

Education Law for Local Authorities Webinar 3

Avoiding and defending Judicial Review claims

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Scope of Session

- Previous sessions: EOTAS (17 September 2025) and School Exclusions (7 October 2025)
- Common types of Education law JR claims
- Pre Pre-Action
- Pre-Action
- Issue and the Permission Decision
- After Permission

Common types of Ed. law JR claims against LAs

- Failure to complete EHC needs assessment or to issue or amend an EHC plan within the statutory time limits.
- Failure to secure the special educational provision in an EHC plan.
- Failure to provide social care or to assess an individual's care needs.

Common types of Ed. law JR claims against LAs

- Failure to provide exceptional educational provision out of school (s. 19 EA 1996).
- Failure to provide home to school transport
- Allegedly unlawful LA policies e.g. home/school transport policies
- Refusal to provide a Personal Budget or Direct Payments

Pre-Pre Action

- Design and review policies so that they are lawful (rational, compliant with the relevant law, with scope for decision-makers to depart in exceptional cases so as not to fetter discretion).

Pre-Pre Action

“This is a level of demand with which the system was never designed to cope...”

(Report of the County Councils Network, “Special educational needs & disabilities in England: How we got to crisis point, and why we need reform of the system” - released 14 November 2025)

Pre-Pre Action

- Are you keeping notes/records of steps taken and reasons why?
- Are you providing information/support to with parents/young people to participate in decisions, per s. 19 CFA 2014?
- When first on notice of a problem in relation to the non-performance of a duty, are you taking the opportunity to react to that in good time?
- Are you following up/what are you doing in the face of obstacles?

Pre-Pre Action

- Ensure that there are clear communication channels between LA officers and between the LA and its local partners

e.g. with legal, brokerage, social services, governing bodies/proprietors of schools, integrated care boards.

See also section 28 of the Children and Families Act 2014 (“Co-operating generally: local authority functions”)

Pre-Pre Action

- Ensure LA officers/decision-makers understand:
 - Relevant law/what makes a decision lawful/unlawful
 - When and how to seek advice.
 - When and how to call on other officers/departments/teams/partners.

Pre-Pre Action

- Have a process for:
 - Identifying legal developments in your area.
 - Regular review of policies.
 - Regular review of training.

Pre-Action: the PAP for JR

- https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/protocol_jrv

- Para. 2:

“...contains the steps which parties should generally follow before making a claim for judicial review...”

- Para. 9:

“...Parties are warned that if the protocol is not followed... then the court must have regard to such conduct when determining costs....”.

Pre-Action: the PAP for JR

- Para. 3:

3. The aims of the protocol are to enable parties to prospective claims to—

- (a) understand and properly identify the issues in dispute in the proposed claim and share information and relevant documents;*
- (b) make informed decisions as to whether and how to proceed;*
- (c) try to settle the dispute without proceedings or reduce the issues in dispute;*
- (d) avoid unnecessary expense and keep down the costs of resolving the dispute; and*
- (e) support the efficient management of proceedings where litigation cannot be avoided.*

Pre-Action: Duty of candour

- The Administrative Court Guide 2025, para. 15.3.1: “*A public authority’s duty of candour and co-operation with the Court is “self-policing”. There is a particular obligation on solicitors and barristers acting for public authorities to ensure that it is fulfilled. The duty arises because public authorities are engaged in a common enterprise with the Court to fulfil the public interest in upholding the rule of law. They are accordingly required to assist the Court with full and accurate explanations of all the facts relevant to the issues which the Court must decide.*”
- National Bank of Anguilla (Private Banking and Trust) Ltd (in administration) and another v Chief Minister of Anguilla and others (Anguilla) [2025] UKPC 14 at [91]: “*...although no duty of candour is owed to the court until judicial proceedings have been commenced... similar considerations can be relevant in the parties’ dealings with each other at the pre-action stage, as a matter of good practice.*”

Pre-Action Checklist

(1) What is the proposed time limit for reply?

Pre-Action Checklist

(2) Do we understand the case we need to answer?

