



Secretary of State for Education

Our Ref: DRO/AJG/THE-10061-001

By Email

Your Ref:

Date: 16 June, 2020

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(Please ensure that our full reference is quoted when using Email)

## PRE-ACTION PROTOCOL LETTER

Dear Sirs

### COVID-19/Free School Meals and the Summer Holidays

1. We write further to your letter of 11 June 2020 and our previous correspondence.
2. You have now confirmed that the national voucher scheme (NVS) will continue until the end of the current school term.
3. As our previous correspondence refers, on 4 June the Government decided that the NVS would not be made available over the forthcoming summer holiday. In our letter of 8 June we asked for the reasons for that decision. In your letter of 11 June you explained:

*“As has been repeatedly and publicly stated, free school meals are not normally provided during school holidays and the current voucher scheme will therefore come to an end as schools close for the summer.”*

4. That free school meals (FSM) are not normally provided during school holidays did not of course prevent the Defendant from providing FSM (in the form of the NVS) during the Easter and Whitsun holidays in order to address the consequences of the pandemic for children eligible for FSM (“eligible children”). For the reasons previously stated, those consequences will have worsened by the time of the summer holidays and hence the

justification for extending FSM was even greater. The NVS was the obvious (although not the only) means by which the Defendant could have done that.

5. Therefore, the decision not to extend NVS over the summer simply because “free school meals are not normally provided during school holidays” leaves us in no doubt that the Defendant has now decided he will not provide FSM to the 1.3 million eligible children during the 2020 school summer holiday. This letter is a challenge to that decision.
6. We set out matters pursuant to the judicial review pre-action protocol below. The background facts have already been set out in detail in our previous letters. We ask that this letter is read alongside our previous correspondence.

### **Proposed Claimants**

7. Sustain and the Good Law Project.

### **Proposed Defendant**

8. Secretary of State for Education

### **Our reference details**

9. DRO/THE-10061-001

### **Decision being challenged**

10. The decision not to provide or make arrangements for the provision of financial assistance for the purposes of ensuring that provision of free school meals is made for all eligible children during the 2020 summer school holiday (“the decision not to provide FSM during the 2020 school summer holiday”).

### **Factual background**

11. The factual background is set out in detail in our letter of 4 June 2020 to which we refer. For ease of reference, we repeat and update the summary set out in our letter of 8 June 2020.

12. Schools closed on 20 March 2020. The overwhelming majority of children who were eligible for FSM thus stopped going to school. The Government recognised that these children needed support. Some efforts were initially made by schools and Local Authorities to provide meals and food vouchers for eligible children, but the Government realised that a more scalable solution was required, and thus within days of announcing the closure of schools it awarded a contract for a voucher scheme to Edenred, a company with experience of administering childcare vouchers.
13. The voucher scheme had (well publicised) teething problems when it started, but has now settled down and is running more smoothly. It has provided voucher codes to schools equivalent to over 50 million meals to date.
14. The pandemic has caused significant economic hardship. Almost 2 million people have applied for Universal Credit, and many have lost their jobs, had hours reduced, or have been furloughed. The number of people experiencing food insecurity has quadrupled. Food bank use has surged.
15. The Government, in response, made the decision to extend support for children on FSM through the Easter and Whitsun holidays. The mechanism they used to do it was the NVS. It was done despite modest increases having already been to Universal Credit, Working Tax Credit and maximum Local Housing Allowance rates.
16. On 4 June 2020 the Government announced (to lobby journalists) the decision that the voucher scheme would not continue through the summer holidays. On 5 June 2020, in response to our correspondence, the Government stated that (in the context of summer provision) "*the decision making is still actively taking place*".
17. On 10 June 2020 the Prime Minister announced a £63m contribution from central Government to the local authority welfare assistance fund "to assist those struggling for food and other essentials". As the DfE Twitter account put it the next day "*While free school meal vouchers are only available during term time, the Government has pledged £63million for local authorities to assist those struggling to afford food due to coronavirus.*"

