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My Ref: MP:MP2494

Date: 16 September 2021

By email to:
newproceedings@governmentlegal.gov.uk
paul.lowe@education.gov.uk

Dear Sirs

Our clients - Nigel and Sally Rowe

This letter is a formal letter before claim, in accordance with the pre-action protocol for judicial review under the Civil Procedure Rules.

The Claimants: Nigel and Sally Rowe of [redacted].

The proposed defendant: The Secretary of State for Education.

Defendant's ref.: Paul Lowe, Senior Lawyer, DfE Legal Advisors

The details of the claimants' legal advisers: See details at the top of this letter

Details of the matters being challenged:

Our clients propose to apply for judicial review of the following decisions by the Secretary of State:

1. The decision dated 13 July 2021 refusing to exercise the S.o.S.'s powers under s. 496 and/or s, 497 of the Education Act 1996 in response to the 'transgender affirming' policy adopted by [redacted]

2. Continuing to hold out the document known as 'Cornwall Guidance' as 'best practice' for schools, and failure to provide consistent and appropriately balanced, evidence-based guidance for schools about addressing pupils' gender identity issues.

Our clients are Christian parents who hold, and wish to instil in their children, Biblically and scientifically centred beliefs in relation to gender. In seeking to raise their children according to their Christian beliefs, they sent their two sons to a Church of England school on the Isle of Wight. Within a two-year period, both of their sons (both 6 years old at the respective relevant times) experienced a boy in their class who wanted to identify in the opposite gender. In the first instance, their eldest son grew up with the boy in question, who began identifying as a female, including wearing a female uniform and using a female name. Given that he had known this pupil since pre-school, the sudden change, and the way it was enforced by authority figures, proved incredibly challenging to him. Because of the confusion and discomfort suffered by their older son, he was removed from the school and home educated thereafter.

Their younger son, also when he was 6 and in Year 1, found himself in a class with a biologically male pupil who had just come into the school and would attend class, some days identifying as a male, and others as a female. Mr and Mrs Rowe attempted to work out their concerns with the school concerning their youngest son, so that he could remain.

In a response to their letter that they sent to the school of 7 June 2017 raising a range of concerns about the situation, the School responded by **letter of 14 July 2017**, suggesting *inter alia* that anyone who could not believe that these children were girls or refused to use female pronouns, would be viewed by the school as being 'transphobic'. The school also announced their intention to educate parents and students alike, in accordance with this transgender ideology. It did so citing guidance from the East Sussex County Council as well as its understanding of its obligations under the Equality Act 2010. The letter was clearly intended as the considered and comprehensive statement of policy on the issue, and is hereinafter referred to as "the School's Policy".

In consequence of the extreme 'transgender affirming' policy adopted by the School, our clients had to remove both their children from the School. Both children are currently home-schooled. Our clients would wish their children to receive education at school, but would only be prepared to place them in a school within the local education authority if they have proper reassurance that their children would be protected from harm caused by extreme transgender-affirming policies, and that their own parental rights will be respected.

By their solicitor's letter dated 17 November 2020, our clients made a formal complaint to the then S.o.S. ("the Complaint"), asking him to exercise his powers under s. 496 and/or s. 497 of the Education Act 1996. The complaint included detailed legal submissions, and the following evidence:

1. Report by Mr Graham Rogers, Consultant Psychologist.
2. Report by Dr Paul Rodney McHugh, University Distinguished Service Professor of Psychiatry at the Johns Hopkins University School of Medicine.
3. Report by Dr Quentin Van Meter, Paediatric Endocrinologist
4. References to a large number of scientific publications about the issues of transgenderism and gender dysphoria.
5. Correspondence between the claimants and Yarmouth Church of England Primary School (submitted under the cover of a further letter from ourselves dated 1 March 2021)

By letter dated 13 July 2021, the S.o.S. refused to exercise his powers under the Act. However, the S.o.S. also indicated that he is "committed to updating" the *Equality Act 2010 Schools Guidance* and is "currently considering" DoE's plans for this. Our clients welcome the indication that the current guidance, which endorses the Cornwall Guidance, is under review and will be updated. Our clients have a significant ongoing concern about the Cornwall Guidance and the S.o.S.'s endorsement of it, and schools across the country are under increasing pressure on this issue and need guidance as a matter of urgency. Our clients therefore require an indication of the timescale when the S.o.S.'s guidance will be updated, and a reassurance that the updated guidance will be lawful and rational.

