Neutral Citation Number: [2025] EWHC 893 (Admin)

Case No: AC-2024-CDF-000078
AC-2024-CDF-000094
AC-2024-CDF-000096

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
BRISTOL CIVIL JUSTICE CENTRE

Bristol Civil Justice Centre
2 Redcliff St, Redcliffe, Bristol BS1 6GR

Date: 10 April 2025

Before :

MR JUSTICE LINDEN

- -

In the matter of applications for judicial review

BETWEEN :

THE KING **Claimant**

on application of

AB
(a child by their mother and litigation friend CD)

-and-

BRISTOL CITY COUNCIL

Defendant

- and –

SECRETARY OF STATE FOR EDUCATION

Interested party

THE KING

on application of

ES
(a child by their mother and litigation friend KEJ)

Claimant

-and-

DEVON COUNTY COUNCIL

Defendant

-and-

SECRETARY OF STATE FOR EDUCATION

Interested party

THE KING

on application of

JX
(a child by their mother and litigation friend AX)

Claimant

-and-

DEVON COUNTY COUNCIL **Defendant**

-and-

SECRETARY OF STATE FOR EDUCATION

Interested party

- -
- -

Stephen Broach KC and Alice Irving (instructed by **Watkins Solicitors**) for **AB**
Joanne Clement KC (instructed by **Bristol City Council Legal Department**) for **Bristol City Council**
Stephen Broach KC and Alice Irving (instructed by **Watkins Solicitors)** for **ES**
Carine Patry KC, Ollie Persey and Jake Thorold (instructed by **Rook Irwin Sweeney**) for **JX**
James Goudie KC, Oliver Jackson and Rita Dias (instructed by **Legal and Democratic Services, Devon County Council)** for **Devon County Council**
Alexander Line (instructed by **Government Legal Department)** for the **Interested party**

Hearing dates: 28, 29 and 30 January 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 10/04/2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Linden :
Introduction

1. These are claims for judicial review brought on behalf of three children who have special educational needs. In each case, the challenge is to the decisions of the Defendant Councils ("Bristol" and "Devon") to enter into "Safety Valve Agreements" ("SVAs") with the Department for Education ("DfE"), in March 2024.

2. Provision for special educational needs and disability ("SEND") in a given area is paid for out of the part of the local authority's Dedicated Schools Grant ("DSG") known as the High Needs Block ("HNB"). As is well known, substantial deficits in relation to the DSG have accumulated in many local authorities across the country, principally as a result of demand for SEND provision outstripping the funding allocated by central government. The DfE has introduced various measures to assist local authorities in tackling these deficits, including the Safety Valve Programme ("SVP") pursuant to which SVAs were entered into until December 2024 when the SVP was suspended. Thirty eight local authorities are currently parties to SVAs.

3. SVAs have been described in these proceedings as "financial bailout" agreements. This reflects the fact that, under a SVA, the DfE agrees to make specified annual payments to the local authority over an agreed number of years to reduce the deficit on its DSG. In exchange, the local authority undertakes to reduce its deficit to a specified level at each financial year end, so that, with the help of the DfE payments, it is eliminated over the course of the agreement. The local authority also agrees to implement an "action plan" with a view to achieving this, and the continuation of the DfE's payments is subject to continued satisfactory progress towards the agreed goals during the lifetime of the SVA. There are arrangements for monitoring, by the DfE, of the local authority's performance in fulfilling the SVA and the agreement is subject to review at any time, including if the authority is making insufficient progress towards its financial targets.

The issues in the Claims

4. The concern of the Claimants which lies at the heart of their Claims is that, they contend, the action plans which Bristol and Devon have agreed to implement pursuant to their SVAs, and the commitment to eliminating their DSG deficits, necessarily entail cuts in funding and potentially adverse changes to SEND provision in their areas. The "live" grounds of challenge are, however, not common to all three Claims:

    i) In the Claims brought by AB against Bristol and by ES against Devon, but not in JX's claim against Devon, there is an allegation of breach of the duty to consult under section 27(3) of the Children and Families Act 2014. I will call this Ground 1.

    ii) There is an allegation of breach of the public sector equality duty ("the PSED") under section 149 of the Equality Act 2010 ("Ground 2") in the

Devon cases but not in the Bristol case, permission having been refused in relation to this Ground in that case.

iii) In the JX v Devon case but not the other claims, there are the following further Grounds. It is alleged on behalf of JX that:

a) Devon acted in breach of its duty of reasonable inquiry under *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1065B – the so called "*Tameside* duty" ("Ground 3"). This point was pleaded in the ES case but is pursued as part of Ground 2 rather than as a free-standing ground of challenge.

b) By entering into the SVA, Devon frustrated the policy of Part 3 of the Children and Families Act 2014 which is to require that the assessed needs of disabled and young people in the local authority's area are met: see *Padfield v Ministry of Agriculture and Fisheries* [1968] AC 997 ("Ground 4").

c) In entering into the SVA, Devon was applying a secret policy: see *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 at [20] and [26] ("Ground 5").

5. In the Bristol case, permission was refused on the papers by His Honour Judge Lambert on all Grounds on 1 August 2024. However, on 27 September 2024, His Honour Judge Keyser KC granted AB's application for permission in respect of Ground 1 only. He refused permission in respect of AB's other Grounds, which included an allegation of breach of the PSED.

6. In the Devon cases, on 13 November 2024, Sir Peter Lane ordered a rolled up hearing in relation to all Grounds at which permission would be considered with the substantive claim to follow if permission were granted. He also ordered that the Bristol case be heard at the same time. In the light of permission having been granted in relation to Ground 1 in the Bristol case, although Devon maintains that none of the Grounds pleaded against it is arguable, permission is not resisted on Ground 1. Permission is, however, resisted by Devon on the merits of the Grounds identified above but also on the grounds that, it is contended:

i) The Claims were not brought promptly.

ii) The Claims are premature in that the Devon SVA has not had any impact, adverse or otherwise, on either ES or JX and nor is there any evidence that it will have any impact on them.

iii) It is *"highly likely that the outcome for the applicant would not have been substantially different if… the conduct complained of had not occurred"* and it is not appropriate to disregard the requirement to refuse permission in these circumstances *"for reasons of exceptional public interest"*: section 31(3C)-(3E) of the Senior Courts Act 1981.

7. Bristol and Devon also contend that relief should be refused:

i) Pursuant to section 31(2A)-(2C) of the Senior Courts Act 1981, on the grounds summarised in relation to section 31(3C)-(3E) at (iii) above.

ii) Pursuant to section 31(6) of the 1981 Act on the grounds that there was undue delay in making the claims for judicial review and the grant of the relief sought would be detrimental to good administration and/or as a matter of general discretion.

Summary of the facts

The Claimants

8. Although some of the witness statements sought to complain about or to defend the local authorities' provision in the particular cases of the Claimants, it is not necessary for me to set out personal details about them or to determine these disputes. As I explained at the hearing, that is because the adjudication of these issues is not necessary in order to determine the Claims, and nor am I able to do so given that the facts are disputed. These issues are for the First Tier Tribunal ("FTT") to determine and, indeed, I note that there have been proceedings in the FTT in all three cases.

9. Suffice it to say that each Claimant is in their teens and each has special educational needs which mean that they have an Education Health and Care Plan ("EHCP") which specifies their special educational needs and the provision required to meet those needs. AB previously attended a mainstream maintained school but now attends an independent special school. ES requires an education package which is delivered otherwise than at a school, and he is due to transition to post-16 provision. There are ongoing issues about what provision will be appropriate for him at this stage. JX attended an independent special school until October 2023 but his parents concluded that the school was not meeting his needs. He has not attended school since then and has been allocated home tutoring and mentoring. However, there are ongoing issues in relation to provision in his case.

Part 3 of the Children and Families Act 2014

10. The key statutory context is Part 3 of the Children and Families Act 2014, which is concerned with children and young people in England with special needs or disabilities. Part 3 sets out various duties on local authorities in relation to this category of children and young people and the principles which are to be applied in considering their needs, as well as the machinery for assessing and determining their needs and for enforcement of the duties owed to them as individuals. These include a duty to carry out an educational, healthcare and social care assessment in specified circumstances (section 36(8)); where an assessment shows that special educational provision is required, a duty to prepare and maintain an EHCP (section 37(1)); a duty to name a particular school/institution in Section I of the EHCP if requested to do so and if specified conditions are met (section 39(3)-(4)); a duty to secure the special educational provision specified in the EHCP (section 42(2)) and a duty to review the EHCP, with a power to amend or cease to maintain it where it is no longer necessary (sections 44 and 45). There is also a right of appeal to the FTT against specified

decisions by a local authority relating to the needs of a child or young person, or to an EHCP (section 51(2)).

How SEND funding works

11. The DSG is a ring fenced grant which is provided by the DfE to a local authority pursuant to section 14 of the Education Act 2002, on such terms as the Secretary of State considers appropriate. It comprises four funding blocks: Schools, Early Years, Central School Services and High Needs.

12. Up to £6,000 of funding for SEND pupils in mainstream schools and academies comes from the Schools block. The HNB is the funding allocated specifically to support children and young people with SEND and to enable local authorities to discharge their duties under the 2014 Act in special schools, hospital schools and pupil referral units as well as to provide top up funding for schools and colleges, and funding for services delivered directly by the local authority. Although up to 0.5% of the Schools block funding may be transferred to the other DSG blocks, subject to approval from the local Schools Forum and after consulting all local maintained schools and academies, local authorities are not otherwise permitted to transfer funds between the four blocks without the approval of the Secretary of State.

DSG funding deficits

13. The problem of local authorities incurring deficits on their DSGs dates back to when the Children and Families Act 2014 first came into force. Although high needs funding increased by 60% between 2019/20 and 2024/25 to a total of £10.5 billion, demand for SEND provision has increased at a greater rate with the result that a significant number of local authorities have substantial deficits on their DSGs. At the end of the 2023/24 financial year the national deficit stood at £2.2 billion, with over 100 authorities in deficit.

14. The principal reason for the DSG deficits is spending in the HNB, and the principal drivers for the increase in the cost of high needs provision are that:

    i) There has been a very significant increase in the number of EHCPs since their introduction in 2014 and an increase in the complexity of the provision required. As noted above, where an individual has an EHCP the local authority has a statutory obligation to secure and fund the provision which the EHCP specifies. According to statistics from the County Councils Network, there was a rise of 115% in the number of people with EHCPs from 2015 to 2023. Government Education Statistics figures show that the numbers continued to increase: between January 2023 and January 2024 there was an 11.4% increase in EHCPs.

    ii) An increase in pupils attending special schools or receiving private provision. According to DfE statistics there was a 72% increase in children and young people with SEND attending special schools between 2010 and 2022. Growing pressure on available provision has also meant that local authorities are obliged to look further afield for

suitable placements, with attendant travel and/or residential costs which would not be incurred if the provision were available locally.

15. Unless the Secretary of State agrees, local authorities are not permitted to draw on resources other than the DSG, including their General Funds and reserves, to fund these deficits. Conditions attached to the DSG by the Secretary of State also require any local authority which has an overall deficit on its DSG account at the end of the relevant financial year to co-operate with the DfE in addressing that situation. As and when requested by the DfE, such a local authority must provide information about its plans for managing its DSG account, and about pressures and potential savings on its HNB. The authority must also meet with DfE officials, when requested, to discuss its plans and financial situation, and must keep the Schools Forum regularly updated about its DSG account and its plans for handling it. The Secretary of State reserves the right to impose more specific conditions of grant on individual local authorities which have overall deficits on their accounts if it is considered that they are not taking sufficient action to address the situation.

Section 114 notices and the statutory override

16. Where it appears to the chief finance officer of a local authority that its total expenditure in a financial year is likely to exceed the resources available, section 114(3) of the Local Government Finance Act 1988 requires them to issue a notice or report ("a section 114 notice"). This was compared, in the context of these proceedings, to declaring bankruptcy. Until the section 114 notice has been considered by the authority, which it must do within 21 days, it may not enter into any new spending unless it is approved by an officer designated under section 151 of the 1988 Act. Before me, it was common ground that the consequences of a section 114 notice are very serious and are to be avoided if at all possible. They may include extensive spending cuts, reallocating capital budgets and raising funds through asset sales, obtaining permission from central Government to raise council tax over the 5% permitted without a referendum, central Government intervention via the appointment of Commissioners, and emergency central Government financial support, although central government is reluctant to provide this.

17. However, in the 2020/21 financial year a "statutory override" was introduced through the Schools and Early Years (England) Regulations 2020. Local authorities are permitted to carry forward their DSG deficits, which are ring-fenced in a separate account and therefore not a charge on the Council's revenue account for the purposes of the section 114 calculation. As a result of an extension in 2022 (see the Local Authorities (Capital Finance and Accounting) (England) (Amendment) (No 2) Regulations 2022), the override will continue to apply until the end of the 2025/26 financial year. The position thereafter has not been decided.

18. I accept the Defendants' case that the combination of the undesirability of local authorities having to fund deficits in any event, the risk of having to issue section 114 notices and the fact that the statutory override is due to come to an end at the end of 2025/26, with no certainty as to the position thereafter, provided a powerful reason for them to take steps to address their DSG deficits

in any event at the time when they decided to enter into the SVAs. They were also under pressure from the DfE, or at least being strongly encouraged, to do so.