18. Despite this assertion from the DfE, and their linking it to FSM, there is no indication, either from the Government press release announcing this fund or in briefings given to our clients and others that (i) this money is solely to assist with food (it is stated as being “to help those who are struggling to afford food and other essentials”), or (ii) it is solely for children (or even families with children). There is no restriction on adults without children accessing the fund.
19. Food insecure children will thus be ‘competing’ with adults and non-food related needs in relation to these funds. Non-food needs that are often covered by local authority welfare funds include white goods, nappies, toiletries, emergency transport and other essentials. Furthermore, the £63m is seemingly not restricted to helping recipients during the six week school summer holiday.
20. Moreover, our clients believe there are other deficiencies in the welfare fund approach that will significantly undermine the ability to tackle food insecurity amongst FSM children, including that:
- a. Many families who need the help are reluctant to approach local authorities for support (believing that it may lead to involvement from social services, which has negative connotations for many). By contrast, schools are often the route by which they seek help when required, as there is a greater degree of trust.
  - b. 100,000 children with NRPF who are eligible for FSM are currently prevented from accessing local authority welfare support.<sup>1</sup>
21. The Government has indicated that the £63m fund will be allocated to local authorities according to need. It is not clear how this need will be assessed or if there will be a competitive process for allocation. It is not clear if all local authorities will be eligible to apply for the fund; whether all local authorities will have the intention to apply; and whether

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<sup>1</sup> <https://www.childrenssociety.org.uk/news-and-blogs/press-releases/the-children%20%99s-society-responds-to-the-boris-johnsons-questions-about>

all have a functioning welfare assistance mechanism in place to be able to reach eligible children.

22. Nor of course is the money for the welfare fund ring-fenced in any way. Local authority welfare fund spending is discretionary and entirely dependent upon criteria set by individual councils. Local Authorities have, as the Government knows, significant financial pressures at present, and are having difficulty meeting statutory obligations, let alone discretionary ones.<sup>2</sup> The evidence suggests that even with extra resources those Councils that have retained welfare schemes are struggling to meet demand, particularly post-COVID 19.<sup>3</sup> There is no guarantee that some of £63m will not go to the administration of the scheme, or even that all of the £63m will not be spent on other pressing needs.
23. Even were that not the case and all of the £63m were directed towards providing free school meals to children eligible for FSM, given that the Government's own calculation (which informed the voucher scheme) is that a supplement of £15pw per child towards food is required, the welfare fund would be insufficient in amount. Even using the figure of 1.3 million children on FSM (which is a significant underestimate of those now eligible given the rise in UC claims caused by the pandemic), to provide every vulnerable child with an emergency food fund would cost £117m at £15 per week – the current level for FSM vouchers.
24. Therefore, even insofar as the use of local authority welfare funds is an appropriate solution to food insecurity amongst children eligible for FSM, which for the reasons relating to ring-fencing and discretion criteria they plainly are not, the Government has made insufficient money available to achieve that purpose.
25. The only other scheme of which our clients are aware is the "Holiday Activities Fund" scheme, which has been suggested a number of times by the DfE in the context of holiday hunger (most pertinently on 4 June when the Government announced the NVS would not

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<sup>2</sup> Indeed, there has been a £250m reduction in money spent on LA welfare schemes over the past 10 years, precisely because they are not statutory and are discretionary (Children's Society "*Leave no Family Behind*" May 2020 p9)

<sup>3</sup> See above p20

be extended over the summer holiday). As valuable as our clients believe this scheme to be, its scope does not come anywhere near an alternative solution. As the Minister has said, it will help ‘thousands’ of children. The problem is that the number of children on FSM is not in the thousands. At the last census (from 2019) it was 1.3 million.

26. The number who will now be eligible (whether or not they have yet claimed them – given that applications rely on input from schools which are closed) will be far higher than that. The HAF scheme (with a budget of £9m) aims to reach 50,000 children. Our clients understand that 10 bids out of more than 60 were successful, and that the scheme will only be running in 17 local authority areas. Only a small proportion of the money for the schemes (which only run for 4 weeks of the holidays) goes on food. The rest goes on staff costs and the activities themselves. Eligibility for the scheme is not always restricted to children on FSM.

