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IN THE HIGH COURT OF JUSTICE No.CO/504/2021

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

Bristol Civil Justice Centre

2 Redcliff Street

Bristol, BS1 6GR

Monday, 18 October 2021

Before:

MR JUSTICE LANE

BETWEEN:

THE QUEEN

(on the application of CHRISTINA MARY GOODRED)
Claimant

- and -

PORTSMOUTH CITY COUNCIL
Defendant

- and -

THE SECRETARY OF STATE FOR EDUCATION
Intervener

MR D. WOLFE QC (instructed by Irwin Mitchell Solicitors) appeared on behalf of the Claimant.

MR P. GREATOREX (instructed by Portsmouth City Council Legal Services) appeared on behalf of the Defendant.

MR J. CORNWELL (instructed by the Government Legal Department) appeared on behalf of the Intervener.

PROCEEDINGS

I N D E X

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(Transcript prepared without the aid of documentation)

Monday, 18 October 2021

(10.58 a.m.)

MR JUSTICE LANE: Yes.

MR WOLFE: Good morning, my Lord. My name is David Wolfe. As you have seen, I appear for the claimant in this matter. Mr Paul Greatorex appears on behalf of the defendant, Portsmouth City Council. And Mr Cornwell (having taken over from Joanne Clement, whose name I think you will have seen on some papers)----

MR JUSTICE LANE: Yes.

MR WOLFE: -- is here for the intervener, the Secretary of State. You should, I hope, have a core bundle and a bundle of legal materials, two skeleton arguments and a written submission from the Secretary of State.

MR JUSTICE LANE: Let me just make sure I have got them. In no particular order, the written materials, the two volumes, yes. I think certainly in the printed version-- I have got the electronic version as well. The printed version runs to 617 pages - is that right?

MR WOLFE: That sounds about right.

MR JUSTICE LANE: Yes, and I have got the Secretary of State's submissions, yes. And we have got a number of-- we have got skeleton arguments as well, but we have also got some statement of facts and grounds that have been changed over time, I think.

MR WOLFE: My Lord, yes. So you will have seen, my Lord, that the claimant is here, pursuant to judicial review permission granted by Mrs Justice Foster.

MR JUSTICE LANE: Yes.

MR WOLFE: I am not going to dwell on all of that----

MR JUSTICE LANE: A slightly odd way in which permission came to be granted, but I think the point is that you put in grounds that you say

that you are entitled now to argue by reference to those revised grounds that followed----

MR WOLFE: Indeed. And the points that arise from them, we say, are relatively simple and have been clear throughout.

MR JUSTICE LANE: Yes. And it is not an unfairness challenge *per se*, is it, which I think featured in a statement of my colleague at some point.

MR WOLFE: Can I come back to that characterisation?

MR JUSTICE LANE: All right.

MR WOLFE: I do not-- it is not an unfairness challenge as such, but you will see what I think she might have meant. But I do not think anything turns on it, one way or the other.

MR JUSTICE LANE: Right.

MR WOLFE: You will have seen, my Lord, that the issues concern the approach taken by a local authority to parents who choose to discharge their section 7 duty - and I will come to that in a moment - by way of home education.

MR JUSTICE LANE: Yes.

MR WOLFE: My proposal is to show the court briefly the statutory materials, briefly the statutory and non-statutory guidance, and take you briefly to the claimant's witness statement, and then show you the key documents arising in her case in chronological order. As you will have seen, whilst she is of course the claimant and to that extent it is her circumstances that are before the court, she is very much here as a representative of a wider group of people who have experienced the same issue, and indeed I emphasise that partly for this reason, which is that the points of concern here concern the defendant's general approach to parents who are home educating, and the general policies that they have adopted in relation to that.

And that, we hope, does not, in the end, turn on any particular phrase, or whatever, in a letter to or from the claimant. Your will also have seen there are documents in there relating to other parents which adopt the same framework. So I hope in the end nothing turns on the particulars of her situation in that regard. My Lord, we expected to have a 10.30 start. I would expect to be finished and 12.00/12.30. That may slip slightly now. Mr Cornwell, I think, wants half an hour. And Mr Greatorex obviously will go in between the two of us. I am optimistic that we can still finish today.

MR JUSTICE LANE: Very well. The only thing that impedes us-- well, it does not really but it eats into the short adjournment so far as I am concerned is that there is a swearing in of newly-appointed Recorders, which is going to be held in this court at ten past one. So I do have to rise at 1.00 fairly promptly.

MR WOLFE: I will keep an eye on the clock.

MR JUSTICE LANE: Thank you.

MR WOLFE: My Lord, in the legal materials bundle then, if I may, you have in tab 1 of the legal materials bundle a range of provisions from the Education Act of 1996. I am only concerned with a small number of those. Most of these are in here at the request of the Secretary of State who, in the usual way of a Secretary of State, is keen that the court should understand the wider aspects of education law. We do not express a concern about that. But, in the end, the provisions with which you, my Lord, are concerned are very specific and really it is three provisions, possibly four provisions. Starting, if I may, with section 7, in that bundle. It is p.7 if you have got the printed pages, bottom right hand corner of each page.

MR JUSTICE LANE: Yes.

MR WOLFE: The provisions around here, 3, 4 and 8, are all definitions sections. I do not think anything turns on the definitions in question,

but you have got them if you need them. Section 7 is a provision which essentially in this form - the changes are immaterial here - has been around since at least 1944. It was previously section 36 of the 1944 Act. I have got copies of that if we should need them. And it really is the bedrock of our education system, which is not a school system, contrary to what one might think at first blush. It is a parental education system, and the obligation is on a parent, at section 7:

> "The parent of every child of compulsory school age [obviously there are lots of definitions packed into that; we are not concerned with them] shall cause him to receive efficient full-time education suitable -
>
> (a) to his age, ability and aptitude [and then (b) is about children with special educational needs, that is a complexity we need not be concerned with]
>
> either by regular attendance at school or otherwise."

So the obligation is on a parent to cause their child to receive what is colloquially collapsed into being "suitable education". They can do that in one of two ways: either by sending them to school, and clearly the State provides some schools but there are also schools in the private sector, or they can do it in another way if they want to do so. And the law is completely neutral as between those different options. It does not express a preference at all. The only question is whether the education the parent is causing their child to receive is suitable for that child.

You have also p.10, section 9, it is a mandatory considerations provision. It says this-- again, this has been around since the 1944 Act:

> "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 is the mandatory consideration bit] 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."

So there is a mandatory consideration which gives a strong nod - my characterisation - to the parental preference, and that occurs in all sorts of ways in education law, but it is in the context here.

You then have a pair of provisions at pp.19 and 21. I have put them together for this reason. What you will see is that section 437 is the provision as originally-- part of the original Act, 436A has been inserted as an addition. They operate together to provide something of a process and a framework. Just as a signpost, if - we might not need to - we look at the decision of the Divisional Court in *Phillips v Brown*, that was relating to the 1944 Act, at which point sections 36 and 37 were the equivalent of section 7 and section 437.

In terms of the process and framework that is then put in place by 436A and 437. 436A says:

> "A local authority must make arrangements [so it is an obligation to make arrangements] to enable them to establish [there is a qualifier, we are not concerned with that] the identities of children in their area who are of compulsory school age but -
>
> (a) are not registered pupils at a school, and
>
> (b) are not receiving suitable education otherwise than at a school."

So that is an obligation of enquiry, if you like. It is an obligation to put in place arrangements to make enquiries. And then 436A(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 ..."

And that is tracking the obligation on the parent in section 7. We then go to 437, which is the situation which leads to and, in some sense, follows from those enquiries. And we have a series of discrete steps here and in subsequent provisions. I am not going to take you through the subsequent steps, other than to show you a flowchart in the Secretary of State's guidance for ease, in four or five minutes' time. These are the first steps in that process. The first step in that process-- and of course there is nothing to say-- this is not a sequence that one necessarily goes through. This is not, as it were, first you do 1, then you do 2, then you do 3. You might do 1 and stop. 437(1):

> "If it appears to a local 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."

Now, that is known in the trade, as it were, as a notice to satisfy (an NTS), and you will see those letters used. I will come back to that provision in a moment, but let me just carry on and then put the two steps together. So the first step is a question, if it appears to the local authority there is question to be answered. There is then the answer to that question: "We consider that the child is not receiving suitable education", and that takes us in those instances to 437(3). If they serve the notice under 437(1), the second step in 437 is 437(3):

> "If -
>
> (a) a parent on whom a notice has been served under subsection (1) fails to satisfy the local authority ..."

That has consequences. So there is a fairly dense process in there, and we need the court to absolutely understand and unpack that dense process. The first step is enquiry. The second step is an appreciation by the local authority of whether it considers the child is not receiving suitable education. If they think the child is not receiving suitable education, they serve an NTS, and once they have served the NTS, to use the Secretary of State's terminology, the burden then shifts. It is not our phraseology, it comes from the Secretary of State, and you will see it is echoed in the guidance in a moment. Once the NTS has been served, the burden shifts to the

parent to demonstrate, but it is not for the parent to demonstrate at the first stage. That is what you will see referred to in the guidance as “informal enquiries”. That is the local authority satisfying itself on the information available to it.

And really the operation of those provisions is at the middle of this case, and just to signpost, you will have seen the way the grounds put this. We say that first step, asking whether it appears to the local authority that the child is receiving suitable education, is a perfectly clear, simple, legal, statutory question. It does not need to be glossed or re-interpreted. It is an evaluation, yes, for the local authority, but on the basis of all of the information which is available to them. And for the purposes of that evaluation, the local authority needs to evaluate all of that information of course, maybe ask supplementary questions about it, but give it appropriate weight in the evaluation. And what it should not do - and this is the problem here, as you will see shortly - is come to that with hard and fast rules about how it deals with particular sorts of evidence, or come to it on the basis that it is for parents to demonstrate suitability in that initial process. And that is why we say this is about the legality of the defendant’s approach, because there is a little bit more complexity to it, which I will come to, but at the highest, simplest level, this local authority has, we say, impermissibly put it at the first stage that parents have to prove their case and put the burden of proof on parents, step one, and they have a rigid rule about how they approach the information that comes to them. The first of those is inconsistent with the statutory scheme. The second of those offends against the general public law principles that relate to the fettering of discretions. My Lord, there are further points but, in terms of headlining so my Lord knows where we are going, that is the starting point.

My Lord, you then have three sets of guidance material from the Secretary of State in tabs 8, 9 and 10. You will have perhaps seen - I did not dwell on it - that section 436A provides for the making of statutory guidance, and tab 8 is that statutory guidance. But the Secretary of State has also, in this context, chosen to make two sets of non-statutory guidance. Taking them in turn, the September 2016 statutory guidance at 132, just to pick up some of the highlights, these are not critical to the argument but I think they help the court understand the general thrust of the position. This guidance uses the expression "children missing education". We see that explained at para.2, p.136:

> "... children of compulsory school age who are not registered pupils at a school and are not receiving suitable education otherwise than at a school."

It does not of course deal with the situation of a child at a school where, for whatever reason, the school is failing them, and this is focused on a different situation. Under the heading "Local authorities' responsibilities", para.5:

> "The local authority should consult the parents of the child when establishing whether the child is receiving suitable education."

Absolutely. At para.11, just to get it out of the way, there is a nod to other issues that might arise in certain situations:

> “Where there is a concern for a child’s welfare, this should be referred to local authority children’s social care.”

My Lord, that is obviously right, as a matter of public policy, but let us be clear, that is absolutely not the situation in any of these instances. Then para.13:

> “Parents have a duty [the court has seen that] 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.”

You will see that in a second. But just to emphasise, this is the Secretary of State’s statutory guidance on the operation of these provisions, and, unsurprisingly, like the provisions themselves, it is completely agnostic as to the position as between choosing to send your child to school and choosing to home educate them. There is no prior judgment or in principle concern one way or the other in relation to that situation.

Within that context, though, at 147, a timely reminder, para.52, under the heading “Children at particular risk of missing education”:

> “There are many circumstances where a child may become missing from education so it is vital that local authorities make judgements on a case by case basis.”

And then there are some particular examples of particular situations which might give rise to a basis for concern, obviously not exhaustive. But we would absolutely emphasise, and it is clearly correct, that it is vital that local authorities make judgments on a case-by-case basis, and that is the essence of the concern here.

You then have in tab 9 the non-statutory guidance to local authorities. A little bit more policy content, as you would expect from a non-statutory guidance document. At p.159, the second and third paragraphs, just the introductory sentence in each case:

> "Parents have a right to educate their children at home, and the government wants the many parents who do it well to be supported."

And then the beginning of the next paragraph:

> "Educating children at home works well when it is a positive, informed and dedicated choice."

My Lord, I think you will have seen from the materials here that for this claimant and the others with whom she is associated, that is absolutely the position. You then have on p.160 -- I promised you a flowchart, this is the flowchart. We are here concerned with steps 1 and 2, and the boundary between them. But it is helpful to see that in the overall context:

“After informal enquiries [this is box number 1] child does not appear [to the local authority] to be receiving suitable education as home.”

The missing question: “If that is the case”:

“LA serves S.437(1) notice on parents requiring them to give information about child’s education.”

This slightly understates the position at 437(1) because at 437(1), as you will recall, the closing words of that, once you have received a section 437(1) NTS, are more directed than that, because-- I will turn it back up for the court’s benefit. It is then an obligation on the parent “requiring him to satisfy” - “requiring him to satisfy”. It is not merely requiring him to give information, as that box in the flow chart says, it is “requiring him to satisfy”. That is why, as the Secretary of State rightly says, if, and only if, an NTS has been served does the - Secretary of State’s word - burden shift to the parent.

You have then got subsequent paragraphs-- subsequent boxes in the flowchart. I have not taken you through the rest of the statutory framework. If the LA is not satisfied - that is in response to the NTS where the obligation is on the parent - they can then serve, there is a discretion, a school attendance order, in effect saying: “You are not-- you have not satisfied us that your educational provision is suitable. We are identifying a school which your child should attend”. And then there is a process following on from that, that can lead ultimately to a criminal sanction. My Lord, just to anticipate a point from the Secretary of State in relation to the step between step 1 and step 2, the Secretary of State says: “Well, serving of an NTS

does not affect the child-- it may or may not affect the child, depending on whether they are aware of it". That is a slightly different point. The fundamental issue, though, is that the statute has carved out a series of steps, and the local authority should not be eliding them in a way that we say it has here, by applying at the first stage the obligations that would apply at the second. (After a pause) And, secondly, and this may be the fairness point that Mrs Justice Foster had in mind, if an NTS is served on you requiring you to satisfy the local authority, you should be going into that formal step having been told what concerns the local authority had about the education that you were providing that led it to serve the notice in the first place. You should not go into that second step blind, I should say. And, indeed, as you will see in a moment, this local authority has a policy, and one of the complaints is the policy has not been followed, to tell parents about what concerns have led it to trigger into the serving of an NTS. The difficulty here is that that policy has been subsumed or overridden by other things.

Sticking, if I may, for the moment, with the Secretary of State's non-statutory guidance to local authorities, at p.161, para.1.2 again emphasising the flexibility of the process:

"Educating a child (or children) full-time at home is a rewarding but challenging task. Parents may choose to engage private tutors or other adults to assist in providing a suitable education, but there is no requirement to do so. There are other settings which may be used, for example parental support groups which offer tuition, and companies which give part-time tuition."

And then other details. My Lord, you will see in passing examples of all of those things in the documentation here. They are all

consistent with that approach. Then there is helpful guidance for local authorities to remind them of what is put on p.162:

> "Reasons for elective home education - why do parents choose to provide it?"

And there is a non-exhaustive range of indicative reasons why parents might quite properly, and with no value judgment to be placed upon them if they do, choose to discharge their section 7 obligations in this way. I suspect, although I would not want it to be definitive, most of the parents involved with the claimant are in the first category, but by no means exclusively so. There may be others, and nothing should be taken as turning on the answer to that question, and nor does the answer to the legal questions turn on the answer to those questions. At para.2.2:

> "These various reasons for undertaking home education are not mutually exclusive. For some children, several of these factors might apply. When local authorities engage with home-educating families they should take into account the context of individual situations. Often home education will be undertaken as a positive choice which is expected to lead to a better outcome."

