Kent County Council
Sessions House
County Hall
Maidstone
Kent
ME14 1XQ

By email

14 February 2025

Registered and postal address

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Our Ref: CB:685

Dear Kent County Council

URGENT: LETTER BEFORE ACTION IN ACCORDANCE WITH THE PRE-ACTION PROTOCOL FOR JUDICIAL REVIEW
RESPONSE REQUESTED BY 28 FEBRUARY 2025

1 Proposed claim for judicial review

To: Kent County Council
Sessions House
County Hall
Maidstone
Kent
ME14 1XQ

2 The claimants

[redacted]

3 The defendant's reference details

Unknown.

4 The details of the claimants' legal advisers dealing with this claim

Caroline Barrett

Rook Irwin Sweeney LLP
107-111 Fleet Street
London
EC4A 2AB
Reference: CB:685
[redacted]

5 The details of the matter being challenged

Kent County Council's ("the LA's") decision, as made by Cabinet on 3 January 2025, to sign off the "Special Schools Review" ("SSR"). The SSR will, amongst other things, lead to the redesignation of the specialism of 7 special schools in Kent.

Please note that we are applying for legal aid (investigative representation) and as such are required, pursuant to Regulation 54 of The Civil Legal Aid (Merits Criteria) Regulations 2013, to notify you of the potential challenge and to give you a reasonable time to respond.

6 The details of any Interested Parties

KSENT (Kent Special Education Needs Trust), who have been sent a copy of this letter before action.

7 Summary of facts

i. The proposed Claimants are all children who attend special schools in Kent. A summary of their current circumstances and how they would be impacted by the decision under challenge is set out below:

[redacted]	[redacted]

[redacted]

[redacted]

[redacted]

	[redacted]

ii. The LA should note that there are a large number of other parents who are concerned about these proposals. Although we are currently acting on behalf of 6 clients in this case, there are a number of other children and their parents who are similarly concerned by this issue and may be joined to this case in due course.

iii. We are also aware of the prior involvement of the Kent Special Educational Needs Trust (KSENT), which is an organisation that represents Community, Foundation and Academy Special Schools across Kent. KSENT have been strongly objecting to KCC's proposals regarding the SSR since early January 2024. We are in touch with KSENT and have seen copies of the correspondence that has passed between KSENT and the LA. We are aware that KSENT have made complaints about the decision making process and have responded robustly to the consultation. KSENT have therefore been named as an interested party to this case, as the decision taken by the LA significantly impacts upon the special schools it represents. Our clients' interests differ from KSENT in that they are concerned about the impact on their individual children and feel that the outcome of the SSR will lead to there being no special school provision available for them in county. Nevertheless, KSENT has a valid interest in this matter given the impact upon their schools if they had to be redesignated.

iv. The SSR was signed off and agreed by Cabinet on 3 January 2025. The SSR proposes to redesignate 7 special schools in the area, to change their area of specialism for disabled children. The impact of the changes is that there will no longer be any special schools which cater for children who have additional needs but do not have a cognitive impairment. For example, schools for communication and interaction (for children with communication issues, mainly children with autism), will be changed to "neurodivergent with learning difficulties". Schools for children with physical disabilities (like children with cerebral palsy and medical needs), would be redesignated to "Complex Learning needs – profound, severe and complex needs". It appears that all special school designations would now require a level of cognitive impairment/learning disability.

v. The Claimants have significant concerns about how these arrangements will be lawful. In practical terms, it means the local authority will not be offering any specialist schooling provision for children who cannot be educated in a mainstream education setting but who do not have cognitive impairments and can follow the national curriculum or something similar to it. There are many reasons why a child with additional needs (but no cognitive impairment) might require a specialist setting. For example mental health needs, anxiety, neurodivergence which may require sensory adaptations and a quieter, smaller school, children with trauma who

require specialist support, and children with complex physical and medical disabilities who require trained teachers who can adapt the curriculum to their communication and physical disabilities. Many of the proposed Claimants have previously had failed mainstream placements.

