



Neutral Citation Number: [2012] EWHC 3622 (Admin)

Case No: CO/7182/2012

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 14/12/2012

Before :

**THE HONOURABLE MR JUSTICE SALES**

Between :

<b>(1) The British Humanist Association</b>	<b><u>Claimants</u></b>
<b>(2) Jeremy Rodell (a member of the Richmond Inclusive Schools Campaign)</b>	
<b>- and -</b>	
<b>London Borough of Richmond upon Thames</b>	<b><u>Defendant</u></b>
<b>- and -</b>	
<b>The Roman Catholic Diocese of Westminster</b>	
<b>- and -</b>	
<b>The Secretary of State for Education</b>	<b><u>Interested Parties</u></b>

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**David Wolfe QC** (instructed by **Leigh Day**) for the **Claimants**  
**Clive Lewis QC** (instructed by **Richmond upon Thames**) for the **Defendant**  
**Robin Hopkins** (instructed by **Treasury Solicitor**) for the **Interested Party**

Hearing dates: 15-16/11/12

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**Approved Judgment**

Mr Justice Sales :

*Introduction*

1. These proceedings concern a claim for judicial review of decisions of the defendant (“the Council”) taken on 24 May 2012, (i) to approve proposals put forward by the Roman Catholic Diocese of Westminster (“the Diocese”) to establish a voluntary aided secondary school designated by the Secretary of State under section 69(3) of the School Standards and Framework Act 1998 as a school having a religious character as a school for Roman Catholics and a similarly designated primary school and (ii) resolving to lease land at Clifden Road, Twickenham (“the Site”) to the Diocese for 125 years at a peppercorn rent to provide premises for those schools. Under the proposals, the schools should be operational for the school year commencing in 2013. Parents in the area of the Council have already put in applications for their children to go to these schools.
2. The Diocese’s proposals to establish the two new voluntary aided schools are made under section 11(1A) of the Education Act 2006.
3. The first claimant is the British Humanist Association, a charity working on behalf of non-religious people. The second claimant is the Richmond Inclusive Schools Campaign (“RISC”), an association of local residents which campaigns to seek to ensure that any new state schools which open in the Council’s area operate open admissions policies. The claimants’ concern is that the Council’s decisions to allow the opening of the new Catholic primary and secondary schools will mean that new schools funded by the state will use the Site operating admissions policies focused predominantly on children who are Catholic, rather than being more widely available to children in the Council’s area.
4. The Site was acquired by the Council in late 2011. It has buildings on it which have until recently been used for a college of education and which are well suited to being adapted for use as a school or schools. Sites suitable for schools do not often become available in the Council’s area, so it acquired this Site when it came on the market so that it could be used as appropriate for school provision in the future. The decision to use the Site for the two new Catholic schools was taken later, in May 2012.
5. To understand the dispute it is necessary to say something about different types of school. Schools, known as maintained schools, may be established to be funded by a local authority. A voluntary aided school is a form of maintained school (i.e. maintained by a local authority). Schools, known as Academies, may also be established to be funded by central government. Academies are a form of independent school (i.e. independent from a local authority).
6. Maintained schools and Academies may be established pursuant to proposals put forward by interested third parties or organisations, including religious organisations such as the Diocese. Where a body wishes to establish a faith school it may seek a

designation for the school as a school having a religious character under section 69(3) of the 1998 Act (maintained schools) or under section 124B (independent schools).