And that is absolutely the situation with these parents. My Lord, again, the thrust of that, we say correctly, is taking into account the individual circumstances of the situation.

Then at 2.4, beginning-- the emphasis which you will see elaborated on in a moment, of how the statutory approach to suitable education

is not a defined one and not one that should be come to with any particular prejudices-- is emphasised correctly, we say, by the Secretary of State. Paragraph 2.4:

> "There are no specific legal requirements as to the content of home education, providing 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 the 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."

My Lord, as I say, that is the first signposting paragraph - I will come to more in a second - which emphasises the open-minded approach which has to be taken by a local authority when assessing suitability. Then at 3.5 on 164:

> "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."

My Lord, the claimant and those with her would say one of the issues here is that this is what this local authority is seeking to do. By its approach to assessing suitability, it is trespassing precisely into that area. Then the guidance goes on:

> "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 the 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."

All absolutely correct. Then 3.6:

> "Because of this, the department recommends [this is not a statutory power] that each local authority should, as a minimum:
>
> • have a written policy statement on elective home education which is clear, transparent and easily accessible by using different formats as necessary, is consistent with the current legal framework [etc] drawn up in consultation with local families ..."

What we have here - and you will see it in a moment, it is part of the issue here - is the local authority's policy, quite properly drawn up with the intention of giving effect to those provisions. Page 167:

> “How do local authorities know that a child is being educated at home?”

Then there is a heading:

> “Children who have never attended school”

And then para.4.2, if I may:

> “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 ...”

Just missing out a few lines because they are unnecessary for my purposes and drop to the underlying section:

> “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.”

We have seen that. And then this is the important sentence:

> “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."

That is absolutely right. It is not at this initial stage for parents to prove. They only have to prove if an NTS is served, and at that point, back to fairness, they should be doing that in a position where they know what the local authority's concerns, if any, have been.

5.2 on p.170, the middle of para.5.2, still dealing with the enquiries that we are talking about-- the middle of that paragraph just by the upper hole punch, middle of the line:

"It is important that the authority's arrangements are proportionate and do not seek to exert more oversight than is actually needed where parents are successfully taking on this task."

And in 5.3 emphasis on a positive relationship. 5.4:

"In any event, the department recommends that each local authority [the second bullet point]:

- 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."

My Lord, the claimant, as you will see, is in that situation. She has been home educating her parents(sic) for four years. She has provided information of exactly the same kind to the local authority in each of those years, and they have not previously expressed any concerns. Of course there will be cases - perhaps a parent newly educating their child at home or where there are other elements arising - which would not fall within the general thrust of that bullet point. And that is why we say, to repeat the proposition, the local authority's approach must be to take each case on its merits and to evaluate the material provided to it in that context. Page 172, 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."

Just pausing there for a second, first of all, to be clear, that is absolutely not the position of this claimant or any of the others with whom she is associated. They are all parents who have provided considerable information to the local authority. They are not what you might call the refusenik parent who simply says: "I am not going to tell you". But even in that extreme case, all we have from the guidance is that it would "normally be justifiable for the authority to conclude", so even in the situation where no information at all is provided, even that extreme outlier, which is nowhere near the

claimant's situation, is by no means automatic. Then over the page, the top of p.173, just continuing that paragraph:

> "This is confirmed by relevant case law."

That is the Leeds parent who refused to provide any information at all, and the Divisional Court said in those circumstances the local authority could not only ask him about it but could also reasonably conclude that the education being provided was not suitable. You have got that in the bundle, and we may or may not need to get to it later in the day. And para.6.10 slightly elaborates on that situation:

> "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.347(1)."

That is really telling us what we have already seen, but it is-- we may as well see the rest of it:

> "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."

In other words, you give no information at all and the local authority in most cases is likely to conclude that is not suitable. This is a million miles away from this situation, where the parents have provided considerable information. There is nothing in any of that which constrains the position beyond that.

Just for information, if we look at the flow of this paragraph - because we might come back to 6.12 later in the day - 6.11 then sets out the 437(1) step in the process, and then 6.12 is dealing with a situation where a notice to serve has been-- notice to satisfy, I am sorry, has been served. And here-- and we do not know the provenance of the local authority's difficulties, but some of the correspondence suggests maybe the provenance-- this may be the provenance of their difficulties. Because in this paragraph, by the lower hole punch, it says this:

> "On the other hand the information provided by parents should demonstrate that the education actually being provided is suitable and address issues as ..."

"Should demonstrate" - that language appeared in some of the local authority's documents, and we simply venture the possibility that this paragraph is the source therefore of it. The difficulty is that it is being used by the local authority at the prior stage, the investigation stage, whereas actually the guidance is using it at the point where the Secretary of State says the burden has shifted in relation to the "NTS having been served" situation.

Just above the sentence I took you to is another point, the sentence which says this:

> “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.”

And we say that applies throughout.

> “For example, an authority should not dismiss information provided by parents simply because it is not in a particular form ...”

And we say again that applies throughout. And one of the difficulties here is the local authority’s policy approach is not to do that. The local authority’s policy approach is effectively to put to one side what they call a parental report; in effect to disbelieve what a parent says in a routine and generic way.

Within the same document, p.185, heading chapter 9, or section 9:

> “What do the s.7 requirements mean?”

Paragraph 9.4:

> “However, clearly a local authority must have a basis on which to reach the decisions called for ...”

So an emphatic reminder that decisions are called for on the basis of the materials provided. What you will see in the present case is that the local authority did not actually even reach a decision on suitability. And then within the subparagraphs of that section:

> "The term 'suitable' should be seen in the following light ..."

Then there are a number of subparagraphs, and if I can go, please, to p.187h:

> "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."

So no "rigid criteria for suitability which have the effect of forcing parents to undertake education in particular ways" - that will have more life when I show you more paragraphs in a moment.

Page 192. You will be pleased to know this is the last paragraph in this document, 10.14:

> “Parents’ education provision will reflect a diversity of approaches and interests. Some parents may wish to provide education in a formal and structured manner, following a traditional curriculum and using a fixed timetable that keeps to school hours and terms. Other parents may decide to make more informal provision that is responsive to the developing interests of their child. One approach is not necessarily any more efficient or effective than another. Although some parents may welcome general advice and suggestions [etc.] local authorities should not specify a curriculum or approach which parents must follow.”

Then we have the guidance for parents, tab 10. Just a couple of sections in here. Page 207, first of all, if I may 2.8:

> “Home-educating parents are not required to: [we have seen the essence of this before]
>
> • have a timetable
>
> • set hours...
>
> • observe school hours, days or terms”

And then over the page at 2.11:

> “There are <u>no</u> legal requirements for you as parents educating a child at home to do any of the following:”

I will just drop to bullet 5, first of all, if I may:

"• provide a 'broad and balanced' curriculum."

You have seen that echoes back previously. Two further down:

"• give formal lessons."

And then of particular importance here:

"• mark work done by the child

• formally assess progress, or set development objectives"

Then, missing out the next one:

"• match school-based, age-specific standards."

What you will see here are examples of what the local authority here is asking of parents which are inconsistent with the flexibility which those provisions recognise. You will see in a moment: "Please give us some marked work. Please give us your progress reports".

My Lord, you then have-- can I then turn to the claimant's situation and her documents, because they illustrate what happened here. You have from her a number of witness statements which I think it is fair to say, and I hope my solicitor will not scream at me, were slightly the victims of the Covid pandemic arrangements. Page 160 first of all. Although the heading is not-- does not say this, this is her first witness statement, and I should say immediately, in case the court is concerned, the witness statement in the form you have it has not been signed. We can very readily produce a signed version for the court. I think I am right in saying, just to put the point to one side, questions were asked of the court, not my Lord of course, as to whether this was satisfactory, and no answer was received back. So I simply want to put that to one side. If there is an issue at all about any of this----

MR JUSTICE LANE: We will see.

MR WOLFE: -- it can all be formalised. What you will see in here, and I hope nothing turns on that, is the claimant giving her personal perspective on some of the points I have just made, and you will see that she refers to some the provisions that I have taken you to. I do not need to go through most of that. Can I pick it up at paragraph number 10? She says this:

> "If PCC took a reasonable and proportionate approach, they would write to me giving options on how I would like to provide my evidence. They did this, and I chose to send a report, only to be told that a report was not enough. [Therein lies the first problem.] This is particularly upsetting as I know from home education groups that I am a member of that most parents in England provide only a 1 to 4 pages report, and those are acceptable unless there is a reason for concern. I provided 11 pages of detailed information about my

> children's education before I sent significant amounts of extra information. I kept on asking PCC to give me details of any concerns they had about my educational provision but they simply ignored my requests for them to do so."

Now, that is just to give a bit of the human flavour to her concerns. You then have a bit more detail on p.163, para.13. You will see these documents in due course, but if my Lord has not already read this statement, you may want to take the opportunity to do so. But it is picking up, to some extent, documents I have seen-- are shown-- you have seen already. And then in para.17, just to signpost where we are going, she identifies two particular provisions that are of concern arising from the defendant's policy and approach. Then she says this at para.20:

> "Actions by PCC have caused me and my children a great deal of distress."

Paragraph 22:

> "I have had sleepless nights worrying [etc]."

So these matters should not be-- cannot be, must not be simply glided over or dismissed lightly, as I think the Secretary of State is at risk of doing. These are matters of considerable concern to the claimant and others.

My Lord, that is her personal account. Just so you understand the current situation, p.454 is her further witness statement. In her particular case, the local authority has agreed to pause further action - you see that in para.4 on p.455 - pending the outcome of these proceedings. But there are other parents in the same situation in relation to whom matters continue. For example, she says this at para.6:

> "I am further aware that enforcement proceedings have recently been served on at least one parent who has repeatedly asked what concern the defendant has about the education. I am advised that Mr M stated to this parent it is not his job to provide information and that the parent has to work it out for themselves. I do not understand how a parent like me can be possibly expected to address of cause of concerns when none are present or when they are not explained. This inability to obtain reasonable responses has been very stressful."

So, my Lord, I think those sorts of concerns are the once that led Mrs Justice Foster to use the framing that she put.

There is a little bit of introduction, para.11, to the claimant's own three children. I just mention that because you will see them mentioned in the documents we are going to look at in a moment. She, as you will see, has three children. They are identified in the public domain so there is not an confidentiality issue, but I will call them L, V and A, nonetheless. Just for the court's note, L (Leah), would have been 13 at the time of the events here, back end of last year; V (Violet) was seven, and A (Archie) was 11.

So in terms of that sequence-- and I do it this way, my Lord, because it also shows how the local authority came to produce the documents which are then-- the public policy documents which are then in issue. That sequence starts, if I may, at p.127 in the bundle. 127 is the local authority's published guidance as it was in July 2020, going into these events, if you like. Within that, if I may, at p.134, the heading towards the top of the page, "Part 3", under that "Policies and procedures", and then under that "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. ['Any further information that they wish to provide'.] Parents will always be given the opportunity to address any specific concerns that the authority has."

We will see in a second that this is at the initial enquiry stage. I will jump over a bit and then come back, if I may, just to follow that thought. 138, just beyond the bullet points:

> "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 serving a formal notice to the parents under section 437 [then it goes on] if needed, to the issuing of a school attendance order (section 437(1)."

That must be a typo, it must be 437(3). The emphasis of those two sections, consistent with each other, is before it serves an NTS, before reaching a conclusion that the education is not suitable, it will tell parents what its concerns are: "This is why we have concluded that the education you are providing is not suitable". The fairness and importance of that is that when a parent then goes into the formal NTS, they know what the concerns were. They are being required to show, required to demonstrate, having received an NTS, but they do so having been told what the concerns are. They do not go into that second stage shooting in the dark, and that is absolutely fundamental.

The bit I jumped over is on p.135, the middle of the page, between the two lots of bullet points:

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

And then you have seen that list before. That comes from the Secretary of State's guidance, including, the last four or so bullet points, no requirement to:

"• mark work done ...

• formally assess progress ...

• match school-based, age-specific standards”

So that was the policy context which prevailed at the point where what we are about to look at then rolls out. That starts, if I may, on p.457, quite properly, 17th July of last year. In each case you have generally only got one example letter, but there are parallel letters in relation to the three children. 17th July, consistent with what you have seen from the Secretary of State’s guidance about an annual check in:

> “Dear Mr and Mrs G, it has been approximately 12 months since our last contact. You were advised that we would be contacted you again to review your child’s progress. We would be obliged if you would complete the attached form and return it to the above [etc]. This is to enable us to establish that your child is still being electively home educated and how we should proceed in this matter to enable us to decide ...”

Absolutely. So no obligation on you, on the face of that, to demonstrate. 458 and the following is the letter which the claimant then sends back in response. As I say, you have got other examples from other parents in the bundle. They are all very much of a similar broad style.

> “Dear Mr McIntyre, we have opted to send you a report on the work we have been doing with L and A and V. Here is a description.”

Then the middle of p.458, “Report for Leah Goodred, home education”. And then under a series of headings, as it happens by

curriculum subjects (although, as you have seen, no necessity to do that), a section on reading, and information about the reading which L is doing, what she is reading, how much of it, how she is doing. And then other topics. It returns to English on p.459. It tells you the time she spends on it each week. It says:

> "We carried out work on the book To Kill a Mockingbird, which L found interesting and have now started working on A Midsummer Night's Dream."

So if one wants to have an understanding of that, you think, well, this is a 13 year old, this is what she is reading. That gives you a sense of what she is doing. That information has been provided. Then over the page on p.460, the second paragraph:

> "She is a very avid reader."

So dealing with that information about how-- what is being provided to Leah, what she does and how she is responding to, any of which could have been-- questions to clarify points of concern or points of misunderstanding could have been asked. But what you will see is none of that. And then the theme continues. I am not going to grind you through the rest of that letter for the other children, the other subjects, but that is the basic thrust of the information that the Goodreds provide.

That triggers a letter of 7th August, which you have got on p.469. The local authority comes back with some questions. No problem in principle with asking questions, but, as you will see, these questions

are potentially problematic in what they are seeking. The numbered paragraphs in the middle of the page----

MR JUSTICE LANE: Sorry, just a minute.

MR WOLFE: 469.

MR JUSTICE LANE: 469, this is 7th August 2020?

MR WOLFE: Exactly.

MR JUSTICE LANE: Yes.

MR WOLFE: And it has been copied and pasted out of an email----

MR JUSTICE LANE: Oh, I see, yes.

MR WOLFE: -- so that some of these are slightly----

MR JUSTICE LANE: Yes, yes.

MR WOLFE: I do not think there is any issue about the reproduction of them.

MR JUSTICE LANE: No, no.

MR WOLFE: But they are all slightly informal. So the numbered paragraphs:

> "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?"

So there is a series of questions, but just immediately to look at the response to that, which is on the face of p.470, a letter comes back from the claimant, 8th August. Just below the lower hole punch, she says this:

> "As you are aware, I am not required to monitor and record my children's work, as is made clear in the elective home education [etc.] guidance."

And she picks up the paragraphs which I have shown the court, and indeed those paragraphs are also in the local authority's own policy. So she is making the point that these are questions-- whether they belie a misunderstanding of what "suitable education" looks like, or whether they are falling into the trap of dictating to parents how they deliver suitable education, they are problematic questions. But, nonetheless, over the page on 471, the claimant provides further information, further detail. Over the page on 471 she says this:

> "L's progress [second paragraph], she successfully completed the following subjects for this academic school year. We monitor her work with discussion and observations, make sure she has an understanding of each of these subjects. We make sure each subject is understood and she is capable of completing them independently. This is how we monitor it. Her work is not dated or signed as she is fully supervised by myself and her father."

And then below that:

> “L mainly uses books such as ...”

