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Your ref: BP/PS/1024

Our ref: Z2603343/SRC/JD5

18 March 2026

Dear Ms Sweeney

R (Hayhurst) v Secretary of State for Education Response to pre-action letter

GLD is instructed to act on behalf of the Secretary of State for Education. We write in response to your letter dated 27th February 2026 in compliance with the pre-action protocol for judicial review claims. We are grateful to your client for agreeing to an extension of time for our substantive response until 18 March. As we set out below, our position is that the proposed claim as set out in your letter will fail because (a) it will be treated as non-justiciable by the Court; and/or in any event (b) it is not arguable on the merits.

We therefore invite you not to launch proceedings, but to continue to raise your concerns through the existing processes leading to the proposed reforming legislation.

If you nevertheless decide to launch proceedings, any claim will be robustly defended and the Secretary of State will claim the costs of defending the claim.

We do not at this stage take the opportunity to respond to every point taken in your letter, rather we focus on the substance of why the claim will fail. Any failure to respond to particular points should not be interpreted as an acceptance of your position on them.

The Claimant

1. The proposed Claimant is Jessica Hayhurst, by her mother and litigation friend Melissa Hayhurst, c/o Rook Irwin Sweeney LLP.

Julia Goring - Head of Division

Emma Parker / Melanie Pennant - Deputy Directors, Team Leaders MOJ, Public Law



The Defendant

2. The proposed Defendant is the Secretary of State for Education.

Reference details

3. We act for the Secretary of State, who is the proposed Defendant in this matter. We would be grateful if any further correspondence could be addressed to GLD at the contact details set out at the top of this letter. The person dealing with this matter to whom correspondence should be directed is [REDACTED] ([REDACTED]). Please quote reference number Z2603343 in any further correspondence.

Details of matter being challenged

4. As set out at section 5 of your letter, we understand that you seek to challenge the lawfulness of the consultation '*SEND reform: putting children and young people first*' ('**the Consultation**'). Your challenge is not against the entirety of this Consultation but in relation to two specific matters referred to in it:
 - a. Change to powers of the Special Educational Needs and Disability Tribunal (which forms part of the First-tier Tribunal (Health, Education and Social Care Chamber)). This is in two respects: (i) its power to order that a particular educational placement be specified in section I of an Education, Health and Care Plan ('**EHC Plan**'); and (ii) its power to order amendments to special educational provision contained in section F of an EHC Plan.
 - b. Placing the duty to deliver the educational offer in an EHC Plan on schools, as opposed to local authorities (as you observe, schools already have a best endeavors duty in relation to this under existing law).
5. You allege that the Secretary of State has acted unlawfully because she has failed to ask questions about these matters in the Consultation. In relation to this you propose three grounds of challenge:
 - a. Unfairness / irrationality in scope of the consultation.
 - b. Breach of the *Tameside* duty of inquiry.
 - c. Unfair / unlawful consultation by failure to comply with the second *Gunning* principle (failure to give sufficient reasons for any proposal to permit intelligent consideration and response).

Response to the proposed claim

Context

6. On 23rd February 2026 the government published both a White Paper entitled '*Every child achieving and thriving*' ('**the White Paper**') and the Consultation. The latter relates specifically to the Government's SEND reform agenda, whereas the White Paper addresses this but also wider reforms. The two are intimately linked, as is obvious; and they are to be read together and as a whole. The White Paper refers explicitly to the Consultation at several points including at pages 13, 19, 40, 47, 48, 49, 51, 52, 55, 56, 72, 101 and 103.
7. The period for consultation is between 23 February and 18 May 2026. Prior to the publication of the White Paper and Consultation, in December 2025 the Government embarked on a national listening exercise which has now concluded. The consideration of the legislation that will be necessary to effect reform will provide a further opportunity for engagement and detailed consideration of the proposals during the passage of that legislation through Parliament.
8. The reasons for what the Government sees as being important and necessary to SEND reform are explained in both the White Paper and the Consultation.

Non-justiciable claim

9. Your claim would amount to an impermissible invitation for the Court to interfere with the Parliamentary process. The Consultation is designed to and will inform legislative change. As already noted, new legislation will be necessary, and is intended, in order to make the reforms to the current scheme that are being consulted on.
10. There are well established constitutional limits to the courts' judicial review function in circumstances like this. See, for example, *R (A, J, K, B and F) and Secretary of State for the Home Department* [2022] EWHC 360 (Admin). At §24 Fordham J asked,

“... does the Court’s supervisory jurisdiction on judicial review extend to the Court policing the Gunning standards, in the context of a consultation which was concerned with “delivering effective legislative change”, and whose culminating substantive decision necessarily entails the design of a Bill of primary legislation to be introduced into Parliament?”

He went on to answer this question in the following way:

“In my judgment, the answer to that question – based on the authorities – is clearly, and beyond reasonable argument, “no””.

