



Neutral Citation Number: [2021] EWHC 3057 (Admin)

Case No: CO/504/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Bristol Civil and Family Justice Centre
2 Redcliff Street, Bristol BS1 63R

Date: 16/11/2021

Before:

THE HON. MR JUSTICE LANE

Between the Queen on the Application of:

CHRISTINA GOODRED	<u>Claimant</u>
- v -	
PORTSMOUTH CITY COUNCIL	<u>Defendant</u>
-and-	
THE SECRETARY OF STATE FOR EDUCATION	<u>Intervener</u>

Mr D Wolfe QC (instructed by **Irwin Mitchell Solicitors**) for the **Claimant**
Mr P Greatorex (instructed by **Portsmouth City Council Legal Services**) for the **Defendant**
Mr J Cornwell (instructed by the **Government Legal Department**) for the **Intervener**

Hearing date: 18 October 2021

Approved Judgment

Mr Justice Lane :

A. INTRODUCTION

1. This judicial review concerns a challenge by the claimant to the way in which the defendant discharges its statutory responsibilities under the Education Act 1996 in respect of children of school age who are not receiving education at a school. The claimant contends that her children are receiving a suitable education at home. She complains that the defendant is imposing on her and others in a similar position, the burden of proving that her children are receiving a suitable education at home, when the statutory scheme does not (at that point) impose such a burden; and that the defendant is fettering its discretion by refusing, as a matter of principle, to accept information provided by the claimant as demonstrating that her children are receiving a suitable education.
2. In this regard, the claimant seeks a declaration that an addition made in late 2020 to the defendant's published policy guidance entitled "Elective Home Education" is unlawful. She also seeks a declaration that the defendant's stage 3 complaint determination arising from the defendant's functions in relation to her children is unlawful. Finally, she seeks quashing orders in respect of the "policy addition and stage 3 complaint determination and an order for a fresh and lawful determination of her stage 3 complaint".

B. PERMISSION AND HEARING

3. Permission was refused on the papers by HHJ Vosper QC on 30 March 2021. The refusal was by reference to the grounds which accompanied the claim form. On 26 April 2021, Foster J ordered the claimant to file and serve a replacement statement of facts and grounds, which I have summarised above. Foster J said she gave permission because "the policy as operated [by the defendant] was arguably unfair; furthermore, it was arguable that there was uncertainty on the part of the defendant about the actual policy at the relevant times."
4. The defendant points out that those reasons are different from the claimant's grounds, both as originally filed and as replaced. In the circumstances, I do not consider it necessary to make an order granting permission in respect of the replacement grounds. At the hearing on 18 October 2021, it was accepted on all sides that these were the relevant grounds of challenge. It should also be mentioned at this stage that the claimant's grounds specifically state that she is not bringing any challenge "to any assessment by Portsmouth ... of the suitability of the education she provides to her children."
5. At the hearing on 18 October, the claimant was represented by Mr David Wolfe QC and the defendant by Mr Paul Greatorex. Following my earlier order, permitting the Secretary of State for Education to intervene, written submissions on behalf of the Secretary of State had been prepared by Ms Joanne Clement of counsel. Oral submissions were made on behalf of the Secretary of State by Mr James Cornwell. I am grateful to all of them for their assistance.

C. STATUTORY FRAMEWORK

6. Section 7 of the Education Act 1996 imposes a duty on parents to secure the education of their children of compulsory school age. It provides that:-

“The parent of every child of compulsory school age shall cause him to receive efficient full-time education suitable—

(a) to his age, ability and aptitude, and

(b) to any special educational needs (in the case of a child who is in the area of a local authority in England) or additional learning needs (in the case of a child who is in the area of a local authority in Wales) he may have,

either by regular attendance at school or otherwise.”

7. Section 9 concerns the provision of education that is in accordance with the wishes of their parents:-

“In exercising or performing all their respective powers and duties under the Education Acts, the Secretary of State and local authorities shall have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure. ”

8. Section 13A imposes upon a local authority a duty to promote high standards and the fulfilment of the learning potential of every person to whom section 13A(1) applies, which includes persons under the age of 20.

9. Section 436A (duty to make arrangements to identify children not receiving education) provides as follows:-

“(1) A local authority must make arrangements to enable them to establish (so far as it is possible to do so) the identities of children in their area who are of compulsory school age but –

(a) are not registered pupils at a school, and

(2) In exercising their functions under this section, a local authority must have regard to any guidance given from time to time by the Secretary of State.

(3) In this Chapter, “suitable education”, in relation to a child, means efficient full-time education suitable to his age, ability and aptitude and to any special educational needs he may have (in the case of a local authority in England) or suitable to the child’s age, ability and aptitude and to any additional learning

needs the child may have (in the case of a local authority in Wales).”

10. Section 437 concerns school attendance orders. So far as relevant, it provides as follows:-

“(1) If it appears to a local education authority that a child of compulsory school age in their area is not receiving suitable education, either by regular attendance at school or otherwise, they shall serve a notice in writing on the parent requiring him to satisfy them within the period specified in the notice that the child is receiving such education.

(2) That period shall not be less than 15 days beginning with the day on which the notice is served.

(3) If -

(a) a parent on whom a notice has been served under subsection (1) fails to satisfy the local education authority, within the period specified in the notice, that the child is receiving suitable education, and

(b) in the opinion of the authority it is expedient that the child should attend school,

the authority shall serve on the parent an order (referred to in this Act as a “school attendance order”), in such form as may be prescribed, requiring him to cause the child to become a registered pupil at a school named in the order.

(4) A school attendance order shall (subject to any amendment made by the local education authority) continue in force for so long as the child is of compulsory school age, unless -

(a) it is revoked by the authority, or

(b) a direction is made in respect of it under section 443(2) or 447(5)...”

11. Section 442 confers the means whereby a parent can secure the revocation of a school attendance order made under section 437. So far as relevant it provides:-

“(1) This section applies where a school attendance order is in force in respect of a child.

(2) If at any time the parent applies to the local authority requesting that the order be revoked on the ground that arrangements have been made for the child to receive suitable education otherwise than at school, the authority shall comply with the request, unless they are of the opinion that no

satisfactory arrangements have been made for the education of the child otherwise than at school.

(3) If a parent is aggrieved by a refusal of the [local authority] to comply with a request under subsection (2), he may refer the question to the Secretary of State.

(4) Where a question is referred to the Secretary of State under subsection (3), he shall give such direction determining the question as he thinks fit.

....”

12. Section 443 creates an offence of failing to comply with a school attendance order:-

“(1) If a parent on whom a school attendance order is served fails to comply with the requirements of the order, he is guilty of an offence, unless he proves that he is causing the child to receive suitable education otherwise than at school.

(2) If, in proceedings for an offence under this section, the parent is acquitted, the court may direct that the school attendance order shall cease to be in force.

(3) A direction under subsection (2) does not affect the duty of the local authority to take further action under section 437 if at any time the authority are of the opinion that, having regard to any change of circumstances, it is expedient to do so.

(4) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 3 on the standard scale.”

13. It is also relevant to mention the duty imposed on a local authority by section 175 of the Education Act 2002, in respect of the welfare of children. Subsection (1) provides:-

“A local authority shall make arrangements for ensuring that their education functions are exercised with a view to safeguarding and promoting the welfare of children.”

D. SECRETARY OF STATE’S GUIDANCE

(1) Children Missing Education 2016

14. In September 2016, the Secretary of State issued statutory guidance for local authorities entitled “Children Missing Education”. Under the heading “Introduction – overview”, we find the following:-

“1. All children, regardless of their circumstances, are entitled to an efficient, full time education which is suitable to their age,

ability, aptitude and any special educational needs they may have.

2. Children missing education are children of compulsory school age who are not registered pupils at a school and are not receiving suitable education otherwise than at a school. Children missing education are at significant risk of underachieving, being victims of harm, exploitation or radicalisation, and becoming NEET (not in education, employment or training) later in life.

