Neutral Citation Number: [2021] EWHC 2936 (Admin)

Case No: CO/1279/2021 and CO/1894/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/11/2021

Before :

MRS JUSTICE STEYN DBE

- -

Between :

THE QUEEN

on the application of

(1) WC (by her mother and litigation friend TL)
(2) BB (by his mother and litigation friend HP)

Claimants

- and -

SOMERSET COUNTY COUNCIL

-and-

Defendant

(1) MISTERTON CHURCH OF ENGLAND FIRST SCHOOL
(2) SWANMEAD COMMUNITY SCHOOL
(3) GREENFYLDE CHURCH OF ENGLAND FIRST SCHOOL

Interested Parties

- -
- -

Stephen Broach and Gethin Thomas (instructed by Irwin Mitchell LLP) for the First Claimant
Stephen Broach and Rachel Sullivan (instructed by Irwin Mitchell LLP) for the Second Claimant
Sarah Hannett QC (instructed by Somerset County Council Legal Services) for the Defendant

Hearing dates: **14 and 15 October 2021**

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MRS JUSTICE STEYN DBE

Mrs Justice Steyn :

A. INTRODUCTION

1. The claimants seek judicial review of Somerset County Council's decision dated 17 March 2021 ("the decision") to approve the proposals contained in a statutory notice dated 27 January 2021 concerning a reorganisation of schools in the Crewkerne and Ilminster area. They have brought separate claims which have been heard and determined together.

2. The first claimant is 7 years old. She is a pupil in year 2 at Misterton Church of England First School ("Misterton"). Misterton is a voluntary controlled school located in the village of Misterton, near the town of Crewkerne in Somerset. Misterton is a first school, educating children in the five year groups from reception to year 4, that is, between the ages of 4 and 9. It is also, as its name indicates, a Church of England ("CofE") school. Misterton has been designated a rural school for the purposes of the Education and Inspections Act 2006.

3. The second claimant is 5 years old. He is a pupil in year 1 at Greenfylde CofE First School ("Greenfylde"). Greenfylde is located in the town of Ilminster in Somerset. Like Misterton, it is a voluntary controlled, CofE, first school, admitting children between the ages of 4 and 9, and it has been designated a rural school.

4. In accordance with the orders of Morris J dated 9 August 2021 in each claim, references to "WC" and "BB" are to the first and second claimant and references to "TL" and "HP" are, respectively, to their mothers (who also act as their litigation friends in these proceedings).

5. Currently, the schools in the area are in a three-tier structure, consisting of first, middle and upper schools (save to the extent that there are already three primary schools). The effect of the decision is to change the existing three-tier structure to a two-tier structure, consisting of primary and secondary schools. In broad terms, the proposals involve: (i) the closure of Misterton; (ii) the amalgamation of Greenfylde and Swanmead Community School (a middle school for children aged 9-13) to form a single new primary school on a split site; (iii) changing Wadham School (an upper school for children aged 13-18) into a secondary school (admitting children aged 11-18); and (iv) changing four other first schools and one middle school into primary schools.

6. The principal focus of the first claimant's challenge is the decision to close her current school, Misterton; while the main focus of the second claimant's challenge is the decision to amalgamate Greenfylde and Swanmead, and so close Swanmead, the non-denominational middle school which his mother wished him to attend from year 5 to year 8. However, both claimants challenge the decision as a whole.

7. The seven grounds on which the decision is challenged are:

   i) **Ground one**: The defendant failed to carry out a lawful consultation;

   ii) **Ground two**: The defendant has unlawfully predetermined the outcome;

iii) **Ground three**: The defendant failed to take proper account of the presumption against the closure of a rural school;

iv) **Ground four**: The defendant failed to have due regard to the needs expressed in section 149(1)(a), (b) and (3) in respect of those with the protected characteristics of "disability" (including pupils with special educational needs) and "religion or belief" (in particular pupils with no religious faith), in breach of section 149(1) of the Equality Act 2010;

v) **Ground five**: The defendant's decision was indirectly discriminatory against those with no religious beliefs, in breach of section 19 of the Equality Act 2010;

vi) **Ground six**: The decision is incompatible with article 14 of the European Convention on Human Rights (considered in conjunction with article 8, 9 or article 2 of protocol 1), and so in breach of s.6 of the Human Rights Act 1998; and

vii) **Ground seven**: The decision was irrational.

8. I have amalgamated (and so partially renumbered) the two claimants' grounds. Both claimants pursue grounds one, two and seven (ground seven corresponding to WC's ground 4 and BB's ground 6). The first claimant alone pursues ground three. The second claimant alone pursues grounds four, five and six (corresponding to his grounds 2, 3 and 5).

9. In two separate orders sealed on 9 August 2021, Morris J granted the claimants permission to apply for judicial review on all grounds save the one I have called ground four. The application for permission on ground four was adjourned to be listed in court as a "rolled-up hearing", at the same time as all other grounds, to allow the issues concerning standing (as a potential bar to permission) to be fully argued.

10. I am grateful to all counsel for the assistance they have provided to the Court in the presentation of their oral and written arguments in this matter.

B. The legislative framework

(a) Duties to secure sufficient schools and efficient primary and secondary education

11. The defendant's general duties to ensure the availability of sufficient and efficient primary and secondary education to meet the needs of the population in its area are contained in sections 13 and 14 of the Education Act 1996 ("EA 1996").

12. Section 13(1) of the EA 1996 provides:

> "A local authority shall (so far as their powers enable them to do so) contribute towards the spiritual, moral, mental and physical development of the community by securing that efficient primary education and section education … are available to meet the needs of the population of their area." (emphasis added)

13. Section 14 of the EA 1996 provides (insofar as relevant):

> "(1) A local authority shall secure that sufficient schools for providing—
>
> (a) primary education, and
>
> (b) education that is secondary education by virtue of section 2(2)(a),
>
> are available for their area.
>
> (2) The schools available for an area shall not be regarded as sufficient for the purposes of subsection (1) unless they are sufficient in number, character and equipment to provide for all pupils the opportunity of appropriate education.
>
> (3) In subsection (2) "appropriate education" means education which offers such variety of instruction and training as may be desirable in view of—
>
> (a) the pupils' different ages, abilities and aptitudes, and
>
> (b) the different periods for which they may be expected to remain at school,
>
> including practical instruction and training appropriate to their different needs.
>
> …
>
> (6) In exercising their functions under this section, a local authority shall in particular have regard to—
>
> (a) the need for securing that primary and secondary education are provided in separate schools;
>
> …
>
> (7) The duty imposed by subsection (6)(a) does not apply in relation to middle schools or special schools." (emphasis added)

14. The terms "primary education" and "secondary education" are defined in section 2 of the EA 1996. These are macro-level target duties, rather than statutory obligations enforceable by individuals: see *R v Inner London Education Authority ex parte Ali* (1990) 2 Admin LR 822, per Woolf J at 828-829 and *R (Somerset County Council) v Secretary of State for Education* [2020] EWHC 1675 (Admin), [2021] ELR 110, per Morris J at [44].

(b) School closures

15. The proposals approved by the challenged decision engage two legal and policy regimes: the regime for "discontinuing" maintained schools and the regime for making "significant changes" to maintained schools.

16. The legislative provisions that apply in relation to the closure of a maintained school are sections 15 and 16 of the Education and Inspections Act 2006 ("EIA 2006") and the School Organisation (Establishment and Discontinuance of Schools) Regulations 2013 ("the Discontinuance Regulations").

17. Section 15 of the EIA 2006 provides (insofar as relevant):

> "(1) Where a local authority in England propose to discontinue–
>
> (a) a community, foundation or voluntary school,
>
> …
>
> the authority must publish their proposals under this section.
>
> (2) …
>
> (3) Proposals under this section must–
>
> (a) contain such information, and
>
> (b) be published in such manner,
>
> as may be prescribed.
>
> (4) The matters to which the relevant body must have regard in formulating any proposals under this section in relation to a rural primary school include–
>
> (a) the likely effect of the discontinuance of the school on the local community,
>
> (b) the availability, and likely cost to the local authority, of transport to other schools,
>
> (c) any increase in the use of motor vehicles which is likely to result from the discontinuance of the school, and the likely effects of any such increase, and
>
> (d) any alternatives to the discontinuance of the school;
>
> and in considering these matters the relevant body must have regard to any guidance given from time to time by the Secretary of State.
>
> …
>
> (6) Schedule 2 has effect in relation to the consideration, approval and implementation of proposals published under this section.
>
> (7) In this section–

(a) *"the relevant body"* means the local authority mentioned in subsection (1) or the governing body mentioned in subsection (2) (as the case may be);

(b) *"rural primary school"* means a primary school designated as such for the purposes of this section by an order made by the Secretary of State.

(8) In this Part any reference to a local authority –

(a) discontinuing a school, or

(b) implementing proposals to discontinue a school (whether published by the authority or the governing body),

is a reference to the authority ceasing to maintain the school." (emphasis added)

18. Section 16 of the EIA 2006 provides (insofar as relevant):

"(1) Before publishing any proposals under section 15 which relate to a school which is a rural primary school or a community or foundation special school, the relevant body must consult–

(a) the registered parents of registered pupils at the school,

(b) in the case of the rural primary school–

(i) the local authority (where they are not the relevant body),

(ii) where the local authority are a county council, any district council for the area in which the school is situated, and

(iii) any parish council for the area in which the school is situated,

(c) [subparagraph omitted as it only applies "in the case of a community or foundation special school"] …, and

(d) such other persons as appear to the relevant body to be appropriate.

(2) Before publishing any other proposals under section 15, the relevant body must consult such persons as appear to them to be appropriate.

(3) In discharging their duty under subsection (1) or (2) the relevant body must have regard to any guidance given from time to time by the Secretary of State.

> (4) In this section *"the relevant body"* and *"rural primary school"* have the same meaning as in section 15." (emphasis added)

19. The Discontinuance Regulations prescribe in considerable detail the information that must be included in any "discontinuance proposals" that is, proposals published under s.15 of the EIA 2006 by a local authority (or governing body) to discontinue a school: regulation 11 of, and Schedule 2 to, the Discontinuance Regulations. The information specified in Schedule 2 includes:

    i) "A statement explaining the reason why closure of the school is considered necessary" (para 3);

    ii) "A statement and supporting evidence about the need for school places in the area including whether there is sufficient capacity to accommodate displaced pupils" (para 5);

    iii) "Details of the schools … at which pupils at the school to be discontinued will be offered places" (para 6);

    iv) "A statement and supporting evidence about the impact on the community of the closure of the school and any measures proposed to mitigate any adverse impact" (para 8);

    v) "Where proposals relate to a rural primary school designated as such by an order made for the purposes of section 15, a statement that the local authority or the governing body (as the case may be) considered section 15(4)" (para 9);

    vi) "Where the school has a religious character, a statement about the impact of the proposed closure on the balance of denominational provision in the area and the impact on parental choice" (para 10);

    vii) "Details of length and journeys to alternative provision" (para 14); and

    viii) "The proposed arrangements for travel of displaced pupils to other schools including how the proposed arrangements will mitigate against increased car use" (para 15).

20. A further stage of consultation is required on publication of the discontinuance proposals, in accordance with regulation 13 of the Discontinuance Regulations, which provides (insofar as relevant):

> "(1) Where the local authority are to consider the proposals under paragraph 8 of Schedule 2 to the Act … any person may send objections or comments in relation to proposals published in accordance with sections 7, 10, 11 or 15 to the local authority within four weeks of –
>
> (a) the date of publication of the proposals;…".

(Regulation 13 is made pursuant to paragraph 5 of Schedule 2 to the EIA 2006 which provides that regulations may make provision for the making of objections or comments in relation to the proposals within a prescribed period to the relevant authority.)

21. The statutory guidance published by the Secretary of State, to which the local authority was required to have regard pursuant to sections 15(4) and 16(3) of the EIA 2006, is the *Opening and closing maintained schools: Statutory guidance for proposers and decision-makers* (November 2019) ("the Closure Guidance").

22. The Closure Guidance addresses the statutory process in these terms:

> "**Stage one: consultation**
>
> It is a statutory requirement to consult any parties the proposer thinks is appropriate before publishing proposals under section 10 or 11 for new schools and for section 15 proposals to close a maintained school.
>
> The proposer may use the consultation to consider a range of options for the future of a school (e.g. amalgamation, federation or closure). However, the proposer must then publish specific proposals (see stage two of the statutory process below). It is these specific proposals setting out details of the new school or the school to be closed which can be commented on or objected to during the statutory representation period.
>
> It is for the proposer to determine the nature and length of the consultation. It is best practice for consultations to be carried out in term time to allow the maximum number of people to respond. Proposers should have regard to the Cabinet Office guidance on Consultation principles when deciding how to carry out the consultation period.
>
> In the case of the closure of rural primary schools and special schools, the Act sets out some particular groups who must be consulted. This is set out in Annex A.
>
> **Stage two: publication**
>
> A statutory proposal should be published within 12 months of the initial consultation period being completed. This is so that it can be informed by up-to-date feedback. A proposal **MUST** contain the information specified in … Schedule 2 [of the Discontinuance Regulations] for closing a school …
>
> The proposer must publish the full proposal on a website along with a statement setting out:
>
> - how copies of the proposal may be obtained;
> - that anybody can object to, or comment on, the proposal;

- the date that the representation period ends; and

- the address to which objections or comments should be submitted.

A brief notice containing the website address of the full proposal must be published in a local newspaper and may also be published in a conspicuous place on the school premises (where any exist), such as at all of the entrances to the school.

…

Stage three: representation

Except where a proposal is for the closure of a rural primary school or a special school, where there are prescribed consultees (see Annex A), proposers of a school closure should consult organisations, groups and individuals they feel to be appropriate during the representation period (the information at Annex A can be used for examples).

The representation period starts on the date of publication of the statutory proposal and **MUST** last for four weeks. During this period, any person or organisation can submit comments on the proposal to the LA, to be taken into account by the decision-maker. …

The decision-maker will need to be satisfied that the proposer has had regard for the statutory process and must consider **ALL** the views submitted during the representation period, including all support for, objections to and comments on the proposal.

Stage 4: decision

…

When issuing a decision, the decision-maker can:

- reject the proposal;

- approve the proposal without modification;

- approve the proposal with such modifications as they think desirable, after consulting the LA and/or proposer (as appropriate);

- approve the proposal – with or without modification – subject to certain conditions (such as the grant of planning permission) being met.

…" (underlining added)

23. In short, it is clear – and common ground – that the defendant was required by statute to consult both (a) before publishing any discontinuance proposal under s.15(1) of the EIA 2006 ("Stage 1"); and (b) on, and for four weeks after, publication of that proposal ("Stage 2", referred to in the guidance as stage 3). Having done so, the defendant then had to determinate whether to reject the proposal or give it approval, with or without modification.

24. The Closure Guidance requires the decision-maker to consider "related proposals" together. "A proposal should be regarded as related if its implementation (or non-implementation) would prevent or undermine the effective implementation of another proposal."

25. The Closure Guidance provides the following advice to proposers:

> "**The presumption against the closure of rural schools**
>
> Proposers should be aware that the Department expects all decision-makers to adopt a presumption against the closure of rural schools. This doesn't mean that a rural school will never close, but that the case for closure should be strong and clearly in the best interests of educational provision in the area.
>
> The presumption doesn't apply where a rural infant and junior school on the same site are being closed to establish a new primary school.
>
> Proposers should set out whether the school is referred to in the Designation of Rural Primary Schools (England) Order or, where it is a secondary school, whether the school is identified as rural on the Get Information about Schools database.
>
> Proposers should provide evidence to show they have carefully considered:
>
> • alternatives to closure including: federation with another local school; conversion to academy status and joining a multi-academy trust; the scope for an extended school to provide local community services and facilities e.g. childcare facilities, family and adult learning, healthcare, community internet access etc;
>
> • transport implications i.e. the availability, and likely cost of transport to other schools and sustainability issues;
>
> • the size of the school and whether it puts the children at an educational disadvantage e.g. in terms of breadth of curriculum or resources available;
>
> • the overall and long term impact on the local community of the closure of the village school and of the loss of the building as a community facility; and

> • wider school organisation and capacity of good schools in the area to accommodate displaced pupils."

26. The guidance on factors to consider when determining proposals provided in the Closure Guidance includes the following:

> "**Rural schools and the presumption against closure**
>
> Decision-makers should adopt a presumption against the closure of rural schools. This does not mean that a rural school will never close, but the case for closure should be strong and a proposal must be clearly in the best interests of educational provision in the area. When producing a proposal to close a rural primary school, the proposer must consider:
>
> - the likely effect of the closure of the school on the local community;
> - the proportion of pupils attending the school from within the local community i.e. is the school being used by the local community;
> - educational standards at the school and the likely effect on standards at neighbouring schools;
> - the availability, and likely cost to the LA, of transport to other schools;
> - whether the school is now surplus to requirements (e.g. because there are surplus places elsewhere in the local area which can accommodate displaced pupils, and there is no predicted demand for the school in the medium or long term);
> - any increase in the use of motor vehicles which is likely to result from the closure of the school, and the likely effects of any such increase; and
> - any alternatives to the closure of the school.
>
> 'Rural primary school', in this context, means any school referred to in the Designation of Rural Primary Schools (England) Order. Proposers should also consider the above factors when proposing the closure of a rural secondary school. …"

(c) Significant changes

27. The legislative provisions governing the making of significant changes to maintained schools (such as changes in age range and published admission number) are contained in sections 18 to 24 of the EIA 2006 and in the School Organisation (Prescribed

Alterations to Maintained Schools) (England) Regulations 2013 ("the Prescribed Alteration Regulations"). In accordance with section 21(6) of the EIA 2006 and regulation 7 of the Prescribed Alteration Regulations, the defendant was required to have regard to the guidance published by the Secretary of State, namely *Making significant changes ('prescribed alterations') to maintained schools: Statutory guidance for proposers and decision-makers* (October 2018) ("the Changes Guidance").

28. The statutory process for making prescribed alterations begins with publication of the statutory proposal. There is no statutory requirement to consult *prior* to publication of the proposal, in contrast to the position in respect of a proposal to close a school. However, the Changes Guidance states:

> "Although there is no longer a statutory 'pre-publication' consultation period for prescribed alteration changes, there is a strong expectation that schools and LAs will consult interested parties in developing their proposal prior to publication, to take into account all relevant considerations."

29. As for a proposal to discontinue a mainstream school, a proposal to make prescribed alterations must be published on a website and in a local newspaper. A four week "representation period" begins on the date of publication of the proposals and ends four weeks later. During that period any person may send objections or comments in relation to any proposals to the local authority. (See schedule 3 to the Prescribed Alterations Regulations.)

30. A determination must be made within two months of the end of the representation period: regulation 6 and para 5(3) of Schedule 3 to the Prescribed Alterations Regulations. The local authority may reject the proposals, approve them without modification, or approve the proposals with such modifications as the local authority think desirable, having consulted the governing body (unless the modifications are proposed by the governing body): regulation 6 and para 5(1) of Schedule 3 to the Prescribed Alterations Regulations. Approval may be conditional on an event prescribed in paragraph 8 (such as the grant of planning permission): regulation 6 and para 5(2) of the Schedule 3 to the Prescribed Alterations Regulations.

31. A proposal to change from a three-tier to a two-tier structure (or vice versa) is not, *per se*, defined as a prescribed alteration, but it will necessarily entail proposals (such as changing the age range of pupils to be admitted to a school) which must be the subject of consultation in accordance with the legislative provisions identified above.

(d) Equality Act 2010

32. Section 19 of the Equality Act 2010 ("EA 2010") addresses indirect discrimination. It provides:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.
>
> (3) The relevant protected characteristics are—
>
> age;
> disability;
> gender reassignment;
> marriage and civil partnership;
> race;
> religion or belief;
> sex;
> sexual orientation."

33. Section 149 of the EA 2010 contains the public sector equality duty ("PSED"). It provides, so far as material:

> "(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;
>
> …
>
> (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;
>
> …
>
> (4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.
>
> …
>
> (7) The relevant protected characteristics are—
>
> age;
> disability;
> gender reassignment;
> pregnancy and maternity;
> race;
> religion or belief;
> sex;
> sexual orientation.
> …"

(e) The Human Rights Act 1998 and the ECHR

34. Section 6(1) of the Human Rights Act 1998 ("HRA") provides:

> "It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

35. Articles 8, 9 and 14 of the ECHR and Article 2 of the First Protocol to the ECHR are "Convention rights": s.1(1) of the HRA.