Deficit Management Plans

19. In addition to the position stated in the conditions for the DSG, the DfE has taken various steps in an attempt to address the issue of DSG deficits. In March 2019, the Department published *"Dedicated Schools Grant deficit recovery plans: Guidance for local authorities"*. This required each local authority with a cumulative deficit of 1% or more at the end of the financial year to submit a recovery plan known as a Deficit Management Plan ("DMP") outlining how it would bring its deficit back into balance in a three year time frame. A recovery plan template was provided by the DfE for this purpose.

20. The DMP is essentially an iterative or 'live' spreadsheet which sets out how the deficit will be managed and reduced, and it is required to be submitted periodically to the DfE. The DMP sets out steps which will be taken to bring the deficit under control by making savings, referred to as "mitigations". It enables a local authority and the DfE to monitor how DSG funding is being spent by the authority; to compare data on high needs spending between authorities; and to form evidence based strategic plans for the provision of services for children and young people with SEND. It is continually updated and modified over time to reflect changes in demand, and the financial forecasts which it contains change on the basis of extrapolations from data as they become available. The figures are expected to require adjustment over time in response to changes in the population, in the complexity of the needs of children and young people and in national policy. The evidence of the Defendants is therefore that the DMP plans and forecasts are "by no means set in stone".

21. In June 2022, the DfE published *"Sustainability in high needs systems: Guidance for local authorities"*. The June 2022 Guidance encouraged authorities to adopt strategies to direct their funding more appropriately. These strategies included meeting children's needs early so as to reduce the escalation of need and to stabilise the numbers of EHCPs; promoting a culture of inclusiveness; promoting parental confidence; and ensuring suitable thresholds and assessment processes. Local authorities were also encouraged to target investment at strengthening inclusion in mainstream provision so as to maximise the number of children whose needs can be met effectively in their local mainstream setting and to ensure that specialist placements are available for those who need them most.

The Safety Valve Programme ("SVP")

22. The SVP was introduced in the 2020-21 financial year. It was aimed at the local authorities which have the highest deficits on their DSGs as a percentage of their total allocation. It involves an escalation of the level of DfE intervention compared with the Delivering Better Value programme ("DBV") in which 55 local authorities, with less severe deficits than those to which the SVP applies, participated. The objective of the SVP is to improve the effectiveness of a local authority's high needs spending, to assist it in managing its HNB within the

funding allocated and to manage its deficit down over time. The DBV and the SVP are described in the *"Department for Education Guidance on our intervention work with local authorities"* which was published in October 2022 ("the October Guidance").

23. As far as the SVP is concerned, the October Guidance explains that two principal goals are critical for local authorities' ability to reach sustainable positions, namely:

    i) Managing demand for EHCPs, including by providing assessment processes that are fit for purpose.

    ii) Ensuring that mainstream schools are equipped and encouraged to meet the needs of children where possible, whilst maintaining high standards for all pupils.

24. The October 2022 Guidance goes on to suggest ways in which these goals may be achieved including:

    i) Early intervention and providing proactive support for children so as to ensure that their needs are met and do not escalate unnecessarily.

    ii) Increasing the support available for children on SEND support, or those without ECHPs, thereby reducing escalation of need and thus the numbers of requests for EHCPs.

    iii) Reviewing EHCP assessment processes and thresholds, so that local authorities can deal with requests for EHCPs better, and reinforcing these processes through a well-functioning annual review process which ensures that EHCPs are fairly assessed for continued relevance and need.

    iv) Taking a strategic approach to planning provision which is driven by need, and investing available capital funding towards the creation of more local places, where necessary and appropriate, thus reducing overreliance on more costly out of area provision.

25. SVAs are the agreed basis on which the DfE makes payments to local authorities within the SVP. The extra money from central government paid pursuant to these agreements may only be applied to reduce their DSG deficits. Mr Thomas Goldman who is the Deputy Director of the Funding Policy Unit of the DfE, and whose evidence was not materially in dispute, describes the agreements as "high level". Local authorities develop more detailed management plans for their own internal planning purposes but the DfE does not formally endorse these management plans and they are reviewed and adjusted by local authorities throughout the lifetime of the SVA.

26. When a local authority was invited to join the SVP it was required to develop substantial plans to reform its SEND systems with a view to rapidly placing them on an effective and sustainable footing. The local authority was assisted by expert SEND and financial advisers engaged by the DfE but the content of the final plan was the responsibility of the local authority. According to Mr

Goldman, that plan was analysed by officials at the DfE with a view to determining whether the authority had demonstrated:

i) how it would reform its high needs system so that it functioned effectively and sustainably and, as a minimum, reached an in-year balance on its allocated funding;

ii) how the plan would improve support for children and young people with high needs;

iii) how the local authority would manage its historic deficit, controlling growth as far as possible;

iv) how the local authority would ensure the effective management of the plan, so that it was successfully delivered;

v) a clear explanation of the financial support requested from the DfE.

27. Importantly, DfE officials would only recommend to the Secretary of State that a SVA should be entered into if:

i) the DfE's expert SEND advisers had given an assurance that the proposals would provide for suitable and effective support for children and young people with high needs;

ii) by the end of the agreement the local authority would reach an in-year balance on its high needs budget;

iii) the local authority's request for financial support was affordable for the DfE, and the local authority's historic deficit would be eradicated by the end of the agreement, taking into account the money provided by the DfE.

28. On 4 December 2024, the Secretary of State announced that she would not enter any further SVAs *"pending wider reform of the whole system to prioritise early intervention"*. Again, the future in this regard is therefore uncertain.

The Bristol case

Outline chronology

29. Bristol's HNB funding rose from £53.9 million in 2019/20 to £89.4 million in 2024/25. However, its DSG deficit also grew over this period. In the financial year 2019/20 the accumulated deficit was £2.977 million and by January 2024, shortly before Bristol entered into the SVA, it was forecast to be £56.077 million. The bulk of this figure was accounted for by the deficit on the HNB. The DSG deficit was projected to be £96 million by the expiry of the statutory override at the end of the 2025/26 financial year.

30. Bristol first submitted a DMP to the DfE in May 2021 and Bristol Schools Forum was presented with a draft of this on 8 June 2021. In 2022, there was then a formal intervention by the DfE in Bristol's planning for the management

of its deficit, through the DBV programme. Bristol Schools Forum was presented with a set of proposed mitigations in relation to the DSG deficit in March 2022 and briefed about Bristol's potential involvement in the DBV programme.

31. A further iteration of the proposed steps to make savings was presented to the Schools Forum on 27 September 2022. The mitigations fell into seven themes, for example *"A - expanding specialist provision", "B - non statutory top up and early intervention", "C- inclusion practice in schools and settings"* etc. Each theme was subdivided into a list of 14 schemes/projects designated A1-3, B1-2 and so on. For example, A1 was creating 330 specialist places in special and mainstream schools to meet current and future projected demand. A2 was "*capital investment in existing specialist settings*", to add 108 specialist places. A3 was the expansion of supported living, to build a 12-bed education residential centre to support preparation for adulthood, known as Project Rainbow. There were also indicative figures for savings which each scheme would aim to achieve in each of the financial years to 2027/28, subject to change following consultation and due diligence. The total savings over this period were projected to be £48.7 million. The minutes of the 27 September 2022 meeting indicate that members supported these proposals.

32. Bristol then undertook a 6 week public engagement process in relation to the proposals in the DMP, which took place from 20 October to 22 November 2022. 32 responses were received from the general public. There was also a targeted engagement with various organisations which are concerned with SEND issues. Views were sought on the themes and schemes in the DMP.

33. As a result of the DSG deficit continuing to rise, Bristol were invited to enter the SVP by letter from the DfE dated 18 July 2023. This asked Bristol to build on the work that had been done as part of the DBV programme. The authority was advised to keep reviewing its DMP throughout the development phase of its safety valve submission and to prepare a presentation on the current iteration of the DMP, and the forecast position, in advance of a meeting with senior DfE officials in September 2023.

34. On 2 August 2023, Bristol agreed to begin negotiations. Between July and October 2023, Bristol worked with external stakeholders to review the use of HNB funding so as to identify opportunities to improve processes, to deliver value for money and to bring the authority into line with national best practice. The outcome of this analysis was presented to the public for consultation which took place in October/November 2023. The focus of that consultation was on (a) proposals to establish three SEND resource bases in Bristol (i.e. specialist SEND provision in mainstream schools) and (b) top-up funding. It included consultation on proposals for an Early Intervention Fund which were adopted in February 2024.

35. From September 2023, there was a period of negotiation with the DfE about the content of an updated DMP and the terms of a SVA which would be specific to Bristol. Throughout the autumn, Bristol officials met with the SEND advisors who were allocated by the DfE, as part of the SVP, to develop the DMP which underpinned Bristol's safety valve submission.

36. As part of the process, Bristol's officers developed a comprehensive sufficiency model or plan – as required by the DfE template - to identify potential demand in future years in a way that mapped against the financial model in the DMP, including the use of both mainstream and independent non-maintained specialist provision. A mitigated and unmitigated version of this was developed, the latter assuming that children and young people with EHCPs who were awaiting a specialist place would be placed in an independent non-maintained specialist school if a maintained specialist place was not created.

37. On 5 January 2024, there was a financial update to elected members. Bristol also submitted an application for a High Needs Provision Capital Allocation ("HNPCA"), the grant of which was contingent on it entering into a SVA. This included an application for £13.2 million for the redevelopment of Claremont Special School, a proposal which had been adopted in July 2019 subject to funding. The savings which would result from these capital projects – through the provision of additional maintained provision – were incorporated into the authority's DMP forecasts for the purposes of the SVA.

38. The application to enter into a SVA was submitted to the DfE on 12 January 2024 following engagement with Bristol's Cabinet Board and its Finance Scrutiny Task Group but the DfE was not willing to agree to it. On 22 January 2024, Bristol submitted a final DMP to the DfE based on a 7 year plan. The DMP included a set of reprofiled financial mitigations which were in line with the mitigations which had been approved by the Schools Forum in early 2023. Ms Woodhouse (Executive Director of Children and Education) provides a summary of these mitigations and how they tie back to the September 2022 DMP which I will refer to as "the original DMP":

    i) *"Scheme A1 - Specialist Provision - Create 380 specialist places in special and mainstream schools to meet current and future projected demand*". This is unchanged and was part of the consultation/public engagement in the last quarters of 2022 and 2023. The aim of this scheme or project is to reduce reliance on private provision.

    ii) *"Scheme A2 - New Capital Request to increase specialist provision".* This scheme builds on the A2 scheme - 'capital investment in existing specialist provision' - in the original DMP. It was reviewed to include potential new funding streams linked to the submission of the HNPCA grant application in January 2024 including the Claremont Special School project. Again, the aim of this scheme is to reduce reliance on private placements. Investment in new and refurbished places was discussed in the 2022 public engagement process.

    iii) *"Scheme A3 -Expansion of Supported Living (Project Rainbow) - To build an education residential centre to support preparation for adulthood.".* This project is unchanged from the original DMP. It aims to reduce demand for private post 18 placements by providing supported living opportunities to improve independence in adulthood alongside post 18 education. This scheme was discussed in the 2022 public engagement exercise.

iv) *"Scheme A4 - Bristol Special Free School -The new Bristol Special Free School will create an additional 129 spaces between September 2025 to September 2031."* This is new but it is consistent with Scheme A2. Again, the aim is to reduce dependency on private placements by increasing maintained provision in Bristol. Consultation in relation to the proposed opening of a free school is required by section 10 of the Academies Act 2010 and Bristol intends to comply with this obligation.

v) *"Scheme B1 - Review of HNB Element 3 Non-Statutory 'top up' Funding"*. This project was part of the original DMP but it now includes B2, E1, F1 and F2 from that iteration. It was discussed in the public engagement in 2022 and the consultation at the end of 2023.

vi) *"Scheme C4 – Belonging with SEND Programme"*. This project is concerned with early intervention work and it captures schemes C4-6 from the original DMP. It was discussed as part of the 2022 public engagement. It also includes a new SEND Outreach Support Model which was consulted on at the end of 2023.

vii) *"Scheme G1- Review and reform of the Alternative Learning Provision model and funding to improve outcomes and ensure best value provision".* This scheme includes D2 and D3 from the original DMP and was discussed in the 2022 public engagement exercise. Again, it is concerned with the improvement of early intervention and inclusion practice in mainstream schools.

39. In the DMP which was submitted to the DfE in support of the SVA application, the forecast savings for each scheme were now provided for each year to 2029/30.

40. The SVA was approved by Cabinet on 5 March 2024.

41. On 7 March 2024, the Secretary of State approved the SVA and a final copy was sent to Bristol to be signed, with a deadline for doing so of 11 March 2024.

The Bristol SVA

42. The key features of the SVA entered into by Bristol are as follows:

i) Under clause 2, the authority undertakes to reach a positive in-year balance on its DSG account by the end of 2029/30 and in each subsequent year, and to control and reduce its cumulative deficit as set out in a table. This identifies the *"Maximum Forecast DSG Deficit Profile at Year End"* for each of the 2023/24 to 2029/30 financial years, starting with £56.1 million for 2023/24, rising to £75.5 million in 2027/28 and falling to £53.8 million at the end of 2029/30.

ii) Under clause 3, the authority:

> "…agrees to implement the action plan that it has set out. This includes action to:

> 3.1 Co-produce and implement a city-wide SEND Inclusion Strategy to improve partnership working, joint accountability, planning, commissioning, and delivery, ensuring that SEND services are needs led;
>
> 3.2. Enhance early intervention, effective outreach, school improvement and targeted funding to enable increased numbers of children and young people with EHCPs to be successfully supported in mainstream settings;
>
> 3.3 Use a 'Test and Learn' approach to support the development of creative and dynamic ways to retain young people in quality mainstream provision, meeting their needs, improving their educational outcomes and reducing the risk of exclusion;
>
> 3.4 Co-design, with schools, a standard practice of excellence in supporting children and young people with SEND through LA-commissioned SEND School Improvement Officers;
>
> 3.5 Improve the EHCP process through measures including speeding up time taken for assessments, plans and reviews;
>
> 3.6 Ensure effective joint governance of SEND improvement across the city, including improving quality and use of data for management performance and service planning, leading to improved accountability and speed of change;
>
> 3.7 Build provision to meet current and future demand with a focus on creating a flexible education estate that can adapt to changes in need."