3. Effective information sharing between parents, schools and local authorities is critical to ensuring that all children of compulsory school age are safe and receiving suitable education. Local authorities should focus their resources effectively in intervening early in the lives of vulnerable children to help prevent poor outcomes”

15. The relevant paragraphs under the heading “Local authorities’ responsibilities” are as follows:-

“4. Local authorities have a duty under section 436A of the Education Act 1996 to make arrangements to establish the identities of children in their area who are not registered pupils at a school and are not receiving suitable education otherwise. This duty only relates to children of compulsory school age.

5. The local authority should consult the parents of the child when establishing whether the child is receiving suitable education. Those children identified as not receiving suitable education should be returned to full time education either at a school or in alternative provision. Prompt action and early intervention are crucial to discharging this duty effectively and in ensuring that children are safe and receiving suitable education.

6. Local authorities should have robust policies and procedures in place to enable them to meet their duty in relation to these children, including ensuring that there are effective tracking and enquiry systems in place, and appointing a named person to whom schools and other agencies can make referrals about children who are missing education.

...

11. Where there is concern for a child’s welfare, this should be referred to local authority children’s social care. If there is a reason to suspect a crime has been committed, the police should also be involved. Where there is a concern that a child’s safety or well-being is at risk, it is essential to take action without delay.”

16. Under the heading “Parents’ responsibilities”, we find (inter alia) the following:-

“13. Parents have a duty to ensure that their children of compulsory school age are receiving suitable full-time education. Some parents may elect to educate their children at home and may withdraw them from school at any time to do so, unless they are subject to a School Attendance Order.”

(2) Elective Home Education guidance to local authorities (2019)

17. In April 2019, the Secretary of State issued guidance to Local Authorities entitled "Elective Home Education". Hereafter, references to the Elective Home Education guidance are references to this guidance (rather than that directed to parents: see paragraph 28 below). Although not statutory guidance, it is common ground that it is something to which a local authority must nevertheless have regard in discharging its relevant functions. Under the heading “Introduction” there is the following:-

“The government’s aim is to ensure all young people receive world-class education which allows them to reach their potential and live a more fulfilled life, regardless of background. That education should be provided in a safe environment, whether at school or at home. Parents have a right to educate their children at home, and the government wants the many parents who do it well to be supported. They devote time, financial resources and dedication to the education of their children. Most parents who take up the weighty responsibility of home education do a great job, and many children benefit from being educated at home. Educating children at home works well when it is a positive, informed and dedicated choice. However, the past few years have seen a very significant increase in the number of children being educated at home, and there is considerable evidence that many of these children are not receiving a suitable education. There is a less well evidenced but increasing concern that some children educated at home may not be in safe environments. The department believes that although the primary responsibility for ensuring that children are properly educated belongs to parents, a local authority has a moral and social obligation to ensure that a child is safe and being suitably educated. If it is not clear that that is the case, the authority should act to remedy the position. This guidance is intended to help local authorities understand their existing powers, and their duties in relation to children who are being educated at home, and how those relate to the obligations of parents. It aims to enable local authorities to identify children not receiving a suitable education and do something about it. The end result should be that every child is receiving a suitable education in a safe and appropriate setting, whether at home or in school. Where necessary - because it is evident that a child is simply not receiving suitable education at home and the use of school attendance powers is not achieving a

change in that situation - the local authority should be ready to use its safeguarding powers as explained in this guidance. The overriding objective in these cases is to ensure that the child's development is protected from significant harm. Our initial step is to ensure that LAs understand the powers at their disposal and when they can be used to intervene if it appears that a child is not receiving an adequate, safe, or appropriate education. However, where it is clear that parents are educating a child well at home, the need for contact should be minimal and not made more onerous than is required by the parents' own needs."

18. After the introduction, the guidance provides a summary flow chart. The first "box" in this chart has the words "After informal enquiries, the child does not appear to be receiving suitable education at home." An arrow leads the reader to a second box which says, "LA serves S.437 (1) notice on parents requiring them to give information about child's education." The following box reads "If LA not satisfied education is suitable and believes child should attend school, LA serves School Attendance Order (SAO) on parents". The remaining provisions of the flow chart are not relevant for our purposes.
19. Paragraph 1.2 of the guidance recognises that educating children at home is a rewarding but challenging task. At paragraph 2.1, a non-exhaustive list of reasons why parents may choose to educate children at home is given. They include ideological or philosophical views which favour home education; religious or cultural beliefs; and the fact that the child may have been bullied at school. Paragraph 2.2 makes it clear that these non-exhaustive reasons are not mutually exclusive.
20. Paragraph 2.4 reads as follows:-

"2.4 There are no specific legal requirements as to the content of home education, provided the parents are meeting their duty in s.7 of the Education Act 1996. This means that education does not need to include any particular subjects and does not need to have any reference to the National Curriculum; and there is no requirement to enter children for public examinations. There is no obligation to follow the 'school day' or have holidays which mirror those observed by schools. Many home educating families do follow a clear academic and time structure but it should not be assumed that a different approach which rejects conventional schooling and its patterns is unsatisfactory, or constitutes 'unsuitable' education. Approaches such as autonomous and self-directed learning, undertaken with a very flexible stance as to when education is taking place, should be judged by outcomes, not on the basis that a different way of educating children must be wrong."
21. Paragraph 3.5 provides:-

"3.5 The current legal framework is not a system for regulating home education *per se* or forcing parents to educate their children in any particular way. Instead, it is a system for identifying and dealing with children who, for any reason and in

any circumstances, are not receiving an efficient suitable full-time education. If a child is not attending school full-time, the law does not assume that child is not being suitably educated. It does require the local authority to enquire what education is being provided and local authorities have these responsibilities for all children of compulsory school age. Local authorities should ensure that their enquiries are timely and effective. Depending on the results of those enquiries, the law may require further action by the local authority and the department believes that this is the case for an increasing number of children. Local authorities must take such action where it is required, within the constraints of the law. Local authorities have the same safeguarding responsibilities for children educated at home as for other children. They should be ready to use safeguarding powers appropriately, when warranted. This flows from the general responsibilities which local authorities have for the well-being of all children living in their area.”

22. Paragraph 3.6 provides, that as a result, each local authority is recommended to have a written policy statement on elective home education. The Local Authority should also seek to offer guidance to home-educating families about their rights and obligations, and also provide advice on good practise and available resources for parents who request it. Local Authorities should regularly review their elective home education policies so that these reflect current law and local circumstances, and are compatible with the Secretary of State’s guidance.
23. Under the heading “How do local authorities know that a child is being educated at home?” we find this:-

“4.2 Identification of children who have never attended school and may be home educated forms a significant element of fulfilling an authority’s statutory duty under s.436A of the Education Act 1996 - to make arrangements to enable the authority to establish, so far as it is possible to do so, the identities of children in its area who are not receiving a suitable education. The duty applies in relation to children of compulsory school age who are not on a school roll, and who are not receiving a suitable education otherwise than at school (for example, at home, or in alternative provision). Until a local authority is satisfied that a home-educated child is receiving a suitable full-time education, then a child being educated at home is potentially in scope of this duty. The department’s children missing education statutory guidance for local authorities applies. However, this should not be taken as implying that it is the responsibility of parents under s.436A to ‘prove’ that education at home is suitable. A proportionate approach needs to be taken.”

24. Under the heading “Local authorities’ responsibilities for children who are, or appear to be, educated at home”, paragraph 5.2 states that it is "important that the authorities'

arrangements are proportionate and do not seek to exert more oversight than is actually needed where parents are successfully taking on this task". So far as relevant, paragraph 5.4 provides:-

“5.4 In any event, the department recommends that each local authority: •should provide parents with a named contact who is familiar with home education policy and practice and has an understanding of a range of educational philosophies;•ordinarily makes contact with home educated parents on at least an annual basis so the authority may reasonably inform itself of the current suitability of the education provided. In cases where there were no previous concerns about the education provided and no reason to think that has changed because the parents are continuing to do a good job, such contact would often be very brief;

...”