36. Article 8(1) provides:

> "Everyone has the right to respect for his private and family life, his home and his correspondence. "

37. Article 9(1) provides:

> "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance."

38. Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any

> ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or social status."

39. Article 2 of the First Protocol provides:

> "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

C. The facts

(a) The current schools

40. Ilminster and Crewkerne are small towns in Somerset, with a recorded history dating back to 725 and 899, respectively. The two towns are about 7.5 miles apart. There are a number of villages in the surrounding area, including Misterton which is near Crewkerne. There are 12 schools in the area with a total of 2,093 pupils on roll as of May 2021.

41. Nine schools in the area conform to the three-tier system, consisting of first, middle and upper schools. First schools admit pupils aged 4-9 into five year groups, from reception to year 4. Middle schools cater for those aged 9-13, in year 5 to year 8 and upper schools are for pupils aged 13 to 18, in years 9 to 13 (or, if the school has no sixth form, the final year group is 11).

42. There is one upper school, Wadham CofE Upper School ("Wadham") and there are two middle schools: Swanmead Community School ("Swanmead") and Maiden Beech Academy ("Maiden Beech").

43. There are six first schools:

    i) Misterton (the first claimant's school);

    ii) Greenfylde (the second claimant's school);

    iii) Ashlands CofE First School ("Ashlands");

    iv) Haselbury Plucknett CofE First School;

    v) Merriott First School ("Merriott"); and

    vi) St Bartholomew's CofE First School ("St Bartholomew's").

44. In addition, three of the 12 schools in the area are primary schools which admit pupils aged 4-11 into seven year groups, from the reception year up to year 6 (encompassing Key Stages 1 and 2). These three schools are: Hinton St George CofE Primary School ("Hinton St George"), Shepton Beauchamp CofE Academy ("Shepton Beauchamp") and St Mary's and St Peter's CofE Academy ("St Mary's"). Hinton St George was

formerly a first school. It changed to become a primary school at the end of March 2020, following a consultation from 14 February to 15 March 2020.

45. The National Curriculum is divided into "key stages": Key Stage 1 corresponds to years 1-2; Key Stage 2 is years 3-6; Key Stage 3 is years 7-9; and Key Stage 4 is years 10-11. In the two-tier system, pupils in primary school are in Key Stages 1 and 2, while pupils in secondary school (leaving aside those in years 12 and 13, otherwise known as sixth form) are in Key Stages 3 and 4. Whereas in the three-tier system, Key Stage 2 is split across first and middle schools and Key Stage 3 is split across middle and upper schools.

46. As the names of the schools indicate, all three primary schools, five of the six first schools and the upper school are CofE Schools. Three of the 12 schools are non-denominational: one first school (Merriott), and both the middle schools (Swanmead and Maiden Beech).

47. It will also be apparent from the names of the schools that two of the three primary schools (Shepton Beauchamp and St Mary's) and one of the two middle schools (Maiden Beech) are academies. The defendant does not have the power to close or make significant changes to an academy.

48. The surrounding areas both within Somerset and across the border in Dorset have all adopted the two-tier system in which education is provided in primary schools and secondary schools.

(b) The perceived problem

49. The background to the proposals which resulted in the challenged decision is explained in the evidence of Amelia Walker, the defendant's Assistant Director for Education, Partnerships and Skills. All references in this judgment to Ms Walker's evidence are to her second witness statement dated 6 September 2021. Ms Walker states:

> "9. There have been longstanding concerns about the financial viability of this three-tier structure. Those concerns have focused in particular on the financial viability of the upper school, Wadham, and the two middle schools, Maiden Beech and Swanmead.
>
> 10. Wadham school has a significant budget deficit which, despite school leaders' best efforts, is growing year on year. The deficit at 31 March 2019 was £598,046; at 31 March 2020 the deficit was £925,114; and at 31 March 2021 the deficit was £1,399,118 (this is the latest figure available). For 2021/22 the school projected a deficit of £1,869,242.
>
> …
>
> 18. … While we do not have access to the financial records of Maiden Beech (the middle school academy), Swanmead Community School (the local authority maintained middle school) also has a growing deficit. Swanmead's deficit on 31

> March 2019 was £25,382; on 31 March 2020 the deficit was £61,017; and on 31 March 2021 the deficit was £62,563. The school's submitted budget plan for 2021/22 projected a deficit of £79,095. …
>
> 22. … Records show that Wadham went into deficit in 2007/08 and this rose steadily until it reached £440,000 in 2011/12. In this year the school's deficit was written off on the agreement of Schools Forum, when there was a change to the Schools Funding Formula. It was felt this presented an opportunity to start on a level playing field for those schools in deficit. As part of the agreement a local charitable organisation, the Crewkerne Education Trust, donated half the sum needed to pay off the deficit. The school was back into deficit by 2015/16."

50. The evidence is that Wadham's deficit flows from the school structure and the demography of the area. The funding that the defendant receives from the government for mainstream state-funded schools is based on the National Funding Formula ("NFF"). The NFF is a per pupil formula which is standardised across the country. The defendant then allocates that funding to schools in the county. Local authorities are not required to follow the NFF in distributing the funds they receive to schools, but Ms Walker states that they are encouraged by the government to do so. The defendant has adopted the NFF and so the funding each school in Somerset receives is calculated by reference to the NFF. Any decision to deviate from the NFF would entail allocating less money to some schools than they would receive if the formula were followed and redirecting it to other schools within the area. Such a decision could only be made with the agreement of the Schools Forum. In other words, the leaders of some schools would have to agree that their school should receive less money than the defendant has received by reference to the number of pupils attending their school.

51. Ms Walker states in paragraph 11:

> "That standardised funding reflects the cost of delivering education, but assumes some economies of scale. Economies of scale in the staffing of schools are based on the school's ability to match the volume of pupils with the number of separate subjects requiring a different specialist teacher."

52. The funding for Key Stage 4 is higher than for Key Stage 3. Ms Walker explains the reason for this by reference to the example of an average sized secondary school with 150 pupils in each year, split into five classes of 30 pupils.

> "A basic Key Stage 3 curriculum following the National Curriculum has 12 distinct subjects. Across three years of Key Stage 3, there would be 15 classes worth of pupils. For Key Stage 3 in this example, pupils exceed discrete subjects (12 compared to 15). For Key Stage 4, most schools will offer more than 12 distinct subjects, as the range of GCSE and vocational subjects available nationally is very wide. However, even if a school did

> not expand choice beyond the 12 subjects in Key Stage 3, there are only two years of Key Stage 4 and therefore only 10 classes worth of pupils. This means that teachers needed now exceeds classrooms worth of pupils. The funding for Key Stage 4 is higher than for Key Stage 3 for this reason. However, as the number of pupils diminishes, the harder it becomes for the school to able to balance the number of pupils against the number of specialist teachers needed, and as pupil numbers diminish this problem becomes acute more quickly for Key Stage 4 than for Key Stage 3."

53. In short, the lower costs at Key Stage 3 compared to Key Stage 4 stem both from the fact that the curriculum is ordinarily broader at Key Stage 4, enabling pupils to take GCSEs in a wider variety of subjects, and from the fact that Key Stage 3 consists of three years groups whereas Key Stage 4 consists of only two.

54. Ms Walker explains:

> "Most secondary schools teach Key Stage 3 and Key Stage 4, and it is standard practice to subsidise the costs of teaching a higher number of discrete subjects in Key Stage 4 by the lower costs of delivering the narrower curriculum in Key Stage 3. Large upper schools may also achieve similar economy of scale for Key Stage 4 due to their size."

55. The difficulty for Wadham is that, as an upper school rather than a secondary school, it only has one Key Stage 3 year group (year 9), and it is not a large upper school. There are currently around 470 pupils on the roll at Wadham, whereas the school site has the capacity to cater for 800 pupils. Wadham "is now the highest performing secondary school in the area, based on the last available standardised testing in 2019", but the school is unable to "invest in cosmetic improvements to the school building and upgrades to facilities" and on average 32 pupils leave the three-tier system between middle and upper school to attend a school other than Wadham.

56. Ms Walker states:

> "Secondary schools can become financially not viable when they are too small. Small pupil numbers give rise to even more acute difficulties for upper schools, and Wadham is in the bottom 10% by size for schools nationally serving Year 7 and higher. By contrast, the other local authority-maintained secondary school in Somerset, Frome Community College, has around 1200 pupils compared to around 470 pupils on the roll at Wadham. At more than twice the size it can comfortably deliver the Key Stage 4 curriculum within funding. For Wadham to reach a similar level of efficiency it would need to make drastic and brutal cuts to the curriculum in Key Stage 4. This would have an immediate negative impact on children's education by curtailing the options available for GCSE or other national qualifications. Further, this impact would be felt most by children whose economic circumstances meant they had no other choice of school, as there

> is no other school that teaches GCSEs within the funded transport area."

57. Ms Walker expands on the latter point in paragraph 21:

> "In a rural area, there will be some pupils who can afford the cost of transport to attend a more distant school. For pupils from lower income background, however, a local school is likely to be the only viable option. Therefore, it is crucial that the school they attend is a good school, and that they can feel a sense of pride that they attend a school of choice."

58. Wadham's sixth form is very small. Across the two year groups (years 12 and 13) there were 35 pupils in 2019 and 33 pupils in 2020. However, the staffing needed to cover the curriculum in years 9-11 is considerably greater than the number of classes, and so the surplus capacity has been used to teach sixth form pupils. There would, Ms Walker states, be even greater surplus capacity in the school if those staff were not deployed to teach the sixth form as well as years 9-11, so (as matters currently stand) Wadham's financial difficulties would not be remedied by closing the sixth form.

59. Ms Walker states:

> "The underlying factors are demographic and arise as a result of ongoing changes within the community which mean that there are fewer resident children of school age and a greater proportion of households with older residents. The number of pupils in the two middle schools and upper school in Years 7 to 11 only was 929 in 2010. By 2020 this was 773, a reduction of 156 pupils. The minimum funding for each pupil in the National Funding Formula is £3,000 for secondary-aged pupils. A loss of 156 pupils represents a loss of at least £468,000 – a figure which equates very closely to the level of deficit being accumulated in the area each year."

60. The defendant's view that Wadham's deficit is caused by structural problems is supported by the findings of the Department for Education's Schools Resource Management Advisor ("SRMA"). The final report was not provided until May 2021, but Ms Walker discussed the findings with the SRMA in February 2021 and referred to the SRMA's findings in her report prepared for the Cabinet meeting on 17 March 2021. The SRMA advised:

> "The review confirms that whilst there are some savings to optimise efficiency, the school is in structural deficit. Staffing costs are too high to support the children with a broad and balanced curriculum; the school would need to be significantly larger in the current age range or expand by adding year 7 and year 8 children into the school. Increasing the average class size across the school will support the current curriculum offer and thereby balancing the finances with the educational experience. The only financial alternative to this would be to drastically

> reduce the curriculum offer; close the sixth form and dramatically reduce non-curriculum support staff."

61. As regards the pupil population, Ms Walker explains:

> "17. The area around Ilminster and Crewkerne is attractive and represents a desirable location to live. There are a number of planned and proposed developments which could, if realised, bring more pupils into local schools in time. However, given what we know about declining birth rates and the age distribution of the population, the impact of house building is only likely to mitigate losses and is unlikely to result in significant growth in pupil numbers…
>
> 18. The impact of declining numbers is not restricted to the upper school. … The pupil numbers in the middle schools are also in decline. While there has been some small growth in the past few years, this is due to a national 'bulge' in the pupil population which is not projected to continue and the downward trajectory is likely to return (based on numbers currently in the primary/first sector and what is known about the birth-rate.)"

62. In 2019 there were 408 pupils at Maiden Beech and 280 at Swanmead. The figures for 2020 were 411 and 290, respectively. In 2009 the total middle school population attending these two schools was 797 pupils. This reached a low of 632 pupils in 2013 and the combined total for both schools in 2020 was 701.

63. In 2019, the defendant proposed an independent review of current school provision in the area.

(c) Futures for Somerset review and report

64. In early 2019, the defendant commissioned Futures for Somerset Ltd to carry out a review of education in the area and the existing school estate, with a view to identifying potentially viable and sustainable means of delivering improved educational outcomes in the future.

65. On 12 June 2019, Futures for Somerset published a report entitled the "Crewkerne & Ilminster Strategic School Review Report" ("the FS Report"). This is a detailed 125 page report. It is impossible fully to capture the content of this report, or the numerous consultation documents to which I refer below, in this judgment.

66. Futures for Somerset (FS) initially identified five Options, namely:

i) Option 1: make no changes;

ii) Option 2: make no structural changes, but explore changes to the funding formula;

iii) Option 3: change to a two-tier structure;

iv) Option 4: change to a two-tier structure, but with infant and junior schools on split sites; and

v) Option 5: change to a hybrid two/three-tier system, retaining the existing first school structure but amalgamating middle and upper years into one consolidated educational phase.

67. The FS Report states:

> "Potentially viable structures were established against these options, resulting in six scenarios deemed to represent the most viable models for further assessment and discussion. Scenarios are identified based on their viability and deliverability and as such many alternatives have been discounted on the basis of not being deliverable within the assumptions and constraints of the review scope (e.g. where sites are too small to practically deliver a scenario, physically or in terms of viability of the resultant educational model, the scenario is not carried forwards as it would not be viable / deliverable / recommended as a structure). Resultant scenarios vary in numbers of schools in the system (and converse potential school closures) and the complexity of associated changes.
>
> These scenarios are not recommendations but an assessment of viable models for future consultation and feasibility study, and as such no single scenario or hybrid scenario is proposed as the best solution. The scenarios show ways required capacity and alternative educational structures could be delivered within the constraints of existing and potential future expanded site developments; but this needs to be reviewed in the wider context of community and Diocese impact, Academisation, estate ownership and the changing MAT landscape etc. No one option can be progressed without critical decisions being taken by stakeholders to agree a way forward." (emphasis added)

68. The FS report advised that Option 1 ('do nothing') was "not feasible if sufficient educational places are to be realised". While several of the existing schools were under-utilised with pupil numbers below site capacity (particularly across middle and upper schools), it was projected that additional school places would be needed across first and middle year groups to meet educational needs. Consequently, Scenario 1A ('do minimum') was developed to serve as the "baseline" for testing the other six options. This was the same as option 1, save to the extent that it involved making some preparation for growth in numbers of first and middle school pupils.

69. The scenarios deemed to represent the "most viable" models for further assessment and discussion were, taking them in the order of the strongest to weakest options, as assessed by FS were:

i) Scenario 3B: This scenario proposed changing to a two-tier structure consisting of four primary schools and one secondary school, with the potential closure of seven rural first/primary schools (including Misterton). The FS Report describes

this proposal as the "strongest or most beneficial viable option". "It was the strongest scoring option for positive improvement across both revenue finance and educational and staffing impact assessment, scoring a mid-range position in terms of required capital expenditure."

ii) Scenario 4D: This scenario proposed changing to a two-tier structure consisting of split site primary schools across six sites (two for juniors and four for infants) and one secondary school. It entailed the potential closure of five rural first/primary schools (including Misterton). This option came second to 3B under the "agreed all round evaluation", but 3B and 4D were tied as the strongest in terms of revenue assessment.

iii) Scenario 4A: This scenario proposed changing to a two-tier structure consisting of three (single site) primary schools, split site primary schools across five sites (two for juniors and three for infants), and one secondary school. This scenario proposed the potential closure of Swanmead (rather than change to a primary, as per 3B, or infant school, as per 4D) and of two first/primary schools (including potentially Misterton).

iv) Scenario 5D: This scenario proposed retaining all first schools, expanding Wadham to provide education for middle and upper school pupils in a single school, and the potential closure of both Swanmead and Maiden Beech middle schools.

v) Scenario 2: This scenario is the same as 1A, save that it proposed adjustments to formula funding. The FS report noted that "any divergence from the National Funding Formula will be at a cost to the Somerset DSG [Dedicated Schools Grant] and therefore affect all schools". The process of seeking such a change would require local consultation and an application to the Department for Education to disapply the regulations. If the proposal failed to carry the support of the Schools Forum, this would place other aspects of the Schools Budget at risk. The FS Report noted that any change to formula funding for Wadham "will not address cumulative deficits" and would not change the curriculum efficiency or allow for increased curriculum spend.

vi) Scenario 1A: This baseline scenario involved no structural change and reflected the status quo, albeit (unlike Option 1) recognising that even maintaining the status quo necessarily entailed proceeding with a plan to move Greenfylde to a new site in order to ensure sufficient school places would be available at first school level to meet projected growth.

vii) Scenario 5C: This scenario proposed retaining all first schools, expanding both Wadham and Maiden Beech to provide education for middle and upper school pupils in two combined middle/upper schools, and closing Swanmead.

(d) Stage 0: The 2019 consultation exercise

70. On 18 June 2019, the defendant sent a letter to staff, governors and parents/carers of pupils regarding the review of education provision in the Ilminster and Crewkerne area. The letter stated:

"You will recall that in my previous letter which I had asked Headteachers to distribute to you I explained that we had been meeting with Headteachers of schools in the area for some time now discussing the need to review the school structure in and around Ilminster and Crewkerne. This is about making sure it is financially viable and has the capacity to provide the range of curriculum opportunities to equip the children and young people in the area with the skills and qualifications that they will need for the future.

In that letter I explained that we had commissioned an organisation called Futures for Somerset (FfS) to carry out a review of provision in the area and that they would be looking at a range of alternative structures, setting out the pros and cons of each. In assessing each model they would look at a number of factors including the educational impacts of each model at each key stage. They will also look at the impact on pupils with Special Educational Needs, early years provision (pre-school and nursery), staffing implications, transport costs, impact on communities and the costs of making any change.

FfS have now completed this work and presented their report to the Local Authority and last week the findings of the review were shared with Chairs of Governors and Headteachers. It is important to understand that the report does not make proposals or recommendations for change but sets out what is possible. We will be spending the next few weeks until the end of term meeting with Governors of all the schools in the area to seek their feedback on the report which will then inform decisions about how we proceed.

A copy of the report is available here: [a link to the report was provided]. There are a considerable number of appendices to the report which are not yet attached to it because of their size. These are being uploaded over the next few days.

We have set up a short survey to gauge people's views of the options and ask what is important to you in considering the structure of schools in the area. This is available here: [a link to the questionnaire was provided].

We will be meeting again with Chairs of Governors and Headteachers and representatives of the Diocese and the Regional Schools Commissioners Office before the end of term to draw together all the responses. Over the summer break we will decide whether there are option(s) we want to take forward for further development or whether there are alternative models we want to explore further with a view to making a final decision on how to proceed in the autumn term, subject to statutory consultation processes.

> I appreciate that this is an unsettling time whilst we decide how we need to proceed. However, the one thing that the review has shown is that there is no one obvious, straightforward solution and so it is important that we use the report as a starting point for discussion to make sure that whatever is decided is the right solution."

71. Ms Walker's evidence is that a copy of the FS Report was published by the defendant in full online and remained available online throughout all the non-statutory and statutory consultation exercises, and remains available online now.

72. The first claimant's mother, TL, states:

> "I responded to the June/July 2019 consultation voting for no change to the current system but it was not my understanding that this would be the last time the option of keeping Misterton open would be on the table. At no point during the 2019 consultation was it made clear that the closure of Misterton would be the final result."

73. Although HP does not expressly say so, it seems likely that the second claimant's mother, HP, was not a consultee at that time as the second claimant would have been three years old and so not yet a pupil at any of the potentially affected schools.

74. The publication of the FS Report on 12 June 2019 and the letter of 18 June 2019 to parents and carers began a non-statutory consultation exercise which ran until 26 July 2019 ("the Stage 0 consultation"). The "Outcome of Summer 2019 consultation" ("Stage 0 Outcomes Report") records:

Option	**Description**	**Rank for efficiency and sustainability**	**Balance of responses**
1A	Do nothing but prepare for growth in pupil numbers	6	-2
2	As 1A but adjusting school formula funding	5	n/a
3B	Closing all small rural schools, consolidating with a smaller number of town primaries, and a single secondary school	1	-50
4A	Close two small rural schools, split all other first and middle schools into infant/junior schools, and a single secondary school	2	-37
4D	As 4A but with the closure of five small rural schools	3	-27
5C	Close one middle school, provide middle and upper in two schools, retain all first schools	4	-32
5D	Close both middle schools, provide middle and upper in a	7	-60

	single school, retain all first schools		

75. The questionnaire was not in evidence. But it can be surmised from the Stage 0 Outcomes Report that the questionnaire did not seek preferences on Option 2, as it was "asking what is important to you in considering the structure of schools in the area" and, in terms of structure, Option 2 was precisely the same as Option 1A. But it is also apparent that the Stage 0 consultation involved meetings with governors, headteachers and representatives of the Diocese and inviting governors, staff and parents/carers to comment on the options identified in the FS Report, as well as inviting responses to the questionnaire.

