

**COVID-19 INQUIRY  
MODULE 8**

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**CLOSING SUBMISSIONS OF DISABLED PEOPLE'S ORGANISATIONS (DPO):  
DISABILITY RIGHTS UK, DISABILITY WALES,  
DISABILITY ACTION NORTHERN IRELAND**

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**INTRODUCTION**

1. **POLICY**: What was done to children and young people, and not directly for them, during the pre-vaccination era of Covid-19 is probably the most controversial, and difficult, of the policy decisions of the pandemic response. There were mass closures of schools to most pupils and easement of statutory duties in education and children's social care ('CSC'). The exceptions were deliberately limited to only the most socially vulnerable of children and young people, with emphasis more on safeguarding than prioritising formative developmental stages. The consequence was that many Disabled children and young people were not offered school places. Those who could not attend (either because they had no place or for health reasons) lost out not only on education, but on other essential support, limiting their access to therapies, specialist care and social services. Consideration and dedicated design of less onerous measures that maintained statutory obligations and allowed for a greater number of children – especially Disabled children and young people – to attend school was necessary.
2. **EXCLUSION**: Of those excluded, arrangements could have been made for in-person attendance for children with SEN/D support, but who did not have an Education, Health and Care ('EHC') plan. In England alone this accounted for 1.1 million pupils. For Disabled children and young people who attended in person, with fewer other children at school they could have benefitted from targeted support. For those who were clinically extremely vulnerable, systems could have been deployed for better educational, therapeutic and social support in the home. A more dedicated approach to inclusive design would have borne less unfair consequences of generational defining significance but were second order priorities.
3. **BALANCE**: The DPO submit this points to an unfair balance being struck between competing risks of harm. For children who were shielding for themselves, or their family, and children who required greater health protection through being educated at home, deficiencies in accessibility and provision meant they paid for necessary clinical protection by sacrificing other needs. A proportion of children also suffered Long Covid debilitation from contracting the virus, who attended school without adequate information and guidance to consider that risk. However, notwithstanding these discrete risks of contraction, for all children and young people – including Disabled people - Covid-19 carried comparatively lower risk of susceptibility, severity and transmission, than it did

for adults. That all might not be the case with the next virus, but it was important to this one. This raises a question of proportionality. Balanced against the often (but not always) lesser direct relevance of the harms posed by Covid-19 to children and young people were the significant harms that non-pharmaceutical interventions ('NPIs') caused to them, especially Disabled children and young people.

4. **OUTLINE:** In Module 8, the Inquiry confronts a difficult truth with few consolations: what happened during Covid-19 to children and young people, especially Disabled children and young people, was unjust, disproportionate, largely inevitable under the current systems we have, and yet there is no plan for reform or reparation. In the sections below DPO examine these propositions from the perspective of Disabled children and young people with a view to considering how policy making for and during prolonged societal crisis can be more just, proportionate and resilient. The submissions are framed in terms of [I] EPIDEMIOLOGY [II] PROPORTIONALITY [III] VULNERABILITY [IV] EASEMENTS [V] UNFAIRNESS and [VI] CAPABILITY.

#### **PART I: EPIDEMIOLOGY**

5. **RISKS:** In its Module 2 findings, the Inquiry concludes that the nationwide lockdowns “*undoubtedly saved lives*” but, amongst other things, they “*brought ordinary childhood to a halt, delayed the diagnosis and treatment of other health issues and exacerbated societal inequalities*”.<sup>1</sup> Of the arrested development of childhood, especially “*for children’s education and physical and mental health*” (for which see further PART III below), the Inquiry recommends child rights impact assessments to enable a systematic appraisal of the specific risks to which children might be exposed (rather than just governing with generalised concern about them).<sup>2</sup> In terms of medical risk, the direct dangers of the virus to children and young people was reflected in the 93,000 on the shielding patient list in March 2020 and 58,000 who remained on the list by December 2020 who experienced much longer lockdown than their peers, often remaining isolated long after restrictions began lifting for others.<sup>3</sup> Whilst data remains incomplete and prevalence remains lower than in adults, ONS estimates 111,816, 3-17 year olds in England and Scotland had self-reported Long Covid with 20,920 reporting that their activity had been 'limited a lot' by the condition.<sup>4</sup> However, given that the “*vast majority of children and young people were not at risk of serious harm from Covid-19*” the Inquiry acknowledges that “*[the] decisions to close schools and early years provision to most children and to implement a lockdown were steps taken to protect the adult population*”.<sup>5</sup>

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<sup>1</sup> M2, 2A, 2B and 2C (20 November 2025) [Vol. I. Executive Summary p. 2]

<sup>2</sup> Ford [INQ000587997/3 §1.6] Acland-Hood [INQ000587992/164 §9.16]

<sup>3</sup> Burton [INQ000588020/233 §715, 721-724] Newlove-Delgado [INQ000587958/39 §88] Davies [INQ000587957/79 §283] Feuchtwang [INQ000650323/27 §73]

<sup>4</sup> ONS (April 2024) [INQ000651354 §Tables 1 & 8] McFarland [T3/41/17-43/15]

<sup>5</sup> M2, 2A, 2B and 2C [Vol. II §§10.89-10.92]

6. TRANSMISSION: Consolation for this might have been found in evidence that school closures made a significant impact on transmission rates, not least because increased rates of adult Covid bereavement was something that caused children and young people trauma, distress and anxiety, and because there were grounds to fear long term post viral sequelae.<sup>6</sup> But the evidence does not support this conclusion.<sup>7</sup> In March 2020, SAGE was careful to emphasise that reduced pupil attendances would make, at most, a “modest” contribution to controlling the R rate; that it would constitute one of “*the less effective single measures to reduce the epidemic rate*”; and that at its height “*school closures, combined with other measures*”, could help, “*although there is uncertainty*”.<sup>8</sup> The “*consensus view*” of SPI-MO was that on a best estimate school closures would reduce reproduction by between 10% and 20%, but there was “*a great deal of uncertainty around the extent to which children have a role in the transmission of SARS-CoV-2*”, such that the distinct necessity of this measure was unclear.<sup>9</sup> Even then, the modelling was questioned by SAGE members, such as Professors Mark Woolhouse and Russell Viner, for overestimating the impact of schools on transmission<sup>10</sup> and it was “*heavily*” dependent on assuming the infectiousness of children as being equivalent to that of adults.<sup>11</sup> Upon entering the first lockdown there was “*a significant lack of high quality evidence*” that schools were making a significant contribution to transmission, there was considerable dependency on studies based on influenza, and the need for more robust data on the issue was clear.<sup>12</sup>
7. EVALUATION: To this day, however, the bulk of the evidence is that the relative role of children in transmission is likely to have been smaller than that of adults, and considerably smaller still for younger children. After the first wave only 3 out of 372 paediatric Covid-19 papers across the globe confirmed transmission from a child and 5 papers showed a potential transmission.<sup>13</sup> A study of 10 high schools of 863 children in close contact in New South Wales showed only two secondary cases of transmission.<sup>14</sup> UK studies confirmed a “*low prevalence rate*” of infections in schools, “*limited transmission from child to teacher and vice versa*” and “*a lower secondary attack rate observed in schools compared to households*”.<sup>15</sup> The reopening of schools in Germany in May 2020 concluded the same.<sup>16</sup> In December 2020, the Children’s Task and Finish Group (‘TFG’) stated with “*high confidence*” that children’s susceptibility to infection appeared less than

<sup>6</sup> Feuchtwang [INQ000650323 §46] (bereavement) M2, 2A, 2B and 2C [Vol. I §§1.52, 8.29-8.31] (Long Covid)

<sup>7</sup> Viner [INQ000588157/20 §§3.19-20, 5.1(c), 6.4] Woolhouse [M2A/INQ000369765/5 §§26, 75, 121-122, 153]

<sup>8</sup> SAGE 12.03.20 [INQ000056209/3] 16.03.20 [INQ000052569/3 §17] 18.03.20 [INQ000075778/3 §20]

<sup>9</sup> SPI-M-O Consensus View 17.03.20 [INQ000074903/2 §§5-6, 9-10]

<sup>10</sup> Woolhouse [M2A/INQ000352697/3] [M2/INQ000250231/15 §81]

<sup>11</sup> SAGE Subgroup 16.04.20 [INQ000074924/5 §19] Viner [INQ000588157/16 §§3.16-3.17]

<sup>12</sup> SAGE Subgroup 16.04.20 [INQ000074924/1 §§2-4, 7-17] Viner et al (April 2020) Lancet [INQ000312293/6]

Viner [INQ000588157/20 §3.19] Rahman [INQ000588066/13 §§4.7, 4.10-4.12] Woolhouse

[M2A/INQ000369765/39 §232] UNCOVER Report (May 2020) [M2A/INQ000352006/3]

<sup>13</sup> Woolhouse et al (July 2020) [M2A/INQ000351965/6]

<sup>14</sup> Woolhouse et al (July 2020) [M2A/INQ000351965/7] Viner [T15/40/19-41/13]

<sup>15</sup> CMO Technical Report [INQ000101642/276] Viner [INQ000588157/21 §§3.20-3.22]

<sup>16</sup> Whitty email 21.05.20 [INQ000606848/1 §4] Viner [INQ000588157/21 §3.20(a)]

adults, and with “*medium confidence*” that pre-school and primary school children remained less susceptible than secondary school students, with modelling indicating that the R rate would rise if all children returned to school, but on a limited basis compared to relaxing general lockdowns.<sup>17</sup>

8. UNCERTAINTY: Hindsight studies therefore concluded that any proof of the effectiveness of school closures in controlling community transmission was regarded as of “*limited quality*” and difficult to disentangle from the other NPIs of which it formed a part, leaving epidemiologists “*in much uncertainty*”.<sup>18</sup> The statement of the Chief Medical Officers (‘CMOs’) and Deputy CMOs of the Four Nations in August 2020 classified transmission to children in schools as “*not a common route of transmission*” and “*may be lower in primary age children*”.<sup>19</sup> The TFG characterised this conclusion as worthy of “*medium confidence*” based on later ONS figures into December 2020.<sup>20</sup> Having declared those matters to encourage parents to send children to school, the problem remained that collected data was never strong enough to quantify the absolute effect of schools on transmission. The Public Health England (‘PHE’) sKIDS report in September 2020 and an ONS survey in December 2020 indicated low rates of infection in primary schools and not significantly higher rates in secondary schools.<sup>21</sup> Uncertainty, however, continued to prevail in circumstances in which SAGE did not collect evidence or monitor the effectiveness of its own advice. The SAGE subgroup on transmission in April 2020 had emphasised the importance of data collection and monitoring but justifiable equivocation over the value of school closures among the most informed sections of the scientific community never went away.<sup>22</sup>
9. DILEMMAS: The high point of the evidence about the effectiveness of closures was the studies on half-term holidays in the Autumn of 2020, that with “*medium confidence*” recorded transmission rates increasing upon return.<sup>23</sup> Yet it remained “*difficult to quantify the size of this effect*” and “*difficult to qualify*” the level of transmission taking place specifically in schools as opposed to other social contact away from schools.<sup>24</sup> It was also relevant that parents change their own behaviour during planned school breaks.<sup>25</sup> Moreover, reopening of schools at various junctures did not lead to surges of Covid-19 (including in March 2021 when no children had been vaccinated) and in countries where schools were open for some time, data suggested that it

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<sup>17</sup> TFC Group 17.12.20 Update (2021) [INQ000073882/2, 5-8]

<sup>18</sup> Krishnaratne et al. ‘Measures implemented in the school settings to contain the COVID-19 pandemic. Cochrane Database of Systematic Reviews.’ 2022, pp 37-38 cited in CMO Technical Report [INQ000101642/270-271 fn. 1]

<sup>19</sup> CMO/DCMO Statement 23.08.20 [INQ000070460/3]

<sup>20</sup> Whitty [INQ000588046/39 §3.66(f)] TFC Group 17.12.20 Update (2021) [INQ000073882/6]

<sup>21</sup> Rahman [INQ000588066/49 §6.62,6.67] PHE (Sep 20) [INQ000223828] ONS (Dec 20) [INQ000542938]