vi. It appears from the LA's decision making paperwork that the LA considers that the proposals in the SSR are in line with its Safety Valve Agreement as the effect of the proposals will be to move more children out of special schools and into mainstream provision, and to reduce the number of children with complex learning difficulties being educated in specialist provision out of county. However this fundamentally fails to acknowledge that there are many children who do not have learning difficulties but still require specialist education for the reasons set out above. If these children are moved out of special schools in the county because they are redesignated to meet the needs of children with more complex learning difficulties, there is a significant chance that these children will themselves now also need to be educated in specialist provision outside of the county. This has not been acknowledged by the LA – the LA seems to be under the impression that any children who do not have learning difficulties can be accommodated within mainstream provision. The failure to acknowledge that this is not the case means that the LA has failed to take relevant information into account and has not properly thought through or costed its proposals within the SSR. Furthermore the LA will be in breach of its sufficiency duties pursuant to s.27 Children and Families Act 2014 and s.14 Education Act 1996.

vii. It is noted that the LA is also planning to build 2 new special schools in Swanley and Whistable, but that these will also be designated for children with "profound, severe and complex needs". There is no alternative specialist schooling for children who continue to need specialist teaching but do not have cognitive impairment.

viii. The timeline of the decision appears to be as follows:

a. May 2023 – KCC enters into a Safety Valve Agreement with DFE. Part of the programme agreed within the SVA is for KCC to be "reviewing the specialist education continuum to ensure only the most severe and complex needs are supported in special schools."
b. On 16 May 2024 – the LA presented papers on the proposed "system wide transformation projects" to the Children, Young People and Education Cabinet Committee. This included the SSR. The Committee endorsed public consultation on the proposals.
c. 19 June – 14 August 2024 – public consultation. This included a two week extension due to a change in the recorded designation for Valence School.
d. The consultation responses resoundingly reject the proposals. 70% of respondents disagree with the changes to designation of special schools and the accompanying admissions guidance for special schools.
e. KCC produces a response to the consultation and essentially justifies carrying on with the proposals, despite the widespread objections.

f. 21 November 2024 – Children, Young People and Education Cabinet Committee further considers the proposals and approves them to be taken forwards.
g. 3 January 2025 – final decision is taken to endorse and agree the SSR actions.
h. 29 January 2025 – the decision is called in to the Scrutiny Committee. Not all documents appear to be online just yet – however it appears that some members raised concerns about whether the outcome of consultation had been properly considered.

ix. It is noted at section 5 of the decision report from 3 January 2025 that a "phased approach" should be taken to making changes to the SEND designation. The LA has said that it "cannot take a final decision on the list of designations prior to further public engagement being completed as part of the statutory procedure for changing the type of SEN provision made at particular maintained schools". Despite the fact that further decisions need to be made, it is clear that the trajectory has now been set with the approval of the SSR, and agreement has been reached in principle on moving to only 3 types of designated school, which excludes children without cognitive disabilities from attending special school. Any failure to challenge the present decision taken on 3 January 2025 is likely to mean that any further challenge to a decision later down the line against an individual school's redesignation may still be futile and of no effect, because the plan to only agree on 3 "designations" has already been agreed and set in stone. Our clients therefore consider that the relevant decision to be challenged is the decision made by Cabinet on 3 January 2025. If the LA considers otherwise, it is invited to set out its position in response to this letter.

x. It is also noted that the LA's position appears to be that children already at special schools will not be impacted by the decision to implement the SSR. Our clients do not agree with this assessment. The LA says in the Decision Report from 3 January 2025 at paragraph 1.11 that "Children who already have placements in special schools in Kent would remain in their current placements, with their needs continuing to be reviewed in accordance with the usual EHCP annual review process as happens now." This does not provide any guarantee that the claimants will be able to remain in their current schools. In fact, it appears likely that in future years/at annual reviews, that the local authority is likely to review whether the current schools are suitable to meet the special educational needs of each of these children in accordance with s.39 Children and Families Act 2014, on the basis that the peer groups will be changing, and more children with more complex learning difficulties will be attending the schools. Our clients are very concerned that even if there is no <u>immediate</u> change of placement, the impact of the redesignations will be that the schools will gradually become unsuitable to meet their children's needs and so they will be moved to alternative provision. Given what the LA has said throughout the documentation, it is highly likely the LA will try to move children to mainstream schools in this scenario, as there will be no other specialist

provision available for the children in county. Our clients are clear that mainstream provision will not meet their children's needs.