And then there are examples of the material that she is using, so from that one can get an assessment, if one needs it, of the extent to which it is age appropriate. She is a 13 year old, and this-- you know what she is now doing. And then returning to the same topic, 471, the bottom of the page, under “English” examples of what she is doing. Again, any of that could have been further sought clarification of if that was what was wanted.

So the claimant quite properly takes the point that: “You should not be asking me for formal assessments and so on because that is not part of this, but here, nonetheless, is information”.

Then at 477, which is the first time the court will have seen this formulation, this is back from the local authority officer, 4th September:

> “Thank you for your recent correspondence regarding your child’s elective home education. I am satisfied with our interpretation of the guidance and the measures we put in place to ensure we can be confident that a suitable education is taking place. This includes a higher degree of professional curiosity in relation to the submissions the council receives. Cases where the parents meet with the local authority, demonstrate

> suitability of education and share examples, provide a much more comprehensive picture which enables a view to be reached more swiftly and easily. 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."

That is the first time the court has seen that formulation. What we understand when they say "report alone", is, to put it in other language, information from a parent, however detailed it is. So this is about lack of information about what books Leah is reading, or how long she reads them, or whether she reads them confidently or struggles. Because that is not what they are asking for. Those would have been perfectly reasonable, sensible questions. If you tell her-- she reads To Kill a Mockingbird, is she reading it quickly, easily, does she struggle? What is being said is: "However detailed your report, whatever you tell us, that is not going to be enough". And that has been the local authority's approach.

At 478, Mrs Goodred writes back:

> "Thank you for your latest letter. I am sure your records will confirm that my previous reports have always been satisfactory. Why then is there suddenly a concern over the education we are proving L, A and V? I understand there are parents that do not follow the law. However, we do, and always have. I have always provided reports that have been detailed and satisfactory."

She is, as I have mentioned before, absolutely in that category of a parent who has been doing this for a number of years. She has

provided exactly the same information. It was satisfactory before. There is no indication to say that anything has changed.

> "Therefore I do have some questions regarding the letter you sent. What specifically are your concerns, and in which areas of L, A and V's education? You will need to be more specific in order for me to address your concerns."

Just pausing there for a second, this is the preamble to an NTS. We will get an NTS-- you will see an NTS served in a moment. If she is going to be faced with an NTS, she wants to know what it is she has to address in responding to that NTS. Otherwise she is shooting in the dark.

> "The local authority very specifically has not [and you have seen this] said: 'We want more information about the books that Leah is reading or the maths that Archie is doing', or whatever it may be."

Then number 2:

> "What further examples are you requiring? I have already given you a list of the subjects they have studied and completed in the last academic year as well as details on what they will be covering and are currently covering. The guidance states that pictures and samples of work are not required. We have always cooperated with Portsmouth LA in regard to detailed reports and have always got the reports to the inclusion team quickly and efficiently. What evidence do you have that has informed your belief that a suitable

> education is not now being carried out for L, A and V? Can I please ask you to look at the report and the additional information that I have sent you, as I believe I have covered everything that is required to deem educational provisions suitable."

What you will see, my Lord, in Mr McIntyre's witness statement - I will come to this in a few minutes - is that actually he has not assessed the suitability of these children's education at all. He simply has not done that. That exercise has not been done. It has been done-- the decision here is based upon the fact that all Mrs Goodred has provided is a parental report with lots of details.

Then she gives a bit more information. She is updating things as we go along. Over the page:

> "If you are still not satisfied, please answer my questions in order for me to address your concerns. I would like to keep relations between Portsmouth LA and myself as amicable as possible. I hope we can achieve this between us."

Then at 480, there is no date on this. You have perhaps got to write in 10th September 2020.

> "Many thanks for your previous response. Please note the previous correspondence was not suggesting the report was not satisfactory in and of itself, but, rather, that the measures we put in place to ensure a suitable education is taking place include a higher

> degree of professional curiosity, meaning that any report on its own is unlikely to satisfy ...
>
> Therefore the concerns for judging suitability [of course actually he has not made one, but passing on] are around evidence of ability to read and write to a level suitable for age, aptitude and ability, for example, and indeed evidence of the programme being described actually taking place."

Now, that is a very odd formulation, because the local authority have got evidence, got the information about, just taking Leah for simplicity, her ability to read and write to a suitable level of age, aptitude and ability. They know what she is reading, they know how she does it. If they want more information about that and they want to say, as I said: "Is she reading To Kill a Mockingbird struggling or enthusiastically?", they can ask for it. And then indeed "evidence of the programme being described taking place". Well, my Lord, the claimant has explained what she-- or she and her husband have explained what she is doing in relation to providing education for her children. If it is being said: "We do not believe you", then the local authority should come clean and say that, but they disavow that. What they say, in effect, is: "What parents tell us is not evidence", and that is plainly wrong.

At p.481:

> "Good afternoon, Mr Stephenson. Thank you for your previous email. We are relieved to hear that there are no issues with the position as reflected in the reports. I would like to provide ... as requested, a little bit more information."

And then it returns to Leah (L) in the next paragraph:

> “L has progressed well over the last academic year and continues to do so. She worked through the regular school holidays, pushed herself up to the next level in maths and English ... progress. She is now working some year 10 work in maths, year 11 up to GCSE in English. She is progressing well in history, geography and science. She is very happy with her progress in all the subjects. We are very confident this will continue, and have loosely discussed whether it is possible for her to do GCSE English next year when she is 14.”

And that is a year early, possibly two years, depending on how you calculate it because she is young in her year. But it would be a year early if she was in school, arguably two years early because she is young. So there is no suggestion here that she is not-- if the local authority wants to disbelieve those things, it should say so. But that is the information that the parents have properly provided and in plenty of detail.

489, that is also-- there is a lot more in there. There is timetabling, and so on. I am not going to take time on the rest of the information she provides. 489, one example - there is another one in the file, but they are all essentially the same. In response to that, this is relation to V:

> “We have recently written to you about your child’s elective home education and have unfortunately been unable to ascertain the educational provision.”

It is quite hard to see how that is the case, given all the information that has been provided. And apart from asking questions which were directed at things which the parents were not required to do, the local authority has not asked for any more detail. So it is quite hard to see how that conclusion could be reached.

That then is the formal process, the formal stage. So now the burden shifts to the parents to demonstrate suitability of the education that they are providing for their children. But that was not or should not have been the position before. And going into that next stage, they then go into it not knowing whether the local authority thinks that To Kill a Mockingbird is suitable or not, or indicative of appropriate provision or not, just to use that as a signposting example. 493-- so in one sense that is a critical decision in the claimant's case.

We then have - and I will take you fairly quickly - three stages of a complaints process, which matter in terms of the overall history here. 9th October 2020, the claimant's response to that. She does not rush off to court. She is concerned about the process the local authority has followed. That gives rise to a legal issue. She raises a complaint. You see this at 493. She gives lots of information in the complaint, as you would expect. She is complaining about the approach being taken. I will not dwell on the detail unless we need to come back to it. Page 500, the same day, she also writes back to the relevant department, still saying: "Please provide us with information". The last paragraph on p.500:

> "We are honestly at a loss as to what else Portsmouth are looking for."

The response to that complaint-- sorry, you have another letter at 409. Do I mean 409? It is out of chronological order. (After a pause) 409, 29th October. This is the first point in the sequence we get the echo of the other highlighted concern. "Dear Mr and Mrs Goodred", this is in relation to A, the third paragraph down:

> "As you are aware, it is for parents to show that the education being provided is suitable and not for the local authority to prove it is not."

"It is for parents to show that the education being provided is suitable", that is the first-- that is in correspondence. You will see it-- sorry, 409. 525-- so the letter-- the documents are generally in chronological order in this tab at the back, but that 409 was out of sequence. 525, determination of the stage one complaint. The fourth paragraph down:

> "A report alone, however detailed, is unlikely to be sufficient to enable the council to be confident."

The same point. I will not dwell on them, but there is a series of letters in between, where the claimant has provided ever more and more information. I am just looking at the track of the complaint for the moment. At 553, 11th November-- there had been mention in that previous letter of safeguarding. Page 553, just by the upper hole punch, the claimant picks up on that point. You will see how that plays out in a second. It is absolutely not the case that there are any safeguarding issues here. I just identified that as a red

herring, as it were. And then on 534, Mr Stoneham's second point, suitability. The claimant picks up those points. I am not concerned too much about the detail of that. And at the top of 535, what we have provided-- she summarises what she has provided. And then the heading towards the foot of p.535:

> "On a final note, what we are looking for, following the outcome from this complaint [the first bullet in red] the notice to satisfy to be withdrawn due to the fact that we have ... several times ... education being given. We asked for the NTS to be withdrawn in a previous complaint."

So she is very clear what she is asking for is for the NTS to be withdrawn on the basis that it has been produced on a flawed basis. She repeats that, just for the record, in an email or letter on 20th November. You have that at 545. At 546 she provides yet further information. Let us not dwell on that too long. 552 is the determination of that stage 2 complaint. As my Lord knows, there are three stages. They get escalated up the council. So this is now being escalated to the director level. Paragraph number 1:

> "I confirm the council has no evidence of any safeguarding concerns regarding your family."

Let us put that on to one side. And then 2, suitability:

> "I am satisfied there is no ambiguity in the requests for further evidence to demonstrate suitable education. Officers have been clear [well, they have been clear]

> that a written report alone, however detailed it may be, is unlikely to be sufficient to enable the council to determine [etc.] This is the main concern, and without appropriate evidence it is difficult for the council officer to determine [etc].”

So the issue here is about the nature of the material, and what is being said is that a report on its own will not do the job. Then the running over the page:

> “In the light of your complaint and other queries the council received about very similar issues, I have clarified the position on our website [and then there is a web link, and then back to ordinary text] and would highlight our definition of ‘suitable education’ [and then there is a web link] which I hope will provide sufficient detail regarding the council’s position.”

That then generates p.145. I apologise for the slightly quirky printout of this, but this document is no longer on the web, so it is an archive version that somebody has annotated. 145, somebody has annotated at the top of 145 to tell you a bit about the document they have downloaded and cut and pasted, and then this is-- obviously its genesis is in the July document that you have seen was in a rather tidier version. It continues to have, on p.150, just so you see them as we go through, under the heading “Contact with parents and children”-- it continues to have in that paragraph, and it is emboldened in blue if your copy is like mine----

MR JUSTICE LANE: Yes.

MR WOLFE: -- five lines down:

> “Parents will always be given the opportunity to address any specific concerns the authority has.”

So that, in theory, remains the policy. And it continues to have, over at 151, the-- there are no legal requirements, the bullet points. And it continues to have, if we just go to 155 for the moment, reasonable opportunity to address the identified concerns. But what was inserted were two things. This is p.152. Well, they would not have known it was two things at the time but you will see in a second why I say that. Something called clarification, and then something called definition. And this, just to signpost-- this, I think, is where we get into the territory of why Mrs Justice Foster said the local authority’s policy is unclear, because this is the beginning of that journey. So 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.”

Do not rely on a written report alone. So that is putting the point in a slightly different way to what you have seen in the correspondence, but it is essentially the same result. And then the next paragraph, which repeats-- you will see why I say that in a second:

> “Parents or carers who are home educating 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 ..."

That is very clearly putting a burden of proof, to use a legal word, on the parents at this initial stage. As we have seen, the Secretary of State agrees that only arises at the second stage. At this point it is for the local authority simply to ask itself the statutory question. Then it says:

> "Embedded below is the council's definition of suitable education ..."

And then below is the definition of "suitable education":

> "The definition of 'suitable education' and the reasons why the local authority may deem education not to be suitable ..."

And then it repeats the same paragraph:

> "Parents who are home educating are expected to provide evidence ..."

So it is a repeat on that. And then, as it happens, it then talks about various characteristics of an education, like broad and balanced, which, as you have seen in the Secretary of State's guidance, are not properly part of the evaluation, but let us just put that to one side

for a moment. Then over the page on 153, just below the bullet points, the paragraph says this:

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

Well, that is the assertion but, as you will see-- or as you have seen and you will see further, that is simply not the way they actually approach it. You cannot just have an incantation like that if that is not actually how you do it.

So those were the problematic inserts into the text. Actually the text was just reflecting what the local authority had done in its exchanges with the claimant in the recent past, but they were nonetheless identified as a change by the council. That is the problematic position.

Linked to that, you will recall I showed you there were two web links in the director's letter. The second web link takes you to p.144, which is a free-standing document which puts in a rather more beautiful form what was embedded in the text you saw a second ago at 152. That was the stage 2 complaint. That was a sort of side track from the stage 2 complaint rejection. At 565, bundle p.565-- do I mean 565? Sorry, 556, my misreading. 556, I am sorry. 18th December, the middle of the page:

> “We are not satisfied with the response to our stage 2 complaint and expect it will be escalated to stage 3. Our reasons for this include ...”

And then at para.2 the claimant picks up on the written report point, and at the end of that paragraph she refers to a passage in the Secretary of State’s guidance that I have showed you before:

> “Of course the local authority should give reasonable weight to information provided by the parents on its own merits.”

And then 3:

> “Further to PCC’s duties in law, we are not required to prove our educational provision.”

And then she quotes back what you have seen already in the Secretary of State’s guidance:

> “This should not be taken as implying that it is the responsibility of parents under 436A to prove their education is suitable. A proportionate approach needs to be taken.”

She is referring back, unsurprisingly, to the Secretary of State’s guidance, but the Secretary of State guidance is correctly, we say, reflecting the law. So those points made by her are the essence of--

part of the essence of the legal concern, not weakened by having come through the Secretary of State's guidance.

> "Therefore the actions ... PCC have not been addressed."

What she wants is that:

> "Notice to satisfy be withdrawn due to the fact that we have provided evidence several times that a suitable education is being provided. We have asked for the NTS to be withdrawn. Our previous complaint on this issue is still outstanding."

So what she wants or what she wanted from the NTS-- sorry, the complaints process was for the local authority to properly engage with the material she had identified on a proper legal understanding, and the difficulty was, as you have seen, that that was not the approach they took.

You have then got other correspondence relating to other people, if you like, which I am not going to dwell on for now. That leads, at 573, just so you have the picture relatively fully, to a pre-action letter written on 18th January.

MR JUSTICE LANE: Sorry, which page?

MR WOLFE: 573. It is written on behalf of another parent who had experienced a materially identical exchange of correspondence. Just sticking with the chronology, which is what I am trying to do at

the moment, 20th January, you then have, at 578, the rejection of the stage 3 complaint:

> "Thank you for your letter and your request that the complaint be escalated to stage 3."

So this then comes from the chief executive. Two paragraphs down:

> "Your letter sets out the context and raises a number of points. It is clear to me that the crux of your complaint revolves around the council's definition of 'suitable education' and the evidence required to demonstrate this. I am satisfied officers have acted appropriately."

The next paragraph:

> "This is the main concern. Without appropriate evidence it is difficult for officers to determine if suitable education is taking place. Parents or carers who are home educating their children 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."

That is to pick up from the definition point you have seen, but it is also the point I made earlier on, that the language it uses has echoes coming from para.6.12 of the Secretary of State's guidance, which is dealing with a point at which an NTS has been served. So nothing turns on this but in terms of trying to understand what has

gone on here, we think that may be the point at which the local authority has got confused. They have infused the process before an NTS is served with what would apply if an NTS was served.

The pre-action letter led to a without prejudice meeting, which is referred to in the letter of the Council on p.581, 5th February:

> "Further to the meeting with Peter ... February, after consideration of the issues that were raised at the meeting, the council will be withdrawing the clarification, also referred to as the addendum, on the basis that the council will accept a report but will reserve the right to interrogate it and seek to relate evidence to the report in order to satisfy ourselves, on the balance of probabilities, that suitable education is being provided."

So that sounds optimistic, in that the apparently problematic observation around reports is seemingly withdrawn. The response to that from the author of the pre-action letter comes at 583-- I am sorry, I should have read you the last paragraph of 581:

> "No change is therefore required to the council's current policy, and the council will act as per the council's current policy."