<sup>22</sup> Whitty [T13/42/20--25] [T13/47/16-48/15] SAGE Subgroup 16.04.20 [INQ000074924/5 §§20, 26, 28-35]

<sup>23</sup> TFG 17.12.20 [INQ000074951/1]

<sup>24</sup> Whitty [INQ000588046/50 §4.7] TFC Group 17.12.20 Update (2021) [INQ000073882/9] TFG 17.12.20 [INQ000074951/1-2] DfE [INQ000314213/24] Rahman [INQ000588066/57 §§7.12-7.13]

<sup>25</sup> Whitty [T13/112/12-114/11]

made little difference to community transmission.<sup>26</sup> Throughout, there was difficulty in distinguishing between the direct contribution of the schools, and of children mixing, and the catalyst for greater adult contact based on them returning to work or dropping children at school.<sup>27</sup> Prevalence of Covid-19 in the community tended to raise it in schools and overall the picture did not change dramatically during the autumn 2020 term.<sup>28</sup> The third closure in January 2021 bore a distinct precautionary character because of the unknown greater transmissibility of the Alpha variant.<sup>29</sup> That should not have prevented the third lockdown being constructed more heavily around children's needs. It could have included dedicated test and trace, attendance rotas, social distancing, better ventilation, blended learning of 50:50 face to face and remote education, regional variations, and in particular (DPO argue) expanding the pools of children with special educational needs and/or disabilities ('SEN/D') who could remain in school.<sup>30</sup>

10. CONTROVERSY: It should not be scientifically controversial to question the justification for closing schools to most children and modifying statutory duties owed to children, but it is controversial for broader political and social reasons. The reasons lie partly in the powerful belief (amongst lay but also scientific observers) based on general experience of influenza that school children, especially very young children, are super spreaders,<sup>31</sup> and (again from influenza) that the risks to children are considerably more substantial.<sup>32</sup> But those risks did not come to pass. Moreover, by June 2020 it was known that primary school teaching was one of the least at-risk occupations during the pandemic, and all teaching was well below average risk, and much less likely to result in death compared to almost all other forms of public facing work.<sup>33</sup> The principal risk of transmission in schools was in the staff room and not the classroom.<sup>34</sup> The primary societal benefit from closing schools was thus to protect adults, not children, which the Inquiry has already found (see §5 above).<sup>35</sup>
11. FOLLOWING THE SCIENCE: The controversy brings to the foreground the accountability problem of the mantra 'following the science'. This phrase was an inherently incomplete validation for policy making when the decision had such wide social, economic, political, legal and philosophical

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<sup>26</sup> Whitty [INQ000588046/42 §3.67] TFC Group 08.07.20 [INQ000224417/5] Viner [INQ000588157/24 §3.28]

<sup>27</sup> Whitty [INQ000588046/57 §4.25] Whitty [T13/42/25-44/3] Rahman [INQ000588066/49 §§6.62-6.65]

<sup>28</sup> Arora [T12/40/9-42/10] Viner [INQ000588157/31 §5.1]

<sup>29</sup> Whitty [INQ000588046/50 §§4.8-4.13, 4.19, 7.2-7.3] Rahman [INQ000588066/56 §§7.10-7.11] Viner [INQ000588157/33 §§6.1-6.4]

<sup>30</sup> DFE Advice 28.12.20 [INQ000075682/1 §§4(c), 7, 15, 26-27] Morris [INQ000588009/13 §2.37] Noakes [INQ000588180/19 §8.2]

<sup>31</sup> Viner [INQ000588157/16 §§3.9, 3.24-3.25] CMO/DCMO Statement 23.08.20 [INQ000070460/4]

<sup>32</sup> Whitty [INQ000588046/2 §§1.6-1.7]

<sup>33</sup> Woolhouse et al (July 2020) [M2A/INQ000351965/8] Woolhouse [M2/INQ000250231/34 §187]: see also CMO Technical Report [INQ000101642/273] Whitty [INQ000588046/30 §§3.57-3.60] CMO/DCMO Statement 23.08.20 [INQ000070460/4]

<sup>34</sup> Whitty [INQ000588046/40 §3.66(k)]

<sup>35</sup> Whitty [T13/92/19-93/16] [T13/94/14-19]

ramifications.<sup>36</sup> The initial closure of schools on a precautionary basis, when many parents were “*voting with their feet*” and uncertainty favoured temporary closure, was understandable from both a lay and scientific perspective.<sup>37</sup> Disquiet lies in the fact that (1) schools were left predominantly closed for the best part of 12 months, with short hiatuses for primary schools in the summer and all schools in the autumn, when (2) it was known that the measure would create consequential harms,<sup>38</sup> but (3) there was a failure to urgently seek evidence to confirm whether the precaution was justified, or otherwise to design and model alternative measures that would have enabled a larger number of pupils to attend school.<sup>39</sup>

12. **CRITICISM:** The Module 2 report has emphasised the lesson of needing to anticipate different pandemic scenarios, such that another pandemic could see children more susceptible to the severe consequences of the virus.<sup>40</sup> However, the adoption of a deliberately conservative modelling assumption that children transmitted Covid-19 in the same way as adults, had a distorting effect on this pandemic.<sup>41</sup> It excluded dynamic exploration of whether a higher cohort of Disabled children and young people and others in need could have been kept in education with tolerable risk to transmission rates if the processes were properly designed. Too little consideration was given to alternatives that other countries soon instituted, such as re-structuring of school premises; half-day rotas or shorter weeks; regional closures based on R rates; or providing travel services with staggered school runs, cordoned from other travellers with limits to parents intermingling with one another (see further PART IV below). As it was, the impact of pandemic response on children led to disproportionate outcomes, particularly for Disabled children and young people.

## II: PROPORTIONALITY

13. **DECISION MAKING TOOLS:** To question whether significant government interference with social arrangements is proportionate is an enquiry associated with human rights law. Beyond law, a proportionality calculus can be seen as “*a tool directing attention to different aspects of what is implied in any rational assessment of the reasonableness of a restriction*”. It is a method to grapple with a complex problem and is of assistance when the conflict of competing interests is intense.<sup>42</sup> Proportionality analysis poses four questions of a given policy measure: (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is

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<sup>36</sup> M2, 2A, 2B and 2C [Vol. II §§9.151-9.165] Whitty [M2/INQ000251645/65 §6.16]

<sup>37</sup> Whitty [INQ000588046/4 §§2.2-2.5] Viner [INQ000588157/24 §§3.30-3.33] DfE 17.03.20 [INQ000107248/1 §1] Sturgeon [M2A/INQ000339033/76 §201] Johnson [INQ000588008/6 §16]

<sup>38</sup> Whitty [INQ000588046/9 §3.9]

<sup>39</sup> Woolhouse [M2/INQ000250231/34 §189] [M2A/INQ000369765/47 §§278-281]

<sup>40</sup> M2, 2A, 2B and 2C [Vol. II §15.4] Whitty [INQ000588046/64 §§7.4-7.7]

<sup>41</sup> Rahman [INQ000588066/44 §6.47] Viner [INQ000588157/23 §§3.24-3.28]

<sup>42</sup> *Pham v Secretary of State for the Home Department* [2015] UKSC 19 [2015] WLR 159 §§95-96 citing Professor Dr Lübbe-Wolff *The Principle of Proportionality in the case-law of the German Federal Constitutional Court* (2014) 34 HRLJ 12, 16-17

rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.<sup>43</sup>

14. RATIONAL CONNECTION: The aim to control virus transmission in the community was important, but its importance clouded consideration of the available science when formulating policies that interfered with children and young people’s rights. There was scientific acknowledgment that the direct contribution of social distancing among children would have somewhat less impact on limiting virus transmission than it did with adults. In that respect, the use of the high threshold of ‘vulnerability’ to qualify for school attendance, based on an aim to limit attendance to no more than 10-20% of the student population, was highly underinclusive and, at the very least, less rationally connected to meeting the general aim than other NPIs concerning the social distancing of adults. It also ran contrary to the emerging recognition in paediatric health care that for children with a range of conditions, such as cerebral palsy and scoliosis, the benefits of school – in terms of access to therapies and developmental support — outweighed the risk of infection.<sup>44</sup> A similar point could be made for students whose learning disabilities or physical conditions would make digital learning either ineffective or sub-optimal (see further §33 below).<sup>45</sup>
15. ALTERNATIVE MEASURES: Professor Whitty’s conclusion was stark: “*if we get another pandemic where children are, as in this one, relatively less affected*”, then there is “*absolute need*” to minimise time away from in-person formal education extending to all ages from primary schools to university. This should have been “*more central to policy thinking*” than it was, he argued, because of the importance of education for the mental and physical health, and it being the principal means by which children, with parents’ help, “*break out of a cycle of deprivation and ill-health feeding one another*”.<sup>46</sup> Due to non-consultation, lack of modelling and research, and overall shortcomings of policy design under crisis, there was a considerable failure to examine less intrusive measures. For Disabled children and young people especially, there was a failure to consider the polymorphous harms that the combination of closures and legal easements would cause. All of this made the price of pandemic countermeasures for them too great. While a judicial review case would not have the evidence, expertise, or constitutional function to look at the overall unfairness of what happened to Disabled children and young people in the pandemic and make a finding of disproportionality, this Inquiry does; and on the basis of the evidence and the expertise it has acquired, this Inquiry should.

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<sup>43</sup> *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39 [2014] 1 AC 700 §§20 and 74

<sup>44</sup> Turner [INQ000651508/15 §33] Guidance (July 2020) [INQ000620609]

<sup>45</sup> Dorer [INQ000587851/15 §54] DPO [INQ000588026/24 §§69-72] (example of the case of Liam)

<sup>46</sup> Whitty [INQ000588046/66 §7.9] Viner [INQ000588157/38 §§8.1-8.4] Watts [INQ000588017/16 §§6.12-6.18]

16. INCONGRUITIES: There will forever remain an incongruity that children were stopped from going to school to lower the R rate while care sector workers moved incessantly between different settings, and other jobs, because there was no economic policy or broader sector planning to prevent that happening, notwithstanding the knowledge that they were more likely to contract Covid-19.<sup>47</sup> Simultaneously, essential health and therapeutic services – such as to visit newborn babies, and to provide life changing speech and language, occupational and physio therapies – were cut for children and young people, because of redeployment of staff into adult nursing and medicine, and sometimes (shockingly, given their expertise and the importance of their work with children and young people) redeployment into administrative and cleaning roles.<sup>48</sup>
17. UNFAIRNESS: DPO’s ultimate claim (see PART V below) is that government did not strike a fair balance between the interests of Disabled children and young people and the interests of the wider community in reducing the R rate, so as to enable a wider student cohort to attend school.<sup>49</sup> For Disabled children and young people and in particular those who faced greater health risks from school attendance, a lack of information and mitigations compounded the imbalance. To make these claims good, the DPO address the effects of vulnerability (see PART III below) and easements (see PART IV below) in policy making.

### III: VULNERABILITY

18. THE VULNERABILITY EXCEPTION: DPO criticism of the distorting flaws in the ‘vulnerable’ child exception to school closures have been accepted by several witnesses. The term’s limitations in this context, carrying a risk of “*stigma*” or labelling,<sup>50</sup> and thus discouraging attendance, were foreseeable, as was the availability of ready alternatives such as “*eligible*”.<sup>51</sup> In reality, “*defining and measuring vulnerability is complex, messy, highly subjective, and influenced by local and national context*”.<sup>52</sup> Far from being innocuous, ‘vulnerability’ is so “*loaded with political, moral and practical implications*” that it can do great damage in the apparent cause of complying with a moral duty to assist those in need of special care and attention.<sup>53</sup> In the light of the evidence heard in this module, DPO make a broader claim, that understanding the extent to which the needs of Disabled children and others were reduced into a narrow concept of ‘vulnerability’ is essential to understanding how decision making on their behalf went awry.