43. As is apparent, these objectives, which included an agreement to consult on a SEND Inclusion Strategy (clause 3.1) were stated at a high level of generality and they differed from the somewhat more specific mitigation schemes and projects which formed part of the DMP which was developed alongside the SVA.

44. Further in relation to the terms of the SVA:

    i) Under clause 4, Bristol agrees to ongoing monitoring of its performance in fulfilling the SVA and it commits to reporting a minimum of three times per year "*on its progress towards implementing the plan as per the conditions set out in [clauses] 2 and 3"*. A template is to be provided by the DfE for this purpose. There is also a commitment to inform the DfE Funding Policy Unit of any unforeseen difficulties or impacts of carrying out the SVA, or any significant risks to reaching the agreed financial position, as soon as they arise. The authority may also be required by the DfE to meet with it as necessary to discuss progress.

    ii) Under clause 5, the DfE agrees to contribute £53.8 million to the reduction of the DSG deficit in 7 annual tranches, starting with a

payment of £21.52 million in 2023/24, and with the last tranche to be paid by year end 2029/30. The payments after 2023/24 are made:

> "..subject to compliance with the conditions set out in paragraph 3….. This funding will be provided in instalments and subject to continued satisfactory progress. Subject to full compliance, Bristol City Council should therefore eliminate their cumulative deficit no later than 2029-30."

iii) Clause 6 then provides that the SVA *"is subject to review at any time, for example as a result of the following events"*. Four contingencies are then identified which include, at 6.3:

> "6.3. Insufficient progress being made towards the authority reaching and sustaining an in-year balance on its DSG account as set out in the plan;.."

45. As part of the overall settlement, although this is not included in the SVA itself, the DfE has also permitted Bristol to contribute an additional £46.5 million from its own reserves towards the schemes set out in the updated DMP. And, on 1 May 2024, the DfE approved a grant of £13.2 million for the rebuilding of Claremont Special School.

46. Ms Woodhouse says, and I accept, that the value in the mitigations set out in Bristol's DMP relates to additional local maintained provision – which is less costly than private and/or out of area provision - along with other projects which increase efficiency whilst also seeking to improve outcomes for children:

> "The Council recognises that it is under a legal duty to meet the needs of children and young people with special educational needs. The purpose of participating in the SVA is not to cut provision, and the plan adopted under it does not involve doing so."

47. She goes on to point out that, on the contrary, entering into the SVA has resulted in substantial investment and other funding for SEND which would not otherwise have been available. It is clear from Bristol's evidence that the SVA is genuinely regarded as a positive development given that it has resulted in access to c£100 million of additional HNB funding. Moreover, the steps which Bristol will need to take in order to achieve the agreed targets in relation to in year and cumulative DSG deficits are a continuation of existing strategies including those identified by central government in its guidance (referred to above), albeit the proposals to implement these strategies have been developed further and there will be significant acceleration in the pace of change, partly as a result of additional funding for local/mainstream provision being unlocked.

Developments since entering into the SVA

48. A number of steps have been taken on the assumption that the Bristol SVA would be entered into and since it was entered into. However, Mr Broach noted that 11 of the 38 authorities which have entered into SVAs nationally are not on track to deliver the agreed savings and that 5 of the SVAs had been suspended

for this reason. As at November 2024, Bristol was not on track to achieve its agreed targets in relation to the DSG deficit but its SVA nevertheless remained in effect.

The Devon case

Outline chronology

49. Devon's HNB allocation rose from £69.1 million in 2019/20 to £116.6 million in 2024/25. Notwithstanding this, its DSG deficit rose sharply during the same period. At the end of 2020/21, it was £43.6 million. Devon was invited to take part in the SVP in November 2021 but it was not possible to reach agreement in the 2021/22 financial year, owing to the size of the forecasted growth in its deficit.

50. On 25 May 2023, Devon was again invited by the DfE to begin negotiations to join the SVP, the deficit having reached £118.3 million at year end 2022/23. It was forecast to reach £207 million by the end of the 2025/26 financial year. This was one of the highest DSG deficits in the country and the reasons for it included the fact that Devon has a higher number of pupils with EHCPs, and SEND children, than the national average. Devon children with EHCPs are also far more likely to be receiving private provision than resource base provision in mainstream schools.

51. During the summer and autumn of 2023, Devon developed its proposals for a SVA through a number of workstreams: its DMP. This involved reviewing existing DSG management and sustainability plans with the help of specialist advisers. Devon had already identified 19 possible projects in the course of the previous unsuccessful negotiations to enter into a SVA and each of these was assessed against its impact on children, its ability to deliver savings to high needs spending and the risk it posed to Devon discharging its statutory duties. Each project was also given a risk assessment rating which reflected the level of confidence that it could be delivered. Through this process, a final list of projects was agreed and these were then developed into more detailed delivery plans. There was then work on a financial plan which would enable Devon to achieve financial sustainability and Devon then adopted its "SEND Transformation Plan" which brought together its Ofsted/CQC improvement work and the proposals in the DMP.

52. The evidence of Maria Price (Director of Legal and Democratic Services), which I accept, is that:

> "The entire review was informed by engagement with the full range of SEND stakeholders, including the Schools Forum, educational institutions, parents and carers; children and young people; and elected members."

53. By this I understand her to mean that the key ideas and strategies which became part of the SEND Transformation Programme, including the DMP projects, had been developed from discussions and consultations through existing public engagement structures which Ms Price describes in her first witness statement. These structures include the Schools Forum, the Parent Carer Forum Devon

("PCFD"), which was a strategic partner in the Transformation Programme, and networks of SEND coordinators as well as other channels of communication with families, and children and young people. As it was put in Devon's submission to the DfE in support of the SVA proposal:

> "The majority of work identified in the SEND Transformation Programme directly links to feedback gathered from parents and carers through family engagement events, parent carer surveys and other feedback loops utilised by PCFD."

54. In her second witness statement, Ms Price also details how there was consultation on many proposals which formed part of the DMP, albeit at the appropriate time rather than when the SVA was entered into. She explains that Devon's approach is to consult when there is a concrete proposal which is at the stage of potential implementation e.g. a proposal to establish a resource base or new school or specific provision at a given school. She does not suggest that there was consultation on the DMP itself. Her position is that Devon *"will conduct consultations on other proposals relating to the DSG Management Plan at the appropriate time for each proposal."*.

<u>The information put before Cabinet for the purposes of deciding whether to enter into the SVA</u>

Overview

55. Given the nature and extent of the grounds of challenge in the Devon Claims it is necessary go into a little more detail about the information presented to Cabinet for the purposes of deciding whether to enter into the SVA than it is in the Bristol case.

The Equality Impact Assessment

56. In December 2023, a draft Equalities Impact Assessment ("EIA") in relation to the proposed SVA was prepared by officers. This fed into the documents referred to below, but it was not presented to decision makers. It is, however, clear from the EIA that the aims of the SVA project were to increase early intervention and local provision in mainstream settings. It is also apparent that the view which was being taken was that there would need to be consultation in relation to a number of the proposals, including statutory consultation, but that the impact of these proposals would be positive for children and their families.

The December report

57. On 13 December 2023, Devon's Directors of Finance and Public Value and Children and Young People's Futures presented a Joint Report entitled *"Update on progress to develop a High Needs Block Safety Valve proposal"* to Cabinet ("the December report") with a recommendation that the contents be noted. The report set out the background of significant pressures on its HNB since 2019/20. It referred to the SVP as applying to the local authorities with the highest DSG deficits and it summarised the SVP as follows:

> "If LAs can demonstrate that their DSG management plans create financial sustainability - returning them to an in-year balance - and improved support for children and young people with SEND, the department will enter into an agreement with the authority, subject to Ministerial approval. LAs will be subject to regular monitoring and will receive incremental funding, if progress is being made, to contribute to their historic accumulated deficits over several years."

58. Figures were then given for Devon's DSG deficit over the previous 5 years, to which I will return, and the report stated that since May 2023 the authority had been updating its plans to reform its high needs system and to bring the deficit under control. The safety valve proposals were then summarised and the paper stated that analysis had been carried out which showed that:

> "if we do nothing, Devon will see a growth from circa 9,000 Education Health and Care Plans (EHCPs) in 2024 to over 10,600 in 2030, with a projected 35% increase in the numbers of students who receive their education from the independent sector. All of which, puts significant and continued pressure on the High Needs Block."

59. The December report stated that some of the authority's project management resources had been redeployed to help build the safety valve work strands which formed part of the SEND Transformation Programme. Some work strands were already being successfully delivered and others would be operational in the foreseeable future. These workstreams aimed to 'mitigate' the projected deficit and reach an in year balance by:

> "• An annual slowing down and flattening of the net increase in EHCPS, to bring us in line with statistical neighbours and England averages.
>
> • A sustained reduction in the use of costly independent specialist provision, with a total reduction in the number of learners accessing this provision of 30% from 2024 to 2030, some 361 places.
>
> • A proportional year on year increase in the number of learners accessing their education in mainstream schools/resource base provision."

60. Further detail was then provided in the accompanying slide pack which I deal with below.

61. As far as consultation is concerned, the December report stated that the Local Area SEND Partnership, which included NHS Devon, and the Devon Education (Schools) Forum had been kept up to date with the ongoing challenges faced by the HNB budget, and with the solutions being developed as part of Devon's DMP. It was also indicated that further consultation was required for certain sorts of proposal and, under *"Legal Considerations"*, it was stated that a number of proposals required statutory consultation as stated in DfE guidance.

62. The *"Financial Considerations"* section explained that financial support from the DfE was dependent on it being assured that Devon's plans were deliverable within the timescales proposed and would achieve the intended outcomes. The

Secretary of State had indicated that the SVA would require a contribution from Devon to fund part of the accumulated deficit. This was why the authority had created the Safety Valve Support reserve in September 2023. Significant capital investment by Devon would also help to achieve the in-year balance. Figures were given.

63. Under *"Equalities Considerations"* the December report stated, consistently with the EIA (although this was not provided to Cabinet):

> "10.1 At this stage, the general principles of the agreement with Government in relation to the Safety value [sic] offer do not represent identifiable equality implications. However, the impact of any offer may have equalities considerations for children and young people with disabilities. These will be assessed in detail as part of normal decision-making processes in relation to any required policy or service changes.
>
> 10.2 Devon County Council has a statutory duty to provide sufficient education places. The proposals within the Safety Valve will provide additional special educational needs places to increase Devon's offer and enhance inclusivity in mainstream schools.
>
> 10.3 By increasing mainstream inclusion and local SEND places it is hoped that this will have a positive impact on learners and their families, supporting more children to attend a school closer to their local community, reducing journey times to school which can result in distress and disruption to family life. The new provisions are expected to improve opportunities for children ensuring earlier support and intervention and improved access to a full inclusive curriculum. The combined overall impacts are seen to be positive."

64. The Summary at the end of the December report reiterated that:

> "The authority has revisited its DSG management and sustainability plans and has developed a proposal to submit to the DfE, as part of the Safety Valve Programme, which will enable the Council to reach a positive in-year balance. If the DfE is assured that the plans proposed are deliverable within the timescales proposed, will result in intended outcomes and have the appropriate level of project management, Governance and resource support then financial support towards the accumulated deficit is expected to be agreed."

The December slide presentation

65. There was also a presentation which included the set of slides enclosed with the December report. These slides were entitled *"Devon's DSG Deficit Management & Sustainability Plans (Safety Valve proposals)"*. The reasons for the deficit were explained in further detail in a slide entitled *"Challenges the Local Area faces which drives (sic) HNB spend"*. A slide headed "*How DCC will control the DSG deficit and reach an in-year balance"* then stated:

> "DCC's strategies and plans to improve the experiences and outcomes for children and young people with SEND and lead to a financially sustainable position, by focusing on the following themes:
>
> **Inclusion & Early Help:** Focus on early intervention so that the majority of children have their needs met within their local mainstream setting, through strengthened universal and targeted support.
>
> **Preparation for Adulthood:** Developing shared pathways into adulthood across the local system, supporting young people (14-25yrs) to access appropriate education and training and ensure a planned transition into employment, independent living, or identified next step in adult life.
>
> **Sufficiency:** Appropriate local provision is available to meet the needs of children and young people with SEND across Devon, including sufficient special school places, the establishment of Specialist Resource Provision and improved use of Alternative Provision.
>
> **Financial management & Placement value:** Improve the use of data to make informed decisions about how the Council spends money to support children and young people with SEND in a timely way. Improving the commissioning of independent placements."

66. The next slide set out *"Devon's SEND Transformation Programme"* which included proposals to implement each of the four themes set out above. These proposals were, however, in bullet point form.

67. There was then a slide which explained how Devon would ensure that the plan was deliverable and would be managed as it was implemented. This said that there was a project management team and described the bodies which would oversee implementation from a governance point of view and the reporting requirements.

