans.

3. The **second**, **third** and **fourth decisions** challenged are to issue statutory notices (**the three notices**) modifying the duty to secure the provision specified in EHC plans under section 42 of the Children and Families Act 2014 (**the 2014 Act)**. The three notices (**the May notice**, **the June notice** and **the July notice**) were issued pursuant to powers conferred by the Coronavirus Act 2020 **(the 2020 Act)**. Their effect was that the duty to secure the making of the provision specified in an EHC plan was replaced for three months by a duty to use "reasonable endeavours" to secure the provision.

4. The 2020 Regulations entered into force on 1 May 2020 and, by their terms, will cease to have effect on 25 September 2020. The second, third and fourth decisions had effect during the three calendar months May, June and July 2020 respectively, thus covering the period from 1 May to 31 July 2020. The last of the notices expired at the end of July 2020 and the duty to secure the provision in an EHC plan has from 1 August 2020 returned to normal.

5. The five grounds of challenge are: breach of a duty to consult prior to making the 2020 Regulations and issuing the three notices; failing to comply with the *Tameside* duty of enquiry; irrationally laying the 2020 Regulations before Parliament the day before they came into force; irrationally deciding that it was appropriate and proportionate to issue the three notices; and in breach of section 7 of the Children and Young Persons Act 2008 failing to have in mind the aim of promoting the well-being of children when making the 2020 Regulations and issuing the three notices.

6. I gave directions on 1 July 2020 for a "rolled up hearing" of the claim, to be heard the same month. The matter came back before me at the end of July. The defendant submits that the claim is academic in respect of the second, third and fourth decisions, as they are already spent, but accepts that the challenge to the first decision – to make the 2020 Regulations, due to remain in force until 25 September 2020 – needs to be determined.

7. The defendant further submits that in any event, all aspects of the claim are unarguable or, alternatively, should be dismissed; and that, in relation to the first ground of challenge (failure to consult), if that failure was unlawful, I must nonetheless refuse leave to apply for judicial review on the ground that the outcome

for the applicants would not have been substantially different if the conduct complained of had not occurred, i.e. if a consultation exercise had taken place (see section 31(3C) and (3D) of the Senior Courts Act 1981).

8. The claimants deny that this latter point is correct and deny that the claim is academic; and they argue, further, that even if it is correct to say that the outcome would not have been substantially different had a consultation exercise been undertaken, I should nevertheless grant leave to apply for judicial review and allow the claim as it is appropriate to do so "for reasons of exceptional public interest" (see section 31(3E) and (2B)).

Relevant Law and Guidance

9. The statutory regime for making provision for children with SEND was overhauled in 2014 following extensive consultation. The new EHC plans combined educational provision with health care and replaced the old statements of special educational needs with the new EHC plans, which can last until the age of 25.

10. The new governing instruments became the 2014 Act and the corresponding regulations, the 2014 Regulations. Part 3 of the 2014 Act contains the provision for children with SEND. Special educational needs (**SEN**) are defined in section 20. The special educational provision (**SEP**) required to meet those needs, together with health care and social care provision, are defined in section 21.

11. By section 36, the relevant local authority must consider a request to assess those needs (an **EHC needs assessment**) and decide whether it may be necessary for the child to have an **EHC plan** specifying the provision required to meet the child's needs. Where the EHC needs assessment leads to the conclusion that SEP, health care or social care is necessary, the authority must secure that an EHC plan for the child is prepared.

12. By section 42 of the 2014 Act, unless the child or young person's parents have made suitable alternative provision, the authority must "secure the specified special educational provision for the child or young person" (section 42(2)) and any health care provision must be provided by the "responsible commissioning body" (section 42(3) and (4)).

13. The EHC plan must be reviewed every 12 months (section 44). Under section 51, there is a right of appeal to the First-tier Tribunal against various decisions including a decision not to secure an EHC needs assessment and a decision as to the content of an EHC plan. These decisions are of vital importance to the children and young people concerned. They greatly affect their lives and futures, determining where and how they are to be educated and cared for.

14. The processes for deciding whether to carry out an assessment and for carrying out assessments and making EHC plans are set out in the 2014 Regulations. They require reporting by expert professionals such as specialist teachers, educational psychologists, doctors and others able to contribute to assessing educational and health needs. The 2014 Regulations include detailed provisions stating the procedure and time limits for each step of the process, including amendments to EHC plans following a review and compliance with orders made by the First-tier Tribunal on appeal.

15. The Coronavirus Bill received its first reading in the House of Commons on 19 March 2020 and became the 2020 Act, entering into force six days later on 25 March 2020. Section 38(1)(b) provides that Part 1 of Schedule 17 makes provision enabling the Secretary of State to give notices disapplying or modifying enactments.

16. Schedule 17, paragraph 5(1)(b) gives the Secretary of State power to modify for a specified period the enactments listed in a table in paragraph 5(6), in the manner set out in the table. By paragraph 5(7) the specified period may not exceed one month. Among the enactments that may be modified is section 42 of the 2014 Act, enacting the duty (**the section 42 duty**) to secure the SEP and health care provision in an EHC plan. The section 42 duty may be modified so that the duty "is to be treated as discharged if the person has used reasonable endeavours to discharge it".

17. A notice disapplying or modifying an enactment may be limited by reference to a specified person or description of persons, a specified area or any other matter (paragraph 5(2)). A notice disapplying or modifying an enactment "must state why the Secretary of State considers that the issuing of the notice is an appropriate and proportionate action in all the circumstances relating to the incidence or transmission of coronavirus".

18. Paragraph 6 of Schedule 17 gives the Secretary of State power to make regulations amending the list of enactments that may be disapplied, or the table in paragraph 5(6) setting out the enactments that may be modified "so as to add an enactment relating (directly or indirectly) to children, education or training, or to vary or remove an entry" (paragraph 6(1)). The Secretary of State must publish a notice under paragraph 5 and take such other steps as he considers reasonable to bring it to the attention of those likely to be affected.

19. The 2020 Regulations were made on 28 April 2020, laid before Parliament on 30 April 2020 and entered into force on 1 May 2020. By regulation 2(2) they will cease to have effect on 25 September 2020. As explained in the explanatory note at the end, they "make amendments to secondary legislation relating to special educational needs and disability in order to provide exceptions to time limits set out in that legislation where they cannot be met because of a reason relating to the incidence or transmission of coronavirus".

20. Regulation 5 inserted a temporary regulation 2A into the 2014 Regulations:

> "**Relaxation of time periods due to coronavirus exception**
>
> 2A.-(1) Where the coronavirus exception applies, any requirement in any of the regulations specified in paragraph (3) for action to be taken within a specified period of time or by a certain day is to be read instead as a requirement for such action to be taken as soon as reasonably practicable.
>
> (2) The coronavirus exception applies where it is not reasonably practicable for a person to meet a requirement referred to in paragraph (1) for a reason relating to the incidence or transmission of coronavirus.
>
> (3) The following regulations are specified for the purposes of paragraphs (1) and (2)—
>
> …."

21. There then follows a list within regulation 2A(3) of the 2020 Regulations, lettered from (a) to (p), of provisions in the 2014 Regulations setting maximum time periods for the carrying out of various steps in the process of assessment and making of EHC plans for children and young people with SEND. The effect of inserting the new temporary regulation 2A into the 2014 Regulations is accurately summarised in the explanatory note at the end of the 2020 Regulations, thus:

> "Regulation 5 inserts a glossing provision into the SEND Regulations 2014 which relaxes certain requirements in those Regulations for actions to be taken within specified time limits where it is not reasonably practicable for a person to meet those requirements for a reason relating to the incidence or transmission of coronavirus. Instead, any such requirement is to be read as a requirement for such action to be taken as soon as reasonably practicable."

22. On 30 April 2020, the day before the 2020 Regulations entered into force, the Secretary of State published non-statutory guidance on the changes to the law entitled *Education, health and care needs assessments and plans: guidance on temporary legislative changes relating to coronavirus (COVID-19)* (**the Guidance**). It has since been updated, most recently on 6 July 2020.

23. The Guidance explains in detail over 18 pages the changes and the reasoning behind them to a target audience of families, parent carer forums, providers of SEND information, advice and support services, local authorities, health commissioning bodies, health care professionals and others involved in SEND assessment and provision.

24. The Guidance emphasises "[t]he importance of co-production", which I was told means "working together", and of co-operation (which also means working together) between local authorities, early years providers, schools, colleges and other education providers. It included examples of "alternative arrangements" in the performance of the modified duty under section 42 of the 2014 Act, for example alterations to the frequency and timing of delivery of provision in school.

25. The Guidance also explained that the elements of EHC needs assessments and plans were unchanged, but that the timescales were modified in accordance with the 2020 Regulations. Rights of appeal to the First-tier Tribunal were unchanged and that tribunal was doing its best to continue its programme of determining appeals during the coronavirus outbreak. The publishing of the Guidance coincided with the publication of the first of the three notices embodying the first, second and third decisions.

26. They were the May notice, signed by the Secretary of State on 28 April 2020 and published on 30 April. It was operational during the maximum one month period from 1-31 May 2020. That was followed on 29 May 2020 by the June notice, covering the period from 1-30 June 2020; and on 29 June 2020 (after these proceedings had been issued) by the July notice, covering the period from 1-31 July 2020 and thus expiring the day after the second and final day of the hearing before me. These three notices modified the section 42 duty during that three month period.

The Facts

27. There is currently a pandemic in this country and many other parts of the world. The disruption, upheaval, suffering and deaths caused by the coronavirus pandemic are too well known to need further elaboration. Many aspects of life changed suddenly and

unexpectedly. Parliament and the government have enacted unusual primary and secondary legislation in response to the pandemic. Education and health care are among the sectors most severely affected.

28. The facts relevant to the present claim are documented in detail in the bundles used at the hearing. I have already mentioned the timing of the key legal instruments adopted during the unfolding history. The parties helpfully set out the detailed facts in an agreed chronology, which is largely reproduced as an appendix to this judgment. I will concentrate here on the main events but in reaching my decision I have been taken through and considered the matters set out in the chronology and in the documents shown to me at the hearing.

