

Our ref: COA13.1  
Date: 1 October 2020

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## JUDICIAL REVIEW PRE-ACTION LETTER

**SUBSTANTIVE RESPONSE REQUIRED BY FRIDAY 16 OCTOBER 2020, 4PM**

Dear Madam/Sir

### Proposed application for judicial review on behalf of the Coalition of Anti-Racist Educators and Black Educators Alliance

1. We act for the Coalition of Anti-Racist Educators ('CARE') and Black Educators Alliance ('BEA'). This letter is written in line with the judicial review pre-action protocol and practice direction on pre-action correspondence and so your response should take the form prescribed therein.
2. On 24 September 2020 the Department of Education published guidance on the curriculum for personal, social, health and economic ('PHSE') education for school leaders, governing bodies, curriculum co-ordinators and teachers to "*plan, develop and implement the new statutory curriculum*".
3. Our clients aver that this guidance is unlawful on the basis that it is irrational, *ultra vires* / for an improper purpose, amounts to breaches of Articles 9, 10 and 11 ECHR pursuant to section 6 of the Human Rights Act 1998, and in breach of s.149 Equality Act 2010.

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4. This letter represents an opportunity for you to reconsider and withdraw this guidance immediately without the need for parties to incur the time and costs of issuing legal proceedings in court.
  
5. In line with the pre-action protocol for judicial review, we would be grateful for your response by Friday 16 October 2020, 4pm. A prompt response is also necessary, given that the guidance is having an immediate impact on teaching staffs' ability to provide education and pupils' entitlement to receive education.

**The details of the legal advisers; reference details; address for reply and service of court documents**

6. Our details are given on the letter head above. This matter is being dealt with by Rachel Harger and Jules Carey.
  
7. Please confirm as a matter of priority who will be dealing with this matter.

**The proposed Claimants**

**Coalition of Anti-Racist Educators**

8. CARE is a network of school, college, and university teachers and support staff, youth, community and union organisers, and other educators, as well as parents and students.
  
9. The network launched on 23 June 2020, with a primary aim of promoting anti-racist education in schools, colleges and other educational settings.

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## **Black Educators Alliance**

10. BEA is a self-organised network of Black<sup>1</sup> educators who are committed to transforming structures and institutions which impact upon the equitable experiences, achievement opportunities and outcomes for Black educators, parents, families and students.
11. BEA is committed to promoting aims across education sectors which include “*promoting greater understanding of structural and institutional racism*”, “*challenging racism at every level*”, “*reclaiming social justice*” and “*wealth harnessing for the good of all*”.
12. Please note that, if it becomes necessary to issue proceedings, we reserve the right to do so on behalf of additional Claimants (to include individual teachers and/or pupils and/or external agencies).

### **The details of the matter being challenged**

13. Our clients seek to challenge the Department of Education guidance, “*Plan your relationships, sex and health curriculum*”, published on 24 September 2020 (“the guidance”).
14. The pre-amble to the guidance suggests that it is aimed at, “*head teachers and principals, senior leadership teams, teachers, curriculum co-ordinators, governing bodies and proprietors.*” Its purpose is said to be to give, “*basic principles to help school leaders plan and prepare for the new statutory curriculum.*”
15. The guidance provides that “*all schools must have a written policy in place for the new relationships education and relationships and*

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<sup>1</sup> BEA has agreed to use the term ‘Black’ in a political context to encompass all members who identify as Black, Asian and any other racialized groups who do not identify themselves as white.

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*sex education curriculum” and that, “many schools who are planning their curriculum for relationships education, relationships and sex education and health education will be doing so within a broader PHSE education framework”.*

16. As these citations make clear, the guidance is intended to be mandatory. The word, “*must*”, is repeatedly used. It is made clear that Ofsted will carry out inspections (from the start of January 2021) “*in the context of this guidance*”.

17. The guidance acknowledges the fact that many teachers place reliance on external agencies to provide speakers, tools and resources to enhance and supplement pupils’ education. However it goes on to set out a series of mandatory duties in respect of such external agencies.