7. A faith school set up to operate under the auspices of a religious organisation as a maintained school may be a voluntary aided school or a voluntary controlled school, the difference turning on the extent of control which the maintaining local authority exercises over it. In the case of a voluntary aided school, the sponsoring organisation is able to set the admissions criteria for the school. This is what the Diocese proposes to do in the current case. The admissions policy for the new secondary school will be to give priority of admission to children of the Catholic faith for all places at the school. The admissions policy for the new primary school aims to admit 20 Catholic children into each form, along with 10 children admitted without reference to faith.
8. A faith school can be established as an Academy, by agreement or arrangement between the sponsoring organisation and the Secretary of State for Education (“the Secretary of State”) under provisions now contained in section 1 of the Academies Act 2010. Such a school would be funded directly by central government and would operate within parameters contained in the agreement. The model agreement currently promoted by the Secretary of State in relation to Academy faith schools allows for 50% of school places to be reserved for children of the relevant faith and requires 50% to be allocated without reference to faith. It would be possible for the Secretary of State to negotiate for different percentages.
9. The funding available for schools reflects the number of pupils who attend them.
10. The claim for judicial review is put forward on two grounds: (i) the claimants say that the Council has identified a need for there to be two new schools in its area and therefore has come under a duty under section 6A of the Education Act 2006 (a provision inserted into that Act by an amendment which came into force on 1 February 2012) to invite proposals for the establishment of an Academy, with the effect that it was not entitled to proceed to consider and approve the proposals of the Diocese made under section 11 of that Act for the formation of the two schools as voluntary aided schools; and, in the alternative, (ii) if in fact the Council had not identified a need for two new schools (as the Council maintains it did not), the public consultation it carried out in relation to the two proposals was flawed in that, the claimants say, it gave the false impression that the Council *had* identified such a need and so materially misled those being consulted.
11. The claimants say that one advantage (from their point of view) of the Council being required to desist from implementing its decisions to allow the establishment of the voluntary aided Catholic schools and required instead to seek proposals for the establishment of Academies is that it is likely that a significantly greater proportion of the places at those Academy schools would be available to children who are not Catholic. Even if the Diocese put forward proposals for Catholic faith Academies to be set up and those proposals were accepted by the Secretary of State, it could be expected that pursuant to the Secretary of State’s model terms of agreement 50% of places would be allocated to children without reference to faith.

12. The Council's case in answer to the claim is that it does not think there is a "need" (in the sense in which that term is used in section 6A of the 2006 Act) for any new school in the borough. Therefore, the Council says, it is not subject to any duty under section 6A to invite proposals to establish Academies. It maintains that its public consultation about the use of the Site was not misleading or unlawful in any way.
13. Although the Council says it does not think there is a "need" for a new school, it does consider that using the Site for setting up the new Catholic secondary and primary voluntary maintained schools is desirable, in the interests of promoting diversity in the provision of schools in its area and increasing opportunities for parental choice. That is why it has decided to approve the Diocese's proposals and to make the Site available to implement them.
14. There is a sizeable Catholic population in the Council's area, and there is a substantial demand for access to Catholic faith schools. At present there is no Catholic secondary school in the Council's area, and secondary school children wishing to attend such a school have to travel to such schools outside the borough. There are currently six Catholic primary schools in the Council's area, but there is significant additional demand in the borough for places at Catholic primary schools which is not met by those schools.
15. At the moment, the Council generally has a good provision of secondary school places and primary school places within its area, sufficient to accommodate all children who wish to attend them. It may need to expand provision at some point in the future in the light of demographic changes, but that point is some way off. The Council's case is that, absent proposals from the Diocese to establish the new secondary and primary schools, the Council would not at this stage have considered it necessary or desirable to establish any new schools in its area.
16. The Secretary of State has been given permission to intervene in these proceedings to present a further argument in defence of the Council in relation to section 6A. The Secretary of State submits that where a third party organisation reaches the point of publishing proposals under section 11(1A) of the 2006 Act to establish a voluntary aided school, the statute requires the relevant local authority to proceed to consider those proposals on their merits. That requirement is not displaced by the operation of section 6A. Contrary to this, the claimants submit that if, in the course of considering proposals under section 11(1A), a local authority comes to think that a new school is required in its area, then it becomes subject to a duty under section 6A to seek proposals for Academies instead of proceeding to consider the section 11(1A) proposals.
17. Whether and in what circumstances faith schools funded by the state should be established are matters of controversy and debate in society. The court is not called on to rule upon these wider social questions. Instead, the current challenge to the decisions by the Council turns on the interpretation of technical statutory rules set out in the 2006 Act and on the law governing the conduct of public consultations.

18. At the end of the oral hearing I was in a position to announce the outcome of the judicial review and did so, with full written reasons to follow. I dismissed the challenge, upholding the Council's arguments and the Secretary of State's further submission. This judgment sets out my detailed reasons.

