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North East London Integrated Care Board

By email only to: [redacted]

EMAIL: [redacted]

TELEPHONE: [redacted]

YOUR REF:

OUR REF: [redacted]

DATED: 23 October 2026

URGENT PRE-ACTION PROTOCOL LETTER

Dear North East London Integrated Care Board

Our clients: [redacted] **and** [redacted]

Re: Policy on assisted reproduction for same-sex female couples

1. We act for Ms [redacted] ("[redacted]") and Ms [redacted] ("[redacted]"). [redacted] and [redacted] are a married same-sex female couple living in London. They hope to start a family using known donor sperm, with [redacted] carrying the child.

2. As a result of the applicable extant fertility policy – the North East London Integrated Care Board ("**NEL ICB**") Fertility Policy dated April 2023 ("**the**

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Policy"), [redacted] and [redacted] are not entitled to NHS funded intra-uterine insemination ("**IUI**"), and if [redacted] is not diagnosed with infertility, [redacted] and [redacted] are required to self-fund six cycles of IUI before they are eligible to receive NHS-funded IUI. Only after 12 rounds of IUI (six of which must be self-funded) will they be eligible for NHS funded in vitro fertilisation ("**IVF**"). Opposite-sex couples can prove that they are eligible for IVF if either party is diagnosed with infertility or after reporting 2 years of unprotected regular sex without conception (1 year if the woman or person trying to get pregnant is aged 36 or over).

3. This policy is unlawful in the following overarching respects:

   a. It directly discriminates against same-sex female couples contrary to ss.13 and 29 of the Equality Act 2010 ("**EA 2010**").

   b. It indirectly discriminates against same-sex female couples contrary to ss.19 and 29 EA 2010.

   c. It is contrary to Article 14 of the European Convention on Human Rights ("**ECHR**") taken with Article 8 ECHR.

   d. It is irrational at common law.

   e. It may be in breach of the public sector equality duty, contrary to ss.149(1), (3) and (7) EA 2010.

4. In view of the urgency of the issues involved, an expedited response is requested. Please, therefore, confirm by no later than **4pm** on **2 November 2026** that you agree to take the necessary steps detailed in this letter. Should we not hear from you by that time, we reserve the right to commence judicial review proceedings against you without further notice. We would be grateful if you would treat this letter as a pre-action letter sent in compliance with the pre-action protocol for judicial review.

A. Our client

5. Our clients are [redacted] and [redacted].

B. Proposed Defendant

6. Should proceedings become necessary, the Defendant in this matter will be the North East London Integrated Care Board.

C. The details of the Claimant's legal advisers

7. Our client can be contacted at this office:

Leigh Day

Panagram

27 Goswell Road

London

EC1M 7AJ

Reference: [redacted]

8. The solicitor with conduct of this matter is Anna Dews, whose contact details can be found at the top of this letter.

D. The details of any Interested Parties

9. We do not consider that there are Interested Parties at this time. Should the NEL ICB disagree, please provide full details of any proposed interested parties and the basis on which it is asserted that they are "*directly affected*" by this proposed claim.

Background

10. [redacted] and [redacted] are a married same-sex female couple who have been in a relationship since 2017. Throughout their relationship, it was always their intention to have children and start a family together.

11. Prior to seeking medical assistance, [redacted] and [redacted] were aware of public commitments to improve access to fertility treatment for same-sex couples and reasonably understood that barriers previously faced by lesbian couples in accessing NHS fertility treatment had been, or were in the process of being, addressed. They therefore anticipated that, once referred into fertility services, they would be supported through a funded pathway to treatment.

12. In August 2025, [redacted] approached her GP at [redacted], [redacted] to discuss starting a family with [redacted] [redacted] was referred to [redacted] fertility services and underwent preliminary blood testing. At this stage, neither [redacted] nor [redacted] were informed that they would be required to self-fund six cycles of IUI before becoming eligible for NHS-funded treatment.

13. Following referral by their GP, [redacted] and [redacted] attended their first appointment at the fertility clinic at [redacted] on 22 October 2025.

14. Both [redacted] and [redacted] found that appointment deeply upsetting. They were asked a number of questions which appeared to proceed on the basis of assumptions more appropriate to heterosexual couples experiencing infertility as opposed to a same-sex female couple using donor sperm. During this appointment, they were directed to the Policy and informed that they would be required to undertake six self-funded cycles of IUI before becoming eligible for NHS-funded treatment. They were also informed that [redacted] fertility service did not have a policy permitting the use of known donor sperm.

15. During this period, [redacted] and [redacted] took proactive steps to prepare for treatment. In November 2025, their proposed donor privately underwent sperm testing at a cost of approximately £195 to assess his suitability as a donor. [redacted] and [redacted] later shared those results with [redacted] fertility services.