xi. Furthermore and for the avoidance of doubt, our clients do not consider that access to the First Tier Tribunal is an adequate remedy in this case. Whilst any individual decision on a child's school placement following annual review can be appealed to the First Tier Tribunal, this does not impact what special schools will be available in the area to meet the child's special educational needs. If all of these schools are redesignated so that they are to cater for children with learning difficulties or "severe, profound and complex" needs, then they are unlikely to be suitable to meet these Claimants' needs. This is going to lead to a situation where the Claimants, and many others in the Claimants' position, would have to request an out of area placement (including an independent placement) or Education Other than At School ("EOTAS"). If the Tribunal determines that the child requires special education but there is no local special school available for them, then the only alternative is to look at the independent sector.

xii. Our clients are particularly concerned that the LA has failed to identify the special education provision that disabled children without learning disabilities require. The decision report from 3 January 2025 simply states that: "Research demonstrates that with the appropriate attitudes, skills, and resources, most pupils' needs can be effectively met in mainstream settings, yielding both academic and social benefits for these pupils and their peers." The report also states that SRPs and special school placements should be "available for children and young people with severe and complex SEN where their needs cannot be met in mainstream settings".

xiii. As set out in this letter, many of these Claimants have already had failed experiences at mainstream placements which were unable to meet their needs. It is simply not the case that these children can have their needs met at mainstream schools at present. If the school designations change so that the special schools are no longer suitable to meet the children's special educational needs in the future, the likelihood is that some or all the Claimants' parents will seek placement at special schools out of county (including independent placements) or they will seek EOTAS packages. It does not appear as though this has been considered or costed anywhere in the LA's paperwork.

xiv. Furthermore, the LA states at paragraph 2.16 of its report that "If mainstream education is not suitable, for example because of the extent to which curriculum needs to be adapted in order to provide suitable education, then children with SEN should attend a specialist provision, such as a special school or an SRP, within their local area. KCC's SEN provision should be capable of serving the vast majority of pupils without the need for out-of-Kent placements". It then goes on to state at para 2.17 that "Parents of children with an EHCP can express a preference for a school placement for their child, and KCC will continue to comply with its statutory duties in individual cases, to accept those preferences, unless to do so would be incompatible with the provision of suitable education, the

efficient education of others or the efficient use of resources." These two paragraphs contradict each other. The legal position is as stated in paragraph 2.17: it is for the parents to request a school placement and the starting position is that local authority must name that school placement in the child's EHCP unless the statutory exemptions apply. It is not the case that you only consider special schools if mainstream is proved to not be suitable. Even if a mainstream school is capable of meeting a child's needs, parents are still entitled to request a specialist placement (even if that is out of county). If that specialist placement can meet the child's needs then the local authority must still name that specialist placement unless it would be incompatible with the efficient education of others or the efficient use of resources. By closing off the special schools in Kent to children who have additional needs but no learning difficulties, this is simply creating another problem for the local authority who will need to secure specialist education provision for them another way.

xv. In summary, there is a significant concern here that the local authority is labouring under a misapprehension that the current cohort of students within the special schools that will be redesignated can eventually be placed in mainstream schools. This is simply not the case and parents who strongly feel that their children's needs cannot be met in mainstream provision (including the litigation friends in this case) will still be requesting specialist provision for their children. By making the existing schools unsuitable for their children (given that the curriculum and peer groups are likely to change in these schools), the costs to the LA will increase, as out of county placements will be sought. There will also be costs to the local authority in adapting and redesignating the existing special schools so that they are able to meet the needs of children with complex SEN. It does not appear as though this has been properly considered or costed anywhere in the decision making paperwork. Given that the LA has reiterated its duties under s.27 Children and Families Act 2014 to keep the sufficiency of provision under review and given that it seems to have conceded that it is currently undertaking such a review under s.27, this is a very significant oversight.

xvi. At paragraph 4.2 of the decision report, the LA acknowledges that many responses to the consultation raised concerns about "children and young people with lower level needs. Respondents emphasised the importance of ensuring that all children and young people receive a suitable education and expressed doubts about the capacity of mainstream schools to adequately support children with special educational needs and disabilities." However the LA fails to grapple with this issue. The response set out in paragraph 4.3 is to simply state that the LA feels that mainstream schools should be able to meet needs. Paragraph 4.4 then reverts to talking about how special school placements should be planned for children with "severe and complex needs", which ignores the needs of children such as the Claimants in this case, whose needs cannot be met in mainstream provision.