*The Statutory Framework*

19. Sections 13 and 14 of the Education Act 1996 provide in relevant part as follows:

**“13 General responsibility for education**

- (1) A local authority shall (so far as their powers enable them to do so) contribute towards the spiritual, moral, mental and physical development of the community by securing that efficient primary education and secondary education and, in the case of a local authority in England, further education, are available to meet the needs of the population of their area. ...

**14 Functions in respect of provision of primary and secondary schools**

- (1) A local authority shall secure that sufficient schools for providing-
- (a) primary education, and
  - (b) education that is secondary education by virtue of section 2(2)(a)

are available for their area.

- (2) The schools available for an area shall not be regarded as sufficient for the purposes of subsection (1) unless they are sufficient in number, character and equipment to provide for all pupils the opportunity of appropriate education.

- (3) In subsection (2) “appropriate education” means education which offers such variety of instruction and training as may be desirable in view of-

- (a) the pupils' different ages, abilities and aptitudes, and
- (b) the different periods for which they may be expected to remain at school,

including practical instruction and training appropriate to their different needs.

3(A) A local authority in England shall exercise their functions under this section with a view to-

- (a) securing diversity in the provision of schools, and
- (b) increasing opportunities for parental choice. ...”

20. The duties now contained in section 14(1) and (2) are to be analysed as “target duties” which leave wide discretion to a local authority as to how they should be pursued and fulfilled: *R v Inner London Education Authority, ex p. Ali* (1992) 2 Admin. LR 822, 827-828. The same is true of the additional duty which has been added as section 14(3A). It does not impose an obligation on a local authority to ensure that schools are provided in its area to meet every wish of parents for schools of particular kinds to provide school places for their children. Rather, it imposes a general objective at a high level of generality, leaving a wide discretion to local authorities as to what steps they adopt to pursue that objective.
21. Part 2 of the 2006 Act makes provision for, among other things, the establishment of schools. In its original form, it included a mechanism (in section 7) for a local authority to publish a notice inviting proposals from persons other than local authorities for the establishment of new schools of certain types of maintained status (including voluntary schools) or an Academy, alongside which a local authority could publish its own proposals to establish a school (section 7(5)); a mechanism whereby a local authority could publish its own proposals to establish certain types of maintained school with the consent of the Secretary of State (section 10(1)) and any persons could, with the consent of the Secretary of State, publish their proposals to establish new schools of certain types (including both voluntary aided and voluntary controlled schools) (section 10(2)) - in both cases before publication of the proposals the proposers were required to consult appropriate persons and have regard to any guidance given by the Secretary of State (section 10(4)); and section 11 allowed for publication of proposals to establish certain maintained schools in limited defined circumstances without any requirement to obtain Secretary of State consent, again after consultation and having regard to guidance (section 11(6)).
22. Part 2 of the 2006 Act was amended by the Education Act 2011, with the amendments only to come into force when commenced by Order. The relevant Order was made on 12 January 2012, providing that the amendments should take effect on 1 February 2012. The amendments added section 6A, imposing a new obligation on a local authority to seek proposals to establish Academies (see below); added a requirement of Secretary of State consent for publication of a notice under section 7 inviting proposals to establish new schools; deleted section 7(5), so as to remove the ability of a local authority to publish its own proposals, and instead added new provisions (section 11(A1) and (A2)) allowing a local authority to publish its own proposals only where no proposals are made or approved pursuant to an invitation exercise under section 7; and moved proposals made by third party proposers to

establish voluntary aided schools from section 10(2) (Secretary of State consent required) to section 11(1A) (no Secretary of State consent required).

23. Section 6A of the 2006 Act provides:

**“6A Requirement to seek proposals for establishment of new Academies**

(1) If a local authority in England think a new school needs to be established in their area, they must seek proposals for the establishment of an Academy.

(2) The local authority must specify a date by which any proposals sought under subsection (1) must be submitted to them.

(3) After the specified date, the local authority must notify the Secretary of State-

(a) of the steps they have taken to seek proposals for the establishment of an Academy, and

(b) of any proposals submitted to them as a result before the specified date, or of the fact that no such proposals have been submitted to them before that date.