That then leads to some correspondence which we will see in a second. Then 583:

> “We welcome [this is the second paragraph] your announcement that the additions made to council’s policy of November 2020, the addendum clarification, will be removed. We understand that to mean that the council will then operate and apply the policy as it existed and had been published at that point. If that is wrong, please respond without delay to explain the position. Your suggestion that no change is therefore required to the council’s current policy and the council will act as per the current policy seems intended to confuse the position. In particular, if our understanding of the above is correct, then that sentence seems to be attempting to suggest that the changes made to the policy in November 2020 did not actually happen when they clearly did. Your letter says nothing about the other issues raised in our letter before action, including in particular the complaint decisions such as the ones in my case which contemplated and/or proceeded on the basis of the amended policy/approach, as now being withdrawn as above ... the Council no longer stands by those decisions. Please confirm that those decisions are now all withdrawn, and that the complaints in question will be lawfully reconsidered on a fresh basis.”

The answer to that is in a slightly tortuous email trail which, in reverse chronological order, starts at 584. You need to pick it up at the foot of p.587, and then read up. The foot of that page:

> “Dear Ms Berman, thank you for your letter of 8th February. The clarification addition to our policy has been withdrawn because it appears to be leading to unnecessary confusion. In our view, our policy did not change in that the policy has always required evidence to be shared about education being provided. We have always asked questions of parents, where we felt the need for more evidence, to be satisfied that a sufficient education was being provided. We will continue to ask for further evidence where we feel it is necessary.”

That is in principle unproblematic if there is a reason to think more information is needed. It is the generics, the blanket approach, that is problematic.

> "The issue about whether a report on its own necessarily provides sufficient evidence has proved unhelpfully confusing, hence our decision to withdraw the clarification section. [So far so good.] We do not propose to change our approach in relation to the complaints you mention. We believe our practice of seeking evidence where necessary in relation to education being provided is both appropriate and consistent with our long-standing policy and the statutory duty."

So, confusingly, and this is the confusion that I think Mrs Justice Foster had in mind, they withdraw the policy formulation in the published document, or at least part of it, but the complaints which applied it are to stand. What is also confusing about that formulation in this email is what is said at the top of 588:

> "Our practice of seeking evidence [in other words, beyond a report] where necessary ..."

Now, we fully accept, and the Secretary of State agrees with us, that there may be-- there will be cases where a local authority says: "Well, there are elements or factors or concerns or issues here on which we need more information. Dear parent, please provide some for information". Unproblematic to do that on a case-by-case basis where the circumstances indicate that is the position. It may be that

somebody is home educating for the first time, or there is something in the report that causes alarm bells to ring. Any number of things could cause that proper enquiry. The problem is the blanket approach, and the difficulty which you are now seeing is that the policy sets out a blanket approach. It may be that the text-- the policy has been withdrawn, but the complaints which applied it (I am going back to Mr McIntyre previously, he personally operated it) remain problematic. Ms Berman responds to that. Go back to 587:

> "We are still unclear [this is by the upper hole punch] precisely what you are changing in the policy. Can I check what you are removing is the whole of the section added in November under the heading 'Clarification' including the section under the further heading 'Definition of suitable education' including in particular removal of the paragraph which says 'parents who are home educating their children are expected to provide' ..."

You can see why she would ask that. Then at 586, the middle of the page:

> "Dear Ms Berman, the changes that have been made on the website to the policy ... At the moment, the date of the policy is July 2020, and indeed the text is the same as applied then, but we will be changing the date to February 2021 to make it completely clear that this is our current policy. I hope that helps."

We do not have-- the Council has not put into the bundle a copy of their policy as it currently is. Our understanding is that the published policy is as per the version I took you to, without the section headed

"clarification", but with the section "definition of suitable education". So it has changed from July 2020 because there is a new section been inserted, and that new section includes the problematic bit about parents having to demonstrate. Back at 585, Ms Berman responds to Ms Jeffrey:

> "Thank you for that email. I am afraid I do not think it correctly quotes the policy as it was in July 2020. Attached to this email is a PDF of the July 2020 policy [that is what the court has seen]. What your link goes to is not the same, even ignoring some formatting changes. It includes a potential additional section which I have quoted below in this email."

Of course now we have seen that in several different forms. Then 584, just finishing off this trail, the middle of the page:

> "Dear Ms Berman, you are correct, the section you reference on the definition of suitable education was added at the same time as the clarification now removed. In practice that definition had been used for a long time in helping families with queries on the issue."

Well, it had not been part of their public policy that appeared newly in November. What they say about its previous use we cannot speak to. But it is, as newly added at that point, problematic because it is putting the burden on the parents at stage 1. So that is why you have I think what Mrs Justice Foster had, this lack of clarity as to what their policy was.

Just to be clear, it may well be that some of the text that was added in November has now been taken out of the published document on the web, but the difficulty, as explained in that Berman correspondence, if I can put it that, is that the complaints, including the claimant's and, as it happens, Ms Berman's, were determined on the basis of that, and the local authority has stood by them. And that is why this judicial review is a challenge to the policy and practice as seen in those materials. We have made clear throughout the litigation that if the local authority wants to tidy any of that up or not proceed in the way that those documents describe, it has been open to it to do so.

My Lord, I think I can then pick things up reasonably swiftly from the skeleton argument, if I may, if you just bring to hand our skeleton argument. Starting at p.12, paras.41 and following, it brings things together. I hope you have seen the underlying materials. What we say is this, ground 1:

> "The council's policy and approach that it is for parents to demonstrate to the council that they are causing their child to receive suitable education without which the council would serve an NTS, is inconsistent with the legal framework and guidance as above. There is no such obligation on parents prior to service of an NTS. Parliament has carefully crafted a statutory framework in which, as the Secretary of State agrees below, the burden only shifts to the parents if and when an NTS has been served."

That is the first point of principle. You have seen the statutory scheme, you have seen the guidance, you have seen the

Portsmouth materials which explain that. I do not think there is any confusion there. The second ground:

> "The council's policy and approach is also 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 educational provision or the contents of the report."

That engages a principle of law, which I do not think is in issue. Mr Greatorex did not want me to put the authorities in, and I think he is happy with the characterisation here. *Venables* is the classic formulation:

> "When Parliament confers a discretionary power exercisable from time to time over a period, such power must be exercised on each occasion in the light of the circumstances at that time. In consequence a person on whom the power is conferred cannot fetter the future exercise of his discretion by committing himself now as to whether he should exercise that power in the future [etc]."

That is problematic because of the Council's policy and approach which says more is needed than a report alone.

The third ground, and you will see how they overlap, they interact:

> "Following that policy and approach [in other words, the report on its own] however detailed [not enough] means

> that the Council served an NTS without, as per the case of the claimant, even identifying any specific concerns about the suitability of the education being provided. That amounts to an unlawful failure on the council's part to act in accordance with its own published policy."

I have given you the footnotes. I do not think the law is controversial here. You have seen the published policy. It is: "If we have got concerns that lead us to (inaudible), we will tell you what those concerns are". There have been no questions here, at least nothing which fits within a proper scheme, to say: "Please tell us more about the reading that Leah is doing, or the maths that Archie is doing, we have not got enough information". So a free-standing concern there.

In ground 4, I just need to say a little bit more about this, if I may. Ground 4, that happens even where the council has not actually evaluated the suitability. So you recall the statutory question under section 437: if it appears to be local authority that the education is not suitable, they serve an NTS. That requires them to reach a view on suitability. That is a bedrock of the statutory scheme. And their policy, in other words a report is not enough, leads them - and you will see why I say this in a second - not to actually do that, not to actually reach a conclusion on suitability. Let me just embed that in the documents, if I may. You have, at p.554, parallel correspondence relating to another parent, Mrs Berryman. If you track the correspondence through, it is in nearly identical terms. The third paragraph there, here responding to her stage two complaint. The third paragraph:

> "I am satisfied there is no ambiguity in the request for further evidence to demonstrate suitable education. [We have seen most of this before] Officers have 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. This is the main concern and without appropriate evidence, it is difficult for officers to determine if suitable education is taking place."

And this is the bit I focus on:

> "I should emphasise that in asking for evidence we are not suggesting you are not providing suitable education."

The difficulty with that is that that is the statutory question. What that is illustrating is an approach which leads to the council serving an NTS without actually having answered the statutory question, let alone reached the necessary trigger answer to it. "We are not saying you are not providing suitable education; you just have not given us the evidence we want". That is not an answer to the statutory question. And indeed, Mr McIntyre's witness statement, which I will come to in a second for another purpose-- but his witness statement starts as p.240 of the court's bundle. He talks-- pick it up at para.26. He uses the term "uncorroborated reports". At para.27 he says:

> "The other issue is whether the education being provided is suitable. That can sometimes involves difficult matters of judgment but it does not arise in this case so I do not discuss it further here."

That is a different way of making the point that was done in Berman. The council has not reached a conclusion, has not addressed its mind to whether Mrs Goodred's educational provision is suitable or not, and yet it served an NTS. There is simply no legal basis to proceed in that way.

My Lord, before I sit down, can I just pick up another section of the skeleton, just to signpost a further point that arises from the materials as set out in the skeleton? Page 16, paras.69 and following, there is a sort of a theme from the local authority to the effect that information provided by parents is not evidence. You get that in a series of places which I have referenced and quoted there, and that is why I am not-- I am looking at it here to save grinding the court through them. For example, at 69(4) - this is in Mr McIntyre's witness statement, but you have also got it in the detailed grounds of resistance:

> "Where parents make unsupported assertions about the education their child is receiving at home."

And then 15 of Mr McIntyre, my sub-(5):

> ".. without any evidence at all of the described education taking place."

And then over the page, sub(8), Mr McIntyre 28-- they are all of a piece, I am just jumping through them quickly:

> "As far as the council is concerned, the claimant has not at any point provided any evidence that the education she describes actually took place or is taking place. The claimant has failed to provide any supporting evidence that the education detailed in the report is actually taking place."

What you have is a theme there and an approach there which is not, in and of itself, the illegality, but it may explain the illegality, which is the council's view that when a parent writes in a document and says: "This is what I am doing", it is not evidence of what is happening. Clearly that is not how a public body or indeed a court would approach such matters. If there are things in what the parent says that you want more information about or that you want more detail about, or whatever, perfectly proper follow-up questions, as long as the follow-up questions are (inaudible) suitable education. But simply to have a rule which says a report on its own will not do, we say, is a blanket fettering. And in the context of a council's approach to burden of proof, one can see how they have then got themselves into this problematic situation.

So, my Lord, just before I sit down, to bring those things together, what the claimant-- although it is the claimant's case, just to repeat what I said at the beginning, and the facts of her correspondence and so on are important to understanding that case, I hope that nothing in the end-- I am not frightened of anything turning on the details of her case, but I do not think anything turns on the specifics of her case and her situation, because her experience, as you have seen, I think, is essentially generic within this local authority, and it follows from the operation of a policy and approach, which we say is inconsistent with the statutory scheme. And that is why, my Lord, she asks for declarations relating to the policy and practice, but she also needs orders quashing the outcome of the complaints process,

and that is therefore the relief she seeks. My Lord, unless I can assist further, those are our submissions. I am sorry, slightly longer than I hoped, but still on track.

MR JUSTICE LANE: Thank you very much, Mr Wolfe. We have got 10 minutes, Mr Greatorex.

MR GREATOREX: Yes, my Lord. As your Lordship I think will be aware from our written argument, we say that this matter is straightforward, both factually and legally, and we certainly say that it is a lot more straightforward than the impression given by the claimant's arguments, both written and oral. The detail of that is set out in the detailed grounds but, to try and summarise it still further, I make a distinction between straightforward legally and factually. Legally - because there is dispute about these provisions - parents have a duty to ensure their child receives a suitable education. The local authority, my client, has a duty to make arrangements to establish if a child is receiving a suitable education, and it has a duty to take action if it is not satisfied of this. The cross-reference, if you want it, is para.4 of the detailed grounds of defence. It is p.92. That sets out the relevant provisions verbatim. My learned friend took you through them. I am not going to do it again unless your Lordship wants me to.

MR JUSTICE LANE: No.

MR GREATOREX: But that is what it boils down to. The claimant's, like all parents, duty is to ensure your child receives a suitable education. We have got a duty to make arrangements to establish if a child is receiving a suitable education and, if we are not satisfied of that, we have got a duty to act. Factually in this case we sought to establish, in accordance with our section 436 duty, if the claimant's children were receiving a suitable education. And no issue is taken with that starting point. So we started in the right place, by agreement, and we had to.

What the claimant then did - and, in my submission, this is a perfectly fair summary of all the documents you have been taken to - is provide a number of emails or letters or other written documents, authored by her, and which described the educational programme that she said her children were following and receiving. It is also equally clear and perfectly fair to summarise all of that by saying that she did not provide any other evidence beyond her own assertion or her own say-so that the education described was taking place.

Now, just pausing at this point, because my learned friend makes so much of it, my learned friend says that our position is that what parents say is not evidence. That is not right. What we have always said is that: "What you tell us is happening is unlikely to satisfy us that your child is receiving a suitable education. That is our position in general terms - unlikely. Not never. And on the facts of this case it does not satisfy us". I will come back to that. But just to return to my briefest possible summary of the relevant facts, it is clear - it is not in dispute - the claimant did not provide anything corroborative or anything other than her own assertion, her own say-so. My learned friend has not suggested otherwise, it is not there in the bundle.

Now, what happened then is we reach an impasse, and you have seen that from the correspondence. What we did is then follow the statutory procedure. We served the notice to satisfy. Nothing new came of that. More of the same. We served the statutory notice of intention to serve a school attendance order. Nothing came of that. We served the school attendance order. And then, in effect, this claim was issued and the process ground to a halt at that stage. So far, so straightforward. That is, in my submission, a fair summary of where we got to.

Now, the legal challenge that follows most obviously from that impasse, reflecting the two sides' positions, is what the claimant was herself saying at the time before the lawyers got involved. She was saying, and, again, in my submission, this is a completely fair summary-- she was saying: "I have provided you with lots and lots of evidence that my children are receiving a suitable education. You should be satisfied with that. I have made it clear. You should stop corresponding with me on this matter and that should be the end of it. You should pronounce yourself satisfied or effectively stop your enquiries there". My Lord, that is the point, just by way of cross-reference, that I pick up - and I will come back to this later - in para.11.3 of my skeleton argument, which in turn picks up-- well, perhaps the easiest thing is to just turn it up. It is right at the end on the last page. Perhaps it is easier if I just ask you to read subpara.3. (After a pause)

MR JUSTICE LANE: Yes.

MR GREATOREX: My Lord, I am not going to go to those pages unless you want to, but the point just for now is that the claimant was quite clearly-- those show the point I have just made, that the claimant was saying effectively: "Back off. Stop there. I have satisfied you. There is no reason for you to be writing to me any further. I will see you next year at the next annual review". So that is the challenge that most obviously follows, that the local authority, my client, was somehow acting unlawfully by not being satisfied on the basis of the information being provided; that any reasonable local authority when confronted with her various emails and letters, and so on and so forth-- the only lawful conclusion it could have come to is that it was satisfied that her children were receiving a suitable education. Not only is that challenge not brought, it is specifically disavowed. What has happened instead is we have got the grounds of challenge drafted by my learned friend, which allege various other things, but

ignore what is really going on in this case and, in my submission, amount to overly or unnecessarily technical arguments that take his client's position no further forward. This comes back to the subparagraph in my skeleton that I just drew to your Lordship's attention.

MR JUSTICE LANE: Thank you. We are going to have to break. Is this-- well, probably not a convenient place to break----

MR GREATOREX: I am happy to break, my Lord.

MR JUSTICE LANE: -- but I think we are going to have to break anyway. Back at two o'clock.

(Adjourned for a short time)

MR GREATOREX: Just before the adjournment I was making the point about the mismatch in our submission between the claimant's position at the time of the material event and what she was saying we were saying and what was happening----

MR JUSTICE LANE: Yes.