76. The Stage 0 Outcomes Report records that the answers to the question "I prefer option …", in respect of the following six options were:

Option	Strongly agree	Agree	Neutral	Disagree	Strongly Disagree
1A	26%	14%	18%	15%	27%
3B	13%	7%	9%	7%	63%
4A	14%	8%	19%	26%	33%
4D	13%	15%	17%	15%	40%
5C	8%	19%	12%	22%	37%
5D	5%	9%	10%	22%	53%

77. The Stage 0 Outcomes Report stated:

> "This consultation did not result in any clear preferences. The strongest positive feedback was for 'do nothing' (1A) though on balance the overall response was still negative. The strongest negative feedback was for closing small village primaries and consolidating around large primaries in the towns (3B), however all options were on balance negative, and the closure of both middle schools (5D) was most negative overall.
>
> In the consultation process, respondees were also asked to note the three thing that were most important to them in relation to school organisation. The following were the most common factors:
>
> - avoiding long journeys to and excess traffic around schools
> - the importance of high-quality education for all
> - the key role played in communities by village schools
> - any changes to result in sustainable schools with the right capacity
> - support for the needs of children caught up in change

- clarity about teaching cohorts in complete key stages
- mitigating or removing the negative effects of two school transfers
- taking account of previous building investment and condition
- ensuring a safe environment on and around school sites for children".

(e) Hiatus pending proceedings

78. The defendant's plan to proceed to statutory consultation in the autumn of 2019 was delayed as a result of an application by Swanmead to become an academy and, together with Maiden Beech, to join the Bridgwater College Trust (now the Bridgwater and Taunton College Trust ("BTCT")). On 16 September 2019, the South West Regional Schools Commissioner (on behalf of the Secretary of State for Education) granted Swanmead's application to become an academy and to join BTCT. The defendant successfully challenged that decision in judicial review proceedings on the basis, amongst others, that the Commissioner had failed to have regard to the prejudicial impact that making an academy order would have on the defendant's ongoing review of the educational structure of schools in the area. Fraser J handed down judgment on 26 June 2020: *R (Somerset County Council) v Secretary of State for Education* [2020] EWHC 1675 (Admin), [2021] ELR 110.

79. In addition, the decision of the governing body of Hinton St George to convert to a primary school (see paragraph 44 above) was the subject of pre-action correspondence by BTCT, although ultimately that decision was not challenged.

(f) Cabinet decision of 21 October 2020 to proceed to pre-publication consultation

80. Ms Walker prepared a report ("the Officer's First Report"), including an Equality Impact Assessment (version 1, dated 1 October 2020) ("EqIA v.1"), for the meeting of the defendant's Cabinet held on 21 October 2021. The Officer's First Report made the following recommendations:

> "That Cabinet agrees to:
>
> a) Publish a formal consultation on a proposed new two-tier model (see para 3.6 (sic)), followed by publication of statutory notices ahead of reporting back to Cabinet for a final decision.
>
> b) Delegate responsibility for agreeing the publication of statutory notices to the Cabinet Member for Education and Transformation, except in the case where consultation responses are such that significant changes to proposals are required and therefore necessitate reporting back to Cabinet."

81. Paragraph 3.9 of the Officer's First Report identified the proposed model for consultation:

"The public consultation would seek views on the following five elements to the proposal for a new two-tier model of education for the area:

1) Crewkerne: Wadham School would change from an upper school with 460 pupils (including to a secondary school with an estimated 780 pupils

2) Ilminster: Swanmead Community School (middle school) and Greenfylde Church of England First School would amalgamate into a split site primary school. Should approved housing development progress in the town, S106 investment would be used to part fund a new single site school bringing these two sites together. In order to achieve this amalgamation, one school would be closed and pupil numbers would be expanded in the other school. However, the intent would be that this would be a wholly new school with a new name and staffing structure, not the continuation of one school and the closing of the other. The new school would be a Church of England primary.

3) Villages near Crewkerne: Merriott First School and Haselbury Plucknett Church of England First School would become primary schools. Hinton St. George Church of England Primary School would not be part of a structure change as it is already moved to becoming a primary school but it would be considered as part of any changes to ensure all schools receive a sustainable proportion of the total pupil cohort. Misterton Church of England First School is federated with Ashlands in Crewkerne (see below).

4) Crewkerne and Misterton: Ashlands and St Bartholomew's Church of England First Schools and Maiden Beech Academy (middle school) would form three primary schools. Misterton is a very small school and is located only 1.2 miles from St Bart's. Though the federation has invested in condition improvements since the assessment, it was the only school in the area rated Red/Amber for building condition in the FfS review. At present, there are not enough pupils in the area to keep the Misterton site in use and so this school would close at the end of the 2021/22 academic year. This means the school would remain open for two years, during which time all pupils would be supported to choose and plan for transition to another local school. In the consultation we would seek views about the best way to keep the building in operation, either for some other educational purpose or for community use.

5) Subject to statutory notices and future decisions by the Council, the proposed implementation of these changes would commence starting September 2022. We will work with schools and local communities to develop a transition plan that ensures quality of education is not adversely affected, every school has a

> manageable number of pupils in each year of transition, and schools are adequately funded through the transition period and beyond."

82. Of particular significance for the claimants, this model proposed (a) the closure of Misterton and (b) the amalgamation of Greenfylde and Swanmead into a single new CofE primary school (initially, at least, on split sites).

83. The reasons for the recommendations were addressed in paragraphs 3.1 to 3.8. The other options considered were addressed at paragraphs 4.1 and 4.2 in essentially the same terms as the Stage 0 Outcomes Report (see paragraphs 74 and 77 above). The most common factors that were identified as important to consultees from the responses given to the Stage 0 consultation (see paragraph 77 above) were described in paragraph 6.2 of the Officer's First Report as "factors which should drive the decision". At paragraph 4.3 the October 2020 Officer's First Report stated:

> "The 'do nothing' option has not been put forward in the current proposal because the only other response to the funding pressures on school in the area would be to dramatically reduce the range of subjects offered to pupils in Years 10, 11, 12 and 13. This would have significant negative impacts on the education of young people in the area, now and into the future."

84. Ms Walker explains in her evidence:

> "36. … Having already undertaken the Summer 2019 consultation and returned no evidence of consensus locally, I judged that a further consultation on a wide range of options would, in all likelihood, return the same result and provide us with no new intelligence on which to proceed. I concluded that we needed more information about the impact that change would have on individual schools and families, and that we would only gain this understanding by consulting on a particular configuration of schools in detail. This could result either in confirming that the model would be viable, or it could identify how the model could be improved, or it could elicit an entirely new way forward that had not previously been considered. Any of these avenues would improve our position in securing a model for the future.
>
> 37. I consulted with the various members of staff with expertise within the County Council and from this advice it was clear that all of the models considered in the 2019 review had disadvantages in relation to the principles elicited from that consultation. Option 1A was discounted as 'doing nothing' would, in fact, not result in no action, but would necessitate swingeing cuts to Wadham's curriculum which was unacceptable. Options 3B, 4A and 4D required the closure of multiple rural schools and recognising the strength of feeling in the first consultation against school closure, as well as the presumption against the closure of rural schools and the impact

> on rural communities of closure, we established that, while school closure was potentially unavoidable, we should aim to close as few schools as possible. Options 5C and 5D retained the rural schools, but at a cost of efficiency. There was no merit in undergoing the pain of reorganisation only to create a new inefficient system.
>
> 38. Because I was not involved in the scoping of the FfS review, I am not aware how the specific options evaluated were selected. However, there were other configurations that were possible that would take elements of the different models. My aim was to create a single 'least worst' model that would balance retaining as many small rural schools as possible, maximise efficiency and make best use of transport, the school estate, church and non-church options."

85. The Officer's First Report identified the FS Report as one of the two background papers, the other being the Secretary of State's Closure Guidance.

86. At the Cabinet meeting, the Cabinet Member for Education & Transformation, Councillor Faye Purbrick, introduced the Officer's First Report and, following a debate, the Cabinet agreed the recommendations.

(g) Stage 1: pre-publication statutory consultation under s.16(1) EIA 2006

87. In accordance with the Cabinet's 21 October 2020 decision, the defendant proceeded to undertake a four week period of consultation under s.16(1) of the EIA 2006. This consultation exercise took place prior to publication of a statutory proposal pursuant to s.15(1) of the EIA 2006. It ran from 12 November 2020 to 11 December 2020. I shall refer to this as the Stage 1 consultation.

88. Prior to the Stage 1 consultation, the defendant published a number of consultation documents. Some of these documents were primarily directed at staff and governors (such as the "HR Principles" and "Financial Principles"). The main documents of interest to consultees such as the claimants' parents were:

    i) "Ilminster and Crewkerne School Structure Change Proposals": a 10 page account of the model on which the defendant was consulting at Stage 1 ("the Detailed Stage 1 Proposals document").

    ii) "Consultation to look at education delivery in Ilminster and Crewkerne" ("the Summary Guide"). Ms Walker states "this was designed for the public and is a high-level introduction to the model and the opportunities to engage with the consultation". It is a user-friendly, colour-illustrated document that explains the five key elements of the proposed model in clear terms, addresses "why change is needed?" in three paragraphs, and gives details of a series of consultation meetings.

    iii) "Crewkerne & Ilminster school structure change proposals Question & Answer Factsheet – general" ("the Q&A Factsheet").

iv) A transition table which shows parents, by reference to the year group their child was in (in September 2021), when their child would transition from primary school to secondary school in a two-tier system.

v) "Crewkerne Schools – Class Structure Projections": this was a spreadsheet showing a summary of the Published Admission Numbers (PAN) modelling, in respect of the primary schools proposed in the model.

vi) And the Stage 0 Outcome Report (see paragraphs 74 to 77 above).

89. The answers in the Q&A Factsheet addressed 12 topics, by reference to 35 questions, including the following:

> "*Why have other options not been considered? Couldn't Misterton be considered as a primary school?*
>
> A. This option has been investigated. In the last consultation, people told us that they wanted to keep as many schools as possible and avoid closure. However, if all schools in the Crewkerne area, including Misterton, were retained, this would result in far too many places compared to how many children there would be. The council cannot close Maiden Beech, and it is unlikely the remaining schools could accommodate all the children without this large school. Hinton St George, Haselbury Plucknett and Merriott are significantly further away from Crewkerne. Ashlands is the only school in North Crewkerne and the likelihood is that this will be the location for housing growth. There would be too many spaces in and around South Crewkerne. To reduce this oversupply either St Barts or Misterton could be closed. Misterton is a smaller school and therefore the number of children disrupted by closure would be fewer. Around half the pupils in Misterton live in Crewkerne.
>
> …
>
> *Why is there only one option on the table?*
>
> A. This is not the first time we have consulted on this matter. In the last consultation multiple options were provided. The outcome of that consultation was entirely inconclusive, and no options received general support, including no change. The council is required by law to precede any decision to reorganise by a publication of one clear and definitive plan. It was judged to be most transparent to consult on that plan widely before a decision was taken whether to progress with that statutory stage. The law states that a proposal that is taken to Cabinet must be the same as the statutory notices. By consulting on one option it provides the opportunity for the community to influence what that model looks like or stop the progress of the decision-making process."

90. Four two-hour public consultation meetings took place on 17, 18, 24 and 26 November:

i) The meeting on 17 November was an event to discuss all schools;

ii) The meeting on 18 November was "specifically to discuss Misterton First School";

iii) The meeting on 24 November focused on schools in Crewkerne; and

iv) The meeting on 26 November focused on schools in Ilminster (including Greenfylde and Swanmead).

91. There were also seven meetings with staff of each of the potentially affected schools from 9 to 23 November 2020. Due to the restrictions on public meetings that were in force at the time, as a consequence of the Covid-19 pandemic, all the consultation meetings were held via a video platform (MS Teams). As the consultations were held online, participants wrote their questions online and a full transcript of all questions and live answers was recorded for each event.

92. The defendant invited consultees to complete a questionnaire ("the Stage 1 Questionnaire"). The questions, aside from those regarding the nature and focus of the consultee's interest, were:

> "3) What do you see as the advantages of the proposed changes/proposals?
>
> 4) What do you see as the disadvantages of the proposed changes/proposals?
>
> 5) What are your views on the proposal to change Wadham school Crewkerne from upper to secondary school?
>
> 6) What are your views on the proposal to amalgamate Swanmead Community School and Greenfylde CofE First School in Ilminster into a split site primary school?
>
> 7) What are your views on the proposal to convert Merriott First School and Haselbury Plucknett CofE First School into primary schools?
>
> 8) What are your views on the proposal to convert Ashlands CofE First School, St Bartholomews CofE First School and Maiden Beech Academy into 3 primary schools in Crewkerne and reduce the total number of schools from 4 to 3 by closing Misterton CofE First School?
>
> 9) What are your views on the proposal to make September 2022 the first date that pupils would attend classes in different schools under the new arrangements?
>
> 10) What are your views on how these proposals might be implemented? You may wish to comment, for example, on

> curriculum, pupil numbers, admissions, provision of early years, preparing for housing growth, managing environmental impact & community impact, school transport or staff re-organisation."

93. The defendant published a summary of the responses in the "Crewkerne and Ilminster Schools Consultation – Outcomes Report" ("the Stage 1 Outcomes Report") and a response, "Crewkerne & Ilminster Area Review – Response to Consultation" ("the Stage 1 Response to Consultation").

94. The Stage 1 Outcomes Report records that during the Stage 1 consultation, the defendant received 379 responses to the questionnaire and 25 written responses by other means. The defendant also received three petitions against the proposals.

95. The headline analysis of the responses was stated to be:

Question	Broadly positive	Mixed	Broadly negative
What are your views on the proposal to change Wadham school Crewkerne from upper to secondary school?	100 *29%*	32 *9%*	217 *62%*
What are your views on the proposal to amalgamate Swanmead Community School and Greenfylde CofE Frist School in Ilminster into a split site primary school?	71 *28%*	22 *9%*	163 *63%*
What are your views on the proposal to convert Merriott First School and Haselbury Plucknett CofE First School into primary schools?	86 *39%*	26 *12%*	109 *49%*
What are your views on the proposal to convert Ashlands CofE First School, St Bartholomews CofE First School and Maiden Beech Academy into 3 primary schools in Crewkerne and reduce the total number of schools from 4 to 3 by closing Misterton CofE First School?	53 *19%*	21 *7%*	208 *74%*

96. Of the responses, 39 were from individuals indicating an interest in Misterton. Of these, 37 (95%) were negative about the proposal to close Misterton. There were 81 responses indicating an interest in Greenfylde and 129 in Swanmead (with many responses indicating interest in more than one school); 58 (72%) of those expressing an interest in Greenfylde, and 102 (80%) of those expressing an interest in Swanmead, were opposed to the proposal to amalgamate Greenfylde and Swanmead into a split site primary school.

97. Following the Stage 1 consultation, in December 2020/January 2021 Ms Walker prepared a report ("the Officer's Second Report"), including an Equality Impact Assessment (version 2, dated 21 December 2020) ("EqIA v.2"), for the consideration of the Cabinet Member for Education and Transformation (in accordance with the power delegated to her by the Cabinet's decision of 21 October 2020). The Officer's Second Report contained the following assessment:

> "• There is significant opposition to proposals, with roughly two-thirds of respondents expressing negative viewpoints. This reflects the outcomes of the previous consultation. However, while there are concerns and opposition, there has also not come forward any viable alternative to the proposals. The alternative options which have been put forward are detailed below.
>
> • Whilst some significant new concerns have come forward, these can all be mitigated in some way. These are detailed in the Consultation responses document."

98. Under the heading "Other options considered" the Officer's Second report advised:

> Respondents to the consultation raised the following alternative options. All options have been assessed and none present a viable way forward. The full assessment of each option is detailed in the background paper entitled 'Consultation Response Document'.

Alternative option	**Summary assessment**
Could restructure be avoided if the middle schools and upper school joined the same Multi Academy Trust (MAT)?	This has been fully explored by the relevant parties and no further routes exist to take this forward at this time. A single MAT would not address the issue of falling pupil numbers in the area.
Could Greenfylde become the only primary school in Ilminster?	This site is too small to accommodate current pupils or any future growth in pupil numbers.
Could you have fewer primary schools in Crewkerne?	Yes, however this would be inadvisable as housing growth might then exceed available capacity in future.
Could Maiden Beech or Swanmead be the secondary school rather than Wadham?	Neither school is large enough to accommodate all current pupils or any future growth in pupil numbers. Separate secondary schools would be exceptionally small and this creates a risk of under-performance.
Could Ashlands and St Bartholomew's be infant	Yes, but this would result in even smaller pupil numbers for Ashlands and St Bart's and would

schools and Maiden Beech the junior school?	lose any advantages of reducing the number of transition points.
Could all primaries in Crewkerne have an admission number of 30?	Not without creating conditions for intense, and therefore potentially damaging, competition for pupils within the area. If pupil numbers were to grow, this could be achieved in future.
Could Misterton become a primary school (and not close) by taking pupils currently allocated to Maiden Beech?	This would put the viability of Maiden Beech at risk by layering the cost of a too large site on too few pupil numbers. It would also require pupils from Crewkerne to travel to Misterton at a level far above what the evidence tells us is parental choice.
Could a model of primary education be adopted that would retain specialist / discrete subject teaching?	Yes, however this could be implemented as part of current proposals.
Could the transition period be phased in some way?	All schools would need to take new year groups at the same time, in order to successfully manage the process of finding new roles for staff. However, it would be a good idea to phase the process of induction and familiarisation for pupils and this could be done within the current proposals

99. The Stage 1 Response to Consultation addressed each of the alternatives referred to in the table above in considerably more detail over about six pages. Notably, the first question proposed a three-tier option in which the middle and upper schools joined a Multi Academy Trust ("MAT"). The defendant addressed this before the Stage 2 consultation began:

> "Whilst in principle a single MAT could potentially be part of a solution for education provision in the area, in practice Maiden Beech Academy is part of the Bridgwater and Taunton College Trust (BTCT) and in order for all schools to sit within the same trust, BTCT would need to adopt church articles, with the permission of the Diocese of Bath and Wells. BTCT does not have church articles, and while conversations have taken place over the past few years about the prospect of BTCT adopting church articles, the outcome of this discussion concluded with no further action. Therefore, there is no prospect in the

> foreseeable future of a single trust solution for these three schools.
>
> Prior to the current consultation, the Regional Schools Commissioner engaged other multi-academy trusts in discussion about the prospect of taking on Wadham School as a solution to the structural deficit. These conversations were not productive, as the issue of low pupil numbers and financial deficit would remain whether the school was located within a trust or not."

100. In evidence, Ms Walker has further explained in relation to the MAT option:

> "57. …While we were in complete agreement that this would have been a preferable option, our repeated attempts to ascertain agreement by all the parties who would be required to agree (all governing bodies, the trust, the RSC and the Diocese) showed us that, not only had agreement not been secured, it was not likely ever to be secured. In this scenario the Diocese and upper school have an effective veto. This is because academisation decisions have to be taken by the school's governing body in the first instance, and the decision to join a trust must additionally be agreed by the trust and the Regional Schools Commissioner, with advice from the headteacher board. However, where the school is a church school, the trust must hold church articles, and the Diocese must agree that the trust meets the criteria to hold church articles. Therefore, unless all parties are in agreement, a church school such as Wadham cannot academise and join a particular trust.
>
> 58. Various elected members and SCC officers directly raised the matter on a number of occasions with the parties involved, over many years including on multiple occasions that I was involved in during the pre-publication and statutory consultations. Though we consistently returned the same message, in the final stages of the debate we sought representations in writing, which were received, which established conclusively that no further avenues existed to be pursued." (emphasis added)

(h) Publication of Statutory Proposal

101. On 18 January 2021, the Cabinet Member for Education and Transformation decided, having reviewed the findings from the Stage 1 consultation, that no significant changes to the proposals were required. In accordance with the power delegated to her by the Cabinet's decision of 21 October 2020, she therefore decided that the defendant should proceed to publish the notice of proposals, in accordance with s.15(1) EIA 2006, and hold the further consultation exercise required by the regulations.