Interested Parties

(1) [redacted] (**"the School"**), [redacted]

(2) Isle of Wight Council, County Hall, High Street, Newport, Isle of Wight PO30 1UD

The Issues

(1) The correct approach to the exercise of powers under s.s. 496 and 497

The following propositions of law are hopefully non-controversial:

Firstly, the duties under s.s. 9, 13(1), 78, 175 and 406-407 of the Education Act ought to be exercised in accordance with the principles of public law. Thus, if a school or a local authority exercise those duties based on (a) a material error of law and/or (b) a misunderstanding or ignorance of the relevant factual position (for example, the relevant scientific facts) and/or (c) in a manner incompatible with Convention Rights, it is thereby (i) acting "unreasonably" within the meaning of s. 496 and/or (ii) fails to discharge the relevant duty within the meaning of s. 497.

Secondly, the S.o.S. is bound by s. 6 of the Human Rights Act 1998 to exercise his powers under s.s. 496 and 497 in a Convention-compatible manner. This means that if a school's or a local authority's exercise of their Education Act duties, or a failure to exercise them, result in a breach of Convention Rights, the S.o.S. ***must*** intervene to remedy that breach insofar as his statutory powers permit doing so.

Thirdly, the provisions of the Education Act 1996 must be interpreted and applied, insofar as possible, in accordance with UK's obligations under international law, including Article 3(1) of the United Nation's Convention on the Rights of the Child, which provides:

> *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

The relevant decisions of the School, the Local Authority, and the S.o.S. all fall within the scope of that provision.

(2) The School's Policy is within the scope of its duties under Education Act 1996

The S.o.S. has erred in law in holding that the School's transgender-affirming policies do not constitute 'education'.

In particular, the references to 'education' within the Act should be interpreted in a Convention-compatible manner. The European Court of Human Rights has made a clear distinction between 'teaching' and 'education', the former pertaining to the transmission of knowledge for intellectual development, and the latter representing the entire process whereby beliefs, culture and other values are communicated to pupils. ECtHR, *Campbell and Cosans v. the United Kingdom*, application nos. 7511/76 and 7743/76, judgment of 22 March 1982, at § 33. Furthermore, education refers not only to the content of the teaching, but also to the manner in which it is taught. ECtHR, *Case of Efstratiou v Greece*, application no. 24095/94, judgment of 18 December 1996 at §§ 28, 32. The duties owed to parents under the Education Acts must be read in light of the Convention, and therefore apply to all of the functions assumed by the State throughout the entire education programme. *Kjeldsen, Busk Madsen and Pedersen v Denmark*, Judgment, Merits, App No 5095/71 (A/23), [1976] ECHR 6, IHRL 15 (ECHR 1976) at §§ 151-152.

Implementation of the transgender affirming policies is as much a part of education as is the teaching of a school's curriculum. In many ways, the moral, physical and spiritual effects of applying transgender affirming policies to primary aged school children are much more consequential and long-lasting than teaching the traditional curriculum. Moreover, in its letter of 14 July 2017, the School was clear that their intention went beyond the two children in question and included teaching pupils and parents alike the tenets of gender identity belief.