29. The claimants are both disabled children with EHC plans. They have not attended school since March 2020. Both have received only limited SEP during the pandemic. Their parents and supporters believe that the "reasonable endeavours" modified version of the section 42 duty leaves the claimants and others like them vulnerable to loss of the provision they need and should receive and that local authorities and health care providers are using the pandemic and the dilution of their legal duties to avoid what should be their obligations to provide the SEP specified in the claimants' EHC plans.

30. An announcement was made in the House of Commons by the Secretary of State for Health and Social Care on 16 March 2020, stating that unnecessary social contact should cease. On 18 March, the Prime Minister announced the closure of schools, colleges and nurseries from 20 March, except for the children of key workers and vulnerable children. On 19 March, the Coronavirus Bill was introduced in the House of Commons.

31. On 23 March, during the accelerated passage of the Bill through Parliament, the Prime Minister announced lockdown measures on national television. The same day, ministers decided in principle to relax the statutory timescales for EHC plan processes. On 24 March, Vicky Ford MP, a Minister in the Department for Education, wrote an open letter for circulation to all partner organisations, parents and others in the SEND sector.

32. The letter referred to published guidance on supporting vulnerable children and alerted recipients to the coming changes. She explained that local authorities would have to decide whether children with SEP would be safer at school or at home. She informed that the Council for Disabled Children (**CDC**), a charity, would act as information provider via its website and would collate and pass on "questions and queries from stakeholders".

33. The National Network of Parent Carer Forums (**NNPCF**) responded in a document the same day making recommendations and observations. They raised many concerns and asked 26 specific questions relating to the published guidance on vulnerable children and young persons, to which the Minister had alluded in her open letter, and about how the needs of those vulnerable persons would be met.

34. That was followed on 26 March by a letter from Ms Anne Longfield OBE, the Children's Commissioner, to the Permanent Secretaries at the Departments of Education and of Health and Social Care, expressing concern that some of the legal protection for the most vulnerable children could be lost because of the 2020 Act, which had become law the previous day. She noted, among other things, the provisions in the Act providing for relaxation of obligations owed to children with

SEND and asked for herself and Parliament to be kept informed and regularly updated about use of the new powers.

35. Officials at the Department for Education met the CDC and NNPCF on 30 March and held briefing sessions. These are documented in emails, most of them so heavily - and inappropriately, in my view - redacted that it is a difficult and slow process to make sense of them. They show that a dialogue was taking place between government and those organisations. Minister Ford met Dame Christine Lenehan of the CDC on 31 March. 36. Dame Christine wanted "clarity around the powers of the Bill" (i.e. the 2020 Act). She referred to "confusion" among local authorities "around what they should be doing". The same day, departmental officials met representatives of the Association of Directors of Children's Services (**ADCS**). This body brings together those in charge of delivering children's services by local authorities. The meeting included discussion of many issues arising from the closure of schools, including new guidance relating to "Vulnerable Children and largely the EHCP cohort".

37. There were further communications and discussions during the first few days of April. On 3 April, Ms Alison Fiddy, the chief executive of Independent Provider of Special Education Advice (**IPSEA**), wrote to the Department lamenting that parents were being advised by local authorities that the latter would not be complying with their duties under the 2014 Act. She asked the Department if or when the section 42 duty might be modified and requested that local authorities be reminded there had been no disapplication of timescales for EHC plan processes.

38. The Department held a meeting with the ADCS and the Local Government Association (**LGA**), representing local authorities in England, the same day. It was not minuted but it is clear from surrounding documents and narrative statements that there was discussion about relaxing the legal duties of local authorities in EHC assessment processes and modifying the section 42 duty as provided for in the 2020 Act. It is clear that local authorities were concerned that they would be unable to discharge their legal obligations to children with SEND unless those obligations were modified.

39. On 6-8 April, a document was produced on an online forum of medical and clinical officers responsible for health care provision, hosted by the CDC. It summarised over several pages the changes to their working patterns and practices arising from the pandemic and the lockdown; for example, officers were being redeployed to do Covid-19 related work. Many were working remotely or in different settings and this was diverting them from availability to do work on EHC assessments and plans. This intelligence was gathered from health care providers and was collated and forwarded by the National Children's Bureau (**NCB**), a children's charity, to the Department.

40. It was followed by a letter of 8 April sent on behalf of all Directors of Children's Services in the East Midlands to the Secretary of State complaining that "the void around SEND becomes more obvious every day". The letter explained that all the 2014 Act duties remained in place and that this was leading to pressure from parents and carers and threats of legal action, which in a period of "global emergency" was "both untenable and unacceptable". The author requested, among other things, that the section 42 duty be disapplied completely, not merely modified; and asked for EHC assessment and planning timescales to be relaxed.

41. Between 6 and 27 April, officials at the Department undertook structured calls with SEN officers from 127 local authorities. Summaries of 88 of the calls were compiled

and tabulated. The picture was mixed but it was plain that much of the SEP normally made was not being delivered. For example, one local authority reported graphically that its main health provider had "pulled up drawbridge and gone to trenches". Another was "managing parents expectations", some of whom were pushing for an "external placement". A document from within the Department at around this time indicated that only about 3.9 per cent of children with EHC plans were attending school.

42. On 9 April, while this exercise was going on, an anonymous official, whose name was redacted out, made a written submission to Minister Ford seeking her agreement to exercise the power to modify temporarily the statutory deadlines for EHC assessments and plans and to note that advice would follow shortly that the duty to secure the SEP in EHC plans should be modified. The written submission envisaged that regulations would be laid before Parliament without observing the conventional 21 days of lead time.

43. The reasoning in the submission included reference to pressure from local authorities and health bodies and the possibility of legal challenges; parent groups and SEND stakeholders were also recorded as having concerns and "the sector generally recognises that changing the law is rightly part of the Government's response to COVID-19 and parents are keen to have greater certainty as to their entitlements".

44. The anonymous official argued that changing the law "would not … in itself have a major impact on the current levels of service … the outbreak has already led to a significant diminution in that provision… ." There was a "significant mismatch between … the statutory duties … and … the current reality on the ground…".

45. The reasoning was that the relevant duties would not be performed whether or not the law continued to require them to be performed. However, the changes would be controversial and legal challenge could be expected. Some authorities were already threatened with judicial review. It was therefore important to "get messaging on these changes right". Public endorsement from bodies such as the ADCS and NNPCF should be sought; "conversations with these stakeholders" had already taken place, the official explained.

46. An equality impact assessment recognised the temporary disadvantage to some disabled children and that boys are twice as likely as girls to have EHC plans. These factors were considered to be outweighed by the public interest in local authorities and health bodies responding appropriately to the Covid-19 outbreak. They should be allowed to deploy their resources where they were most needed without risk of a successful legal challenge.

47. Further rounds of meetings and correspondence continued in the second and third week of April. Directors of Children's Services in other regions followed the lead of the East Midlands in asking for duties in the 2014 Act to be disapplied completely and time limits for EHC assessments and plans relaxed. On 16 April, the Department circulated draft guidance on what became the changes in the law wrought by the four decisions.

48. Comments on the draft guidance were sought and received from interested parties, including the NCB, the NNPCF and another organisation called Contact, a charity for families with disabled children. A discussion was held with those bodies on 17 April. Ms Fiddy of IPSEA was telephoned on 20 April and asked to provide her comments by 5pm the next day, which she did.

49. A further submission to Ministers, from the Department's Ms Sue Pickerill, was produced on 21 April. This sought approval from two Ministers of proposals to exercise various powers under the 2020 Act. The submission recorded that officials had "taken into account stakeholders' views on the burdens that trying to meet legislative requirements are creating, whilst they are focusing on maintaining essential provision".

50. Among the proposals was one to modify the section 42 duty in the manner provided for by the 2020 Act, to replace the absolute duty with a "reasonable endeavours" duty regarding the SEP specified in an EHC plan. The submission pointed to the requirement that a relevant notice must specify why the issuing of the notice was an appropriate and proportionate action in all the circumstances relating to the incidence or transmission of coronavirus.

51. Suggested reasons to be included in any notice were then set out and the Ministers were asked to consider those reasons. In relation to modifying the section 42 duty, the reasons suggested were: reduced available local authority resources; redeployment of local authorities' and health care bodies' staff to respond to pressures generated by the outbreak itself; the fact that only about 3.9 per cent of EHC plan children were attending school, making it in many cases impossible to make provision normally delivered in an education setting and only some of which could be delivered remotely; and allowing local authorities and health bodies to adapt to the situation.

52. The submission to Ministers then set out a strategy to "control the narrative" and "mitigate criticisms around how this direction-making power will be used". Both "proactive statement" emphasising limiting the spread of the virus and "reactive handling" of concerns of parents that their children are "no longer getting the support they need" would have to be used. There was an equality impact assessment similar to the previous one, though broader because other proposals (not relevant to this claim) were also addressed.

53. The first decision, to make the 2020 Regulations, was then made, together with the second decision, to issue the May notice, together with the Guidance. These three instruments together formed a package of measures. The 2020 Regulations were made on 28 April, the day the Secretary of State signed the May notice. The 2020 Regulations were laid before Parliament on 30 April, the same day as the May notice was issued and the Guidance was published.

54. I have already touched upon the Guidance, to which there is no separate challenge, though it clearly stands or falls with the 2020 Regulations and, while they were effective and current, the three notices. I have already explained the effect of the 2020 Regulations, which entered into force on 1 May, and the effect of the May notice.

55. The reasoning in the May notice mirrored that suggested in the written submission of Ms Pickerill. It was also stated in the notice that the Secretary of State had considered alternative options such as delivering provision remotely but that this was hampered by redeployment of staff and limitations on the ability of parents of children with SEND to participate remotely and the fact that remote provision would not comply fully with the duty.