<sup>47</sup> M6 DPO Written Opening 19.09.25 [p. 9 §§20--29]

<sup>48</sup> Munn [INQ000587965/17 §64-70, 78-80, 118] Morton [T7/158/11-159/8] [T7/163/23-164/6] Feuchtwang [INQ000650323/14 §34] Amadi [INQ000588007/4 §§14, 17] Ford [T9/162/23-163/1] Davies [INQ000587957/69 §229] Turner [INQ000651508/17 §§35, 38, 41]: see further M8 DPO Written Opening 15.09.25 [p.19 §40]

<sup>49</sup> DPO [INQ000588026/55 §154]

<sup>50</sup> Morris [INQ000588009/28 §6.5] [T9/2/10-3/12] [T9/10/17-14/3] Williamson [INQ000268013/44 §5.8.2] Ford [INQ000587997/62 §11.3] Gething [INQ000652058/22 §§74, 76] Williams [INQ000651701/21 §85] Todd [INQ000651699/17 §50] Rennick [INQ000650941/11] Feuchtwang [INQ000650323/8 §17]

<sup>51</sup> Todd [INQ000651699/17 §50]

<sup>52</sup> McCluskey et al [INQ000587959/61 §133] [T6/118/8-25]

<sup>53</sup> K. Brown (2011) ‘Vulnerability’: Handle with Care, Ethics and Social Welfare, 5:3, 313-321, 314

19. STATUTORY CONTEXT: The language of ‘vulnerability’ is not a statutory term. Since 1989 the emphasis in children’s social care has been on ‘children in need’, defined in section 17(10) of the Children Act as a child (a) who is “*unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision of services*”, or (b) whose “*health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services*”, or (c) who “*is disabled*”.
20. SYSTEMIC CONTEXT: This broadly drawn concept of need, with an open-ended definition under section 17(11) Children Act of “*health*” as “*physical or mental health*” and “*development*” extending to “*intellectual, emotional, social or behavioural*” growth, was struggling to translate into practical delivery before 2020. Successive rounds of reductions in public sector funding, and an ever-growing focus on child protection, had crowded out this understanding of need; too often ‘in need’ had become a shorthand for situations that may develop into safeguarding concerns.<sup>54</sup> The consequence is that prior to the pandemic, social services struggled to provide services beyond the narrow confines of safeguarding, even though in legislating for need, Parliament had conceived of life – and especially the development of young life – as requiring more than mere protection from harm.<sup>55</sup> That meant that children’s social care services under section 17 of the Children Act became harder to obtain; and once assessed as necessary, harder to enforce. Likewise, in respect of special educational provision via Education Health and Care (‘EHC’) plans under the Children and Families Act 2014 (see PART IV §34 below).
21. VULNERABILITY AS ELIGIBILITY: Notwithstanding its absence from welfare laws prior to 2020, ‘vulnerability’ was still part of welfare discourse. As a new Chancellor of the Exchequer in 2010, George Osborne, set this group apart when outlining the impact of the government’s deficit reduction programme; beginning his first Budget speech with the pledge that “*the most vulnerable*” would be protected.<sup>56</sup> Under austerity economics, vulnerability has functioned as a *de facto* means to take away rights for anyone other than a category of those considered to be in extreme need. At the same time, social workers and lawyers have been increasingly compelled to categorise their clients as vulnerable to meet *de facto* welfare thresholds and overcome stringent pre-conditions for services. During the pandemic, in the hurried construction of a school closure policy, ‘vulnerability’ was deployed to refer to exceptional levels of need; and often during Government communications reference was made to the policy applying to the “*most vulnerable*”.<sup>57</sup> By and large, what was meant was children in need of “*safeguarding*”, which Vicky

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<sup>54</sup> Allen [INQ000650824/3 §15]

<sup>55</sup> Longfield [T4/97/3-98/14] Ford [T9/193/16-195/4]

<sup>56</sup> Hansard, HC Debates, 22.06.2010, Vol. 512, cc 167, 180

<sup>57</sup> M8 DPO Written Opening 15.09.25 [p. 3 §7] Johnson 18.03.20 [INQ000086755/3]

Ford, as Minister of State, emphasised was the “*primary reason*” for keeping schools open for vulnerable children.<sup>58</sup>

22. INVENTING THE VULNERABLE CHILD: The Guidance on school attendance issued on 22 March 2020, in order to support a policy that did not exist on 17 March, effectively invented “*the vulnerable child*” as a social category.<sup>59</sup> It included those who had been assessed as “*being in need or otherwise met the definition of section 17 of the Children Act*” or who had an EHC plan but added a caveat. Those with an EHC plan were to be “*risk-assessed by their school or college in consultation with the local authority and parents, to decide whether they need to continue to be offered a school or college place in order to meet their needs, or whether they can safely have their needs met at home*”.<sup>60</sup> Attendance of children with an EHC plan was limited to those at “*significant risk*”.<sup>61</sup> The Children’s Commissioner was told in a DfE and DHSC joint letter on 17 April 2020 that a “*minority*” of children with an EHC plan may benefit from attending school, with the “*vast majority*” to remain at home.<sup>62</sup> This was in line with a DfE Note of the same date, which recorded that “*all but a very small number*” of children with an EHC plan had been identified by colleges as needing to attend.<sup>63</sup> SSE’s letter to all local authorities on 21 April 2020 reiterated: “*we expect that many children and young people with EHCPs can remain safely at home*”.<sup>64</sup> In addition, during three months across the first wave, there were easements to the duty under section 42 of the Children and Families Act 2014, which requires local authorities to secure the special educational provision specified in a child’s EHC plan and health bodies to arrange the health care provision specified. During this period, local authorities and health bodies only had to make “*reasonable endeavours*” to deliver the provision.<sup>65</sup> This meant that key therapies and support, often delivered at school, no longer had to be provided. The DfE belatedly understood this created a double disadvantage for children, who were not receiving essential therapies and services because they were not at school.<sup>66</sup>
23. COMMUNICATIONS: When the category of ‘vulnerability’ was communicated to the public, the messaging became confusing, and ultimately excluding.<sup>67</sup> How were parents to reconcile “*stay at home, save lives*” with “*but we really care about you so please come to school*” with “*only if you are unsafe at home*” and “*not before it is decided that you could be safe at school*”.<sup>68</sup> This was the lost in translation aspect of the ‘vulnerability’ exception. It was not perceived as a

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<sup>58</sup> Ford [INQ000587997/12 §3.7] [T9/156/9-158/1] [T9/158/11-161/22]

<sup>59</sup> Ford [INQ000587997/11 §§3.1-3.21]

<sup>60</sup> DfE Guidance 22.03.20 [INQ000520192/1]

<sup>61</sup> DfE Guidance 22.03.20 [INQ000520192/9-10]

<sup>62</sup> DfE/DHSC Letter to CC 17.04.20 [INQ000540851/2]

<sup>63</sup> DfE Note 17.04.20 [INQ000588506/1]

<sup>64</sup> SSE Letter 21.04.20 [INQ000540874/2]

<sup>65</sup> DfE Guidance 22.03.20 [INQ000520192/10] DfE Guidance 19.04.20 [INQ000519887/8-9]

<sup>66</sup> Acland-Hood [T11/26/5-11]

<sup>67</sup> McCluskey [T6/165/23-166/8] [T6/170/7-171/6]

<sup>68</sup> Morris [T9/28/5-17]

“positive” act of state, but “negative, potentially dangerous, stigmatising”<sup>69</sup> and likely to alienate a cohort of learners whose attendance in non-pandemic periods can be complicated by unexpected or crisis circumstances.<sup>70</sup> While initial Guidance overlooked the risk of stigma, in the April Guidance, it was naively proclaimed that “*there should be no stigma attached to attendance*” and there would be no reason why vulnerable students in the same setting as students of “*parents carrying out important roles*” would be identified.<sup>71</sup> For Disabled children these communication problems were compounded by repeated failures of the UK government to include children and young people in their communication strategies generally<sup>72</sup> and to ensure access for d/Deaf and Disabled people (both parents and children) by the use of BSL and other alternative formats.<sup>73</sup> The Inquiry has found such matters not to be “*secondary considerations*”, for “[e]veryone should be able to understand the action their government is asking them to take”.<sup>74</sup> Further, Disabled children and their families often could not access tailored health advice, to support informed decisions about the relative risks and benefits of school attendance, including properly understanding Long Covid.<sup>75</sup> In terms of balancing the broader risks of harms and range of needs, the STAY SAFE and SAVE OUR NHS slogan was counterproductive, and HELP US TO HELP YOU was more appropriate in terms of building collaboration.<sup>76</sup> If ever there was a candidate for early co-production and co-design, with actual schools, DPO and Disabled children and young people, and their families, here it was.<sup>77</sup>

24. **UNNECESSARILY NARROW:** The decision to exclude from automatic eligibility for school attendance near to 1.1 million children with SEN/D support, but who did not have an EHC plan, meant that the definition of vulnerability was unnecessarily narrow and problematically underinclusive,<sup>78</sup> particularly given that closure of schools *per se* was not compelled by the scientific evidence. Relevant to the issue were: (a) the deficiencies in the EHC plan system pre-pandemic, which meant children who needed EHC plans faced barriers and delays in obtaining them; and (b) the severity of impact on children with SEN/D of being unable to attend school, while often struggling to engage with remote education.<sup>79</sup> The DfE note to the Cabinet Office of 15 March 2020 foresaw that parents and siblings of children with SEN/D “*will face a higher burden of care, as school offers valuable care and respite*” and that beyond the 450,000 children already with EHC plans, “*additional pressure will be put on already under-pressure families and pupils [who] would lose*

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<sup>69</sup> Hammond [T8/43/1-10] McCluskey [T6/168/14-169/4]

<sup>70</sup> McCluskey et al [INQ000587959/64 §140]

<sup>71</sup> DfE Guidance 19.04.20 [INQ000519887/5]

<sup>72</sup> M2, 2A, 2B and 2C [Vol. II §§12.100-12.104]; see also Viner [INQ000588157/39 §8.5(h)-(i)]

<sup>73</sup> M2, 2A, 2B and 2C [Vol. II §§12.105-12.111]

<sup>74</sup> M2, 2A, 2B and 2C [Vol. I Executive Summary p. 12]

<sup>75</sup> DPO [INQ000588026 §§37-38] LCK [INQ000588023/12 §§40, 214] M2, 2A, 2B and 2C [Vol. II §§8.25]:

<sup>76</sup> Lockhart [INQ000472876/55 §157]

<sup>77</sup> Hammond [T8/43/20-44/3]

<sup>78</sup> Ofsted 16.06.21 [INQ000621278/20] PSED 06.05.20 [INQ000231333/40]

<sup>79</sup> DPO [INQ000588026/8 §§26-27]: see also Ofsted (June 2021) [INQ000621278/3-4, 7-19]

access to the pastoral support often offered by schools, include counselling services, as a time that will already be stressful”.<sup>80</sup> In its assessment of “key risks” on 19 March 2020, DfE highlighted children “who do not meet the definition of a vulnerable child are at greater risk”. This might include “children who are currently being assessed for social care support or for an EHCP, children whose needs would have been identified by education professionals in the coming weeks/ months, siblings of vulnerable children who aren’t themselves defined as vulnerable etc”.<sup>81</sup>

25. THE UNGUIDED DISCRETION: The situation was not properly catered for by the category in the Guidance allowing schools to offer admission to children who were “otherwise vulnerable”. Unhelpfully, the Minister stated in correspondence on 24 March 2020 that schools could exercise discretion for children with SEN/D, but no EHC plan, to attend school, but neither the March nor the April versions of the Guidance confirmed that they could. The initial Guidance stated only “We know that schools and other education providers may also want to support children who are vulnerable if they are able to do it”, undertaking to work with schools, colleges and local authorities “to identify the children most in need of support”. The only discretion mentioned was for risk assessment to be carried out on those who had applied for an EHC plan but had not yet had one issued.<sup>82</sup> Some schools automatically included that category of learners in those they offered school places to, but there was no consistency.<sup>83</sup> The later Guidance created the category of those assessed to be “otherwise vulnerable” by educational providers and local authorities, but then provided the examples “children on the edge of care, in alternative provision or young carers, or others, at the education provider and/or local authority’s discretion”, making no mention children with SEN/D but no EHC plan.<sup>84</sup> Contrary to Minister Ford’s evidence, this greater flexibility to the Guidance did not evolve to explicitly encourage children and young people in a range of SEN/D categories or Disabled students to be invited into school, despite their foreseeable needs.<sup>85</sup> In Scotland, the Guidance was, at least, broadened in May 2020 to underscore that vulnerability was “not an exclusive concept” and extended to those that “will have become newly vulnerable as a consequence of the outbreak”<sup>86</sup> and those affected by disability.<sup>87</sup> In Wales, the Guidance included “[D]isabled children and those with Statements of special educational needs” but until October 2020, it added that “the most vulnerable of these should be prioritised”.<sup>88</sup>