(3) Failure to consider the evidence of harm to children caused by gender-affirming policies

The decision of 13 July 2021 asserts: "*The Secretary of State has **found no evidence** to suggest that the school's actions, at the time, posed a risk to any child at the school, including Mr and Mrs Rowe's two sons. The evidence reviewed also suggests that the school's approach regarding gender identity was focused on the wellbeing of pupils. The Secretary of State has therefore concluded that the local authority is not in breach of section 175*". [Emphasis added]

It must be inferred that the S.o.S. has failed to consider the ample and credible scientific evidence on which our clients relied, including in particular (without limitation) the respective expert reports of Mr Rogers and Dr McHugh. The burden of their evidence is summarised in para 13 of the Complaint as follows: "*their evidence is that encouraging a child, particularly one whose gender confusion is likely to reduce with the onset of puberty, on a path which might include the medical suppression of puberty, cross-sex hormones and significant surgical alteration before they are old enough to know the consequences of such weighty and life changing decisions, is medically and psychologically unethical*".

In particular (without limitation), Dr McHugh's report in paras 21-25 sets out just some of the long-term physical consequences that can occur because of an overly liberal approach to transgenderism such as is set out in the Cornwall Guidance. Some of the consequences he lists include the prevention of secondary sex characteristics developing, arrested bone growth, decreased bone accretion, the full organisation and maturation of the brain being prevented, the inhibition of fertility, an increased risk for coronary disease and sterility, thrombosis, cardiovascular disease, weight gain, hyperglyceridaemia, elevated blood pressure, decreased glucose intolerance, gall bladder disease, prolactinoma, breast cancer, cholesterol issues, increased hepatoxicity and polycythaemia (an excess of red blood cells), an increased risk of sleep apnoea, insulin resistance, possible effects on breast, endometrial and ovarian tissues.

Our letter in para 11 expressly draws S.o.S.'s attention to the fact that "*policies which affirm a child in their gender confusion without requiring psychological evidence are **highly damaging to the children involved***" and "*leading experts in the area of psychiatry and paediatrics argue that **abundant scientific evidence** exists showing that transgender-affirming policies do none of the children they are meant to serve any real or lasting good; that it **harms the vast majority of them; and that it leads to catastrophic outcomes for many such afflicted children***" (emphasis added), and include references to the relevant publications.

The requirement to take account of relevant considerations and to consider relevant evidence is a fundamental principle of public law, reaffirmed in many cases starting from *Associated Provincial Picture House Ltd. V Wednesbury Corp.* [1948] 1 KB 223, per Greene MR at 233-234. The statute expressly imposes safeguarding duties on the local authorities, and requires an oversight of compliance with those duties by the S.o.S. The relevance of evidence of potential harm to children's welfare from the actions of local authorities is therefore indisputable (see *Wednesbury* per Greene MR at 228; *In re Findlay* [1985] AC 318 at 333H-334C). A failure to consider that relevant evidence expressly and properly brought to S.o.S.'s attention under a statutory procedure is *ultra vires* and/or irrational.

(4) Misinterpretation of the protected characteristic 'gender reassignment' under s. 7 of the Equality Act 2010

The Complaint included detailed submissions explaining that the School's Policy, and/or the Cornwall Guidance, are based on conflating (a) a child's subjective view of their gender identity and (b) the protected characteristic of gender reassignment under s. 7 of the Equality Act 2010. That is manifestly wrong in law. In fact, the legal protections afforded to gender reassignment under the Equality Act 2010 only apply to a portion of the people who identity as transgender: *Forstater v CGD Europe & Ors*, [2021] UKEAT 0105 20 1006 at §118.

The S.o.S. repeats the same error of law by recommending the Cornwall Guidance as best practice in his own Equality Act Guidance, and by refusing to intervene in the School's erroneous exercise of its duties.

The decision of 13 July 2021 states that on "the evidence" considered by the S.o.S., the School's decision was motivated, *inter alia*, by avoiding "*compromising the rights of* ***the transgender child***" (emphasis added). However, it is apparent from the School's Policy that the School was satisfied with a mere assertion by the child that they "identify" in the opposite gender. Such an assertion is not sufficient to evidence that the child is "transgender"; that is precisely the error of law our clients have complained about. By referring to the child as "the transgender child", the S.o.S. appear to endorse and/or repeat that error.