The submission of the SVA proposal to the DfE

68. On 15 December 2023, Devon submitted its proposals for a SVA to the DfE. These included a *"DSG Management Plan 2023-24"*, together with a slide presentation which summarised Devon's thinking. The DMP took the form of a detailed, 40 page, Excel spreadsheet which provided forecasted savings resulting from each of the projects identified by Devon as part of the four themes set out above.

69. Again, the projects were set out at a high level of generality in the slide presentation. By way of illustration, there were eight bullet points under the theme of *"Inclusion and Early Help"* the first two of which were:

> "• **Ordinarily Available Inclusive Provision (OAIP) Toolkit/Support** – Improving the inclusive capacity of Devon's mainstream schools and settings by ensuring high quality OAIP is available consistently as part of a

> robust graduated approach. Supported by 4 Locality SEND Advisory Teachers.
>
> • **Education key workers** – Targeted support for children with EHCPs/SEN Support to overcome barriers to attending mainstream settings. Working with parents to support a return to education and build a positive relationship with school. Includes intensive support for primary transition. Focused pilot work on Emotionally Based School Avoidance (EBSA). (Scale of reach dependent on 0.5% Schools Block transfer)."

70. The bullet points for the "Sufficiency" theme were:

> "• **Special School Places** - Provision of two new state-funded special Free Schools (up to 190 places) to prevent the need for independent specialist provision due to lack of capacity. Additional satellite provision in West Devon (up to 40 places)...
>
> • **Specialist Resource Provision** - Expansion of specialist support provision within mainstream schools through the establishment of additional resource base units for up to 200+ places. Reduction in reliance on independent sector provision, releasing capacity within special schools to more appropriately meet more complex SEN needs. Providing local provision for local children and a well-resourced continuum of provision.
>
> • **Alternative Provision** – developing a framework approach to commissioning alternative provision. Develop capacity of registered AP and mainstream schools to deliver AP. Joint commissioning of provision being explored to reduce the costs and improve VFM. SEMH projects becoming operational."

71. By the end of January 2024, DfE advisers were satisfied that Devon's financial proposals were acceptable and, in February, the proposed SVA was submitted to the Secretary of State for approval.

72. On 7 March 2024, Ministerial approval for the SVA with Devon was granted and the final agreement was sent to Devon to be signed, with a deadline for doing so of 11 March 2024. On 11 March 2024, following consultation with the Leader of the Council, the Chief Executive, the Director of Children's Services and the Director of Finance & Public Value signed the Devon SVA.

The March report

73. On 13 March 2024, Cabinet unanimously resolved to enter into the SVA having been provided with the final version of the SVA and a *"Joint Report of the Chief Executive, Director of Finance and Public Value and Director of Children and Young People's Futures"* ("the March report"). This report summarised the terms of the SVA and provided information about the financial implications and considerations, including figures to which I will return below.

74. The March report stated in terms that under the SVA:

> "The Authority undertakes to reach a positive in-year balance on its Dedicated Schools Grant (DSG) account by the end of 2026/27 and in each subsequent year. In essence SEND services within the High Needs Block element of the Dedicated Schools Grant will cost no more in any year than the funding available from Government grant and any block transfer agreed."

75. The actions which Devon agreed to take under the SVA were set out in the March report (see further, below) which went on to state:

> "7.1 The key to achieving the positive outcome from the negotiations with the DfE and vital to the financial sustainability of the authority is the development of the Safety Valve Management Plan that results in services being delivered within the funding available and deliverable in a reasonable timeframe.
>
> 7.2 The DfE are assured that the plans will be deliverable within the timescales proposed and will achieve the intended outcomes, which has resulted in financial support towards the accumulated deficit of £95 million over a 9 year period."

76. The March report stated that without the Devon SVA the *"cumulative SEND deficit could reach £207 million at 31 March 2026 before it then stabilises"* i.e. the date on which the statutory override is due to cease. Through the Devon SVA the Secretary of State *"has agreed to contribute £95 million to this deficit"* by March 2032, with the remainder coming from sources including in-year savings for the 2023/24 financial year (£10 million), the revenue budget (£5 million per annum over the eight years), interest earned on the Secretary of State's ringfenced contributions (£29 million), reserves (the £20 million reserve created in September 2023), and flexible use of capital receipts (£13 million).

77. The report stated that capital investment into early intervention and expansion of mainstream provision would also deliver savings over time, namely: £18 million to increase Devon's special school estate and £6 million to deliver 200+ resource base places at mainstream schools and to secure two additional Free Schools. Devon had also submitted a bid for additional high needs capital totalling £8.7 million which would be matched with £1.5 million from the authority. This investment would increase Further Education capacity and provide additional pre-16 provision in the west of the County.

78. The March report contained materially the same information about consultation as the December report. Under *"Equality Considerations"*, the passage quoted from the December report (at [63] above) was repeated. The March report concluded:

> "The approval of the Authority's Safety Valve proposal by DfE is a huge achievement and opportunity. It is the result of significant work across the authority over many months and years. The significance of this agreement should not be underestimated and will deliver the service improvements and financial sustainability we need and want."

79. On 21 March 2024, the Defendant made a public announcement that it had entered into the SVA.

80. On 25 March 2024, Devon's Children's Scrutiny Committee reviewed the SVA. This committee has the power to review Cabinet decisions and require the Cabinet to reconsider them. There were criticisms of the proposal, which are relied on by JX, but the decision to enter into the SVA was accepted by the committee.

The Devon SVA

81. The Devon SVA contains the same standard terms as the Bristol SVA. There is therefore, in clause 2, an undertaking to reach a positive in-year balance by the end of a specified financial year – in this case 2026/27 – and in each subsequent year. And the authority undertakes to control and reduce the cumulative deficit, in the Devon case, as set out in a table containing figures from 2023/24 to 2031/32. The forecast deficit for 2023/24 is £153.4 million which rises to £160.9 million in 2025/26 and then falls progressively to £95 million in 2031/32.

82. Under clause 3, the authority agrees to implement the action plan that it has set out including action to:

> "3.1 Focus on improving early intervention through strengthened universal and targeted support;
>
> 3.2 Develop shared pathways into adulthood across the local system, supporting young people (14-25yrs) to access appropriate education and training and ensure a planned transition into employment, independent living, or identified next step in adult life;
>
> 3.3 Ensure appropriate local provision is available as far as practicable to meet the needs of children and young people with SEND across Devon, including sufficient special school places, the establishment of Specialist Resource Provision and improved use of Alternative Provision;
>
> 3.4 Improve processes and use of data to make informed decisions about how the council spends money to support children and young people with SEND in a timely way;
>
> 3.5 Work with partners to improve the inclusive capacity of Devon's mainstream schools and settings by ensuring high quality Ordinarily Available Inclusive Provision (OAIP) is available consistently as part of a robust graduated approach. This work will be supported by four Locality SEND Advisory Teachers;
>
> 3.6 Work with partners to improve the way services in Devon, including health services and schools, work together to provide seamless cross-service support for children and families."

83. Again, it will be noted that these aims, measures or objectives are expressed at a very high level of generality and differ from the somewhat more specific projects in the DMP.

84. Clause 4 – the agreement to ongoing monitoring of the authority's performance – is in materially the same terms as the Bristol SVA as is clause 6, the agreement that the SVA was subject to review at any time.

85. Clause 5 of the Devon SVA provides for payments, in 9 annual tranches, of a total of £95 million, starting with a payment of £38 million in 2023/24. As under the Bristol SVA the payment of the tranches is subject to compliance with the conditions in clause 3 and subject to continued satisfactory progress. The cumulative deficit would thereby be eliminated no later than 2031/32.

86. Separately, the DfE also agreed, on 24 January 2024, to the transfer of 0.25% from the Schools Block to the HNB.

Developments since entering into the SVA

87. Like Bristol, as at November 2024 Devon was not on track to achieve the financial targets agreed in its SVA. It had delivered £11 million of savings to date but it had also reduced its backlog in issuing EHCPs which resulted in significant increased costs which had not been built into the forecasts. A number of existing EHCPs amongst post 16 and post 18 year olds had come to an end in the context of the EHCP review process. 100 post 18 young people had relinquished their EHCPs by going into employment or other outcomes and around 60 had chosen a mainstream post 16 placement instead of a specialist or independent school placement.

Ground 1: Did the Defendants have a duty to consult under section 27(3) of the Children and Families Act 2014 before they entered into the SVAs?

The relevant statutory provisions

88. Section 27 is one of the provisions of Part 3 of the 2014 Act. It states, so far as material, as follows:

> **"27 Duty to keep education and care provision under review**
>
> (1) A local authority in England must keep under review—
>
> (a) the educational provision, training provision and social care provision made in its area for children and young people who have special educational needs or a disability, and
>
> (b) the educational provision, training provision and social care provision made outside its area for—
>
> (i) children and young people for whom it is responsible who have special educational needs, and

> (ii) children and young people in its area who have a disability.
>
> (2) The authority must consider the extent to which the provision referred to in subsection (1)(a) and (b) is sufficient to meet the educational needs, training needs and social care needs of the children and young people concerned.
>
> (3) In exercising its functions under this section, the authority must consult—…

89. There is then the following list:

> "(a) children and young people in its area with special educational needs, and the parents of children in its area with special educational needs;
>
> (b) children and young people in its area who have a disability, and the parents of children in its area who have a disability;
>
> (c) the governing bodies of maintained schools and maintained nursery schools in its area;
>
> (d) the proprietors of Academies in its area;
>
> (e) the governing bodies, proprietors or principals of post-16 institutions in its area;
>
> (f) the governing bodies of non-maintained special schools in its area;
>
> (g) the advisory boards of children's centres in its area;
>
> (h) the providers of relevant early years education in its area;
>
> (i) the governing bodies, proprietors or principals of other schools and post-16 institutions in England and Wales that the authority thinks are or are likely to be attended by—
>
> (i) children or young people for whom it is responsible, or
>
> (ii) children or young people in its area who have a disability;
>
> (j) a youth offending team that the authority thinks has functions in relation to—
>
> (i) children or young people for whom it is responsible, or
>
> (ii) children or young people in its area who have a disability;
>
> (k) such other persons as the authority thinks appropriate…."

90. Section 30 of the 2014 Act requires a local authority to publish information about the provision which it expects to be available within and outside its area:

the *"SEN and disability local offer"*. Section 30(2) states that the provision referred to is (a) education, health and care provision, (b) other educational provision, (c) other training provision, (d) arrangements for travel to and from schools, post-16 institutions and places at which relevant early years education is provided, and (e) provision to assist in preparing children and young people for adulthood and independent living. When preparing and reviewing its local offer, a local authority must consult with a materially identical list of persons to that which is set out in section 27(3): see regulation 54 of the Special Educational Needs and Disability Regulations 2014.

The Claimants' case

91. Mr Broach's legal arguments and submissions were essentially the same in both the ES and the AB cases, albeit he took account of the differences in the factual position in Bristol and Devon. His overall argument was:

i) First, that it is for the court to decide whether section 27 has been *"triggered"*. In this case, on the evidence, section 27 was triggered by the decisions of Bristol and Devon to enter into the SVAs given that these were strategic level decisions to make significant spending cuts across their entire SEND budgets over 7 years in the case of Bristol, and 9 years in the Devon case, and to implement the action plans referred to in the SVAs in order to achieve this by transforming global provision. In the course of deciding to enter the SVA the Defendants considered sufficiency of provision and yet they failed to consult.

ii) Second, and alternatively, Mr Broach argued that even if it was not for the court itself to decide whether section 27 was triggered and, instead, it was a matter for the local authority to decide whether there should be a review, subject to *Wednesbury* irrationality standards, the failures to conduct reviews in these cases, which necessarily entailed an obligation to consult, were irrational.

92. As far as the first argument is concerned, Mr Broach confirmed (and the Agreed List of Issues in AB reflected this) that his case was not that the Defendants had carried out reviews but, contrary to section 27(3), had failed to consult. It was that they had not carried out reviews, which would have included consultation as part of the review process, when they were obliged, by section 27 itself or any rational approach to their duties under section 27, to do so before entering into the SVAs.

93. Mr Broach also accepted that in general the decision, under section 27, as to whether to carry out a review is a matter for the local authority subject to intervention by the court on *Wednesbury* grounds. He gave the example of a complaint (such as in *R (ZK) v London Borough of Redbridge* [2019] EWHC 1450 (Admin), [2019] ELR 482 – "the *Redbridge* case") about the local authority not having carried out a review for a long time, or decisions about the authority's programme or approach to when it carries out reviews, or about what the review process should involve (provided there is compliance with section 27(3)), as being subject to *Wednesbury* rationality standards. But, he contended, this is not the position in "a trigger case" where it is argued on the facts that the

nature of the local authority's decision is such that section 27 compels a review before the decision is taken. If it is said that there has been a trigger event then the court must decide for itself whether this is so. He submitted that this view is clearly supported by the decision of the Court of Appeal in *R (D) v Hackney London Borough Council* [2020] EWCA Civ 518, [2020] PTSR 1587 ("the *Hackney* case") and, in particular, the judgment of Bean LJ at [48] with whom Baker LJ and Cobb J agreed.

94. Mr Broach's case that the obligation to carry out a review had been triggered in the present cases was based on the fact that year on year reductions in spending on SEND, as compared with what had been projected, were required if the Defendants were to achieve their target annual deficit figures agreed under their SVAs. He also emphasised the scale of those reductions:

    i) In the case of Bristol, Mr Broach calculated that the scale of the reductions rose from 9% for 2024/25 to 45% in 2029/30. Spread over the duration of the SVA, a total reduction of 25% was required as compared with what Bristol would spend if it continued with its existing approach.

    ii) In the case of Devon, compared to its existing approach, in 2025/2026 a reduction in SEND spending of 19% was required in order to achieve the target figure for the deficit. The level of savings needed increased in subsequent years. Based on the available information (which was incomplete) Mr Broach estimated that a total reduction of more than 20% was required, spread over the nine years of the agreement.