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<sup>80</sup> DfE Note 15.03.20 [INQ000286012/1]

<sup>81</sup> DfE Note 19.03.20 [INQ000542867/2 §3]: see also Coffey [INQ000588111/136 §381]

<sup>82</sup> Ford [INQ000587997 §3.19] Ford 24.03.20 [INQ000542454/2] DfE Guidance 03.20 [INQ000520192/2 & 11]

<sup>83</sup> Barneby [INQ000648389/12 §§37-38]

<sup>84</sup> DfE Guidance 19.04.20 [INQ000519887/4]

<sup>85</sup> Ford [T9/152/8-153/20] [T9/158/3-10]

<sup>86</sup> Swinney [INQ000588143/39 §§132-134] OCSWA Submission 25.05.20 [INQ000569856/2 §§13-14]

<sup>87</sup> OCSWA Submission 25.05.20 [INQ000569856/2 §10]

<sup>88</sup> WG Written Statement 20.03.20 [INQ000299040/2] Williams [INQ000651701/13 §59]

26. FORESEEABLE NEEDS: The various definitions of vulnerability were focussed on immediate health risks, safety and safeguarding, all of which are relevant to Disabled children and young people who require emergency medical attention and suffer higher levels of abuse than non-disabled peers.<sup>89</sup> But these focuses largely overlooked other foreseeable serious harms arising from loss of special educational provision and health interventions resulting in (sometimes irreversible) regression. This revealed a lack of understanding by decision makers of the various things that happen for Disabled children in school life, whether in mainstream school or special school, in terms of caring for pupil's health and development, as well as providing education.<sup>90</sup> Students relied on the physical presence of classroom assistants, or regular speech and language therapy, physiotherapy or occupational therapy, or specialist equipment, or methods and routines for managing eating disorders or forms of autism, which could either not be replicated remotely or in other locked down settings, or placed significant pressures on family households if required to act as substitute providers.<sup>91</sup> The Guidance assumed that arrangements would be made for essential services to be delivered in the home, when that mostly did not happen, especially when the mass redeployment of the workforce in essential therapeutic services led to significant backlogs.<sup>92</sup> It overlooked that schools play a critical role in referring children to other services, be it mental health, learning disability services, and autism services; as a pipeline, this was severely disrupted in the pandemic.<sup>93</sup> It also did not account for the fact that very young children often do not have established plans, or diagnoses.<sup>94</sup> In these failures of foresight, the general "*common sense*" recognition in Government, SAGE and SPI-M and others that closures would be detrimental to children was no substitute for child rights impact assessments, undertaken with ready access to experts in these service fields and including advice informed by Disabled children and young people themselves.<sup>95</sup>
27. EXTREMISING VULNERABILITY: The language of vulnerability conveys a sense of extremity, that no civilised society would want to tolerate for children. As a policy construct it had the effect, at least in some parts of the country, of raising the threshold of eligibility for schooling and other services to the extreme threshold of safety, without regard to developmental wellbeing. Schools felt unsupported in how to carry out the risk assessments required to determine who could attend

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<sup>89</sup> DPO [INQ000588026/43 §122] Toman [T3/16/4-24]

<sup>90</sup> Toman [T3/13/6-17] Allen [INQ000650824/14 §§60-61] BASW 15.07.20 [INQ000643632/10-11] NCB SEND Report for NI (June 2021) [INQ000643655/48-50] DPO [INQ000588026/14 §§41, 63, 92-96]

<sup>91</sup> Inclusion London (June 2020) [INQ000474761/17, 28, 29] Longfield, Childhood in the Time of Covid (Sep 2020) [INQ000231345/12] DPO [INQ000588026/13 §§40, 92-98]

<sup>92</sup> DfE Guidance 22.03.20 [INQ000520192/1-2] Ford [T9/16/1/23-162/24] Burton [INQ000588020/134 §§426-427] Ofsted [INQ000621278/28, 31-33] Coffey [T5/47/3-12] Carter [INQ000615527/5 §14]: see further M8 DPO Written Opening 15.09.25 [p. 18 §§38-39]

<sup>93</sup> Burton [INQ000588020/243 §763] McCluskey [T6/175/5-17]

<sup>94</sup> Davies [INQ000587957/97 §362]

<sup>95</sup> Whitty [T13/46/12-47/2] Cf. M2, 2A, 2B and 2C [Vol. II §§9.90-91 R3, §§10.38, 10.106-108 R7]

school, resulting in heavy delays.<sup>96</sup> What seemingly had to be done to children to get them help was to classify their levels of need as matters of safeguarding, or subject them to delay until the arrival of demonstrable crisis. Children and young people had to be shown to be vulnerable enough to get into school, or to be at sufficient risk of harm to receive services or qualify for prioritised assessments, which were no longer subject to absolute statutory duties or time limits (see §34 below).

28. VULNERABILITY RENDERING: School closure was itself likely to generate vulnerability, especially for those with pre-existing SEN/D requirements,<sup>97</sup> although the Guidance on attendance did not highlight the issue until 31 December 2020.<sup>98</sup> Through loss of routine, respite services (contrary to NICE guidelines<sup>99</sup>) and isolation leading to increasing stress and distress within family households, there is strong evidence that the pandemic response contributed to new mental health conditions.<sup>100</sup> Set against a context in which mental health disorders are collectively the leading cause of impairment of Disabled children and young people in Britain,<sup>101</sup> referrals to CAMHS services and indices of mental disorder reached record heights that went beyond rising pre-pandemic trends.<sup>102</sup> Simultaneously, the availability of mental health services contracted,<sup>103</sup> with particular consequences for Disabled children with SEN/D and autism that many psychological therapies are not tailored to.<sup>104</sup> Moreover, given that 99% of mental health conditions are treated in community settings including schools,<sup>105</sup> there were also extraordinary increases in admissions to hospitals; for instance, the 90% rise in admission of children and young people to hospital for eating disorders, even at a time when the threshold for non-Covid hospital admission had to be raised.<sup>106</sup>
29. HEALTH INEQUITY: The problem of declining health amongst children was compounded by the inequity in the health system as between children and adults. Children and young people make

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<sup>96</sup> Coffey [T5/19/1-12] Toman [T3/24/8-19]

<sup>97</sup> NCB SEND Report for NI (June 2021) [INQ000643655/11] Lockhart [INQ000472876/5 §17] Newlove-Delgado and Cresswell [INQ000587958/37 §§81-85]

<sup>98</sup> Ford [INQ000587997/15 §3.20]

<sup>99</sup> Challenging Behaviours Foundation [INQ000643694/7-8 §2.2]

<sup>100</sup> Allen [INQ000650824/14 §60] BASW 15.07.20 [INQ000643632/11] Lockhart [INQ000472876/4 §16] Feuchtwang [INQ000650323/13 §32] Burton [T7/19/8-21/18] Turner T7/91/20-94/14] Sutton Trust Briefing (Nov 2022) [INQ000587919/1-2] Courtney [T5/155/19-22]

<sup>101</sup> UK Parliament Post No. 653 September 2021 [INQ000485260/1]

<sup>102</sup> Newlove-Delgado and Cresswell [INQ000587958/22 §§48-51] Newlove-Delgado [T4/126/11-128/10] [T4/142/9-143/9] [T4/149/20-151/20] [T4/154/10-155/11] [T4/159/17-160/7] Lockhart [INQ000472876/4 §§12-13, 38] CMO Technical Report 01.12.2022 [INQ000101642/274] NSPCC Briefing (Feb 2022) [INQ000268039/6] DPO [INQ000588026/37 §106]

<sup>103</sup> DfE Evidence Narrative 20.05.20 [INQ000075422/3] Kinniburgh [INQ000651498/52 §4.68.2] Killian [INQ000588116/75 §251] Allen [INQ000650824/31 §138(i)] Newlove-Delgado and Cresswell [INQ000587958/46 §112]

<sup>104</sup> Dorer [T7/130/7-131/14]

<sup>105</sup> Burton [INQ000588020/169 §521]

<sup>106</sup> Newlove-Delgado and Cresswell [INQ000587958/30 §§54-58] [T4/134/15-139/11]: see also Devoe et al (2023). The impact of the COVID-19 pandemic on eating disorders: A systematic review. The International Journal of Eating Disorders, 56(1), 5-25, [p. 3 §1, p.5-6 §3.5, p.15-166 §§3.7.1-3.7.5]

up 25% of the population but only 11% of the NHS budget.<sup>107</sup> They make up more than a third of those in contact with mental health services that across the four nations is resourced by less than 10% of the allotted funds for mental health services.<sup>108</sup> The considerable reprioritisation of services during the pandemic into adult health care provision reflected a focus on preventing deaths of adults from Covid-19, and a failure to distribute resources across different types of harm.<sup>109</sup> The consequence was delayed presentation and identification of health problems and deterioration of those with existing diagnoses through reduction of appointments and procedures.<sup>110</sup> Commenting on the redeployment of specialists in child therapy, the Chief Nursing Officer acknowledged that it was “*very easy to stop things; but actually to scale them back up*” was “*more difficult given the challenges that were happening at the time*”.<sup>111</sup> Overall, recovery of children’s health services was slower than adult services,<sup>112</sup> and this too had consequences for children rendered vulnerable by the nature of the pandemic response.

30. SITUATIONAL VULNERABILITY: DPO see disability and vulnerability as socially determined,<sup>113</sup> with the social exclusion of Disabled people often compounded by other disadvantages including poverty, deficient housing, as well as by way of intersectional impacts due to gender or race.<sup>114</sup> Children and young people’s situation during the pandemic depended on a range of protective factors present in the home, in terms of a financially secure household and suitable housing, a place where everybody was in good health, where parents were available and able to give extra care and attention, with access to additional resources for learning, play and outdoor space. Where those protective factors were absent, then mental health conditions were more likely to ensue. For those who before the pandemic were just about managing, in need of support but not for diagnosable impairments, there was now a need for greater intervention.<sup>115</sup> Pre-pandemic vulnerabilities were then aggravated by cuts to services to families with Disabled people, with up to 75% of family respondents describing decreases in support available to them, but with 50% also reporting considerable reduced income and 80% reporting additional expenses.<sup>116</sup> The result was marked decline in mental and physical health, with impacts on siblings and carers.<sup>117</sup> Moreover, removing school attendance also meant removing a major situational basis for identifying vulnerability in the first place.<sup>118</sup> While this was understood as a matter of generality,

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<sup>107</sup> Turner [T7/100/16-101/5]

<sup>108</sup> Lockhart [INQ000472876/19 §§58-61, 151]

<sup>109</sup> Viner [INQ000588157/26 §§4.2-4.3, 8.5(c)]

<sup>110</sup> DPO [INQ000588026/§89] RCPCH 05.2020 [INQ000620611] Turner [INQ000651508/17 §§33-35, 38, 41]

<sup>111</sup> Burton [T7/59/9-13] Toman [T3/25/6-12]

<sup>112</sup> Burton [T7/23/22-25/14]

<sup>113</sup> Toman [T3/4/5-16]

<sup>114</sup> DPO [INQ000588026/29 §§84, 105] Toman [T3/7/10-10/17]

<sup>115</sup> Newlove-Delgado [T4/124/11-125/1] [T4/133/9-134/1] Ketch [INQ000588090/21 §64]

<sup>116</sup> Family Fund [INQ000588307/5, 7, 12-14]

<sup>117</sup> Family Fund [INQ000588307/16-21]