16. On 1 December 2025, having received no meaningful response to their queries regarding the protocol for using known donor sperm, [redacted] and [redacted] submitted a formal complaint through the [redacted] Patient Advice and Liaison Service ("PALS"). They explained their concerns regarding the service's refusal to facilitate treatment using their known donor. They were concerned that they had been informed there was no policy permitting the use of known donor sperm, despite their clear wish to conceive using a known donor.

17. On 5 December 2025, [redacted] and [redacted] attended a further appointment with the Clinical Lead and Head Nurse of the fertility service. During that meeting, they were informed that [redacted] would develop and implement a policy permitting the use of known donor sperm.

18. In spring 2026, [redacted] and [redacted] were informed that [redacted] was developing a policy governing the use of known donor sperm and were subsequently advised that the policy had been ratified. However, to date they have not been provided with a copy of the policy. More than a year after their first fertility appointment, [redacted] and [redacted] have only recently been offered their first appointment under the newly implemented donor pathway, scheduled for 26 October 2026. They understand that, even following this appointment, further stages including donor screening, sperm collection, testing, storage and quarantine will be required before treatment can begin.

<u>The details of the matter being challenged</u>

19. The Policy funds treatment only where there is "*evidence of subfertility*" and "*the process for demonstrating subfertility will necessarily be different*" for people conceiving through intercourse and through artificial insemination. The Policy provides, in relevant part:

    a. For those conceiving through intercourse section 11(a) provides for referral for consideration of NHS IVF after one year of regular unprotected vaginal intercourse (six months if the woman or person trying to get pregnant is aged 36 or over). Where investigations show that IVF is the only effective treatment, eligible patients will be referred for NHS IVF without delay, otherwise NHS IVF can be offered to eligible patients who have not conceived after two years (one year if the woman or person trying to get pregnant is aged 36 or over).

    b. For those conceiving through artificial insemination section 11(b) provides that there is to be referral for NHS assessment only "*after six self-funded cycles of intrauterine insemination (IUI)*" (three if aged 36 or over) and NHS IVF after 12 cycles of IUI (six if aged 36 or over). Up to six cycles of unstimulated IUI using partner sperm are funded for eligible patients who cannot have vaginal intercourse and have not conceived after six self-funded IUI cycles, or have conditions that require specific consideration in relation to methods of conception (e.g., sperm washing). Up to six cycles of unstimulated IUI using donor sperm are funded for patients where they have azoospermia, deficits in semen quality, a high risk of transmitting a genetic or infectious disorder to the child or partner, or severe rhesus isoimmunisation. Alternatively, up to six cycles of IUI are funded where the individual or couple trying to conceive have not conceived after six self-funded IUI cycles.

20. On 7 January 2026, [redacted] wrote to the NEL complaints team in relation to the operation of the North East London Integrated Care Board Fertility Policy (April 2023) (the "Policy")) as it applies to same sex couples.

21. She requested NHS funding for fertility treatment on the basis that she met all of the eligibility criteria within the policy. She had been referred to [redacted] fertility services by her GP for investigations in the summer of 2025 and none of the results were indicative of any medical barriers to conception.

22. On 17 March 2026, [redacted] received a response to her complaint from [redacted] a patient experience coordinator at NHS North East London who stated that: "*To proceed formally, we kindly ask that you complete and return the attached consent form. This will allow us to share your complaint with* [redacted] *Hospital and your GP practice,* [redacted]*, so we can gather additional perspectives and information regarding your concerns. Meanwhile, we are actively consulting with our Fertility commissioners to review your case in view of our local Fertility policy.*"

23. On 18 March 2026, [redacted] and [redacted] returned the required consent forms but did not receive a response to their complaint. We therefore wrote to NEL ICB directly on behalf of [redacted] and [redacted] on 6 August 2026. We requested a response by 20 August 2026, which was received on 14 August 2026.

24. The Response recognised and understood why our clients' questioned whether the eligibility criteria resulted in unequal access to treatment but, with respect, that was a misunderstanding of our clients' position. They were not questioning *whether* it resulted in unequal access to treatment, they were asserting that it *does* result in unequal access, on the following grounds:

The Issues

25. First, the policy is directly discriminatory on the basis of sexual orientation. Section 13(1) of the Equality Act 2010 ("EA 2010") provides that "*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*". Pursuant to s.4 EA 2010, sexual orientation is a protected characteristic. In a comparison for the purpose of establishing direct discrimination, the comparator must be in the same position in all material respects as the victim, save only that they are not a member of the protected class: s.23 EA 2010 and *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] NI 174. There are two relevant comparator groups in this case:

    a. The first comparator is a heterosexual couple in which the man has azoospermia. In both couples: the woman who will carry the child has no diagnosed fertility problem; the partner cannot provide sperm, donor sperm is needed, and the couple pays for it. The heterosexual couple proceeds directly to six NHS-funded IUI cycles and then to IVF, while the female same-sex couple must first self-fund six IUI cycles. The only difference is the sex of the partner.