95. Mr Broach submitted that it is clear that the action plans, to which the Defendants had agreed in order to achieve these savings, involved very real decisions as to strategy. Whilst the actions under the SVA were not set in stone, the agreements required a detailed plan which, at the very least, set a direction of travel for changes to SEND provision. The plans entailed system wide transformation which would inevitably impact on how SEND assistance was provided by each of the authorities. Indeed, in both cases comprehensive sufficiency plans had been developed alongside the safety valve application which, in turn, had impacted on the strategy adopted. Consideration of sufficiency was required by the DfE template and, in the case of Devon, sufficiency was one of four themes in its action plan.

96. Mr Broach's case, at least as set out in his skeleton argument, was that the SVAs obliged the authorities to implement the schemes and projects which were identified in the DMP and these were linked to projected savings. He confirmed in his oral submissions that he was not contending that the Defendants would fail to comply with their statutory obligations in relation to individual children and young people with SEND, and he submitted that it was not necessary for him to show that the decision to enter the SVA would cause significant disadvantage. It was enough that a strategic decision as to global SEND provision was being made which involved major reductions in spending and an associated transformation in the approach to provision. Moreover, an authority could not rationally conclude that there would be no disadvantage or adverse effect without, first, carrying out a global review of sufficiency.

97. As far as Mr Broach's alternative argument is concerned, he submitted that it was irrational not to hold a review which encompassed consultation with the bodies specified in section 27(3). This was the effect of his primary position (summarised above) but he also pointed out that there was no evidence that either Bristol or Devon had considered their obligations under section 27 as opposed to other types of consultation. There was therefore no decision to which the court should accord deference and he challenged each of the grounds on which the local authorities argued that their approach was justified. They had, however, recognised that sufficiency of provision was an issue and had modelled accordingly and yet they failed to consult as part of this.

98. Mr Broach also submitted that consultation which had been carried out with other bodies, and/or other public engagement in which the Defendants had been involved, were irrelevant to the question whether section 27 was engaged. Nor were they capable of discharging the obligations which it imposed on a local authority. Section 27 consultation is at a global strategic level, and is therefore different in nature to the consultation which had been carried out by Bristol and Devon. The section also imposes an additional obligation to the local authority's other statutory obligations to consult in relation to decisions concerning individual children and young people or to consult the Schools Forum or to consult in relation to its local offer. It would be irrational to hold that a local authority can avoid its section 27(3) duty by consultation which was not compliant with that subsection.

99. Mr Broach submitted that whilst there may be a degree of flexibility as to how the target figures agreed in the SVA are to be achieved, in contrast to a number of the cases discussed below where the section 27 claim had failed, the Defendants in this case bound themselves to achieve the specified reductions in spending. He argued that, given the magnitude and effect of the decision to enter the SVAs in these cases, if the duty to carry out a review was not triggered it is difficult to see how it ever will be given that detailed decisions on specific proposals are unlikely to engage section 27 because they are not decisions about global provision.

Analysis of section 27 of the Children and Families Act 2014

The case law

100. In *R (Hollow) v Surrey County Council* [2019] EWHC 618 (Admin), [2019] PTSR 1871 ("the *Surrey* case") a Divisional Court (Sharp LJ, as she then was, and McGowan J) considered a complaint of breach of the section 27(3) duty to consult in a case where a local authority approved detailed service revenue and capital budgets for the 2018–2019 financial year in terms which involved significant reductions to its budget for schools and special educational needs and disabilities. The budget identified areas in which the local authority could potentially make savings although, at the date of the decision to approve the budget, no specific cuts had in fact been proposed.

101. Having reviewed the legislative history, the explanatory notes to section 27 and various other materials, at [98]-[99] the Divisional Court accepted the following propositions:

i) Section 27 of the 2014 Act is concerned with consideration at a strategic level of the global provision for special educational needs made by a local authority, or which is accessed by children for whom it is responsible. It both complements the general duties imposed on local authorities under Chapter III of Part 1 of the Education Act 1996 (including under sections 13 and 14) and *"feeds in"* to the local offer which must be consulted on and published pursuant to section 30 of the 2014 Act.

ii) Section 27 imposes a duty on a local authority to review the SEND provision that is made in its area and the provision that is made outside its area for children who are from its area. When reviewing the relevant provision, the local authority must consider whether it is sufficient.

iii) No specific "trigger" for the duty to review is provided and so, by section 12(1) of the Interpretation Act 1978, the power may be exercised, or the duty is to be performed, *"from time to time as occasion requires"*.

iv) When reviewing the relevant provision and considering whether it is sufficient, the local authority must consult a wide range of persons and bodies who are likely to have an interest in the provision, namely all of the bodies or individuals specified in section 27(3)(a)-(k) of the 2014 Act.

102. At [102]-[103], Sharp LJ said:

> "102..…. We do not consider Parliament can have intended that the extensive and onerous duties of consultation made mandatory by section 27, should be undertaken on a "rolling basis" let alone, that it would be triggered every time a change is made to the provision of SEN. Such an interpretation would be capable of leading to absurd results, adversely affecting both the ability of local government to carry out its business, and the amount of resources available to meet the needs of those the legislation is designed to protect.
>
> 103 In our view, there is nothing in the legislation, or legislative history for that matter, to support such an interpretation, or to indicate that this was Parliament's intention. <u>On its face, and when read in the statutory context to which we have referred, in our view, the legislation imposes a duty on local authorities, which arises from time to time, to consult at reasonable intervals, those identified in section 27(3) in order to keep the provision referred to under review, in which connection local authorities must consider the extent to which the provision referred to is sufficient to meet the educational needs, training needs and social care needs of the children and young people concerned</u>." (emphasis added)

103. At [104]-[106], the Divisional Court considered the correctness or otherwise of earlier decisions by Elisabeth Laing J (as she then was) in *R (DAT) v West Berkshire Council* (2016) 19 CCLR 362 and His Honour Judge Cotter QC (as he then was) sitting as a Deputy High Court Judge in *R (KE) v Bristol City*

Council [2018] EWHC 2103 (Admin), [2018] ELR 502. In both of these cases it was held that section 27 must bite where a local authority makes a decision which will necessarily affect the scope of the provision referred to in section 27. This view was held by the Divisional Court to be wrong and it declined to follow *DAT* and *KE*.

104. In the *Redbridge* case (supra) the complaint was that there had been no section 27 review for some time. It was not contended that there had been a decision which triggered the obligations under section 27. Swift J's observations were made in this context. However, he agreed with [102]-[105] of the judgment in the *Surrey* case and added:

> "60….It is notable that s 27 is formulated differently from duties, for example the s 149 Equality Act 2010 public sector equality duty, which attach to general decision-making. Language such as in s 149(1) of the 2010 Act which ties the obligation under that section to 'the exercise of functions' is singularly absent from s 27 of the 2014 Act. For the reasons given by Sharp LJ there is no sustainable basis for reading that sort of requirement into s 27."

105. Swift J went on to consider the substantive content of section 27 i.e. what is required to discharge the obligations imposed. As he saw it, this was the issue in the *Redbridge* case. The outcome of the case did not depend on whether the section 27 duty was triggered by events. At [63] he said that he considered that *"the s27 duty is in the nature of a strategic obligation"* and he went on to say that:

> "what is required is something programmatic in the sense that in the course of a sensible period of time, a local authority monitors and evaluates the provision it makes, leading overall to reconsideration of whether that provision ought to be the provision that continues to be made."

106. At [64], Swift J said:

> "Section 27 does not contain obligations of the sort that lend themselves to an overly prescriptive approach by the courts. A 'one size fits all' approach ought not to be the objective. Local authorities should be best placed to determine for themselves what the elements of a review programme should be, subject always to review by the courts against the well-known *Wednesbury* standards of purpose, relevance and rationality."

107. In *R (D) v Hackney London Borough Council* [2020] EWCA Civ 518, [2020] PTSR 1587 the claimants challenged the decision of the local authority to reduce the value of the resources to fund schools to deliver special educational provision by 5% for the 2018–2019 financial year. They contended that this breached the local authority's duty to consult under section 27(3) of the 2014 Act and the duty, under section 27(2), to consider the sufficiency of provision.

108. It was submitted on behalf of the claimants that the analysis of section 27 by the Divisional Court in the *Surrey* case was obiter and wrong. The Divisional Court had interpreted the duties in a way in which there could be many substantial

changes to local SEND provision but no consultation upon any of them until the next strategic review happened to take place. A de minimis reduction in funding would not trigger section 27 but the reduction in this case was not de minimis. The gist of Hackney's evidence was that a reduction of anything more than 5% in the relevant element of the SEND budget would have been unacceptable; 5% was therefore to be seen as a *"tipping point";* and consultation under section 27 was therefore essential.

109. In rejecting the claimants' case, at [44] Bean LJ said that he agreed with the decision of the Divisional Court in the *Surrey* case:

> "in particular with the finding at para 98 that section 27 is concerned with consideration at a strategic level of the global provision for SEND made by a local authority; and with the observation at para 99 that the duties are to be performed from time to time, as the occasion requires, with no particular "trigger" for the duty being specified."

110. At [45], Bean LJ also agreed with the Divisional Court that *DAT* and *KE* were wrong to proceed on the basis that a duty to consult under section 27(3) arises whenever a local authority makes a decision which will necessarily affect the scope of its SEND provision. And, at [46], he agreed with Swift J that the section 27 duty is in the nature of a strategic obligation and that local authorities are best placed to decide for themselves what the elements of a review should be, subject to review by the courts against *Wednesbury* standards. He said that it was not necessary to decide whether Swift J was right to say that section 27 required a programmatic approach.

111. At [47], Bean LJ rejected the claimants' argument that the 5% reduction was so close to the *"tipping point"* that consultation under section 27 was required by law:

> "It cannot be the case that if a local authority rationally concludes that a particular level of saving on SEND provision can be achieved without a significant adverse impact, but that a more drastic budget reduction (which it is not proposing to implement) might well have such an impact, that is enough to bring section 27 into play."

112. At [48] in a passage on which Mr Broach particularly relied, Bean LJ added:

> "I do not consider that this modest reduction in one element of SEND funding was sufficient to trigger a strategic review under section 27(1)–(2) with the consequent requirement of widespread consultation under section 27(3). It did necessitate consultation with the schools forum under the 2012 Regulations, which is what occurred. I would leave for another day the issue of what level of major budget cuts or transformation of a local authority's SEND provision would trigger a wider duty to consult either under section 27 or at common law."

113. As noted above, Mr Broach argues that in this passage Bean LJ implicitly accepted that, in principle, the section 27 duty may be "triggered" and that the question whether a duty to consult has been triggered is for the court itself to

decide, rather than an issue in which the court can only intervene on rationality grounds.

On what basis may the court intervene?

114. Given that the duty under section 27 is to "*keep [education, training and social care provision] under review",* rather than expressly *"to review"* such provision on a particular occasion, I have some doubts about the foundations of Mr Broach's argument. As I have noted, this proceeds on the basis that, for the purposes of section 27, there is a concept of *"a review"*. He argues from this premise that there was an obligation to conduct a review in the circumstances of the present case and that if one had been conducted there would have been an obligation to consult as part of that review. Mr Broach also built on this foundation to argue that consultation about specific measures was irrelevant in the context of section 27 given that the section was concerned with consultation as part of a global or strategic review, which was a materially different process involving consultation on materially different matters.

115. I am not clear that this approach is consistent with the terms of section 27. A more natural reading of the section, as indicated at [103] of the *Surrey* case (cited at [102], above) and consistently with the analysis of Swift J in the *Redbridge* case and Bean LJ at [44] of the *Hackney* case, is that the obligation under section 27 is to keep education, training and social care provision, and particularly the sufficiency of such provision, under consideration and, as part of this, to consult the specified interested parties from time to time. Looked at in this way, there might be circumstances in which it would be irrational not to consult – e.g. an event of a nature which compelled the local authority to ascertain the views of the specified parties as to the sufficiency of provision - but the notion of a requirement to carry out a "global strategic review" being "triggered" would seem somewhat artificial in the context of the section read as a whole. Moreover it would not follow from the fact that sufficiency of provision was considered by a local authority that there was necessarily an obligation to carry out a review: it would be for the authority to consider whether and when to consult, subject to rationality standards.

116. However, the case was argued before me on the footing that there could be circumstances in which an obligation to carry out "a review" under section 27 was triggered. The issue was as to whether it is for the courts to determine whether such circumstances have arisen or whether it is for the local authority, subject to *Wednesbury* irrationality standards. In my view it is the latter. Whether the obligation is to carry out a review from time to time, or to consult from time to time as part of keeping the relevant provision under consideration, it would go against the grain of the section for the question of a trigger to be an issue for the courts to determine on the facts. In my view, and consistently with the views expressed in the *Surrey* and the *Redbridge* cases, section 27 leaves to the local authority the decisions as to how to keep provision under review and whether and when to consult the specified parties as to this question. As Swift J said, and for the reasons which he gave, *"Section 27 does not contain obligations of the sort that lend themselves to an overly prescriptive approach by the courts."*. Adopting the phrase from the Interpretation Act 1978 used by

Sharp LJ in the *Surrey* case, it is for the local authority to decide whether *"occasion requires"* the exercise of its powers and duties under section 27.