## **Law**

### General duties of the Secretary of State

27. By s.10 of the Education Act 1996 the Defendant shall promote the education of the people of England and by s.7 of the Children and Young Person’s Act 2008 it is his general duty to promote the well-being of children in England. The activities which may be undertaken or supported in the discharge of the s.7 duty include activities in connection with parenting. When discharging functions under s.7 the Defendant must have regard to the aspects of well-being mentioned in section 10(2)(a) to (e) of the Children Act 2004: (a) physical and mental health and emotional well-being; (b) protection from harm and neglect; (c) education, training and recreation; (d) the contribution made by them to society; (e) social and economic well-being.
28. Whilst general duties of the type contained in s.10 and s.7 are not normally directly enforceable by individuals seeking specific provision for themselves, they at the very least

identify "the general objectives by reference to which the Secretary of State must exercise his functions."<sup>4</sup>

Power of the Secretary of State to make financial provision

29. By virtue of s.14 of the Education Act 2002 the Defendant:

"may give, or make arrangements for the giving of, financial assistance to any person for or in connection with ... the promotion of the welfare of children and their parents and ... the provision of support for parenting (including support for prospective parents.)"

Meals provided to school pupils

30. Local authorities have a power to provide pupils at maintained schools with meals on school premises or any other place where education is being provided (s.512(1),(2) Education Act 1996). Unless unreasonable to do so, local authorities must exercise that power to provide school lunches<sup>5</sup> where requirements prescribed by order of the Defendant are met,<sup>6</sup> a request has been made by or on behalf of the child and the child is eligible for free lunches within the meaning of section 512ZB(2) of the 1996 Act (s.512(3)).<sup>7</sup> Eligible children include those whose parents are in receipt of income support, income based JSA, income based ESA, Universal Credit (UC) if their earnings are below £7,400, asylum support pursuant to the Immigration and Asylum Act 1999, Pension

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<sup>4</sup> Lord Wilson in *R (A) Secretary of State for Health (Alliance for Choice and other intervening)* [2017] UKSC 41, [2017] 1 WLR 2492 re s.1 of the National Health Service Act 2006.

<sup>5</sup> Food made available for consumption by the pupil as his midday meal on a school day. A "school day" in relation to a school, means any day on which at that school there is a school session (s.579 Education Act 1996).

<sup>6</sup> Education (School Lunches) (Prescribed Requirements) (England) Order 2003

<sup>7</sup> Eligibility is defined in s512ZB and various pieces of secondary legislation: Free School Lunches and Milk, and School and Early Years Finance (Amendments Relating to Universal Credit) (England) Regulations 2018; various orders: Education (Free School Lunches) (Prescribed Tax Credits) (England) Order 2003, Education (Free School Lunches) (State Pension Credit) Order 2005, Education (Free School Lunches) (Working Tax Credit) (England) Order 2009

Credit, Child Tax Credit (where not also on Working Tax Credit and annual income not exceeding £16,190) and Working Tax Credit (where by virtue of reg. 7D of the WTC regulations). The Government allowed families with leave to remain in the UK that is subject to a No Recourse to Public Funds condition to also obtain FSM when otherwise entitled.

31. Local authorities can charge cost price for meals provided pursuant to 512(1) but school lunches for eligible children must be free (s.512ZA).<sup>8</sup>
32. The provision of school meals by local education authorities is a “function with respect to education” (*R (Transport & General Workers Union) v Walsall Metropolitan Borough Council* [2001] EWHC Admin 452 at [36]).
33. Local authorities shall make arrangements for ensuring that their education functions are exercised with a view to safeguarding and promoting the welfare of children (s.175 Education Act 2002). In considering what arrangements are required to be made by them under that subsection, local authorities must have regard to any guidance given from time to time (in relation to England) by the Secretary of State (s.175(4)).

#### Local authority welfare provision

34. In April 2013 the Department for Work and Pensions ('DWP') abolished the Crisis Loan and Community Care Grant elements of the Discretionary Social Fund and provided funding to upper tier local authorities in England to support the delivery of 'local welfare schemes' through s.2 of the Local Government Act 2000.
35. By s.2 Local Government Act 2000 every local authority has the power to do anything they consider is likely to achieve one or more of the following objects: (a) the promotion or improvement of the economic well-being of their area, (b) the promotion or improvement of the social well-being of their area, and (c) the promotion or improvement

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<sup>8</sup> The Defendant has the power to transfer the function of providing school lunches to governing bodies 512A(2) and arrangements in relation to academy schools must include provision by them of free school lunches (512B).

of the environmental well-being of their area. The power under subsection (1) may be exercised in relation to or for the benefit of (a) the whole or any part of a local authority's area, or (b) all or any persons resident or present in a local authority's area.