18. Firstly, it states that local authorities, governing bodies and head teachers “*must*”:

- *“Forbid the pursuit of partisan political activities by junior pupils;*
- *Forbid the promotion of partisan political views in the teaching of any subject in the school; and*
- *Take reasonably practicable steps to secure that where political issues are brought to the attention of pupils, they are offered a balanced presentation of opposing views.”*

19. Secondly, the guidance states that schools should not “*under any circumstances*” work with, or even use materials produced by external agencies that take or promote “*extreme positions*”. Examples of extreme positions include, but are not limited to:

- *“Promoting non-democratic political systems rather than those based on democracy, whether for political or religious reasons or otherwise*

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- *Teaching that requirements of English civil or criminal law may be disregarded whether for political or religious reasons or otherwise*
  - *Engaging in or encouraging active or persistent harassment or intimidation of individuals in support of their cause*
  - *Promoting divisive or victim narratives that are harmful to British society*
  - *selecting and presenting information to make unsubstantiated accusations against state institutions.”*

20. On the specific matter of resources, the guidance goes further and stipulates that:

*“Schools should not under any circumstances use resources produced by organisations that take extreme political stances on matters. This is the case even if the material itself is not extreme, as the use of it could imply endorsement or support of the organisation. Examples of extreme political stances include, but are not limited to:*

- *A publicly stated desire to abolish or overthrow democracy, capitalism, or to end free and fair elections;*
- *Opposition to the right of freedom of speech, freedom of association, freedom of assembly or freedom of religion and conscience;*
- *The use or endorsement of racist, including anti-semitic, language or communications;*
- *the encouragement or endorsement of illegal activity;*
- *a failure to condemn illegal activities done in their name or in support of their cause, particularly violent actions against people or property.”*

21. The Secretary of State also published practical training materials for primary and secondary schools to use to train staff to “*teach about respectful relationships*”. These materials inform staff that

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they should “*teach that censorship and ‘no platforming’ are harmful and damaging*”, and explain that “*seeking to get people ‘cancelled’ (e.g. having them removed from their position of authority or job) simply because you disagree with them, is a form of bullying and is not acceptable*”.

22. Finally, the guidance makes reference to the Equality Act 2010 and the Public Sector Equality Duty that schools are required to comply but reiterates that the school curriculum is “*exempt from the duties imposed on schools by Part 6 of the Equality Act*” and that “*this means schools are free to include a full range of issues, ideas and materials in their curriculum. Schools are not required to equally weight all of the protected characteristics within the curriculum*”.

23. However, whilst the guidance acknowledges a school’s responsibility to comply with the Public Sector Equality Duty, there is no explanation of how the Secretary of State has complied with this duty in publishing the guidance.

### **The grounds of challenge**

24. The guidance is unlawful for the following four grounds.

25. **First**, in publishing the guidance, the Secretary of State has acted without a legal power and/or for a purpose that is different to the statutory purpose.

26. The power to give guidance about the provision of education about relationship, sex, and health arises under s.80A Education Act 2002 and s.403(1A) Education Act 1996. Neither power permits the Secretary of State to seek to enforce his political preference as regards the use of teaching materials from external agencies.

27. Section 80A sets out the purpose for which guidance must be given. It is to ensure that pupils learn about the nature of marriage and civil partnership, the safety in forming and maintaining relationships, how relationships may affect physical and mental health and well-being and that education is appropriate “*having regard to the age and the religious background of the pupils.*” Section 403(1A) is in similar terms.
28. The purpose of the guidance (in particular those sections of the guidance set out above) is to enforce the Secretary of State’s political preferences. It is not understood how prohibiting the use of teaching materials prepared by an external agency that may at one stage have expressed a view about capitalism, “*victim narratives*”, or about wider state malpractice can fall within the statutory purpose set out in s.80A Education Act 2002 or s.403(1A) Education Act 1996. The guidance is also inconsistent with (and/or goes significantly further than) the statutory guidance on the use of external materials.<sup>2</sup>
29. Second, the guidance represents a considerable and unjustified interference with the common law right of freedom of speech and with the rights to freedom of religious belief and to freedom of expression set out in articles 9 and 10 of Schedule 1 of the Human Rights Act 1998.
30. The guidance also represents a considerable interference with these common law and Convention rights. This is because they seek to prohibit teachers from using the materials that they consider most relevant to the matters set out in the Curriculum. They also prevent pupils from learning about alternative political ideas. Furthermore they seek to prevent movements and agencies from providing teaching materials to schools.