Our clients rely on the submissions made in the Complaint. In particular (and without limitation):

- Under the Equality Act 2010 s.7 a person has the protected characteristic of gender reassignment if they are proposing to undergo, are undergoing or have undergone a process (or part of a process) for the purpose of reassigning their sex by changing physiological or other attributes of sex.

- Young children under the age of 13 are "highly unlikely" to be *Gillick* competent to understand the nature of, or to 'propose' to undergo, the first stages of the process of gender reassignment; see in particular *Bell & Anor v The Tavistock and Portman NHS Foundation Trust* [2020] EWHC 3274 (Admin).

- The Gender Recognition Act 2004 is instructive as to the meaning of 'the process' of gender reassignment. The process is only open to persons aged at least 18 and based on medical evidence of gender dysphoria.

It is certainly not correct to refer to a child as 'transgender' for the purposes of the Equality Act 2010 or other legislation or guidance merely where they have, as in the present case, asserted that they are no

longer identifying with their biological sex, expressed confusion about their gender or requested to be addressed by a different name. It is an error of law for the S.o.S. to do so.

(5) Breach of our clients' and/or their children's Convention Rights

Protocol 1, Article 2 of the European Convention of Human Rights, as transposed into the UK domestic law by the Human Rights Act 1998, provides:

> "*No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions*".

The two sentences of Article 2 of Protocol No. 1 must be read not only in the light of each other but also, in particular, of Articles 9 of the Convention: *Catan v Moldova and Russia* (GC), para 136.

In particular, the first sentence of Article 9(1) protects the absolute right to "*freedom of thought, conscience and religion*". In contrast to the freedom to manifest one's religion, that general freedom is not qualified in Article 9(2) and cannot be lawfully restricted at all.

The contents of the School's letter of 14 July 2017 make it clear that the School was proposing to act in breach of our clients' and their children's Convention rights under Article 9 and/or Article 2 of the 1st Protocol. In particular, by prohibiting "*inability to believe a transgender person is actually a "real" female or male*" as the prime example of "*transphobic behaviour*" and "*bullying*", the School expressly prohibited its pupils from holding certain beliefs (which in our clients' case, correspond to the family's religious and philosophical convictions; and which are protected by the Human Rights Act 1998 and the Equality Act 2010: *Forstater v CGD Europe* (UKEAT/0105/20/JOJ); *R(Miller) v College of Policing* [2020] EWHC 225 (Admin)). This is a paradigm example of a breach of the freedom of thought, conscience and religion (not merely a restriction on the freedom to manifest religion or belief).

In any event, the restrictions set out in the School's letter cannot be justified as 'prescribed by law', proportionate, or otherwise 'necessary in a democratic society' under Article 9(2).

Our clients have been effectively deprived of their right to obtain school education for their children. The extreme Policy proclaimed by the School utterly fails to respect our clients' "*right to ensure such education and teaching in conformity with their own religious and philosophical convictions*". The Guidance behind the Policy has been endorsed by the S.o.S. and the Local Authorities, and our clients therefore have no assurance that it would not be applied to their children in any school in their area. In the absence of such an assurance, our clients have no alternative to home-schooling their children. That is clearly a severe prejudice to the children's right to education.

Our clients are aware that a few other children have been removed from the School because of the school's failure to balance these issues properly.

(6) Contradictory guidance

As pointed out in the Complaint, paras 40 et seq., the Cornwall Guidance as well as the East Sussex Guidance are documents drafted largely by campaigning groups with a political agenda regarding transgenderism. The documents are mainly aspirational and inform schools what they believe the law *should* be, rather than what it is. The campaigning points are then given legitimacy in that they are being held out by Local Authorities, and in the case of the Cornwall Guidance the DfE itself, as best practice. The Cornwall Guidance, for example, treats gender identity as synonymous with the protected characteristic 'gender reassignment', and ends many of its chapters with campaigning points that should be respected by schools. At the end of the document, it provides links to such controversial campaigning groups such as Mermaids. Opposition to the points set forth in the documents and the policy positions they underpin, are often labeled, as was the case with our clients, as being transphobic. Such practice is the very definition of the pursuit of partisan political aims.