(4) A notification under subsection (3) must-

(a) identify a possible site for the Academy, and

(b) specify such matters as may be prescribed.”

24. Section 7 of the 2006 Act (as amended) provides in relevant part as follows:

**“7 Invitation for proposals for establishment of new schools**

(1) A local authority in England may with the consent of the Secretary of State publish a notice under this section inviting proposals from persons other than local authorities for the establishment of any new school falling within subsection (2).

(2) The schools falling within this subsection are-

(a) a foundation, voluntary or foundation special school, other than one providing education suitable only to the requirements of persons above compulsory school age, or

(b) an Academy school. ...

(7) Schedule 2 has effect in relation to the consideration, approval and implementation of proposals under this section.”

25. Section 11 of the 2006 Act (as amended) provides in relevant part as follows:

**“11 Publication of proposals to establish maintained schools: special cases ...**

(1A) Where any persons (“proposers”) propose to establish a new voluntary aided school in England, they may publish their proposals under this section. ...

(6) Before publishing any proposals under this section, the authority or proposers (as the case may be) must consult such persons as appear to them to be appropriate; and in discharging their duty under this subsection the authority or proposers must have regard to any guidance given from time to time by the Secretary of State.

(7) Where any proposals are published under subsection [(1A) or] (2), the proposers must submit the proposals in accordance with regulations to the local authority who it is proposed should maintain the school.

(8) Schedule 2 has effect in relation to the consideration, approval and implementation of proposals under this section. ...”

26. Schedule 2 to the 2006 Act provides in relevant part as follows:

**“1**

(1) This Schedule applies to proposals published under section 7, 10, 11 or 15.

(2) Accordingly, in this Schedule, unless a contrary intention appears, “proposals” means proposals published under any of those sections. ...

**6**



All proposals under section ... 10 or 11 require consideration under paragraph 8. ...

**7A**

- (1) This paragraph applies where proposals under section 7 consist of or include Academy proposals.
- (2) The Secretary of State must decide whether to enter into Academy arrangements as a result of any of the Academy proposals.
- (3) The Secretary of State must notify the relevant authority of a decision under sub-paragraph (2).
- (4) Sub-paragraphs (5) and (6) apply where the proposals under section 7 include non-Academy proposals.
- (5) If the Secretary of State decides not to enter into Academy arrangements as a result of any of the Academy proposals, the non-Academy proposals require consideration under paragraph 8.
- (6) In any other case, the Secretary of State may direct that all or any of the non-Academy proposals require consideration under paragraph 8.

**8**

- (1) Proposals which require consideration under this paragraph, other than proposals to which paragraph 10 applies, must be considered in the first instance by the relevant authority.
- (2) Sub-paragraphs (3) and (4) apply in relation to the relevant authority unless the authority is required by any of paragraphs 10 to 13 and 15 to refer the proposals to the adjudicator.
- (3) In a case where the proposals were published under section 7 and two or more sets of proposals were published, the authority may-
  - (a) reject all the proposals,
  - (b) approve any of the proposals without modification,  
or

- (c) approve any of the proposals with such modifications as the authority think desirable, after consulting such persons as may be prescribed.
- (4) In any other case, the authority may-
  - (a) reject the proposals,
  - (b) approve the proposals without modification, or
  - (c) approve the proposals with such modifications as the authority think desirable, after consulting such persons as may be prescribed.
- (5) Any approval given under this paragraph may be expressed to take effect only if an event specified in the approval occurs by a date so specified; and regulations may prescribe the events that may be so specified.
- (6) When deciding whether or not to give any approval under this paragraph, the relevant authority must have regard to any guidance given from time to time by the Secretary of State. ...

***Duty to refer to adjudicator certain proposals made by or involving relevant authority***

**10**

- (1) The relevant authority must refer to the adjudicator, within a prescribed time-
  - (a) all the proposals published under section 7 in response to a notice under that section and which-
    - (i) would otherwise require consideration by the authority under paragraph 8, and
    - (ii) consist of or include proposals which relate to the establishment of a foundation school with a foundation falling within sub-paragraph (2);
  - (b) any proposals under section 10 or 11 which-
    - (i) are made by the relevant authority, or
    - (ii) relate to the establishment of a foundation school with a foundation falling within sub-paragraph (2). ...”