56. An explanatory memorandum accompanying the 2020 Regulations stated the reasons for not complying with the "21-day rule", a parliamentary convention requiring

relevant instruments to be laid before Parliament for at least 21 days prior to coming into force. The explanatory memorandum continued:

> "3.1 …. The instrument forms part of the Government's response to the outbreak of coronavirus (COVID-19), a national public health emergency. This instrument will come into force on 1st May 2020, in order urgently to reduce pressures on local authorities, health commissioning bodies and others involved in EHC needs assessment and plan processes; thereby allowing them to focus on the response to coronavirus (COVID-19) and direct their resources where most needed. Local authorities in particular have asked for these changes to take effect as a matter of urgency.
>
> 3.2 If we complied with the 21-day rule, it would delay these bodies having the flexibility they need urgently to adapt their priorities during the coronavirus (COVID-19) outbreak. It was not possible to make this instrument sooner. The Government announced social distancing guidance on 16th March 2020, then introduced 'stay at home' rules on 23rd March. The Department was not in a position to assess the full extent and impact of these measures on the EHC needs assessment and plan processes immediately and needed to engage with the sector to understand the impact.
>
> 3.3 By taking effect on 1st May, we are also responding to calls from the families of those with SEND for greater certainty as to what they can reasonably expect over the EHC needs assessment and plan processes during the outbreak. It should also be noted that this instrument is relaxing the timescales for EHC need assessments and plan processes, rather than changing the substance of those processes."

57. Later in the explanatory memorandum, the following passage appeared:

> "**10. Consultation outcome**
>
> 10.1 Given the importance of acting swiftly to change the law so as to free up local authorities, health commissioning bodies and the other public bodies concerned to respond to the current national public health emergency, no formal consultation was conducted. There is no legal requirement to consult on changes to the timescales covered in this instrument.
>
> 10.2 We have, however, discussed the principle of amending the timescales and why urgent action is needed with a range of stakeholders, including representative bodies for local authorities and parents of children with SEND and a number of specialist SEND organisations. Local authority representatives expressed strong support for the principle of changing the statutory deadlines to give greater flexibility over the deployment of resources. Representatives of the families of those with SEND and SEND organisations recognised the need for changes to the law during the coronavirus (COVID-19) outbreak, provided that those changes were proportionate. There was strong consensus among all stakeholders about the need for clear guidance to support implementation."

58. A pre-action protocol letter then arrived at the Department, sent on behalf of the first claimant on 7 May 2020. The lockdown continued. Discussion, meetings, correspondence and debate about the first and second decisions continued through May. The Children's Commissioner published a statement on 12 May expressing

"serious concerns" about the 2020 Regulations and stating her view that "the downgrading of key duties towards children with SEND is disproportionate to the situation".

59. The Department responded to the pre-action protocol letter on 22 May. The battle lines were drawn for what became this case. Ms Pickerill produced a further written submission to the two Ministers on 22 May. The May notice was due to expire at the end of the month, and the question arose whether to issue a further notice covering part or all of the month of June. The submission to Ministers was similar to the previous one.

60. The new development mentioned in the submission of 22 May was that officials had reviewed whether the relevant notices (including the May notice) should be renewed for June, in the light of what by then had become "conditional plans for the phased wider opening of education and childcare settings for selected groups of children and young people, in addition to vulnerable children and the children of critical workers, from 1 June 2020".

61. Officials had, Ms Pickerill explained, "taken steps to engage with stakeholders' [sic] and consider their views on the burdens that trying to meet legislative requirements are creating, whilst they are focusing on maintaining essential provision." The conclusion was that:

> "[i]rrespective of whether the planned conditional phased wider opening goes ahead from 1 June or provision is continued solely for children of critical workers and vulnerable children, we consider that the issuing of notices is an appropriate and proportionate action at this time".

62. The evidence reviewed was described later in the submission, thus: feedback from the ADCS; intelligence from local authorities' SEND heads of service received via departmental SEND advisers; the CDC's dedicated medical officer and dedicated clinical officer forum; regional SEND lead officers from NHS England and NHS Improvement; and "[o]ther relevant evidence that has come to our attention, such as relevant research reports".

63. On 29 May 2020, a group of about 50 organisations supporting children with SEND wrote to the Minister, Vicky Ford MP, expressing their concerns about the "disproportionate impact" of the 2020 Act and the Guidance on children with SEND "who already experience poorer outcomes than their peers". They asserted that some local authorities were making "little or no attempt to engage with them to agree what provision in [EHC plans] will continue to be made and how and when this will happen … ."

64. The letter went on to express concern that reporting on required therapeutic interventions was not taking place, which could adversely impact on the children's long term physical and mental health and well-being. Given the expectation of an imminent renewal of the May notice to cover the month of June, the letter asked "how your Department is monitoring these processes, what provision is being made; how the measures have affected children with SEND and what evidence will inform any subsequent decisions … ."

65. The letter asked for an assurance that the 2020 Regulations would not be extended beyond their current lifespan until 25 September 2020; and went on to raise the question how and when children with SEND could be expected to return to a school

setting without the SEN support in their EHC plans in place to assist them on their return.

66. Then on 28 May 2020, the Secretary of State made the third decision, signing the June notice covering the period from 1-30 June 2020. The narrative and reasoning in it were similar to that in the May notice, but slightly expanded. The May notice became spent on 31 May and the June notice took effect from 1 June. Some schools did indeed reopen in early June to children beyond those of key workers and vulnerable children. A limited number of children in reception classes, year 1 and year 6 began to return to school.

67. A further pre-action protocol letter before claim was sent to the Department on 5 June, this time on behalf of both claimants. The challenge was updated to include the June notice within the scope of the proposed application for judicial review. There was some discussion in the correspondence about disclosure and the duty of candour. The claim was then made on 12 June.

68. Saini J gave directions the same day, including an anonymity order in respect of the second claimant and his litigation friend, which remains in place. He gave directions

for the acknowledgement of service to be filed by 19 June, including the defendant's response to the request for disclosure of documents pursuant to the duty of candour.

69. On 15 June, a number of schools opened their doors to year 10 and 12 students and those in secondary schools. The Department kept the position under review. Representations continued to be made by, among others, the NNPCF and feedback for monitoring purposes was provided by the ADCS.

70. On 16 June, a further submission to Minister Ford was provided, by an anonymous official. She or he emphasised the "significant implications for children and young people with SEND and their families" which the changes to the SEND regime had wrought. It was necessary to monitor the impact of the changes and assess whether they continued to be appropriate and proportionate, "given the implications for children's rights".

71. The official recommended that the Minister noted the proposed approach to monitoring the temporary changes and offer any views. The author explained further that a judicial review application was underway and that the Department had "come under pressure to carry out a Children's Rights Impact Assessment" (**CRIA**) in relation to the temporary changes. This was not a statutory requirement but was recommended to supplement the prior equality impact assessments. The CRIA would be complete by the end of June.

72. The defendant filed its acknowledgment of service and summary grounds of resistance, together with written evidence, on 22 June. The CRIA was then completed and a further submission to Ministers incorporating it provided the next day, again penned by an anonymous official whose name has been blanked out.

73. The author recorded that in applying the "appropriate and proportionate" test, officials had, once again, taken steps to engage with stakeholders and consider their views. In the light of the partial reopening of schools, officials had also considered whether the modifications and disapplications in paragraph 5(6) of Schedule 17 to the 2020 Act remained appropriate or whether "there is a case for taking a more nuanced approach,

by limiting the modifications and disapplications to specified persons, specified areas, or in other ways …".

74. The recommendation in the case of the modified section 42 duty, however, remained the same: that the duty remained modified as before under a new notice to take effect from 1-31 July 2020. Officials considered, in the light of the CRIA, that the temporary changes to the legislation remained an appropriate and proportionate response to the extraordinary circumstances.

75. The evidence cited, on which that view was based, was described in similar terms to the description in the previous submission to Ministers, but was slightly expanded, to include more recent feedback including from "SEND stakeholders", namely the CDC, Contact and the NNPCF; and the results of the Department's "COVID-19 Pupils, Parents and Young People's Survey".

76. The view of the author was that despite the judicial review and the view of those who questioned whether a further notice was needed, and despite the wider opening of educational and childcare settings and increased attendance of children and young

people with EHC plans, "local authorities and health commissioning bodies are still unable to meet these duties".

77. Three options were presented to Ministers: to revert to the absolute duty under section 42 of the 2014 Act to secure the SEP in an EHC plan; to amend the 2020 Act (using a "Henry VIII" power to amend the primary legislation by secondary legislation) to enact a different form of duty under section 42 of the 2014 Act (for example replacing "reasonable endeavours" with "all practicable steps" or "best endeavours"); or to continue the "reasonable endeavours" duty for another month.

78. These options were then briefly assessed in turn. The first was considered premature: local authorities and health commissioning bodies would not yet be able to cope. The second was laborious and would take time; the legislation probably would not be ready by the end of June; furthermore, use of a Henry VIII power, according to case law "must be an exceptional course". The citation was from Lord Donaldson MR's judgment in *McKiernon v Secretary of State for Social Security* (1989) 2 Admin LR 133, 140, also cited recently by Lord Neuberger PSC in *R (Public Law Project) v. Secretary of State for Justice* [2016] AC 1531, at [27].

79. The third option, continuing the status quo for another month, was therefore "strongly recommended". The reasons were set out in an annex to the submission. The main reason was that "children and young people with [EHC] plans are still for the most part at home where their full provision cannot be secured or arranged irrespective of local authorities and health commissioning bodies continued efforts".

80. The "detailed rationale" to the same effect was elaborated more fully in Annex B to the submission. The CRIA was summarised near the end of the written submission. The first part of it related to children generally, not just children with SEND. There was a discussion of various matters not relevant to this claim, including the disapplication of section 444 of the Education Act 1996 making school attendance compulsory.

81. In relation to children with SEND, the outcome of the CRIA (set out in full at Annex C to the written submission) was that "we believe … the adverse impacts on children and young people with EHC plans not necessarily receiving the provision specified in

their plans in full whilst the notice is in force are appropriate and proportionate in the circumstances". The Department had "taken steps to mitigate the negative impacts, detailed in the CRIA"; and:

> "In addition we have prioritised vulnerable children and young people, including those with an EHC plan to attend school or college, where it is determined, based on a risk assessment, that their needs would be as safely or more safely met in the educational environment."