25. Section 6 is entitled: “What should local authorities do when it is not clear that home education is suitable?” The following paragraphs are relevant:-

“6.4 The department’s advice is that in all cases where it is not clear as to whether home education is suitable (including situations where there is no information available at all), the authority should initially attempt to resolve those doubts through informal contact and enquiries. This is likely to be the most productive initial approach even when a child is not being suitably educated. An authority’s s.436A duty (and that under s.437, see below) forms sufficient basis for informal enquiries. Furthermore, s.436A creates a duty to adopt a system for making such enquiries. Local authorities should be in no doubt about the necessity for doing this in order to make an early move to formal procedures under s.437 if necessary, thus avoiding delay in securing a suitable education when it is not being provided.

6.5 The most obvious course of action is to ask parents for detailed information about the education they are providing. Parents are under no duty to respond to such enquiries, but if a parent does not respond, or responds without providing any information about the child’s education, then it will normally be justifiable for the authority to conclude that the child does not appear to be receiving suitable education and it should not hesitate to do so and take the necessary consequent steps. This is confirmed by relevant case law. In many cases, making such informal enquiries will allow the situation to be resolved, either by evidence being provided that the home education is suitable or by agreement on alternative approaches to educating the child based on the local authority’s initial assessment (for example, by catering for special needs in a different way).

6.6 Informal enquiries can include a request to see the child, either in the home or in another location. But the parent is under no legal obligation to agree to this simply in order to satisfy the local authority as to the suitability of home education, although a refusal to allow a visit can in some circumstances justify service of a notice under s.437(1). The question of access to the child in relation to safeguarding powers is dealt with in a later section of this guidance.

...

“6.10 Local authorities considering whether they should serve a s.437(1) notice in a specific case should note that current case law means that a refusal by parents to provide any information in response to informal enquiries will in most cases mean that the authority has a duty to serve a notice under s.437(1). This is because where no other information suggests that the child is being suitably educated, and where the parents have refused to answer, the only conclusion which an authority can reasonably come to, if it has no information about the home education provision being made, is that the home education does not appear to be suitable. Local authorities should take care to ensure that the family has received any enquiries, and is not simply absent.

....

6.12 In considering whether it is satisfied by the parent’s response to the s.437(1) notice, it is open to the authority to consider any other relevant information available to it – not only through its own contacts with the family, but also information provided by other agencies and other sources and the child’s former school (if any), as to the child’s circumstances and needs. The authority should make arrangements to gather and record as much information as possible from these alternative sources. Of course, the local authority should give reasonable weight to information provided by parents, on its own merits. For example, an authority should not dismiss information provided by parents simply because it is not in a particular form preferred by the authority (eg, a report by a qualified teacher). On the other hand the information provided by parents should demonstrate that the education actually being provided is suitable and address issues such as progression expected and (unless the home education has only just started) achieved. It should not be simply a statement of intent about what will be provided, or a description of the pedagogical approach taken – this would not enable the authority to reach a legitimate conclusion that a suitable education is actually being provided. This is often a key point in separating out families which are genuinely providing a suitable education at home from those who are not, because the latter often cannot demonstrate satisfactory content or measurement of progress.

6.13 The information needed to satisfy the test in s.437(3)(a) depends on the facts of the case and the judgement of the local authority. However, if the parent refuses to make any substantive response to a notice served under s.437(1) that refusal in itself is likely to satisfy the test in s.437(3)(a) - and such a parent should expect to be served with a school attendance order.

...”

26. Under the heading “Safeguarding: The Interface with home education”, we find:-

“7.1 A situation in which a child is not receiving a suitable full-time education requires action by a local authority under education law, as described above. But it is important to bear in mind that unsuitable or inadequate education can also impair a child’s intellectual, emotional, social or behavioural development, and may therefore bring child protection duties into play. This will depend on the facts of the case, but local authorities should consider whether they ought to take action under safeguarding law, especially where the steps described above have not been, or seem unlikely to be, sufficient to address a risk to a child’s welfare”

27. Paragraph 7.3 observes that there is no proven correlation between home education and safeguarding risk. However, a child being educated at home is, in the Secretary of State’s view, not necessarily being seen on a regular basis by professionals such as teachers. This can logically increase the chances that any parents who set out to use home education to avoid independent oversight may be more successful by doing so.

28. Under the heading “What do the s.7 requirements mean?” the guidance addresses the duty on parents to provide an efficient, full-time education, suitable to the age, ability and aptitude of the child in question. Paragraph 9.3 notes that the wishes of parents are relevant, in the light of Article 2 of Protocol 1 of the European Convention on Human Rights. That does not, however, mean that parents are sole arbiters of what constitutes a suitable education:-

“9.4 ...clearly a local authority must have a basis on which to reach the decisions called for in s.437 of the Education Act 1996 as to whether or not the education being provided is suitable. The term ‘suitable’ should be seen in the following light:

a. it should enable a child to participate fully in life in the UK by including sufficient secular education. This means that even if the home education is primarily designed to equip a child for life within a smaller community within this country it should not foreclose the child’s options in later life to adopt some other mode of living, and to be capable of living on an autonomous basis so far as he or she chooses to do so. This view is compatible with the small amount of potentially relevant case law;

b. notwithstanding (a), the home education provision does not need to follow specific examples such as the National Curriculum, or the requirement in academy funding agreements for a ‘broad and balanced’ curriculum, nor the independent school standards prescribed by the Secretary of State. Conversely, however, if the home education does consist of one or more of those, then that would constitute strong evidence that it was ‘suitable’ in terms of s.7;

...

h. local authorities should not set rigid criteria for suitability which have the effect of forcing parents to undertake education in particular ways, for example in terms of the pattern of a typical day, subjects to be followed and so on. Some parents may decide that a very formal approach is necessary; others may decide to make a more informal provision that is more appropriate to the particular child. Whatever the views of the parents, the key focus for the authority should be on suitability for the child in question.”

(3) Elective Home Education (Parents) (2019)

29. In April 2019, the Secretary of State issued non-statutory guidance entitled, “Elective Home Education: Departmental guidance for parents”. Under the heading “What is ‘full-time’ education?” the guidance explains that home-educating parents are not required to have a timetable; set hours during which education will take place; or observe school hours, days or terms. The question of whether education for a specific child is full-time will depend on the facts of each case. Parents are told, however, that they should “at least be able to quantify and demonstrate the amount of time for which your child is being educated” and that education “which is clearly not occupying a significant proportion of a child’s life ... will probably not meet the s.7 requirement”.
30. Under the heading “What is a ‘suitable’ education?” the guidance explains that there is no definition of “suitable” education in statute law. Education must, however, be suitable to the age, ability and aptitudes of the child, and any special educational needs. The education must therefore be age-appropriate and enable the child to make progress according to his or her particular level of ability, and also take into account any specific aptitudes, such as whether the child is, for example, very good at mathematics.
31. Paragraph 2.10a provides that, even if there is no specific link with the National Curriculum or other external curricula, there should nevertheless be “an appropriate minimum standard which is aimed at, and the education should aim at enabling the child, when grown-up, to function as an independent citizen in the UK”.
32. Paragraphs 2.11 and 2.12 provide as follows:-

“2.11 There are no legal requirements for you as parents educating a child at home to do any of the following:• acquire specific qualifications for the task•have premises equipped to any particular standard •aim for the child to acquire any specific

qualifications •teach the National Curriculum •provide a ‘broad and balanced’ curriculum •make detailed lesson plans in advance •give formal lessons •mark work done by the child •formally assess progress, or set development objectives •reproduce school type peer group socialisation •match school-based, age-specific standards.