117. Mr Broach did not call the correctness of the *Surrey* or the *Redbridge* decisions into question and he therefore accepted that, as Swift J said in *Redbridge*, decisions as to how to keep provision under review are a matter for the local authority subject to rationality standards. If that is right, and I agree that it is, I cannot see how the same statutory provision can be read as saying that if there is an alleged trigger event decisions as to how to keep provision under review are a matter for the courts. Although it may be said that there is a difference between deciding what steps should be taken as a matter of general forward planning or routine and what steps should be taken in the context of a specific event, both are ultimately decisions as to how the duty under section 27 should be discharged. I do not accept that there is any basis in the text of the section for the distinction which Mr Broach sought to draw.

118. Similarly, it is clear from [47] of the *Hackney* case (cited at [111], above) that the Court of Appeal considered that decisions as to the impact on provision of a given proposal – including as to whether it was or was not adverse - were a matter for the rational assessment of the local authority. It would therefore appear fundamentally inconsistent with the analysis in the *Hackney* case to suggest, in the context of the same statutory provision, that decisions as to the implications of an alleged "trigger event" for the purposes of section 27 are a matter for the court. That is at least part of the answer to Mr Broach's argument founded on [48] of the judgment of Bean LJ but, in any event, Bean LJ was expressly not deciding the question which he left open and nor, therefore, can he be taken to have been deciding what the approach to that question would have been had the Court of Appeal needed to determine it. Moreover, what he said was at least as consistent with a rationality approach as it was with the approach contended for by Mr Broach.

119. I am therefore satisfied that I may only hold that Bristol and/or Devon were obliged to review/consult if it would have been *Wednesbury* irrational for them to decide to do otherwise before entering into their SVAs.

<u>Were the decisions to enter into the SVAs without carrying out a section 27 review irrational?</u>

120. It is important to note that Mr Broach's case is that the decision to enter into the SVA triggered section 27 and/or that it would have been irrational for Bristol and Devon to think otherwise. Fundamental to the determination of this issue is therefore a clear understanding of the nature of the SVAs entered into by Bristol and Devon, which ultimately did not appear to be materially in dispute as between him and the Defendants.

121. Perhaps the most important point of contention in relation to this question, which appeared to fall away during the hearing, was as to whether, by entering into the SVAs, the Defendants bound themselves to the schemes and projects set out in the DMPs which accompanied their proposals to the DfE and/or to the savings which they projected would result from these proposals. Even if they had done, those schemes and projects were expressed at a high level of

generality as I have pointed out, and a good deal of the detail necessary to implement them was omitted. But they were not.

122. I accept that what the Defendants agreed to do by way of action plans was as set out in section 3 of the SVAs which they entered into. This is the correct interpretation of the terms of the SVAs taking into account the evidence of the witnesses who provided statements in these proceedings, including Mr Goldman, and the DfE template monitoring forms which the Defendants agreed, in section 4 of the SVA, to fill out as part of the process of determining whether satisfactory progress under the SVA was being made. These forms extract the measures set out in section 3 of each SVA and require the authority to explain the position in relation to each measure. The form does not measure progress against the more specific schemes and projects set out in the DMPs.

123. It follows from this that, as Mr Goldman and the witnesses for Bristol and Devon have emphasised, the action plans to which the authorities agreed in their SVAs are at a very high level of generality. I have quoted them in full at [42] and [82] above and need not repeat them. But it is obvious that they are capable of implementation in a variety of different ways and that the manner of their implementation is a matter for the local authority to decide.

124. Secondly, and so that the first point is not thought merely to be a matter of form rather than substance, I also accepted Mr Goldman's evidence that although DfE officials helped the authorities to work up their SVA proposals and satisfied themselves as to their feasibility, the DMPs are for the authorities' own internal planning purposes: *"The Department does not formally endorse these management plans and they are reviewed and adjusted by local authorities throughout the SVA"*. This is also the evidence of the Defendants' witnesses. The DMPs are not *"set in stone"*, whether as a result of entering into the SVA or otherwise. As I have pointed out, they are also expressed in broad terms and require the detail to be worked out before they can be implemented on the ground.

125. Thirdly, and fundamentally, entering into the SVAs did not entail any ability or intention on the part of the authorities to fail to comply with their obligations to make the provision to individual children and young persons required by Part 3 of the Children and Families Act 2014. That provision would be assessed in the usual way on the basis of the needs of the particular child or young person, and decisions on these matters would be susceptible to appeal to the FTT. The Defendants' decisions to enter into the SVAs would not, in themselves, result in *"cuts"* in the sense of existing individual provision being withdrawn, reduced or altered or any provision being denied if this was contrary to the requirements of the 2014 Act.

126. Fourthly, true it is that the SVAs required savings to be made in the years to which they applied, but this was as compared with the then projected levels of spending, and spending was forecast to rise over the coming years as demand for SEND provision continued to increase. This was about controlling the increase in spending and the DSG deficit. Moreover, broadly, the savings were to be achieved by early intervention to prevent needs from becoming more complex, best practice in terms of inclusion in mainstream schools and

increasing the levels of provision which would be available in the maintained sector. In other words, the needs of children and young people would continue to be met but by means which were more cost effective and, where provision was local, more convenient for the pupil or their family. The method of provision might well change where this was consistent with the Defendants' statutory obligations but the premise for the SVAs was that they would be obliged to continue to comply with these obligations.

127. Fifthly, entering into the SVA resulted in substantial sums being unlocked for SEND provision. The DfE made payments which reduced the authorities' DSG deficits but it also agreed to the release of funds for investment in provision. The authorities were obliged to deliver on their side of the bargain if the annual DfE payments were to continue. But they were clearly obliged to take steps to address their DSG deficits whether or not they entered into an SVA given the size and implications of those deficits, and given the general conditions attached to the DSG. It is not easy to see a major downside for the Defendants in entering into the SVAs given that the worst that could happen would be that the DfE payments were discontinued and I agree that the authorities could rationally consider, as they did, that there would be no significant adverse impact from entering the SVAs per se. The impact would depend on decisions which the authorities themselves took to implement the actions and achieve the financial objectives which they had agreed, and these would be the subject of consultation or public engagement where appropriate.

128. Sixthly, the measures which were specified in the SVAs, and indeed the DMPs, and the steps which were proposed to implement them had, to a significant degree, already been the subject of public engagement and consultation. The strategic objectives which underpinned these measures – such as early intervention and greater local and mainstream or maintained provision – were also well known and understood given that they had been the subject of guidance from central government and had been under discussion for some time. Although there was to be an acceleration of the process of change and there were some new specific ideas for achieving the stated objectives, the DMPs built on work which had been ongoing for some time and had been part of the discourse about how to approach SEND provision and the DSG deficits. These matters would also be the subject of consultation and public engagement in the future, as I have said.

129. I do not agree with Mr Broach that this is irrelevant. Bristol and Devon were entitled to consider, as they did, that they had a good awareness and understanding of the views of interested bodies and individuals in their areas in relation to the high level strategies which they proposed to pursue and the steps which they proposed to take to implement them. It was perfectly rational for them to decide that they need not consult at this stage, given this, given the overall beneficial nature of the SVAs as summarised above, given their intention to consult on the specific proposals which would implement these objectives, and given their ability to alter these proposals or introduce new proposals over the course of the agreements. It was not the case that, by entering into the SVAs, the authorities irrevocably bound themselves to a particular set

of proposals, and the achievement of particular levels of savings by those proposals, "come what may".

130. I take Mr Broach's point that the public engagement and consultation which had taken place had not taken place in the context of a single global strategic review of provision, including as to its sufficiency, but this does not render it irrelevant. The question arising from Mr Broach's argument on Ground 1 is whether the authorities could rationally conclude that they need not conduct such a review and consult in the context of such a review because they had a good awareness of the views of stakeholders on the relevant strategic objectives, and because they would consult on the specifics in due course. In my view that question is answered in the affirmative.

131. In this connection, I also agree with the Defendants' argument that the fact that the authorities developed models to assist in projecting how many specialist placements they would need to commission in the future on different scenarios does not mean that it was irrational for them not to carry out a strategic level global review of sufficiency. As I have noted, Mr Broach was clear that he was not arguing that there had been a section 27 review, including consideration of the sufficiency of provision; his argument was that there ought to have been one.

Conclusion

132. Ground 1 will therefore be dismissed.

133. I reach this conclusion without accepting suggestions by the Defendants that I should take into account their understanding that there was a need to keep the SVA negotiations with DfE confidential and/or their arguments that there was insufficient time to comply with section 27 given the constraints imposed by the DfE and/or the need to reach agreement with the DfE in good time before the end of the financial year. The former consideration, the need for confidentiality, appears to have been a perception rather than the reality being that the DfE would not have permitted consultation if either of the authorities had wished to undertake it. The latter argument assumed that a review/consultation could not have been commenced sufficiently soon after the DfE's invitation to bid for a SVA, an assumption which I did not consider to be justified on the evidence.

Ground 2: the PSED challenge (the Devon cases only)

The public sector equality duty

134. Section 149 of the Equality Act 2010 provides, so far as material to the present case, as follows:

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to—
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it." (emphasis added)

135. The section goes on to give a further explanation of this duty. Section 149(3) provides, so far as material, as follows:

> "(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
>
> (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
>
> (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
>
> (c) …"

The competing arguments

136. In her clear and helpful submissions Ms Irving emphasised that, contrary to what appeared to be Mr Goudie KC's position, the question whether a public body has had *"due regard"* so as to satisfy section 149 of the 2010 Act is a matter for the court. In *R (Fire Brigades Union) v HM Treasury* [2024] EWCA Civ 355, [2024] ICR 922 at [162] Elisabeth Laing LJ said:

> "162. The touchstone is the statutory language. A decision-maker must simply give "due regard" to the listed equality needs whenever it exercises a function. What regard to those needs is due in any particular context is a question, in the first instance, for the decision-maker. On an application for judicial review, the question whether the duty has been complied with by the decision-maker is a question of evaluation for the first instance judge…".

137. Ms Irving accepted, however, that as Elias LJ said in *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin), [2012] HRLR 13 at [78]:

> "[78] The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. …".

138. She also accepted that where the issue is whether *"due regard"* meant that further inquiries ought to have been made because relevant information was not available, the duty is analogous to the *Tameside* duty (see *Hurley* at [90]) and therefore subject to intervention by the court on the grounds of irrationality only: see, further: *Hotak v Southwark London Borough Council* [2015] UKSC 30, [2016] AC 811 at [74]-[75].

139. Ms Irving took me to the familiar authorities on the application of section 149. These included *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, [2014] EqLR 60 at [26]. She placed particular reliance on the following passages/points from the well known summary of the principles provided by McCombe LJ in that case:

i) "…[the PSED is] an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation" [26(1)].

ii) "The relevant duty is upon the ….decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the …decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice" [26(3)].

iii) "A [decision maker] must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a "rearguard action", following a concluded decision" [26(4)].

iv) The duty must be "exercised in substance, with rigour, and with an open mind" [26(5)(iii)].

v) The duty is non-delegable and is a continuing one [26(5)(iv) and (v)].

vi) "General regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria." [26(6)].

i) "Officials reporting to or advising .. public authority decision makers, on matters material to the discharge of the duty, must not merely tell the ..decision maker what he/she wants to hear but they have to be "rigorous in both enquiring and reporting to them" [26(7)].

140. Ms Irving also took me to further references in *Bracking* to the judgment of Sedley LJ in *R (Domb) v Hammersmith & Fulham LBC* [2009] EWCA Civ 941, [2009] LGR 843 at [79] from which [26(7)] was drawn. At [74]-[75] of *Bracking*, Elias LJ said:

> "[74]….Any government, particularly in a time of austerity, is obliged to take invidious decisions which may exceptionally bear harshly on some of the most disadvantaged in society. The PSED does not curb government's powers to take such decisions, but it does require government to confront the anticipated consequences in a conscientious and deliberate way in so far

> as they impact upon the equality objectives for those with the characteristics identified in section 149(7) of the Equality Act 2010.
>
> [75] ……In my opinion neither the EIA nor the document setting out the response to the consultations, .. identifies in sufficiently unambiguous terms the inevitable and considerable adverse effect which the [decision] will have, particularly on those who will as a consequence lose the ability to live independently. It may be that this is because of a tendency for officials to tell the Minister what they thought she would want to hear — a tendency which, as Sedley LJ pointed out in R (Domb) v Hammersmith & Fulham LBC [2009] EWCA Civ 941, para.79, must be strenuously resisted. I suspect also that part of the problem may be that these documents are for public consumption and give the impression that they have been drafted with at least half an eye to sending an up-beat message about the merits of the policy. This necessarily involves down-playing the adverse effects of the decision and exaggerating its benefits. As understandable as that may be from a political perspective, forensically it inevitably creates doubt whether the true impact of the decision has been properly appreciated….".

141. Ms Irving also cited *Domb* itself as part of her overall case that the approach of the officers in the Devon case was *"Panglossian"*. Here, she submitted, the officers ignored *"actual outcome in favour of "planned outcome", limited the account of the consequential risk and presented conclusions to members without the data needed to evaluate them*".