Pre-Action Checklist

(3) Do we have all the relevant information and know the material facts?

Pre-Action Checklist

(4) Do we need more time to reply?

(PAP para. 21: "Where it is not possible to reply within the proposed time limit, the defendant should send an interim reply and propose a reasonable extension, giving a date by which the defendant expects to respond substantively... Where an extension is sought, reasons should be given...")

Pre-Action Checklist

(5) Are we the correct defendant?

(Should the claim be against e.g. another LA, the governing body or proprietor of a school, an Integrated Care Board, etc?)

Pre-Action Checklist

(6) Are there any interested parties?

(CPR rule 54.1(2)(f): 'interested party' means any person (other than the claimant and defendant) who is directly affected by the claim)

(PAP para 24: The response should be sent to all Interested Parties identified by the claimant and contain details of any other persons who the defendant considers are Interested Parties).

Pre-Action Checklist

(7) Does the Claimant have “sufficient interest” to bring the claim (“standing”)?

(Senior Courts Act 1981, s31(3) – to bring a claim the claimant must have “sufficient interest in the matter to which the application relates”)

Pre-Action Checklist

(8) Is there an adequate alternative remedy?

(e.g. internal complaints procedures, review mechanisms, statutory or non-statutory appeals (e.g. SEND Tribunal)..?)

R (Glencore Energy Ltd) v HMRC [2017] EWCA Civ 1716 [2017] 4 WLR 213, at §55 per Sales LJ:

“... judicial review... is ordinarily a remedy of last resort, to ensure that the rule of law is respected where no other procedure is suitable to achieve that objective...”

“... However, since it is a matter of discretion for the court, where it is clear that a public authority is acting in defiance of the rule of law the High Court will be prepared to exercise its jurisdiction then and there without waiting for some other remedial process to take its course...”

Pre-Action Checklist

(8) Is there an adequate alternative remedy?

(R (Glencore Energy Ltd) v HMRC [2017] EWCA Civ 1716 [2017] 4 WLR 213, at §55 per Sales LJ (applied recently in the context of the FTT being held to be an alternative remedy R (LW) v London Borough of Islington [2025] EWHC 703 (Admin))

“... the court should have regard to the provision which Parliament has made to cater for the usual sort of case in terms of the procedures and remedies which have been established to deal with it...”

“...If Parliament has made it clear by its legislation that a particular sort of procedure or remedy is in its view appropriate to deal with a standard case, the court should be slow to conclude in its discretion that the public interest is so pressing that it ought to intervene to exercise its judicial review function along with or instead of that statutory procedure...”

“But of course, it is possible that instances of unlawfulness will arise which are not of that standard description, in which case the availability of such a statutory procedure will be less significant as a factor...”)

Pre-Action Checklist

(9) Is the claim 'academic' – or soon to be so?

(See the Administrative Court Judicial Review Guide 2025 at 6.4.3, citing *R (on the application of L) v Devon CC [2021] EWCA Civ 358*:

At [50]: "*Judicial review is a flexible and practical procedure....It enables the court to avoid hearings in cases in which, although the issue may be arguable, the court's intervention is not required, because the claimant has obtained...all the practical relief which the Court could give him...*"

At [62]: "*What do we mean when we describe a claim as 'academic'? A claim will be academic if the outcome does not directly affect the rights and obligations of the parties...*"

Pre-Action Checklist

(10) Is it 'highly likely' the outcome for the claimant would not have been substantially different if the conduct complained of had not occurred?

(Senior Court Act 1981 s 31(3C)-(3F))

Pre-Action Checklist

(11) Is the decision under challenge amenable to judicial review?

(De Smith's Judicial Review 3-018: "*the main touchstones...are now (a) that the source of the decision maker's authority is a statutory provision or prerogative power and (b) that the function has a public character...*")

Pre-Action Checklist

(12) Is the proposed claim still in time?

(Claims for JR must be started promptly and in any event not later than 3 months after the grounds for making the claim first arose: CPR 54.5(1))

Pre-Action Checklist

(13) What is the explanation for the decision (if the challenge concerns a decision)?