102. The Statutory Proposal was published on 27 January 2021. It is a detailed, 43 page document in which the defendant gave notice of its intention:

i) to make prescribed alterations to Wadham, Greenfylde, Merriott, Haselbury Plucknett, Ashlands and St Bartholomew's;

ii) to discontinue Misterton; and

iii) to discontinue Swanmead to achieve an amalgamation with Greenfylde.

The notice explained that "the proposed change to Maiden Beech is included to provide an overview of all the changes that are being considered across the Crewkerne and Ilminster area", although as Maiden Beech is an academy the proposed significant change to its age range would be determined by the Regional Schools Commissioner.

103. The Statutory Proposal included a table setting out the alternatives that had been considered in identifying Misterton for closure:

Closure of all first schools, Maiden Beech becomes the single primary	Dismissed on grounds that the community has clearly expressed that it is a priority to retain village and first schools. All schools in the area are subject to the presumption against the closure of rural schools.
Closure of Hinton St George	The building can support a three-class primary. The distance from nearest area school (Ashlands) is 2.8 miles (over 2 miles for pupils under 8 years and 3 miles for pupils over 8 years creates an entitlement to dedicated school transport which is likely to give rise to significant additional costs to the local authority).
Closure of Merriott	Merriott is a growing village, housing development means expansion is likely needed in future.
Closure of Haselbury Plucknett	The building can support a three-class primary. Distance from nearest area school (Ashlands or Misterton) is 2.4 miles (over 2 miles for pupils under 8 years and 3 miles for pupils over 8 years creates an entitlement to dedicated school transport).
Closure of Ashlands	The Crewkerne key site which is going through the planning process now is in North Crewkerne. Ashlands is the only school in North Crewkerne.
Closure of Maiden Beech	The maximum capacity at Maiden Beech is 492 and the maximum capacity of all other schools in the town and surrounding is 648. The minimum capacity in Crewkerne and surrounding villages needed to accommodate the existing forecast for pupil numbers is 691. Without places from Maiden Beech, the town would not have capacity to accommodate forecast pupils setting aside housing growth and this would very likely necessitate school building or expansion work. The local authority does not have powers to close academy schools and therefore a proposal based on the closure of Maiden Beech could face serious implementation barriers if the trust chose not to action the proposal.

Closure of St Bartholomew's or closure of Misterton	If all schools become primary schools, the greatest excess of places would be in South Crewkerne and surrounding. St Bartholomew's maximum capacity is 210. Misterton maximum capacity is 60. Both schools would represent a loss of denominational places – this would be a greater loss if St Bartholomew's were to close. The greatest displacement of pupils would be with closure of St Bartholomew's. Proportion of pupils who attend their catchment school (St Bartholomew's) – 66%. Proportion of pupils who attend their catchment school (Misterton) – 57%. Misterton is located directly on the road with associated potential for air quality issues and traffic congestion. St Bartholomew's is located off the road with dedicated parking and car access
Retain all schools and redistribute pupils from Maiden Beech allocation to Misterton	Maiden Beech capacity is 492. Under current proposals they would have a capacity of 210 pupils. If 60 were reallocated to Misterton, this would result in 140 pupils on roll at Maiden Beech. The building would be more than two thirds vacant. This is financially and operationally inadvisable as the school would not have sufficient funding with such a low intake to carry the cost of such a large site. For Misterton, this would result in a two-class school of 56 pupils. This would involve redirecting pupils out of Crewkerne as there are only around 30 pupils in the village. In past years the first preferences for this school were 5 in 2020, 1 in 2019, and in 2018 there were 3. A two-class primary negatively affects the ability of the school to deliver high standards and the minimum being proposed in the current model is three classes. This is because to avoid mixing key stages one class would be 24 pupils and the other 32. It would not be viable to allocate an intake of 4 to Misterton with one class of 28. This would also leave Maiden Beech with six classes which is not deliverable within the 30-pupil limit for Key Stage 1 without mixing key stages.

(i) Stage 2 Statutory Consultation – the Representation Period

104. The Stage 2 consultation ran from 27 January 2021, the date of publication of the Statutory Proposal, until 24 February 2021. Representations could be made via an online questionnaire or by writing to or emailing the defendant.

105. The Stage 2 Questionnaire asked respondents:

> "4. What is your view of the proposal?" [Giving five answers ranging from strongly in favour to strongly not in favour.]

5. Listed are the common views shared by respondents in the pre-publication consultation which were given as reasons to support the proposal.

• Do any of these reflect your views?

• Select as many options as apply.

• I believe this has the potential to improve the quality of the whole education system in the area.
• I believe that this would put schools on a more sustainable financial footing.
• I believe it is advantageous to have a two-tier system as this is in place in most of the rest of the country.
• I believe that there would be a positive impact if children were to stay at first schools for longer.
• I believe that there would be a positive impact if children were to stay in the same school for each key stage.
• I believe that fewer transition points would be helpful for children with SEND and other vulnerabilities.
• I believe starting secondary school in year 7 can help better prepare children for GCSEs.
• I believe the proposals have the potential to improve Wadham School.

6. Listed are the common views shared by respondents in the pre-publication consultation which were given as reasons to oppose the proposal.

• Do any of these reflect your views?

• Select as many options as apply.

• I believe the three tier and Middle School system is preferable.
• I am concerned that proposals could increase mixed age and mixed phase classes.
• I am concerned about the impact of additional travel for children between Ilminster and Crewkerne.
• I am concerned there is a risk to the provision of high-quality provision for pupils with SEND
• I am concerned about the extent of training needed for teachers to operate within a different phase of education.
• I am concerned about the potential loss of specialist subject teaching for years 5 and 6.
• I disagree with the method and timing of the review and consultation period.
• I disagree with the closure of Misterton First School.

7. Please share any further comments you have on the proposal."

106. Again, the defendant prepared a summary of the consultation responses ("the Stage 2 Outcomes Report"). The defendant received 611 responses to the Stage 2 Questionnaire (348 of which were from parents of pupils), seven written responses from individuals, three from the Town and Parish Councils of Haselbury Plucknett, Misterton and Crewkerne and four from the governing bodies of Merriott and Haselbury Plucknett Federation, Greenfylde, Misterton and Ashlands Federation and Misterton Pre-School. Of the 348 parents who responded to the Stage 2 Questionnaire, 30 were parents of pupils at Misterton, 58 were parents of pupils at Greenfylde and 79 were parents of pupils at Swanmead.

107. The Stage 2 Outcomes Report showed that 418 of the responses to the Stage 2 Questionnaire were negative about all aspects of the proposal, of which 359 were strongly against the proposals. The report addressed a number of alternative models suggested by respondents.

(j) The defendant's decision of 17 March 2021

108. Following the Stage 2 consultation exercise, in February/March 2021 Ms Walker prepared a detailed, 32-page report ("the Officer's Third Report"), an Equality Impact Assessment (version 4, dated 19 February 2021) ("EqIA v.4") and an "Impact Assessment: Proposed closure of Misterton Church of England First school on the village of Misterton" ("Misterton Impact Assessment"), for the consideration of the Cabinet.

109. On 17 March 2021, the defendant's Cabinet decided to approve the Statutory Proposal, subject to some modifications to the implementation plans, for the reasons given in the Officer's Third Report.

D. GROUND ONE: CONSULTATION

(a) The ground in outline

110. The claimants contend that the consultation was flawed in three respects. First, they submit the defendant failed to consult on the proposal at a formative stage. Second, the product of the consultation has not been conscientiously taken into account. Third, consultees did not have access to key information to allow them to make an informed response to the consultation.

111. In respect of ground one, the claimants do not allege any breach of the statutory requirements. However, it is uncontroversial that, where necessary, the common law will supplement any legislative requirements in order to ensure fairness. The common law duty of procedural fairness informs the manner in which any consultation, irrespective of how the duty to consult has been generated, should be conducted. In order to be fair, any consultation must comply with four basic requirements (known as the "Sedley principles"):

    i) Consultation must be at a time when proposals are still at a formative stage;

    ii) The proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response;

iii) Adequate time must be given for consideration and response; and

iv) The product of consultation must be conscientiously taken into account in finalising any statutory proposals.

112. The Sedley principles were proposed by Mr Stephen Sedley QC (as he then was) in *R v Brent London Borough Council, ex p Gunning* (1985) 84 LGR 168 and accepted by Hodgson J. They have since been endorsed by the Court of Appeal on a number of occasions and, in *R (Moseley) v Haringey London Borough Council* [2014] UKSC 56, [2014] 1 WLR 3947, by the Supreme Court. It is common ground that they apply and that it is for the court to determine whether a fair procedure was followed. In this case, the alleged flaws on which the claimants' challenge is based correspond to principles (i), (ii) and (iv).

(b) The parties' submissions: consultation at a formative stage

113. The contention that the defendant failed to consult at a formative stage is essentially based on the fact that at both stages of the statutory consultation exercise, the defendant consulted on a single, two-tier model that entailed the closure of Misterton and the amalgamation of Greenfylde and Swanmead into a single split site primary school. They contend that the defendant's rationale for consulting only on its preferred model at Stage 1 amounts to a pre-emptive dismissal of the value of formal consultation. And the effect of the defendant's approach was to preclude discussion on any other options than its single proposal.

114. The first claimant, in her Statement of Facts and Grounds, challenges the defendant's failure to consult at Stage 1 (i.e. consultation prior to publication of a statutory proposal pursuant to s.16(1) EIA 2006) "without putting forward either a 'do nothing' option, or an option to retain Misterton". Similarly, the second defendant, in his Statement of Facts and Grounds, relies on the fact that "Option 1A (the 'do nothing' option) … was not included in the Stage 1 consultation". He contends that by consulting only on a two-tier proposal the defendant precluded any possibility of consideration being given to Swanmead and Greenfylde not being merged.

115. In oral submissions, Counsel for the claimants, Mr Broach, conceded that the defendant could not be criticised for not putting forward for consultation Option 1A, given it had been assessed as non-viable in the FS Report. He also acknowledged that the defendant was able, rationally and lawfully, to adopt a preferred option. However, he submitted that fairness required the defendant to consult, at Stage 1, on all of the "most viable" options, as identified in the FS Report, namely, Options 2, 3B, 4A, 4D, 5C and 5D (see paragraph 69 above). The primary omission identified by Mr Broach was the failure to consult on Option 2 at any stage.

116. The claimants place particular reliance on the judgment of Lord Wilson JSC in *Moseley* at [27] where he said:

> "Sometimes, particularly when statute does not limit the subject of the requisite consultation to the preferred option, fairness will require that interested persons be consulted not only upon the preferred option but also upon arguable yet discarded alternative options. For example, in *R (Medway Council) v Secretary of*

> *State for Transport, Local Government and the Regions* [2003] JPL 583, the court held that, in consulting about an increase in airport capacity in South East England, the Government had acted unlawfully in consulting upon possible development only at Heathrow, Stansted and the Thames estuary and not also at Gatwick; and see also *R (Montpeliers and Trevors Association) v Westminster City Council* [2006] LGR 304, para 29." (emphasis added)

The claimants contend that this is one of those cases where failing to consult on other viable options was so unfair as to be unlawful.

117. In the alternative, if the court rejects the contention that the defendant was required to *consult* on alternative options, the claimants contend that the defendant was at least required to *make passing reference* to them in the consultation documents. In support of this submission they rely on Lord Wilson's judgment in *Moseley* at [28]:

> "But, even when the subject of the requisite consultation is limited to the preferred option, fairness may nevertheless require passing reference to be made to arguable yet discarded alternative options. In *Nichol v Gateshead Metropolitan Borough Council* (1988) 87 LGR 435 Gateshead, confronted by a falling birth rate and therefore an inability to sustain a viable sixth form in all its secondary schools, decided to set up sixth form colleges instead. Local parents failed to establish that Gateshead's prior consultation had been unlawful. The Court of Appeal held that Gateshead had made clear what the other options were: see pp 455, 456 and 462. In the Royal Brompton case 126 BMLR 134, cited above, the defendant, an advisory body, was minded to advise that only two London hospitals should provide paediatric cardiac surgical services, namely Guys and Great Ormond Street. In the Court of Appeal the Royal Brompton Hospital failed to establish that the defendant's exercise in consultation upon its prospective advice was unlawful. In its judgment delivered by Arden LJ, the court, at para 10, cited the Gateshead case as authority for the proposition that "a decision-maker may properly decide to present his preferred options in the consultation document, provided it is clear what the other options are . . ." It held, at para 95, that the defendant had made clear to those consulted that they were at liberty to press the case for the Royal Brompton." (emphasis added)

118. The claimants contend that the defendant failed to meet even this lesser requirement, particularly in respect of Option 2.

119. The Court should, they submit, reject the argument that other options were reasonably obvious to consultees given the clear message communicated by the defendant in its consultation documentation was that other options were irrelevant, the FS Report was not (they submit) easily available to consultees, and having regard to the complexity of the issue.

120. In submitting that the proposal to close Misterton was not consulted on at a formative stage, the first claimant also relies on the explanation given in the Q&A document for that proposal, and the statement in the Detailed Stage 1 Proposals document that in the consultation the defendant "would like to hear views about the best way to keep the [Misterton] building in operation, either for some other educational purpose or for community use".

121. The claimants contend that the defendant determined that the schools in the area should be reorganised into a two-tier structure in September 2020, *before* undertaking any statutory consultation. They rely on *R (Parents for Legal Action Ltd) v Northumberland County Council* [2006] EWHC 1081, [2006] ELR 397. The local authority, as in this case, wished to change from a three-tier to a two-tier school system. It adopted a three stage consultation process. Stages 0 and 1 of the consultation involved county-wide consultation on the general principle of whether or not to adopt a two-tier model. Munby J held that by adopting this approach, and deciding to change to a two-tier system before undertaking any consultation on the proposal to close two middle schools, the local authority had precluded consultation on whether schools should close at a time when the proposal was at a formative stage. The claimants submit that the defendant has taken the same approach in this case and that the decision is unlawful for the same reasons.

122. Mr Broach relies on the fact that the claimants are being deprived of an existing benefit or advantage and so – a point underpinning the whole of ground one - the demands of fairness are "somewhat higher" than they would be if the claimants were bare applicants for a future benefit: *Moseley*, per Lord Wilson at [26]. He acknowledges that what fairness requires is fact sensitive, but contends that the complexity of the subject and the nature of the consultees is similar to the position in *Moseley* where the Supreme Court held that the consultation was unlawful.

123. In addition, the claimants refer to the Q&A Factsheet published prior to the Stage 1 consultation in which the defendant addressed the question why it was consulting on only one model (see paragraph 89 above). The claimants contend that the answer given demonstrates that the defendant misdirected itself in law that it was only *permissible* to advance one option for consultation at Stage 1.

124. The defendant rejects the contention that the decision was not taken at a formative stage. The defendant places reliance on the evidence that the defendant retained an open mind during the consultation exercises. Ms Walker states:

> "25. …while it is evident that the three-tier system is a key factor in the presenting issues, the imperative was to find a model that would create sustainability, not to remove the three-tier system per se. Were the review and/or subsequent consultation to have concluded that a different three-tier configuration was the most desirable, this would have been entirely acceptable as a model for the future.
>
> …
>
> 42. This consultation was a pre-publication consultation, and therefore it was not prescribed in regulations what the

> consultation would entail. Our decision to consult on a single model was a positive decision to do so. It was clear to us that this was an exceptionally complex scenario, and that any option, if pursued, could easily result in unintended consequences. Were we to consult again on multiple options, the feedback we would likely receive would be primarily in the form of lobbying for one option rather than another, and we would likely fail to receive detailed consideration of all aspects of the various models. The regulations require that statutory proposals include extensive consideration of a wide range of factors. It was my view that, without testing a specific model, we would be unable to progress a statutory proposal that was sufficiently detailed and insightful. If the consultation feedback had revealed that the model was fatally flawed, or if a more desirable model had come forward, we would have the latitude to make fundamental changes at that stage. Once we advance to statutory consultation, a decision must be taken within a defined time period that relates to those proposals, and while they may change, this does not allow for a complete about turn at that late stage. Consulting on a single model left open the widest possible number of routes to finding a model we could have confidence in." (emphasis added)

125. In respect of Misterton, Ms Walker states:

> "65. WC, through TC, has alleged that the proposal to close Misterton was presented as a fait accompli or was taken in advance of the consultation process. This is not the case: the closure of Misterton was openly presented for consideration alongside all other elements of the proposal, with open-ended questions seeking views on this possibility. Had a viable alternative structure been suggested at any stage and in any manner, which permitted Misterton to remain open, SCC would have considered it. Where alternatives were suggested SCC did consider them, however they were all, unfortunately, unviable." (emphasis added)

126. Counsel for the defendant, Ms Hannett QC, submits that the approach taken by the authority in *Parents for Legal Action* was very different to that taken in this case. In particular, she emphasises:

i) At Stage 0 the authority undertook a general consultation on whether to adopt a two-tier system and, at its conclusion, the authority resolved 'in principle' to adopt a two-tier system (see [7(i)]). Stage 1 was also a general consultation on whether the authority should adopt a two-tier system for the county as a whole and, at its conclusion, the defendant "resolved" to adopt a two-tier system as its 'preferred framework' (see [7(ii)]). The "stage 1 consultation was intended to be confined to discussion of general principles and was not intended to embrace consideration of the implications for individual schools" (see [12]). Munby J observed that during stages 0 and 1 there "was no consultation on the implications for specific school partnerships, let alone specific schools" ([18]).

ii) Stage 2 focused on specific schools and schools partnerships, but it was confined to consideration of different two-tier models and "all models were to close Middle Schools" (see [16] and [18]). The effect of the decision to adopt a two-tier system was that all middle schools would close. In short, by taking a broad structural decision after the stage 1 consultation, having not yet undertaken any consultation in respect of the closure of specific schools, the authority "prevented itself from complying with its statutory obligation to consult on *individual* school closures and alterations" ([32]).

iii) In contrast, in this case, the defendant (a) did not undertake a consultation confined to discussion of general principles, to the exclusion of discussion of specific schools at any stage; (b) did not take a broad structural decision; and (c) consulted in respect of specific school closures and alterations at both Stages 1 and 2.

127. Ms Hannett acknowledges that the claimants have a stronger interest than a bare applicant for a future benefit, given that their current schools are affected by the proposals, and accepts that as a consequence what fairness requires is somewhat higher. But she contends that the factual matrix is very different to that considered by the court in *Moseley*.

128. Unlike the claimants, the defendant emphasises the judgment of Lord Reed in *Moseley*, and submits that Morris J was correct to observe in *The Electronic Collar Manufacturers Association v The Secretary of State for Environment, Food and Rural Affairs* [2019] EWHC 2813 (Admin) at [27(4)] that, to the extent that the differences between the judgments of Lord Wilson and Lord Reed are material:

> "in the light of the observations of Baroness Hale and Lord Clarke, it is the judgment of Lord Reed which more closely represents the view of the majority of the Supreme Court".

129. The defendant contends that this is not a case in which fairness required the defendant to consult, at Stage 1, on alternative options. The defendant had already consulted on a wide range of alternatives at Stage 0 and took a rational decision to consult on a single model at Stage 1, for the reasons explained by Ms Walker. Once it is accepted that 'doing nothing' was not a viable option, there is a question as to what else should have been consulted on. This was not a binary situation, like Moseley, where there was one other viable option. The claimants had not pleaded that the defendant ought to have consulted on Option 2 or raised this suggestion in their skeleton arguments. In any event, it was not a viable option and there was no obligation on the defendant to consult on options that it had rationally concluded were not viable. If passing reference was required to other options, that standard was more than met. The context was one in which consultees were aware of, and able to raise, alternative options.

130. As regards the suggestion that the defendant misdirected itself, the defendant contends that it is clear from the Q&A Factsheet itself, as well as from Ms Walker's evidence, that there is no substance to this contention.

