DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Before Upper Tribunal Judge Wikeley

Attendances:

The **Applicant** was represented by Ms Amelia Walker of Counsel, instructed by HCB.

The **Respondent** was represented by Ms Sarah Hannett of Counsel, instructed by the Government Legal Department.

The DECISION of the Upper Tribunal is to dismiss the Applicant's application for permission to apply for judicial review.

This determination is given under section 19 of the Tribunals, Courts and Enforcement Act 2007 and rule 30 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

REASONS FOR DECISION

Introduction

1. The context for this application for judicial review is the publication by the Department for Education ("DfE") of 'performance tables' for primary schools in or around early December each year. This application is a challenge by the Governing Body of a London primary school ("the School") to the Secretary of State for Education's decisions when (i) issuing technical guidance on primary school accountability measures; and in particular (ii) refusing to disaggregate the attainment and progress results for pupils attending a special unit for children with autism at the School from the results for other pupils attending the mainstream part of that same School.

2. The case began life as an application for judicial review in the Administrative Court (CO/5558/2017). On 6 December 2017 Garnham J refused an associated interlocutory application for urgent interim relief in respect of the publication of the December 2017 primary school performance tables. Subsequently, on 11 April 2018, and having considered written submissions from the parties, Walker J confirmed the transfer of the School's application for permission to apply for judicial review from the Administrative Court to the Upper Tribunal (Administrative Appeals Chamber) (under section 31A(3) of the Senior Courts Act 1981, as inserted by section 19 of the Tribunals, Courts and Enforcement Act 2007).

3. An oral hearing of the application for permission to apply for judicial review was held at the Rolls Building in London on 3 September 2018. Ms Amelia Walker of Counsel appeared for the Governing Body of the School (the Applicant) and Ms Sarah Hannett of Counsel for the Secretary of State (the Respondent); I am indebted to them both for their careful and admirably clear submissions.

The factual background

4. The key features of the factual background do not appear to be seriously in dispute. Lark Hall Primary School is a large community primary school in the London Borough of Lambeth. The School has on its site a special centre or unit, "the CfA", for pupils for whom autism gives rise to a primary special educational need (although the children in question may also have other conditions giving rise to learning difficulties). The CfA is part of the School in that it operates from the same site and shares the same DfE school number. The School has about 400 pupils on roll of whom 33 (so just under 10%) exclusively attend the CfA. In practical terms, however, the CfA operates as in effect a school within a school in as much as:

(i) The CfA children are admitted (at varying times) separately through Lambeth's SEND Admissions process and not the School's own admissions process for mainstream schooling;
(ii) The CfA has a separate entrance, a separate building and staff who teach exclusively in the unit;
(iii) The CfA pupils access a modified version of the national curriculum ("NC") and progress is measured against 'P levels', designed for those children operating below NC testing thresholds;
(iv) Consequently, the CfA children do not sit SATs.

5. The annual performance tables published by the DfE each December include measures of attainment (i.e. achievement against absolute standards) and progress (i.e. value-added performance relative to previous achievements) for primary school pupils on a national basis. In particular, the performance tables include data on the percentage of pupils achieving the 'expected standard' in English reading, English writing and mathematics ('RWM') at the end of KS2 (i.e. at the end of year 6), pupils' average scaled scores in reading and mathematics at the end of KS2, the percentage of children who achieve at a higher standard in RWM at the end of KS2 and pupils' average progress in RWM as between KS1 (i.e. the end of year 2) and KS2. These data are designed to enable comparisons to be made between schools.

6. However, as it stands, the DfE regime for collecting and publishing data on pupils' attainment and progress means that the School must return the results for pupils in the CfA together with the data for children in the mainstream part of the School. The results for both sets of pupils are thus aggregated and published as the relevant data for the School as a whole. In a nutshell, the School's argument is that the inclusion of the attainment and progress data for pupils who do not access mainstream classes, and who are taught in what is effectively a separate special school, sends an incomplete and misleading picture to parents, prospective parents and the wider community at large. The School's Statement of Facts and Grounds for the purposes of this judicial review application put it thus: "It is as incomplete and misleading a message as if the Defendant chose to mix the results of a special school and its neighbouring mainstream school."