    b. The second comparator is a heterosexual couple with no fertility problem. If both couples try to conceive each cycle for a year (the heterosexual couple through intercourse, and the female same-sex couple inseminating at home with known donor sperm), the heterosexual couple reaches NHS assessment free. The female same-sex couple, inseminating just as often, does not. Home insemination does not count, so they must also pay for clinic IUI.

26. The requirement to self-fund six rounds of IUI before becoming eligible for funded IVF clearly amounts to less favourable treatment. All female same-sex couples who do not have a medical fertility problem, but who

cannot procreate with their partner because neither party produces sperm, must pay c.£5,000 to £8,500, plus sperm costs. To put this figure into perspective, in the financial year 2025 (April 2024 to March 2025), the median household income in the UK was £39,200, based on estimates from the Office for National Statistics (ONS) Household Finances Survey.

27. The NEL ICB response states that "*the policy was not designed to treat same-sex couples less favourably*". Nevertheless, it is well-established that intention and motive are irrelevant in deciding whether any treatment is "because of" a protected characteristic. As Lord Phillips emphasised in *R (E) v Governing Body of JFS* [2010] 2 AC 728 at §20, the important question is what criterion was being employed by the service provider when granting a service to one and denying it to another. The ICB may have a benign motive, such as ensuring that IVF is only offered to couples who are sub-fertile, but there is no general defence of justification to direct discrimination and accordingly, once direct discrimination is made out, the explanation for it is irrelevant.

28. Secondly, or in the alternative, the requirement that a couple must demonstrate "*evidence of sub-fertility*" in order to be eligible for fertility treatment is indirectly discriminatory on the grounds of sexual orientation. Indirect discrimination is defined at ss.19 and 29 EA 2010.

29. The relevant provision, criteria or practice ("**PCP**") is that IVF, pursuant to the Policy, will only be funded and available to couples "*who want to have a baby, but who have a clinical problem which means that they are potentially infertile*". The PCP is applied as follows:

    a. The requirement in sections 11(b) and 13 that people conceiving through artificial insemination, with no known clinical cause, self-fund six (or three) IUI cycles at a licensed clinic before NHS assessment or treatment; and

b. More broadly, the requirement to show "*evidence of subfertility*", defined by failure to conceive through intercourse or through self-funded IUI.

30. The majority of opposite-sex couples are able to conceive through having unprotected penetrative sex. A diagnosis of medical infertility or sub-fertility for an opposite-sex couple concerns not only the fertility status of the woman getting pregnant but also the fertility status of the man producing the sperm to impregnate her. If he has a condition with his semen such as a low sperm count or sperm that are insufficiently mobile, he could be diagnosed with "*absolute infertility*" and, if the couple met the other eligibility criteria, they would have immediate access to NHS funded assisted reproduction services, including IVF.

31. Barring a small number of exceptions, the majority of same-sex female couples will not be able to conceive without some type of assisted reproduction because neither party produces sperm.[1] Even if both members of a same-sex female couple are tested as having normal fertility, they are *de facto* infertile in their relationship: they are in the same position as an infertile man and a fertile woman. The application of this policy puts same-sex female couples at a particular disadvantage because their de facto infertility is unrecognised by the policy and they must self-fund cycles of IUI, at a cost likely to exceed £10,000, in order to be eligible for NHS fertility treatment.

32. The policy is not justified. Even if, which is not accepted, limiting the persons who are entitled to funded IVF to persons for whom IVF is a medical necessity is a legitimate aim, the means of requiring same-sex

[1] There will be some same-sex marriages or civil partnerships where one or both of the parties is transgender or intersex and does, or at one point did, have the ability to produce sperm.

couples to pay tens of thousands of pounds for multiple rounds of IUI in advance of receiving NHS funded fertility treatment is not proportionate. Cost alone cannot justify discrimination and the cohort of same sex female couples seeking IVF treatment is likely to be small and the cost comparatively modest. In any event, a less discriminatory alternative exists, and the ICB could fund six IUI cycles for this group to put them in the same position as heterosexual couples.