(PAP para. 23 “the reply should... provide a fuller explanation for the decision, if considered appropriate to do so...”)

Pre-Action Checklist

(14) Have you addressed each point of dispute?

(PAP para. 23 “the reply should... address any points of dispute, or explain why they cannot be addressed...”)

Pre-Action Checklist

(15) How strong is the claim that the LA acted unlawfully?

Pre-Action Checklist

(16) What is the action you are being asked to take (the remedy sought)? What would be the impact if that remedy were ordered?

Bahamas Hotel Maintenance & Allied Workers v Bahamas Hotel Catering & Allied Workers [2011] UKPC 4 per Lord Walker at [40]:

“All relief granted by way of judicial review is discretionary, and the principles on which the Court’s discretion must be exercised take account of the needs of good public administration...”

Pre-Action Checklist

(17) What are the claimant's ADR proposals? What are yours?

(PAP paras. 8-12

Court may require the parties to provide evidence that ADR was considered (see also *R (Cowl) v Plymouth City Council* [2001] EWCA Civ 1935 at [3]: “*the court may have to hold, on its own initiative, an inter partes hearing at which the parties can explain what steps they have taken to resolve the dispute without the involvement of the courts. In particular the parties should be asked why a complaints procedure or some other form of ADR has not been used or adapted to resolve or reduce the issues which are in dispute*”)

If it is appropriate to issue a claim to comply with a time limit, but parties agree to a stay of proceedings to explore settlement (or narrow the issues in dispute) a joint application for appropriate directions can be made.)

Pre-Action Checklist

(17) What are the claimant's ADR proposals?
What are yours?

(Examples of ADR:

- *Discussion and negotiation.*
- *Using relevant LA complaints or review procedures.*
- *Ombudsmen.*
- *Mediation.)*

Pre-Action Checklist

(18) Have requests for information and documents been responded to?

(PAP para. 13: “Requests for information and documents... should be proportionate and... limited to what is properly necessary... to understand why the challenged decision has been taken and/or to present the claim in a manner that will properly identify the issues. The defendant should comply with any request which meets these requirements unless there is good reason not to do so...”)

(PAP para. 23 “the reply should... enclose any relevant documentation requested by the claimant, or explain why the documents are not being enclosed... where documents cannot be provided within the time scales required, then give a clear timescale for provision...”)

Pre-Action Checklist

(19) Should the claim be conceded in full, in part, or not at all?

(PAP para. 23: “the reply should say so in clear and unambiguous terms...”)

Pre-Action Checklist

(20) Are they asking for any interim remedy
- if so, do you oppose?

(PAP para. 23(f): “*where appropriate, confirm whether or not they will oppose any application for an interim remedy*”)

Pre-Action Checklist

(21) Have they stated an intention to ask for an interim costs order - if so, what is your response?

Pre-Action Checklist

(22) Will we accept service by email?

PAP Annex B section 9: Address for further correspondence and service of court documents (Set out the address for any future correspondence on this matter)

(see also PD 6A paras 4.1-4.3 and R. (on the application of Karanja) v University of the West of Scotland [2022] EWHC 1520 (Admin) at [21]).

Issue and the Permission Decision

A N461 is usually filed with a supporting statement of facts and grounds and evidence.

- Urgent procedure if a decision is needed within 7 days requires an N463 to be completed. The Court has been critical of wrongly brought urgent claims - *Hamid* jurisdiction. An expedited procedure may be more readily justifiable or indeed a rolled-up hearing.
- Interim relief may be sought, since this tends to be in the form of an injunction it is considered on a slight modification of the *American Cyanamid* principles (the Administrative Court Guide 2025 at 16.1 notes that a Judge will consider whether there is a real issue to be tried (that is, whether there is a real – not fanciful – prospect that the claim will succeed at the substantive hearing) and whether the balance of convenience lies in favour of granting the interim order. Where the relief sought is a mandatory order against a public body, a strong *prima facie* case needs to be shown.)
- Usually time to instruct counsel if you have not already.