2.12 However, many home-educating families do some of these, at least, by choice. Furthermore, it is likely to be much easier for you to show that the education provided is suitable if attention has been paid to the breadth of the curriculum and its content, and the concepts of progress and assessment in relation to your child’s ability.”

33. Under the heading “What are the responsibilities of your local authority?” paragraph 5.1 tells parents that their local authority “has no formal powers or duty to monitor the provision of education at home”, although it has a statutory duty under section 436A of the Act to make arrangements to enable it to establish the identities of the children who are not receiving a suitable education.
34. Paragraph 5.2 provides that, in order to fulfil the section 436A duties, local authorities “are entitled to make informal enquiries of parents to establish what education is being provided”. The following paragraphs are of potential significance in the present case:-

“5.3 The local authority is therefore likely to make such enquiries if it becomes aware that you are educating a child at home - or may be doing so. As parents you are under no legal obligation to respond, but if you do not, the local authority is entitled to conclude from the absence of any response that it appears that your child is not receiving a suitable education, with all the consequences which can follow from that (see below).

5.4 Some local authorities will ask to see the child at home or in another location, as well as seeing examples of work done. As parents, you are under no legal obligation from education law to agree to such a meeting (but see section below on safeguarding) or to produce specific evidence but you should consider carefully the reasons for not doing so, what is in the best interests of your child, and what is the most sensible approach. If you do not do enough to satisfy the local authority about the education being provided at home it may have no option but to conclude that the education does not meet the s.7 requirement.

...

5.6 If your local authority feels that it has not had sufficient information about the home education being provided, or has had no information, and it appears to the authority that your child is not receiving a suitable education at home, it must serve a notice (known as a s.437(1) notice), requiring that you as parents satisfy the authority that the child is receiving a full-time and efficient

education at home suitable to your child's needs. Again, it would be sensible to respond to such a notice if you receive one; and you will have at least 15 days to respond so that you have time to gather suitable material that you may wish to supply.

5.7 The local authority must consider the response, if any, which you make to the notice, in order to decide whether your child is receiving an education which meets your responsibilities under s.7, taking account of any evidence you have provided and any other information it has about the education your child is receiving. If parents make no response at all, then the local authority is entitled to conclude that the child is not receiving a suitable education.”

E. DEFENDANT'S POLICY GUIDANCE

35. The defendant's July 2020 guidance entitled “Elective Home Education” to a large extent covers ground covered in the Secretary of State's guidance documentation. The following passages from the 2020 guidance are relevant for our purpose:-

“Further to [the duty under section 436A] the Local Authority has a duty to enquire about a child's education if they are of compulsory school age. Enquiries [sic] be timely and effective. Therefore the LA does has a duty of oversight and this will be carried out at least annually.

....

Prior to serving a notice under section 437(1), we will try to address the situation informally with parents. If we have information that makes it appear that parents are not providing a suitable education, we would ask parents for further information about the education they are providing. Such a request is not the same as a notice under section 437(1), and is not necessarily a precursor for formal procedures. Parents are under no duty to respond to such enquiries, but it would be sensible for them to do so.

...

Contact with parents and children

We acknowledge that learning takes place in a wide variety of environments and not only in the home. However, if it appears that a suitable education is not being provided, we will seek to gather any relevant information that may assist us in reaching a properly informed judgment. This will include seeking from the parents any further information that they wish to provide which explains how they are providing a suitable education. Parents

will always be given the opportunity to address any specific concerns that the authority has. The child involved will also be given the opportunity, but is not required, to attend any meeting that may be arranged or invited to express his or her views in some other way. Please note that parents are under no duty to respond to our requests for information or a meeting, but it would be sensible for them to do so because until the local authority is satisfied that a home educating child is receiving a suitable full-time education, then the child being educated at home falls under the scope of the powers and duties in relation to children missing education.

There are no legal requirements for you as parents educating a child at home to do any of the following:

- acquire specific qualifications for the task
- have premises equipped to any particular standard
- aim for the child to acquire any specific qualifications
- teach the National Curriculum
- provide a 'broad and balanced' curriculum
- make detailed lesson plans in advance
- give formal lessons
- mark work done by the child
- formally assess progress, or set development objectives
- reproduce school type peer group socialisation
- match school-based, age-specific standards

However, many home-educating families do some of these, at least, by choice. Furthermore, it is likely to be much easier for a parent to show that the education provided is suitable if attention has been paid to the breadth of the curriculum and its content, and the concepts of progress and assessment in relation to your child's ability.

If it appears to us that a child is not receiving a suitable education we will write to parents to discuss their ongoing home education provision. This letter will offer a range of ways in which you can choose to tell us about your provision. We would prefer that an officer from our service meets with you in order to discuss your arrangements, however the letter does give alternative options.

Some parents may welcome the opportunity to discuss the provision that they are making for the child's education during a home visit but parents are not legally required to give us access to their home.

You may choose to meet an officer at a mutually convenient and neutral location instead, with or without the child being present, or choose not to meet at all. Where a parent elects not to allow access to their home or their child, this will not of itself constitute a ground for concern about the education provision being made. Where we are not able to visit the home, we should be able to discuss and evaluate the educational provision by alternative means.

If you choose to meet an officer, you will be asked to provide evidence that you are providing a suitable education. If we do ask you for information, you are under no duty to comply although it would be sensible for you to do so given that the LA must be satisfied of suitable education. Following any review of your home education provision, you will receive a short notification from us. If we are satisfied that the education is suitable, you will be notified and advised that we will contact you again in a year's time. If we are not satisfied, you will be notified and given a maximum of 3 months to put plans in place and demonstrate the suitability of education. If we remain dissatisfied, we may take statutory action as set out above.

...

If we consider that a suitable education is not being provided, then we will write to parents informing them of this. If we are not satisfied that a suitable education is being provided, and the parents, having been given a reasonable opportunity to address the identified concerns and report back to us have not done so, we will consider sending a formal notice to the parents under section 437 before moving on, if needed, to the issuing of a school attendance order (section 437(1)).”

36. In late 2020, the defendant added to its guidance the following definition:-

“Definition of suitable education and the reasons why the local authority may deem the education not to be suitable

Parents who are home educating their child(ren) are expected to provide evidence of a suitable education that would, on the balance of probabilities, convince a reasonable person that a suitable education is being provided for the age and ability of the child.

In considering the parent's provision of education the local authority may reasonably expect the provision to include the following characteristics:

Broad: it should introduce the pupils to a wide range of knowledge, understanding and skills.

Balanced: each part should be allotted sufficient time but not such that it pushes out other essential areas of learning.

Relevant: subjects should be taught so as to bring out their application to the pupil's own experience and to adult life and to give due emphasis to practical aspects.

Differentiated: what is taught, and how it is taught, needs to be matched to the child's age, abilities and aptitude, taking into account any special education need.

A good curriculum also includes other aspects at an appropriate level such as personal, social and health education, outdoor and environmental education, citizenship, careers, food technology and information and communication technology. Opportunities to mix and relate with other children and adults are considered to be important to a child's personal and social development.

There may be a variety of reasons why the information / evidence provided has not been deemed suitable by the local authority. This may include:

The education provision described lacks detail and it is difficult to ascertain what is being taught / what subjects are being studied.

There is no or very limited examples of work submitted.

There is no or very limited information regarding resources used internally and externally.

There is no or very limited detail of how the child's progress is being monitored or examples of work to demonstrate relevant progression.

There is no clear academic or time structure.

It is important to note that the above is for guidance and by way of example only and is not an exhaustive list. Each case is judged upon its own individual circumstances.

The types of information and evidence might include: a timetable; a curriculum plan; photographs; workbooks; progress reports; dated work over time; conversations with the child / parent; home visits; etc.

The local authority needs to be satisfied that appropriate education is taking place and therefore it will be about building a full picture of the individual circumstances rather than rigid adherence to a check list.”