7. The School's application is supported by a detailed and helpful witness statement by the School's Head Teacher, Mr Gary Nichol. This sets out more fully the background to and the current operation of the CfA. He stresses that the School's judicial review application is solely concerned with the treatment of the data for those children educated exclusively in the CfA – the School fully accepts the importance of returning data for those pupils in the mainstream classes who happen to have an Education and Health Care Plan (EHCP) or an old-style Statement of Special Educational Needs. Mr Nichol charts in some detail the development of the DfE's attainment and progress measures as set out in *Primary school accountability in*

2016 (published in October 2016) and its August 2017 revision. The Head Teacher explains his concerns about the achievement data as currently constituted, arguing that a misleading picture is painted of the School's achievements by the inclusion of the data for the CfA pupils. In short, he says, given they are working at P levels and do not sit the SATs, "they will never be able to achieve the expected standards but because they are on the school roll they count towards the percentage of children who do not achieve the expected standard" (witness statement at §47).

8. In his witness statement Mr Nichol proceeds to analyse the data for the academic years 2014/15, 2015/16, 2016/17 and 2017/18 (in fairness I should point out that Ms Hannett made no submissions on this data analysis and neither accepted nor rejected the conclusions reached). Mr Nichol argued that using the DfE aggregated data resulted in an artificially deflated attainment rate for the School's pupils achieving the expected standard in RWM at KS2. He calculated that removing the CfA pupils' results led to the School's attainment rate increasing by between 7% and 11% in each of the four years in question. It should perhaps be noted that in every year bar one the School's RWM results were better than the national average, even without making any adjustment for the inclusion of the CfA pupils. Even so, the Head contended, "of the 73 primary schools in Lambeth, using the DfE-produced results, Lark Hall finds itself ranked 29 out of 73. By removing the CfA children Lark Hall would certainly score significantly higher" (witness statement at §60). Mr Nicol further maintained that the performance tables as (he argued) misleadingly constructed had several adverse effects on the school, such as misinforming parents deciding where to send their children and making it more difficult to recruit teaching staff. The tables also put the School in jeopardy in terms of being potentially classified as e.g. a 'coasting school' for the purposes of DfE and related regulatory controls.

The legislative framework

9. The legislative underpinning for the publication of schools' performance tables is to be found in section 537 of the Education Act 1996 (formerly section 16 of the Education Act 1992). As amended – and omitting subsections (7)-(13), which are not material for present purposes – section 537 provides as follows:

> **537.— Power of Secretary of State to require information from governing bodies etc.**
> (1) The Secretary of State may by regulations make provision requiring—
> (a) the governing body of every school which is—
> (i) maintained by a local authority, or
> (ii) a special school which is not maintained by such an authority, and
> (b) the proprietor of every—
> (i) independent school, or
> (ii) alternative provision Academy which is not an independent school,
> to provide such information about the school as may be prescribed.
> (2) For the purposes of this section information about the continuing education of pupils leaving a school, or the employment or training taken up by such pupils on leaving, is to be treated as information about the school.
> *(3) Where the Secretary of State exercises his power to make regulations under this section he shall do so with a view to making available information which is likely to—*
> *(a) assist parents in choosing schools for their children;*
> *(b) increase public awareness of the quality of the education provided by the schools concerned and of the educational standards achieved in those schools; or*
> *(c) assist in assessing the degree of efficiency with which the financial resources of those schools are managed.*

(4) Information which is required by virtue of regulations under this section shall be provided—

(a) in such form and manner,

(b) on such occasions, and

(c) to such person or persons, in addition to or in place of the Secretary of State,

as may be prescribed and regulations under this section may provide that, in such circumstances as may be prescribed, the provision of information to a person other than the Secretary of State is to be treated, for the purposes of any provision of such regulations or this section, as compliance with any requirement of such regulations relating to the provision of information to the Secretary of State.