<sup>118</sup> Allen [INQ000650824/4 §§20-21, 60-61, 67-70]

the capacity of schools and local authorities to monitor and respond to vulnerability varied widely. The Inquiry heard of extended risk profiling for vulnerabilities based on additional support needs, and outreach to students for ‘wellbeing walks’ and grocery deliveries.<sup>119</sup> But it was also the case that some Disabled students, like Kaylea Tifford, were not visible to their schools or to other services, with preventable fatal consequences in Kaylea’s case.<sup>120</sup>

31. INCONSISTENCY: Leaving a range of decisions to schools’ discretion in terms of risk assessments and what became “*the otherwise vulnerable*” category for going to school was never going to work consistently across the country in an unplanned for and difficult to understand pandemic.<sup>121</sup> It assumed that vulnerable children would be ‘found’ despite insufficient data, co-ordination and monitoring.<sup>122</sup> Schools behaved in markedly different fashions as to whether they encouraged or discouraged attendance or completed risk assessments (promptly or at all).<sup>123</sup> A DfE survey of England found that by June 2020, of the local authorities that responded, on average, they had risk assessed only 55% of children and young people with EHC plans to determine whether they should attend school.<sup>124</sup> As high proportion as 75% of parents of children with SEN/D reported a failure of schools to risk assess whether their children could attend school or not knowing if an assessment had taken place.<sup>125</sup> There was also never an agreed consensus on what ‘critical’ social work for children with SEN/D meant, such as to render their attendance necessary.<sup>126</sup> Other barriers concerned the removal of travel arrangements for Disabled children and the absence or redeployment of specialist staff who were familiar with learners’ needs.<sup>127</sup> The approach to admitting the “*otherwise vulnerable*” was also not systematically monitored by Central Government.<sup>128</sup> Data gathering calls by REACT (see §40 below) did not include any questions

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<sup>119</sup> Lewis [T6/30/13-24] [T6/31/1-32/11] [T6/32/14-33/24] Lewis [INQ000649886/5 §§32-35]: see also Morris [INQ000588009/10 §2.31]

<sup>120</sup> Powell [T8/94/18-96/9] [T8/104/8-22] [T8/105/13-106/5]

<sup>121</sup> LGA Covid 19 M8 Report (Feb 2025) [INQ000546957/39-40] McCluskey et al [INQ000587959/64 §139]

<sup>122</sup> BASW 15.07.20 [INQ000643632/6] LGA Survey for M8 (Feb 2025) [INQ000546957/39-40] Coffey [T5/22/14-20] Williamson [INQ000588024/34 §4.68] Barnaby [T7/182/12-183/10]

<sup>123</sup> Longfield, Childhood in the Time of Covid (Sep 2020) [INQ000231345/8] [T4/29/23-24] [T4/35/5-9] [T4/35/17-18] Coffey [INQ000588111/127 §352(d)] [T5/12/23-13/4] Ofsted (June 2021) [INQ000621278/35] Hammond [T9/48/12-52/14] BASW 15.07.20 [INQ000643632/2, 10] DPO [INQ000588026/24 §§70-72] see also Haque [INQ000651497/11 §25a-b] Harrison [INQ000588105/12 §§51-56] Abbey [INQ000588041/5 §29] Hammond [INQ000588016/7 §§26-27] Sandy [INQ000587991/6 §§29, 83-87] Lewis [INQ000588059/22 §97-98, 108] Chibber [INQ000588063/8 §§34, 86] McEvoy [INQ000587994/6 §38] Orrels [INQ000588061/10 §47] Davies [INQ000587966/13 §§53-55] Freeman [INQ000588144/14 §§4.1, 4.5-4.8]

<sup>124</sup> DfE Vulnerable Children and Young People Survey 17.06.20 [INQ000623396/9]

<sup>125</sup> Longfield, Childhood in the Time of Covid (Sep 2020) [INQ000231345/8] DPO [INQ000588026/9 §28] Toman [T3/24/4-19]

<sup>126</sup> BASW 15.07.20 [INQ000643632/3]

<sup>127</sup> Ofsted Briefing Nov 20 [INQ000531048/2-4] Ofsted SEND Report 16.06.21 [INQ000621278/25, 34] McCluskey et al [INQ000587959/180 §460] [T6/169/5-10] DPO [INQ000588026/9 §30] Marks [T6/48/1-7] [T6/48/20-49/2]

<sup>128</sup> Williamson [INQ000588024/34 §§4.67-4.68] Ford [INQ000587997/13 §§3.9-3.12] Kavanagh Dixon [INQ000588048/23 §78] Morris [INQ000588009/4 §2.4] Oram [INQ000587996/20 §§3.41, 3.43]

about risk assessments or “*otherwise vulnerable*” children,<sup>129</sup> and local authorities felt the REACT team’s engagement on issues relating to SEN/D was relatively weak.<sup>130</sup>

32. OUTCOME: The outcome was (unsurprisingly) significant local variation and very low rates of school attendance by Disabled children. According to the DfE, less than 2% of the school population had attended as at 24 April 2020 (including “10% of *eligible vulnerable children*” – but this could not account for “*otherwise vulnerable*” children given the lack of monitoring of that cohort).<sup>131</sup> Only 6% of children with an EHC plan attended school on average from the start of the first lockdown to the end of May 2020.<sup>132</sup> A very significant number of those with SEN/D did not attend.<sup>133</sup> A Family Fund survey in 2021 revealed that only 3 in 10 Disabled children attended school between March 2020 and the end of the 2020 school year.<sup>134</sup> Many children with complex needs did not attend school at all during the first lockdown. Even when reopened, not all those with SEN/D returned and others were given a narrower curriculum than usual.<sup>135</sup> By January 2021, during the second round of school closures, the number of Disabled children attending school had only increased to 4 in 10.<sup>136</sup> In Scotland, some local authorities had *no* vulnerable children attending, only children of key workers.<sup>137</sup> Only 1% of all children attended the 'hub schools' which remained open, with the majority of those attendees being children of key workers.<sup>138</sup> In Wales, as at 5 May 2020, the Children’s Commissioner was advised that several hundred vulnerable children were in school hubs each day, but this was a tiny proportion of those eligible to attend.<sup>139</sup>
33. DIGITAL EXCLUSION: For those students who attended remotely the pandemic exposed the harsh reality of the digital divide, as education moved online.<sup>140</sup> Having a disability is one of the strongest predictors of digital exclusion.<sup>141</sup> Other factors of disadvantage such as space in the home to learn compound the problem.<sup>142</sup> From the outset DfE recognised that learners with SEN/D were likely to struggle with remote learning. Schools did not yet know how to support them. Parents did not have the necessary training to fill the gap.<sup>143</sup> Ministers were told that providing devices and connectivity would not be enough to mitigate the widening attainment gap

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<sup>129</sup> REACT script [INQ000540902] REACT Call Script [INQ000540989]

<sup>130</sup> Kavanagh Dixon [INQ000588048/19 §65]

<sup>131</sup> DfE Social Distancing Paper [INQ000263376/1]

<sup>132</sup> Children’s Commissioner, Childhood Report Sept 20 [INQ000231345/8] DPO [INQ000588026/9 §28]

<sup>133</sup> Coffey [T5/21/20-22/13]

<sup>134</sup> DCP Silence Report 10.09.21 [INQ000618444/21]

<sup>135</sup> Ofsted SEND report 16.06.21 [INQ000569771/6] Homden [INQ000588056/43 §173]

<sup>136</sup> DCP Silence Report 10.09.21 [INQ000618444/21]

<sup>137</sup> Todd [INQ000651699/14 §40]

<sup>138</sup> DPO [INQ000588026/9 §29]

<sup>139</sup> Cifuentes [INQ000587975/124 §417]

<sup>140</sup> BASW [INQ000650824/38 §171]

<sup>141</sup> M2, 2A, 2B and 2C [Vol. II §10.80] GM Disabled Peoples Panel [INQ000643696/31 §13.2]

<sup>142</sup> Montacute [T3/164/13-165/5] [T3/167/9-168/20]

<sup>143</sup> DfE (27.03.20) Early Years Learning from Home [INQ000575615/59]

for SEN/D students.<sup>144</sup> Suitable (sometimes specialist) devices and software would be required.<sup>145</sup> Despite this, the steps taken were wholly inadequate. DfE’s list of online resources for learners with SEN/D and Oak Academy’s specialist content were of limited use to educators.<sup>146</sup> 89% of parents reported their child did not receive necessary assistive technology.<sup>147</sup> Gavin Williamson, as Secretary of State, frankly accepted that the resources provided by the DfE were not sufficient to ensure remote education was accessible to Disabled children during the first lockdown,<sup>148</sup> as confirmed by a survey of SEN Coordinators in which 73% said their school experienced challenges providing virtual support to pupils with SEN/D.<sup>149</sup> Even when more detailed guidance was provided, it relied (and continues to rely) heavily on educators having the expertise to tailor interventions to individual needs.<sup>150</sup> This resulted in wide variability.<sup>151</sup> In January 2021, Ofsted found that only 46% of teachers stated their school offered additional remote learning arrangements for pupils with SEN/D,<sup>152</sup> who often received fewer hours of structured online learning per day than their peers.<sup>153</sup> In May 2021, DfE reported that only 25% of teachers agreed that they could effectively support pupils with SEN/D to learn remotely.<sup>154</sup> Many Disabled students were thus doubly excluded: excluded from school attendance and excluded from access to remote learning.

#### PART IV: EASEMENTS

34. REMOVAL OF RIGHTS: Governments in England, Scotland and Northern Ireland enacted easements in respect of core statutory duties owed to Disabled children and young people. In England, this involved downgrading the mandatory duty to secure the provision in a child’s EHC plan to a duty to use “*reasonable endeavours*” to do so; in Northern Ireland, the equivalent duty was downgraded to “*best endeavours*”.<sup>155</sup> Government should not have acted to remove rights at a time when Disabled children and young people needed the support more than ever.<sup>156</sup> This was especially so given the known difficulties which children and young people faced pre-pandemic in meeting the high threshold necessary to obtain an EHC plan.<sup>157</sup> Thereafter, there was an optimism bias that local responses would still meet needs, despite the invitation to use

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<sup>144</sup> DfE (15.04.20) Project Update, Departmental Support and Launch Plans [INQ000497607/6 §31]

<sup>145</sup> DfE (28.04.20) [INQ000226712/47 §7]

<sup>146</sup> Dorer [INQ000587851 /15§54] McCluskey [INQ000587959/169 §419] SNJ 04.05.20 [INQ000621513/1-2]

<sup>147</sup> McCluskey et al [INQ000587959/166 §409]. See also Toman [T3/22/11-23/6] DPO [INQ000588026/20 §59]

<sup>148</sup> Williamson [T10/145/9-146/20]

<sup>149</sup> EIA Jun 21 [INQ000542725/20 §67]

<sup>150</sup> Good practice 01.10.20 [INQ000519932/7] Guidance 19.08.24 [INQ000575797/10]

<sup>151</sup> McCluskey et al [INQ000587959/167 §§412, 414]

<sup>152</sup> Ofsted Remote education research 25.01.21 [INQ000575804/22-23]

<sup>153</sup> McCluskey et al [INQ000587959/168 §415]

<sup>154</sup> DfE, Education Technology (EdTech) Survey 2020-21: research report (May 2021) pp 47-48]

<sup>155</sup> For England, see Coronavirus Act 2000. Para 5(4) and (5) Schedule 17 and for NI, see para 18: see also Longfield, Changes to SEND Duties 12.05.20 [INQ000231371] DPO [INQ000588026/16 §§48-50]

<sup>156</sup> Longfield, Childhood in the Time of Covid (Sep 2020) [INQ000231345/28] Baron [T9/102/6-12] DPO [INQ000588026/18 §§54-55]