36. Funding of local welfare schemes was moved into the general Revenue Support Grant from 2015/16 onwards. Councils have since had to make significant savings and this has resulted in a number of authorities completely closing their schemes and many more considerably reducing their level of support (Centre for Responsible Credit "*Decline in Local Welfare Schemes*" September 2017).

#### Human Rights Act 1998

37. The Defendant has a duty to act compatibly with the rights contained in the European Convention of Human Rights (s.6 Human Rights Act 1998).

#### Equality Act 2010

38. By section 29(1) and (2) of the Equality Act, a person concerned with the provision of services to the public, or a section of the public, whether or not for payment, must not discriminate by not providing the service, or as to the terms on which it is provided, or by terminating it, or by subjecting a person to whom the service is provided to any detriment. By section 31(3), this applies to the provision of a service in the exercise of a public function; by section 31(4), a public function is a function of a public nature for the purpose of the Human Rights Act 1998. Section 29(6) provides that: A person must not, in the exercise of a public function that is not the provision of a service to the public, do anything that constitutes discrimination, harassment or victimisation.

39. Section 19(1) and (2) define indirect discrimination as follows:

"(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 Bs 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.”

40. The public sector equality duty in s.149 Equality Act 2010 requires a public authority when exercising its functions to have due regard to the need to—

“(1)(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(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”

### **Grounds of challenge**

41. The Defendant has the power to provide financial assistance to local authorities, multi-academy trusts, schools or individuals for the purposes of providing or securing the provision of free meals during the 2020 summer holiday to children eligible for FSM. That power has to be exercised having regard inter alia to the Defendant’s general duty to promote the education and welfare of children. Insofar as the Defendant chose to make

funds available to local authorities the Defendant could use his guidance making power to direct the manner in which such funds should be used to secure FSM during the holiday.

42. As stated above, the Defendant has decided not to exercise this power (or any other power) for the purposes of ensuring that provision of free school meals is made for all eligible children during the 2020 school summer holiday (“the decision not to provide FSM during the 2020 school summer holiday” or “the decision”).
43. The decision is unlawful on the grounds set out below.

**Ground 1: The Defendant failed to have regard to a relevant consideration: the likely extent of food insecurity and hunger amongst children eligible for FSM over the school summer holiday.**

44. For the reasons extensively set out in our letter of 4 June the pandemic has caused very significant financial hardship for families and individuals such that (a) children who are eligible for FSM are at even greater risk of food insecurity and (b) many more children are or soon to be eligible for FSM.
45. The purpose of FSM is to avoid the irrevocable consequences of food insecurity for children. The heightened risk of imminent food insecurity was the basis of the decision to extend FSM over the Easter and Whitsun holidays. That risk remains and affects even greater numbers of children. The decision of the Defendant means that a child who because of FSM avoided hunger over Easter will go hungry over the summer holidays, along with many others who have become eligible for FSM since Easter.
46. In treating the 2020 summer holiday as being no different from “normal” school holidays, the Defendant failed to have regard to a relevant consideration, namely that the need for FSM for eligible children will be the same if not greater than during the Easter and Whitsun holidays.

**Ground 2. The Defendant had regard to irrelevant considerations: (a) the increases made to Universal Credit, Tax Credits and Local Housing Allowance made on 6**