(5) No information provided in accordance with regulations under this section shall name any pupil to whom it relates.

(6) The Secretary of State may—

(a) publish information provided in accordance with regulations under this section in such form and manner as he considers appropriate;

(b) make arrangements for such information to be published in such form and manner, and by such persons, as he may specify for the purposes of this section;

(c) make regulations requiring local authorities to publish prescribed categories of such information, together with such supplementary information as may be prescribed, in such form and manner as may be prescribed.

10. In summary, section 537(1) gives the Secretary of State the power to require schools to provide relevant data. Subsection (3) sets out in high-level terms the goals the Secretary of State is to have in mind when exercising the regulation-making power for data gathering. Subsection (4) provides in very broad terms for the nature and format of the data gathering powers to be prescribed in regulations (for the details, see further the Education (School Performance Information) Regulations 2007 (SI 2017/2324)). Subsection (6) then empowers the Secretary of State to publish such data "*in such form and manner as he considers appropriate*". I have highlighted subsections (3) and (6) in the extract above as they were relied on heavily in the submissions on behalf of the Applicant and the Secretary of State respectively.

11. As Harrison J observed two decades ago in *R v Secretary of State for Education and Employment, ex parte The Governing Body of West Horndon, County Primary School* [1997] ELR 350 ("*West Horndon*"):

> "It is clear that s.16 [*now section 537*] gives the Secretary of State a wide discretion as to the form and manner in which the information in the performance tables is to be published. This court could only interfere with the exercise of that discretion if it could be shown by the applicants that the Secretary of State has acted unreasonably in the legal sense – that is to say, that no reasonable Secretary of State could have decided that the tables should be presented in the manner set out in Circular 15/96 – or otherwise has acted perversely. That is a high threshold for the applicants to satisfy. Of course, as this is a leave application, they only have to show that that threshold has arguably been satisfied."

The Applicant's case in summary

12. The gist of the School's challenge, in lay terms at least, will be evident from the discussion of the factual background above. In terms of the decisions under challenge in the application for permission to apply for judicial review, the School challenges the DfE's refusal to disaggregate the attainment and progress results for pupils attending the CfA from the results for pupils attending the mainstream part of that school. The Applicant also attacks the DfE's technical guidance on primary

school accountability measures (as published in August 2017 and revised in January 2018). The Applicant poses the two-fold challenge in that order. However, in the analysis set out further below I take them in the reverse order (although the issues overlap to some extent), on the basis that it is the DfE technical guidance, and its alleged limitations, which is at the root of the School's complaints. The refusal to disaggregate flows inexorably from the framework established in the DfE technical guidance.

13. At a macro level Ms Walker submitted that the DfE technical guidance is irrational in public law terms in that it fails to provide any scope for the disaggregation of data relating to pupils who, while being on the School's roll, are (a) taught entirely in a separate unit, (b) taught an entirely discrete curriculum and (c) do not take part in SATs. She also contended that there was an internal inconsistency in the technical guidance as special treatment was permitted for certain other categories of school or pupil. Turning to the micro level of the School itself, Ms Walker set out three public law grounds. First, the refusal to disaggregate was said to frustrate the will of Parliament and, in particular, section 537(3) (see paragraph 9 above). Second, the refusal to disaggregate was *Wednesbury* unreasonable. Third, the methodology adopted and the refusal to adapt it to accommodate the particular circumstances of the CfA unit meant that the Secretary of State was unlawfully fettering his discretion.