<sup>157</sup> Longfield [T4/76/18-77/4]

only “*reasonable endeavours*”, as opposed to “*all practical steps*” as argued for by the Children’s Commissioner<sup>158</sup> and the well-documented failings in the system pre-pandemic. Applicable guidance requiring records to be kept of changes to provision delivered under EHC plans was reportedly not complied with.<sup>159</sup> NGOs and local authorities queried the ability to apply a standard of legal certainty as to what reasonable or best endeavours meant.<sup>160</sup> As a likely consequence, of Disabled children who had previously accessed therapy through their school, a survey found 85% of respondents were unable to use physical therapy or physiotherapy and 84% were unable to use speech and language therapy.<sup>161</sup> Ofsted considered EHC plan students attending schools during its regional inspections, but it did not audit compliance with individuals plans; and neither did it monitor risk of SEN/D learner’s non-attendance.<sup>162</sup> Local authorities and health bodies should not have been afforded such wide-ranging opt out discretions on a blanket basis across the country, without any threshold of necessity, especially without systematic reporting and monitoring of how the easements operated.<sup>163</sup>

35. SANCTIONING OF DELAYS: At the same time, statutory time requirements for myriad social services assessments and reviews were replaced by “*as soon as reasonably practicable*” requirements.<sup>164</sup> These changes were enacted in circumstances of such abject failure to consult with the Children’s Commissioner and other children’s NGOs, as to cause the Court of Appeal to deem a suite of the changes as vitiated by a “*one-sided*” and “*conspicuously unfair*” process (see §41 below).<sup>165</sup> The vice was to remove the essential imperative of timelines for assessments of looked-after children and children in residential care or on short stay placements, and to paint these matters as the easement of “*administrative burdens*” amounting to “*low risk changes*”.<sup>166</sup> Other regulations allowed for delayed assessments and reviews with regard to EHC plans.<sup>167</sup> The potential greater damage that arises from delay in monitoring the situation of children in dependent situations should not have been so willingly jettisoned.<sup>168</sup> Children coming to the front of a queue for assessment for SEN and EHC plans suddenly lost the opportunity to be assessed; unlawful

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<sup>158</sup> Longfield, Changes to SEND Duties 12.05.20 [INQ000231371/1]

<sup>159</sup> Guidance - EHC Needs Assessments and Plans [INQ000519890/7] Joint letter to Minister Ford [INQ000643670/1-2]

<sup>160</sup> CC Letter 26.03.20 [INQ000540815/1] Joint Letter to Vicky Ford 29.05.20 [INQ000643670/1] Vulnerable CYP National Board Agenda 17.04.20 [INQ000497842/2] ADCS paper 13.05.2020 [INQ000643082/1]

<sup>161</sup> Disabled Children’s Partnership Report [INQ000618444/27]: see also DPO [INQ000588026/22 §§64-68 & 93] Toman [T3/28/22-30/11]

<sup>162</sup> Coffey [T5/47/13-48/4] [T5/22/14-20], as to absence of other monitoring see: Dickie [T8/17/2-20]

<sup>163</sup> Cf. M8 DPO Written Opening 15.09.25 [p. 15 §33]

<sup>164</sup> The SEND (Coronavirus) (Amendment) Regulations 2020 (from 01.05.25 – 25.09.25) and The Adoption and Children (Coronavirus) (Amendment) Regulations 2020 (from 24.04.20-25.09.20)

<sup>165</sup> *Art. 39 v Secretary of State for Education* [2020] EWCA Civ 1577 [INQ000231395 §§7, 80, 83-87]

<sup>166</sup> Cf. Ministerial Submission 06.04.20 [INQ000540854/1 §3]

<sup>167</sup> The Special Educational Needs and Disability (Coronavirus) (Amendment) Regulations 2020 (from 01.05.20-25.09.20)

<sup>168</sup> Baron [T9/103/17-104/20] Allen [INQ000650824/28 §125] BASW 24.04.20 [INQ000643622]

delays that existed pre-pandemic became delays of 6-12 months during the pandemic,<sup>169</sup> a significant period in the life of a child or young person.

36. TRANSITION TO ADULTHOOD: For Disabled people transitioning to adulthood, mandatory duties to assess for care and support plans under sections 58-59 of the Care Act 2014 were now downgraded to discretionary powers as were other statutory duties to ensure continuity of Disabled children's social care provision during transition to adult services.<sup>170</sup> The mounting delays in those types of assessments had prejudicial consequences for the wellbeing of Disabled young people, as well as their families and carers, including young carers.<sup>171</sup>
37. BACKDOOR EASEMENTS: Aside from formal easements, there were 'back-door' easements through generally worded guidance about duties which had not been eased. The initial guidance to CSC in early April 2020, countenanced in general terms that local authorities "*will struggle to meet some [unspecified] of their statutory duties*".<sup>172</sup> The Children's Commissioner criticised the document for lack of clarity and for effectively licensing rule breaking, as long as authorities "*do their best*".<sup>173</sup> The Government sought to clarify the situation in later Guidance for CSC in May 2020,<sup>174</sup> after the "*as soon as reasonably practicable*" easements were introduced. But that later Guidance still contained a general licence to conduct remote forms of contact with children rather than face-to-face meetings, unless it was necessary to do so, even though there was no such easement that modified duties in that regard.<sup>175</sup> Overall, these generally worded licences set an ambiguous tone combined with the redeployment of staff, that for these exceptional and complex times relaxation of duties was allowed. At the very least this could lead to inconsistency, with face-to-face visits limited to dangerous situations, and not to promotion of health and development.<sup>176</sup> In a system in crisis that pivoted heavily to the risk of mortality and suffering in adult social care "*the workforce supporting children in social care was not prioritised for the same protections that the adult workforce received*".<sup>177</sup> More broadly the language of easements became a cover for the impoverishment of practices, and an already stretched system that could render Disabled Children and young people invisible was allowed to go into further decline.<sup>178</sup>

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<sup>169</sup> McCluskey [T6/175/18-176/2] Dorer [INQ000587851/21§77]

<sup>170</sup> Sections 2A(2)-(4), (6) Chronically Sick and Disabled Persons Act 1970; sections 17ZH(2)-(4), (6) Children's Act 1989. See section 15 and Schedule 12 Coronavirus Act 2020.

<sup>171</sup> Longfield 26.03.20 [INQ000540815/1-2] DPO [INQ000588026/39 §§112-119] Allen [INQ000650824/35 §158] Acland-Hood [INQ000587992/157§8.43-8.45] Feuchtwang [INQ000650323/16 §44]

<sup>172</sup> Guidance for CSC (April 2020) [INQ000519580/4]

<sup>173</sup> Longfield 06.04.21[INQ000239691/4-5]

<sup>174</sup> Ford [T9/170/25-175/2]

<sup>175</sup> Ford [T9/178/7-180/20]

<sup>176</sup> Ford [T9/184/3-15]

<sup>177</sup> Oram [INQ000587996/89 §7.12]

<sup>178</sup> DPO [INQ000588026/17 §§51-53]

38. OUTCOMES: The real-time evidence of decline was there for four nation governments to see.<sup>179</sup> Although the easements to the Care and Families Act 2014 ceased in August 2020, as late as January 2021, 72% of respondents to a survey reported that their child's EHC plan or SEN support had been negatively affected by Covid-19; 21% of parents whose children had EHC plans said their child was getting none of the special educational provision specified in their plan, and 46% were only getting some of it. 52% said they were experiencing delays in EHC needs assessments, with 27% reporting they had been waiting for more than 6 months.<sup>180</sup> By April 2021, 67% of parents reported that withdrawn EHC plan services had not been reinstated, with over 50% still unable to access occupational therapy, speech and language therapy, or physiotherapy.<sup>181</sup> For those Disabled children and young people receiving social care services, such as personal care and assistance, care and support within the home and community, respite care and travel support, the Left in Lockdown survey of 4,000 families in May 2020 reported that all support had stopped since the start of lockdown for over three quarters of respondents.<sup>182</sup> Untrained parents and siblings were left to perform tasks and procedures without the required number of individuals to do so and having to use inappropriate techniques.<sup>183</sup> Ofsted inspections in Autumn 2020 found that not all of the multi-agency support that had stopped during the first national lockdown had restarted, with consequential developmental harm for Disabled children.<sup>184</sup> Ofsted, the Scottish Care Inspectorate and others have highlighted the scale of the withdrawal of respite services that have not otherwise been fully restored.<sup>185</sup>

## PART V: UNFAIRNESS

39. SYSTEMIC SHOCK: The above matters bring into question whether policy measures taken in relation to children and young people involved disproportionate harms. The more limited and indirect benefits of school closures in reducing transmission have to be set against the fact that the measure precipitated what Professors Newlove-Delgado and Cresswell described as “a *systemic shock*” to the wider determinants of child health, with impacts on family functioning and income, access to healthcare and education.<sup>186</sup> That is because schools represent an (almost) universal setting serving myriad functions<sup>187</sup> and the main social infrastructure that children (and

<sup>179</sup> DPO [INQ000588026/15 §§46-47] Tolman [T3/29/12-30/2]

<sup>180</sup> Pears Foundation [INQ000643684/2, 6-7]

<sup>181</sup> Disabled Children's Partnership (April 2021) [INQ000588312/10]

<sup>182</sup> DCP Lockdown Report [INQ000347077/4]

<sup>183</sup> DPO [INQ000588026/40 §116]

<sup>184</sup> Ofsted (June 2021) [INQ000621278/28]

<sup>185</sup> Ofsted (October 2020) [INQ000103025/9] Ofsted CSC Report 27.07.22 [INQ000553793/4, 13-14]

Care Inspectorate Report (August 2021) [INQ000643175/41] DCP Silence Report 10.09.21 [INQ000618444/30

§2.3.2] DPO [INQ000588026/41 §119] Killean [INQ000649659/29 §110] Haque [INQ000651497/5 §§12, 34c]

Yiasouma [INQ000588091/22 §§61, 65, 182b]

<sup>186</sup> Newlove-Delgado and Cresswell [T4/122/10-18] [INQ000587958/19 §40] citing Hefferon et al, *Priorities for the child public health response to the Covid-19 pandemic recovery in England*. Archives Of Disease In

Childhood, 106(6), 533-538, 538

<sup>187</sup> Newlove-Delgado and Cresswell [INQ000587958/16 §§34, 140]

their families) are in contact with every day.<sup>188</sup> For Disabled people, the consequence of the shock was to aggravate pre-existing impairments and crucially generate new ones. Because of the harms arising from unplanned school closures and easements, DfE needed to be more central to the government response, including co-ordinating a reparations package. That is not what occurred, despite the losses in learning, relationships, wider experiences and wellbeing.<sup>189</sup> Instead, a pre-pandemic social compact of children daily leaving their homes to be part of a school community, with parents being able to go to work and manage other aspects of their own and their families' lives, was reversed in the act of sending children home. The dramatic shift had implications for resilience, mental wellbeing and the ability of many children to cope or engage with school settings when they reopened. The result has been substantially reduced post-pandemic attendance, including children and young people who simply never returned.<sup>190</sup> For Disabled children and young people, especially in the SEN/D category, the compact erosion was even more pronounced, with pre-existing attendance challenges made worse, and return to school and normal life complicated by the fact that so many services and routines have not been reinstated.<sup>191</sup>

40. CONSULTATION RIGHTS AND VALUES: Given the radical transformation imposed on the everyday lives of children and young people during the pandemic, the jettisoning of even established consultation practices – through the conventional channels of the statutory Children's Commissioner and established NGOs – was particularly extreme. The Regional School Commissioner Team ('REACT') set up "*to ensure effective oversight and joined up working*" as between government and schools was experienced by local authorities as a "*one-way process*" in which data provision and feedback about how policy could change was not reciprocated with response or genuine collaboration.<sup>192</sup> Still less did the level of co-production and co-design between the state and society meet the standard of co-production and co-design that form entitlements, including for Disabled children, under Article 4(3) of the UNCPRD. There are also analogues in Article 12 in UNCRC, with the additional role of the Children's Commissioners to draw the attention of decision makers to the views and interests of children in accordance with the UNCRC.<sup>193</sup>
41. CONSPICUOUS UNFAIRNESS: In the Article 39 judicial review of the failure to sufficiently consult on the amendments to children's social care regulations (see §35 above), the Court of Appeal found not only a breach of discrete statutory duties to consult, but breaches of the common law

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<sup>188</sup> Barnaby [T7/182/1-7]