**April 2020 and (b) the £63m made available to local authorities to provide welfare assistance.**

47. From the contents of the letter of 11 June it seems that the Defendant decided not to make provision for FSM over the summer holiday because of the increases made to Universal Credit, Working Tax Credit and Local Housing Allowance. This was an irrelevant consideration. Not only do they not render a child in a relevant household ineligible for FSM, the said increases predate the decision to extend FSM over the 2020 Easter and Whitsun holidays and will no more obviate the need to extend FSM over the 2020 summer holiday than they did those holidays. As is referred to above, the heightened risk of food insecurity for eligible children pertains.
48. Moreover, the said increases do not (a) impact those on legacy benefits (b) reflect the number of eligible children in households (c) in the case of LHA, supplement subsistence benefits (d) disentitle children from eligibility for FSM or (e) otherwise compensate in amount for the absence of £15 per pupil per week food vouchers. Therefore, even if used exclusively for purchasing meals for eligible children, the increases would be insufficient to address the heightened levels of food insecurity amongst eligible children over the summer holiday.
49. The letter of 11 June also implies that the decision not to extend FSM was made because of the £63m made available to local authorities to provide welfare assistance. This was also implicit in the DfE tweet of 11 June (referred to above).
50. This was also an irrelevant consideration. Local authority welfare assistance funds are not specifically aimed at children, still less free meals for FSM children. On the contrary, the announcement made clear that it is to be used for food and “other essentials”. In any event the money is not ring fenced and the manner of its deployment is a matter of discretion for each local authority.
51. There being no reasonable basis for believing that the extra money for local authority welfare schemes will address food insecurity and hunger amongst children eligible for

FSM over the school summer holiday, it was unlawful of the Defendant to have regard to the money when making the decision.

**Ground 3: Alternatively, insofar as the Defendant decided that (a) the increases made to Universal Credit, Tax Credits and Local Housing Allowance and (b) the £63m made available to local authorities to provide welfare assistance meant FSM did not need to be provided during the summer holiday, this was irrational.**

52. As is explained above, (a) and (b) do not alone or taken together amount to adequate alternative provision for all FSM children. There was no basis for confidence that any of the money involved in (a) and (b) would necessarily be spent on free meals for eligible children during the six-week summer holiday. Indeed, even if the Government had directed that the £63m should be used exclusively for that purpose, the amount would have been plainly insufficient to ensure that all such children are provided with FSM over the summer holiday.

53. Therefore, no reasonable Secretary of State would have decided that all children eligible for FSM would receive equivalent support by virtue of (a) and (b).

54. Alternatively, if the Defendant decided that in fact only some children eligible for FSM would need extra provision and that their needs over the summer would be met by (a) and (b), this decision was equally irrational.

55. First, there was no reasonable basis for the Defendant to differentiate between different groups of FSM children such as to decide that summer provision was necessary for some and not for others. In particular:

- a. The rules regarding FSM eligibility are the established mechanism by which children at risk of food insecurity are identified and provided for. Absent compelling reasons to the contrary, the FSM eligibility criteria were the only rational means of assessing food insecurity amongst children.
- b. The Defendant did not carry out any assessment or inquiries that would permit him to make such a determination.

56. Therefore, no reasonable Secretary of State could rationally conclude that he had sufficient information to enable him to take the decision that only some eligible children required FSM over the summer holiday.
57. Second, even if the Defendant did lawfully determine that only some eligible children needed support over the summer holidays, he had no reasonable basis for concluding that their need for free meals will be met during the summer holiday.
- a. Neither the Defendant nor any other minister has used their powers to direct that support be provided to those eligible children determined to be in need.
  - b. As stated above, the £63m being made available to local authorities is not directed to be spent on children, still less free meals for children eligible for FSM, over the six-week summer holiday.
  - c. No assessment of likely demand for the £63m has been undertaken. It is a fact that not only eligible children (or families with eligible children) will face hardship over the summer holiday. For example, many newly unemployed people are likely to see sudden shortfalls in their incomes which will put pressure on their food budget. Those in this position with children may not be able to have them registered for FSM before the summer holiday starts (particularly as schools are closed) and yet they will be in equal need to those children who are registered and therefore ‘competing’ for the same welfare assistance. The Defendant has not estimated the likely size of this or indeed any other group (including older or disabled people for example) that may approach their local authority for support and therefore has no basis for concluding that £63m will be sufficient to avoid FSM children suffering food insecurity over the summer.
  - d. A reasonable Secretary of State would appreciate the practical and other impediments, including stigma and fear of adverse consequences, that will prevent eligible children from receiving FSM or support with meals from their local social services department.