82. The Secretary of State accepted the advice in the written submission. On 29 June he made the fourth decision, signing the July notice. The reasoning in support of the "appropriate and proportionate" test referred to the partial reopening of some schools from early June and reflected the reasoning in the written submission. A paragraph was included referring to the subject matter of the CRIA and accepting the "negative impact" on those with EHC plans who were not receiving full provision.

83. It was also recognised that lack of full provision may also make it impossible to return to an education setting or make it more difficult to transition back to such a setting; but the modification was regarded as proportionate because it allowed local authorities and health commissioning bodies to adapt to the changing situation in their area and arrange "reasonable alternatives to the usual service" during the outbreak, such as delivering services remotely.

84. The July notice became effective on 1 July and remained so until 31 July. On 1 July, the case came to me on the papers and I directed a rolled up hearing, to take place during the second half of July. I allowed the claimants to amend the claim so as to challenge the July notice. Certain further evidence was filed by both parties in the weeks leading up to the hearing before me, which took place on 29 and 30 July as a "hybrid" hearing, with myself and the advocates in court, while others attended remotely, by Skype.

Is the Challenge to the Three Notices Academic?

85. Of the five grounds of challenge, four attack the legality of the three notices (all except the third ground); while four (all except the fourth ground) attack the legality of the 2020 Regulations. The defendant accepts that the challenge to the 2020 Regulations is not academic, because they are to last until 25 September 2020, but contends that I need not determine the challenge to the three notices because they are all spent and have not been replaced.

86. Thus, I must address four of the five grounds of challenge even on the defendant's case that the challenge to the three notices is academic. I therefore hope I will be forgiven for not spending too long on the issue whether the challenge to the three notices is academic. One might say that question is itself largely academic. I have to address all but one of the grounds anyway and it is better to address all five grounds in case of an appeal.

87. I was referred to the usual authorities: Lord Slynn's speech in *R v. Secretary of State for the Home Department ex p. Salem* [1999] 1 AC 450, 457A-B and Silber J's judgment in *R (Zoolife International Ltd) v. Secretary of State for Environment, Food and Rural Affairs* [2007] EWHC 2995 (Admin) at [36]; and to Lewis J's recent decision on permission (under appeal) in *R (Dolan) v. Secretary of State for Health and Social Care* [2020] EWHC 1786 (Admin).

88. The claimants submit that the defendant may issue further notices at any time during the lifespan of the 2020 Act (currently two years, until March 2022); that if there was an unperformed obligation to consult (one of the grounds of challenge), that obligation will need to be performed before any future notice; that justice should not be defeated by adopting short term measures that expire before the court can catch up with them; and that the issues here are of serious public concern, as Saini J recognised in his initial directions order.

89. The defendant submits that the summer holiday period for schools and colleges is now upon us; that there is no present intention to issue any further notices; that there is no exceptional public interest reason to determine the legality of the three notices; that the legality of any future notices would be fact-sensitive, including in relation to

any duty to consult; and that the court's time should not be used to give advice or answer hypothetical questions, particularly during the current national emergency.

90. The short answer to this issue is the pragmatic one that I need to address all but one of the grounds of challenge anyway and that it is proportionate to address them all, in case of an appeal. If that were not so, I would have preferred the defendant's submissions and declined to entertain the challenge to the notices. However, I would have done so with the caveat that short term mini-laws should not be used in future as a way of eluding justiciability.

The Merits

The first ground: breach of duty to consult

91. The claimants assert that there was a common law duty to consult families whose children have SEND and their representative organisations, before making the 2020 Regulations and issuing the three notices. Broadly, they say it would be conspicuously unfair not to consult them and that no reasonable decision maker could decide otherwise because of the abrupt removal of their right to receive SEP specified in their EHC plan and timely assessment and reporting to determine what SEP should be made.

92. It is sufficient to mention three only of the cases relied on by the claimants, since there was no dispute about the law and the parties agreed that precedent is at the most a guide and not a cage. First, they reminded me of Laws LJ's celebrated exposition of legitimate expectation in *R (Bhatt Murphy) v. The Independent Assessor* [2008] EWCA Civ 755, at [40]-[42], and at [49]:

> "…. for this secondary case of procedural expectation to run, the impact of the authority's past conduct on potentially affected persons must, again, be pressing and focussed. One would expect at least to find an individual or group who in reason have substantial grounds to expect that the substance of the relevant policy will continue to enure for their particular benefit: not necessarily for ever, but at least for a reasonable period, to provide a cushion against the change. In such a case the change cannot lawfully be made, certainly not made abruptly, unless the authority notify and consult."

93. This is what the claimants characterise as the "fourth duty" to consult, identified by Hallett LJ giving the judgment of the court in *R (Plantagenet Alliance Ltd) v. Secretary of State for Justice* [2014] EWHC 1662 (QB), at [98]:

> "There are four main circumstances where a duty to consult may arise. …. Fourth, where, in exceptional cases, a failure to consult would lead to conspicuous unfairness."

94. The expression "conspicuous unfairness" goes back to the judgment of Simon Brown LJ (as he then was) in *Ex p. Unilever plc* [1996] STC 681, at 694-6. But in *R (Gallaher Group Ltd) v. Competition and Markets Authority* [2018] UKSC 25, Lord Carnwath JSC at [40]-[42] criticised the notion of unfairness (conspicuous or otherwise) or abuse of power as a free standing principle of law and a definite test of illegality. He preferred more firmly grounded principles of judicial review, such as irrationality and legitimate expectation.

95. Hence the claimants submit here that no reasonable decision maker could decide that it was fair to make the 2020 Regulations and issue the three notices without first consulting those most closely and abruptly affected by the changes. They described the section 42 duty as "the core statutory entitlement for children and young people with SEND to receive the provision they need".

96. The claimants submit that the legislation has been in place undisturbed for decades and that past legislation on the subject and consultation on that legislation, including the extension by the 2014 Act of the right so as to include specialist health care, was "past conduct" making it unfair not to remove the relevant rights abruptly, without first consulting formally.

97. Mr Broach accepted that the consultation exercise did not have to be protracted but submitted that it had to take place. He also complained that engagement with local authorities and health bodies, i.e. the providers of SEP and health and social care, was far more extensive than with families of children with SEND and their representative organisations.

98. Mr Broach referred to detailed evidence from parents, charities representing their children's needs, from the Children's Commissioner herself and from within Parliament, to support his proposition that the deliberations that took place were no substitute for a structured consultation exercise. The data collected was anecdotal and one sided, the claimants asserted.

99. In the case of the July notice, it consisted of "a partial monitoring effort" by the defendant, with certain survey work being conducted involving those on the supplier side of SEND provision, largely to the exclusion of those who were losing the right to receive it.

100. The context was that even before the pandemic, there had been systemic failures in the delivery of SEP to children with SEND. The defendant ignored that context, the claimants submitted. After the pandemic arrived, many local authorities stopped making any meaningful provision at all.

101. Such were the claimants' arguments in support of a duty to consult. The defendant countered that the existence of the duty was not arguable. They submitted that the "fourth duty" to consult is not made out. The right to EHC plans arises from primary legislation, not policy or practice; the plans are made and implemented by local authorities, not the Secretary of State; and there is no relevant past conduct that could support the existence of the duty.

102. The defendant was exercising powers conferred on him by statute without the legislation containing any duty to consult and in circumstances where the pool of those affected was very substantial, the decisions made have temporary effect and the circumstances of national emergency were very pressing. It was not, therefore, arguable that a failure to consult was irrational; the information and evidence gathering that was done provided an ample rational basis for the exercise of the powers.

103. The consultation that took place before the reforms enacted in the 2014 Act were not in any way comparable so as to amount to relevant "past conduct", Ms Hannett for the defendant submitted. Those were enduring major legislative reforms undertaken at normal speed in normal times, not emergency measures undertaken to respond to an unprecedented situation in which normal educational provision was not in place at all.

104. I think the claimants' case on this ground is arguable and I grant permission. The impact on parents and their children with SEND was sudden and severe and came at a time when there had already been serious failures in delivery of SEND provision, before the pandemic struck. The effect of the virus on delivery of SEP began in March 2020, before any change in the law. But the Amendment Regulations and the three notices had a disproportionate impact on children with SEND as the defendant's own impact assessments confirmed.

105. Having acknowledged the points in favour of the claimants' case and found this ground of challenge arguable, I have little difficulty in preferring the contention of the defendant that the duty to consult did not arise on the facts here. I accept that the Secretary of State's powers enabled him to take away existing rights of SEND children. But the question that confronted Ministers in the Department for Education was how to respond to the emergency.

106. The short answer to the claimants' challenge is that it was reasonable for Ministers to decide that the necessary changes would be introduced at the beginning of May 2020, given the urgency of the situation. The 2020 Act took barely a week to go through Parliament and entered into force on 25 March, two days after full lockdown instructions took effect and a week after the closure of schools and colleges was announced.

107. The Minister, Ms Ford MP, began her contacts with the sector on the subject of SEND provision as early as 24 March. The powers to make the changes subsequently made from the end of April were in place from 25 March. The contacts between the Department and interested parties (in the jargon, "stakeholders") were not formal and structured. It is difficult to see how they could have been, at least at first.

108. A formal consultation exercise here would have had to occupy at least part of the six weeks or so between the last week of March and the beginning of May, if the measures were to take effect at the beginning of May, a timescale no one could sensibly say was too short in view of the urgency of the situation.

109. As Ms Hannett for the defendant pointed out, where a decision maker decides to consult, whether or not under a duty to do so, the consultation must be fair and must observe the *Gunning* principles endorsed by the Supreme Court in *R (Moseley) v. London Borough of Haringey* [2014] 1 WLR 3947.

110. Here, that would have required the preparation of a formal consultation document, presumably setting out options and perhaps a preferred option, a response form, a

deadline for responses and a list of consulted persons and organisations to whom the consultation document would be sent for comment. Officials would then have had to collate the responses and present them to Ministers for decision, followed by the drafting of notices and, in the case of the 2020 Regulations, draft regulations to be laid before Parliament.