<sup>189</sup> Dorer [T7/131/20-132/7]

<sup>190</sup> Hammond [T8/54/18-55/14]

<sup>191</sup> DPO [INQ000588026/9 §29] Ofsted (Junne 2021 [INQ000621278/20-21, 23-27])

<sup>192</sup> Morris [INQ000588009/4 §2.4] Cf. Hammond [T8/53/15-54/1]

<sup>193</sup> Children Act 2004, s. 2 and 2A as amended by the Children and Families Act 2014

requirement to consult to avoid “*conspicuous unfairness*”.<sup>194</sup> Fairness in this context, as a feature of policy making, has been recognised as (1) “*liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested*”, (2) avoiding “*the sense of injustice which the person who is the subject of the decision will otherwise feel*”, and (3) “*reflective of the democratic principle at the heart of our society*”.<sup>195</sup> While the Covid-19 pandemic required policy making under crisis, the Court determined the urgency did not preclude at least a short informal consultation; the DfE did not dispute that such a consultation could have taken place. The fact that the Secretary of State was facing difficult decisions about whether and, if so, how to modify key duties and support made it all the more important that he should receive as wide a range of advice as possible, in order to meet a requirement to act with fairness in the broader constitutional sense; to ensure that decision-making was properly tested, including considering of the views of those affected; and to protect against arbitrariness.<sup>196</sup>

42. MISSING CALCULATIONS: What happened in the Article 39 case was part of a deeper problem. In the effort to deal with the unprecedented and unplanned for crisis, what was all too absent were risk assessments that factored in the interests of children as a primary consideration. There was a failure to investigate how, with testing and design around social distancing and pandemic resource and labour scarcity, children could come together more, receive essential services, and how families of children in need could obtain respite.<sup>197</sup> At the outset of the pandemic, the United Nations Human Rights Committee on the Rights of the Child had warned of the risk of such missing calculations.<sup>198</sup> The Children’s Commissioners of the four nations have objected to the manner in which children were not seen as rights holders during the pandemic and indeed overly instrumentalised into the agendas of adult public health policy.<sup>199</sup> Numerous witnesses speak to the failure to analyse policies that affected children so as to sufficiently prioritise the harms that would accrue to them, rather than the harms to others.<sup>200</sup>

43. NON-EXPLORATION: Baroness Longfield pressed the issue with SAGE, for instance in her letter of 30 June 2020, in asking whether there had been sufficient exploration of “*the potential for differential social distancing requirements for adults and children*” given the “*differential susceptibility of children to Covid-19 compared with adults*”.<sup>201</sup> The answer from the CMO and CSMO was that SAGE had considered the differential impacts of the virus on children and adults “*extensively*”, but the potential for different social distancing requirements for adults and children

<sup>194</sup> *R (Plantagenet Alliance Ltd) v Secretary of State for Justice and others* [2014] EWHC 1662 (QB) §98(2)

<sup>195</sup> *R (Moseley) v Haringey LBC* [2014] UKSC 56 [2014] 1 WLR 3947 §§23-24

<sup>196</sup> *Art. 39 v Secretary of State for Education* [INQ000231395/32 §§77, 85-87] Ford [T9/185/20-186/21]

<sup>197</sup> Baron [T9/109/2-110/23]

<sup>198</sup> UNCRC 08.04.20 [INQ000146829]

<sup>199</sup> Killean [INQ000649659/13 §47] Longfield [INQ000588139/8 §26] Yiasouma [INQ000588091/20 §55] Cifuentes [INQ000587975/49 §171]

<sup>200</sup> Turner [T7/69/16-70/20] [T7/76/11-17] Coffey [INQ000588111/323 §754]

<sup>201</sup> Longfield [INQ000588139/32 §87] [INQ000588094/2] [T4/78/6-83/8]

had not been considered and no advice had been provided on the issue.<sup>202</sup> While that was not SAGE's responsibility, the fact that differential social distancing requirements were never seriously considered because the CSA and CMSO (who were not specialists) understood it to be "*extremely difficult to achieve in a school environment*" ignored the potential to model variables of partial closure and expanded attendance. First, there were reasonable grounds to consider tolerating greater transmission amongst, especially, younger children given their lower susceptibility to the virus and less common secondary transmission if infected by it. Second, there were means to design greater social distancing into the school environment including by ventilation, renovation and temporary nightingale type structures.<sup>203</sup> Third, the epidemiological advice created policy dilemmas based on priorities, for instance whether to enable greater school opening, but to limit the movement and gathering of adults beyond the essential workforce. Only politicians could make those choices. Fourth, there is an aspect of this non-exploration – that the scientists and the policy makers never seriously got beyond the initial modelling – that treated children as small adults for transmission purposes, even though the evidence never clearly confirmed that to be the case. In September 2020, the blanket insistence of treating children and adults as similar for transmission purposes started to break as Scotland and Wales adopted different approaches to the rule of 6, exempting children under 12, whereas England did not.<sup>204</sup>

44. SCIENCE AND POLICY: To treat different risks of transmission and different categories of harm as similar when they are different is an indication that a policy is unfair to the point of being unreasonable and otherwise disproportionate.<sup>205</sup> In this default tendency to lock down children on the same basis as adults, the relationship between science and policy produced unfair results. Minister Ford proclaimed a lose-lose dimension of school closure but explained it as an equivalent to the "*many lose-lose situations in Covid*", for "*if you'd sent your severely disabled child to school and they'd got Covid and brought it home and infected other family members, that's pretty bad, as well*".<sup>206</sup> Based on the epidemiological evidence that was not the predominant problem. Rather, the relationship between science and policy remained unsystematic and unsophisticated in researching and designing alternative options for children that were less blunt. For example, there were very general assumptions about keeping school attendance low, with an initial modelling to tolerate 20% for the combined eligible groups. A range of concerns were raised about how to manage attendance in areas of higher uptake, and that it may be unsafe for there to be 20% attendance per school, as opposed to across different geographical areas.<sup>207</sup> It would have been possible to model the implications of additional cohorts of students attending

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<sup>202</sup> Valance and Whitty [NQ000239696/1-2] Whitty [T13/73/13-74/18] [T13/78/1-79/22]

<sup>203</sup> Watts [INQ000588017/15 §6.6, 6.8-6.11] Noakes [INQ000588180/19 §§8.4(6), 8.6] [T15/83/16-84/16]

<sup>204</sup> Longfield [INQ000588139/33 §88] M2, 2A, 2B and 2C [Vol. II §10.106]

<sup>205</sup> *Matadeen v Pointu* [1999] 1 AC 98,109; *Thlimmenos v Greece* (2000) 31 EHRR 15 §44

<sup>206</sup> Ford [T9/163/23-164/4]

<sup>207</sup> SAGE 18.03.20 [INQ000075778 §23] Ford [INQ000587997 §3.14] GPSMIG 19.03.20 [INQ000056038/3-10]

schools, but the DfE did not ask for such modelling.<sup>208</sup> The answer to the question of who should take the initiative was that it was for policy makers, not advisers, to do so.<sup>209</sup> This was an example of scientific expertise being constrained by limitations of what the DfE or the Cabinet asked it to advise upon.<sup>210</sup> At the same time, limitations in the diversity of SAGE and its subgroups (including limited dialogue with school providers and SEN/D specialists, and little consideration of the views of Disabled people) meant that SAGE and its subgroups did not self-generate advice to steer government towards the examination of alternative options on school closure.<sup>211</sup>

45. THE SECOND ORDERING OF LESS INTRUSIVE MEASURES: What is regrettable is that after mid-March 2020, less intrusive measures were left relatively underexplored by either the scientists or the policy makers. More dynamic modelling and research could have, at least, examined whether opening schools up to a broader cohort of children with a range of SEN/D could be done safely, including on a rota system.<sup>212</sup> In Germany in May 2020, schools opened to prioritise health and wellbeing over learning goals, and specific language needs, above all other goals.<sup>213</sup> After the initial crisis of unplanned closure, there could and should have been greater modelling, research and design towards a genuine system of hybrid schooling. The aim and the message should have been to optimise attendance, based on the virus transmission rate, tolerably prioritising children and young people in “*need of support*”, including students with SEN support.<sup>214</sup> What is now known is that although a range of staggered and hybrid models of schooling were modelled, neither the DfE nor TFG initiated any broader discussion to expand the eligibility criteria to tolerably higher levels.<sup>215</sup> Moreover, although SAGE and TFG could provide modelling and other data analysis, they were not involved in operational design and delivery, and that was not within their expertise.<sup>216</sup> Indra Morris’ impression at various stages was that while closure was a first order priority of government, the decision to keep schools open for vulnerable children and young people remained of a second order status to be dealt with in the light of the transmission control decisions.<sup>217</sup> Professor Viner’s understanding (like the CSA/CMO letter to the Children’s Commissioner) was that the potential to split and rotate classes were not matters that were prioritised by government because they were thought to be logistically too difficult.<sup>218</sup> Along with the CMO it is a common lesson learned by many of the experts that more should have been done to try (see §15 above).

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<sup>208</sup> Whitty [T13/36/24-40/8]

<sup>209</sup> Whitty [T13/81/4-90/10]

<sup>210</sup> M2, 2A, 2B and 2C [Vol. II §§9.97-9.108]

<sup>211</sup> M2, 2A, 2B and 2C [Vol. II §§9.83-9.91, 10.38] M2 DPO Closing [INQ000399541 §§25-27]

<sup>212</sup> Viner [INQ000588157/39 §8.5(e)]

<sup>213</sup> Whitty email 21.05.20 [INQ000606848/2 §10]

<sup>214</sup> Morris [T9/54/4-14] Patel [T5/134/4-13]

<sup>215</sup> Rahman [INQ000588066/21 §5.16] Watts [INQ000588017/13 §5.7] Viner [T15/23/-24/16]

<sup>216</sup> Watts [INQ000588017/14 §5.8]

<sup>217</sup> Morris [INQ000588009/2 §1.1, 5.4] [T9/4/17-5/12]

<sup>218</sup> Viner [INQ000588157/29 §4.6] [T15/25/4-28/15] Coles [INQ000651602/80 §231]

46. ALTERNATIVE OPTIONS: It did not have to be like this. Recalling that schools are “*central places*”, not only of learning, but for the delivery of essential therapies and support, and the psychological and social integration of children and young people, there could have been a more creative, and more expansive approach to how schools could act as hubs for services, with variant options for different cohorts of families and children.<sup>219</sup> The British Association of Social Workers characterised the partial closure of schools, as their being “*re-purposed*” as a safe place for vulnerable children.<sup>220</sup> This could have offered an opportunity so that children who for whatever reason were in need of a social service (including assessments of individual and family needs) could attend the school building and grounds. The idea could have been developed also to include health and therapeutic services delivered in safe environments, or so-called “Closed Childcare Clusters”, either at school or between groups of students and families sharing reciprocal needs.<sup>221</sup> The emphasis needed to be on how to enable these measures in a safe and segmented environment, expanding the number of options for families, and creating different models of schooling and childcare.<sup>222</sup> On that basis, with greater prioritisation and better design, higher numbers of children in need of support could have been integrated into on-site schooling sooner. An effective policy to make that happen would have had critical benefits in diminishing foreseeable harms for Disabled children and young people.

#### **PART VI: CAPABILITIES**

47. INEVITABILITY: But there is an important qualification. The various expert reports and reviews, including from Ofsted, indicate that the buckling of the various systems around children and young people during the pandemic was largely inevitable given the pre-pandemic systemic vulnerabilities. The challenge faced by those who argue for smarter and more targeted NPIs, and in this context, more proportionate restrictions on access to schooling, healthcare and other specialist support, is that the potential for more sophisticated and flexible pandemic responses is dependent on education, health and social care systems being resilient when a pandemic begins.<sup>223</sup> Instead, in early 2020, many of the systems upon which Disabled children and young people draw, including the SEN system, children’s social care and CAMHS, were underfunded and in a state of profound instability. They have only suffered more since the Covid-19 pandemic. No amount of pre-pandemic planning will be effective without enhanced investment in the services upon which children and young people rely. That in turn requires societal reconsideration of what is to be done with levels and distribution of taxation.<sup>224</sup>

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<sup>219</sup> Newlove-Delgado [T4/122/10-123/12]

<sup>220</sup> E.g. BASW [INQ000643619/9]

<sup>221</sup> Newlove-Delgado [T4/152/14-23] [INQ000587958/57 §142] citing Petri-Romao et al (2021). Safe Model for School Return during the COVID-19 Pandemic. Glasgow: University of Glasgow.