(c) The parties' submissions: conscientiously taking account of the product of consultation

131. The claimants contend the defendant has failed to take the consultation outcome conscientiously into account in three respects. First, the claimants contend that the defendant did not fairly report the outcome of the Stage 0 consultation. That consultation exercise could not fairly be said to be "entirely inconclusive". Option 1A had the least negative feedback, as well as the strongest positive feedback, an outcome which the defendant failed to acknowledge explicitly in the Stage 0 Outcomes Report (see paragraph 77 above) and the Officer's First Report. The defendant rejects this suggestion, emphasising that the Stage 0 Outcomes Report specified the support for and opposition to each option in percentage terms. It stated, expressly, that the "strongest positive feedback was for 'do nothing' (1A)", while noting, accurately, that "on balance" the overall response to Option 1A was "still negative". The Officer's First Report provided the same information.

132. Secondly, the claimants submit that it is evident from the decision not to put forward a 'do nothing' option at Stage 1, despite the fact that this was the most preferred option in the Stage 0 consultation, and the one which received the fewest negative responses, that the defendant has failed to take account conscientiously of the outcome of that consultation exercise. In their pleadings and skeleton arguments, the claimants submitted that conscientious consideration should have resulted in Option 1A being the subject of consultation at Stage 1. In oral submissions, Mr Broach relied on Option 2 as the model that should have been taken forward.

133. The defendant submits that this contention is based on a misapprehension of the nature of a consultation. Ms Hannett relies on the observation of Arden LJ (giving the judgment of the court) in *R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472, [2012] 126 BMLR 124 at [87]:

> "True consultation is not a matter of simply 'counting heads': it is not a matter of how many people object to proposals but how soundly based their objections are."

134. It also fails to take into account the evidence as to how the consultation outcomes were taken into account in drawing up principles to be applied in developing a model and, subsequently, in modifying the proposal for implementation.

135. Thirdly, the claimants rely on various statements in the FS Report to the effect that any of the options entailing structural change were unlikely to be deliverable without the support of key stakeholders. The FS Report repeatedly warned that stakeholder support was necessary to deliver change:

    i) With regard to Option 3B specifically, the FS Report stated "without the support of key stakeholders the option would not prove deliverable";

    ii) More broadly, the FS Report made clear that "[w]ithout the support of key stakeholders progression of any option other than 'baseline – as is' will most likely prove non-deliverable";

    iii) The FS Report concluded that "[w]hilst the Local Authority is keen to drive change to achieve a sustainable and viable structure for the future, it can only do so with the commitment of [stakeholders]", including the schools; and

iv) The FS Report made clear that should any one of the major stakeholders object or block the changes sought by the defendant, "it would be extremely difficult to bring about a holistic longer term solution that can more effectively and efficiently serve the needs of the Crewkerne and Ilminster area over and beyond the next decade".

136. The claimants contend that given this advice and the overwhelming objections to the restructuring, it is evident from the defendant's decision to proceed that the outcome of the consultation exercises (in particular, the lack of support for the proposed reorganisation) cannot have been conscientiously taken into account.

137. The defendant submits that properly understood the FS Report was referring to those stakeholders that had the legal power to impede reorganisation (such as an academy whose cooperation would be needed if it were proposed to change the age range of pupils), rather than consultees more broadly. The defendant's assessment, as evidenced in Ms Walker's second statement, was that the proposal would be deliverable, key stakeholders would cooperate, and that has proved to be the case.

(d) The parties' submissions: provision of information to consultees

138. The claimants contend that the defendant failed to provide three key pieces of information as part of the consultation.

139. The first of these is an articulation of the finding in the FS Report that, without the support of key stakeholders, progression of any option other than 'baseline – as is' would most likely prove undeliverable. Even if the defendant considered the risk of non-cooperation by major stakeholders (as indicated in a confidential annex to the Officer's Second Report, disclosed in evidence), that was not made available to consultees and so they were denied an opportunity to comment on it.

140. Secondly, the first claimant submits the defendant failed to carry out, or in any event provide, its analysis justifying the rebuttal of the presumption against the closure of rural schools. In written submissions, the claimant contended that there was a failure to provide this information until after all three stages of consultation had ended, but in his oral submissions Mr Broach acknowledged that sufficient analysis was given in the Statutory Proposal, published prior to the Stage 2 consultation. Nevertheless, he maintained that the consultation was unfair by reason of the failure to provide this information earlier, in particular, prior to Stage 1, meaning that consultees were denied an opportunity to comment on, or challenge, it.

141. Thirdly, the second claimant submits the defendant failed to provide key financial information in response to an email from HP sent on 25 February 2021 in which she asked:

> "Please may I register the following question/s for answering at the 'Scrutiny for Policies, Children and Families Committee' meeting which is being held on the 3rd March:
>
> During one of your Nov/Dec 2020 consultation Q&As I asked if the merged Swanmead and Greenfylde school would receive extra financial assistance as obviously there will be

> unavoidable extra costs associated with operating one school over two sites. The answer was a blunt 'yes', which is good to know but hardly a very enlightening or informative answer.
>
> We appreciate there will be transitional funding but what, if any, kind of financial packages will there be for schools to mitigate the financial implications associated with significant surplus floor area being opened up across the school estate as a result of moving 2 extra year groups to Wadham? Obviously parents and staff have concerns and need reassurance that schools won't be financially disadvantaged as a result of your proposed changes. In the case of a merged Swanmead and Greenfylde - will a certain amount of financial assistance be indefinite for as long as the school remains split site, or will there be a cut off point? Will the amount they receive actually cover all unavoidable extra costs or just lessen them? And will this extra financial assistance be guaranteed and protected from future budget cuts and changes in Council leadership?" (emphasis added)

142. The defendant submits that no unfairness was caused by the lack of reference in the consultation documents to FS's view regarding the deliverability of any options without key stakeholder support. The presumption against closure of rural schools was drawn to consultees' attention during earlier stages of consultation and, in any event, there was no unfairness in addressing it in detail in the Statutory Proposal published prior to the Stage 2 consultation exercise.

143. As regards HP's email, first, Ms Hannett relies on the fact that the information was sought after all three stages of consultation had closed, in support of the submission that if it was so central that consultees could not submit an informed response without it, it would have been requested earlier. Secondly, and in any event, she relies on the evidence of Ms Walker (at [68]-[70]) that the following response was given to HP's email (circulated via email and then published online):

> "I can give you absolute reassurance that a split-site primary school in Ilminster would be guaranteed split-site funding for as long as that was the arrangement. This is something that is hard-wired into the national funding formula which is the money provided by central government and so it would be in place whatever happened locally and as long as it was needed. If a decision is taken to move forward, one of the things we would be investing in is a detailed study of the accommodation options for an Ilminster school. Money has already been committed, subject to a decision to progress on the 17th, to invest in reconfiguring the accommodation so that Swanmead could serve Key Stage 2 pupils. It would be counterproductive not to look at the longer term at the same time, so if this goes ahead we would take the opportunity to think more widely about the future, including what the old Adult Education building on Ditton Street could be used for (because it sits right next to Swanmead). Or whether Swanmead could be expanded to bring all pupils onto

> one site. Or in what circumstances the time would be right to consider a whole new building. If the decision on the 17th is that change is coming, this would create opportunities as well as challenges. We would want to leave no stone unturned in order to secure the right spaces for children to learn in."

144. In response, Mr Broach states that HP was not aware of that response and in any event it does not fully answer her questions as no *details* of the funding were given.

(e) Analysis and decision on Ground One

145. At Stage 0, the defendant included an option that entailed no structural change to the school system (Option 1A), as well as the three two-tier options (3B, 4A and 4D) and the two hybrid options (5C and 5D) developed, and identified as the "most viable" options, in the FS Report. In light of the outcome of that consultation exercise, the defendant took a positive decision to consult on a single model during the Stage 1 consultation.

146. The contention that the defendant misdirected itself that it could only consult on a single model during Stage 1 is baseless. What the defendant said was that it could only take a proposal to Cabinet for a final decision if it was the same as the statutory notice and that it is "required by law to precede any decision to reorganise by a publication of one clear and definitive plan". In other words, by the point of publication of its Statutory Proposal – after the Stage 1 consultation and prior to Stage 2 - the defendant was required to narrow down to a single proposed model. However, the Q&A Factsheet and Ms Walker's evidence make clear that the defendant *chose* to consult on a single model during the Stage 1 consultation in the knowledge that it was not required by law to limit the options at that stage.

147. The question for the court is whether the decision not to consult on alternative options during the Stage 1 consultation was so unfair as to be unlawful. The defendant submits that it is only where a failure to set out alternatives renders the consultation clearly and radically wrong or unfair that a court ought to interfere, relying on *R (AA) v Rotherham Metropolitan Borough Council* [2019] EWHC 3529, per Jefford J at [83(iv)]. However, in *R (Bloomsbury Institute Ltd) v The Office for Students* [2020] EWCA Civ 1074, Bean LJ (with whom Males and Simler LJJ agreed) addressed the references in the earlier case-law to the question whether something has gone "clearly and radically wrong" at [65] to [69]. In short, applying *Bloomsbury Institute*, it is clear that the test is whether the process was so unfair as to be unlawful. That is the test I shall apply: there is no additional hurdle requiring the court to find that something has gone clearly and radically wrong.

148. In answering this question, as Jefford J observed in *AA* at [83(i)-(iii)], the following propositions can be stated:

> "i) It is not necessary in all cases where a particular proposal is the subject matter of a consultation to set out alternatives including those that may have been rejected or explain why they have been rejected.

> ii) Fairness requires that to be done where it is necessary to allow informed or intelligent responses. That is sometimes the case as Lord Wilson said at paragraph 27 of his speech.
>
> iii) Whether that is necessary, and correspondingly whether the consultation is a fair one, is a broad question in answering which the matters that fall to be considered include the purpose of the consultation, the nature of the proposal being consulted on, and what consultees can be reasonably taken to know about the proposal and its context."

149. In *Moseley*, Lord Wilson JSC (with whom Lord Kerr of Tonaghmore JSC agreed) considered (at [24]) that the consultation was undertaken in pursuit of three purposes:

i) The requirement to consult is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested;

ii) Undertaking a consultation exercise avoids the sense of injustice which the person who is the subject of the decision will otherwise feel; and

iii) Of particular relevance in a case such as *Moseley*, in which the question was "Required, as we are, to make a taxation-related scheme for application to all the inhabitants of our borough, should we make one in the terms we here propose?", was the democratic principle at the heart of our society.

150. Although Lord Reed JSC laid "less emphasis upon the common law duty to act fairly, and more upon the statutory context and purpose of the particular duty of consultation" with which the Supreme Court was concerned ([34]), in harmony with Lord Wilson's emphasis on the degree to which the third purpose – the democratic principle – shaped what was required, Lord Reed observed (at [38]) that the purpose of this particular statutory duty was "to ensure public participation in the local authority's decision-making process".

151. Baroness Hale of Richmond DPSC and Lord Clarke of Stone-cum-Ebony JSC, in a single paragraph joint judgment at [44], agreed with both Lord Wilson's and Lord Reed's judgments, observing:

> "… There appears to us to be very little between them as to the correct approach. We agree with Lord Reed JSC that the court must have regard to the statutory context and that, as he puts it, in the particular statutory context, the duty of the local authority was to ensure public participation in the decision-making process. …"

152. In order to enable ordinary members of the public to participate in a meaningful way in the decision-making process, in *Moseley*, enough had to be said about how the loss of income by the local authority might otherwise be replaced or absorbed to enable consultees to make an intelligent response. Fairness demanded that in the consultation document brief reference should be made to other ways of absorbing the shortfall and to the reasons why (unlike 58% of local authorities in England) Haringey had concluded

that they were unacceptable. Such brief reference to other ways of absorbing the shortfall would not have been onerous. (See Lord Reed's judgment at [40]-[41] and Lord Wilson's judgment at [29]-[30].)

153. In *Moseley* the obligation on the authority was to make brief reference in the consultation documents to alternative ways of absorbing the shortfall, not to put forward an alternative proposal for consultation. In other words, this was a case falling within Lord Wilson's paragraph 28, engaging a lower level obligation in respect of alternatives than paragraph 27.

154. The two examples that Lord Wilson gave of cases where fairness required the public body to *consult* upon arguable yet discarded alternative options were *Medway* and *Montpeliers* (see paragraph 116 above). The focus of the *Medway* case was a consultation document published by the Secretary of State preparatory to the publication of a White Paper on the future development of air transport in the United Kingdom. The consultation document described options involving the expansion of Heathrow, Stansted, Luton and a possible new airport in Kent. Maurice Kay J observed that "conspicuous by its absence is any option for new runway capacity at Gatwick". He held that the omission of any Gatwick option was unfair because the effect was that when expansion of Gatwick came to be considered in the future, representations in its favour would have to argue against Government policy enshrined in a White Paper, having been prevented from making representations about Gatwick prior to the adoption of that Government Policy: see [29]-[32]. In *Montpeliers*, a consultation following the making of an experimental traffic order was unfair in circumstances where the local authority excluded from consideration "an option which on any view was of central significance" (namely, retaining the barriers), in circumstances where Munby J found the residents had a legitimate expectation that they would be allowed to make representations on all options.

155. The question whether the defendant was obliged to consult on, or to refer briefly in consultation documents to, an alternative option (or options) is a highly fact specific question. First, it is necessary to ascertain the purposes for which the statutory obligations to consult have been imposed.

156. The statutory context is as follows:

i) Misterton is a designated "rural primary school" and so, prior to publishing a statutory proposal to discontinue the school, the defendant was obliged to consult parents of registered pupils at the school, any district and parish council for the area in which the school is situated, and "such other persons as appear to the relevant body to be appropriate" (see s.16(1) EIA 2006, cited in paragraph 18 above).

ii) Swanmead is not "a rural primary school or a community or foundation special school" and so, prior to publishing a statutory proposal to discontinue the school (to achieve amalgamation with Greenfylde), the defendant was obliged to consult "such persons as appear to them to be appropriate" (see s.16(2) EIA 2006, cited in paragraph 18 above).

iii) The proposals to make significant changes to other schools would not, taken on their own, have placed the defendant under a statutory obligation to consult prior

to publishing a statutory proposal. However, there was a strong expectation – pursuant to the Changes Guidance, to which the defendant had to have regard – that the defendant would "consult interested parties in developing their proposal prior to publication, to take into account all relevant considerations". In addition, as the proposals formed part of a single model, the defendant necessarily had to consult interested parties on all aspects of the proposals at the pre-publication stage.

iv) The defendant was also required on publishing the Statutory Proposals, in respect of both discontinuance and prescribed alterations, to enable any person or organisation to submit comments on the proposal to it, for its consideration.

157. In my judgement, two purposes underlie the defendant's statutory duty to consult at both Stages 1 and 2:

i) First, consultation is liable to result in better decisions. Any (non-statutory) proposal on which an authority consults can be properly tested, having regard to information and representations provided by interested parties. This purpose applies equally to consultation in respect of discontinuance and substantial alteration proposals.

ii) Second, consultation is designed to avoid the sense of injustice which a person who is significantly affected by the decision will otherwise feel. This purpose is particularly firmly engaged in respect of proposals that would have the effect of depriving a person of a benefit, such as a proposal to close a school that a consultee's child currently attends, to change a school that they currently attend from a first school on a single site to a primary school on a split site, or to change the age range of a school they currently attend in such a way as to require them to leave the school earlier than anticipated.

158. Having regard to the nature of the subject-matter, and the class of persons to be consulted at Stage 1, I do not consider that a purpose of consultation in this case was to enable the general public to participate in the defendant's decision-making process. The purposes here were the narrower ones, to which I have referred, of protecting the interests of those likely to be affected by the proposals and, above all, generating better decisions.

159. The focus of submissions has been on the question whether there should have been consultation on alternatives at Stage 1. Having regard to the legislative scheme, it is correct for the focus to be on that stage. Consultation at Stage 2 involves receiving objections or comments on the local authority's published proposal to discontinue a school or to make prescribed alterations. In my judgement, the scheme of the legislation limited the options which should be the subject of consultation, at Stage 2, to the defendant's preferred option as set out in the Statutory Proposal.

160. The position is different at Stage 1. It was open to the defendant, in accordance with the scheme of the legislation, to consult on one, two or a range of options at Stage 1. The legislation did not require the defendant to consult on alternative options, but nor did it preclude the defendant from doing so. Nevertheless, in my judgement, fairness did not require the defendant to put forward alternative models for statutory

consultation (i.e. the higher level duty described in *Moseley* at [27] did not apply) for the reasons which follow.

161. First, the defendant had consulted on six models one year before, including a 'no change' (three-tier) option, two hybrid options, and three two-tier options.

162. Secondly, in determining the principles to be applied in developing a model, the defendant had regard to factors identified by consultees during the Stage 0 consultation as those which should drive the decision, namely:

> "• avoiding long journeys to and excess traffic around schools
> • the importance of high-quality education for all
> • the key role played in communities by village schools
> • any changes to result in sustainable schools with the right capacity
> • support for the needs of children caught up in change
> • benefits of teaching cohorts in complete key stages
> • mitigating or removing the negative effects of two school transfers
> • taking account of previous building investment and condition,
> • ensuring a safe environment on and around school sites for children."

163. The principles that the defendant adopted clearly reflected these factors that consultees had identified. The principles were:

> "• The structure should provide pupil numbers which, wherever possible, support efficient pupil / teacher ratios so that every school can deliver educational excellence sustainably.
>
> • There is a presumption to retain village schools, recognising that in some circumstances this may not be possible.
>
> • The structure should ensure sufficiency of places meet the future needs of the area.
>
> • The option to choose a church school should be retained in each locality for compulsory education.
>
> • The structure must consider the condition and suitability of the school estate.
>
> • The structure should avoid significantly increasing travel to school times where this can be avoided."

164. Thirdly, it was important that consultation at Stage 1 should be upon proposals of some specificity because of the identity of those being consulted (*Moseley* at [26]), which here included parents. Specificity was desirable as it would give consultees proposals into which they could "get their teeth" (as Hodgson J put it in *Gunning*) and enable the proposals to be properly tested. At the same time, particularly given that a significant body of consultees consisted of parents of pupils, it was crucial that "the consultation documents should be clear and understandable, and therefore should not be unduly complex or lengthy": see *Moseley*, Lord Reed at [41]. If, as the claimants contend, the

defendant had been required to *consult* at Stage 1 on each of the "most viable" scenarios identified in the FS Report, the consultation documents would have been far too long and complex. It has to be borne in mind that each alternative, if set out with any specificity, would have been multi-faceted, each one affecting numerous schools in the area in a variety of different ways.

165. Fourthly, the defendant's reasons for deciding to consult on a single model were rational and show the defendant's aim was to ensure that a primary purpose of the consultation, namely, to secure better decision-making, was achieved: see paragraph 124 above. The outcome of the Stage 0 consultation exercise had been inconclusive. It had enabled the principles to which I have referred to be developed, but the defendant's view that consulting again at Stage 1 on multiple proposals was unlikely to result in any significant progress was a reasonable one. Although I accept that the word "lobbying" was inapt, and sympathise with the claimants' objection to it, I reject the contention that the defendant was dismissive of the purpose of consultation. Ms Walker's concern that the defendant would be less likely to receive focused and detailed feedback, properly testing any model, if there were multiple options on the table was not unreasonable, as the existence of multiple proposals would have enabled (and likely led) consultees to support or oppose the various proposals according to how any particular school in which they were interested was affected, without engaging more deeply with the proposals.

166. Fifthly, it cannot sensibly be said that it was so unfair as to be unlawful for the defendant not to re-consult at Stage 1 on all of the options consulted upon at Stage 0. Options 3B, 4A and 4D were all (like the model on which the defendant consulted at Stage 1) two-tier models. None of these models were unviable. But each required the closure of many more rural first schools than the model consulted on. The defendant decided, "recognising the strength of feeling in the first consultation against school closure, as well as the presumption against the closure of rural schools and the impact on rural communities of closure", that "while school closure was potentially unavoidable, we should aim to close as few schools as possible". Consequently, these three options were dropped prior to the Stage 1 consultation precisely because the defendant conscientiously took into account the outcome of the Stage 0 consultation.

167. Notably, none of these three options would have made it more likely that Misterton would remain open – quite the contrary. And as these were two-tier options, whatever the precise proposal in respect of Swanmead, it would not have remained a middle school. It is evident that the only reason for suggesting that the defendant was required to consult on these options is to support the submission that option 1A/2 had to be consulted on, having been included by FS amongst the most viable options they identified.