- e. One group that plainly would be included any rational determination of which eligible children would be at highest risk food insecurity would be those whose leave to remain is subject to an NRPF condition and yet they are one group that is specifically excluded from local authority welfare assistance funds.
58. In all the circumstances, insofar as the Defendant decided that that (a) the increases made to Universal Credit, Tax Credits and Local Housing Allowance and (b) the £63m made available to local authorities to provide welfare assistance meant FSM did not need to be provided during the summer holiday, this was irrational.
- Ground 4: Unreasonable failure to exercise power to provide financial assistance**
59. The Defendant has the power to provide financial assistance to local authorities, multi-academy trusts, schools or individuals for the purposes of providing free meals to children eligible for FSM during the 2020 summer holiday. That power has to be exercised having regard inter alia to the Defendant's general duty to promote the education and welfare of children. For the reasons referred to above, and despite increases made to some benefits, there will be abnormally high levels of food insecurity during the 2020 summer holiday amongst children eligible for FSM that the £63m welfare assistance money will inevitably fail to address.
60. Moreover, it is maintained that the decision offends the common law principle of systemic illegality developed in a line of cases including *R (Detention Action) v First-Tier Tribunal (Immigration and Asylum Chamber)* [2015] 1 WLR 5341 at [27]. This is because (a) the consequences of not making FSM or equivalent available during the summer is that many eligible children will suffer a breach of their Article 3, 8 and 14 rights (see below) and (b) the system of meeting needs for FSM (or avoiding the need from arising) through local authority welfare provision creates an inherent risk that such children will not receive assistance and that risk is unacceptable (see *R (Delezuch) v. Leicestershire Constabulary* [2014] EWCA Civ 1635 at [54].)
61. This risk could readily have been avoided by extending the NVS or an equivalent funding mechanism allocated pro-rata to local authorities, multi-academy trusts or directly to

schools on the basis of the number of eligible children judged to be in need of free school meals over the holiday, with a requirement that the support be given to those eligible children and their families in a clear and accountable way that ensures demonstrable need is met. However, this has not been done.

62. In the circumstances, the decision of the Defendant to not make financial assistance available to provide FSM to all eligible children over the summer holiday, as he did for the Easter and Whitsun holidays, is unreasonable.

**Ground 5. The decision breaches the Equality Act 2010.**

63. The decision causes indirect discrimination against persons sharing the protected characteristic of race. BAME children are disproportionately overrepresented in the class of children eligible for FSM.<sup>9</sup> The decision put BAME children at a particular disadvantage because they are more likely than non-BAME children to suffer food insecurity as a result of the decision not to provide FSM over the school summer holiday.
64. The decision, including the difference in treatment to which it gives rise, is not a proportionate means of achieving a legitimate aim. In particular, there is no basis for concluding that BAME children will be overrepresented in the group of eligible children who may receive assistance with free meals during the holiday by virtue of the welfare assistance fund such as to “overcome” the disadvantage caused by the decision (see *R (Ward/Gullu) v. Hillingdon LBC [2019] EWCA Civ 692* at [86]).
65. Moreover, the Defendant did not appear to have due regard to the needs set out in s.149(1) Equality Act 2010:

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<sup>9</sup> See, for example, the Department for Education’s response to a Freedom of Information request in June 2018, showing e.g. 13.1% of White British pupils in Years 7-11 being eligible for FSM, as opposed to much higher proportions in other ethnic groups (e.g. 20-25% of pupils from Caribbean, African, Pakistani and Bangladeshi pupils, 30% of Gypsy/Roma pupils and 57% of Irish Traveller pupils):  
[https://www.whatdotheyknow.com/request/latest\\_percentage\\_eligible\\_for\\_f](https://www.whatdotheyknow.com/request/latest_percentage_eligible_for_f)

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
  - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
  - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
68. The equalities impacts of the decision needed to be identified and assessed, with any mitigation properly identified. As this was apparently not done the decision is in breach of s.149.
69. A failure to comply with the PSED impacts directly on justification under s.19. As stated in *R (Coll) v. Secretary of State for Justice [2017] 1 WLR 2093 at [42]*"
- "Cranston J's finding that the Secretary of State was in breach of the public sector equality duty also means that the ministry is not in a position to show that the discrimination involved in the different provision made for men and for women is a proportionate means of fulfilling a legitimate aim. It may or may not be. Given that the Ministry has not addressed the possible impacts upon women, assessed whether there is a disadvantage, how significant it is and what might be done to mitigate it or to meet the particular circumstances of women offenders, it cannot show that the present distribution of APs for women is a proportionate means of achieving a legitimate aim."
- Ground 6: The decision is incompatible with Article 3, 8 and 14.**
70. The consequences of a failure to provide FSM to eligible children over the summer holiday is that many of them will suffer inhuman or degrading treatment pursuant to Article 3. Whilst it is recognised that the threshold is high, amongst those affected will be children experiencing pre-existing disadvantage and for whom FSM is their principle source of nutrition. An extended period without FSM risks their mental and physical health.