8 Summary of grounds

i. The Claimants challenge the decision of the Cabinet Member for Education and Skills taken on 3 January 2025. This is a 'key decision' under the Defendant's constitution. There will be follow-up consultations and decisions made pursuant to this key decision, however, the decision of principle in respect of redesignation of the identified special schools has been taken and is therefore justiciable.

Ground 1: Irrationality

ii. The decision is irrational as it is unreasonable and premised upon an inadequate inquiry. The decision is based on a lack of evidence that i) the proposals are workable (including in terms of the costs of the proposals), and ii) their impact upon disabled children. Due to the profundity of impact of the decision on a vulnerable cohort, the Court will apply anxious scrutiny: see *R (KM) v Cambridgeshire CC* [2012] PTSR 1189, the Supreme Court held at [36].

iii. The decision is premised upon a flawed assumption that disabled children whose specialist provision will be reduced (or 'redesignated') will have their needs met in mainstream settings and SRPs. It is premature for the Defendant to be able to rationally reach that conclusion. For example, it is acknowledged in the Decision Report that the "*plan includes action to implement the Countywide Approach to Inclusive Education (CATIE), by improving the SEN offer in mainstream provision (which is also the subject of a separate consultation) as well as ensuring there is sufficient and consistent capacity across the county to support children with the most severe and complex needs in a special school within their local area where possible."* That plan is still subject to consultation and is at too nascent a stage for the Defendant to understand the capacity of mainstream settings in the area to meet need. The Claimants are not aware of any cogent evidence of mainstream and SRP capacity to accommodate additional children with SEND. Such evidence is not set out in the report or the decision. The Defendant is put to proof that there is such evidence and that it was considered by the decision-maker.

iv. It does not appear that the Defendant has even assessed how many children who are currently attending the schools which will be redesignated are likely to also require alternative specialist settings – without this information the Defendant is simply not in a position to understand the impact of this decision and whether one problem is simply going to be replaced with another.

v. The Decision Report in respect of Valence School is illustrative of the lack of logic underpinning the decision. The report at [4.11] provides that:

"Current data indicates that no students with physical disabilities from Canterbury, Thanet, Dover, Folkestone or Hythe districts attend Valence School. Instead, their needs are being met in local mainstream schools, SRPs, or other local special schools, a trend that has persisted for some time. Additionally, very few local authorities now operate their own special schools for physical disabilities as needs can be met in either mainstream provision, SRPs, or local PSCN special schools. This inconsistent offer across Kent highlights that the current model neither works effectively, nor supports the need for specialist PSCN provision."

vi. The report reaches the conclusion that because children from areas that are too far away to travel to Valence School are not attending, it follows that their needs must be being met elsewhere and therefore Valence School's specialism is not needed. That is a non-sequitur and irrational. No evidence is provided that children in those areas that cannot attend Valence School are having their needs met in mainstream settings, or that mainstream settings could meet the needs of the children attending Valence School.

vii. There are no adequate impact assessments and the decision is premised upon an unlawful consultation (on which, see Ground 3).