<sup>222</sup> Newlove-Delgado [T4/157/4-158/3] [T4/162/21-164/1]

<sup>223</sup> M2 DPO Closing [INQ000399541/32 §50]

<sup>224</sup> Lockhart [INQ000472876/53 §§151-155] Collins [INQ0006497/15 §§3.40-3.49] Johnson [T14/76/21-81/18]

48. DESIGN: According to Professor Woolhouse, scientific work concerning children’s lesser transmission of the virus, as with other aspects of the so-call cocooning/segmentation alternatives to full lockdowns, was “*policy relevant*” when considering whether to deliver a system of expanded and repurposed schooling, but this work was not “*policy ready*”. As Woolhouse puts it, what was required for more segmented approaches to lockdowns was further modelling and input from other sources, including expert assessments of what levels of containment could be achieved and logistics input.<sup>225</sup> The Inquiry has already reported on the importance of planning and preparation, with strategic clarity requiring clearly defined objectives. Design capability is also needed. In a pandemic this would extend not just to the development of greater space, ventilation and testing in schools. It would also include design of systems to limit end to end contact of adults and children going to and from schools, separation of traffic on the school run, and managing the movement of other key workers.
49. DIGITAL POSSIBILITIES: There is huge potential for technology to improve the accessibility of education for Disabled children and young people,<sup>226</sup> both at school and when remote education is required, including during emergencies or when an individual child is unable to attend school. The latter issue has arisen for children and young people who are CEV or vaccine intolerant.<sup>227</sup> For this potential to be realised, Disabled learners and those who educate them need to know about, have access to and be trained in the use of available assistive technologies. DfE research in May 2021 and November 2022 recommended: (i) guidance on the use of accessibility features built into mainstream devices and software, (ii) research into the tools and products designed to support learners with SEN/D, and (iii) that all future research into remote education should consider the needs of learners with SEN/D.<sup>228</sup> There also needs to be support for schools and colleges, either peer-to-peer (e.g. through reinstatement of EdTech Demonstrator Schools<sup>229</sup>), or via external expert organisations. There is at present a missed opportunity to support Disabled learners in education via technology and to address education inequity, by pooling the best examples of online learning and enabling access to teaching that is not available to students in their face-to-face schooling.<sup>230</sup>
50. LEGISLATION: At the local level, cuts and the fragmentation of key systems have undercut services, governance, and also the law. For years before the pandemic, the legal entitlements of Disabled children and young people with EHC plans were not being met. Only those with the capacity and resources to navigate the system could secure accountability, with approximately

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<sup>225</sup> Woolhouse [M2/INQ000250231/41 §228]

<sup>226</sup> McCluskey et al [INQ000587959/165 §§407, 423, 425] DPO [INQ000588026/26 §§74-76, 157]

<sup>227</sup> Wong [T3/141/17-142/4]

<sup>228</sup> DfE, Education Technology (EdTech) Survey 2020-21(May 2021) [p. 110] DfE [INQ000575750/11 §4]

<sup>229</sup> The EdTech Demonstrator Programme [INQ000575749] (discontinued post-pandemic)

<sup>230</sup> MacNamara 27.01.21 [M2/INQ000308390]

90% of complaints to the Ombudsman and appeals to the Tribunal being successful.<sup>231</sup> That was the context in which six days were taken in Parliament to debate the entire Coronavirus Act 2020. The resulting easements in respect of the SEN system applied to the whole of England, Northern Ireland and Scotland, when they could and should have been more tailored to circumstances of necessity. A legal challenge against the suspension of the duty in section 42 Children and Families Act 2014 failed, with the Court rejecting the argument that official reports to key decision makers could be challenged because they were “*Panglossian*”, giving an over-optimistic impression that children would fare acceptably well under a “*reasonable endeavours*” regime.<sup>232</sup> We know now that children did not fare acceptably well. For all easements being considered in a future emergency, necessity should be the touchstone. Procedurally, the better approach would be to use temporary powers under an amended Civil Contingency Act to introduce time limited measures, followed by a period in which primary and secondary can be robustly debated before Parliament.<sup>233</sup>

51. DATA: In the context of pre-existing systemic failings, there were clear grounds to be sceptical that legal easements would be monitored and, indeed, the data on how they were used is wholly inadequate. In future, there must be requirements for duty holders to notify easements with reasons and record decision making transparently, with sufficient monitoring of use throughout. Likewise, scientific uncertainty about transmission was in part the product of a data infrastructure that could not easily inform the centre of what was going on in the localities. As with all aspects of the pandemic, there is a lesson about the indispensability of a smart data infrastructure that is not overly burdensome to update, analyse and communicate.<sup>234</sup>
52. HUMAN RIGHTS: The extent to which the inevitability of generational harms did not properly figure in the proportionality calculus also shows why prioritisation of children’s rights cannot be guaranteed without far greater constitutional focus on them.<sup>235</sup> The situation for Disabled children and young people is even less secure. The human rights treaties in this context are not just values, but toolkits for policy making. Insufficient focus on these rights, especially in UK Government decision making, was a barrier to devising fair, proportionate and effective policies affecting Disabled children and young people. As with the UNCRPD, the narrative that this country has *de facto* incorporation of the UNCRC was tested during the pandemic, and the claim to an existing rights based system for children in many ways failed.<sup>236</sup> Of significance to this

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<sup>231</sup> DPO [INQ000588026/5 §§16, 19-20, 47, 152] LGSCO [INQ000643648/3] IPSEA Report [INQ000643742/1

<sup>232</sup> Cf. *Shaw v Secretary of State for Education* [2020] EWHC 2216 (Admin) §§120-129

<sup>233</sup> M2, 2A, 2B and 2C [Vol. II. §§13.109-13.113]

<sup>234</sup> Rahman [INQ000588066/74 §§9.6-9.10] Morris [INQ000588009/8 §2.22]

<sup>235</sup> Longfield [T4/85/10-86/2]

<sup>236</sup> Longfield [T4/94/5-95/2]

debate is the role of co-produced impact assessments, which would enable the risk of a virus and NPIs, including the prioritisation of services, to be more rigorously assessed.<sup>237</sup>

53. MACHINERY OF GOVERNMENT: There is also a problem in the current model of Cabinet Government, especially in the UK, where the political representation of the interests of children and young people, and especially those who are Disabled and at risk of being disabled, is not strong enough.<sup>238</sup> This manifested itself in the lack of expertise that DfE had in a range of education and child social care matters,<sup>239</sup> its dependency on SAGE and leads on science and research in other departments,<sup>240</sup> and the extent to which it did not have autonomy or influence over pandemic decisions that affected children and young people in profound ways.<sup>241</sup> More broadly, there were problems of a lack of diversity and a culture that government knows best, which the events of this pandemic have truly humbled.<sup>242</sup> Despite the claims of a policy focus on vulnerable children and young people, they did not enjoy a guarantee of joined up thinking across departments.<sup>243</sup> Hence the argument for a Secretary of State to have overarching responsibility for children and young people.<sup>244</sup> This aligns with the finding that the Inquiry has already made that the system of government should have ensured that those with particular responsibility for Disabled people – the Minister for Disabled People and the Disability Unit – were fully integrated into those bodies charged with the policy on, and operational response to, the pandemic from January 2020.<sup>245</sup> The consideration of children’s rights, as with disability rights, needs to become embedded in every department of Government, with policy makers able to activate cross-government activity.<sup>246</sup>
54. RELATIONSHIPS: The relationship between government, local authorities, schooling and healthcare is not integrated in normal times, let alone for the purposes of emergency planning.<sup>247</sup> Where local authorities used to serve an important coordination and monitoring function in respect of state education, increased academisation has resulted in a significant segment of the state school system falling outside of local authority arrangements, undermining their ability to lead a coordinated response.<sup>248</sup> As with adult social care, there remain dispiriting indicators that our present systems of government are ill-designed and ill-disposed to do things differently.

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<sup>237</sup> Longfield [T4/88/25-90/4] Toman [T3/13/18-14/14]

<sup>238</sup> Longfield [T4/95/8-96/16]

<sup>239</sup> Williamson [T10/5/17-6/6] Coles [T5/88/11-91/12] [T5/102/3-104/2]

<sup>240</sup> Rahman [INQ000588066/18 §§4.7, 9.3-9.5]

<sup>241</sup> Williamson [T10/7/6-20], [T10/19/15-20/16], [T10/89/11-90/14] Acland-Hood [T11/40/9-41/4], [T11/49/17-50/22] [T11/51/23-52/1] [T11/122/8-123/11] Rahman [INQ000588066/13 §§5.2]

<sup>242</sup> Coles [INQ000651602/61 §170] [T5/89/12-90/1] MacNamara [INQ000273841/18 §§32(iv), 74(vii)] [M2/T16/49/2-50/13] M2, 2A, 2B and 2C [Vol. II. §11.40-11.48]

<sup>243</sup> Morris [INQ000588009/24 §§5.3, 5.5-5.10]

<sup>244</sup> Ford [T9/117/21-120/16] Longfield [T4/102/25-105/6] Willow [T12/97/21-98/17]

<sup>245</sup> M2, 2A, 2B and 2C [Vol. II. §10.38]

<sup>246</sup> Morris [T9/22/10-23/14]

<sup>247</sup> Slater [INQ000588040/23 §11.2] Viner [M2/INQ000056482/10 §7.1]

<sup>248</sup> Hammond [T8/48/12-51/1] Coles [T5/60/15-61/7] Courtney [INQ000588135/8 §§19.1-19.2]

Professor McCluskey spoke of there being “*no one part of the ecosystem of schools that has the right answer*”. Instead, it was necessary for the “*voices of children and young people and their families [to be] included in decision making*” and for there to be partnership with “*systems, and all the different parts of the system, work[ing] much better together*”.<sup>249</sup> If we do not have sufficiently resourced and accountable systems that can generate adequate relationships and communication among different levels of government, institutions, experts, families and children and young people themselves, then we are destined to repeat the largely inflexible responses that occurred in this pandemic, because we are not sufficiently led, organised, or integrated to achieve anything better. In this respect Indra Morris ended her evidence by emphasising that there were dangers in becoming overly sector-focused and service-focussed; for there was need “*to find a way of also having the lens that starts with the child and their families, and thinks about what are the needs, what are the drivers of vulnerability and what does that mean in terms of protective public services*”.<sup>250</sup>

### **CONCLUSION: UNREPAIRED AND UNREFORMED**

55. **TRUTH:** No adult society can sit easily with a reality that when faced with a dilemma between damaging children – especially Disabled children – and protecting ourselves, on some considerable level we opted to protect ourselves. The president of the Royal College of Paediatric saw failure to design policy around children as indicative of the “*low priority of children in our society*”, noting that they were left on the “*second tier of priorities*” for much of the pandemic.<sup>251</sup> If the outcomes were largely inevitable under current systems, the continuing unfairness lies in the fact that there is no plan for reform or reparation. Repair begins with the acknowledgement of these difficult truths. Reform comes from a realignment of values shared between government and society, around what is important, and the creation of organisation, policies and practices now, to ensure that those values can be delivered upon in an increasingly uncertain and unstable future. The testimonies that the Inquiry has gathered from children and young people do give some grounds for optimism. They tell us that there is a generation of people – Disabled and non-disabled – who will more readily appreciate the reality of social vulnerability as they come to succeed us.

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**SHAMIK DUTTA**

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**BHATT MURPHY SOLICITORS**

**3 DECEMBER 2025**

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<sup>249</sup> McCluskey [T6/195/22-197/7]

<sup>250</sup> Morris [T9/65/5-19-66/20]

<sup>251</sup> Turner [T7/69/6-70/20]