37. At the same time as that definition was added, the defendant also published, as part of its guidance, the following “clarification”:-

“Clarification:

In order to ensure that suitable education is taking place and to minimise any safeguarding risks, the council is now making it clear to parents or carers who electively home educate their children that a written report alone, however detailed it may be, should not be relied on in order to satisfy the council that suitable education is taking place.

Parents or carers who are at home education their child(ren) are expected to provide evidence of a suitable education that would, on balance of probabilities, convince a reasonable person that a suitable education is being provided for any age and ability of the child.

Embedded below is the council’s definition of suitable education, the reasons why the local authority may deem the education not to be suitable and some examples of the types of information and evidence that parents or carers might provide to demonstrate that suitable education is being provided.

This is not to say that once the council is satisfied that suitable education is taking place, that a report would not in the future be sufficient, but this should not be relied on.”

38. The defendant subsequently removed the “clarification”, on the basis that it considered the passage was causing unnecessary confusion.

F. CASE LAW

39. In Phillips v Brown (unreported, 20 June 1980) Mr Phillips appealed against his conviction for an offence under the Education Act 1944 of failing to comply with a school attendance order. The legislation in question was the predecessor of section 443 of the 1996 Act. In October 1976, Leeds City Council wrote to Mr Phillips regarding the fact that his child was not attending any school. The response received was that the child was receiving a “full time education... which is suitable to his age, aptitude, and ability; he receives his education otherwise than by regular attendance at school; he has already received this education since (and inclusive of) his 5th birthday; such education falls in accordance with current Educational Law”. Mr Phillips's case was that the Council exceeded its powers, if it asked him to prove that he was discharging his duty, to ensure that his child was properly educated, unless it had some reason to doubt that this was the case.

40. The Divisional Court (per Donaldson LJ) accepted the duty of securing that children were properly educated was placed by section 36 of the 1944 Act “fairly and squarely” upon the parents. It was, however, wrong to conclude that the Council was not concerned with whether parents discharged that duty. On the contrary, section 37(1) provided that it was the duty of the Council to serve on the parent a notice requiring him to satisfy the authority that the child is receiving efficient full-time education “suitable to his age, ability and aptitude...” The prescribed circumstance was that “It appears to a local educational authority that the parent of any child of compulsory school age in their area is failing to perform the duty imposed on him by the last foregoing section.”
41. Donaldson LJ rejected the submission that, unless and until something came to the notice of the Council which caused it to conclude, prima facie, that the parent was in breach of his or her section 36 duty, the Council was neither bound nor entitled to make inquiries of the parent. Donaldson LJ held that “where an authority has a duty to take action in particular circumstances, it also has a duty to be alert in order to detect the possibility that those circumstances exist”. Where the Council knew that a child was not being educated at school, the question arose:-

“What should it do? I do not accept that it should do nothing. This would rightly be criticised as an attempt to because [sic] like an ostrich -- to put its head in the sand in order that it should not learn of anything which might place upon it the burden of discharging its duty to consider making and, in appropriate cases, to make School Attendance Orders. The most obvious step to take is to ask the parents for information. Of course such a request is not the same as a notice under section 37(1) of the Education Act 1944 and the parents will be under no duty to comply. However it would be sensible for them to do so. If parents give no information or adopt the course adopted by Mr. Phillips of merely stating that they are discharging their duty without giving any details of how they are doing so, the L.E.A. will have to consider and decide whether it "appears" to it that the parents are in breach of section 36. In this context there is no reason why it should necessarily accept the parents' view - opinions differ on what has to be done in discharge of the duty - and if the parents refuse to answer, it could very easily conclude that prima facie the parents were in [breach] of their duty.

If the L.E.A., having considered the matter, is in a state of mind which can be described by saying that it appears to them that the parents are in breach of their obligation under section 36 of the Education Act 1944 it has no alternative but to serve notice on the parents under section 37(1) requiring the parents to satisfy them within a specified period, not being less than fourteen days, that the child is receiving efficient full-time education suitable to his age, ability and aptitude either by regular attendance at school or otherwise.”

G. THE FACTS OF THE PRESENT CASE

42. On 17 July 2020, the defendant wrote to the claimant and her husband in respect of each of their children, in order to review the children's elective home education provision. They were asked to complete and return a form, which would enable the defendant “to establish that your child is still being electively home educated and how we should proceed in this matter.” It was stated that, as an alternative, an email or telephone call could be employed. The letter said that, in the event that the defendant received no response, it “must advise you that we have a duty to conduct further inquiries. If after making those enquiries it appears to us that no suitable education is taking place, we will act in accordance with our procedures outlined in our elective home education guidance.”
43. On 26 July 2020, the claimant responded. She said that it had been decided “to send you a report on the work we have been doing with [the children] with a brief description of some of the things we cover and do”. There followed a description, by reference to subjects, of what she said the children had been doing.
44. On 7 August 2020, the defendant’s Mr McIntyre replied. He said that the educational provision submitted “was informative and allowed me to better understand how you are delivering the provision”. He explained that the defendant was tasked with ensuring that an efficient full-time education suitable to a child age, aptitude and ability was being delivered. In that regard, Mr McIntyre stated that it was often helpful to meet to go through some of the aspects “in a little more detail” and that he would “welcome this opportunity”. If that were not a possibility, “it would be great to see more examples of the work and even meet your child. This would assist us in ensuring that we are able to make the judgement in relation to the suitability”. Mr McIntyre posed the following questions:-
- “1. What progress/achievements has your child made this academic year? How has this been monitored and recorded? Can you provide supporting evidence of this?
 2. Can you provide any supporting documents of completed educational subjects covering this academic year? Is this marked and dated?
 3. Can you provide dated reports, assessments or feedback from the online resources which are being used?”
45. The claimant replied on 8 August 2020. She stated that “as you can see” the children were progressing “in line with their age, ability and aptitude”. The claimant said that she was not “required to monitor my children’s work as is made clear in the Elective Home Education Departmental Guidance for Parents”, which stated at paragraph 2.11 that there are no legal requirements for parents educating a child at home to mark work done by a child or formally assess progress, or set development objectives.
46. The claimant explained that the work “is not dated or signed” as the child in question “is fully supervised by myself and her Father”. She described books used and subject areas covered. For example, as regards one child "we make sure each subject is

understood and he's capable of completing them independently himself. This is how we monitor his progress and achievements.”

47. Mr McIntyre responded on 3 September 2020. He said that the defendant was satisfied “with our interpretation of the guidance and the measures we have put in place to ensure we can be confident that a suitable education is taking place.” Mr McIntyre said this had “included a higher degree of professional curiosity in relation to the submissions that counsel receives.” Where parents meet with the defendant, demonstrate suitability of the education and share examples, the defendant could obtain “a much more comprehensive picture which enables a view to be reached more swiftly and easily”. Mr McIntyre stated that, “a report alone, however, detailed, is in my view, not going to be enough to enable us to be confident that suitable education is taking place”. This was because “for every example of a parent whose child is receiving education and performing exactly as described in the report, there will be another example of where this is not the case”. This created a “dilemma” for the defendant and was the reason “we are taking the approach as described above”. Having reviewed all the information received from the claimant, Mr McIntyre concluded that the defendant was “not able to discharge our duty that a suitable education is taking place”. He therefore stated that the defendant “will therefore continue with our procedures set out in our elective home education guidance”.
48. The claimant replied on 6 September 2020. She referred to her “previous reports”, which “have always been satisfactory”. She asked what specifically were the defendant’s concerns about the education of her three children. As for further examples, the claimant said that she had “already given you a list of the subjects they have studied and completed... as well as details of what they will be covering and are currently covering”. She said that the Secretary of State’s guidance explained that “pictures and samples of work are not required.” She believed she had “covered everything that is required to deem education provision suitable”.
49. The defendant responded by email on 10 September 2020. It explained that the previous correspondence was not intended to suggest that the claimant’s report “was not satisfactory in itself, but rather that the measures that we have put in place to ensure that a suitable education is taking place include this higher degree of professional curiosity, meaning that a report on its own is unlikely to satisfy us”. The email explained that cases where “parents meet with the local authority, demonstrate the suitability of education and share examples, provide a much more comprehensive picture which enables a view to be reached more swiftly and easily.” The defendant’s concerns centred “around evidence of ability to read and write to a level suitable to age, aptitude and ability for example and indeed evidence of the programme being described, taking place”. The defendant hoped that the claimant would appreciate the dilemma faced by the defendant “in not wishing to be prescriptive but at the same time needing to be satisfied of a suitable education”. The email said that the defendant would “genuinely welcome your assistance with any suggestions as to how we might resolve that dilemma productively.”
50. The claimant responded by email on 15 September 2020. She described one child as having progressed well over the last academic year and continuing to do so. The child concerned was “now working on some year 10 work in maths and year 11 up to GCSE level in English” as well as progressing well in history, geography and science. The child was “very happy with their progress in all subjects” and the claimant was