Ground 2: Appearance of predetermination

viii. The decision is unlawful because there is the appearance of predetermination. As with bias, predetermination is unlawful if the outcome is actually predetermined and also if there is an appearance of predetermination: *R (T) v West Berkshire Council* [2016] EWHC 1876 (Admin) *per* Elisabeth Laing J at [49]. Accordingly, if there is a real possibility that a decision maker has predetermined an issue, in the sense of closing their mind to the merits of the issue that is to be decided, then they are disqualified from making the decision, and if they do make the decision it is liable to be quashed. The test to be applied is the analogue of the test for apparent bias. That is, whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal had predetermined the issue: *Miller v Health Service Commission for England* [2018] EWCA Civ 144 [2018] PTSR 801 *per* Sir Ernest Ryder at [62].

ix. In *Bovis Homes Ltd v New Forest District Council* [2002] EWHC 483 (Admin) Ouseley J, at [382], explained the vice of predetermination:

> *"There is obviously an overlap between [the requirement for an open mind] and the commonplace requirement to have rational regard to relevant considerations. But, in my judgment, the requirement to avoid predetermination goes further. The further vice of predetermination is that the very process of democratic decision making, weighing and balancing relevant factors and taking account of any other viewpoints, which may justify a different balance, is evaded. Even if all the considerations have*

passed through the predetermined mind, the weighing and balancing of them will not have been undertaken in the manner required. Additionally, where a view has been predetermined, the reasons given may support that view without actually being the true reasons. The decision-making process will not then have proceeded from reasoning to decision, but in the reverse order. In those circumstances, the reasons given would not be true reasons but a sham."

x. There is the appearance of predetermination here because:

a. The decision was required by the Defendant's need to implement SEND budget savings committed to in the Defendant's Safety Valve Agreement (**'SVA'**) with the Secretary of State for Education. The SVA included a commitment that *"only the most severe and complex needs are supported in special schools"* and required extensive savings to be made as particularised in their management plan.

b. No alternatives that included *expanding* specialist provision (rather than redesignating specialist provision) were adequately considered. For example, the need to increase special school places or to build another specialist school so that these schools could keep their designations and continue to cater for children without significant cognitive impairment. The only alternative set out was maintaining the status quo (see heading of decision, 'Any alternatives considered and rejected').

c. Decision report, and the decision of the Cabinet member fails to adequately grapple with the significant opposition to the proposals (70%) in the consultation responses.

d. No or no adequate inquiry was undertaken to ascertain whether the assumptions that the decision is premised upon (in particular, the capacity of mainstream settings and SRPs to accommodate children with particular types of SEND) are established by evidence (on which, see Ground 1 and Ground 3).

e. The decision-maker adopts much of the analysis in the Decision Report, without critical evaluation.

Ground 3: Breach of section 27 Children and Families Act 2014 ('CAFA 2014') and unlawful consultation

23. Section 27 CAFA 2014 requires the Defendant to *"keep under review"* the SEN provision available to it within and outwith its area. There are three elements to the section 27 duty: firstly a local authority must keep educational, training and social care provision under review, secondly a local authority must consider the extent to which this provision is sufficient to meet the educational, training and social care needs of children and young people is sufficient, and thirdly in exercising this review the local authority must consult.

24. The purpose of section 27 CAFA 2014 is therefore for a local authority to understand whether there is sufficient SEN provision in place and make appropriate, evidence-based adjustments to its SEN provision to meet the

needs of children and young people with SEN in its area. As part of this duty it is required to comply with the extensive consultation requirements set out in section 27.

25. The Defendant appears to agree that the decision under challenge triggers its section 27 duties. For example paragraph 1.8 of the Decision report references the "duty to plan sufficient school places for all children with SEND" and the report also details the Defendant's duties under section 27 CAFA at section 8 of the report. The Defendant therefore needs to show that it has properly analysed and reached a decision on the sufficiency of provision in its area.

26. In reaching the decision under challenge, the Defendant is put to proof to establish that it complied with section 27 CAFA 2014 including that its consultation complied with the *Gunning* principles for lawful consultation. The *Gunning* principles refer to the principles set out by Hodgson J in his judgment in *R v Brent London Borough Council ex p Gunning* (1985) 84 LGR 168:

> *"First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third … that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals."*

27. In respect of the *Gunning* principles:
    i. The proposals were not at a formative stage as the local authority had already set itself on a course of action and was not prepared to consider alternatives
    ii. Insufficient reasons were provided, and there were material errors in the consultation document (such as those identified in the appendix to KSENT's response to the consultation dated 22 July 2024).
    iii. The consultation largely occurred during the school holidays and was too brief for proper engagement by the affected groups set out in section 27 CAFA 2014.
    iv. Despite the consultation responses overwhelmingly rejecting the proposals, the proposals have been adopted without cogent reasoning addressing the concerns raised by consultees indicating that the product of the consultation has not been conscientiously taken into account.