Issue and the Permission Decision

- In the normal run of cases a Defendant will file an Acknowledgement of Service alongside Summary Grounds of Resistance, evidence relied upon and a N260. This is usually due 21 days after service of the claim form (CPR 54.8).
- The Claimant has 7 days to file a right of reply (CPR 54.8A).
- The Court will then proceed to consider the documents on the papers and to make appropriate directions.

The Permission Decision

- Section 31(3) of the Senior Courts Act 1981 states “*No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates.*” CPR 54.4 sets out that “*The court’s permission to proceed is required in a claim for judicial review whether started under this Section or transferred to the Administrative Court*”.
- In *Sharma v Antoine* [2006] UKPC 57 at §14(4) Lord Bingham and Lord Walker, giving the Judgment of the privy council, set out that “*The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy*”.
- Section 31(2A) of the Senior Courts Act 1981 states that the High Court must refuse to grant relief on an application for judicial review “*if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.*”

General Judicial Directions

When considering the case, a judge will generally give consideration to directing the following:

- Whether he can consider permission on the papers or wants a permission hearing or rolled up hearing.
- Deadlines for detailed grounds of resistance and any pertinent evidence.
- What level of Judge should hear the case (specifically whether it should be a deputy judge or two or more judges).
- Other matters such as skeleton arguments, trial bundles or authority bundles.

Post Permission

- If permission is not granted then the Defendant will typically be entitled to their costs of preparing their summary grounds of resistance. The Defendant will not typically be entitled to the costs of attending an oral permissions hearing (nor are they generally required to attend - CPR 54A PD para 8.4-8.5)

If the judge does not make any directions, then the following standard directions apply (1/3)

The following is set out in the Administrative Court Guide 2025 at 10.1.4 and is important to keep in mind when planning work flow:

- (1) The claimant must pay the relevant fee to continue the application for judicial review. Failure to do so within 7 days of permission being granted will result in the ACO sending the claimant a notice requiring payment within a set time frame (normally 7 more days). Further failure will result in the claim being struck out without further order (CPR 3.7. See also paras 1.5.5 and 10.1.4.1 of this Guide).
- (2) Any party who wishes to contest or support the claim must file and serve any Detailed Grounds and any written evidence or documents not already filed in a paginated and indexed bundle (in both hard copy and electronic copy) (CPR 54A PD para 9.1(3) and 9.2) within 35 days of permission being granted (CPR 54.14(1)). Detailed Grounds should be as concise as possible and must not exceed 40 pages without the Court's permission (CPR 54A PD para 9.1(2)). The fact that the claimant's Statement of Facts and Grounds is prolix is not necessarily a good reason for the defendant's Detailed Grounds to exceed the 40-page limit.

If the judge does not make any directions, then the following standard directions apply (2/3)

(3) If all relevant matters have already been addressed in the Summary Grounds, a party may elect not to file separate Detailed Grounds and instead inform the court and the parties that the Summary Grounds are to stand as Detailed Grounds (CPR 54A PD para 9.1(1)). However, before doing so, the party should consider carefully whether the material in the Summary Grounds is sufficient to discharge the duty of candour and cooperation with the court. In this regard, it is important to note that what is required to discharge that duty at the substantive stage may be more extensive than what is required before permission has been granted (see para 15.3.2 of this Guide).

(4) The claimant must file and serve a skeleton argument no less than 21 days before the substantive hearing (see para 20.2 of this Guide for the contents of the skeleton argument) (Previous versions of the PDs required skeleton arguments to be filed 21 working days before the date of the hearing. The new CPR 54A PD para 14.5 refers simply to “21 days before the date of the hearing”. This means “calendar” days: see CPR 2.8.).

(5) The defendant and any other party wishing to make representations at the substantive hearing must file and serve a skeleton argument no less than 14 days before the substantive hearing (see para 20.4) (CPR 54A PD para 14.6. “14 days” means 14 calendar days.).