111. The normal 21 day period between laying regulations before Parliament and their entry into force, if observed, would alone have occupied about half the available time if the changes were to be in place by the beginning of May 2020. There was nothing irrational or unfair (conspicuously or otherwise) about deciding instead to go down the path of making calls, sending emails, gathering evidence, receiving representations and deciding how to act.

112. This method of proceeding, informal though it was, did not shut out the voice of parents of children with SEND and organisations representing their needs and interests. Representations from those organisations, up to and including the Children's Commissioner, were heard, received and considered by officials at the Department and Ministers responsible for the decision making.

113. The Department was lobbied by Directors of Children's Services whose authorities were simply unable to perform the absolute section 42 duty to make available the SEP specified in EHC plans. It was right for Ministers to ascertain the position, so as to act on the basis of evidence. The possibility of legal challenges was real and there was already evidence of a small number of challenges or threats of challenge.

114. On the other side of the debate, the Department was lobbied by organisations representing vulnerable children and young people, urging that their rights be protected. That was right and proper. Their voice was heard. Ministers were not persuaded by the call from local authority directors to disapply the section 42 duty completely. There was some compromise.

115. I can see nothing irrational or unfair about the chosen method of proceeding, by information gathering, research and dialogue rather than formal consultation. The first ground of challenge, though arguable, fails.

116. I do not refuse relief on the ground that it is highly likely the outcome would not have been substantially different for the claimants if a formal consultation exercise had been undertaken (see section 31(3C) and (3D) of the Senior Courts Act 1981). If consultation had taken place, I cannot say what the outcome would have been. It could have been better, or indeed worse, for the claimants. For example, the section 42 duty could have been disapplied completely. Or, it could have been preserved, unmodified. I do not know.

117. Had I been persuaded that the failure to consult was unlawful and that it was highly likely the outcome for the applicants would not have been substantially different had formal consultation taken place, I would not have found that the case was one where reasons of exceptional public interest lead me to disregard the requirements in section 2A(a) and (3D). But that issue does not arise.

The second ground: failing to comply with the Tameside *duty of enquiry*

118. The second ground of challenge is that sufficient enquiry was not made prior to making the 2020 Regulations and issuing the three notices. The claimants point out that the duty can include the need to confer with outside bodies with particular

relevant knowledge (see the fifth of six propositions in the *Plantagenet* case, cited above, at [100] in Hallett LJ's judgment of the court).

119. The duty of enquiry is part of the duty to make decisions that are rational. To be rational, they must be sufficiently informed. It is for the decision maker to determine, within the bounds of rationality, what degree of enquiry is called for and what specific enquiries need to be made (*R (Balajigari) v. Secretary of State for the Home Department* [2019] 1 WLR 4647, per Underhill LJ (judgment of the court) at [70]; and see in the context of the current pandemic *R (Christian Concern) v. Secretary of State for Health and Social Care* [2020] EWHC 1546 (Admin) in Singh LJ's judgment of the court at [66]).

120. The claimants say the defendant did not make himself aware of the background and context in which his decisions had to be taken: namely, that there had been systemic failures in delivery of SEP for some years, as had been independently confirmed prior to the pandemic.

121. In relation to the 2020 Regulations, Mr Broach submitted that before deciding to relax the time limits in the 2014 Regulations, the defendant failed to investigate sufficiently whether the concerns raised by local authorities that they were unable to meet those timescales, were well founded. The word of the ADCS was accepted without questioning what the Directors of Children's Services were saying.

122. Mr Broach criticised as "Panglossian" the briefings given to Ministers preceding the three notices, in particular the submission that preceded the July notice. Officials gave the over-optimistic impression that children with SEND would fare acceptably well under the modified section 42 duty, as if they lived in the best of all possible worlds. The submissions to Ministers told them what they wanted to hear: that, while the impact on children with SEND would be disproportionate and adverse, it would be acceptably so.

123. As a corollary, he submitted that officials omitted to tell Ministers what they presumably did not want to hear: of the systemic pre-pandemic failures in the delivery system and a "complete lack of information as to the actual impact on children and young people of downgrading the s.42 duty". The advice given to Ministers was therefore, says Mr Broach, "incomplete, inaccurate or misleading" and the *Tameside* duty of enquiry, accordingly, breached.

124. I can deal with this ground more briefly. I do not think it is arguable and I refuse permission. I accept the defendant's submissions that the level of enquiries made was, incontestably, adequate to make informed and rational decisions. It was obvious that performance of the full section 42 duty was unachievable during lockdown conditions, with a medical emergency diverting many health workers to more urgent and dangerous work, and with schools and colleges closed.

125. Furthermore, the unqualified nature of the section 42 duty meant that the impossible conditions engendered by the pandemic, lockdown and school closures would provide no excuse for its non-performance and no defence to a claim to enforce its performance. Local authorities would have to resort to asking the court to exercise its discretion to refuse relief. Similar reasoning would apply to assessment and reporting deadlines in the 2014 Regulations. It requires no extensive enquiries to recognise that unless changes were made, the law would be impossible to obey.

126. Mr Broach submitted that there was little evidence of threatened legal challenges and parents would not engage in "futile" judicial review applications seeking remedies the court would not grant because they would impossible to carry out. The Secretary of State should have recognised that parents and organisations representing children with SEND would show restraint and stay their hand from pointless legal action.

127. But that argument overlooks the point that there was already some evidence that a small number of legal challenges were being prepared or threatened. Common sense suggests it was likely to grow. Enterprising parents with tenacious lawyers may obtain concessions and provision not available to all, by threatening legal action or bringing a challenge which must be dealt with even if it ultimately fails.

128. I also reject as unarguable the submission that the defendant made insufficient enquiry into the pre-pandemic levels of compliance with the section 42 duty. They were not of direct relevance to the situation on the ground from late March 2020. The historic position was not, as Ms Hannett correctly submitted, a mandatory relevant consideration i.e. one which no reasonable decision maker could ignore.

129. Finally, it is not arguable that the written submissions to Ministers painted a "Panglossian" picture which trivialised the adverse effect of the measures on children with SEND. The equality impact assessments and the CRIA squarely faced up to the disproportionate adverse impact the measures would have on children with SEND, compared to other children missing out on their schooling; and, within the SEND group, on those who were boys, being twice as likely as girls to have an EHC plan.

The third ground: irrationally laying the 2020 Regulations before Parliament the day before they came into force

130. The claimants submit that it was irrational to decide to lay the 2020 Regulations before Parliament on 30 April 2020, the day before they came into force, thereby avoiding all but the most cursory parliamentary scrutiny. This was a breach of the parliamentary convention that 21 days should be allowed between laying of regulations and their entry into force (**the 21 day convention**).

131. The defendant submits that the decision to dispense with the 21 day convention is not justiciable because a ruling from the court on the legality of that decision would infringe the rule in article 9 of the Bill of Rights Act 1689 "[t]hat the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." They also submit that the decision was, in any case, rational and lawful and that the contrary is unarguable even if the issue were justiciable.

132. I grant permission to advance this ground of challenge. If the challenge is justiciable (which is itself an issue that is arguable), it is arguable that it was irrational to lay the 2020 Regulations before Parliament only one day before they came into force. I agree that the decision to do so curtailed nearly to vanishing point any practical opportunity for Parliament to scrutinise the 2020 Regulations before they came into effect.

133. Dealing first with the Bill of Rights issue, the following matters are common ground. A statutory instrument may be made so as to come into operation even before it is laid before Parliament if "it is essential that any such instrument should come into operation before copies thereof can be so laid" (Statutory Instruments Act 1946 (**the 1946 Act**), section 4(1)). The Speaker must be notified and an explanation given.

134. Where a statutory instrument is subject to the negative resolution procedure (as the 2020 Regulations were; see section 135(4) of the 2014 Act and section 569(4) of the Education Act 1996) either House may within 40 days beginning with the date of laying before Parliament (here, 30 April 2020) resolve that an Address be made to Her Majesty praying that the instrument be annulled (section 5(1) of the 1946 Act). I am told the 40 day period expired on 20 June 2020 (because under section 7(1) of the 1946 Act, periods of adjournment of more than four days do not count towards the period).

135. The scope of the "no go area" for the courts in relation to proceedings in Parliament is analysed in the judgment of Lang J in *R (Scott H-S) v. Secretary of State for Justice* [2017] EWHC 1948 (Admin). That was an ambitious and unsuccessful claim by a prisoner serving an indeterminate sentence for judicial review of the failure of the Defendant to consult upon and then exercise the power in section 128 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 as a means of relaxing the test for the release of prisoners serving sentences of imprisonment for public protection.

136. I gratefully adopt, and do not repeat here, Lang J's review and analysis of the case law and other materials, at [38]-[53] in her judgment. It is clear from that review that the court cannot require a minister to introduce primary legislation in Parliament, nor to refrain from doing so and at a time of the minister's choosing.

137. Lang J held at [53] that those principles apply also to secondary legislation. This is subject to the point that the enactment of secondary legislation may require compliance with a prior statutory duty to take a particular step such as undertaking consultation or complying with section 149 of the Equality Act 2010 (the public sector equality duty). Thus, at [51] Lang J said:

> "Under Ground 2, the Claimant's case was that the Defendant was legally obliged to consult before exercising his power to lay an order before Parliament. If the Court upheld this ground, it would have the effect of preventing the Defendant from laying an order before Parliament unless or until he had undertaken a consultation exercise, *even though there was no statutory duty to consult* [*my italics*], because otherwise he would be acting unlawfully. Thus, the consequence of allowing the Claimant's claim was an interference by the Court with Parliamentary proceedings, which was contrary to Parliamentary privilege and the separation of powers".

138. In *R (Heathrow Hub Ltd) v. Secretary of State for Transport* [2020] EWCA Civ 213, at [158] in the judgment of the court (Lindblom, Singh and Haddon-Cave LJJ), the Court of Appeal recorded the concession of the Speaker of the House of Commons that "there are circumstances in which reference can properly be made to proceedings in Parliament and where therefore this will not constitute impermissible 'questioning' of statements made in Parliament".