confident that this will continue, having “loosely discussed whether it's possible for her to do GCSE English next year, when she is 14”. The "second child had made good progress in all subjects and he was “very confident in the things he's learnt over the last academic year.” The claimant was sure that this would continue and had moved him up to some year 8 and 9 work in maths and year 8 work in English. The third child was “making enormous progress in her maths, she is also progressing well in English and her other subjects.” She was “very happy and confident”. The parents monitored “the kids’ progress by supervising them whilst learning and making sure their answers are correct, before moving on to the next page or subject”. The email said that if the children “get wrong answers, we will go over the subject again until they fully understand and make sure they understand the subjects they have studied”. There then followed a description, by subject and child, of what each had been studying.

51. Mr McIntyre wrote to the claimant on 29 September 2020, stating that the defendant had “unfortunately been unable to ascertain” the educational provision of the claimant’s children. The claimant was required within 15 days of the service of the attached notice to satisfy the defendant that the children were, in each case, receiving full-time education suitable to age, ability and aptitude either by regular attendance at school or otherwise. If the claimant should fail to respond, the defendant “may serve a school attendance order upon you requiring you to cause your child to become registered at school named in the order”.
52. On 9 October 2020, the claimant made an official complaint to the defendant regarding its dealings with her. The complaint contended that the defendant had chosen to break its own guidance and had totally ignored the guidance of the Secretary of State, thereby “assuming that their own opinions and demands trump Law and guidance surrounding home education”. This had caused “a lot of unnecessary stress”. The claimant submitted that she had provided evidence but the defendant continued to remain unsatisfied, declining to tell her “what they are not happy with”. The claimant had provided extremely detailed reports in respect of the children.
53. On 2 November 2020, Mike Stoneham, the defendant’s Deputy Director, Education, replied to this stage 1 complaint. He said that due to a significant rise in elective home education, there had been numerous cases of unsuitable education, which had led the defendant to put in place measures to ensure it could be confident that suitable education was taking place and that there were no safeguarding concerns. The defendant’s measures to determine suitability had therefore included a higher degree of professional curiosity. “It has also meant that a report alone and any other written reports presented, however detailed they may be, are unlikely to be sufficient to enable the Council to be confident that suitable education is taking place.” Cases where the parents concerned meet the defendant, demonstrating suitability of education and sharing examples “usually provide a much more comprehensive picture, which in turn enables the view to be reached more swiftly and easily”. The response confirmed that the defendant was “supportive of home-education where suitable education is taking place”. It was, however, said that in the light of the complaint and “another query the council has received about similar issues, I will be adding a guidance note to the policy which I hope will provide further clarification regarding the council’s position on determining the suitability of education”.
54. On 4 November 2020, the claimant wrote a “To whom it may concern” letter again setting out "a list of some of the examples of completed subjects [the children] have

done as per your request”. The descriptions by reference to subjects took the same form as in previous letters and emails from the claimant to the defendant. Under the heading “English”, in respect of one of the children, mention was made of the novel *To Kill a Mockingbird*. Since this particular example was highlighted by Mr Wolfe for the claimant in his oral submissions, I shall set out what it says: -

“To Kill a Mocking bird. She researched the different literature used in this book. What they mean. She has also looked into the meanings of the stories, and how the language and terms used, translate into today's world.”

55. On 25 November 2020, the defendant sent the claimant a notice of its intention to serve a school attendance order. The notice said that on 29 September 2020, the claimant had been served under section 437(1) of the 1996 Act, with a notice requiring her to satisfy the defendant that the children were receiving a suitable education; and that the claimant had failed to satisfy the defendant in that regard.
56. On 1 December 2020, the claimant replied that she had previously sent the defendant “a lot of information as evidenced that a suitable education is taking place”, including “a legal document of an affidavit”. I pause here to note that the affidavit, signed on 4 November 2020 by the claimant and her husband, said as follows:-
 - “1. This is my statement in terms of an educational report prepared to demonstrate that our children's ... home education is suitable within the terms of the Education Act 1996 s7.
 - 2.This statement is made to describe our first-hand knowledge.
 - 3.The contents of this, our statement are true to the best of our knowledge and belief”.
57. The letter of 1 December said that it included “some extra information to be added to the previous reports we sent you, regarding subjects our children are working on this academic year”. Again, there followed, by reference to subject, a series of what may be described as sub-headings. For example, under the heading, “History” we find “the history of slave trade”.
58. On 14 December 2020, the defendant served a school attendance order on the claimant, in respect of the children.
59. In her letter of 4 November 2020, the claimant had requested that her complaint move to stage 2 of the defendant's complaints process. On 16 December 2020, the defendant responded to the stage 2 complaint. The defendant stated that it could confirm it had no evidence of any safeguarding concerns regarding the claimant’s family. The reference in its earlier communication to safeguarding had been, to “provide some context and the fact that the council has safeguarding responsibilities which apply to all children and young people, including those children who are educated at home.” The defendant said that, in its view, there was “no ambiguity in the request for further evidence to demonstrate suitable education”. The defendant’s officers had been “clear that a written report alone, however detailed it may be, is unlikely to be sufficient to enable the

council to determine that suitable education is taking place”. Without “appropriate evidence it is difficult for officers to determine if suitable education is taking place”.

60. On 17 December 2020, the claimant asked for her complaint to be escalated to stage 3.
61. On 11 January 2021, the defendant (through Mr McIntyre) wrote to the claimant and her husband to say that there had been a failure to comply with the school attendance order, in that the children had not been registered at the relevant schools named in the order. The matter would therefore be referred to the Legal Services Department for consideration of proceedings being taken for breach of the order.
62. This led to a letter before action being sent on 18 January 2021 by the Portsmouth Home Education Group, of which the claimant is a member.
63. On 20 January 2021, the defendant’s Chief Executive responded to the claimant’s stage 3 complaint. The letter stated that it appeared "the crux of your complaint revolves around the council's definition of suitable education and the evidence required to demonstrate this". The letter stated that the defendant’s officers had acted appropriately and had been clear that a written report alone, however detailed it may be, was unlikely to be sufficient to enable the council to determine that suitable education was taking place. The Chief Executive went on to state that children being home educated were “expected to provide evidence of a suitable education that would, on the balance of probabilities, convince a reasonable person that a suitable education is being provided for the age and ability of the child”. Reference was made to the defendant’s definition of suitable education. The examples of evidence that might be provided were not intended to be an exhaustive list and each case was said to be “judged upon its own individual circumstances”. As previously explained, "there are too many examples in the city of parents who are not providing suitable education, which will affect the life chances of children that may result in safeguarding risks".
64. On 25 January 2021, the defendant refused to revoke the school attendance order and, on 22 February 2021, the present claim was issued.