That conclusion was based on long established case law, which he cited and analysed, and on equally long-established constitutional principles including Article 9 of the Bill of Rights, the separation of powers and the courts' *“self-denying ordinance in relation to interfering with the proceedings of Parliament”* (a citation from *R (Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (Admin)). He concluded at §§25-26 that the *Gunning* standards could not be applied as this would amount to an inappropriate extension to the Court's supervisory jurisdiction. See also [R \(Police Superintendents Association\) v HM Treasury \[2021\] EWHC 3389 \(Admin\)](#).

11. The Court will similarly hold here that the claim is non-justiciable. Through the White Paper and Consultation, fundamental reform to the SEND system is envisaged that will need to be implemented through primary legislation. This is clear in both the White Paper and Consultation which consistently refer to the reform agenda throughout, but for example at page 57 of the former see reference to *“once legislation is introduced”* and at page 67 of the latter see reference to *“primary legislation”*. The entire consultation, including the points you focus on, is inextricably connected to the Parliamentary process that will lead to primary legislation. How exactly the reforms will ultimately be implemented through primary legislation is a matter for Parliament to consider, which at this stage cannot be pre-judged. The short point is that it is clear that significant primary legislative changes would be necessary and are intended if the reforms under consideration proceed.
12. What follows below is provided for completeness, but the non-justiciability point provides a complete answer to the proposed claim.

Gunning challenge

13. We take first your suggestion that the Secretary of State has failed to comply with the second *Gunning* principle.
14. Here there is no duty to consult. There is no general duty to consult in public law. As the Court of Appeal observed in *R (National Council for Civil Liberties v Secretary of State for the Home Department* [2025] EWCA Civ 571 at §62: *“It is important not to lose sight... that, for better or for worse, the common law recognises no general duty on a public authority decision-maker – or, more particularly, on the Government when contemplating making primary or secondary legislation – to consult those who may be affected...”*

15. A duty to consult has nevertheless been recognised in three limited situations: (a) where there is a statutory duty to consult; (b) where a legitimate expectation to consult has been created (through promise or established past practice); and (c) in exceptional circumstances where not consulting would create conspicuous unfairness (see, for example, §98(2) of *R (Plantagenet) v Secretary of State for Justice* [2014] EWHC 1662 (Admin)). Your letter does not identify any of these situations as being applicable to the circumstances here. Moreover, it is for a public body to determine how a consultation is carried out including the manner and extent of the consultation, see for example §90(v) of *R (Help Refugees Ltd) v Secretary of State for the Home Department* [2018] EWCA Civ 2098 and *R (National Council for Civil Liberties) §124*.
16. In any event, if something has already been decided upon, and there is no duty to consult in relation to the subject matter of that point, then *Gunning* simply has no application. It is open to a decision maker to not consult absent one of the limited circumstances creating a duty being applicable. In relation to the matters you focus on, the Secretary of State has made decisions about them and thus has chosen not to consult on them (hence there are no specific questions about them, and also why at page 21 it states “each section contains relevant consultation questions”). Voluntary consultation only extends as far as the matters on which there has been a decision to consult. The Consultation contains information about the duty to deliver the educational offer in an EHCP being placed on schools, and as to the Tribunal’s powers on an appeal. However, this is contextual information which tells readers of the Secretary of State’s position on them. The Secretary of State is not seeking views or representations on them and is not consulting on them.
17. Finally, it is to be noted that the changes you refer to have to be viewed in their wider context as set out more fully in the White Paper and Consultation, including as to additional funding for SEND that will be made directly available to schools, and as to the changes to EHC Plan content (see, for example, pages 26-29, 46-47, 54-55, 62-69, 82-96 of the Consultation document; see also the White Paper pages 47-59, 101). Whilst what is proposed will result in change, the duty to deliver the educational offer in an EHCP and a right of recourse to a Tribunal will exist in a system that will be designed to improve the deficiencies which exist under the Children and Families Act 2014.

Irrationality and Tameside

18. These grounds add nothing of substance. It is for the Secretary of State to determine the scope and extent of any consultation; and also any enquiries considered to be necessary. There is no basis for any suggestion of irrationality in any part of her decision making, including the extent of inquiries undertaken at this stage.

Relief sought

19. For the reasons given above, the Secretary of State does not propose to act as you invite her to do.

Details of any interested parties

20. You have not identified any and we are not at this stage aware of any.

ADR proposals

21. Your client has not suggested any ADR proposals. Should she do so these will be considered but, as above, there is fundamental disagreement with the position you have set out in your letter before claim.

Address for further correspondence and service of court documents:

22. Please direct further correspondence to the Government Legal Department, noting the reference provided at the beginning of this letter. Issued proceedings can be served by email

on newproceedings@governmentlegal.gov.uk. We would be grateful if a copy could also be sent directly to [REDACTED]

Yours sincerely

A handwritten signature in black ink, consisting of stylized, cursive letters that appear to be 'JG'.

[REDACTED]
For the Treasury Solicitor

T [REDACTED]
E [REDACTED]