Moreover, the inability to feed themselves will interfere significantly with their private and family life under Article 8.

71. For the reasons set out above the decision also breaches Article 14 ECHR (taken in conjunction with A1P1 or Article 8<sup>10</sup>). In addition to the race discrimination set out above, it is also clear that being a child, and in particular a child eligible for FSM, are relevant statuses for the purposes of A14 (see e.g. *Mathieson v SSWP* [2015] UKSC 47, [2015] 1 WLR 3250).
72. Children eligible for FSM are in a significantly different position to other potential beneficiaries of the funding provided to local authorities. It is well-established that deprivation and hunger have particular, long-term adverse effects for children. Accordingly, the Government is required to justify failing to treat children eligible for FSM differently to others who may face deprivation (*Thlimmenos v Greece* (2000) 31 EHRR 12) by providing targeted funding sufficient to meet their particular needs, which will not be used up in providing support to others, leaving poor children to go hungry.
73. These ECHR rights must be interpreted and applied consistently with international human rights standards, including the United Nations Convention on the Rights of the Child (“UNCRC”), and in particular Articles 3, 4 and 24 and thereof (see also General Comments Nos. 4, 14, 15 and 19).
74. To date no justification has been provided by the Defendant that would justify the indirect discrimination on the grounds of race or the *Thlimmenos* discrimination against eligible children. In light of the extreme consequences and the extent of food insecurity caused by the consequences of the pandemic there can be no justification for allowing in excess of 1 million children to go without FSM this summer holiday.

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<sup>10</sup> Lord Wilson commented in *R (DA) v SSWP* [2019] UKSC 21, [2019] 1 WLR 3289: “it cannot seriously be disputed that the values underlying the right of ... respect for ... family life include those of a home life underpinned by a degree of stability, practical as well as emotional, and thus by financial resources adequate to meet basic needs, in particular for accommodation, warmth, food and clothing”.

### **Action required**

75. Please confirm by **4pm on Monday 22 June** that either the NVS will continue over the holidays, or that an alternative means of ensuring that all children eligible for free school meals will have access to free meals during the 2020 school summer holiday will be put in place.

### **Documentation and Information required.**

1. Please provide all disclosure including ministerial advice in relation to the decision to make £63m available for expenditure on local authority welfare assistance schemes (whether in the custody of the Defendant or other government departments).
2. Please provide all disclosure including ministerial advice in relation to ministerial decisions regarding the HAF schemes (whether in the custody of the Defendant or other government departments).
3. Please provide all disclosure in relation to the decision not to make free school meals available to all eligible children during the 2020 school summer holiday.
4. For the avoidance of doubt these requests for disclosure are in addition to those made in our letter of 8 June 2020.

We see no reason why this material cannot be provided to us immediately and in any event by **4pm on Monday 22 June**. As you acknowledge in your email, time is of the essence.

### **Interested Parties**

Ministry of Housing, Communities & Local Government

Department for Environment, Food & Rural Affairs

Department for Work and Pensions

**Address for reply and service**

As above. Given current circumstances, please send all correspondence by email, also copying in Ms O'Shea – amy.o'shea@simpsonmillar.co.uk

**Date for response**

**4pm on Monday 22 June** Should a satisfactory response not be received, we reserve the right to issue judicial review proceedings, seeking expedition as well as our costs, without further notice to you.

We appreciate that 14 days is the default period for a response under the JR Pre-action Protocol. However, in light of the urgency of this issue and that you have now been aware of our clients' concerns since 4 June 2020 we consider it necessary and appropriate that time for a response should be abridged.

Please contact us using the details above should you wish to discuss the contents of this letter.

Yours faithfully



**Simpson Millar LLP**