139. None of the six instances then given is directly in point here. Among them is the Speaker's fifth proposition, which touches upon but does not answer the question

before me, holding that the court may "have regard to Parliamentary proceedings in the context of the scope and effect of Parliamentary privilege, on which it is important for Parliament and the Courts to agree if possible: see the decision of Stanley Burnton J (as he then was) in *Office of Government Commerce v Information Commissioner* [2010] QB 98, at paragraph 61".

140. Against that constitutional and jurisprudential background, the parties' submissions were as follows. For the claimants, Mr Broach submitted that parliamentary scrutiny of delegated legislation is an important aspect of parliamentary accountability and that the accountability of the government to Parliament "lies at the heart of Westminster democracy" (*R (Miller) v Prime Minister* [2020] AC 373 (*"Miller No 2"*) (judgment of the court, per Baroness Hale PSC and Lord Reed DPSC, at [46]).

141. He contended that the decision as to the timing of laying the 2020 Regulations was an exercise of executive discretion over which the courts have exercised a supervisory jurisdiction for centuries (*Miller No 2*, at [31]). The decision to lay the 2020 Regulations a day before their entry into force breached the 21 day convention and the reasons given for that in the explanatory memorandum failed the test of rationality.

142. Mr Broach submitted that reliance on article 9 of the Bill of Rights and parliamentary privilege was misplaced. The manner of exercising a power to lay regulations under a statute was a procedural choice which is a government decision, not a proceeding in Parliament. Mr Broach drew support from the view of the Speaker's Counsel in an email of 3 July 2020 and more formally in a letter to both parties' solicitors dated 27 July 2020.

143. She opined in the letter that "the laying of the regulations before each House of Parliament is a proceeding, as is any debate on them in either House or report by the Joint Committee on Statutory Instruments"; but "the decision **not** [bold in original] to lay the regulations at least 21 days before their coming into force … is not, in my view, a proceeding in Parliament but a decision of the executive".

144. What the court may not do, according to the Speaker's Counsel, is "make an order or declaration which directly required the Government to take steps in their capacity as Members of Parliament". She noted that the court in *Wheeler v. Office of the Prime Minister* [2008] EWHC 1409 (Admin) had left open the possibility that the position could be different in relation to subordinate legislation and, in her view, it is indeed different so far as the timing of a decision to lay secondary legislation is concerned.

145. Ms Hannett (who also represented Speaker's Counsel in the *Heathrow Hub Ltd* case) submitted that while delegated legislation may itself be unlawful and can be quashed even though it has been affirmed in both Houses, the challenge here is to the laying of the 2020 Regulations at a specific time and is founded solely on absence of opportunity for adequate parliamentary scrutiny.

146. The claimants' attack here would inhibit or prevent the Minister from laying the 2020 Regulations and as such falls within the judicial exclusion zone, Ms Hannett submitted. Lang J in *R (Gill) v. Cabinet Office* [2019] 3407 (Admin) had emphasised at [95] that it is an impermissible interference with proceedings in Parliament for the court to grant a declaration "which has the effect of requiring a minister to introduce,

> or prohibiting a minister from introducing, draft legislation to Parliament, other than on terms laid down by the court … ."

147. Ms Hannett submitted that the position was different here from that in *R (Adiatu) v. HM Treasury* [2020] EWHC 1554 (Admin), where the Divisional Court (Bean LJ and Cavanagh J) at [226] distinguished Lang J's decision in *H-S* on the ground that in *H-S* there was no prior statutory obligation to take any step before introducing a statutory instrument in Parliament; while in *Adiatu*, the statutory equality duty under section 149 of the Equality Act 2010 had not been complied with.

148. The Divisional Court there held, at [228], that "a challenge can be advanced under the PSED [public sector equality duty] to the processes followed by a Government Department in preparing to lay before Parliament a statutory instrument". Ms Hannett submitted that the present challenge, by contrast, was to the defendant's noncompliance with the 21 day convention which was a matter for Parliament. The claimants were asking the court to dictate to the defendant when he could lay regulations before Parliament without any legal obligation to prevent him laying them at any time he chose.

149. Such were the parties' submissions, supplemented by the observations of Speaker's Counsel on the claimants' side of the argument which are entitled to the highest respect. I have, however, come to the firm conclusion that Ms Hannett's submissions are correct and are to be preferred.

150. In my judgment, the judicial exclusion zone applies to decisions to lay delegated legislation as well as primary legislation before Parliament, except in cases where statute and not merely parliamentary convention bestows upon the court authority to intervene. Unless there is some specific statutory obligation affecting the laying of secondary legislation, the decision *when* to lay an instrument is as much taken in the political capacity of Member of Parliament as the decision *whether* to lay one.

151. In my judgment, the court would be dictating the terms on which the minister should exercise his or her political functions if it were to decide when the minister is free or not free to lay legislation before Parliament. I accept that, as decided in *Adiatu* and other cases, the position is different where it is not the court or the common law but an express statutory obligation which limits the minister's freedom to lay secondary legislation before Parliament.

152. It is the constitutional role of the court, in the usual way, to enforce the statutory obligation. It is not the role of the court to enforce a parliamentary convention without legal force. Where there is no statutory obligation for the court to enforce, the laying of a statutory instrument is governed by the 1946 Act. The remedy for inadequate parliamentary time for scrutiny is a negative resolution under section 5(1) of the 1946 Act within the 40 day period.

153. I would therefore hold that the third ground of challenge is not justiciable. If I were wrong about that, I would not accept the claimants' argument that the defendant acted irrationally and unlawfully by laying the 2020 Regulations before Parliament the day before they were due to enter into force. He could even have laid them before Parliament after they had already entered into force, on the basis that that was "essential"; see section 4(1) of the 1946 Act.

154. The absence of the usual 21 days for parliamentary scrutiny must be viewed in the light of the pandemic and the destruction it was wreaking at the end of April and the beginning of May 2020. If the 21 day convention was to be observed, the 2020 Regulations would either have had to be drafted weeks earlier – during the first part of the period of discussion and research into what should happen – or come into force weeks later, by which time some deadlines relaxed by the regulations would have expired and local authorities placed in further breach of the duties it was impossible for them to perform.

155. I do not accept the claimants' criticisms of the reasons given for not observing the 21 day convention. They were far from irrational; they made good sense. Local authorities and health bodies did need to have pressures on them reduced, allowing

them to focus and direct their resources on the response to the virus. The families of children with SEND did need "greater certainty" about what they could reasonably expect. They no doubt disagreed with the outcome that EHC plan assessment and reporting deadlines were relaxed, but they still needed to know with clarity what the position was.

156. In my judgment, it was for those reasons not irrational to hasten the process of clarifying the position. While I grant permission to the claimants to advance the third ground of challenge, I do not think it is justiciable and, if it were, I do not think the charge of irrationality is made out on the facts. I therefore dismiss that ground of challenge.

The fourth ground: irrationally deciding that it was appropriate and proportionate to issue the three notices

157. In their fourth ground of challenge, the claimants assert that it was irrational to decide that it was rational and proportionate to issue the three notices. The contention must be, therefore, not only that it was irrational and disproportionate to issue the three notices, but that no reasonable decision maker could take the contrary view, which the defendant took on three successive occasions.

158. The summary formulation of this ground at the start of the claimants' skeleton argument focuses on "the reasons" given by the defendant as to why it was "appropriate and proportionate" to make the notices. It is said, at the risk of some linguistic contortion, that these "reasons" were "irrational". I think this must mean that the reasons relied on in the three notices were not capable of supporting a rationally defensible decision to issue them.

159. It may be recalled that the notices had to "state why the Secretary of State considers that the issuing of the notice is an appropriate and proportionate action in all the circumstances relating to the incidence or transmission of coronavirus" (see the 2020 Act, Schedule 17, paragraph 5(2)). The notices did so in terms that reflected the reasoning in the written submissions to Ministers.

160. The issue thus becomes whether it is arguable that the reasons in those written submissions, replicated in the three notices, were incapable of supporting a lawful decision by the defendant that it was "appropriate and proportionate action in all the circumstances relating to the incidence or transmission of coronavirus" to issue them.

In advancing their submissions, the claimants dispute the defendant's contention that the claimants are indulging in a "microanalysis" of the defendant's decision making.

161. The claimants' points can be summarised briefly as follows. They argue for a high level of intensity of review commensurate with the high impact of the determinations in the three notices. They caution against allowing the pandemic to be invoked as an excuse; it would be wrong "that this somehow lowers the standard of reasoning required".

162. The first reason given is that the outbreak is affecting the ability of local authority staff capacity, affecting their ability to deliver SEP. This is said to be irrational because "it focuses only on reduced administrative staff capacity", who do not deliver the SEP.

163. Secondly, the claimants do not accept that there is evidence to justify the assertion that children being at home makes it more difficult to deliver SEP to them. The claimants reiterate their argument that parents would not try to enforce the section 42 duty in its undiluted form, knowing that the court would refuse relief where it is impossible to perform the duty and deliver the SEP.

164. The claimants say that the small amount of SEP that cannot be delivered remotely would be "dwarfed by the majority of provision which local authorities were able to deliver during the pandemic". They submit that it is irrational to say that remote equivalent provision would not constitute securing the provision specified in an EHC plan. That must vary from case to case.

165. The notices, say the claimants, "are the proverbial sledgehammer to crack a nut". Likewise, required social distancing measures causing disruption should not be allowed to qualify as a rational basis for downgrading the duty. Nor should the "superficial reasoning" found in the June notice, that staff absences and redeployments have affected capacity to deliver SEP.

166. The claimants accuse the defendant of overlooking the need for a proportionality assessment, striking a balance between the interests of children and young people with SEND, on one side of the balance, and other interests on the other side. The notices contain, say the claimants, "absolutely no consideration of the impact of the modification on children and young people" and there is no consideration of whether a "less drastic" change could be made instead; for example, a duty to take "all practicable steps" to deliver the SEP.