142. She also disputed Mr Goudie's argument, at least as set out in his skeleton argument, that the PSED is not engaged by a high level budgetary decision where there is flexibility in how the decision is to be implemented, including room for consideration of the equalities impacts at the point of implementation. This proposition was said by Mr Goudie to be established by four authorities: *R (Fawcett Society) v Chancellor of the Exchequer* [2010] EWHC 3522 (Admin); *R (JG) v Lancashire County Council* [2011] EWHC 2295; *R (A) v Oxfordshire County Council* [2016] EWHC 2419 (Admin) and the *Surrey* case (supra) at [83]-[85]. Ms Irving submitted that these cases did not establish the position contended for by him, which had been expressly rejected by Judge Cotter QC in the *KE* case, referred to above.

143. Ms Irving's submission was that, applying the principles set out above, Devon had failed to have due regard to the relevant equality considerations as required by section 149 of the 2010 Act. She submitted, correctly, that as the EIA had not been provided to Cabinet for the purposes of its decision to ratify the SVA, and as the PSED is non delegable, the EIA could not be relied on by Devon as evidence of "due regard". There had been no witness evidence on this topic from any member of Cabinet and the only evidence of consideration of the relevant matters was therefore what appeared in the December and the March reports (set out above at [63]). This was woefully inadequate given the enormity of the implications of entering into the SVA. It amounted to "kicking the can down the road" in that the proposal was to consider the equality implications at a later stage, and the suggestion that the results of entering into the SVA would be entirely positive was "Panglossian".

144. Ms Irving's submissions were adopted by Ms Patry KC on behalf of JX.

145. In the event, Mr Goudie modified his position in answer to a question from the court. He accepted that the section 149 applies whenever a public body exercises its functions. It therefore applies to the exercise of budgetary functions, whether high level or otherwise. However, what is required in terms of *"due regard"* will depend on the nature of the budgetary decision. Mr Goudie took me through each of the authorities referred to at paragraph [141], above. He went on to argue that there had been due regard in all the circumstances of this case.

Discussion

146. In my view Mr Goudie was right to make the concession referred to at [145] above. There is no principle that the exercise of certain budgetary functions by a public body does not engage the PSED. Each of the decisions on which he relied was to the effect that the PSED applied but that there had been "due regard" on the facts of the case given the stage which the decision making had reached, and *KE* was a case in which there had not been.

147. The principle which these cases illustrate is not based on the classification of the decision or function as budgetary or otherwise. It is as stated at [56]-[57] of *R (Sheakh) v Lambeth London Borough Council* [2022] EWCA Civ 457, [2022] PTSR 1315 where the Court of Appeal said this:

> "56. The authorities show that the concept of "due regard" is highly sensitive to facts and context. How intense the "regard" must be to satisfy the requirements in section 149 will depend on the circumstances of the decision-making process in which the duty is engaged. What is "due regard" in one case will not necessarily be "due regard" in another. It will vary, perhaps widely, according to circumstances: for example, the subject-matter of the decision being made, the timing of that decision, its place in a sequence of decision-making to which it belongs, the period for which it will be in effect, the nature and scale of its potential consequences, and so forth. When the decision comes at an early stage in a series of decisions, and will not fix once and for all the impacts on people with protected characteristics, the level of assessment required to qualify as "due regard" is likely to be less demanding than if the decision is final or permanent. This may especially be so if the decision is also experimental, and is itself conducive to a more robust assessment of equality impacts later in the process.
>
> 57. Although in Bracking this court provided useful guidance on what may constitute "due regard", the judgment must not be read as if it were a statute. The guidance it set out will apply differently in different contexts…." (emphasis added)

148. Indeed I note that, having considered the authorities on this point relied on by Mr Goudie, Sharp LJ said this at [80] of the judgment in the *Surrey* case:

> "We start by observing that what constitutes "due regard", will depend on the circumstances, particularly, the stage that the decision-making process

> has reached, and that the nature of the duty to have "due regard" is shaped by the function being exercised, and not the other way round."

149. She went on to point out, at [81], that on the facts of the *Surrey* case the proposals to achieve the relevant savings were yet to be determined and the intention was that they would be developed in consultation with schools in order to mitigate potential negative impacts. The position was similar on the facts of the *Lancashire County Council* case [82]. "Due regard" was paid to the matters required by the PSED by deciding that the relevant impacts and implications would be considered in greater detail when more specific proposals had been formulated. That was also the view of Ouseley J in the *Fawcett Society* case (supra) at [10].

150. By contrast, as Sharp LJ noted, *KE* was concerned with a concrete budgetary decision to reduce provision and *"to cut the extent of services to a defined group",* so that it was *"axiomatic"* that some elements of the service *"would reduce or even cease"*. Further, it was not open to subsequent decision-makers to reopen the relevant budget line as the budget was indeed *"set in stone"* [78] (to borrow Langstaff J's phrase in the *Oxfordshire County Council* case). In *KE*, more specific consideration of the equality implications of the decision which had been taken was therefore both practical and necessary if the Council was to pay "due regard" to those implications.

151. Having said this, it seems to me that the key to Ground 2 is the true characterisation and implications of the decision of Devon to enter the SVA, and the fact that Devon's proposals were based on matters which had been under discussion and consideration for some time, as to which I have made findings at [120] to [130], above, in particular. In my view the SVA and, indeed, the DMP did state the authority's proposals at a high degree of generality. The achievement of future savings was very much dependent on the specifics of whether and how the agreed objectives would be implemented "on the ground", as to which there was a high degree of flexibility. The view of the authority was expressly (see 10.1 of the December/March reports) that at the stage of entering into the SVA the implications were not sufficiently specific, that there may be equalities issues for children with disabilities and that the equality implications would be considered further in detail in relation to any changes to provision. This view was consistent with the approach which it adopted to the question of consultation which, of course, would potentially help to identify equality issues when the time came. I do not accept that this amounted to a failure to have "due regard" to the relevant matters given the stage which Devon had reached in the decision making process. Regard was paid to them and, having done so, the view was taken that it would be necessary to consider the implications of specific proposals and at the appropriate time. In my view, this was sufficient to discharge the PSED, at least in relation to the decision to enter into the SVA.

152. As for the suggestion that what was said in the December and the March reports was "Panglossian", (i.e., presumably, "unrealistically optimistic") with respect, this accusation misses the central point. This is that Devon recognised that there may be equality implications but decided to consider this question further in the context of specific proposals when they were formulated in detail and/or were due to be implemented. Devon did not decide that it need not pay any or any

further regard to any equality implications because there was no possibility of any adverse equality related consequence for anyone as a result of entering the SVA. Moreover, a fair reading of what was said in the two reports was that it was *"hoped"* that increasing mainstream inclusion and local SEND places would have a positive impact on pupils/students and their families for reasons which were explained in the reports i.e. they would go to school nearer their homes. It was *"expected"* that early intervention and greater inclusion would improve opportunities for children. The *"combined overall"* impacts were seen to be positive. In my view there was nothing "Panglossian" about these high level views of the impact of entering into the SVA which was, itself, a high level agreement. As I have said, such views were rationally open to Devon.

Conclusion

153. I therefore refuse permission on Ground 2.

Ground 3: the Tameside challenge (JX only)

The issues under this heading

154. The Agreed List of Issues identifies the following particular respects in which JX alleges that the reports provided to Cabinet and supporting documents/materials did not provide sufficiently clear and full information, so that the decision of Devon to enter into the SVA was therefore irrational:

i) The context informing Devon's previous efforts to ensure efficient expenditure on SEND provision and its national and comparator position on: (i) EHCPs; (ii) use of travel to other authorities; and / or (iii) the use of the independent sector.

ii) The extent of the savings in SEND expenditure required by the proposed Devon SVA.

iii) Devon's mitigation strategy, in order for the Cabinet to be able to understand where the savings would be made.

JX's arguments

155. Ms Patry began by referring me to an email exchange between the Chief Executive of Devon and the DfE on 11 March 2024 in which the former returned a signed copy of the SVA following consultation with the Leader of the Council and said *"This will be ratified by our Cabinet on 13th March 2024…, we then hope to be able to announce that we have reached agreement on 14th March 2024..."*. This, said Ms Party, was indicative of what was ultimately a superficial and inadequate consideration by Cabinet of the question whether the SVA should be entered into.

156. Ms Patry emphasised that Devon was under statutory duties to achieve best value, the fact that there had been ongoing attempts to make savings for a number of years, and the scale of the savings which would now be required by the Devon SVA. Her position was that the working assumption for the authority

should have been, and should be for the purposes of the Claims, that there was "no fat to trim". And yet, under the SVA, Devon agreed to move from a projected DSG deficit for 2023/24 of c£37 million to achieving an in year balance in terms of funding and spending in 2026/27 i.e. in the space of three years.

157. She also criticised the December and March reports for presenting the matter as a binary choice when, she argued, it was not. Ms Patry said that there was no evidence that the draft SVA could not be renegotiated or delayed whilst Cabinet made further inquiries. Indeed, there had been a failure to reach agreement on the previous attempt in 2021/22, so (at least as it appeared at that stage) failing to do so in March 2024 would not have precluded a further attempt.

158. Reflecting the Agreed List of Issues, Ms Patry argued that there had been a failure by Cabinet to make reasonable inquiries into three key areas in coming to its decision.

i) First, Cabinet was not given information on the context for the decision which it was being asked to take. It was told of the broad nature of the problem in terms of the deficit and its causes. But it was not told, for example, what work had been done to comply with the DfE guidance on how to manage HNB spending or to comply with Devon's statutory best value duties, or what the reasons were for the characteristics of the Devon population which led to the particularly high levels of EHCPs etc. Cabinet was not given any information as to whether what Ms Patry called the proposed "cuts" were being suggested against a background of Devon having already made as many savings as it could, nor any understanding of whether there might be reasons why its SEND population might be different to other authorities.

ii) Second, Cabinet was not given the DMP at any stage and was not told the extent of the cuts/savings which it was agreeing to achieve in order to reduce the deficit to the levels identified in the SVA. For example, it was apparent from the DMP that Devon was projecting cuts/savings of £15.345 million for 2024/25 but Cabinet was not given the information which would enable it to be aware of this. Indeed, on Ms Patry's calculation, it was implicit in the reports which were provided to Cabinet (if a member of Cabinet had chosen to carry out the same calculation) that savings of significantly less money - £7 million - were projected in order to achieve the agreed targets. (This figure was disputed by Devon but, in any event, Ms Patry's central point was that Cabinet was not given the figures as to required savings). Cabinet needed to consider whether the proposed savings were workable and what their impacts would be, and yet it was not put in a position to do this. She also suggested that Cabinet would need to consider whether there would be costs shifting to the adult care budget.

iii) Third, Cabinet was not given any detail as to Devon's mitigation strategy and what little it was told was of no assistance. For example, it was inconceivable that increasing the special school estate would deliver significant savings in the near future, and certainly not within one

> financial year, given the time required to develop and implement the proposals. Increasing resource bases, similarly, required consultation and would take time. It might be that applications for further funding were being made but they had not been determined and it was speculative to assume that they would be granted. The DMP forecasted particular savings for particular headline projects but it was not provided to Cabinet and, in any event, it raises significant questions about how the savings would be achieved in practice. These were questions about which the Cabinet ought reasonably to have been informed, and which it ought to have considered, before entering into the SVA. The lack of information about these matters was the very thing which had caused at least one councillor on the Children's Scrutiny Committee, on 24 March 2024, to complain about the lack of specifics in the information presented to decision makers and that, as a result, the Committee was struggling to understand where the savings would be made.

159. On these bases Ms Patry submitted that Cabinet did not know what it was committing to when it ratified the SVA. The reports which it received were misleading and/or incomplete or, at least, were not *"sufficiently clear and full to enable councillors to understand the important issues and the material considerations that bear upon them"*: see *R (Trashorfield Ltd) v Bristol City Council* [2014] EWHC 757 (Admin) at [13(iii)]. Devon therefore had not taken *"reasonable steps to acquaint [itself] with the relevant information to enable [it] to answer [the question which it had to answer] correctly"* (per Lord Diplock in the *Tameside* case (supra at 1065B.)

Discussion

160. Mr Goudie relied on a number of authorities which address the level of detail required in officers' reports to local authorities or their committees, including *Trashorfield* (supra) at [13] and *R (Lensby Ltd) v Richmond-upon-Thames LBC* [2016] EWCA Civ 814 at [8]. I have taken the guidance in these authorities into account but, ultimately, I was not convinced that this is the best lens through which to view the issue raised by Ms Patry. For one thing, the particular context for this guidance was planning decisions, where the committee which considers the report will generally bring significant specialist knowledge and experience to its consideration of the report. For another, whilst these may be two sides of the same coin in the present case, ultimately the allegation under Ground 3 was that the decision of Cabinet was irrational rather than that the reports which were presented to it were defective.

161. I have therefore focussed on the test in *Tameside* itself and the helpful summary of the principles to be derived from the caselaw on this principle which was provided by the Court of Appeal in *R (Balajigari) v Secretary of State for the Home Department* [2019] EWCA Civ 673, [2019] 1 WLR 4647 at [70]:

> "First, the obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Secondly, subject to a *Wednesbury* challenge ... it is for the public body and not the court to decide upon the manner and intensity of inquiry to be undertaken… Thirdly, the court should not intervene merely because it considers that further inquiries

> would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision. Fourthly, the court should establish what material was before the authority and should only strike down a decision not to make further inquiries if no reasonable authority possessed of that material could suppose that the inquiries they had made were sufficient. Fifthly…, Sixthly, the wider the discretion conferred on the [authority], the more important it must be that he has all the relevant material to enable [it] properly to exercise it."

162. Applying this summary, I can see that Cabinet might have chosen to make further inquiries but I do not consider that it is realistically arguable that Cabinet acted irrationally in ratifying the SVA on the basis of the information which it had. The starting point is to reiterate, without repeating, the findings which I have made at [120]-[130] above about the nature and context of the SVA and therefore the nature of the decision which was taken on 13 March 2024.