27. Regulation 18 of the School Organisation (Establishment and Discontinuance of Schools)(England) Regulations 2007 provides that the period within which a local authority must determine whether to give approval under paragraphs 8(3) or (4) of Schedule 2 is two months from the end of the representation period.
28. The transfer of authority to publish third party proposals to establish voluntary aided schools from section 10(2) to section 11(1A), removing the requirement of Secretary of State consent, was the subject of debate in the course of the passage of the amendments to the 2006 Act through Parliament. Baroness Massey objected to the removal of that requirement, on the basis that it would make it easier to establish faith schools. The relevant Minister, Lord Hill of Oareford, Parliamentary Under Secretary of State for Schools, wrote a letter dated 20 October 2011 to Baroness Massey to explain that the requirement was not designed as, and did not operate as, a safeguard against undesirable faith school provision, since consent had previously been given to all 71 requests that had been made; rather, the requirement was being removed on the basis that it was unnecessary bureaucracy. The letter went on:

“The necessary safeguards are instead built into the statutory process which proposals must go through once the Secretary of State has given his consent. This process begins with consultation with those who are likely to be affected by the proposals. The proposals are then published and there is a representation period in which comments and objections can be submitted. Depending on the circumstances, the local authority or the Independent Schools Adjudicator then decide whether the proposal should be approved and the school established. In doing so they are required to consider the case in its entirety, taking into account any objections or comments submitted. Finally the proposals are implemented and the school established. **Our changes to Schedule 11 would leave the safeguards built into this statutory process in place.**”

29. This change, and the Government’s rejection of amendments to it, was discussed in Parliament, and reference was made to the Minister’s letter. It may be noted that the explanation in the letter envisages that a local authority should consider an application by a proposer of the establishment of a voluntary aided faith school on its merits, in accordance with the scheme in Schedule 2.

#### *Factual Background*

30. On 6 December 2010 the Council approved a 10 year strategy in relation to provision of primary and secondary school places in the borough, set out in a document entitled “Choice and diversity: a policy paper for Education and Children’s Services 2010”

- (“the Strategy Paper”). It was forecast that by 2014 the Council’s current capacity of 1,560 secondary school places across the eight secondary schools and Academies within the borough would no longer be sufficient to accommodate all in-borough children whose parents would want school places. Some additional capacity could be provided by expanding existing schools, but it was expected that more capacity would be likely to be needed: “the equivalent of two secondary schools (including one Roman Catholic) will be needed by about 2015 to meet the demand for places.” It was noted that the Council was the only borough in London (or, as set out in later documents, one of only two boroughs in London) with no Catholic secondary school, with the result that many outstanding pupils had to travel long distances out of the borough to obtain their chosen education. The document also identified increasing demand for primary school places in the borough, which would be met for a time by expanding provision at existing primary schools; by 2018, however, it was forecast that there would be a shortfall of at least 300 places.
31. On 21 July 2011 the Council’s Cabinet approved a proposal to purchase the Site “for future school provision”. It was said that the Site would provide an ideal location for further school place provision in the Council’s area to meet the increasing local demand for school places. At this stage no recommendation was made as to what educational provision should be made on the Site. It was noted that in April 2011, in response to a petition calling for the establishment of a state Catholic secondary school in the borough, there had been cross-party support in favour of provision of such a school, but the question whether the Site should be used for this purpose was left over to consideration on another occasion.
  32. Lord True, the Leader of the Council, issued a press release dated 25 July 2011 referring to the acquisition of the Site. He explained that there was a “growing need” for school places in the borough, and that the Council was acting to address “that need”. He emphasised that the Council was at the beginning of a process, but the acquisition of the Site might pave the way for the Council to deliver on the ambition to provide a Catholic secondary school in the borough. Lord True made similar comments in a further press release issued on 5 September 2011, referring to the exchange of contracts for purchase of the Site. Lord True’s comments in both press releases were all consistent with the Council’s identification of future needs in its Strategy Paper.
  33. On 16 September 2011 the Diocese applied to the Secretary of State for consent under section 10 of the 2006 Act to publish proposals to establish a voluntary aided primary school and a voluntary aided secondary school (the applications were made prior to the amendment of the Act with effect from 1 February 2012, as set out above, to remove the requirement of Secretary of State consent). The proposal for the primary school referred to a steady increase in parental demand for more Catholic primary places in the area. The proposal for the secondary school stated that there had been parental demand for a Catholic secondary school in the area for some time, and referred to petitions from local parents in favour of establishing such a school.