33. Thirdly, or in the alternative, the ongoing failure to supply fertility services on an equal basis between opposite-sex couples and same-sex couples is discriminatory contrary to Article 14 in conjunction with Article 8 of the ECHR. A measure is discriminatory when it has "*disproportionately prejudicial effects on a particular group*": *DH v Czech Republic* (2008) 47 EHRR 3, §175. As the individual circumstances set out above explain, same-sex female couples face disproportionately prejudicial treatment by reason of the requirement to self-fund multiple cycles of IUI before obtaining funded NHS fertility treatment.

34. Moreover, the current policy fails to treat different groups differently: *Thlimmenos v Greece* (2001) 31 EHRR 15, §44. Same-sex female couples are in a significantly different situation to opposite-sex couples with fertility issues. Even though same-sex couples are clearly *de facto* infertile, the policy treats them the same as opposite-sex couples, i.e. as *prima facie* fertile. Where there is a failure to treat different groups differently, the State may have a positive obligation to allocate a greater share of public resources to that group to ameliorate that difference: *Burnip v Birmingham City Council* [2013] PTSR 117, §17-18.

35. Where the difference in treatment is based on sexual orientation, the court must apply "*strict scrutiny*" to the assessment of any asserted justification: "*particularly convincing and weighty reasons to justify*" it are required: *EB v*

France (2008) 47 EHRR 21 at §91 and *Karner v Austria* (2003) 38 EHRR 24 at §37.

36. It is well-established that it is not the scheme as a whole which must be justified but its discriminatory effect: *A v Secretary of State for the Home Department* [2005] 2 AC 68 per Lord Bingham at §68. For the reasons set out above in relation to direct discrimination and indirect discrimination pursuant to the EA 2010, the discriminatory effects of the scheme cannot be justified, particularly on the basis of the "*strict scrutiny*" standard which applies.

37. Fourthly, and more straightforwardly, the distinction drawn between same-sex female couples and opposite sex couples by the policy is irrational. There is no rational justification for requiring a woman in a same-sex partnership to prove that she is clinically infertile prior to the provision of IVF. Even if she proves that she is fertile, she will still be unable to conceive without medical assistance. She is therefore, functionally, in the same position as a woman, in an opposite sex partnership, who is infertile. The distinction is incapable of objective justification, and so is irrational at common law.

38. Fifthly, NEL ICB may have failed to comply with the public sector equality duty ("**PSED**") to pay "due regard" to the needs specified in s.149 EA 201 when exercising a public function.

39. The ICB's response letter stated that the PSED had been expressly considered when it said that: "*in reaching its decision, NEL ICB had due regard to its obligations under section 149 of the Equality Act 2010 (the Public Sector Equality Duty), including the need to eliminate unlawful discrimination, advance equality of opportunity and foster good relations between persons who share a protected characteristic and those who do not. Equality considerations formed part of the policy development process and Health Inequalities, Equality*

and Quality Impact Assessment was undertaken to support decision making." However, the publicly available information indicates that NEL ICB did not pay sufficient regard to the need to eliminate unlawful discrimination against lesbian couples and there is no reference to the PSED in the policy itself save for reference to the fact that the policy was developed following *"identification and consideration of potential equality and equity issues"*.

Action required

40. In light of the above matters, NEL ICB is respectfully invited to urgently reconsider the policy on (i) not funding IUI for same-sex female couples; and (ii) requiring same-sex female couples to undertake 12 cycles of IUI to be eligible for funded IVF.

41. Should you fail to take this step before 4pm on 2 November 2026, we are instructed to issue judicial review proceedings. We are prepared to issue this claim without further delay, but trust that this can be avoided.

ADR proposals

42. Our client is committed to resolving these issues without recourse to Court proceedings, if possible. Our client would very much welcome any proposals that NEL ICB may have for resolving this claim by way of ADR.

43. To assist us in advising our client, please provide us with copies of all relevant documentation on which NEL ICB relies. We expect this should include:

    a. Any policy document on which NEL ICB relies;

    b. Any documentation or evidence upon which NEL ICB relies to justify the ongoing indirect discrimination, contrary to the EA

2010, or the ongoing interference with our clients' rights under Article 8 and/or Article 14;

c. Any assessment on which NEL ICB relies to justify not funding IUI for same-sex female couples; and

d. Any documentary evidence on which NEL ICB relies to assert compliance with the PSED, including any Equality Impact Assessments.

44. We strongly remind you of your duty of candour in this regard.

Funding and costs

45. We anticipate that, should litigation become necessary, this claim will be litigated by way of Conditional Fee Agreement.

Proposed reply date

46. Given the importance of the issue outlined above, we request that you provide a substantive response in writing by 4pm on 2 November 2026, failing which we reserve the right to commence judicial review proceedings without further notice.

47. We hope that an application for judicial review will not be necessary and look forward to hearing from you.

Yours faithfully



LEIGH DAY