Standard directions (3/3)

(6) The parties must agree the contents of a paginated and indexed bundle containing all relevant documents required for the hearing of the judicial review (see para 21.2). This bundle must be lodged with the Court in both electronic and hard copy form by the parties not less than 21 days before the date of hearing unless judicial order provides otherwise (CPR 54A PD paras 16.1, 16.2 and 16.3.) Core bundle: If hearing bundle over 400 pages then a core bundle must be agreed including, but not limited to, pleadings, the decision under scrutiny and any other essential documents. Parties solicitors must certify that the hearing bundle meets the above requirements (PD54A, 16.1). Note Administrative Court Guide 2025 at Annex 9 in relation to how E bundles should be prepared.

(7) The parties must agree the contents of a bundle containing the authorities to be referred to at the hearing (see paras 22.2 and 22.4). This bundle must be lodged by the parties with the Court in both electronic and hard copy form no later than 7 days before the date of hearing (CPR 54A PD paras 15.4 and 15.5.) Can often be resolved by counsel and their clerk but good to check that no more than 10 authorities are relied upon, unless a core authorities bundle/supplementary authorities bundle prepared. Check correct version of authorities used: See Practice Direction: Citation of Authorities 2012 (google it).

(8) In Divisional Court cases, one set of the hearing bundle and one set of the authorities bundle should be provided for each judge hearing the case (see paras 21.2.4 and 22.2.1 for further details).

Other required documents

- CPR 15.7: 7 days before the hearing:
 - Agreed list of issues;
 - Agreed chronology with page refs;
 - List of essential reading and time estimate for reading with page refs.
- Issues and chronology must be described neutrally.

Other warnings (Administrative Court Guide 10.1.5-10.1.6)

NB failure to file detailed grounds of resistance: A defendant or interested party who has not filed Detailed Grounds (or informed the court and the parties that the Summary Grounds are to stand as Detailed Grounds) within the time specified in CPR 54.14 (as varied by any order of the Court) requires permission to be heard at the substantive hearing. Although the Court is generally assisted by submissions from the defendant and interested party, this should not be regarded as a “late entry pass”. Where a defendant in default is given permission to participate, the Court may nonetheless impose a costs sanction, even in cases where the lateness does not cause identifiable prejudice (R (Dobson) v Secretary of State for Justice [2023] EWHC 50 (Admin), [26].)

NB relevant evidence: Pursuant to CPR 32.1, the Court has power to give directions to control evidence. This includes the power to direct that a witness statement or evidence be re-served omitting irrelevant or duplicative material. Legal proceedings do not exist for the purpose of permitting parties to put irrelevant matters in the public domain, and the court must be astute to ensure that proceedings, legitimately pursued, do not become the occasion to publicise irrelevant material.

Settlement

- Not uncommon for Defendants to fight permission but then concede because:
 - Taken the opportunity to fight at permission so not just rolling over
 - Limits cost risk (Claimants will want permission costs)
 - Maintains an element of control over the outcome.

Settlement documents

- Settlement documents – draft order, statement justifying it, authorities (CPR PD 54A 17.1)
- Order and statement both require joint signatures.
- 3 copies filed with the ACO.
- Get it wrong and you may be called in for a hearing.

Settlement documents (continued)

- The Administrative Court Guide 2025 contains some reminders for consent orders:
 - an indication (often in the header to the order as well as in the recitals) that the order is made “By Consent” (CPR 38.4).
 - the signature of the legal representative for every party to the claim, or of the party themselves where he or she is acting in person
 - where the order will finally determine the claim, the manner of determination (e.g. that the claim is withdrawn or that the decision challenged is quashed)
 - Provision for determining costs.
- The Statement:
 - Keep it brief and to the point;
 - Brief procedural and relevant factual background;
 - Set out why settlement and the specific terms of settlement, are appropriate.