The Respondent's case in summary

14. Ms Hannett advanced two reasons for resisting the application for permission to apply for judicial review. First, she submitted that the claim was unarguable. In short, section 537 invested the Secretary of State with a wide discretion, and his "SEND policy", i.e. that all pupils attending a mainstream school, including those with special educational needs, should be included in the published headline attainment and progress measures, was plainly both reasonable and lawful. Ms Hannett further submitted that the refusal to exempt certain types of special units was rational as any such carve-out faced major definitional problems as well as being inconsistent with the SEND policy. That policy was rational in that:

> (a) excluding all children with special educational needs from the performance tables would give an incomplete and misleading picture as to the results of all pupils at the school;
> (b) such an approach would undermine the principle of inclusion and send a harmful message about the Respondent's expectations of attainment and progress for children with such needs;
> (c) not all children with special educational needs are low achievers;
> (d) schools should be held accountable for the attainment and progress of children with such needs in their schools; and
> (e) the exclusion of such pupils from performance tables might create a perverse incentive for schools to contend children are working below the levels of the NC tests (even if they are not).

15. Second, Ms Hannett contended that the School's application was materially identical to the factual matrix of the High Court's decision in *West Horndon*, in which leave to apply for judicial review had been refused. As such, permission should also be refused in the present case. I deal with that point first.

The *West Horndon* case

16. As with the instant case, in *West Horndon* a primary school's governing body (but in that case together with the National Association of Head Teachers) had applied for leave to apply for judicial review of the Secretary of State's decision to

publish the very first set of primary school performance tables for maintained schools in March 1997 (in a form set out in what was then Circular 15/96). As here, the Applicants had argued that the way in which the information was presented in the tables would frustrate the intentions of Parliament and was *Wednesbury* unreasonable. Harrison J refused leave to apply for judicial review, concluding as follows:

> "Having regard to the matters to which I have referred, it is clear to me that the Secretary of State was faced with a difficult decision. She took into account the point that had been raised by the applicants and decided to deal with it in the way which I have described, namely by including the total number of pupils with special educational needs in the school in the performance tables. That in itself may be argued, as it is argued by the applicants, as being not a perfect answer to the problem. I sympathise again with the point that is raised by the applicants on that aspect. But it is a matter for the Secretary of State, and she has applied her mind to it and has reached a decision which, in my view, cannot be reasonably argued to be perverse or outwith the intentions of the statute."

17. Ms Hannett acknowledged that the Upper Tribunal, when exercising a jurisdiction formerly exercised by the High Court, is not bound to follow a decision of the High Court (see e.g. *Chief Supplementary Benefit Officer v Leary* [1985] 1 WLR 84). However, she submitted that the Upper Tribunal should not depart from such a decision except in circumstances where another High Court judge would do so, i.e. where satisfied that the earlier High Court decision was wrong (see e.g. *Revenue and Customs Commissioner v West* [2018] UKUT 100 (TCC) at [53]). Moreover, *West Horndon*, whilst strictly 'only' a ruling refusing leave to apply for judicial review, was a fully-reasoned decision of the High Court. As *West Horndon* was on all fours with the present case, Ms Hannett submitted permission should likewise be refused on this application.

18. Ms Walker contended that while some of the arguments advanced by the applicants may be similar, the two cases were distinguishable on three principal points. First, one factor influencing the outcome in *West Horndon* was that the Secretary of State had taken into account the applicants' representations, which was not the case here. Second, *West Horndon* was concerned on its facts with special <u>classes</u>, rather than with special <u>units</u>. Third, in the earlier case there had been considerable emphasis on the need for uniformity of approach – yet in the intervening two decades several adjustments had been made to the performance table criteria which had undermined that policy. However, I am not persuaded that any of these three points (either singularly or together) amounts to a sufficient basis to distinguish *West Horndon* for the reasons that follow.