167. The claimants deny the objection that these criticisms amount to an invitation to the court to differ from the defendant in the amount of weight given to the considerations informing the reasoning in the three notices. They submit starkly that the defendant was simply "not aware of the detriment to children and young people with SEND of downgrading the section 42 duty" and was therefore unable "to carry out a proper proportionality analysis".

168. Next, focussing particularly on the July notice, the claimants criticise the defendant for not recognising the "circularity" of reasoning that although some schools were reopening, SEP could still not be delivered in schools since children with SEND were not returning to school; not acknowledging that those same children were prevented

from returning by the very absence of SEP which their inability to return is said to justify.

169. The claimants say the proportionality analysis in the July notice is striking for its brevity and paucity, which repeats previously used reasoning, adding the new point that "[t]he full provision not being available in an education setting may also make it impossible or hinder an effective transition back to their education setting". The claimants submit that this does not engage with the reality of the impact on the children affected.

170. They also renew their criticism that there is nothing in the July notice, nor in the earlier ones, to indicate that consideration was given to a milder dilution of the section 42 duty; for example, a duty to take "all practicable steps" or some other form of words. They say the defendant was misled into believing the only option was that set out in the 2020 Act; whereas the defendant could have used his power to amend that Act itself to create other options.

171. In his skeleton argument, the defendant produced an eight point rebuttal of the claimants' arguments under this heading. I do not find it necessary to go through each of the points. I accept the contention that the fourth ground of challenge is not arguable. The claimants criticise the reasoning supporting the three notices – particularly the July notice – but the criticism does not arguably come near reaching the threshold of irrationality.

172. I am satisfied that the criticisms, individually and cumulatively, do no more than express strong disagreement with the defendant's assessment of what was appropriate and proportionate. The argument that the defendant's reasoning is circular has superficial attraction but, as the defendant points out, depends for its validity on removal of SEP being the only permissibly discernible cause of SEND children's absence from an educational setting. That is untenable.

173. The argument that the defendant should have considered other alternatives such as amending the 2020 Act using a Henry VIII power is bad because the claimants cannot select mandatory relevant considerations for the defendant. For the rest, the claimants' arguments merely read like representations in favour of a different outcome and do not arguably impugn the validity of the three notices, or any of them. I refuse permission on the fourth ground.

The fifth ground: failing to have in mind the aim of promoting the well-being of children

174. The claimants submit that the defendant, in making the 2020 Regulations and the notices, failed to perform his duty under section 7(1) of the Children and Young Persons Act 2008 (**the 2008 Act**). That provision states that it is his "general duty … to promote the well-being of children in England".

175. The general duty is fleshed out in various ways in section 7(2)-(5), including an obligation in subsection (5) to have regard to the aspects of well-being in section 10(2)(a)-(e) of the Children Act 2004, which are physical and mental health and emotional well-being; protection from harm and neglect; education, training and recreation; the contribution made by them to society; and social and economic wellbeing.

176. It is common ground that the general duty under section 7(1) is a target duty and not a duty owed to any child as an individual to take specific steps with reference to that child (*R (Simone) v. Chancellor of the Exchequer and Secretary of State for Education* [2019] EWHC 2609, per Lewis J at [81]-[83]). The claimants say that does not mean the general duty in section 7(1) of the 2008 Act is non-justiciable.

177. Section 7(1) can, they argue, be breached and generate a claim for judicial review in an individual child with standing to bring it, if the Secretary of State performs his functions without regard to promoting the well-being of children in England. The claimants say that is what happened here: the defendant failed to have in mind the broad aim of promoting the well-being of children when making the 2020 Regulations and issuing the three notices.

178. Whether or not a breach of the target duty in section 7(1) of the 2008 Act could ever found a judicial review claim by an individual child, it is not arguable that an actionable breach occurred in the present case. The factual basis for the fifth ground of challenge travels the same ground as those already considered, in particular the second ground asserting breach of the *Tameside* duty of enquiry, which I have already found to be unarguable.

179. It is, with respect, obvious from the factual history that in making the first to fourth decisions, the defendant was considering measures he knew would impact adversely and disproportionately on the well-being of children with SEND, but judged that the measures should be taken nonetheless. It is idle to contend on those facts that he did not have the well-being of that group of children in mind.

180. The duty under section 7(1) does not mean that the minister can never take measures adverse to the well-being of children in England. He may feel reluctantly constrained to do so despite having well in mind his general duty to promote their well-being; particularly in extreme circumstances such as war or, as in this case, a pandemic.

181. I do think that the general duty in section 7(1) makes promoting the well-being of children a mandatory relevant consideration when considering measures that may affect their well-being; though that does not mean it must always be expressly mentioned when recording the reasons for such decisions. Beyond that, it does not provide a vehicle for the court to interfere with decisions affecting children taken in the exercise of the minister's judgment.

182. It is incontestable that the defendant in this case had in mind the need to promote the well-being of children with SEND when he took the four decisions. There is no arguable merit in the claimants' contention to the contrary and I therefore refuse permission to advance the claimants' fifth and final ground of challenge.

Conclusion and Disposal

183. For those reasons, I refuse permission to apply for judicial review on the second, fourth and fifth grounds of challenge. I grant permission on the first and third grounds but I dismiss the application for judicial review based on those grounds.

184. I am grateful to the parties and their legal teams for their help in organising the hearing at short notice and to the advocates for providing me with helpful oral and written submissions.

APPENDIX: AGREED CHRONOLOGY

(cross-referred to hearing bundle)

03/03/20	Coronavirus Action Plan published by the Government
18/03/20	Prime Minister announces that as of 20 March, schools, colleges and nurseries will close until further notice except for the children of keyworkers and vulnerable children
19/03/20	First reading of the Coronavirus Bill in the House of Commons
23/03/20	Second and third readings of the Coronavirus Bill in the House of Commons
23/03/20	Ministers decided in principle to allow for an exception from statutory timescales in relation to EHC plan processes [C259, para. 14].
24/03/20	First and second readings of the Coronavirus Bill in the House of Lords
24/03/20	Minister Ford's 'open letter' to children and young people with SEND, their Parents/carers and families and those who support and care for them [C283-C285]
24/03/20	The National Network of Parent Carer Forums ("the NNPCF") responds to the Departmental guidance on Supporting vulnerable children and young people during the coronavirus (COVID-19) outbreak with a briefing ('COVID 19: Recommendations and questions from the NNPCF') [C289-C294]
25/03/20	Third reading of the Coronavirus Bill in the House of Lords
25/03/20	The Coronavirus Bill is granted Royal Assent and becomes the Coronavirus Act 2020 ("the Act")
25/03/20	Example of COVID-19 attendance recording daily summary of data from education establishments. [C966-C967]
26/03/20	The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 are made, laid before Parliament and come into force
26/03/20	Children's Commissioner writes to the Department and the Department for Health and Social Care ("DHSC") [C656-C658]
27/03/20	Internal email re 'Local authority stakeholder intel gathering' and two attached notes of discussions with a local authority Head of EHC Planning and a Senior Educational Psychologist [C484-C493]
27/03/20	Association of Directors of Children's Services ("the ADCS") ebulletin, including consideration of Education, Health and Care ("EHC") plans

	[C496-C505][C502]
30/03/20	Department meets with the Council for Disabled Children ("the CDC") [C279]
30/03/20	Department meets with the CDC, the NNPCF, Contact and the Family Fund Trust [C286-C288]
31/03/20	Minister Ford meets with the CDC [C280-C282]
31/03/20	Children's Social Care: Department meets with the ADCS [C305-C306]
31/03/20	Email from a local authority SEND Strategic Manager to the Department requesting an update on the statutory process timescales [C382]
01/04/20	Department meets with the CDC (not minuted; referenced in the PAP response of 8 June 2020) [D1081-1086]
01/04/20	Email from the NNPCF to the Department and internal response re 'COVID 19 concerns' including interpretation of the power to modify s.42 of the Children and Families Act 2014 ("the CFA 2014") [C536C537]
Undated	Family Fund Trust: Impact of COVID-19, Research – Initial Findings [C509-C535]
02/04/20	NHS England / Improvement guidance on how providers of community health services can release capacity to support the COVID-19 preparedness and response [C386-C404]
30/03-03/04/20	Email chain regarding the modifications to SEND duties and attendance data for pupils with EHCPs for Coronavirus Act modification power [C582-C590]
03/04/20	Email from Alison Fiddy (IPSEA) to the Department and response re 'LAs misunderstanding the Coronavirus Act 2020' [C538-C539]
03/04/20	Department meets with the Local Government Association ("the LGA") and the ADCS (not minuted; referenced in the PAP response of 8 June 2020) [D1081-1086]
03/04/20	Email from the CDC regarding evidence of health staff redeployment [C494-C495]
02-07/04/20	Email chain between Department and the ADCS [C295-298]
07/04/20	SEND Briefing Note – North East Regional ADCS [C333-C334]
05-07/04/20	Various emails setting out information gathered by SEND officials regarding the redeployment of local authority and health staff [C464C470]

06-08/04/20	Summary of health intelligence received as of 8 April, based on the CDC's Designated Medical Officer/Designated Clinical Officer (DMO/DCO) forum and intelligence from the Department's SEND Advisers Email from the National Children's Bureau to NHS England, then forwarded to the Department Document entitled 'Are you being redeployed from your DCO/DMO role? (Thread on DCO/DMO forum)' [C453-C463]
6-27/04/20	Summary of relevant material gathered from structured SEND Adviser calls with 127 local authorities [C341-C377]; see [C262 para.24]
08/04/20	Letter to the Secretary of State on behalf of all Directors of Children's Services in the East Midlands [C335-C336]
09/04/20	Submission sent to Ministers seeking agreement to modify statutory timescales in relation to EHC needs assessment and plan processes [C411-C428]
09/04/20	Children's Social Care: COVID-19 Meeting (Department and the ADCS only) [C307-C308]
09/04/20	Letter to the Secretary of State from the Chair of the North West region ADCS [C327-C329]
09/04/20	Letter to the Secretary of State on behalf of all Directors of Children's Services in the Yorkshire and Humber region [C339-C340]
14/04/20	Letter to the Secretary of State on behalf of all Directors of Children's Services and Children's Services Lead Members in the South West [C330-C332]
14/04/20	Email to the Secretary of State on behalf of all Directors of Children's Services and Children's Services Lead Members in the Eastern Region [C337-C338]
14/04/20	Email from the Regional Schools Commissioner for the East Midlands and the Humber to the Department concerning SEND [C384]
14-15/04/20	Emails between the Department and the ADCS [C299-C300]
14-16/04/20	Email chain between the Department, NHS England and DHSC regarding 'draft notice to modify s42 of Children and Families Act' [C471-C483]
16/04/20	Children's Social Care: COVID-19 Meeting (Department, ADCS, the LGA and Ofsted) [C309-C311]
16/04/20	Draft guidance circulated to stakeholders for comments [C605-C606] [C607-C655]