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<sup>2</sup> “*Relationships, Education, Relationships and Sex Education (RSE) and Health Education: Statutory guidance for governing bodies, proprietors, head teachers, principals, senior leadership teams, teachers*”, §§23-26.

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31. This serious interference is exacerbated by the vague terminology in the guidance. It is not clear what “*victim narratives*” means, or who is to determine whether an external agency’s “*narrative*” is a “*victim narrative*”. It is not clear what an “*unsubstantiated accusation*” against a state institution is, or who is to determine whether an accusation of state malpractice is substantiated or not. The lack of clarity in these key terms means that the guidance is not “*in accordance with the law*” for the purposes of articles 9(2) and 10(2) and is thereby unlawful. It also means that teachers and boards of governors are likely to err on the side of caution in the use of any external materials and thereby that the free exchange of ideas will be stymied.
32. This serious interference with common law and Convention rights is also wholly unjustified. The disproportionate impact of the guidance can be illustrated by examples of conduct that is prohibited by the guidance:
- a. The holding of a “*mock election*” in school in which a pupil seeks to promote a political party;
  - b. The use of material produced by “*Black Lives Matter*”, INQUEST, or another campaigning organisation that seeks to draw attention to the disproportionate impact of state violence (including against Black men);
  - c. The use of material produced by “*Extinction Rebellion*”, the environmental movement that seeks to draw attention to the climate emergency through non-violent protest;
  - d. The use of material produced by a local Mosque, which may not have condemned an individual act of war by the Islamic State (which was purportedly carried out in support of Islamic people, everywhere);
  - e. The use of material produced by an organisation that campaigns for rights for minority groups (such as trans

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people), given that such organisations are likely to have been accused of a “*victim narrative*”.

33. There is no proportionate basis for the prohibition of any of the above examples.
34. **Third**, even if the Secretary of State has the power to seek to prevent the use of “*extremist*” material through this guidance, the guidance has no rational link to that aim. Indeed, the guidance puts groups wanting to replace the capitalist system on a par with those endorsing racism, antisemitism and violence. It also seeks to suggest that any attempt to break any law (whether “*civil*” or “*criminal*”) is an extremist step. Such a suggestion is fanciful, given the importance of non-violent resistance in recent years (whether it be the Suffragettes, the “*civil rights*” movement in the USA, or the “*climate strike*” movement started by Greta Thunberg) and the fact that such tactics and issues have attracted the support of mainstream politicians, trade unions, anti-fascist, and environmental movements.
35. **Fourthly**, the guidance is in breach of s.149 Equality Act 2010, in that it is likely to have a considerable impact on the equality of opportunity for protected groups and/or to have a disproportionate impact on certain groups (such as the Black community or the trans community). The Secretary of State has not published any assessment of these equality impacts.

**The details of the action that the proposed Defendant is asked to take**

Please confirm that:

36. The Department of Education guidance on the PHSE Education curriculum and all associated training materials (which were published on 24 September 2020) will be immediately withdrawn.

**Details of any information sought and documents that are requested as relevant and necessary**

37. To assist us in properly advising our clients, please provide us with copies of all relevant documentation on which the Secretary of State relies. This should include:
- a. Any documentary evidence upon which the Secretary of State relies to justify the significant interference with common law and Convention rights (as set out above);
  - b. An explanation of the legal power that is said to justify the publication of the guidance;
  - c. Any policy document on which the Secretary of State relies;
  - d. A full explanation of the rationality and justification of the excerpts from the guidance set out above;
  - e. Any documentary evidence on which the Secretary of State relies to assert compliance with the PSED, including any Equality Impact Assessments.

38. We remind you of your duty of candor in this regard.

#### **Funding and costs**

39. We anticipate that, should litigation become necessary, this claim will be litigated through crowd-funding. Given the importance of the issues raised by this claim and the limited financial resources of our clients, we respectfully invite the Secretary of State to agree to a costs capping order.

#### **Proposed reply date**

40. Given the importance of the issues outlined above, we request that you provide a substantive response in writing as soon as possible and in any event by **4pm on 16 October 2020**, failing which we reserve the right to commence judicial review proceedings without further notice.

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

42. Please confirm receipt of this letter by return.

Yours faithfully

*Bindmans LLP*

**Bindmans LLP**