19. As to the first point, the applicants' principal challenge in *West Horndon* to the treatment of special units or special classes had not in fact been accommodated by the Secretary of State in setting the criteria for the first performance tables. Harrison J was referring to a range of other modifications which had taken place in response to a consultation process. In the same way, in the contemporary arrangements the attainment and progress criteria remain subject to a process of iteration and refinement, as evidenced by the DfE's publication of new versions of the official guidance in October 2016, August 2017 and now January 2018 (DfE, *Primary school accountability in 2017: A technical guide for primary maintained schools, academies and free schools*). The DfE has also set up a working group to explore the issues raised for mainstream schools which include such specialist units. Ms Hannett advised that this working group, including schools with specialist SEND units, had

met in July 2018, was due to meet again this autumn and advice would go before ministers at the end of the year. Whilst progress may be minimal from the perspective of the School, this is not a Secretary of State who has shut his doors to all comers or closed his mind to objections.

20. As to the second matter, with respect it is not as straightforward as saying *West Horndon* was a decision about special classes (e.g. one designated as such by the LEA and consisting wholly or mainly of pupils with special educational needs) rather than free-standing special units (e.g. where certain statemented pupils are taught entirely separately from other children but on the same site). The applicants' submissions in *West Horndon* were initially framed in terms of special units, and only shifted to focus on special classes late in the proceedings by way of reply to the Secretary of State's arguments, which had highlighted the definitional problems associated with identifying special units. I do not read Harrison J's conclusions as being limited to the position of special classes to the exclusion of special units.

21. So far as the third point is concerned, Harrison J recognised that uniformity of treatment was a policy that the Secretary of State was entitled to pursue. Ms Walker argued that this uniformity had in effect been abandoned by the continued exclusion of special schools from the performance tables regime and the changes made to certain categories of pupils who need not be returned as part of the required attainment and progress data. It does not seem to me that this point takes the School anywhere. Special schools – along with several other categories of educational institution – have remained outwith the scheme, but are subject to other accountability measures. The tweaking of the guidelines to deal with certain narrowly defined categories of children who can be excluded from the data returns is consistent with a policy objective of ensuring uniformity of treatment with exceptions only being allowed where they can be adequately isolated and carefully defined.

22. All that said, I recognise that *West Horndon* is not strictly binding. In any event, what matters is the *ratio* of *West Horndon* – and that is neatly encapsulated in the citation from Harrison J's judgment at paragraph 11 above. In my view there can be no dispute but that (what is now) section 537 gives the Secretary of State a very broad discretion. Whether there can be a successful public law challenge to the way that discretion is exercised will be context-specific. Understandably, I was not taken to the guidance on the original departmental Circular 15/96. It is sufficient for present purposes to recognise that both the 1996 guidance and the 2017/18 guidance provided for no exemptions for specialist free-standing SEND units within mainstream schools. In other respects, however, the factual and regulatory landscape may well be very different, and the present claim must be judged in its contemporary context.

The Upper Tribunal's analysis

23. Ms Walker's primary submission was that the DfE technical guidance was irrational in public law terms in that it failed to provide any scope for the disaggregation of data relating to pupils who, while being on the School's roll, were taught exclusively in a separate special unit within the School. This is an ambitious claim with a high threshold to meet if it is going to succeed, given both the public law test for irrationality and the breadth of discretion vested in the Secretary of State by virtue of section 537. In my view the arguability test is not met. Ms Walker seeks to persuade me that there is no definitional problem that precludes an opt out for such special units. However, as Ms Hannett pointed out, special units have no separate legal status and so no independent legal identity separate from the mainstream school to which they are attached. In the real world, special units take a variety of

forms. For example, in some cases admissions will be governed by the local authority's SEND admissions process, in others by the school's own arrangements; likewise, in some schools pupils are taught exclusively in the special unit while in others practice is more fluid, with children moving between mainstream schooling and the unit on a daily basis. Special units also accommodate children with a wide range of special educational needs, including those with needs arising from a physical disability, such that it cannot be assumed that the pupils in question will be attaining at levels below their chronological age.