28. The Claimants are concerned that the consultation was not designed to ensure effective participation of all stakeholders specified in section 27 CAFA 2014. Proactive steps would be required to facilitate their participation, in particular the voices of children and young people who have a disability (section 27(3)(ii)).

29. Furthermore, even if the Defendant submits that it complied with the consultation requirements in section 27, this is not a complete answer as the Defendant needs to show that it has properly reached a decision, as part of the s.27 review, regarding sufficiency of provision. The Defendant's decision to implement the SSR has focused on meeting the needs of children with complex SEN including complex learning difficulties, but has not considered the sufficiency or adequacy of provision for children such as the Claimants in this case, who require specialist support (and whose parents will request specialist support), but who do not have learning difficulties or significant cognitive impairments. The decision to implement the SSR will have a direct impact on the sufficiency of provision for these children. The decision report makes no final decision about what decision has been reached as an outcome of the s.27 review in this respect.

Ground 4: Breach of section 14 Education Act 1996

30. Section 14 of the Education Act 1996 provides that a local authority must secure sufficient schools for providing primary and secondary education. In accordance with section 14(2), "the schools available for an area shall not be regarded as sufficient for the purposes of subsection (1) unless they are sufficient in number, character and equipment to provide for all pupils the opportunity of appropriate education.

31. "Appropriate education" is defined in section 14(3) as being education which offers such variety of instruction and training as may be desirable in view of the pupils' different ages, abilities and aptitudes, and the different periods for which they may be expected to remain at school.

32. Although the local authority has cited its duty under s.14 Education Act 1996 within section 4 of the decision report, this is cited with no analysis and no decision. It does not appear the local authority has actively considered this sufficiency duty, or the sufficiency duty under s.27 CAFA when deciding to redesignate these schools. The impact of the decision is that children in the Claimants' position are unlikely to have long-term access to specialist education, as they do not have complex learning difficulties.

33. Section 14(3A) of the Education Act 1996 also expressly states that a local authority must exercise its sufficiency duty with a view to "securing diversity in the provision of schools and increasing opportunities for parental choice." In this case the local authority is aware that it is trying to narrow the choice for children who are in the Claimants' position – by trying to ensure the only viable options in the area are mainstream provision. This is despite the Claimants having special educational needs and their parents being firmly of the view that they require a special school placement.

34. The local authority has not provided any evidence that it has complied with this duty when reaching the decision under challenge. It is reducing the choice available to parents and reducing the sufficiency of specialist

placements for children with certain types of disability. It is also difficult to understand how the local authority could even reach a decision on whether it has special school places that are "sufficient in number, character and equipment" when it has made no attempt to analyse which children currently in special schools in Kent will continue to require specialist provision even if their current schools are changed.

Ground 5: Indirect discrimination in breach of section 19 Equality Act 2010 and Article 14 ECHR read with Article 2 of Protocol 1

35. The redesignation of special schools will have a discriminatory impact upon the Claimants who have who have additional needs but do not have a cognitive impairment.

36. A *prima facie* case of indirect discrimination under section 19 (read with section 29) Equality Act 2010 is established as follows:
    i. The Claimants have the protected characteristic of disability. Specifically, they have a subset of the protected characteristic in that they have special educational needs that do not constitute a cognitive impairment.
    ii. The Provision, Criterion or Practice (**'PCP'**) is the redesignation of the specialist provision in the Defendant's area.
    iii. The PCP *would put* the Claimants at a disadvantage. For the avoidance of doubt, the Claimants are entitled to challenge as discriminatory PCPs that are yet to directly affect them: see Equality and Human Rights Commission's '*Services, public functions and associations Statutory Code of Practice'* at [5.8].
    iv. The PCP is the 'but for' cause of a particular disadvantage. The particular disadvantage here is i) that their schools lose their specialism that corresponds to the Claimants' needs and/or ii) the risk of their placement being changed at annual review.
    v. The comparator here can be hypothetical (*A Multi-Academy Trust v RR* [2024] UKUT 9 (AAC)) and is either i) a child with a disability that constitutes a cognitive impairment who may have their school options expanded ii) a non-disabled child who will not have their school redesignated.