168. Options 5C and 5D "retained the rural schools, but at a cost of inefficiency". The defendant's view that there was "no merit in undergoing the pain of reorganisation only to create a new inefficient system" cannot be faulted. From the claimants' perspective, option 5C would have resulted in Misterton remaining open, and Greenfylde remaining a first school, but it involved the closure of Swanmead. It was assessed by FS as *worse* overall than the baseline option and it received strongly negative feedback in the Stage 0 consultation. Option 5D was the less inefficient of the two hybrid options, but it was open to the defendant to conclude that it was not a significant enough gain, compared

to the status quo, to be worth pursuing given the even stronger negative feedback on this option at Stage 0.

169. The claimants concede that it was not unlawful not to consult again, after Stage 0, on option 1A. However, I am not prepared to proceed on the basis of that concession which was based on the understanding that FS concluded that option 1A was not viable. When the FS Report concluded that "'doing nothing' is not an option" and that "do nothing is not feasible if sufficient educational places are to be realised", the option being addressed was option 1 (not 1A). FS did not determine that Option 1A was not viable and it was one of the options addressed in section 12 of the report, under the heading "Most Viable Options". This does not mean that it was not open to the defendant to determine, at the end of the process, that it was not an acceptable option. But retaining the status quo was a realistic alternative throughout the process: it would have been the outcome if the defendant had decided to reject the proposals, rather than accept them (with or without modifications).

170. Nevertheless, in my judgement, having regard to the points I have made above, fairness did not require the defendant to put forward option 1A as an alternative proposal at Stage 1. The defendant was entitled to consult on a preferred option: see *Royal Brompton* at [10], [142] and [151]. Normally, it is for the body carrying out a consultation to decide how to pitch it and what options to include or exclude, albeit the exclusion from consideration of a particular proposal may, depending on the factual and statutory context, be so unfair as to be unlawful. As Jefford J observed in *AA*, numerous authorities emphasise that the body carrying out a consultation has a large measure of discretion as to what it consults on (see [84]-[92]). However, I consider that this was a context in which fairness required brief reference to be made to alternative options (see paragraph 176 below).

171. Sixthly, I reject the contention that fairness required the defendant to consult on, or make brief reference to, option 2. The statutory provisions to which I have referred do not impose any duty on a local authority to consult on options which it has determined are unviable or unrealistic, and nor does common law fairness require consultation on such alternatives: see, albeit considering different statutory provisions, *Moseley* at [41] and *R (Nettleship) v NHS South Tyneside CCG* [2020] EWCA Civ 46, [2020] PTSR 928 at [56].

172. Although the focus of the claimants' oral submissions was on Option 2, as no reliance had been placed on that option in either of the claimants' pleadings, skeleton arguments or evidence, it was not addressed directly in the defendant's evidence. Nevertheless, the defendant's conclusion that it was not a realistic option, and the reasons it was not pursued, are reasonably apparent.

173. As the FS Report noted, first, this option would require the support of the Schools Forum; secondly, as it is the same as Option 1A (save for an adjustment to funding) it would not address the underlying cumulative deficit; and thirdly, it would not change the curriculum inefficiency or allow for increased curriculum spend (see paragraph 69.v) above69.v) above). Although the FS Report included Option 2 amongst the group of scenarios it described as the "most viable" options (just as it included 5C in this group, even though it was worse than the status quo), on a fair reading of the FS Report, the authors' doubts about the feasibility or efficacy of Option 2 are manifest. As the FS Report noted at 14.1.10:

> "Whilst the option of a change to formula funding initially appeared as a potential quick fix, it soon became clear that this would in effect only result in a temporary relaxation of the increasing deficit and would not have any impact on the quality or sustainability of education going forwards."

174. The consultees included headteachers, governors, an academy trust, parish and district councils who could be expected to engage fully with the analysis in the FS Report and to understand the school funding mechanism. I was not shown any evidence that any of these consultees sought to persuade the defendant that departing from the NFF was a realistic, deliverable option.

175. In my judgement, it was reasonably open to the defendant to reject this option on the basis that the support of Schools Forum was unrealistic, given it would involve persuading schools throughout the county to depart from the NFF i.e. to agree to receive (or at least be at risk of receiving) less funding for their school so that other schools could receive more. In addition, option 2 was otherwise the same as option 1A. So pursuing option 2 would have involved the pain of a county-wide consultation to seek to persuade schools of the merits of departing from the NFF, only to be left with a structure which did not address the underlying cumulative deficit.

176. As I have indicated, I accept the claimants' alternative submission that fairness demanded brief reference in the consultation documents to the existence of alternative options. The reorganisation of schooling in an area is complex. In order to respond intelligently to the proposal, consultees needed to be informed why the defendant had chosen to put forward the particular model it had, and that entailed some understanding of the reasons for rejecting alternatives. On the other hand, the extent of the requirement is informed by the fact that consultees could reasonably be expected to appreciate – and evidently did appreciate - that other options could be put forward. Not least, they were well aware of the status quo.

177. I consider the requirement was clearly met. The evidence I have taken into account in concluding sufficient reference was made to alternative options to more than meet a standard of fairness that required no more than passing reference be made to realistic alternatives includes, prior to the Stage 1 consultation, the following:

i) Consultees were alerted to the fact there was a range of possible options in the letter of 18 June 2019 (see paragraph 70 above). That letter expressly directed their attention to the FS Report, in which numerous options were described (see paragraphs 65 to 69 above).

ii) The Stage 0 questionnaire asked consultees for their views in respect of Options 1A, 3B, 4A, 4D, 5C and 5D.

iii) The FS Report remained online throughout the Stage 0, 1 and 2 consultations and it was explicitly drawn to consultees' attention again in numerous documents, including the opening paragraphs of the Detailed Stage 1 Proposals document (see paragraph 88.i) above) which stated:

> "1. A Cabinet paper proposing a formal consultation on change to school structures in the Ilminster and Crewkerne

> area was considered on 21 October. These papers were available publicly from 14 October. This document describes what we proposed to Cabinet for the consultation that will take place in November.
>
> 2. These proposals follow on from the 2019 review of education provision in the Ilminster and Crewkerne area, which was carried out by Futures for Somerset and commissioned by Somerset County Council (SCC). The review identified a number of possible structural solutions to issues faced by schools in the area. There was an informal online consultation process with the schools' communities undertaken in the second half of the summer term 2019 (see Appendix A).

The document referred to as the "Cabinet Paper" is the Officer's First Report. Appendix A is the Stage 0 Outcomes Report.

iv) The Stage 0 Outcomes Report (a brief document of just over two pages), listed and gave a brief description of all seven options considered in the FS Report (including Options 1A and 2), in a clear table on page 1. The same table appears in the Officer's First Report which was published prior to the Stage 1 consultation and discussed at the public meeting of the Cabinet on 21 October 2020.

v) The Q&A Factsheet referred to "the many options … including no change" and specifically addressed: (i) the options of a secondary or an extended secondary school on the Maiden Beech site; (ii) Misterton becoming a primary school; (iii) the reasons for the proposal to close a first school, and for the proposal that that school should be Misterton rather than one of the other first or primary schools.

vi) In the Q&A Factsheet consultees were also informed that another way of addressing Wadham's deficit – and so to retain the status quo - albeit not an option the defendant was proposing, "would be to make very heavy cuts to the year 10 and year 11 curriculum, drastically reducing the number of GCSEs and other options available to pupils".

vii) The Summary Guide referred to the identification of "a range of different options for reorganising education within the area" in the independent review in 2019 (i.e. the FS Report). It identified where all the consultation documentation was available on a dedicated webpage. And the same point that the alternative to structural change "would be to dramatically reduce the subjects offered to pupils in Key Stages 4 and 5" was made.

viii) Each EIA, including version 1, identified and gave a brief description of the options identified in the FS Report (including options 1A and 2).

178. In addition, prior to the Stage 2 consultation the following further documents were published:

i) The Officer's Second Report was published which addressed numerous options that had been raised during Stage 1 (see paragraph 98 above).

ii) The Stage 1 Response to Consultation addressed in considerably more detail the alternative options that had been raised during Stage 1 (see paragraph 99 above). These included a range of options which did not entail the closure of Misterton or the loss of Swanmead as a school admitting year 7 and 8 pupils.

iii) The Statutory Proposal was published which, in addition to identifying the reasons for the proposals, included a table addressing the identified alternatives to closure of Misterton (see paragraph 103 above).

179. Nor, in my judgement, is this case analogous to *Parents for Legal Action*. In that case, on the local authority's models, the automatic consequence of deciding to change from a three-tier to two-tier school system was the middle schools would be closed. Therefore, when the authority resolved to change to a two-tier system, it precluded the possibility of the middle schools remaining open (even subject to prescribed alterations). In consulting about the closure of specific schools for the first time after resolving to change to a two-tier system, the authority failed to consult at a formative stage on the closure of those schools.

180. By contrast, in this case, both stages of the statutory consultation addressed specific schools. The defendant did not take the approach of deciding, in principle, whether to adopt a two-tier system. The high point of the claimants' contention that the defendant had a closed mind prior to the start of the Stage 1 consultation was the statement contained in the Detailed Stage 1 Proposals document that "[h]aving decided to undertake a structural change, we are not putting forward another three-tier system". However, I do not consider that this statement can bear the weight the claimants seek to put upon it, when considered in context.

181. As Morris J observed in *ECMA* at [139]:

> "The requirement that the consultation takes place at a "formative stage" means that at the relevant time the decision-maker must have an "open mind on the issue of principle involved": *Montpelier* §21 (ii). The question is whether the decision-maker had already made up its mind to adopt the proposal or whether it was willing to reconsider its proposal in the light of the consultation process if a case to do so was made out. There must be no actual pre-determination on the part of the decision-maker. Where the decision-maker is consulting on a particular proposal, the consultation must include consultation on whether the proposal should be adopted, and not just on how. However I accept the Secretary of State's submission that there is a legitimate distinction to be drawn between actual pre-determination on the part of the decision-maker and the decision-maker having a "pre-disposition" towards the proposal. The latter is permissible, and necessarily so in circumstances where the decision-maker is, as entitled to do, to determine the particular proposal upon which he wishes to consult, see *Lewis v Redcar* §§63, 95, 99, 106-107; *Langton* §§106, 107; *Spurrier*

> §§503-535, especially at §§509-511, 524, 531." (emphasis added)

182. The contemporaneous documents, as well as Ms Walker's evidence, make clear that while the defendant was undoubtedly pre-disposed to the view that changing to a two-tier model would be the better option – as it was evident that the three-tier system was "a key factor in the presenting issues" – the defendant had not pre-determined either that a two-tier model, or the particular two-tier model it proposed, should be adopted. The defendant was open to the possibility that the consultation might reveal that a different configuration was the most desirable and sustainable or that the proposed model was so flawed that it needed to be fundamentally changed.

183. Nor had the defendant determined prior to the conclusion of the consultation process that Misterton should close. Ms Walker has given clear evidence that while, on the facts, it appeared that Misterton would be the most logical school to close,

> "had we found an efficient and implementable model that retained Misterton, we would not have continued to propose closure. Or, if it had become clear through the consultation that the model did require the closure of a school, but there was another school that it would be more logical to close, then we would have changed the proposal."

184. In the Stage 1 Questionnaire, the defendant asked for views on the proposal to close Misterton. In the Detailed Stage 1 Proposals document, the defendant expressed interest in hearing views as to how the school building might be used if the school were to close (albeit no question seeking such views was included in the Stage 1 Questionnaire). This is not evidence of predetermination. A mandatory consideration in formulating any statutory proposal to close Misterton was "the likely effect of the discontinuance of the school on the local community" (s.15(4) EIA 2006). Information as to how the building might be used if the school were to be closed would have been potentially relevant to the defendant's consideration of that issue. If the consultation had only addressed *how* the proposal should be adopted, that would have demonstrated that the defendant was not willing to reconsider in the light of the consultation process whether the case for closing Misterton was made out. But that is not the position: the primary focus of the consultation in respect of Misterton was on the question *whether* the school should close.

185. For the reasons I have given, I consider that the defendant consulted on the proposals at a formative stage and I reject the contention that the omission to consult on alternative proposals, or address other options more fully, was so unfair as to be unlawful.

186. I also reject the claimants' contention that the defendant has failed to take the consultation outcome conscientiously into account. There is no dispute that the defendant was obliged to give conscientious consideration to the outcome of each stage of the consultation. However, I accept the defendant's submissions that it has done so (see paragraphs 131 to 137 above). The Stage 0 Outcomes Report (and the Officer's First Report) fairly reported the outcome of that consultation. The Stage 0 consultation evidently was inconclusive, the balance of responses being negative in respect of every option. The fact that Option 1A had the least negative feedback, as well as the strongest positive feedback, was expressly acknowledged.

187. The decision not to put forward an option involving no structural change at Stage 1, despite that being the most popular (and least unpopular) option, does not begin to demonstrate that the defendant failed to take account conscientiously of the outcome of the Stage 0 consultation. I agree with Ms Hannett's submission that the premise underlying the claimants' argument is mistaken: this was not a referendum. The fourth Sedley principle does not impose an obligation to *adopt* the view of the majority, a plurality or of any individual respondent to the consultation.

188. Moreover, it is evident that in deciding not to pursue any of the two-tier or hybrid options put forward for consideration at Stage 0, and in developing principles to guide the formulation of a different 'least worst' model, the defendant took conscientious account of the basis for consultees' objections, as well as the extent of opposition, to the various options (see paragraphs 83 to 84 and 162 to 163 above). Conscientious consideration of the consultation feedback also led the defendant to change its approach to Published Admission Numbers and in respect of transport arrangements after extra-curricular activities at Wadham, as explained in paragraphs 55-56 of Ms Walker's evidence.

189. Nor can it be said that the objections of consultees to the proposals must have been ignored, given the warning in the FS Report that without the support of key stakeholders any option (other than the status quo) was likely to prove undeliverable. I agree with the defendant that, properly understood, the FS Report was addressing the possibility that non-cooperation by certain bodies would prevent implementation of proposals the defendant might choose to pursue. For example, proposals to change the age ranges of academies would be in the hands of the BTCT and the Regional Schools Commissioner, not the defendant. The contemporaneous evidence demonstrates that the defendant considered that risk and assessed that it was low.

190. In any event, if the warning in the FS Report was intended to suggest that lack of support for proposed reorganisation amongst consultees generally would be likely to prevent the proposals being implemented, no basis for taking that view was given, and the defendant was entitled to reach a different conclusion. As the defendant has said, change which commands the support of all stakeholders would be preferable. But in reality, re-organisation of the structure of education in a particular area, such as this one, will almost invariably face challenges and objections. It was reasonably open to the defendant to consider that the proposals would be capable of implementation.

191. The third and final aspect of ground one is the contention that the defendant failed to provide sufficient information to enable intelligent consideration and response by consultees. The right to be informed is instrumental to an effective right to make representations. It is an aspect of fairness that a consultation document must present the issues in a way that facilitates an effective response.

192. Although the consultation documents did not expressly refer to the warning regarding non-deliverability given in the FS Report, the issue that the power to implement all aspects of the proposal did not lie with the defendant, and whether this would impact on implementation, was raised in clear terms:

    i) The Q&A Factsheet addressed the questions whether Maiden Beech, as an academy, could refuse to convert to a primary school, and whether this would alter the proposals. The answer given was:

> "Yes, as an academy Maiden Beech are autonomous and decide their own admissions. However, the leadership of Maiden Beech and the trust, Bridgwater and Taunton College Trust, are working collaboratively with Somerset County Council and other partners in the recognition that all schools are part of a system and it is in the best interests of pupils and parents if schools work together. While the current proposal may not reflect the preference of every stakeholder, we have been encouraged by the willingness to accept the outcome of the consultation and political decision-making, and work in the best interests of children and the community."

ii) The Statutory Proposal stated:

> "The decision to review school organisation sits with the Council, because it has a legal duty to secure efficient and effective education in the area. The Council does not hold legal powers to execute every aspect of the current proposal, and it is therefore possible that other stakeholders might not cooperate in implementing proposals. However, the Council has been working cooperatively with the office of the Regional Schools Commissioner, the Diocese of Bath and Wells, Bridgwater and Taunton College Trust and the Baths and Wells Multi-Academy Trust and to date all stakeholders, whether in agreement with the substance of the proposals or not, have remained committed to playing their part in any future changes for the good of children and the area."

193. In my judgement, these statements sufficed to enable consultees to comment on the issue of whether the proposals were deliverable in light of the distribution of relevant legal powers. As I have said, properly understood, I consider that was the issue that the FS Report was raising. In any event, the Q&A Factsheet also raised and addressed the question whether the attempt to reorganise might fail because of broader opposition. The Q&A Factsheet stated:

> "*The general consensus is people do not want this to go ahead. You are potentially damaging a generation of children's education. What would happen if people start to vote with their feet and move their children so that Wadham loses further students and decide not to transition them there at all?*
>
> A. We know this is an issue that divides the community. In the previous consultation, none of the many options received general support, including no change. However, it is a reality of political decision-making that it can be more damaging to avoid difficult decisions than to take them. We have already received many varied and constructive responses to this consultation, and remain open and willing to ideas about how to solve this longstanding problem."

194. The defendant fairly raised the issues, enabling consultees to respond. Fairness did not require the defendant to go further and refer to the view expressed in the (published) FS Report on this ancillary issue.

195. The second piece of information that the first claimant contends ought to have been provided earlier is the defendant's analysis of the justification for concluding that the proposed closure of Misterton was justified, despite the statutory presumption against the closure of rural schools. A detailed analysis was provided in the Statutory Proposal. The first claimant accepts that, in this regard, the Stage 2 consultation was not flawed. Although the presumption was not addressed in such detail earlier in the process, consultees were alerted to its existence on a number of occasions:

i) The Officer's First Report referred to the presumption against closure of small rural schools. It was noted that the additional regulations in respect of designated rural schools are relevant to the majority of schools in the Ilminster and Crewkerne area. Reference was made to the wider social and environmental cost of closing small rural schools. It was noted that one of the steps that must be considered, with a view to avoiding closure of such a school, namely becoming part of a federation of schools, had already been taken as Misterton is part of a federation with Ashlands. The reasons given to justify the proposal to close Misterton were that there were surplus places elsewhere in the local area which could accommodate displaced pupils and there was not predicted demand for the school in the medium to long term. The report stated an intention that the project team would actively engage during the consultation period with, amongst others, "all stakeholders identified as relevant to schools with a rural school designation".

ii) The Q&A Factsheet noted "The impacts on the community of Misterton will be considered in an equality impact assessment. Rural communities require special consideration and the potential social and economic impact of closing schools is understood and never considered lightly."

iii) The Detailed Stage 1 Proposals document referred to the existence of "a presumption to retain village schools, recognising that in some circumstances this may not be possible".

iv) In addition, the FS Report, which was provided to consultees at Stage 0 and available online throughout the consultation process, referred to the national presumption against the closure of small rural schools. Reference was made to the Designation of Rural Primary Schools (England) Order 2018 and to the fact this recognises the importance of rural primary schools (which are often small schools) within their local communities. It was noted that the majority of schools proposed for closure (in the various options addressed by FS) were designated "rural schools".

196. The information on this issue provided prior to the Stage 1 consultation was limited. But I do not consider that the consultation is so unfair as to be unlawful by reason of the detailed analysis being provided after the Stage 1 consultation. First, the issues were sufficiently raised prior to Stage 1 to enable intelligent response in the documents to which I have referred. Secondly, the fairness of the consultation must be judged as a whole, bearing in mind that the process is an evolving one. It is indisputable that

consultees were fully informed of the defendant's analysis regarding the presumption prior to the Stage 2 consultation. As Arden LJ observed in *Royal Brompton* "it is inherent in the consultation process that it is capable of being self-correcting".

197. As regards the financial information sought by HP, it must be borne in mind that neither the legislative provisions governing this consultation exercise, nor the common law, required the defendant to inform consultees of every granular detail of the proposals. Consultation documents must be clear to the general body of consultees, and should not be unduly long. HP's question regarding split site funding was a reasonable one, but the consultation cannot be said to be unfair by reason of the omission to provide that information pre-emptively in the consultation documents.

198. If the alleged unfairness is said to stem from failure to answer (or fully answer) the request, it is pertinent that HP's email was sent on 25 February 2021, after every stage of the consultation had ended. In any event, although the response did not come to HP's attention, a clear and sufficient answer was given (see paragraph 143 above).

199. The claimants' submissions in respect of consultation on alternative options were raised under the sub-heading of failure to consult at a formative stage, but I recognise that those submissions also raise an allegation of failure to provide sufficient information to enable consultees to respond. I have addressed them on that understanding, albeit my analysis appears in the context of the formative stage argument. Accordingly, I reject the third and final aspect of ground one, and so ground one as a whole fails.