MR GREATOREX: -- and the grounds that are now advanced and how the most obvious challenge - and the challenge that reflects the claimant's position - is not -- is being specifically disavowed. Now, we do say, we maintain the submission that we have made out, that the claim is not clear.

Now, of course, my learned friend has articulated four grounds of challenge and we have answered those head on. We have answered them head on in the summary grounds of defence and, as you have seen, the judge granted permission, effectively side-stepped the issue of the specific grounds and we have done the same thing in the detailed grounds of defence, i.e. to set out the specific challenge and meet it

head on. We do not say, my Lord, that the complaint about lack of clarity is not one that is made for rhetorical effect, it is an intensely practical issue for us----

MR JUSTICE LANE: Yes.

MR GREATOREX: -- as it is, one imagines, not least because the Secretary of State's interest in the matter for other local authorities, the intensely practical question for my clients is well, what should we have done differently and perhaps even more importantly, if this claim is to succeed, what is it that we have to do differently going forward? We would understand if the challenge was the one that was not being made, i.e. on the basis of this information the only rational conclusion is that you should be satisfied, but that is not it.

The Secretary of State has not suggested in his submissions that we have anything wrong and that maybe the Secretary of State is going to say well, they are not getting involved in the facts of this case, but one would expect that if the Secretary of State thought that we were doing something seriously wrong here as a matter of principle, then the Secretary of State would have come out and said so.

If your Lordship still has that paragraph in my skeleton argument open that I referred to before the short adjournment----

MR JUSTICE LANE: Paragraph 11(g)?

MR WOLFE: -- 11.3, yes, it is really more the second part of that, having made the point that it is not -- what is being sought now is not what was being sought at the time. What is now being sought - and the words are in quotes from the claimant - "The s.463(a) process to be repeated lawfully." As I say in that paragraph, it is unclear what the claimant means by that, what that would look like in practice or how it would make any difference to anything in which regard s.313(d) of the 1981 Act plainly applies.

My Lord, I would respectfully observe that, like almost everything else in my skeleton argument, my learned friend for the claimant has not addressed that point in his oral

submissions. That does also mean that if anything about it is said in reply once I have sat down, I am not going to have a chance to respond to it, it will be too late, in my submission.

My Lord, what one is reminded of, in my submission, is what was said almost in passing in the *Phillips v Brown* case in the authorities bundle at tab 6. I do not know if your Lordship remembers that. We can turn it up if necessary, but it is a comment and it is on----

MR JUSTICE LANE: (Inaudible).

MR GREATOREX: -- p.122 of the authorities bundle. There is no need to turn it up unless your Lordship wants, it is a short point. The comment is made:

> "Life would have been made much easier for all concerned, including [the claimant] if he had seen fit to place [the] evidence …"

of suitability before the court. This is the situation we have here. The claimant keeps saying "I am perfectly happy that I am providing my children a suitable education, I have no doubts about that", and yet she has deliberately, specifically refused to go beyond providing what she has provided. And the fact of the matter is that one way or another the claimant, like all other home educating parents, is going to have to at some point satisfy someone of that. In the first instance that is us.

The statute makes sensible provision for disagreements between parents and local authorities. You can go to the Secretary of State, you have seen this in my statutory section, the Secretary of State can direct a local authority to revoke, and the final safety net is the magistrates, but one way or another or, potentially, my Lord, subject to the point about alternative remedy, potentially this course on a claim for judicial review. One way or another that has to be done at some point and yet it has not happened to date.

That brings me, by way of ending, to my opening submissions. What I propose to do, with your Lordship's permission, is go through the submissions that were made by my learned friend with various responses to them----

MR JUSTICE LANE: Yes.

MR GREATOREX: -- because that leads on to where he began which is the statutory scheme and he took you through the provisions and I have summarised them.

The point is made in the skeleton - and I repeat it now - that one has to be very careful, in my submission, about what the claimant calls unpacking or rephrasing the provisions or glossing them because in my submission that is simply unnecessary and over-complicating something that does not need to be rephrased or unpacked. My particular challenge is as to my learned friend's unpacking where he breaks matters down into stages, as he calls it. That is wrong. The s.7 duty on parents to ensure that their child receives a suitable education applies at all times.

Similarly, the defendant, or local authorities, have a binary position they have to have at all times which is either they are satisfied that the child is receiving a suitable education in which case they do not have to do anything, or they are not, in which case they do.

My learned friend talks about the burden of proof and says that we are wrongly placing it on the parents. That is his phrase. The statute is what the statute says. It is not helpful or necessary to talk about burdens of proof and one point we would emphasise, my Lord, is that this is meant to be a simple and straightforward and very practical area of the law. These are not regulations governing the public procurement of contracts worth hundreds of millions of pounds. We have kept saying the aim is very simple, the duties are very simple. The bottom line aim for everybody is that children receive a suitable education.

If your Lordship goes to the authorities bundle - I am sorry -- yes, it is the authorities bundle and it is p.136, and my learned friend took you to para.5:

> "The local authority should consult the parents of the child when establishing whether the child is receiving a suitable education".

And he said we agree with that. Yes, obviously. The rhetorical question posed in the light of that is what is the point of that then, and if one turns forward in the bundle to the flow chart which is at p.160, the first box there:

> "After informal enquiries the child does not appear to be receiving suitable education at home again."

Yes, that is obvious. That is the whole point of what is going on here. What is the point of those enquiries if it is not to enable the local authority to form a view about that?

Then later on in this guidance document, para.6.12, which is on p.174, if you recall, my Lord, my learned friend went to para.6.12 and about two-thirds of the way down picked up on the phrase:

> "The information provided by parents should demonstrate that the education actually being provided is suitable".

My learned friend says "A-ha, this is said in the context of a response to a notice to satisfy, so it is perfectly acceptable and permissible at that stage but it is wrong at the earlier stage". My Lord, in my submission, that is as good an example as any of the misconception and the over-complication by the claimant of this whole matter because, as I have submitted, the point is the same at all stages and the point is simply this: unless at some point the parent demonstrates to somebody that their child is receiving a suitable education, then action is going to be taken. It is not different at different stages.

As we have said throughout, the statutory scheme is clear and simple and with an obvious purpose. The underlying and obvious purpose is to ensure children are receiving a suitable education, it simply formalises in the notice to satisfy before one gets to the earliest -- the later stage of the local authority's position. As we all know, there is no obligation on a parent to comply with it, but as this document says at a paragraph that was actually not referred to by my learned friend - and I should just mention this, it is in our detailed grounds - it is paragraph -- sorry, in the next non-statutory guidance document for parents at para.5.4, which is p.214, for your Lordship's note, of the authorities bundle, it is quoted in our detailed grounds of defence, you do not have to provide anything, but if you do not then you might leave the local authority with no choice.

MR JUSTICE LANE: Where is that?

MR GREATOREX: Paragraph 5.4 on p.214 of the authorities bundle. It is quoted in our detailed grounds of defence also. Can I just at this point in parenthesis, my Lord, acknowledge that the Secretary of State in his written submissions quite rightly ticks me off for referring to this guidance as (overspeaking) when it is not.

MR JUSTICE LANE: (Overspeaking) clear guidance, yes.

MR GREATOREX: In practice -- I mean, I accept that is right. In practice, actually, it makes very little difference because it is accepted to be a relevant consideration and therefore at risk of challenge if you do not follow it without good reason, but I deal with that point.

So this comes back to my main point that the claimant accepts that we started in the right place, that we were entitled to begin where we did and then somehow in ways that we genuinely do not understand suggests that we should have taken a different course at some point. And as I keep saying, the only different course that we could have taken is to say: "Okay we are satisfied". We do not accept we should have done that. As I said, I do not think the Secretary of State suggests we should have done that and there is not a challenge in those terms before this court.

Now, the next point is this and this is by reference to para.6.5 of the non-statutory guidance that we were looking at, so we are back to p.172. My learned friend

referred to this and said this is not my client, the parents who refuses to respond. My learned friend's phrase was "She is not the refusenik parent". Now I would not use that phraseology or characterisation myself, but the submission is wrong. She is, in the relevant legal sense, because she has refused quite deliberately and consistently to date to provide any evidence other than her own say-so the educational programme described as being received by her children, and she says that because she clearly believes that she does not have to. See p.468 of the bundle at the top, the second line on that page.

MR JUSTICE LANE: 462?

MR GREATOREX: 468.

MR JUSTICE LANE: Yes. I mean, at a high level of legal generality, you are saying that no matter what is said in the statutory guidance by reference to the statutory scheme, which does in turn say you are not obliged to do X, Y and Z, that is merely and importantly merely saying you are not obliged to do X, Y and Z on the basis of if you do not do them, there is no discrete penalty that you will incur.

MR GREATOREX: Exactly.

MR JUSTICE LANE: It is not a statutory duty to be backed up with the force of criminal law, but it does, you say on behalf of your client, have the important consequence that if you rest on that, then you may not be able to satisfy the defendant of the matters that it needs to be satisfied of.

MR GREATOREX: Exactly.

MR JUSTICE LANE: I understand.

MR GREATOREX: And that is what the Secretary of State says also.

MR JUSTICE LANE: But going down into - and you may think this takes us into the area of challenge to the actual Wednesbury reasonableness or otherwise of the decision in this case, which is (inaudible) -- but I mean she is a lady who is not saying "I refuse to provide anything at all", I mean, she takes the time, it must take several hours to write what she has written about---

MR GREATOREX: Absolutely. Yes.

MR JUSTICE LANE: -- about what the three children have been doing, and your client says “It is not enough”, but she is left, at least she contends through her counsel that she is left, in a position which is she does not quite know what she does have to provide. I must say that, looking at the communications from the defendant, it is difficult to see what the defendant is doing to help her to comply, to help her to satisfy it.

MR GREATOREX: Well, perhaps I can address that then, my Lord----

MR JUSTICE LANE: Yes.

MR GREATOREX: -- because I do not accept that for one moment. And also formally, you are absolutely right, my Lord, that is the challenge that is not being brought to the reasonableness of the decision.

But to deal with that - I mean, it is answered partly -- and perhaps the starting point is the detailed -- sorry, the skeleton argument.

MR JUSTICE LANE: Yes.

MR GREATOREX: At para.8.3 on p.4 of 6.

MR JUSTICE LANE: Yes.

MR GREATOREX: And in terms of the guidance as to what could be done about it, the first point to note is that what is clear and what is made clear in our witness statement is we are not prescriptive about it. We absolutely do not have any “it has got to be samples of work” or “it has got to be...” -- our point is that in most cases it has to be something more than just your say-so. We do not really mind what and perhaps your Lordship has asked about this and I should give you the precise reference which is at p.246 in the bundle, this is in the middle of the Mr McIntyre’s witness statement starting at para.21, so it is the main hearing bundle, p.246, para.21.

MR JUSTICE LANE: Yes.

MR GREATOREX: It is really 21 and 22. I mean, the whole of the witness statement is obviously important, but I think those are the most relevant.

MR JUSTICE LANE: Yes. Just to be clear and perhaps to anticipate something in reply, if the claimant had actually put everything that she put into her communications to the council as a statement of truth, signed it with the usual rubric at the end, that would not be sufficient?

MR GREATOREX: Formally I would have to take instructions, but I very much doubt it would make any difference. That has not been the point and it is really -- sorry, I have moved away in my bundle, but if I just go back to the page we were at, para.25, I think, anticipates that question, my Lord, on p.247. "It is not a question..." -- it is about four lines down.

MR JUSTICE LANE: Yes, "It is not a question of not telling the truth..."

MR GREATOREX: "... not telling the truth, but a question of properly discharging our statutory duties and doing so in a way that is consistent and fair as between all individuals."

It is also the reason, my Lord, why we have been careful not to say a report will never be enough. The word used in the complaint, because it is not in the policy, is unlikely and that is our position, it is unlikely but we do not say never. We cannot. And that is the answer to my learned friend's formal challenge point. He was, if I may respectfully say so, very loose in his language in saying that we have said it will never be enough. We have not. It is quite clear we have said it is unlikely, but there might be. I would say in any event that is a challenge for the individual case. This is a point as a matter of principle.

The other point that has been slightly overlooked as well in relation to 480 which we looked at is the point about the claimant's children's ability to read and write. Again, this is not in dispute. The only basis we have for drawing any view about that is what the claimant herself is telling us. There is absolutely zero other evidence.

Now, the other point to make in answer to your Lordship's question - and I was just struggling to get the precise reference - is the policy itself. If your Lordship would

give me a moment, if you will forgive me, your Lordship, because I thought I had it cross-referenced.

Yes, p.144. At p.144, the second set of bullet points on the second half of that page suggests reasons why the information provided may not be suitable.

MR JUSTICE LANE: Just a moment, I am in the wrong bundle.

MR GREATOREX: I am sorry, it is the main bundle, my Lord.

MR JUSTICE LANE: Yes.

MR GREATOREX: 144.

MR JUSTICE LANE: This is the document -- at least we have heard some already established -- well, it was not his difficulty, he was saying that it was unclear what the status of this is.

MR GREATOREX: No, no, I do not think it is. This is part of the policy.

MR JUSTICE LANE: Right.

MR GREATOREX: This is part of the policy. Would your Lordship like me to deal with that particular point now?

MR JUSTICE LANE: No, when you come to it because there were some issues about just what policy we have got when and---

MR GREATOREX: Yes, very well. I will come to that after this.

One can see from the second half of that page that some indications are given of what might be problematic and one can deduce from that the converse of each of those how one might satisfy, and I will make two general points, my Lord, or rather one specific to this case. For the record, we simply do not accept that the claimant can fairly and reasonably say “I have no idea what you wanted from me”.

To the extent there was any doubt at all is because we were not prescriptive in the sense of we did not say “You must give us a sample of work or else”. That is actually another submission my learned friends there wanted to challenge because my learned friend - I am sorry we are jumping around, but I have managed to give you the reference without going to it - my learned friend went para.2.10 and 2.11 of the non-statutory guidance for parents, I will give the page reference in a minute, which are things that there is no requirement. I can see your Lordship probably wants to look at it. Let me get the page reference. It is p.207 and p.208 of the authorities bundle. For example, my learned friend’s submission with reference to para.2.11 on p.208 was he drew attention to the fact that he says there is no legal requirement to mark work done or formally assess progress, and then complained that that is what we had asked for.

MR JUSTICE LANE: There is going to be two minutes silence.

(Two minutes silence)

MR JUSTICE LANE: Thank you very much.

MR GREATOREX: My Lord, we were looking at p.208----

MR JUSTICE LANE: Yes.

MR GREATOREX: -- para.2.11 and my learned friend’s submission that some sort of criticism or complaint that we had asked for things that guidance makes clear you do not have to do. I do not accept that that is a fair or correct criticism of us in the slightest. We have made consistently clear throughout that we do not have any formal requirements. We give examples. We have accept of things that might satisfy us, but that is the point, the paragraphs in the witness statement that we just looked at, my Lord, make the position very clear and the correspondence that you looked at made it very clear; it has got to be something.

Again, almost in parentheses, looking at para.2.11, there is an interesting mirror between this issue about suitable education and this issue about parents -- local authorities being satisfied because, of course, 2.11 is correct in the sense that there is no legal requirement to do any of those things. However, the rather obvious question it begs is that if you are delivering education that delivers none of those things, on what basis are you saying it is suitable?

It is one of the difficulties of the law in this area and the guidance. The guidance is very clear about all the things you do not have to do, but it does not actually give any indication of what you do have to do. The only requirement is suitability. It is a bit like – and I say that because it is the mirror image of what we are talking about - what parents have to do to satisfy local authorities. You can make a long list of things you do not have to do, but the question of all that begs is well you still have to do something otherwise you are not going to satisfy the local authority. The education you provide and your child receives has to be something, otherwise it is not suitable. So I do not accept at all that there is any basis upon which you, my Lord, this court, can properly find that the claimant was genuinely in the dark about what to do.