On 24 September 2020, the Department for Education issued new guidance, entitled *Plan Your Relationships, Sex and Health Curriculum*[1].

The Guidance, speaking directly to the issue of transgender ideology and the use of materials from external agencies, is clear:

> *"We are aware that topics involving gender and biological sex can be complex and sensitive matters to navigate.* ***You should not reinforce harmful stereotypes, for instance by suggesting that children might be a different gender based on their personality and interests or the clothes they prefer to wear. Resources used in teaching about this topic must always be age-appropriate and evidence based. Materials which suggest that non-conformity to gender stereotypes should be seen as synonymous with having a different gender identity should not be used and you should not work with external agencies or organisations that produce such material****. While teachers should not suggest to a child that their non-compliance with gender stereotypes means that either their personality or their body is wrong and in need of changing, teachers should always seek to treat individual students with sympathy and support." [Emphasis added.]*

Continuing to endorse the Cornwall Guidance puts the S.o.S. in breach of his own RSE curriculum guidance quoted above. On the one hand, the S.o.S. strongly discourages (a) using materials "which suggest that non-conformity to gender stereotypes should be seen as synonymous with having a different gender identity" and (b) cooperating with campaigning groups which produce such materials. On the

1 *Found at:* https://www.gov.uk/guidance/plan-your-relationships-sex-and-health-curriculum#using-external-agencies.

other hand, the S.o.S. himself continues to endorse the Cornwall Guidance, co-authored by an external agency or organisation of exactly the type warned about in the RSE guidance, and which equalises non-conformity to stereotypes with transgenderism. This is irrational.

Action(s) that the defendant is expected to take:

In order to avoid litigation, our clients require the Secretary of State to confirm, by return:

(a) the intended timescale of the review of the Equality Act Guidance and when the new guidance will be issued.

(b) that the expert evidence submitted by our clients will be taken into account in reviewing and updating the Guidance.

(c) That S.o.S. will reconsider his decision dated 13 July 2021 in the light of the points made above.

The issues raised in our clients' Complaint have taken an extremely long time to resolve, causing severe prejudice to our client's ability to obtain school education for their children. Therefore, if litigation is to be avoided, the errors identified above must be remedied within a robust timetable.

ADR proposals

Our clients are mindful of both parties' mutual responsibility to consider whether some form of ADR might enable settlement of this matter without proceedings being commenced and without the incurrence of significant costs; accordingly they would welcome an opportunity to meet with you in ADR.

We would however want to know your client's position in relation to their claim. Our clients are open in respect of the detail of discussions.

The details of any information sought

As noted above the S.o.S.'s decision makes no reference to the scientific expert evidence served with our client's Complaint. We therefore assume that expert evidence is not disputed. In the event the S.o.S. intends to dispute any elements of that evidence, please identify all points of dispute in your Response.

The details of any documents that are considered relevant and necessary

The S.o.S.'s letter of 13 July indicates that he received "further evidence relating to the handling of your clients' complaint made in June 2017" from the School, and/or the local authority and/or the Diocese of Portsmouth. Please provide by return copies of all evidence received from those parties.

The address for reply and service of court documents

We are instructed to conduct correspondence and to accept service on behalf of our clients in relation to this matter. Therefore, please use this firm's contact details at the top of this letter.

Proposed reply date

Please acknowledge this letter by return. In line with the Pre-action protocol for judicial review, we require your substantive response within 14 days of this letter, i.e. by 30 September 2021.

Failing a satisfactory response, proceedings may be commenced without further notice.

We look forward to hearing from you.

Yours faithfully,

Andrew Storch Solicitors