163. Secondly, Cabinet should be taken to have had a reasonable degree of awareness of the context in any event as it is quite apparent from the evidence that the DSG deficit had been an ongoing issue for some time. But, as I have highlighted above, Cabinet was also given information as to this in the December report, in the slides which accompanied it and in the figures with which it was provided in the December and March reports. These figures showed that there had been substantial in year deficits in the preceding 5 years, that the accumulated deficit had increased over this period and was very substantial (c£163 million for 2023/24) and that it was forecast to increase substantially (to c£207 million) in the relatively near future. In the December slide presentation they were given information as to the causes of the increase in spending in terms of higher numbers of EHCPs, more complex cases and greater use of private and out of area provision etc. It was implicit that this had happened despite the authority's best efforts to date, but it was also clear that the proposal was to *"reform"* Devon's high needs system to achieve the necessary savings.

164. Thirdly, as far as the specifics of the savings required are concerned, it was plain - from the figures and other information which Cabinet was given in the December and the March reports - that there would need to be reform, and substantial savings would need to be made. It is true that Cabinet was not given specific figures for the savings which would need to be made in each year to which the SVA applied in order to achieve the agreed cumulative deficit targets. However, the figures in the December report showed the funding, spend and therefore overspend in each year from 2019/20-2023/24 (forecast) as well as the cumulative deficit. The figures showed in year deficits of in the order of £37/38 million in the preceding two financial years. As Ms Patry points out, the forecast for 2023/24 itself was for an in year deficit of c£37 million, and a cumulative deficit at that stage of £162.585 million. The March report stated in terms that there would have to be a positive in year balance in the third year after the SVA and in all years thereafter. The scale of the challenge was therefore clear.

165. In addition to this information the March report itself included the SVA, from which Cabinet members could see the agreed targets for the cumulative deficit

over the years to 2031/32. There were also figures which showed the contributions from different sources which Devon would be required to make over the period of the agreement so as to bring the forecast accumulated deficit down to £95 million in 2031/32, and therefore to zero when the DfE's payments were taken into account.

166. Fourthly, as for the mitigation strategy, as noted above, in the December slide presentation Cabinet was told the four themes which would form part of the strategy and the projects which would be pursued as part of the SEND Transformation Programme. In the December report it was told what the intended impact/strategic objectives were (i.e. slowing down the increase in EHCPs, a reduction in the use of private provision and an increase in provision in mainstream schools). Cabinet was also told that the proposals would need to be *"constantly reviewed and other initiatives may be brought forward through continued performance and risk management"* and it was told that there would be consultation in relation to proposed service changes or other developments such as new special schools or resource base provision.

167. It also seems to me to be significant that, as noted above, the December report told Cabinet that the DfE would only enter into a SVA if it was assured that the plans were deliverable within the timescales proposed and would achieve the intended outcomes. They were told, in effect, that a good deal of work had been done on the proposals in conjunction with DfE officials, and the March report told them in terms that the DfE was assured on the question of the feasibility of the action plan and the financial targets which Devon was agreeing to achieve. Cabinet therefore was looking at the matter on the basis that there had been careful consideration of the proposals over a significant period of time and the specialist/expert view of all who were involved was that they were workable. Indeed, the DfE would not have agreed to the payment and unlocking of what were very significant sums if it had considered otherwise.

168. Of course, a member of Cabinet might have asked for more information on what savings would need to be made, more detail on how it was proposed that they would be achieved and how likely it was that the proposed reforms would succeed. But they could perfectly rationally take the view that they did not need additional detail about these or any other matters in order to decide whether it was in Devon's interests to enter the SVA. The need to take steps to address the deficit was clear, well understood and pressing. It was clear that it would be necessary to make substantial savings, that reform would be required and that success could not be guaranteed. But the proposals had been approved by the DfE. For the reasons which I have given above, members of Cabinet could rationally consider that the SVA was an essentially beneficial opportunity to take steps which needed to be taken in any event whilst receiving financial assistance from central government and being permitted to invest other sums in order to make progress. The downside to not going ahead with it at that point was a great deal more obvious than the downside to entering into it, even if ultimately it was not as successful as was hoped.

Conclusion

169. So, for all of these reasons, I refuse permission in relation to Ground 3.

Ground 4: the Padfield challenge (JX only)

The issues and the arguments

170. The Agreed List of Issues identifies two issues under this heading:

i) Is it permissible in principle for the exercise of a statutory power to be unlawful (per *Padfield*) for frustrating the legislative intention of a separate statute which is not the source of that power?

ii) If so (per *Padfield*), did the Defendant's decision to enter into the Devon SVA have the effect of frustrating the legislative intention underpinning Part 3 of the Child and Families Act 2014?

171. As for the first of these issues, Ms Patry agreed that her argument was not what she termed "a pure *Padfield* argument" but she submitted that there is no reason in principle why the rationale for *Padfield* should not apply where a public body exercises a power under one statute in a way which frustrates the legislative purpose of another. She relied on *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61 at [51] where the Supreme Court said that *"ministers cannot frustrate the purpose of a statute or a statutory provision, for example by emptying it of content or preventing its operation"* including in the *"exercise of prerogative powers*". Her argument was that section 111 of the Local Government Act 1972 and section 1 of the Localism Act 2011, pursuant to which Bristol and Devon may be taken to have acted in entering into their SVAs, could be treated as analogous to prerogative powers for the purposes of this principle.

172. Ms Patry also relied on *Onesearch Direct Holdings Limited (t/a Onesearch Direct) v York Council* [2010] EWHC 590 (Admin), [2010] PTSR 1481 where Hickinbottom J (as he then was) said (albeit obiter) that he did not see why, in principle *"a court might not conclude that Parliament could not have intended that a power in one statute be exercised in a way that would utterly defeat the purpose of another statute…"* (emphasis added). And she relied on *R (London Borough of Islington) v Secretary of State for Education* [2024] EWHC 1798 at [110]-[114] where the proposition that the exercise of powers under one statute cannot frustrate the purpose of another was not disputed.

173. Mr Jackson took me to *Padfield* itself, *R v Secretary of State for the Environment, Transport and the Regions ex parte Spath Holme* [2001] 2 AC 249, 281 and *R (Palestine Solidarity Campaign Limited) v Secretary of State for Housing, Communities and Local Government* [2020] UKSC 16, [2020] 1 WLR 1774 at [22] which show that the question is one of vires. The *Padfield* principle is that the statutory provision under consideration cannot have conferred a power to frustrate the purpose for which the power was conferred. That purpose is derived from the construction of the statute which confers the relevant power. It followed, in Mr Jackson's submission, that the *Padfield* principle could not be extended. The passage relied on by Ms Patry from *Onesearch* was obiter and the point was not in issue in the *Islington* case. Even if it was possible to extend the *Padfield* principle in the way advocated by Ms Patry, it would still be necessary to analyse the scope of the power being exercised – in this case section

111 of the 1972 Act and/or section 1 of the Localism Act 2011 Act – which Ms Patry had not done in the Statement of Facts and Grounds or in her written or oral submissions.

174. In reply, Ms Party said that all she needed was *Miller*. She said that her argument held good on the basis that section 111 of the 1972 Act and section 1 of the 2011 Act did not confer a power to frustrate the purposes of the 2014 Act.

Discussion

175. Section 111(1) of the Local Government Act 1972 provides so far as material as follows:

> "Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do any thing (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions."

176. Section 1 of the Localism Act 2011 provides a general power of competence on a local authority. Section 1(1) and (2) state that:

> "(1) A local authority has power to do anything that individuals generally may do.
>
> (2) Subsection (1) applies to things that an individual may do even though they are in nature, extent or otherwise—
>
> (a) unlike anything the authority may do apart from subsection (1), or
>
> (b) unlike anything that other public bodies may do."

177. And the rest of the section goes on to elaborate on this.

178. As for the proposition that the *Padfield* principle may be extended to the exercise of powers under a different statute to that which is alleged to be frustrated, it seemed to me that Ms Patry's arguments based on an extrapolation from what was said in *Miller* ignored the fact that, in that case, the Supreme Court was considering the particular historic constitutional relationship between prerogative powers, on the one hand, and legislation enacted by Parliament on the other. I was therefore very doubtful that the analogy which she sought to draw was apt. Although I could see the force of the argument that, in principle, in a given case Parliament, in statute B, might not have conferred a power to take a given step which was contrary to or frustrated earlier statute A, whether this was so would turn on the construction of statute B. I agree with Mr Jackson that Ms Patry had not pleaded or argued Ground 4 on the basis of a careful analysis of sections 111 of the 1972 Act and/or 1 of the 2011 Act. I would therefore have been reluctant to determine this point given that the way in which

the proposition was presented on behalf of JX led to a lack of detailed argument on the true issues.

179. However, happily I do not need to determine this question. Even if Ms Patry is right on the first issue – whether accurately described as an extension of *Padfield*, or otherwise - she fails on the second. *Padfield* was a case in which the decision of the Minister was effectively the opposite of what Parliament intended in enacting section 19 of the Milk Marketing Act 1958. At p 1030B Lord Reid said:

> "Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act, the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court." (emphasis added)

180. As it was put in *Onesearch*, the standard before the court will be prepared to hold that the decision maker has exceeded its powers is that the exercise of the power *"utterly defeats"* the purpose of the legislation. As noted above, in *Miller* (which on Ms Party's argument is relevant) the Supreme Court referred to the exercise of the prerogative power *"emptying the statute of all content or preventing its operation"*. And in *Islington* the arguments failed because the exercise of the relevant power did not undermine the relevant legislation to this degree: it did not *"utterly defeat"* the purpose of the statute, see [113].

181. Ultimately Ground 4 fails because, as Ms Patry acknowledged, the highest that she could properly put her case was to submit that entering into the SVA increased the potential for, or increased the risk of, Devon failing to comply with its duties to make provision in particular cases under Part 3 of the 2014 Act. Even that was contested by Devon. She did not submit, and nor could she, that it was an inevitable consequence of the SVA that Devon would fail to comply with its obligations in any particular case, or likely that this would happen on a wider scale. Mr Broach expressly stated that it was not his case that these would be the consequences and, as I have accepted, in fact the SVAs were entered into on the basis that this would not in any way permit the authorities to fail to comply with their duties to individual children and young persons under Part 3 of the 2014 Act. On the contrary, the aim of the SVA was to enable Devon to comply with its obligations more cost effectively and to improve its SEND provision. If frustration of Part 3 was a likely or intended consequence of entering into the SVA the DfE would have declined to approve Devon's proposal. Moreover, the FTT would also be on hand to police the 2014 Act and prevent any breaches of its requirements.

182. Even assuming, then, that as a matter of construction sections 111 of the 1972 Act and section 1 of the 2011 Act do not confer a power on a local authority to enter an agreement which frustrates the purpose of Part 3 of the 2014 Act, that was not the effect of Devon entering into the SVA in this case. Looking at it in

another way, given Ms Patry's (correct) concessions, and in any event, she was unable to establish the proposition that the broad language of section 111 and section 1 did not encompass a power on the part of Devon to enter into a SVA because of the effect which doing so would have on its ability to fulfil its duties under Part 3 of the 2014 Act. With respect, her arguments did not begin to include an analysis of these sections which supported the conclusion contended for under Ground 4.

Conclusion

183. I therefore refuse permission in relation to Ground 4.

Ground 5: the alleged secret policy (JX only)

184. Ms Patry said that this point could not succeed if JX failed on Ground 3 i.e. if I accepted that the information provided to Cabinet was not misleading and was sufficient to enable it to make a rational decision as to whether to enter into the SVA. As indicated above I do accept this. Ground 5 therefore fails. Officers of Devon were not withholding information from Cabinet or pursuing a hidden policy in presenting the proposal to enter into the SVA.

185. I therefore refuse permission on Ground 5.

The Defendants' procedural objections

186. In the light of my conclusions on the merits of the Grounds set out above, I do not propose to state any concluded views on the procedural objections to the grant of permission or the arguments raised by the Defendants in relation to relief.

187. As far as permission is concerned, given the nature of the challenges brought by the Claimants I very much doubt that I would have refused permission on the grounds of prematurity for the reasons given by Mr Broach and Ms Patry. In relation to promptness, there is a degree of artificiality about considering how I would have exercised my discretion in relation to permission had I considered that a ground or grounds had merit: it is likely that my view would have been influenced by the question of which grounds and how strong they were. As far as the argument under section 31(2A), (3C) and (3D) of the Senior Courts Act 1981 is concerned, again the assessment of the likelihood of a different outcome would depend on which ground or combination of grounds was found arguably to have merit, what would have been required in order for Devon to have acted lawfully and what the outcome would have been. The question of exceptional public interest then might or might not have needed to be addressed. Unless good reason is suggested to the contrary, then, I do not think it necessary or proportionate to enter into these hypothetical questions.

188. For similar reasons, unless there is good reason to do so I do not propose to give a view on the question of relief on a hypothetical basis, whether under section 31(2A) or section 31(6) of the 1981 Act or otherwise in the Bristol or the Devon cases. There are additional reasons for declining to do so in the case of section 31(6) or as a matter of discretion, namely the fact that the effect of granting a

quashing order, whether a prospective quashing order or otherwise, would be relevant to the exercise of my discretion. That effect is not entirely certain on the evidence.

Overall conclusion

189. For the reasons set out above I dismiss Ground 1 and refuse permission on Grounds 2-5.