One sees that -- there are three points. The first is the one I have just made and I have given you the references to where we make clear on numerous occasions that you have got to do something more than what you are doing. It is no good just telling us things over and over and over again. As I say in my skeleton, my Lord, it is the quality of the information provided, not the quantity. You provide a 200-page book on what your child is doing, but it will not necessarily satisfy a reasonable local authority without anything which corroborates it or supports it.

The second reason is that - again, this is made clear in our witness evidence - plenty of parents can and do satisfy us in all sorts of different ways, as Mr McIntyre makes clear. The other thing that might have struck your Lordship reading that witness statement is that it is not very much; samples of work, a few videos, a meeting. On no view can it be said that we have a particularly high bar or threshold, the only point is that in most cases it is more than just what the parents assert.

The third point, my Lord - and, in my submission, if you need it this is the clincher - is that here we are today when -- whilst I am always prepared to accept failings in my own job, I do not think we could have made clearer what our position is and the claimant has not said at any point “Oh my gosh, I never realised that is what you were after, here is the evidence. Oh, if that’s what you meant well of course I can

give you this". It is the point made right in the last line of my skeleton argument, the substantive part of it. Even today there is no evidence, apart from the claimant's own say-so, as to how good any of her children are at reading and writing or that any of the educational programme that she describes is taking place.

Not that I think the point is labouring, but since my learned friend brought it up, he took the example of To Kill a Mockingbird and we said, "Look, we told you everything about it", but that does not go to the point in issue, that is still just what you are telling us. Because, my Lord - and this is the point again made throughout - the wording of the duty in the relevant statutory duties has to be taken as a whole. You, as the parent, have a duty to ensure and we as a local authority have a duty to satisfy ourselves that children are receiving a suitable education. I have made the point in my skeleton argument, my Lord, it is in a footnote. I hope it was not overlooked for that reason. It is on p.3 of 6, para.7.1:

> "The replacement of statement of facts around the claimant's skeleton argument makes a potentially telling error in repeatedly suggesting that the legal requirement is for a suitable education to be provided rather than received."

And I give, I do not know, about 20, maybe a bit less, somewhere between 10 and 20, cross references.

Now, it may just be that my learned friend is using convenient shorthand. It does not really matter either way, but to the extent that anyone is deliberately using that phraseology, they are wrong because that is the question about receiving. This brings me onto the next point, my Lord. My learned friend said that we have not applied our minds to the question of whether the education that the claimant says her children are receiving is suitable. And in that regard he took you to our witness statement, para.27 on p.247.

Now, can I ask that your Lordship turns this up because we do need to look at this page in particular, an earlier paragraph. We pick this up at the previous page, para.24, the key point is actually at the top of the page with para.27 on, 247.

MR JUSTICE LANE: Yes.

MR GREATOREX: What Mr McIntyre says is the two main considerations for the council are usually - he does not quite put it this way: one, whether the education described by the parent is actually taking place; and two, whether that education is suitable. He deals first with the first of those and then at 27 he picks up on the second, and that is why he says what he does in 27 because that is not the issue here, this is the point about the challenge that is not brought. The sorts of issues that would come under that, simply for convenience to use the example given, is reading To Kill a Mockingbird suitable for a child of that age, et cetera, et cetera. That might arise in this case potentially once we are satisfied, but there is no point in assessing the suitability of education in the abstract if you are not satisfied it is actually happening because you are just wasting your time.

It is, as I say, again for the record, it is not accepted in the slightest that we have not applied our minds to it, this is exactly what we have done. The reason we are not satisfied is not because we say To Kill a Mockingbird is not suitable for the claimant's child to be reading or anything like that, we do not even get to that. We are not satisfied under our statutory duty because we are not satisfied it is actually taking place. We have no evidence of reading or writing ability and no evidence apart from what the claimant says.

As I said, look at this practically, my Lord, that is actually the issue. The claimant does not want it to be but that is the issue as to whether or not that conclusion was rational or not because if it was, then we have done nothing wrong. If it was not rational, then there is a big problem. I mean, subject to the issue of alternative remedies, but that is not the challenge brought.

The point of principle at stake here going forward, in my submission, is whether this court is going to hold in a precedent that a local authority is bound to accept the

parent's say-so, either in general terms or on the fact of this case. I mean, there is nothing unusual about the facts of this case that I think could distinguish it. As we have said, both in the detailed grounds and repeated in the skeleton, that cannot be right. It simply cannot be right, either as a matter of statutory construction or considering the purpose of this legislation or, if one ventures into that dangerous territory of appealing to common sense, whichever way you look at it, it cannot be right that a local authority has no legal option but to accept what it is told in a case like this. There might be more difficult questions that arise where some further information is provided and the local authority says "Well, you sent us one 30-second video, we don't think that is enough", or "You have sent us two samples of work, we don't think that is enough".

I would urge the court not to forget that the issue of suitable alternative remedy, the right to be a real obstacle to any challenge in those cases, I have accepted that there could be a challenge in (inaudible) principle, but the answer is that if you think you have an unreasonable local authority, it makes more sense to go to the Secretary of State and ask the Secretary to of State to provide a revocation or we go to the magistrates. But the facts here are stark; there was nothing other than assertion.

I have one -- at this point in my list, I am not sure anything at all turns on this, but you were taken to p.469. Simply to make the point, just in case, I do not think it is, but this also appears at 370. 469 is not an accurate reproduction. I do not suggest that it was deliberately changed, but to the extent that your Lordship looks for any reason at 469, your Lordship should not, and your Lordship should look at 370 in the bundle. There are some missing words before the numbered points, one can see from p.370 that what the defendant said was an omitted:

> "In order for us to best discharge our duty, can I ask that you provide further information as requested below."

As I said, I do not think anything turns on it. My Lord, I think the point -- this is the point we might need to deal with, what is not a ground of challenge but just an issue about policy.

MR JUSTICE LANE: Yes.

MR GREATOREX: Because I hold my hand up here, my skeleton does not get it quite right. I am sorry. My mitigation is that we had about 48 hours to do our skeleton argument because of the timetable imposed in this case, but I accept that the way that I sought to summarise it in my skeleton is not entirely correct. I am referring to -- you might want to mark it up, my Lord, to correct it. At para.11.1 -- I am sorry, that is the wrong paragraph. It is para.8.1. What I said at para.8.1 is - and I did at least get the cross-reference right:

> "As explained in para.14 to 17 of the defendant's witness statement that policy has been the same at all material times and the defendant has never been uncertain about what it is. The only change made was to add four paragraphs in December 2020 after all relevant decisions in this case had been taken which were then withdrawn two months later in February 2021 because they appeared to be causing unnecessary confusion".

As the cross-referred paragraphs make clear and in particular para.17 at p.245 in the bundle, that page that we looked at before, my Lord, was added in December 2020. It is the page that appears in the bundle at p.144. We looked at it earlier, my Lord.

So to try and erase my mistake and make sure I have not caused any confusion, the position is clear is that the policy - and my learned friend said "Well, we have not put the policy in," I mean, I think they put it in originally and they put in the right one and we put in another copy, the copy that appears at p.127 in the bundle, starts at 127, which was in right at the start of this claim - is the policy and there are only two changes that occurred both of which occurred after all the material decisions in this case were taken, first of all; second of all, were not changes of substance; and third, do not form any part of the claimant's challenge.

The only two changes were to put in four paragraphs only to take them out a couple of months later and if you read the documentation I really do not think this matters - I can go through it if you want - they were added in as part of the discussions that we were having because we were trying to be co-operative and helpful and have

discussions and we thought that it would make things clearer in response to the concerns that were being raised. When it became apparent they were not, we took them out and that page that I have just shown your Lordship was added again to try and make matters clearer because this issue had come up.

The point is nothing turns on that. To the extent that the judge might (inaudible) might have thought that there was some uncertainty and that does not matter, my Lord, there was not and it is not a ground of challenge, but the factual position is clear and is agreed, the policy is what it is in the bundle.

MR WOLFE: Sorry, which one is that? 137, 127?

MR GREATOREX: Yes, the document that has always been there.

MR WOLFE: What did you say the one before that?

MR GREATOREX: Well, give me a minute, my Lord.

MR JUSTICE LANE: You have a policy that starts----

MR GREATOREX: 144 was added in December. That is what Mr McIntyre says----

MR JUSTICE LANE: Yes.

MR GREATOREX: 144, as Mr McIntyre says, was added in December 2020. That is the change that I omitted to refer to in my skeleton, I held my hands up to. I am sorry for confusing everyone.

As with regard to all of these things, it does not matter what I say, what matters is what Mr McIntyre says and he made the position very clear. I have just formally summarised it in my skeleton.

If you look at the claimant's grounds, they do not say "Well, this is uncertain, unclear", they say "this is your policy and it is wrong".

My Lord, I think I have dealt with my learned friend's submissions and then perhaps what I can do to end by way of wrapping up is simply go through my skeleton argument to make sure that I have emphasised everything that I want to and that everything is covered.

So para.5 sets out all the different ways the claimant's case has been put at great length. Then we have sought to summarise in para.7 an even shorter version. I am sorry, either a shorter version or to summarise the legal framework and the detailed grounds. The key facts are at para.8 and I think I have covered all of those points.

Paragraph 9 deals with three particular points. Fettered discretion to operate as a blanket policy. I have dealt with that and in my submission it is clear beyond any doubt from our witness evidence that we deal with each case on its facts. That is the whole point about how there is not any requirement for what evidence, the only thing you have said - and we will say it again - is that it is unlikely that a mere report is going to be enough. But beyond that, we do not have any particular rules or requirements and, as I have said to you, my Lord - and I urge this point upon you - what we have made clear is that it is not -- that we do not demand very much. As I say, the reason why it has not been provided appears to be because a point of principle is taken: I do not have to, I am not obliged to. One sees that in the way the legal arguments are expressed saying "Ah, the parent is not obliged to at that stage. They might be at a later stage but not at that stage". That is where I say well there is no distinction, you cannot break it down in that way. I have made all my submissions on that.

Sub-paragraph 2 I have dealt with about the point about the concerns and I have made my submissions on that and I think sub-paragraph 3 again I have dealt with.

Paragraph 10 is the submission I say why ultimately it must be obvious on any view this claim cannot succeed because it means that we just had to stop. As I say, our concern would be that we would actually be failing in our duties if we did that.

Then in terms of the completeness. Well, I have dealt with the judge's reasons. This, I think, is the only point that I have not dealt with explicitly in sub-paragraph 2, because I have dealt with sub-paragraph 3, and that is the *Phillips* case. Well, I have to say I do not have anything useful to add to what the Secretary of State said in writing on it. Of course, strictly -- I do not think anyone is suggesting that it strictly binds your Lordship to come to any particular conclusion. I mean, not least because the statutory framework is not identical because s.436A has been added, but it all but answers the claimant's point. As I have said, we do not agree with the claimant's reading of it at all. It is quite clear that the same basic point was being made as you have to have something before I am under a duty as a parent to do something and the court said no. So, as I say, one does not need precedent to dispose of this claim, but it provides very substantial support and/or significantly undermines the claimant's case.

So, my Lord, if I can just check whether there is anything else.

MR JUSTICE LANE: Of course.

MR GREATOREX: Unless I can assist further, those are my submissions.

MR JUSTICE LANE: Thank you very much. Yes, Mr Cornwell.

MR CORNWEL: My Lord, firstly can I start by saying thank you for permitting the Secretary of State to intervene. You already have the written submission from my learned friend Ms Clement which I hope your Lordship has had a chance to digest.

MR JUSTICE LANE: Yes, I have.

MR CORNWEL: I do not propose to repeat those verbatim or indeed to any great extent in my oral submissions. What I propose to do is two things. The first is I want to go through some of the key provisions of the statutory scheme in a little bit more detail, principally s.7, 436A and 437, and then I want to go through some points, specific points, that arise from the submissions of my learned friends so far as they raise points of law. We are neutral on the facts of this case, but where the facts or interpretations of the facts raise potential legal issues, the Secretary of State has a view on I will seek to elucidate that to you.

So starting with the first of those tasks, in my submission it is important to start with the context of this. If your Lordship turns to the guidance, the point is made at several points, but if one takes as an example the local authority non-statutory guidance at p.149 of the authorities bundle, that emphasises that of course the Secretary of State accepts the right of parents to educate their children at home should they choose to do so, but also it ventilates the Secretary of State's concern that in an increasing number of cases home education is not being conducted in a satisfactory way and that children are missing out on suitable education.

The consequences of that are articulated in the statutory guidance which is a few pages earlier in the bundle at p.136 where the Secretary of State emphasises that all children are entitled to an efficient, full-time education which is suitable for their age, ability, aptitude and any special educational needs they have. Then the Secretary of State spells out the consequences of that not happening: significant risk of underachieving, being victims of harm, exploitation, radicalisation or becoming (inaudible) later in life. That is the context against which my submissions need to be considered.

The guidance, both the statutory guidance in 2016 and the local authority non-statutory guidance, also emphasises the important connection between the pure educational provisions under the 1996 Act and safeguarding and the welfare of children. I am not making any submission in that regard specific to this particular case, just to be clear, but it is important context that these two overlap and the Secretary of State is very clear that in certain circumstances a failure to provide to ensure that suitable education is received by a child can amount to a safeguarding and welfare concern and can indeed satisfy the threshold conditions for the granting of supervision orders under the Children Act, and that is important context in which we operate. So that is my first point on the statutory scheme.

My next point, if your Lordship could turn to s.7 of the '96 Act, which is at p.7 of the authorities bundle, that is the starting point and I hope I am not overlabouring things if

I point out the importance of the actual wording that is used. It imposes a duty on the parents. That applies in relation to every child. First point. The second point, it is a duty to cause the child to receive, that is the first element. An efficient education, that is the second element. It has to be a full-time education and it has to be suitable. And then suitability is cashed out in the next two sub-paragraphs (a) and (b) as to age, ability and aptitude and then to any special educational needs. And it is important to emphasise that there are those four elements to the duty: receiving, efficiency, full-time and suitability. If any of those elements are not present, the duty is not being discharged and the child is not receiving the education that they are entitled to under s.7 and indeed under art.2 of the first protocol of the European Convention on Human Rights.

The duty is an objective one. It is not a duty to provide an education that the parent considers to be suitable or efficient or full-time. It is cast in objective terms and ultimately it may fall to others, local authority, the Secretary of State, or a magistrates court to decide that question. It is clearly a substantive duty. These are potentially burdensome requirements and if a parent cannot discharge them then they will have to find some alternative means of securing necessary education by sending the child to school.

Section 7 must be read with s.9, which is at p.10 of the authorities bundle. Two points to note there. Yes, it does indeed emphasise the importance of parental preference, but that is a duty to have regard to the general principle, and duties to have regard are ones that should be followed unless there is a good reason not to.

The second point is that the duty is expressly - and as part of the duty is expressly termed to be - only so far as that is compatible with the provision of efficient instruction, and I would emphasise “efficient instruction” links to, looks back to the concepts we have been looking at earlier.

The duties that I am about to discuss that fall on the local authority have to be viewed, in my submission, in the light of the general responsibilities in respect of

education that fall on the local authority under s.13 which is at p.13 of the authorities bundle. That is not the duty under s.13.1 is not restricted to education in any particular institution, such as a school, it is education generally and that would include the education of those who are being educated at home.

Also, the duty under s.13(a), which is at p.15 of the authorities bundle, must ensure that relevant educational functions there, relevant training functions are, so far as they are capable of being so, exercised by the authority with a view to, *inter alia*, promoting high standards and performance of learning potential.

Education functions are then defined, you do not need to go to it, my Lord, but they are defined later on in the Act at s.43 -- sorry, 579 at p.56 as education functions means functions specified in sch.36(a) and then 36(a) is at p.63 of the bundle. 62 -- sorry, in 63 of the bundle, and which includes functions conferred on a local authority under the Education Act which is then defined in s.578 and that includes both the 96 Act and the 2002 Act. Also includes, for these purposes, the power under s.36 of the Children Act 1989 to make an educational -- seek an educational supervision order and we see that at p.63 of the authorities bundle. Also, the duty under s.175 of the 2002 Education Act which your Lordship will find at p.95:

> "[The] local authority shall make arrangements for ensuring that the [education] functions … are exercised with a view to safeguarding and promoting the welfare of children."