37. Once a *prima facie* case of indirect discrimination is established, the burden shifts to the Defendant under section 136 Equality Act 2010 to justify the discrimination.

38. The decision is also discriminatory in breach of Article 14 ECHR read with Article 2 of Protocol 1 (the right to education). A *prima facie* case of Article 14 breach is established as follows:
    i. The decision falls within the *ambit* of the right to education (Article 2 of Protocol 1)
    ii. The Claimants have the relevant statuses of being disabled with SEN but without a cognitive impairment

iii. They have been differently treated in that their school's specialism will be redesignated and will no longer meet their needs. The comparator is the same as with section 19 Equality Act 2010.

39. The Defendant is put to proof that its decision is objectively justified. Disability discrimination is on one of the *"suspect grounds"* which ordinarily require *"very weighty reasons"* by way of justification: see *R (Crowter) v SSHSC* [2021] EWHC 2536 (Admin) at [142].

8 The details of the action that the defendant is expected to take

i. To immediately suspend and withdraw the SSR until all legal requirements have been complied with, including:

a. Compliance with the sufficiency duties under s.14 Education Act 1996 and s.27 CAFA 2014, including active consideration of the fact that parents will have a primary choice to choose specialist education for their child in an EHCP;
b. Evidencing compliance with the consultation duties under s.27 CAFA 2014;
c. Consideration and reconsultation on other options including the option to increase special school places/special schools, rather than redesignate the existing special schools so that only children with complex learning difficulties can attend them;
d. Consideration and analysis of the cost impact of children (such as the Claimants in this case) who may now seek to access EOTAS packages or independent specialist placements out of county, given that their needs cannot be met in mainstream education or maintained special schools.

9 ADR proposals

In theory the Claimants are open to ADR, however given that the SSR has already been approved and the Defendant is about to issue statutory notices to change the designations to the schools, there must first be an assurance that the decision will be suspended pending ADR, and that no issue will be taken on "promptness" in respect of issuing judicial review proceedings in order to allow ADR to take place. A fresh decision would need to be made following ADR which would be the new "decision" for the purposes of limitation in judicial review proceedings.

However in the Claimants' view, ADR only has a prospect of success if the Defendant is willing to consider rescinding its decision entirely, or if it will consider a further option for the changes to special school provision in the area – namely that the Defendant will consider expanding special school places/schools, rather than restricting access to special schools for children such as the proposed Claimants.

10 The details of any information sought from the Defendant

i. The Claimants seek the following documents from the Defendant:

a. Any documents relating to the Scrutiny Committee 'calling in' the decision under challenge.
b. The consultation documents produced following the publication of the statutory notice (as mentioned at para 5.9 of the Decision Report).
c. All documents provided to the relevant Cabinet decision-maker in respect of this decision.
d. Any analysis of the sufficiency of provision that has been carried out by the Defendant in respect of the special school places available to children with SEN but who do not have learning difficulties or cognitive impairments.

12 The details of any documents that are considered relevant and necessary

As listed above, as well as all the existing decision making documents available on the LA's website.

13 The address for reply and service of court documents

Caroline Barrett
Rook Irwin Sweeney LLP
107-111 Fleet Street
London
EC4A 2AB

We request all documents and correspondence are sent to us by email at [redacted]

14 Proposed reply date

We request a reply **by 4pm on 28 February 2025**.

In the absence of a substantive response by 28 February 2025 in the terms requested, the claimants intend to make an application for judicial review without further recourse to you. In the event that the claimants apply for a judicial review, they will make an application for costs against the defendant in accordance with *M* v *Croydon Borough of London* [2012] EWCA Civ 595.

We hope that will not be necessary and look forward to hearing from you by 28 February 2025.

Yours faithfully

Rook Irwin Sweeney

ROOK IRWIN SWEENEY LLP