E. GROUND TWO: PREDETERMINATION

200. On the issue of predetermination, there is no dispute between the parties as to the law. A distinction is drawn between actual pre-determination and the appearance of predetermination. Actual predetermination involves a finding on the subjective attitude or state of mind of the decision-maker. I have addressed the allegation of actual predetermination in the context of the contention that the consultation did not take place at a formative stage (see paragraphs 145 to 185, especially 179 to 184 above).

201. The remaining issue in respect of this ground of challenge is whether the decision can be impugned on the grounds of an *appearance* of pre-determination. The test to be applied is whether the fair-minded and informed observer would think that there was a real possibility that the decision maker had predetermined the matter, in the sense of closing its mind to the merits of the matter: *R (Lewis) v. Persimmon Homes Teesside Ltd* [2008] EWCA Civ 746, [2009] 1 WLR 83 per Rix LJ at [96]-[97]. A decision maker is entitled to have a predisposition in favour of a particular policy provided that the decision maker considers the issues fairly and on their merits when making the decision: *Lewis* per Rix LJ at [95] and [96] and per Pill LJ at [62]-[63]; *R (Spurrier) v Secretary of State for the Environment, Food and Rural Affairs* [2019] EWHC (Admin), [2020] PTSR 240, per Hickinbottom LJ and Holgate J at [510].

202. In *Lewis*, Longmore LJ stated that predetermination was "an extremely difficult test to satisfy" ([109)); and see per Pill LJ at [63] and Rix LJ at [96]-[97]. The importance of appearances is generally more limited in the context of administrative decision making than in the context of judicial decision-makers: see *Lewis* per Pill LJ at [71]. In *Spurrier* the Divisional Court observed at [511]:

> "The risk of predetermination because of an *appearance* of a closed mind involves an assessment of that risk by the court. Given the role of a policy-maker in a statutory scheme such as this, neither is easy to prove: and, in particular, when the court is faced with an allegation of predetermination in this context, it needs to be cautious about the inferences which may properly be drawn from statements and conduct on the part of the policy-maker …".

203. The claimants rely on the same matters in support of their allegations of both actual pre-determination and an appearance of pre-determination. They contend that the defendant had – or appears to have – determined that a two-tier system would be implemented prior to undertaking any statutory consultation and before making the decision. The first claimant submits the defendant has been fixed on closing Misterton, as part of its determination to proceed with its specific proposal for re-structuring the school system, since September 2020.

204. The evidence does not support these contentions. Far from there being any clear pointers that the defendant approached the consultation and decision-making process with a closed mind, and so failed to properly apply itself to the task, in my judgement, the evidence points strongly in the other direction. Having regard, in particular, to the matters I have addressed in respect of ground one, especially in respect of the issues as to whether consultation took place at a formative stage and whether conscientious account was taken of the outcome of each consultation exercise, it is plain that this ground must fail.

F. GROUND THREE: PRESUMPTION AGAINST CLOSURE OF A RURAL SCHOOL

(a) The parties' submissions

205. The first claimant contends that, in formulating the proposal to close Misterton, the defendant failed to comply with the obligation in s.15(4) EIA 2006 to have regard to the matters set out in that subsection at (a) to (d) or to the presumption against the closure of rural schools contained in the Closure Guidance.

206. This ground of claim raises a question of statutory construction. The issue between the parties is one of timing. The first claimant acknowledges that the matters to which the defendant was required to have regard are addressed in the Statutory Proposal. It is not contended that the content of the Statutory Proposal is deficient. However, Mr Broach submits that addressing the mandatory relevant considerations for the first time in the Statutory Proposal – save for mere references to the existence of the presumption earlier in the process - was too late. The real mischief, he contends, was proceeding with the Stage 1 consultation without having rigorous regard to the s.15(4) considerations.

207. In support of his construction of s.15(4), Mr Broach relies, first, on the words "in formulating" in s.15(4). He submits the use of the continuous present indicates that Parliament was not just concerned with the single point in time when the proposal is published. The requirement to have regard operates throughout the process of formulating the proposal. Second, he submits that the duty to have regard to the s.15(4) considerations arises in parallel with the pre-publication consultation duty in s.16. Mr Broach placed reliance on the headings above sections 15 and 16 which read,

respectively, "Proposals for discontinuance of schools maintained by local authority" and "Consultation in relation to proposals under section 15". Third, he submits this interpretation gives effect to Parliament's intention that regard should be had to the s.15(4) matters throughout the process, not just at a point far into the process when there is a risk that it may be difficult to backtrack.

208. The defendant draws a distinction between the presumption against the closure of rural schools, which is contained in the Closure Guidance, and the specific matters referred to in s.15(4). In accordance with s.16(3) of the EIA 2006, the defendant had to have regard to the Closure Guidance in undertaking the Stage 1 consultation pursuant to s.16(1). The defendant therefore accepts it had to have regard to the presumption against the closure of rural schools when undertaking the Stage 1 consultation.

209. Whereas the defendant submits that s.15 does not require consideration of the matters referred to in s.15(4)(a) to (d) when the statutory consultation contemplated by s.16 is carried out. Ms Hannett points out that there is no reference to those matters, or to s.15(4), in s.16. Section 15(4) requires regard to be had to those matters at the time of publishing the proposals, and also at the time of deciding whether to approve or reject the proposals. Ms Hannett submits this is the natural reading of the words, and that it makes practical sense as it is likely that matters relevant to the issues in section 15(4) will be raised during the course of any pre-publication consultation exercise. In any event, Ms Hannett submits the duty in s.15(4) has been complied with.

(b) Analysis and decision on Ground Three

210. First, irrespective of the interpretation of s.15(4), the defendant had a duty to have regard to the Closure Guidance pursuant to s.16(3), as well as s.15(4) of the EIA 2006. The presumption against the closure of rural schools is contained in the Closure Guidance (see paragraphs 25 to 26 above). In the absence of any good and properly articulated reason for departing from it (and the defendant does not seek to rely on any), the defendant was required to follow the guidance given by the Secretary of State.

211. Accordingly, the defendant had to adopt the presumption against the closure of rural schools throughout the statutory consultation and decision-making process. The Closure Guidance addresses matters that the "proposer" must consider "[w]hen producing a proposal to close a rural primary school" (see paragraph 26 above). It also specifies matters that "Proposers should provide evidence to show they have carefully considered" (see paragraph 25 above). It is clear that the references to the "proposer" and a "proposal" relate to the publication of a statutory proposal pursuant to s.15(1) of the EIA 2006 by a local authority (or pursuant to s.15(2) where the proposer is a governing body). The Closure Guidance requires all of the matters referred to in s.15(4)(a) to (d), and some additional matters, to be considered when producing a statutory proposal and for evidence of careful consideration to be contained in the statutory proposal.

212. Secondly, in addition to the requirement to have regard to any guidance given from time to time by the Secretary of State, s.15(4) of the EIA 2006 establishes that certain matters are mandatory relevant considerations, namely: (a) the likely effect of discontinuance of the school on the local community; (b) the availability, and likely cost to the local authority, of transport to other schools; (c) any increase in the use of motor vehicles which is likely to result from the discontinuance of the school, and the

likely effects of any such increase, and (d) any alternatives to the discontinuance of the school ("the s.15(4) matters").

213. A local authority (or governing body) must have regard to them when formulating a statutory proposal under s.15 to close a rural primary school. Section 15(4) requires a proper and conscientious focus on the matters identified in the statutory provision. The duty is a continuing one. Formulating a statutory proposal is a process, not an event that occurs at the single point in time when the proposal is published.

214. Nevertheless, the duty in s.15(4) is only triggered when the relevant body begins formulating the *statutory* proposal, not when the process of preparing consultation documents prior to consultation pursuant to s.16(1) of the EIA 2006 begins. None of the consultation documents prepared in this case for the Stage 1 consultation, albeit proposing the closure of Misterton, constituted a proposal under section 15.

215. That the duty extends only to the period when a relevant body is formulating a statutory proposal, and not to the prior period when it is preparing consultation documents for a period of pre-publication consultation, is made clear by the reference in s.15(4) to "any proposals under this section". This interpretation is also supported by the terms of s.16(3), in which the matters to which a relevant body must have regard in consulting under s.16(1) or (2) are expressly set out, and make no reference to s.15(4) or the s.15(4) matters. I agree with Ms Hannett that no assistance on this point can be gleaned from the section headings.

216. A realistic and proportionate approach to evidence of compliance with the s.15(4) duty must be taken. While the process of producing a notice of statutory proposals must inevitably begin (shortly) before publication, evidence of compliance (or lack of compliance) is likely to be contained in the proposal itself, rather than extraneous documents.

217. Has the defendant complied with these duties? The Statutory Proposal shows that the defendant complied with the duty to give proper and conscientious consideration to the s.15(4) matters. As it is not disputed that, if the focus is on the Statutory Proposal, it demonstrates compliance, it is unnecessary to expand on this point.

218. In my judgement the evidence also shows the defendant had regard to the Closure Guidance, and so to the presumption against the closure of rural schools, throughout the consultation and decision-making process. There is no dispute that in the Statutory Proposal the defendant demonstrated that it applied the Closure Guidance. Nor is there any suggestion that there was any failure to conscientiously follow it in the Officer's Third Report, and the discrete Impact Assessment addressing the proposed closure of Misterton, on which the decision was based.

219. The contention is that there was a failure earlier in the process. However, first, the defendant had regard to the presumption from the outset, prior to commencing the Stage 0 consultation. The FS Report contains the defendant's "statement of intent", in which the defendant recognised "the national presumption against the closure of small schools". Second, the defendant adopted the presumption, prior to the Stage 1 consultation, when devising the principles that should guide the drawing up of any model. Third, the defendant had regard to the presumption when determining, prior to the Stage 1 consultation, that options 3B, 4D and 4A, which would have involved the

closure of seven, five or two designated rural first schools, respectively, should not be pursued, despite option 3B achieving the highest score overall in FS's evaluation and both options 4D and 4A scoring well on the revenue assessment.

220. Fourth, the Officer's First Report, in proposing Misterton for closure prior to the Stage 1 consultation, adopted the presumption; was mindful of "the wider social and environmental cost of closing small rural schools"; considered alternatives; took into account that the route of federating with another school had already been taken; and had regard to whether the school was surplus to requirements, bearing in mind predicted demand in the medium to long term. At the same time, the EqIA v.1 noted that there would be ample places for pupils in nearby schools and travel distances would not be excessive.

221. Bearing in mind that the Closure Guidance requires consideration of the matters identified in respect of the rural presumption to be evidenced in the statutory proposal, the evidence amply demonstrates that there was no breach of s.16(3) or s.15(4) insofar as that provision required regard to be had to the Closure Guidance.

G. GROUND FOUR: PUBLIC SECTOR EQUALITY DUTY

(a) The ground in outline

222. The second claimant contends the defendant breached the PSED (cited in paragraph 33 above) by failing to have due regard to the needs expressed in s.149(1)(a), (b) and (3) in respect of those with the protected characteristics of "disability" and "religion or belief". There is no issue as to the applicable law.

223. In respect of this ground, in view of the standing issue raised by the defendant, the application for permission has not yet been determined (see paragraph 9 above). Before me, the defendant has acknowledged that the second claimant has standing to challenge the decision, and so he is entitled to advance his challenge on any available grounds, including this one. The defendant's contention is that the second claimant does not have a sufficient interest in obtaining declaratory relief that due regard was not had in respect of the protected characteristics relied on. So argument raised is not that there is a bar to the grant of permission: it goes only to the question of relief (if it arises).

(b) The parties' submissions

224. The second claimant submits the decision will have an adverse impact on pupils with special educational needs and disabilities (SEND) or vulnerabilities. This adverse impact flows from losing the staged transition at the age of 13 to the upper school. While the decision results in one transition rather than two, the second claimant emphasises that (i) the transition to Wadham will take place when pupils are two years younger; and (ii) it will be a transition to the bigger environment of Wadham as an enlarged secondary school.

225. HP explains that many parents have concerns about the size of Wadham. She observes that Swanmead has 276 pupils and Greenfylde has 380. "Even when the two schools amalgamate the students will be transitioning from a smaller school to Wadham where there will be between 700-800 pupils. This will be difficult for all children, especially

those who are classed as 'vulnerable children' and those with SEND, to adapt to as they will find the new, bigger school intimidating and uncomfortable."

226. This adverse impact was not identified in the EqIA v.4 (or earlier versions) and so, the second claimant submits, it is apparent the defendant failed to have regard to it. In addition, the defendant has failed to obtain information regarding the impact on disabled pupils of changing the transition points, which information it needed to discharge its duty under s.149 of the EA 2010.

227. The defendant contends that it rationally does not consider that the change to transition points entailed in moving from a three-tier to a two-tier system is a disbenefit to pupils with SEND (or those with vulnerabilities, albeit the defendant does not accept this description engages the protected characteristic of disability). On the contrary, its expert view is that the reduction in transition points, as a result of the decision to move from a three-tier to a two-tier system is beneficial for such pupils. In this regard, the defendant relies on the evidence of Ms Walker at paragraph 72 of her statement.

228. Nor does the defendant accept that there is any evidence that larger schools necessarily result in lower quality provision for children with SEND, a view the defendant expressed in the Statutory Proposal, albeit with respect to larger primary schools. In any event, the defendant points out that the decision does not create any large schools. In the Q&A Factsheet, the defendant observed that "[n]othing in the proposal would create [a] large school in either Ilminster or Crewkerne. All schools would still be very small compared to similar schools nationally".

229. Moreover, Ms Hannett emphasises that the proposal involved moving to an educational structure that has been adopted in the vast majority of the country, and compliance with the PSED has to be viewed against that backdrop.

230. In relation to the protected characteristic of religion and belief, the second claimant submits that the defendant focused on the need to ensure access to faith schools in every locality, to the detriment of those, such as his family, who profess no faith and would prefer to choose a non-denominational school. Under the current structure, the first claimant would be able to attend Swanmead, a non-denominational school, from the age of 9-13. The amalgamation of Swanmead and Greenfylde involves the creation of a new *CofE* primary school, resulting in the loss of all the non-denominational places previously provided by Swanmead.

231. The second claimant draws attention to the only discussion of the impact on those with no faith in (each version of) the EqIA where it states: "there would be a reduction of non-church school spaces at middle school level. While this reduces choice, at present pupils in the Ilminster area do not have choice between a church and nonchurch option at any stage of their education, therefore the degree of choice is not reduced." This is, he submits, internally inconsistent: choice cannot be both reduced and not reduced.

232. Mr Broach submits that the reality is that choice has been reduced. There are no longer any non-denominational school places in Ilminster. He contends that the PSED would be rendered ineffective, if what has been done here is regarded as enough.

233. The defendant acknowledges that the decision has the effect of reducing the number of non-denominational schools and places in the area. But that does not easily equate to a

reduction in choice because, properly understood, the effect of the decision is to make it easier for those who wish to attend either CofE schools or non-denominational schools *throughout their schooling* to do so.

234. Moreover, the defendant submits that the loss of non-denominational places was before the Cabinet, both in the EqIAs and in the Officer's Third Report, and in the Statutory Proposal. It was recognised (correctly) that the proposals would lead to a loss of non-denominational places in middle schools in Ilminster. It was also recognised (correctly) that the loss was modest in the context of an existing configuration that makes it difficult for a child in the Ilminster and Crewkerne area to enjoy a secular education for the entirety of their education.

(c) Analysis and decision

235. In *R (Kides) v. South Cambridgeshire DC* [2002] EWCA Civ 1370; [2003] 1 P & CR 19, Jonathan Parker LJ observed at [134]: "A litigant who has a real and genuine interest in challenging an administrative decision must be entitled to present his challenge on all available grounds." The second claimant undoubtedly has a real and genuine interest in challenging the decision. As the defendant acknowledges, standing therefore presents no bar to the second claimant advancing this ground of challenge. So I grant permission.

236. As the second claimant is able to raise this ground of challenge irrespective of whether he can be regarded as having either of the protected characteristics relied on, it is unnecessary to address the arguments as to whether he has those protected characteristics.

237. The legal principles to be applied in determining this ground are uncontentious. The authorities establish the following propositions:

i) Equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.

ii) The PSED is a duty to have due regard to the need to achieve the goals identified in s.149(1)(a) to (c) of the EA 2010; it is not a duty to achieve a result. The decision maker must be clear precisely what the equality implications are when they put them in the balance, and they must recognise the desirability of achieving them, but ultimately it is for the decision maker to decide what weight they should be given in the light of all relevant factors.

iii) The duty is upon the decision maker personally. It is non-delegable. What matters is what the decision maker knew and took into account.

iv) The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria. General regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria.

v) The duty must be exercised in substance, with rigour, and with an open mind.

vi) The duty is a continuing one. It must be fulfilled before, and at the time when, a particular proposal is being considered, not as a 'rearguard action' following a concluded decision.

vii) The duty requires the decision maker to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required.

viii) In determining whether there has been compliance with the duty, the Court is concerned with substance, not form. Nonetheless, it is good practice for public bodies to keep records demonstrating the consideration they have given to the need to achieve the identified goals.

See *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, per McCombe LJ at [26] (and the authorities cited therein) and *Hotak v London Borough of Southwark* [2015] UKSC 30; [2016] AC 811, per Lord Neuberger at [73] to [75].

238. The second claimant does not rely on s.149(1)(c). In this case, the essential question is whether, in making the decision, the defendant failed to have due regard to the need to fulfil the goals set out in s.149(1)(a) and (b) - in short, eliminating unlawful discrimination and advancing equality of opportunity - in relation to those with the protected characteristics of "disability" or "religion or belief".

239. The starting point is to consider the way in which the protected characteristic of disability was addressed in documents that were put before councillors. The EqIA (v.4) addresses the protected characteristic of disability in these terms:

> "• Adaptations would be compliant with the Equalities Act.
>
> • There is an extensive backlog of building condition works in affected schools and a number of the schools are old buildings where access and suitability can be below modern standards. Refurbishment is an opportunity to raise standards.
>
> • The proposed transition of pupils into a new secondary school would involve over 400 pupils transitioning at one time. Any physical adaptations needed would be undertaken. This could also increase the risk that pupils with SEND were negatively impacted by the change."

240. A box was marked to indicate it was assessed that the Statutory Proposal would have a "positive outcome" for those with the protected characteristic of disability. The section of EqIA (v.4) addressing action to be taken to mitigate the impact of potentially negative outcomes noted, in respect of the process of supporting pupils in Misterton to find a new school home, "[a]ny parents concerned about the transition process or needing additional help and support would have an opportunity to request this from officers with special expertise, such as SEND". The EqIA noted the need for "[c]areful planning and use of expertise to mitigate any impacts on pupils with SEND that were negatively impacted by the change". More broadly, it was noted that the process of

induction and familiarisation for pupils changing schools in September 2022 would be phased, starting in Autumn 2021.

241. In the context of the proposed transition of 400 pupils at once – a one-off event due to the proposed change of structure – it was recognised that SEND pupils could be negatively impacted. The defendant had regard to this and put in place mitigations. Ms Walker's evidence in this regard reflects the contemporaneous evidence to which I have referred:

> "As we have stated in the Equalities Impact Assessment, the unusually extensive transition of up to 480 pupils from the middle schools to the new secondary school at one time that would be necessary should the reorganisation go ahead, would create a heightened risk to pupils with vulnerabilities. However, having identified the heightened risk in that transition, we are confident that measures can be put in place to reduce that risk. As a 'one- off' transition event it would benefit from the added expertise, investment and resources that are assigned to the implementation project, which are not available on an ongoing basis. Therefore, any risk presented by a single, exceptional transition event, is significantly lower overall than the ongoing risk of standard practice being three transition points for all pupils compared to two."

242. As the second claimant has identified, the defendant did not have regard to the adverse impact on SEND pupils that he contends flows from the change to the transition points as a result of the decision to move from a three-tier to a two-tier structure. Mr Broach makes the fair point that some of the defendant's submissions as to the basis for its view that there is no adverse impact are submissions, not evidence. Insofar as the submissions are unsupported by evidence, I have not taken them into account.

243. Nevertheless, the defendant's view is supported by the evidence. Ms Walker states (at paragraph 72):

> "It is my view (and is a view that has been expressed to me repeatedly by Julian Wooster, the Director of Children's Services in SCC), that the balance of evidence is that every educational transition point presents a risk to children with vulnerabilities. Reducing the number of transition points in any education system reduces the risk to children with vulnerabilities (including, but not restricted to, children with SEND) and is therefore desirable."