24. I therefore agree with Ms Hannett that the definitional problem is very real. It may or may not be insuperable but reasonable people may reasonably differ on that. I also accept that the assessment data must be robust and nationally consistent, not least so the same approach is applied in an even-handed fashion as possible as between schools. There is no 'easy fix', such as exempting certain types of special unit, e.g. those in which the pupils do not access any mainstream classes and/or the pupils are taught exclusively in the special unit. Even then further definitional questions could arise as to e.g. the effect of one child out of a special unit cohort attending the occasional mainstream class (is there a *de minimis* rule and if so what is the threshold?). What also would be the effect of children sharing in part or in full the same breaktime and/or breaktime space? True, starting with a blank sheet of paper one could envisage a (rather complex) weighted scoring system where special units are assessed as to their degree of exclusivity by reference to a number of relevant criteria (e.g. 1 point if 75% of pupils in the unit have an EHCP or SEN statement, 3 points if more than 90% of children do and 5 points if 100% do), and exempted if they score more than so many points across all indicators. However, and pursuing the stationery metaphor, this is not an exercise to be conducted on the back of a judicial envelope. The policy decision to develop such a carve-out is a classic issue of discretion for the Secretary of State, having listened to the advice of experts and stakeholders. In any event, such a carve-out would sit uneasily with the SEND policy as a whole, as it would mean that some pupils would be exempt from the attainment and progress measures (i.e. those in the most 'exclusive' special units, howsoever defined) while other pupils with such needs would not (i.e. those in more 'fluid' special units or indeed in mainstream schooling).

25. In so far as the application is a claim that the Secretary of State has acted irrationally in not making an exemption for the CfA in this particular School, rather than for special units more generally, it fares no better. The objections set out above apply in equal measure if not with more force, given the obvious public interest in having clearly defined rules that can be applied consistently across all schools.

26. In support of her irrationality submissions, Ms Walker also sought to persuade me that there was an internal inconsistency in the DfE technical guidance in that special treatment was permitted for certain other categories of school or pupil but not for a special unit such as the CfA. She gave three principal examples. First, special schools are excluded from the 'floor standards' (i.e. the minimum standard for pupil attainment and/or progress that the government expects schools to meet). Second, pupils with "extremely negative progress scores" are now excluded from the data returns. Third, "pupils in particular circumstances" are also excluded. However, for the reasons that follow, I am not satisfied that any of these examples assists the School's case.

27. As to the first example, the floor standards for assessing performance measures do not apply to special schools (January 2018 guidance, p.6). A similar exemption operated when the performance tables regime was introduced some 20 years ago.

Indeed, as Ms Walker rightly pointed out, Harrison J acknowledged in *West Horndon* that the exclusion of special schools ran counter to the uniformity approach but was "for reasons of administrative simplicity and it will not necessarily continue in the future". However, there are other accountability measures for special schools. Their continued exclusion over the past two decades may also be testament to the enduring nature of the administrative and definitional problems of exempting special units in addition to special schools.

28. Secondly, the latest DfE technical guidance has included a new exemption for pupils with "extremely negative progress scores" (January 2018 guidance, p.8). The guidance acknowledges that where pupils have extremely negative progress scores (e.g. because of a lengthy absence from school owing to long-term illness) then this can have a disproportionate effect on a school's average results. Ms Walker contended that it was irrational to exclude the occasional student whose performance would have such an effect yet not to exempt a larger cohort of pupils in a special unit such as the CfA. However, this easement is a relatively minor tweaking at the margins to the performance data regime. It does not impinge on the wider policy considerations, such as the SEND principle of inclusivity.

29. As to the third example, there is provision for "pupils in particular circumstances" (January 2018 guidance, p.25) to be excluded from the performance measures. The example given is a pupil who has recently arrived from overseas. If such children can be taken out of the equation, presumably on the basis that their inclusion would give an entirely unfair picture of the relevant school's performance, Ms Walker argues, then why not also a larger group of children being taught in an entirely separate special unit? However, such a very limited exemption applies only following an application to the Secretary of State. This is another ad hoc category which does not bring into play the wider policy considerations involved, e.g. the importance attached to the SEND policy and the imperative to avoid making provision for wider class-based exemptions that may well create perverse incentives.