So that underscores the point I made earlier in relation to the essential and important link with safeguarding and welfare and for these purposes, because the Education Act 2002 is to be read as a piece with the 1996 Act, the same definition of education functions is applied. And we see that from s.212 (2) at p.97 of the authorities bundle.

Next, moving on from s.7 and 9, the next place to go is s.436A. Again, I hope I do not labour things too much, but I do want to make some points on that.

The first point to note is that it is a duty to make arrangements and the purpose of those arrangements is to enable the local authority to establish, so far as it is possible to do so, and the Secretary of State's view is that it does not simply mean so far as is convenient to the local authority, but means as far as is actually possible to identify -- to establish the identities of children in their area who are compulsory school age but are not registered pupils at school and are not receiving suitable education otherwise than at school.

We then find there the definition of suitable education for the purposes of the subsequent provisions and that is in subsection 3. And again one sees that that mirrors s.7, it defines suitable education as efficient, full-time education, suitable, and suitable is again cashed out in terms of age, ability, aptitude and any special educational needs.

Now, the concept of receiving is still important because we find that in subsection 436A(b), so we still have the four elements that I referred to in relation to s.7. We will see that receiving also appears in s.437(1). So again, those four elements are there and those all have to be satisfied, all of them are potentially in play.

Now, it is also important to note at this point, my Lord, a potential for equivocation and confusion here because suitable education is used in two ways. One, it is used as the defined term "suitable education" as cashed out in subsection 436A(3) and it can also be used in the narrower sense as it appeared within 436A(3) of education that is suitable to age, ability and aptitude. In my submission, it is important to understand which of those -- in which way the term is being used and some of the differences between my learned friend may be explicable because their clients, or they themselves, are using the term in one way and the other is using it in another way.

So that is 436A.

The next point -- so that then takes us to 437, which is the first point at which a formal step is taken in the proceedings and again the precise wording of that is important. 437(1) (inaudible):

> "If it appears to a local authority that a child of compulsory school age in their area is not receiving suitable education".

So that is education, suitable education, as defined in 436A(3), so efficient, full-time education, suitable to his age, ability, aptitude and special educational needs and that education has to be received.

I repeat the submission made by my learned friend Ms Clement in the written submissions that we say this is a low threshold. It merely needs to appear to the local authority that it is not the case that the child is receiving suitable education. The local authority does not need to be satisfied that the child is not receiving suitable education. Parliament has clearly used that word within these provisions, if it means it, but it has not, it has simply used the word "appears" and that is a low threshold. Pointing to other cases in other statutes where different wording is used where there is a low threshold, as Mr Wolfe does in his skeleton argument, in my submission does not change that position.

It is clearly a low threshold. Both on the basis of the words that are used in the provision, but also if one thinks about how it fits into the scheme. The authority carries out some informal enquiries. If at the end of those informal enquiries it is left in a state where it appears to it that the child is not receiving suitable education, then that triggers its duty to serve a notice, what has been dubbed a notice to satisfy.

Now, my learned friend has made much of the fact that we refer in the written submissions to the burden shifting and on that I think it is now our -- it falls to us, as it did with Mr Greatorex, to say that perhaps that had got lost in the speed at which the written submissions had to be prepared. We are not, to be clear, not suggesting that the burden of proof was on anyone else, in particular the local authority, before that,

all we are saying when we refer to the burden of proof shifting to the parent is that at that point there is plainly a formal burden of proof and it is on the parent. We see that from the wording of 437(3).

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

And then there is a second condition about expediency of the child being at school, then they duty falls on the local authority to make a school attendance order.

There is, in my submission, nothing in the wording of s.436A or indeed 437(1) to suggest that there was a burden on the local authority. It is indeed the case that the local authority has the duty to make arrangements and, as is explained in our statutory and non-statutory guidance, a duty to make informal enquiries, but that does not mean that there is a burden on anyone in particular. All that -- the only question that arises is a simple question as to whether or not it appears to the local authority, on whatever evidence it happens to -- information it happens to have been able to gather, whether the child is receiving suitable education or not.

My learned friend Mr Wolfe also characterised the question, he has put it that the s.437(1) answer as being whether there was a suitable -- whether the local authority were satisfied that the child was not receiving suitable education, but that is not the word of the statute, it just says "appears", and that is important and must not be elided. So we say there is a low threshold at that point and indeed that fits in the scheme where there is then a *prima facie* -- some *prima facie* basis for thinking that the child is not in a suitable education has to arise and then the burden falls on the parent plainly under subsection 3 to then satisfy the local authority.

The statutory scheme, in our submission, leaves it largely open to the local authority as to how it approaches the question of suitability. It has a duty, but there is very little to suggest there is anything other than the Wednesbury basis for assessment as to whether it is properly carrying out its assessment of suitability.

Reiterating a point I made in relation to s.7, when the authority is considering a position under 437(1) and then indeed under 437(3), the relevant threshold has to be applied in relation to each of the four elements: receiving, efficiency, full-time and suitable education. If at the 437(1) stage it appears to the local authority that one or other or a combination or all of those elements are not being or are not met, then they have a duty to act and to issue a notice to satisfy.

Similarly, if at the next stage under 437(3) the local authority is not satisfied in relation to any one or a combination or all four of those elements, then it must, provided the subsection 3(b) condition was also satisfied, it must issue a school attendance order.

It is also, in my submission, to be noted here that the importance of focussing on the individual child, which the Secretary of State entirely accepts - and indeed says in terms on a number of occasions in his guidance - cuts both ways. My learned friend Mr Wolfe suggests it is principally significant in requiring the local authority not to set down rigid criteria. That is true to an extent, but it is equally the case that the local authority has to be, in each of the elements that I have identified, in relation to each child it must be satisfied to the relevant degree, either it must appear to be -- not -- it must not appear to be the case that the child is not receiving suitable education cashed out in terms of the four concepts I have referred to, or then at the subsection 3 stage, it must be not satisfied in relation to each of those elements in relation to a specific child. So that, in my submission, emphasises the legitimacy of the local authority expecting to have some fairly substantive evidence as to the position in relation to the particular child.

I have said that the appropriate standard of review in relation to local authorities, that the decisions that it comes to is the Wednesbury standard. In my submission, that is

then further emphasised if one goes further on through the statutory scheme. I do not propose to do so in great detail, but if one skips forward to s.442, at p.33, this is a provision which permits a parent to ask the local authority to revoke a school attendance order which the local authority:

> "… shall comply with [such a] request, unless they are of the opinion that no satisfactory arrangements have been made for the education of the child otherwise than at school."

So again, it is the opinion -- it is the subjective opinion of the local authority which matters there. In my submission, the only sensible way of analysing that again that has to be assessed on a Wednesbury basis.

Sorry, I should have said when I was talking about the -- when I was talking about the absence of any indications statutory provisions that there was a burden of proof on the Secretary of State, I should also have said that in my submission exactly the same applies in relation to his guidance.

The guidance is clear that there is a burden on the parent after -- once one gets to the s.437(1) stage having been reached, but -- sorry, once a notice has been issued under that, but the Secretary of State at no point in the guidance says there was a burden on the local authority prior to that, it was just simply the simple question of whether or not it appears to them that the relevant matters obtain.

My Lord, I do briefly want to take you to the case of *Phillips v Brown*. This is a judgment of the Divisional Court, so the position would be that your Lordship -- and it is a decision under the previous statutory regime, but I think everyone accepts that those provisions are materially similar to the ones that are in issue here. As a decision of the Divisional Court, it is not strictly binding on you, but you should only depart from it if you think it is clearly wrong. In my submission, it is not clearly wrong, indeed it is entirely right.

The issue there was that Mr Phillips, when the local authority made enquiries, informal enquiries of him simply wrote back - and we see this at the bottom of p.118 - with a bare assertion that he was discharging the statutory duty quoting the terms of the statute. His position was that the local authority required some positive evidence of or some positive indication of lack of suitable education and the mere absence of evidence was not sufficient. That was firmly rejected by the Divisional Court. We see that from the passage at p.121 that my learned friend Ms Clement quoted in the submissions.

In my submission, it is quite clear that a situation where nothing is provided in response to informal enquiries entitles a local authority to issue a notice to satisfy. Where there is a bare assertion but without any more, plainly that would in principle entitle them to issue a notice to satisfy. There may in some cases be some other evidence from somewhere else that displaces that assumption, but on the face of it, they may indeed be duty bound to do so. Beyond that, in my submission it really is a question of Wednesbury reasonableness whether, in the particular circumstances of the case, the authority should or should not be satisfied or for it to consider that it appears to them that the duty is not being discharged. As Mr Greatorex has pointed out, this is not (inaudible) or Wednesbury challenge.

I then turn on to the specific points that I want to make. The first point is in relation to not receiving the relevant education. In my submission, the Secretary of State is very clear and indeed in my submission it is quite clear on the face of the Act that it is fundamental that the local authority be able to be satisfied or at least for it not to appear to it that education is not being received. That is a separate question from whether the education is suitable or efficient or full-time.

If it does not appear to the local authority that education is being received, then it is not in a position to come to a view which would stop it from falling under the duty to issue a notice to satisfy. So it follows from that that in my submission any suggestion that a local authority is not entitled to enquire about whether or not education is actually being received is simply wrong. A local authority is entitled to do that. There is nothing in the statutory scheme to suggest that a local authority is required to

accept a report. That would only be the case if it would be Wednesbury unreasonable in the particular circumstances of the case for it not to accept the relevant information.

Now, my learned friend has referred to the Secretary of State's guidance and if I may take your Lordship to that, there is the Secretary of State -- let me find the relevant bit. Yes, it is para.5.2 on p.170 where the Secretary of State says:

> "It is important that the authority's arrangements are proportionate and do not seek to exert more oversight than is actually needed where parents are successfully taking on this task."

I.e. the task of educating children at home.

And then on the next page at 5.4, the second bullet point:

> "In cases where there are no previous concerns about education provided and there is no reason to think this changed because the parents continue to do a good job, such contact would often be very brief."

But in my submission it is not Wednesbury unreasonable for a local authority, where there has not been direct evidence previously of education being provided, to seek some co-operation beyond the contents of the report. And it will only -- that will only be an impermissible option if the high threshold of Wednesbury irrationality is surmounted.

The Secretary of State will be very concerned, my Lord, if anything falling -- any part of this court's decision were to suggest that a local authority was required to accept a parent's report as a matter of law which, in my submission, does seem to be a fundamental assumption underlying Mr Wolfe's submissions, however much he may suggest otherwise.

The second point is in relation to policies. The Secretary of State makes clear that he would hope and expect local authorities to have policies in relation to home education. There is, in the Secretary of State's view, nothing wrong with a local authority having a policy that identifies the kinds of information and evidence they would generally expect to see in order to meet the relevant thresholds under s.437(1) and (2). Nor in principle is there anything wrong with referring the balance of probabilities. These are civil matters, indeed if anything (inaudible) probably puts the matter too highly in respect of s.437(1) because all that is required there is the appearance of education not being provided, of the relevant kind not being provided.

Nor, in our submission, is there anything in principle wrong with reference to a reasonable decision maker. The local authority should not be unduly lax to a Wednesbury reasonable extent nor unduly strict to Wednesbury extent when considering the evidence they have. But what is required is for them to consider the evidence they have and form a view attaching such weight as they see fit to that evidence, and again the weight that they would attach to the evidence will be a matter for Wednesbury review not any lower threshold. Provided the policy is not so rigid that it is a blanket policy and to unlawful (inaudible), then the Secretary of State in principle would not see anything wrong with that.

The next point is in relation to raising concerns. Section 436A does not specifically say that a local authority needs to raise concerns it has with a parent. The Secretary of State statutory guidance says that the local authority should consult with the parents before issuing a notice to satisfy and we are quite clear that it is generally appropriate for an informal approach to unresolve things at that stage. But so far as there is any duty to raise concerns, that is duty to raise the concerns that the authority has. So if the authority does have a concern that the education is not actually being received and, as I said earlier, that in principle is a concern that an authority can lawfully have, then it is entirely entitled to raise that with the parent and indeed should do so.

If a local authority had a policy that purported to preclude it from raising such concerns and restricted the concerns that it could raise only to questions as to suitability in the narrow sense, commenting on the contents of the report, that would, in my submission - and I have checked and got instructions on this - that would, in our view, be unlawfully restrictive and would itself be a fetter.

The fourth and penultimate point before I finish my submissions is in relation to the guidance. The guidance that has principally been referred to is the non-statutory guidance. Both parties in the past have referred to it as statutory. It is not, but in the Secretary of State's submission, it is relevant matters that the local authority in particular should have regard to to the extent that it correctly sets out the law and in our submission it does correctly set out the law. But that guidance has to be read as a whole and not cherry pick the particular passages that might be helpful to one party or another.

In that regard, I particularly refer your Lordship to the parental guidance and one of the key passages that the claimant has from an early stage in these proceedings referred to is para.2.11 which is at p.208 which says there are no legal requirements for you, as parents, educating a child at home to do any of the following, and then there is a list of various things. That is correct. There are no legal requirements to do any of those things, but that has to be read in the context of para.2.10 which emphasises that it must be age appropriate -- education must be age appropriate, enable a child to make progress according to his or her particular level of ability and should take account of any specific aptitudes and then sets out -- and at point (a) on p.207, there should be a minimum standard that is aimed at.

2.11 also has to in particular be read with 2.12, which says:

> "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."

My Lord, in my submission that is going to back to the point essentially made by the Divisional Court in *Phillips v Brown*, that although there is not a legal obligation on a parent to provide certain things to a local authority, they may well find that if they do not, they do not put -- the local authority is not put in a position where it can be confident it can cease to appear to them, as it were, that a suitable education is not being provided. But that is not to impose an obligation or anything like that, it is simply a common sense statement of the obvious and obvious consequence to the way the statutory scheme works.

My final point is in relation to the nature of the challenge. My Lord, again this is a point that is, in my submission, clear from *Phillips v Brown*. There are a number of opportunities under the statutory scheme which is quite carefully crafted to allow various opportunities for a parent substantively to demonstrate they are discharging their duty under s.7. There are two opportunities at least to demonstrate that to the local authority under s.437(1) and then under s.437(3). Again, if the parent asks to revoke a school attendance order under s.442, they can then also demonstrate to the Secretary of State if they apply for a direction from the Secretary of State and finally they can do so in the Magistrates Court.

In my submission, the warning from the Divisional Court in *Phillips v Brown* that a parent should focus on questions of substance as to the education that is provided is an important one and challenges that seek to challenge what should be a quick, non-bureaucratic stage should not be readily encouraged.

My Lord, if I may just check that I --

My Lord, those are my submissions. I am sure I was a little bit longer than I was planning.

MR JUSTICE LANE: Not at all. Thank you very much indeed. Yes, Mr Wolfe.

MR WOLFE: My Lord, I am grateful.

My Lord, I am going to deal, if I may, with the Secretary of State's submission first and then deal with the defendant's. At least with the Secretary of State, I will try and deal with them in the order that they were made because there was a pattern to that.

First of all, the suggestion of distinction. A significant distinction between the words "receiving" and "providing" and something is made, I think, of the fact that we used the word "providing" in various places. Can I be clear, we intend no significance in that and can I also in that context just ask my Lord to turn up the Secretary of State's local authority guidance at p.171 to start, if I may.

MR JUSTICE LANE: You are going to show me some instance of --

MR WOLFE: (Inaudible). Tab 9.

MR JUSTICE LANE: Yes. Just a second. 171, yes.

MR WOLFE: I am going to give you three points in three pages.

MR JUSTICE LANE: Yes.

MR WOLFE: 171, 5.4, second bullet point:

> "... the authority may reasonably inform itself of the current suitability of the education provided."

And then the second reference is 172, para.6.5:

> "The most obvious course of action is to ask parents for detailed information about the education they are providing."