16/04/20	Internal Departmental email relating details of a legal challenge to a local authority [C381]
17/04/20	Department meets with the CDC, the NNPCF and Contact (not minuted; referenced in the PAP response of 8 June 2020) [D1081-D1086]
17/04/20	Department meets with the ADCS and the LGA (not minuted; referenced in the PAP response of 8 June 2020) [D1081-D1086]
17/04/20	Department's Permanent Secretary writes to the Children's Commissioner in response to her letter of 26/03/20 [C659-C662]
20/04/20	Revised draft guidance circulated to stakeholders for comments [C270, para. 57] [C252, para. 6]
20/04/20	Letter sent on behalf of the S.E. Region SEND Network DCO/DMO Group to the Department and NHS England [C591-C592]
21/04/20	Submission sent to Ministers seeking approval to exercise the powers in the Act to produce a notice modifying s.42 of the CFA 2014 [C429C442]
Undated	Template setting out rationale and evidence for issuing May Notice [C443-C452]
21/04/20	Children's Social Care: COVID-19 Meeting (Department and the ADCS) [C312-C313]
23/04/20	Children's Social Care: COVID-19 Meeting (Department, the ADCS, the LGA and Ofsted) [C314-C315]
28/04/20	The Special Educational Needs and Disability (Coronavirus) (Amendment) Regulations 2020 ("the 2020 Regulations") are made
28/04/20	Secretary of State signs a notice modifying s.42 of the CFA 2014 for the period 1 May 2020 to 31 May 2020 ("the May Notice") (issued on 30 April) [C405-C407]
28/04/20	Children's Social Care: COVID-19 Meeting (Department and ADCS only) [C316-C317]
30/04/20	The 2020 Regulations are laid before Parliament
30/04/20	Department publishes its guidance 'Education, health and care needs assessments and plans: guidance on temporary legislative changes relating to coronavirus (COVID-19)' ("the Guidance")
30/04/20	Children's Social Care: COVID-19 Meeting (Department, ADCS, the LGA and Ofsted) [C318-C319]
01/05/20	The 2020 Regulations and May Notice come into force

05/05/20	Children's Social Care: COVID-19 Meeting (Department and the ADCS) [C320]
06/05/20	Email from NHS England to the Department reporting the views of NHSE regional SEND leads as to whether a further modification notice should be issued in June [C596-C597]
07/05/20	Pre-action protocol letter ("the PAP Letter") sent to the Department on behalf of the First Claimant [D997-D1017]
07/05/20	Solicitors for the Secretary of State acknowledge the PAP Letter by email [D1018]
12/05/20	Email from the NHS to the Department for Education reporting the view of NHSE regional SEND leads [C596]
12/05/20	Children's Commissioner writes to Minister Ford with an attachment entitled 'Modification of Section 42 of the Children and Families Act 2014' [C663-C669]
14/05/20	Children's Social Care: COVID-19 Meeting (Department, the ADCS, the LGA and Ofsted) [C321-C323]
15/05/20	Follow up to the PAP Letter sent to the Department [D1022-D1023]
20/05/20	Internal email regarding intelligence from the National Association of Principle [sic] EPs and attachment [C600-C604]
21/05/20	Children's Social Care: COVID-19 Meeting (Department, the ADCS, Ofsted and the Home Office) [C324-C326]
21/05/20	Letter from the Equality and Human Rights Commission to the Secretary of State regarding the 'Impact of coronavirus on education of children and young people with protected characteristics' [C961-C963]
22/05/20	Response to the PAP Letter sent by solicitors for the Secretary of State [D1029-D1056]
Undated	Spreadsheet summarising the views of a number of stakeholders who comprise the SEND Reference Group on options for wider opening on 1 June [C580-C581]
Undated	Report from Paediatric Continence Forum on 'The impact of Covid-19 on CYP with continence issues' [C593-C595]
22/05/20	Submission sent to Ministers seeking approval to exercise the powers in the Act to issue a notice modifying s.42 of the CFA 2014 [C540-C563]
Undated	Template setting out rationale and evidence for issuing June Notice [C564-C579]

28/5/20	Claimant's solicitors write to request disclosure of evidence [D10571059]
28/05/20	Minister Ford writes to the Children's Commissioner in response to her letter of 12 May [C670-C673]
28/05/20	Internal Department for Education emails in response to Submission to Minister [C682-C683]
29/05/20	Letter from around 50 organisations that work with and support children with SEND and their families (including Contact, Carers Trust, Mencap, NNPCF) to Vicky Ford MP, Parliamentary Under Secretary of State for Children and Families regarding COVID-19 and SEND [C894-C897]
29/05/20	Department updates the Guidance
29/05/20	Secretary of State issues a notice modifying s.42 of the CFA 2014 for the period 1 June 2020 to 30 June 2020 ("the June Notice") [C408C410]
05/20	Family Fund Trust: Impact of COVID-19 'Survey Two – England Initial Findings (48hrs)' [C968-C996]
01/06/20	The June Notice comes into force
02/06/20	Written answer from Minister Ford MP to parliamentary question from Tulip Siddiq MP [E1153]
03/06/20	NNPCF note, 'Working list of NNPCF thoughts on school re-opening' [C902-C915]
03/06/20	Email from the CDC to the Department re 'Redeployment of health staff', containing the poll results from the CDC's poll on redeployment [C598]
03/06/20	NHS England / Improvement guidance on the restoration of community health services for children and young people [C847-C858]
02-10/06/20	Email chain between the Department, NHS England and the DHSC regarding 'NHSE regional SEND leads intelligence for monitoring SEND legal changes' [C863-C867]
05/06/20	Claimants send second letter before claim in relation to June Notice and Second Claimant ("the Second PAP Letter") [D1074-1079] Solicitors for the Secretary of State acknowledge the Second PAP Letter by email [D1072]
08/06/20	Secretary of State's substantive response to disclosure requests [D1081]
11/06/20	Notes from 'Children's Social Care: COVID-19 Meeting' on 11 June [C923-C924]

12/06/20	Claim form sealed [A6-A12]
12/06/20	Order of Mr Justice Saini [A86-A88]
12/06/20	Email chain between Contact, the National Children's Bureau and the Department [C925-C927]
12/06/20	Email chain between Contact, the National Children's Bureau and the Department [C928-C931]
15/06/20	Email chain containing Department notes from meeting with SEND stakeholders on 15 June and comments [C898-C901]
15/06/20	Email from the SEND Reference Group providing feedback as part of the Department's monitoring and reviewing of the SEND temporary legal changes [C845-C846]
15/06/20	SEND Reference Group – School and Setting responses to temporary SEND legal changes, including reasons why pupils are not attending school [C830-C844]
16/06/20	Submission to Ministers regarding the 'Monitoring and Review of SEND Legal Changes' [C674-C681]
17/06/20	NNPCF note, 'Working list of NNPCF representations on Covid 19' [C908-C915]
17/06/20	Email chain between the Department, NHS England and the DHSC regarding the 'SEND modification notice' [C859-C862]
17/06/20	ADCS feedback to support the monitoring and review of SEND legal changes [C828-C829]
18/06/20	Email chain containing Department notes from roundtable meeting with SEND stakeholders (including the CDC, Association of Educational Psychologists, Special Educational Consortium, World of Inclusion, Achievement for …, SCA/SNJ, NAS …, Sense, Contact, Mencap and Amaze) and comments [C916-C920]
18/06/20	Notes from DCS Stakeholder chat [C921-C922]
22/06/20	Briefing from Contact regarding 'Key issues raised by families with disabled children during the Covid-19 – pandemic' [C958-C960]
22/06/20	Summary Grounds of Resistance and further evidence [A98-113]
Undated	SEND Adviser 'script' summary extract of 17 calls [C774-C776]
Undated	Various notes of structured SEND Adviser calls with local authorities [C777-C827]
Undated	NHS England PowerPoint presentation on '[Allied Health

	Professionals] working with [Children and Young People] and their families – Particularly those who are vulnerable and/or with SEND' [C868-C893]
Undated	COVID-19 Pupils, Parents and Young People's Survey: SEND Results [C932-C940]
23/06/20	Submission sent to Ministers seeking approval to exercise the powers in the Act to issue a notice modifying s.42 of the CFA 2014, including a child's rights impact assessment [C747-C773]
Undated	Template setting out rationale and evidence for issuing July Notice [C941-C957]
23/06/20	Claimants' Reply [A114-129]
24/06/20	Letter in response from Nick Gibb MP, Minister of State for School Standards, to the Equality and Human Rights Commission's letter of 21 May [C964-C965]
29/06/20	Secretary of State issues a notice modifying s.42 of the CFA 2014 for the period 1 July 2020 to 31 July 2020 ("the July Notice") [C743-C746]
29/06/20	Department updated the Guidance
01/07/20	July Notice comes into force
01/07/20	Order of Mr Justice Kerr [A132-A134]
02/07/20	Secretary of State announces Government's plan for the full return of children and young people to full-time education in September 2020 and that, unless the evidence changes, he does not intend to issue further national notices to modify s.42 of the CFA 2014
06/07/20	Department updates the Guidance
29-30/07/20	Rolled up hearing of the claim
31/07/20	July notice ceases to have effect