H. DISCUSSION

65. Under Ground 1, Mr Wolfe submits that the defendant has a policy of placing the burden of proof on parents to demonstrate that they are causing their child to receive a suitable education, failing which the defendant will serve a notice to satisfy (NTS) under section 437(1) of the 1996 Act. Mr Wolfe submits that this is inconsistent with the statutory framework and the Secretary of State’s guidance. There is no such obligation on parents, prior to the service of an NTS. Parliament has carefully crafted a statutory framework in which the burden only shifts to the parents if and when a NTS has been served.
66. Mr Wolfe seeks to draw support from the Secretary of State’s Elective Home Education guidance. He points out that this confirms parents have a right to educate their children at home. He prays in aid the flow chart, to which I have made reference, submitting that

the defendant has, in practice, sought to place a burden of proof on the claimant at the first stage of “informal inquiries”. That does not correspond with the statutory scheme.

67. Mr Wolfe draws particular attention to the second bullet point in paragraph 5.4 of the Secretary of State’s Elective Home Education guidance for local authorities. This bullet point says that where there were no previous concerns about the education being provided and no reason to think that it has changed, the local authority’s annual contact with the parents would often be “very brief”.
68. Both Mr Greatorex and Mr Cornwell take issue with this analysis of the statutory scheme. Mr Greatorex submits, in essence, that the claimant’s construction misconstrues and overcomplicates what is intended to be a simple and straightforward process.
69. Mr Cornwell points out that there are four elements to the duty conferred by section 7 of the 1996 Act on parents; namely, to (i) cause the child to receive (ii) an efficient, (iii) full-time and (iv) suitable education, having regard to age, ability, aptitude and any relevant special educational needs. If any one of those elements is absent, the duty imposed by section 7 is not being discharged. I consider this to be an accurate analysis of the section 7 duty.
70. I also agree with Mr Cornwell that the duty is, plainly, objective in nature. The parent is not the ultimate arbiter of whether, for example, the education being received by the child is suitable. The requirement in section 9 for the Secretary of State and the local authority to have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents has no direct impact upon the section 7 duty.
71. Section 436A imposes a duty on the local authority to make arrangements to enable it to establish, so far as possible, the identities of children who are of compulsory school age, but who are neither registered pupils at the school nor receiving suitable education otherwise than at a school.
72. Section 436A(2) provides that, in exercising those functions, the local authority must have regard to any guidance given from time to time by the Secretary of State. I note that there is nothing in this subsection that restricts the duty to guidance that is specifically categorised as statutory in nature.
73. Section 436A(3) defines “suitable education” in terms of an efficient, full-time education suitable to the child's age, ability, aptitude and any special educational needs. This effectively “tracks” the terminology of section 7.
74. The duties in section 7 and section 436A are, in my view, important in setting the correct approach to be taken to section 437. As we have seen, section 437(1) provides that where it “appears to a local authority” that a child of compulsory school age, is not receiving suitable education, the authority has a duty to serve an NTS notice requiring the parent to satisfy the authority that the child is receiving such an education.
75. The claimant’s ground 1 hinges on the submission that the defendant is wrongly imposing a burden on parents, prior to service of an NTS notice.

76. I reject that submission. There is nothing remotely problematic in the defendant approaching a home-schooling parent, as it did in the present case, to request evidence that, if satisfactory, would enable the defendant to discharge its duty under section 436A, without the need to serve an NTS notice.
77. I agree with Mr Greatorex that Mr Wolfe's construction of the legislation represents an over-complication of a process that is intended to be (at least at this stage) relatively informal. It is not in the interests of parents or of the local authority (discharging its public interest duty) to construe the legislation in such a way that the local authority becomes satisfied of relevant matters only after an NTS has been served. Although the language of burden of proof is perhaps not helpful at this stage, it is plain that a parent who receives an informal inquiry at this stage needs to respond to it in a meaningful way, if he or she is to avoid the necessity of responding to an NTS.
78. In so finding, I have had regard to the passages in the 2019 guidance materials to which Mr. Wolfe referred. I do not consider that they provide any material support for the claimant's position on this issue. By contrast, other provisions of the guidance make it manifest that the legislation falls to it to be construed in the way for which the defendant contends.
79. The Secretary of State's Elective Home Education guidance for local authorities, at paragraph 6.4, advises that, where the position regarding the suitability of education is not clear, the authority should "initially attempt to resolve these doubts through informal contact and enquiries". The guidance explains that the "authority's s.436A duty (and that under s.437) forms sufficient basis for informal inquiries". These are the informal inquiries mentioned in the first box of the flow chart (see paragraph 18 above). I agree with the guidance that either or both of these sections contain the necessary legislative underpinning for the defendant's approach, as set out in the correspondence. I also agree with the guidance that "Furthermore, s.436A creates a duty to adopt a system for making such enquiries". Thus, the defendant's system of initial inquiries is not only permitted by the statutory scheme; it is positively demanded.
80. Paragraph 6.10 of the Elective Home Education guidance for local authorities provides that local authorities considering whether to serve a section 437(1) notice should note that "current case law" (which I take to be Phillips v Brown) means that a refusal by parents to provide any information in response to informal inquiries "will in most cases mean that the authority has a duty to serve a notice under s. 437(1)". This is because, where parents have refused to answer those enquiries, it is likely that the only conclusion which the authority can reasonably reach, if it has no other information about the home education provision being made, is that the home education does not appear to be suitable. That precisely accords with the position I have reached above.
81. There is nothing in the defendant's own policy that is incompatible with the statutory scheme or the Secretary of State's guidance. On the contrary, it is entirely in accord with both. Under the heading "Contact with parents and children", the defendant's guidance states that "If it appears that a suitable education is not being provided, we will seek to gather any relevant information that may assist us in reaching a properly informed judgment. This will include seeking from the parents any further information that they wish to provide, which explains how they are providing a suitable education" (my emphasis).

82. The reference to “further” information in the guidance chimes with the policy of the defendant to ask for information which, if supplied at that time, would enable the defendant to satisfy itself that the section 7 duty is being discharged by the parent concerned; and that the child in question is not, thereby, within the ambit of section 436A. In other words, the defendant’s procedure falls within the first box in the summary flow chart set out in the Secretary of State’s Elective Home Education guidance. It comprises the “informal enquiries”, which lead to the further steps described in the flow chart, where the response (or lack of response) is such as to trigger the section 437 duty. The fact that the NTS stage involves an information-gathering process does not mean that the defendant is wrong to make its initial inquiries, in the expectation that if they yield a satisfactory response, there will be no need to serve an NTS notice.
83. There is, accordingly, nothing problematic with the passage of the defendant’s guidance, which reads:-
- “If we consider a suitable education is not being provided, then we will write to parents informing them of this. If we are satisfied that a suitable education is not being provided, and the parents, having been given a reasonable opportunity to address the identifying concerns and report back to us have not done so, we will consider sending a formal notice to the parents under section 437 before moving on, if needed, to the issuing of a school attendance order (section 437(3))”.
84. As the correspondence between the defendant and the claimant make plain, the defendant began its enquiries with an open mind. It was only when faced with what it regarded as insufficient material from the claimant that the informal inquiries continued, leading to the impasse which then meant it appeared to the defendant that the children were not receiving a suitable education at home. As Mr Cornwell submits, the threshold at this point is a low one. It merely requires the defendant to take a view, as matters then stand, challengeable only on public law grounds.
85. The four paragraphs of “clarification” which the defendant inserted in its guidance in late 2020, and subsequently removed, have no material bearing on ground 1. Insofar as the language used indicates that, at the informal inquiries stage, a parent may have the task of providing evidence that shows a suitable education is being provided, the clarification accurately describe the statutory scheme, as explained by the Secretary of State’s guidance. The same is true of the paragraph under “definition of suitable education”, added in late 2020, which is to the same effect.
86. Ground 1 accordingly fails.
87. Ground 2 contends that the defendant’s policy and approach are that unless more than a report is provided by parents, it will directly proceed to serve an NTS, even if it has no concerns, (and certainly has not explained any concerns) about the education provision or the content of the report.
88. I do not consider it is a fair analysis of the defendant’s position, as articulated in the correspondence between it and the claimant, that the defendant “will directly proceed to serve an NTS, even if it has no concerns” over the suitability of the education being received by the child. On the contrary, the defendant’s process makes it abundantly plain that the defendant is anxious, if at all possible, to reach the point during the

“informal enquiries” stage, at which it can be satisfied of that matter, without necessarily having to serve an NTS notice.