Then 174, para.6.12, this is a post NTS process, but I am not looking at it for that purpose. By the lower hole punch:

> "... the information provided by the parents should demonstrate that the education actually being provided is suitable ..."

There is no pin head to dance on between those two words and we do not seek to dance on one.

The next point for the Secretary of State is the threshold question. It may be that we have misunderstood what the Secretary of State was saying when the Secretary of State said lower threshold. As explained by Mr Cornwell, I do not think there is anything between us at the end of the day on that because he focuses - and rightly focuses - on the statutory questions and we absolutely agree that the statutory questions are the critical questions, and as he repeatedly emphasises and so do we, the question for the local authority at the first stage is does it appear to us that the child is not receiving suitable education? So yes, it is a question of appearance and to that extent we take some adjective we are going to apply to that, but the phrasing is absolutely clear: does it appear to us that the child is not receiving suitable education. It is expressed, if you like, in that negative way.

As distinct from what happens after the NTS has been served, which is where there is a formal burden shifting. Now, just to be clear on what Mr Cornwell says about that, we say he was right to say there is a burden shifting, but we do not claim - and we have never claimed - that there was at the beginning of the process some burden on the local authority. This is not burden versus counter-burden, it is a simple statutory question: does it appear to us that the child is not receiving suitable education? And as you have seen here - and I will show you again the NTS in a moment - this local authority did not actually answer that question. They did not reach a conclusion it appeared to them that the child was not receiving suitable education, and I will come back to that in a moment.

What is absolutely critical about that first informal stage is that in the context of the local authority asking itself that question: is there something here which makes us think the child is not receiving a suitable education, there is not a burden on the parent. That is why the shifting the burden angle is correct, there is not a burden on

the parent, there is a simple statutory question to be answered. And the Secretary of State's guidance got this absolutely right, p.167 of the materials bundle and the local authority on statutory guidance, at 4.2, the closing couple of lines:

> "... this should not be taken as implying that it is the responsibility of parents ... to 'prove' that education at home is suitable."

That is absolutely correct. So stage 1, informal enquiries, straightforward question for the local authority: does it appear to us that the child is not receiving suitable education? If the answer is: it does appear to us that the child is not receiving suitable education, notice to serve -- satisfying, sorry, burden then on the parents, but there is not a burden on the parents in that first stage. That in a sense is the beginning, middle and end of the fundamental problem with the local authority's additional material at p.142. Sorry, 144, I am sorry, in the court bundle. Because that very clearly in the opening under the rubric of definition, it goes beyond a definition:

> "Parents ... are expected to provide evidence ... that would, on the balance of probabilities, convince a reasonable person ..."

That is an expression of a burden of proof. That is straightforwardly contradicting para.4.2 of the Secretary of State's guidance which, of course, is not the law and straightforwardly contradictory to the statutory scheme.

Just to put that in the context of, if it matters, the claimant's own experience, if we look at the rejection letter of her stage 3 complaint, it is p.578, you have seen this before, the penultimate paragraph on 578, very clearly -- the third paragraph on 578 in the rejection of her stage 3 complaint picks up on exactly that point from the local authority's own policy statement.

MR JUSTICE LANE: Yes.

MR WOLFE: Our ground is that as seen in 144 and in that letter to the claimant they are imposing a burden of proof on the claimant at the informal stage which is just not there in law as the Secretary of State's guidance makes clear. The statutory

question is one on enquiry for the local authority. We do not accept the counter-effect of that is a lower threshold, it is the statutory question.

Just in terms of how the local authority answer to that question is to proceed, we simply say that the local authority has to answer that question by reference to the information and evidence which is provided to it. It has to evaluate and weigh the material which has been given. I will illuminate that a little bit more in a second. It cannot at an opening stage rule out chunks of stuff and yet that is what this local authority has done. I will show you that again in a moment.

I will come back to that point, but just Mr Cornwell's next point was how one evaluates the local authority's approach to that. He keeps saying it is a Wednesbury assessment. Well, it may be a Wednesbury assessment at some stage in the process and if, for example, a parent wanting to judicially remove the local authority's decision at that stage, that might be a case, but can I just remind the court of this, that s.443 of the Education Act, which is the end of the process, you have that in tab 1, p.35, at the end of the multistage process following if there is noncompliance with a school attendance order 443(1):

> "If a parent on whom a school attendance order is served fails to comply with the terms 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".

So it is not simply it is a side point to some extent, but I do not want my Lord to think that this is simply a Wednesbury question of the local authority. Our case does not turn on that, but I would not want the court to mis-state the position. It is a fresh question for the magistrates. So the local authority is doing this in the context of a process which in an extreme case will be dealt with in that phase.

Can I then look at *Phillips v Brown*, if I may, (inaudible) through the prism of the Secretary of State's submissions? You have that in tab 6. As you have rightly been

told, this was earlier legislation when there was not a 436A, it turned on the two steps of what were then s.37. The point about Mr Phillips' position was that he simply refused to provide any information at all. He simply said: "I am providing a suitable education. You cannot enquire about that." And I will show you that in a moment. The court's analysis starts at p.120 of your printout, middle of the page:

> "Two questions are referred to this court, namely the interpretation of the words 'if it appears in'".

And then a subsequent point about the court should not interfere with the judgment. It is the first of those of which we are concerned. Mr Phillips has argued his case, blah, blah, blah, and he says this. The first issue - two complaints - the first issue is that:

> "The LEA exceeds its powers if it asks parent to prove that they are discharging their duty to ensure their children are properly educated, unless it has some reason to doubt this is the case."

Then there is a second point. The first point though is explained at the top of 121. It understands what the submission was, if we look at the top of 121:

> "Mr Phillips submits that unless and until something comes to the notice of a local authority which causes it to conclude that prima facie particular parents are in breach of their duty … it is neither bound nor entitled to make inquiries of those parents. He claims that an L.E.A. is in the same position as a policeman and says that policeman [should] not go from house to house inquiring whether a burglary has been committed. Similarly, L.E.A.s should not oppress parents by inquiring whether there has been a breach of section 36."

That is Mr Phillips' submission. He says unless you have some information as if somebody reported a crime, you cannot even ask me. That is the submission that the court rejects and that is plainly not a submission -- well, it is not a submission we make and it would not be a sustainable submission in the light of s.436A because in effect s.463A has imposed a duty to make enquiries. I am slightly (inaudible) on that.

Indeed, s.436A you might think is almost giving effect to what the Divisional Court goes on to say in the middle of p.121:

> "What should it do? I do not accept it should do nothing. The right of the accused is crystallised in an attempt because of the lack of ostrich [dah dah, dah].
>
> "The most obvious step [five lines down] is to ask the parents for information."

Well, that is now the 436A obligation, so effectively on a statutory footing. Of course such a request is not the same as a notice under s.37(1) of the Education Act and the parents would be under no duty to comply. That is the distinction between the two steps. However, it is said to do so if - and this is a really important sentence in my understanding - a distinction here:

> "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 LEA will have to consider and decide whether it appears that the parents are in breach of s.36."

An important sentence reminding us that the question is: does it appear to the local authority is in breach, but also Mr Phillips' case is simply asserts without more my education is suitable. Important words here though: "No information at all and without giving any details."

My Lord, you will see in a moment when we are grinding back through it that that is very much not his case and you, my Lord, made the point Mrs Goodred had spent many hours explaining, giving details of precisely the education that is being provided, so of course *Phillips v Brown* is good on what it says in relation to the situation it dealt with. It has now been, as it were, swallowed up by the new statutory scheme in terms of putting the obligation to enquire on a statutory footing, but it is not rejecting anything further than that and it is not putting any further gloss on the statutory question: does it appear to us on the basis of the information and the details we have received that this child is not receiving suitable education?

That may be it on the Secretary of State. That is it on the Secretary of State. Can I then return, if I may, to the submissions of the local authority. First of all to remind the court in the context of what I have just said about the statutory question of what the actual notice to serve is (inaudible) said here. So at p.489, so this is in very direct terms:

> "We have recently written to you about your child's elective home education and unfortunately have been unable to ascertain their educational provision."

Now, the statutory question is: does it appear to us that your child is not receiving suitable education?

The first point, they do not address the statutory question and indeed you, my Lord, have seen examples - and it is p.554 - of where they actually go as far - 554 - Mr Berryman's case to say well, they are not actually suggesting you are not providing suitable education, but that is the statutory question. That is why our ground 4 is very clear in saying that I am not actually, because of their approach, addressing the statutory question. They say you are not able to ascertain. That is not an answer to a statutory question.

In terms of the not able to ascertain, the defendant's skeleton which Mr Greatorex is taking you back to is very clear on this point. The last sub-paragraph of his 11, 11.3, he emphasised - and so do I - this no doubt carefully crafted submission, the last sentence at 11.3:

> "The claimant has not to date provided any evidence of her children's reading and writing ability".

You, my Lord, have seen that she explained - and I only showed you Leah just for simplicity - what Leah is reading, how she reads it. Her prospects of achieving GCSE English a year early and so on. That is evidence of her children's reading ability.

Now, if the local authority wants to disbelieve it and say: “You tell us that, but that does not actually show she is getting it”, then they should come clean and say that.

Mr McIntyre in his witness statement said: oh, well it is not just a case of just believing parents. But what then is it? What then is it? My Lord put the very pertinent question: would it make a difference if Mrs Goodred put a statement of truth and said: “I make the necessary statement of truth to say that she is reading To reading To Kill a Mockingbird and so on, not to go too fine into the details, and the answer comes back: “it would not make any difference”. The reason it would not make any difference is because the local authority has a policy of saying that what parents provide is not evidence that their children are receiving it. That goes straightforwardly against every basic principle of the ordinary civil law and the ordinary approach of dealing with statutory questions like this.

The Secretary of State says give way to everything. We agree. Absolutely. It does not mean - it does not mean - just to deal with the point that they both seem to think that -- it does not mean you have to accept it in an unqualified way. There will, of course, be cases where there is something in the parental report or the surrounding circumstances which make it incredible or that make the local authority call for more information, but that does not entitle the local authority to simply disregard it in the way that has happened here.

Just imagine the situation in previous years. What is odd about the local authority’s case is that in the last three years they have accepted from Mrs Goodred reports of essentially this kind. Now, that puts them in a rather awkward position because that suggests that for three years they have been proceeding without any evidence at all.

MR GREATOREX: I am sorry, my Lord, at this point - and I hate doing this - I am going to object because this is now the third new point that has been made in reply. I have not stood up to interrupt, but it is not appropriate or fair for new points to be made for the first time by way of reply.

MR WOLFE: I am respond----

MR GREATOREX: It is the third one.

MR WOLFE: I do not think it is, but -- so to go back to -- the claim is not (inaudible) to date. That is the simple point. The local authority simply has the policy of not accepting parental reports as being evidence. You have seen that. Mr Greatorex would seek to gloss it by saying the written policy now withdrawn, query, includes the word "unlikely to", but let me just remind you what Mr McIntyre said in his opening salvo of the correspondence. When the first letter came, p.477 of the bundle, the middle of that paragraph, middle of that letter:

> "A report alone, however detailed, is, in my view, not going to be enough ..."

And you have then got Mr McIntyre's witness evidence which I have given you the salient elements to and also the salient elements from the local authority's pleadings in our paragraph - I have the wrong document - our para.69. There is a whole series of passages in the local authority's case and in Mr McIntyre's evidence which showed actually this is their operational rule.

Let me just test it this way: if we put the rule on the basis of it is unlikely to, then what is the local authority offering? What is it that a parent could do in their report to displace this otherwise apparently rigid rule? You cannot just add a word in like "unlikely" and say it is not a rigid rule, if in practice we see it operates that way, and if in practice nothing is offered to go in the report. Because they very clearly say "A report however detailed". So even if Mrs Goodred had said: "Leah reads To Kill a Mockingbird on a Tuesday. She read it yesterday from 5 until 7. She read it quickly. She read three chapters. She really enjoyed it. We had a conversation afterwards for the parental report." They are simply not going to accept that evidence because that is their working rule and that is the problem. That is the problem.

MR JUSTICE LANE: Yes.

MR WOLFE: We then have a question of specifying concerns. Just to put Mr Greatorex's mind at rest----

MR JUSTICE LANE: Yes.

MR WOLFE: -- Mrs Goodred of course understands that the local authority has served an NTS because she only provided a report, so to that extent she understands what their concern is “you only provided a report”. What she wanted, what she asked for in the correspondence - and I will not take you back to it - and what the local authority’s policy required was information about the specific concerns about the suitability of the education. In other words, we do not think To Kill a Mockingbird is an appropriate book or appropriate at this level, or whatever it may be. Or please tell us more and we have not got enough information about that. Those are information about -- sorry, specifying concerns about the suitability of education. There is none of that given here because all of that you might call fair process has been subsumed in a rule that basically says we will put your reports to one side.

Although Mr Greatorex said he was disagreeing with my characterisation of what Mr McIntyre had said, actually that is exactly what Mr McIntyre said in his witness statement when he said suitability did not arise here. You remember that para.27, we never got to that stage, that is exactly what Mr Greatorex said. We have not got to that stage because we did not have information about it actually being provided.

What Mrs Goodred wants - and it is not an unreasonable request, it is what the local authority policy requires - is not the law will accept that (inaudible), what the local authority policy requires is information about whether they have concerns about the education she said she is providing, her children are receiving. That is not some semantic technicality, that is what their policy requires and it is basic fairness because she is about at that stage to go into a process where she has to demonstrate suitability.

All the difference in the world going into a process which basically says: “what you say is good enough, but we do not believe you. Now prove it.” From: “We hear what you say, but we have concerns about this, that and the other” or whatever it may be. All the difference in the world. That is what she is asking for.

So in terms of Mr Greatorex's what difference would it make kind of question that she poses, the difference it would make is to have these complaints quashed and the matter previously (inaudible) would be that the local authority would approach the question, the statutory question, ask itself the statutory question, which it has not yet done, as you have seen, ask itself a statutory question on the basis of what parents have provided is indeed evidence. If the local authority has a reason to disagree with it, it should say so. If it has concerns arising from that information, it should explain those concerns. If it is then of the view that its -- (inaudible) registration not being provided, so be it, serve an NTS. But the NTS at that point would be a completely different situation to the one that Mrs Goodred and others have faced and that is the difficulty here.

That is why, to pick up, I suspect, the final point, the alternative remedies point, it is not an alternative remedy to say you can tootle down the line and persuade the local authority to revoke, the Secretary of State to direct or the magistrates to acquit because in each of those cases they are concerned with the underlying question of the suitability of the education in question. This case is not concerned with that question. This case is concerned with the process the local authority follow and that is why this group of parents through Mrs Goodred have got a very specific and focused judicial review looking at the local authority's approach to this stage in the statutory process.

This is not about suitability of the education provided to LB and A, it is not a question that Mrs Goodred could raise in subsequent steps in the process. *Phillips v Brown*, you may have seen the date on that, that was before the modern expression of "judicial review" in 1981. I do not think you could do what Mr Phillips did in those circumstances now in a Divisional Court case stated in those circumstances. In any event, this is the appropriate place we have the permission to challenge. This is about the legality of the local authority's policy approach manifested in those four ways.

It puts a burden on parents where there is not one, it fails to specify its concerns, it treats what they say as not evidence at all and it does not actually, having done all

those things, answer the statutory question. And that, in essence, is what we ask the court to pick up on, set out the problem with those legal processes. It is entirely possible that the local authority would go through Mrs Goodred's case or any one of the others and come to in the end the same result and serve an NTS, entirely possible. We do not seek to preclude that at all nor could we, but in that event the NTS that had been served would have gone through a lawful process. This NTS and those others have not gone through a lawful process.

My Lord, unless I can assist further, those are our submissions.

MR JUSTICE LANE: Thank you, Mr Wolfe.

I am very grateful to you for your respective submissions and I am going to reserve my decision in this case, so you will get it in writing in due course. Thank you.

(4.03 p.m.)