30. As to Ms Walker's three public law grounds, the submission that the Secretary of State's refusal to disaggregate the data for the CfA from that for the mainstream School was *Wednesbury* unreasonable is flawed for the same reasons as the irrationality argument is rejected above. There is an understandable disagreement of opinion as to the most appropriate methodology to be adopted, but that does not come close to a claim of irrationality or *Wednesbury* unreasonableness.

31. It was also claimed that the refusal to disaggregate the relevant data frustrated the will of Parliament as expressed in section 537 and especially section 537(3). This submission takes the Applicant no further. *West Horndon* demonstrates the breadth of the discretion vested in the Secretary of State by virtue of what is now section 537(6), and section 537(3) sets out high level objectives. Again, this claim amounts to a disagreement over the methodology to be adopted in publishing attainment and progress data. I recognise there is a respectable body of opinion that considers on balance that the publication of performance tables for primary schools (and especially in the cruder form of 'league tables' published in newspapers) does more harm than good, but that does not render the Secretary of State's decision to publish such data irrational or *Wednesbury* unreasonable – the same applies for differences of opinion as to the best methodology once the principle is accepted. As Harrison J observed in *West Horndon*, "Given the principle of the publication of the performance tables, there is inevitably considerable scope for argument as to what should or should not be included in the tables and how it should be presented. That is a matter for the Secretary of State, subject to the unreasonable/ perversity criteria."

32. It was also argued that the methodology adopted in the DfE's technical guidance and the refusal to adapt it to accommodate the particular circumstances of the CfA meant that the Secretary of State was unlawfully fettering his discretion. This takes the School nowhere. As previously noted, section 537 vests the Secretary of State with a broad discretion. Given the significance attached to performance tables, there is a pressing need for a transparent set of rules that are capable of uniform application on a national basis. The development of those rules, as an aid to consistency of approach, and their tweaking where appropriate, is an entirely proper exercise of that broad discretion and is not arguably an unlawful fettering in public law terms.

33. Ms Walker also prayed in aid the wider impact of the performance tables in terms of exposing the School to the risk of intervention, e.g. by Regional Schools Commissioners (RSCs) as a 'coasting school' (see section 1(3) of the Education and Adoption Act 2016, inserting section 60B into the Education and Inspections Act 2006; see also the Coasting Schools (England) Regulations) 2017 (SI 2017/9). However, RSCs enjoy a considerable discretion as to whether and how to act, and the performance of groups of pupils with particular characteristics, such as a large cohort of children in a special unit, is plainly one such relevant factor. In the event the RSC elected not to take any steps in the case of the School. The risk of identification as a coasting school is essentially an unfortunate unintended consequence. It does not undermine the essential rationality of the Secretary of State's approach to the construction of the performance tables. The same is true for some of the other examples of what was said to be the prejudicial effect of the performance tables. Mr Nichol's witness statement reported that Lark Hall admitted 26 new pupils in September 2017, despite having a two-form mainstream entry (expected admission = 60 children). That shortfall obviously had a dramatic adverse impact on the School's finances. However, cause and effect in such matters is notoriously difficult to establish empirically, and certainly the Secretary of State did not accept there was a direct correlation. A whole host of other factors may impinge on parental choices.

Conclusion

34. For all the reasons above, and notwithstanding Ms Walker's careful submissions, I conclude that the application for judicial review is not arguable. It follows that I refuse permission to apply for judicial review.

Costs

35. In the light of the above, the Applicant is to pay the Respondent's costs of preparing the Acknowledgment of Service, summarily assessed in the revised figure of £3,968.00

Signed on the original on 7 September 2018	**Nicholas Wikeley Judge of the Upper Tribunal**