89. The real ambit of ground 2 is that the claimant says the defendant has adopted a rigid stance, whereby it will reject reports provided by parents, in deciding whether a child is receiving suitable education at home. This amounts to an unlawful fettering of the defendant’s discretion: R v Secretary of State for the Home Department, Ex p Venables [1997] 3 All ER 97.
90. Additionally, the claimant contends that the defendant has not, at any stage, told her what she needed to provide, over and above what she had given in her various reports concerning her children's home education. This aspect of ground 2 merges into ground 3, which alleges that the defendant has a policy of serving an NTS notice without “even identifying any specific concerns about the suitability of the education being provided”. This amounts to an unlawful failure on the defendant's part to act in accordance with its own published policy, as well as a breach of "the requirements of basic procedural fairness (which require it to specify the basis on which it considers the education is not suitable and allow time for remedial action, before serving an NTS)" .
91. Although it is true that, in his email of September 2020, Mr McIntyre said to the claimant that a “report alone, however detailed, is in my view, not going to be enough to enable us to be confident that suitable education is taking place”, the defendant’s actual position, repeated throughout the correspondence, is that “a written report alone, however detailed it may be, is unlikely to be sufficient to enable the Council to determine that suitable education is taking place” (see eg. the Chief Executive’s letter of 20 January 2021; my emphasis).
92. In the section of its guidance headed “Definition of suitable education and the reasons why the local authority may deem the education not to be suitable”, inserted in 2020, the defendant states, in terms, that there may be a variety of reasons why the information/evidence provided has not been deemed suitable. A series of non-exhaustive examples is then given. Amongst these are that “There is no or very limited examples of work submitted” and that "there is no or very limited detail of how the child's progress is being monitored or examples of work to demonstrate relevant progression”. The guidance stresses that what has just been said "is for guidance and by way of example only and is not an exhaustive list. Each case is judged upon its own individual circumstances". There then follows a passage describing what types of information and evidence might be suitable (original emphasis). These include timetables, curriculum plan, photographs, workbooks, progress reports, dated work over time, conversations with the child/parent, home visits etc.
93. I find that this guidance is entirely in accord with that of the Secretary of State. At paragraph 6.12 of the Elective Home Education guidance for local authorities, it is stated that the local authority should give reasonable weight to information provided by parents, on its own merits. In particular, the local authority should not dismiss such information simply because it is not in a particular form preferred by the authority:-

“On the other hand, the information provided by parents should demonstrate that the education actually being provided is suitable and address issues such as progression expected and (unless the home education has only just started) achieved. It

should not be simply a statement of intent about what will be provided, or a description of the pedagogical approach taken - this would not enable the authority to reach a legitimate conclusion that a suitable education is actually being provided. This is often a key point in separating out families which are genuinely providing a suitable education at home from those who are not because the latter often cannot demonstrate satisfactory content or measurement of progress.”

94. As can readily be seen, in the present case the defendant did not reject the claimant’s reports because they were not in a particular form. The defendant’s concerns were substantive ones. Despite the length of the claimant’s reports, they were wholly assertive in nature. They contained nothing by way of actual work produced by the children. To take the example of work on *To Kill a Mockingbird*, which featured in submissions at the hearing, there was no material showing the degree of comprehension of the appellant’s daughter concerning the novel; merely a series of statements from the claimant.
95. The affidavit, produced by the claimant and her husband, takes matters no further. It does not change the nature of the reports, to which the affidavit refers.
96. It will be noted that the claimant has submitted reports in the past, presumably of a similar nature, which had been accepted by the defendant. As Mr Greatorex was, however, at pains to point out, the challenge brought by the claimant does not include a challenge to the legality of the defendant’s decision not to accept the 2020 reports as sufficient to discharge the claimant’s statutory obligations. As I have also mentioned, the claimant’s grounds make it plain that she is not bringing any challenge to the assessment by the defendant of the suitability of the education that she provides to her children. In any event, the defendant’s policy properly takes account of the 2019 guidance documents of the Secretary of State; and there is no challenge to the lawfulness of these.
97. I turn to the complaint that the defendant has not told the claimant what she should provide in order to satisfy the defendant’s concerns. On a proper reading of the correspondence and the defendant’s guidance, I find this complaint to be misconceived. As Mr Greatorex says, the claimant has still not to date provided any evidence of her children’s reading and writing ability, or any evidence that the described educational programme is actually taking place and actually being received by her children.
98. In support of her position, the claimant points out that, as stated at paragraph 2.4 of the Secretary of State’s Elective Home Education guidance for parents, there are no legal requirements to (inter alia) teach them the National Curriculum, give formal lessons, mark work done by the child, formally assess the child’s progress or set development objectives. Whilst all that is true, it is important to note what is said immediately thereafter:-

“2.12. However, many home-educating families do some of these, at least, by choice. Furthermore, is likely to be much easier for you to show that the education provided is suitable if attention has been paid to the breadth of the curriculum and its

content, and the concepts of progress and assessment in relation to your child's ability.”

99. The fact that a parent may, for example, not teach the National Curriculum, give formal lessons or mark the child's work does not absolve the parent from the practical requirement to show that the requisite education is, in fact, being received by the child and that it is suitable to his or her needs. Nor does it mean that the local authority is necessarily compelled to accept merely assertive statements by the parent. Without intending to be prescriptive, what may be needed in such cases could well involve a meeting with the child and/or an examination of the child's work, whether or not this work has been marked by the parent.
100. It is, in my view, plain that the claimant is, in fact, aware of what is needed. The truth of the matter is that she is simply unwilling to provide it.
101. As we have seen, the defendant's position is that a report alone is "unlikely to be sufficient". I see no reason not to take the defendant at its word. The fact that, in the present case, the claimant's report has not been sufficient, does not mean that the defendant will take the same view of a report submitted in another case. Once a local authority has satisfied itself, by reference to the Secretary of State's guidance, that suitable education is actually being received by a child who is being home-schooled, a subsequent inquiry in respect of the same parent and child might be satisfactorily answered by production of a report along the lines of that produced by the claimant. Such a result would seem to be compatible with second bullet point in paragraph 5.4 of the Elective Home Education guidance for local authorities, where, as we have seen, once the local authority has been satisfied of the suitability of the education, subsequent contact might "be very brief". One can also envisage that a report from a parent who is a qualified teacher might be regarded as sufficient.
102. Finally under these grounds, I address the contention of the claimant that she is under no legal duty to respond to the initial or informal inquiries of the defendant. That is, of course, true; but, as I have already explained in dealing with ground 1, it does not follow that the parent risks no adverse consequences, if they fail to respond meaningfully at this initial stage. As paragraph 6.5 of the Elective Home Education guidance for local authorities points out, "If a parent does not respond, or responds, without providing any information about the child's education, then it will normally be justifiable for the authority to conclude that the child does not appear to be receiving suitable education and it should not hesitate to do so and take the necessary consequent step"; that is to say, serving an NTS notice.
103. Grounds 2 and 3 accordingly fail.
104. Ground 4 contends that the defendant's policy and approach mean that it serves an NTS even when it has no concerns and when it is not even actually suggesting that suitable education is not being provided. This is said to be inconsistent with the legal framework and statutory guidance.
105. Much of this has already been covered in the earlier grounds. I find that the defendant does not have a policy of issuing an NTS in circumstances where it has no concerns. The allegation of inconsistency with the legal framework and

Judgment Approved by the court for handing down.

statutory guidance is unparticularised. It is in, any event, wrong for the reasons given in respect of Ground 1.

CONCLUSION

Each of the claimant's grounds fails.