Typical Format of Hearing

- (1) Claimant addresses the Court
- (2) Defendant addresses the Court
- (3) Any interested party or intervener addresses the Court
- (4) Claimant has a right of reply
- (5) Judgement (ex-tempore or reserved, the latter usually includes setting another hearing to consider the precise form or order and costs)

Costs (1/4)

- Interested Parties may recover the costs of preparing Acknowledgments of Service, but it is unusual for the Court to order two sets of costs against a Claimant following a substantive hearing.
- Intervenors are not usually ordered to pay costs or able to recover them (see section 87 of the Criminal Justice and Courts Act 2015).
- The Court has the discretion to award costs by virtue of section 51 Senior Courts Act 1981. Under CPR 44.2(2)(a) is *“the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party”* but the Court may depart from this rule (CPR 44.2(2)(b). In *R (M) v Croydon LBC* [2012] EWCA Civ 595 [2012] 1 WLR 2607 at [1] questions of costs was described as *“highly fact-sensitive and very much a matter for the discretion of the first instance tribunal”*.

Costs (2/4)

R (M) v Croydon LBC [2012] EWCA Civ 595 [2012] 1 WLR 2607 the Court noted:

“60. Thus, in Administrative Court cases, just as in other civil litigation, particularly where a claim has been settled, there is, in my view, a sharp difference between (i) a case where a claimant has been wholly successful whether following a contested hearing or pursuant to a settlement, and (ii) a case where he has only succeeded in part following a contested hearing, or pursuant to a settlement, and (iii) a case where there has been some compromise which does not actually reflect the claimant’s claims. While in every case, the allocation of costs will depend on the specific facts, there are some points which can be made about these different types of case.

61. In case (i), it is hard to see why the claimant should not recover all his costs, unless there is some good reason to the contrary...

Costs (3/4)

62. In case (ii), when deciding how to allocate liability for costs after a trial, the court will normally determine questions such as how reasonable the claimant was in pursuing the unsuccessful claim, how important it was compared with the successful claim, and how much the costs were increased as a result of the claimant pursuing the unsuccessful claim...I would accept the argument that, where the parties have settled the claimant's substantive claims on the basis that he succeeds in part, but only in part, there is often much to be said for concluding that there is no order for costs...However, where there is not a clear winner, so much would depend on the particular facts. In some such cases, it may help to consider who would have won if the matter had proceeded to trial, as, if it is tolerably clear, it may, for instance support or undermine the contention that one of the two claims was stronger than the other...

63. In case (iii), the court is often unable to gauge whether there is a successful party in any respect, and, if so, who it is. In such cases, therefore, there is an even more powerful argument that the default position should be no order for costs. However, in some such cases, it may well be sensible to look at the underlying claims and inquire whether it was tolerably clear who would have won if the matter had not settled. If it is, then that may well strongly support the contention that the party who would have won did better out of the settlement, and therefore did win."

Costs (4/4)

- Note section 26 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and The Civil Legal Aid (Costs) Regulations 2013 – protects parties with legal aid, orders in such cases generally have wording akin to the following:

Para 1: The Claimant shall pay the Defendant's reasonable costs of the claim, to be subject to detailed assessment on the standard basis if not agreed, and subject to the Claimant having the benefit of costs protection under section 26 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The amount (if any) of costs that the Claimant shall pay shall be determined on application by the Defendant under regulation 16 of the Civil Legal Aid (Costs) Regulations 2013.

Para 2: There shall be a detailed assessment of the Claimant's own publicly funded costs in accordance with the Civil Legal Aid (Costs) Regulations 2013 and CPR 47.18.
- Cost capping orders are not covered here but may be a factor in public interest litigation and if it is raised you will want to consider your response carefully and how it impacts the client's risk appetite.

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'Katherine is very helpful and very clear in her advice. She helps us achieve great results.'
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'Katherine is a calm and organised barrister who is really helpful and clear with clients managing their expectations appropriately and helping to reassure them. She is responsive to queries and goes out of her way to help.' **Legal 500 UK 2026/Education/London Bar**



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'Jim fights tooth and nail for his client's position with composure and professionalism. He is a persuasive advocate who exudes a gentle authority.'
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'A huge thank you for everything you have done on this case which went far and beyond.'
Solicitor client

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