244. This reflects the view she expressed in her report to Cabinet prior to the Stage 1 consultation (the Officer's First Report) where Ms Walker said: "It is possible to maintain a flourishing system with a greater number of transition points. However, every transition point presents a risk for vulnerable pupils, and therefore there is merit in reducing transitions as part of this change project." It is also reflected in the Detailed Stage 1 Proposals document (para 10).

245. The FS Report states:

> "9.9.1 This scenario proposes that all pupils will transition directly from primary to secondary education after Year 6, this means a reduction to optimal position of only one transition, which could provide greater continuity for the more vulnerable (reducing anxiety for some students) and minimise impact associated with poor transition."

246. At 10.8.1, transition directly from primary to secondary education after year 6 is again described as the "optimal position". The FS Report addressed transition in the context of the hybrid options (5C and 5D) at 11.8.1 and 11.18.1 in very similar terms to the quotation from 9.9.1, adding "This is effectively the same as the optimal scenario under the two-tier system, but with transitions happening at a younger age during 'primary' years." The single transition envisaged was at the age of 9 to a combined (and so likely larger) middle and upper school. The fact that FS identified two transitions as potentially having a negative impact on vulnerable pupils, whereas there was no suggestion that moving the single transition point to even younger than under the ordinary two-tier system would be disadvantageous, supports the defendant's submission that it is well established that reducing the number of transition points is better for pupils with SEND and those with vulnerabilities.

247. The second claimant's submissions focused on the transition being brought forward from age 13 to age 11, but ignored the fact it could equally be said that the proposal pushes back the age at which pupils first transition from age 9 to age 11, as well as halving the transitions. While HP refers to her own and others' concerns, a common view expressed by those responding to the Stage 0 consultation was: "I believe that fewer transition points would be helpful for children with SEND and other vulnerabilities".

248. The contention that the defendant ought to have investigated whether the change from a three-tier to a two-tier system would adversely affect pupils with SEND by reason of the change to transition points has to be viewed against the backdrop that this is a field in which the defendant's officers have expertise and the proposed change is to a structure that is already in operation in the vast majority of the country. In addition, even with the proposal to increase the number of pupils at Wadham, it would not be larger than an average secondary school.

249. In my judgement, there was no failure of the part of the defendant to comply with the PSED in respect of the protected characteristic of disability. The defendant's rational assessment was that the effect of changing from a three-tier to a two-tier structure was beneficial for pupils with SEND and other vulnerabilities. There is no expert evidence to the contrary. The adverse impact which is the premise for this argument has not been made out.

250. The starting point for considering the argument with respect to the protected characteristic of religion or belief is the existing distribution of denominational and non-denominational places. For those preferring to send their children to CofE schools the current position results in what Ms Hannett vividly described as a "secular sandwich":

i) There are five CofE first schools: Ashlands (in Crewkerne), Greenfylde (in Ilminster), Haselbury Plucknett (north east of Crewkerne), Misterton (south east of Crewkerne) and St Bartholomew's (in Crewkerne).

ii) There are no CofE middle schools.

iii) The upper school, Wadham (in Crewkerne), is a CofE school.

iv) In addition, there are three CofE primary schools: Hinton St George (between Ilminster and Crewkerne), Shepton Beauchamp (in Ilminster) and St Mary's (in Ilminster).

251. The effect of this arrangement is that it is not currently possible for a child to be educated at all stages in CofE schools in the Crewkerne and Ilminster area. Parents can choose the three-tier system, in which case they can choose a CofE first and upper school, but have no choice other than a non-denominational school at middle school level. Or they can choose a CofE primary school and then transfer to a CofE school outside the Crewkerne and Ilminster area at secondary level.

252. The effect of the defendant's decision is to plug the gap in provision of CofE places in the area for those in years 5-8:

i) Four of the five CofE first schools become primary schools (in one case via amalgamation), creating new CofE places in years 5 and 6 at four schools.

ii) One CofE first school closes (with the loss of CofE school places in reception to year 4).

iii) The three existing CofE primary schools continue unchanged.

iv) The upper school becomes a secondary school, creating new CofE places in years 7 and 8.

As a result of the decision, parents are able to send their children to CofE schools in the Crewkerne and Ilminster area for the whole of their schooling, if they wish.

253. For those wishing to send their children to non-denominational schools, the current position is:

i) There is one non-denominational first school: Merriott (north of Crewkerne).

ii) There are two non-denominational middle schools: Maiden Beech (in Crewkerne) and Swanmead (in Ilminster).

iii) There is no non-denominational upper school.

254. The effect of this arrangement is that it is not possible for a child to be educated at all stages in non-denominational schools in the Crewkerne and Ilminster area. It is possible to choose non-denominational first and middle schools, but to continue in non-denominational schools after the age of 13 a child would have to attend a secondary school outside the Crewkerne and Ilminster area. That would involve transferring at an abnormal transition point into the two-tier system that exists in neighbouring areas.

255. As far as non-denominational schools are concerned, the effect of the defendant's decision is:

i) The one non-denominational first school becomes a primary school (north of Crewkerne), increasing the non-denominational places available in years 5 and 6.

ii) One of the two non-denominational middle schools becomes a primary school (in Crewkerne), resulting in the gain of non-denominational places in reception to year 4 and the loss of non-denominational places in years 7 and 8.

iii) One of the two middle schools amalgamates with a CofE first school, ceasing to be a non-denominational school, resulting in the loss of non-denominational places in years 5 to 8.

256. For those wanting a non-religious school, the decision has the adverse effect that it results (i) in the number of non-denominational schools reducing from three to two; (ii) it ceases to be possible to educate a child in a non-denominational school in the area in years 7 and 8; (iii) the number of non-denominational places reduces and, in Ilminster, it reduces to 0. On the other hand, it has the beneficial effects: (i) of creating a choice between two non-denominational primary schools; and (ii) if a parent wishes their child to attend a non-denominational secondary school outside the area, they can transfer at the natural transition point.

257. The EqIA (v.4) addressed the protected characteristic of religion or belief in the following terms:

> "One of the principles which have informed the model that formed the basis of the consultation is: "the option to choose a church school should be retained in each locality".
>
> The proposal would safeguard access to church schools in the area as there would be no loss of places.
>
> However, there would be a reduction of non-church school spaces at middle school level. While this reduces choice, at present pupils in the Ilminster area do not have choice between a church and non-church option at any stage of their education, therefore the degree of choice is not reduced.
>
> In Crewkerne, there would be a non-church primary option which did not previously exist, which will increase choice."

A box was marked to indicate it was assessed that the Statutory Proposal would have a "positive outcome" for those with the protected characteristic of religion or belief.

258. The second half of the passage addresses the protected characteristic from the perspective of those wishing to choose non-denominational education. The third paragraph is awkwardly worded. At first sight, it may appear, as the second claimant suggests, to be internally inconsistent. However, on analysis, it is reasonably clear why it was assessed, looking at the overall impact, that the *degree* of choice was not reduced.

It is also reasonably clear why the Statutory Proposal was assessed as positive for those with this protected characteristic. A combined mark was given reflecting the positive impact on those choosing CofE schools and the broadly neutral impact on those choosing non-denominational schools in the area as a whole. I also bear in mind that it is not appropriate to engage in an overly-forensic critique of an equality impact assessment. The Court is concerned with matters of substance, not form.

259. The Cabinet made their decision having regard to, amongst other documents, the EqIA and the Officer's Third Report which expressly drew their attention to the EqIA and to the tables in the Statutory Proposal addressing the balance of provision at primary schools in the area.

260. I readily accept that this ground is arguable but, on balance, in my judgement, the evidence demonstrates that the defendant has had due regard to the need to eliminate unlawful discrimination and, most pertinently, to the need to advance equality of opportunity for those having the protected characteristic of religion or belief by reason of having no religion.

261. In light of my conclusions, it is unnecessary to address, the questions of relief raised by the defendant by reference to second claimant's alleged lack of sufficient interest in declaratory relief or s.31(2A) of the Senior Courts Act 1981.

H. GROUND FIVE: INDIRECT DISCRIMINATION (S.19 EA 2010)

262. The second claimant alleges that the decision unlawfully indirectly discriminates against him, contrary to s.19 of the EA 2010 (cited in paragraph 32 above). In this context, he relies (only) on the protected characteristic of 'religion or belief'. The defendant accepts that, for the purposes of s.19(1), the decision amounts to a 'provision, criterion or practice'.

263. It is common ground that the second claimant has to establish that the decision puts or would put people who have no religious belief at a particular disadvantage when compared with persons who do not have this protected characteristic; and it puts or would put the second claimant at this particular disadvantage. If these criteria are met, it is for the defendant to show that the decision is a proportionate means of achieving a legitimate aim.

264. The second claimant contends the decision puts people who have no religious belief at a particular disadvantage because the effect is that they have no option to attend a non-religious school in Ilminster. Swanmead, the only non-denominational school in Ilminster, will become part of a split site CofE primary school. The decision has the effect that the number of non-denominational school places in Ilminster will be reduced to zero. Whereas there will be three CofE primary schools in Ilminster: the new Greenfylde/Swanmead school, as well as Shepton Beauchamp and St Mary's. And he contends it puts him at this particular disadvantage.

265. The defendant contends the first criterion is not met. On the contrary, the decision will make it easier for a parent to select a secular school for the duration of a child's academic career. In any event, if any disadvantage arises, it is modest, a factor which goes to the question of justification.

266. I am persuaded that the decision puts people in Ilminster who have no religious belief at a particular disadvantage because they will no longer be able to send a child to a non-denominational school in Ilminster for any part of their education, whereas there is a choice of three CofE primary schools in the town. I address the extent of the disadvantage below.

267. The defendant contends that even if the decision puts the relevant group at a particular disadvantage, it does not put the second claimant at that disadvantage. The second claimant does not live in Ilminster. Ms Walker states at paragraph 71:

> "… BB, through HP, has alleged that it is important to him to attend a secular middle school. However, BB currently attends a church school, Greenfylde Church of England First school. BB lives in Westport, which is not in the catchment of Greenfylde. In fact, the nearest primary school to his home is Hambridge, a secular school, which has vacant places. Greenfylde is only the eighth nearest school to BB's place of residence."

268. In her first statement, HP explained her wish for her son to attend Swanmead:

> "I chose the Ilminster three-tier school system because of the nurturing support I know Swanmead provides (from personal experience) and because we are very much part of the Ilminster community, but most importantly because I want my son to attend Swanmead, a non-faith middle-school. I consider it to be extremely important for my son to experience some time in a non-faith provision rather than an imposed religious environment. We are not Church of England, which is why I considered his future attendance at Swanmead to be an important element of his education career."

269. HP acknowledged in her first statement that her son currently attends a faith school, and that their closest primary school is a non-faith school. She has explained her choice of school for BB in her two statements. First, she did not consider that Hambridge would provide the type of nurturing environment BB requires, in view of his vulnerabilities. Secondly, Hambridge is a primary school, not a first school, and HP deliberately chose to educate BB in the three-tier system. Thirdly, HP works in Ilminster a short walk from Greenfylde (which is very close to Swanmead). Fourthly, BB's grandmother lives in Ilminster and she is able to collect him from school when HP cannot, and she sees him and looks after him after school; whereas she would not be able to do so if he attended Hambridge because she cannot drive and there is no public transport. Fifthly, when HP chose Greenfylde she anticipated being able to send BB to a non-denominational middle school.

270. I accept the second claimant's contention that the decision will put him at the same particular disadvantage as the group. For the reasons given by his mother, it is evident that he and his family are part of the Ilminster community, although he does not live there. Although he is currently attending a CofE school by choice, I readily accept that his mother genuinely wished for him to have the opportunity to attend a non-faith school for a significant part of his education. The effect of the decision is that he will remain in a CofE school for two years longer than she had intended and he will not be able to

attend a CofE middle school. It also appears that Wadham will be his closest secondary school, and so the effect of the decision is that he will only be able to attend a non-faith school if he chooses a secondary school that is more distance both from his home and his mother's work. This will make it harder for him to attend a non-religious school for part of his education.

271. Justification is for the defendant to establish. The defendant advances as legitimate aims (i) the need for a coherent and efficient system of education, (ii) the educational advantages related to a two-tier over a three-tier system; and (iii) the saving of resources. The defendant contends, essentially for the reasons I have addressed in relation to ground four, that any disadvantage is very modest, and justified and proportionate to the identified aims.

272. Ms Hannett emphasises that the independent reviewers, FS, were unable to identify any model, other than 'do nothing', in which Swanmead was retained as a middle school, or as a middle/upper school. Given that the only other middle school was an academy, even the options identified in the FS Report which sought to retain a hybrid version of the three-tier system involved the proposed closure of Swanmead. No alternative has been identified which would avoid the loss of non-denominational places at Swanmead while addressing the identified problems.

273. The second claimant submits that the defendant cannot justify the decision as being proportionate, given that the failures alleged in relation to consultation and the PSED mean that it cannot be said there are no alternatives which involve less interference. It is no answer to this to say that no alternatives came forward, given the failures in consultation process. Mr Broach submits that the defendant has not acknowledged the disadvantage and so it has not done the work required to justify the decision.

274. In my judgement, the defendant has shown that the decision is a proportionate means of achieving the legitimate aims relied upon. It is not disputed that providing a coherent and efficient system of education, and saving public resources, are legitimate aims. I agree with the defendant that the disadvantage is modest, and particularly felt in Ilminster. In the Crewkerne and Ilminster area, the decision creates a choice between two non-faith primary schools, and increases the overall numbers of secular primary school places. There will be no secular secondary school, but that situation is not brought about by the decision: it is because there is, currently, no non-faith upper school. For those in the area who choose one of the non-faith primary schools, the decision has the beneficial effect that if they wish to continue in a non-faith secondary school, they will transfer at the natural transition point for neighbouring schools.

275. No alternative which would meet the defendant's legitimate aims, and that would result in a lesser interference, has been identified. As I have rejected grounds one and four, it follows that this aspect of the second claimant's argument must fail.

I. GROUND SIX: ARTICLE 14 OF THE ECHR

276. The second claimant contends that the decision has a differential impact on children, including him, who have no religion; and that the impact has not been justified. The decision is, he contends, incompatible with his article 14 rights, and so the defendant has breached s.6(1) of the HRA.

277. There is no dispute as to the law. The Court should follow the approach identified in *Re McLaughlin* [2018] UKSC 48, [2018] 1 WLR 4250, per Baroness Hale of Richmond PSC at [15] and in *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2021] 3 WLR 428, per Lord Reed PSC at [37].

278. The first question is whether the circumstances fall within the ambit of one or more of the Convention rights. Ms Hannett accepts that if I were to find that the decision puts or will put the second claimant at a disadvantage (in the context of ground five), the defendant's argument that the link to article 9 or article 2 of protocol 1 is too tenuous would fall away. This matter is within the ambit of those two rights. It is unnecessary to address the argument as to whether it is also within the ambit of article 8.

279. It also follows from the analysis above that there has been a difference in the treatment of persons in analogous situations, based on the identifiable characteristic of being of no religion. The impact of the decision on children in Ilminster with no religion is more severe than the impact on those of the Anglican faith.

280. Such a difference of treatment is discriminatory if it has no objective and reasonable justification. What has to be justified under article 14 is the difference in treatment arising from the decision: see *A v Criminal Injuries Compensation Authority* [2021] UKSC 27, [2021] 1 WLR 3746, per Lord Lloyd-Jones JSC at [80]. Although the focus is on the impact, rather than the decision *per se*, the defendant and the second claimant both rely on the same matters as raised in respect of ground five in support of their submissions, respectively, that justification is, or is not, made out.

281. I agree with the defendant that the difference in focus does not lead to a different conclusion to that which I have reached in respect of ground five. The defendant has shown that there is a reasonable relationship of proportionality between the means employed and the legitimate aims sought to be realised. Accordingly, I reject this ground of challenge.

J. GROUND SEVEN: IRRATIONALITY

282. There are two aspects to this ground of challenge. First, the claimants rely on the warning in the FS Report that changes would most likely prove non-deliverable without the support of key stakeholders, taken together with the evidence that a high proportion of respondents to the consultations objected to the proposals, and in particular there was overwhelming opposition to the closure of Misterton. In this context, the defendant contends the decision is irrational in both the senses described by the Divisional Court in *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin), [2019] 1 WLR 1649 (at [98]), that is, it is outside the range of reasonable decisions open to the decision-maker and there is a demonstrable flaw in the reasoning that led to it. This contention is based on the premise that (a) the defendant unlawfully failed to consult stakeholders and/or (b) failed to heed FS's warning.

283. I have rejected the claim that the consultation was unlawful, so the first premise falls away. I have addressed FS's warning in paragraphs 189 to 193 above. The evidence (including the confidential annex to the Officer's Second Report) shows that the defendant paid proper heed to the risk of non-cooperation scuppering implementation of the proposal, but rationally assessed that the risk was low. It follows that the second premise also falls away.

284. It is true that the responses to the consultation exercises show a high proportion of respondents were opposed to the proposals, and opposition to the closure of Misterton amongst respondents was especially high. But it does not follow from that lack of support that it was irrational for the defendant to adopt the Statutory Proposals.

285. Secondly, the claimants allege a breach of the defendant's *Tameside* duty. There is no dispute as to the law. As Morris J stated in *ECMA* at [183]:

> "A decision-maker is under a duty of inquiry: a duty to ask himself the right question and to take reasonable steps to acquaint him or herself with the relevant information to enable him to answer it correctly: *Tameside*, supra, at 1065. Subject to Wednesbury challenge, it is for the decision-maker and not the court to conclude what is relevant and to decide upon the manner and intensity of inquiry to be undertaken into any relevant factor accepted or demonstrated as such. The court should only strike down a decision not to make further inquiries if no reasonable decision-maker, possessed of material before the decision-maker, could suppose that the inquiries made were sufficient: Khatun, supra, at §35."

286. The claimants contend the defendant is in breach of its *Tameside* duty by reason of failing to carry out the detailed cost/benefit analysis advised by FS. The FS Report stated:

> "A detailed cost/benefit analysis of baseline Scenario 1A against other options is recommended so the limitations and constraints of proceeding with changes for natural growth only are fully understood, in terms of continued impact on education provision (and potential future performance) and finances. All proposed improvement scenarios require increased levels of Capital expenditure and have potential revenue cost associated with factors such as travel; this needs to be better understood in relation to likely ongoing financial deficits and baseline capital funding requirements."

287. The defendant acknowledges that it did not undertake the detailed cost/benefit analysis advised by FS. The reason for not doing so is explained by Ms Walker at paragraph 41:

> "[I]t became clear once cost/analysis was commenced that this would not be the finely balanced affair that it first appeared. At first glance, the costs of 'do nothing' versus 're-organise' are relatively similar, and it involves a lot of detailed work to account for all factors and weigh one against the other over twenty years. However, having started this work with the pre-supposition, it only then because [sic] clear that there was one, very expensive factor that made more detailed work unnecessary. That factor was that there was a longstanding pre-existing planning proposal in Crewkerne (the Key Site) which included a new first school to replace Ashlands. The finances for this build were only ever expected to partly cover the cost, with

> an expectation that SCC would fund £5 million from borrowing alongside the developer's contribution. Once it was identified that the new model would mean it would be no longer necessary to take forward a new first school in Crewkerne, the scale of the saving meant that any further, more detailed analysis was never going to outweigh this very significant advantage to the proposed change. I do not believe this was a factor that FfS took into account in their judgement about the complexity of weighing cost and benefit. As it happens, the detailed financial analysis that was undertaken in establishing the cost of change, still resulted in an overall saving over 20 years of £7.9 million in total."

288. The claimant contends that the defendant has failed to explain why the saving could not have been gained by other models, too. However, I accept Ms Hannett's submissions that the reason the saving was unique to this model is because it was the only one that pushed capacity down the year groups by keeping almost all the schools open, and using the capacity of both middle schools for primary age pupils.

289. The reason given for not undertaking a more detailed cost/benefit analysis is rational. In the circumstances, I am not persuaded that no reasonable decision-maker would have failed to make further enquiry before taking the decision.

K. CONCLUSIONS

290. For the reasons I have given, the claimants have not established any of their grounds of challenge. Accordingly, this claim for judicial review is dismissed.