34. The Diocese's applications were noted by the Council's Education and Children's Services Overview and Scrutiny Committee at a meeting on 17 October 2011. On the Council's understanding, the Diocese was pursuing proposals to establish Catholic voluntary aided schools, rather than a faith Academy, as the number of places reserved for Catholic children in the latter would be more limited and would not fully meet demand for Catholic school places. The Council's Director of Education, Children's Services and Culture, Mr Whitfield, reported that there was a need to improve the achievement in the Council's existing (i.e. non-faith) secondary schools and that increasing capacity in a system where there was already space would be detrimental to that aim, since this would affect budgets and morale. No decision was yet called for from the Council on the Diocese's proposals.
35. Mr Whitfield's comments were, again, consistent with the Council's Strategy Paper: in 2011 the Council still had surplus capacity in its existing schools, with a forecast need in future to expand capacity. The detrimental impact on those schools of creating more non-faith school places was that the existing schools could be expected to lose some pupils (and the funding attached to those pupils) as a result of parents choosing to send their children to take up new non-faith school places added at a new school or schools. This would be likely to have a negative effect on the ability of existing schools in the borough to work to maintain and improve the standard of education on offer at them. This was a factor which ultimately weighed with the Council in taking the decision under challenge to approve the Diocese's proposal for a Catholic voluntary aided secondary school. Mr Whitfield's advice was that such a school, with a fully Catholic intake absorbing demand from local Catholic parents for Catholic school places, would not pose such a threat to maintenance of standards at other secondary schools in the borough as would the establishment of a Catholic faith Academy, with 50% of places available as non-faith school places and hence likely to have the negative effect on existing secondary schools to which Mr Whitfield called attention.
36. On 20 December 2011 the Secretary of State gave consent for the Diocese to put forward its proposals for Roman Catholic primary and secondary voluntary aided schools in the borough. The Diocese then moved to consult on its proposals (i.e. to carry out the consultation prior to publication required under section 10(4) of the 2006 Act, in its unamended form). The Diocese's consultation ran from 20 January 2012 to 17 February 2012. It was therefore overtaken by events, by the coming into force of the amendments to sections 10 and 11 of the 2006 Act. However, since consultation in advance of publication of proposals was also required in similar terms under section 11(6) of the 2006 Act (as amended), which was now applicable in relation to the Diocese's proposals, the Diocese proceeded with its consultation without any objection being made.
37. In a Council press release dated 6 January 2012, the Council referred to its commitment to support the introduction of a Catholic school but also to its commitment to consult the public about whether the Site should be used for such a school or for some other purpose, and said that it would soon launch its own consultation on that question.

38. In a further Council press release, dated 13 January 2012, the Council announced that its consultation would commence on 20 January 2012, and Lord True said that the many issues involved in the debate over a new Catholic school were addressed in the Council’s consultation, “where we have provided a full background as to why a Catholic secondary school is necessary in this borough, by looking at issues such as the pressures on our primary school places, the impact of free schools, sixth forms and developments in our neighbouring boroughs”.
39. Mr Wolfe QC for the claimants understandably fastened on this use of language by Lord True, and the language in the earlier press releases, in aid of his submission that the Council had indeed identified a need for the establishment of a new school, so that an obligation under section 6A (once it came into effect on 1 February 2012) arose. However, in my view, particularly in light of all the other evidence in the case and bearing in mind that section 6A was not yet in force, it is clear that Lord True was not addressing the technical question of “need” as that term is used in section 6A, but was speaking more generally about the desirability of introducing Catholic schools into the borough to allow for greater parental choice, foster diversity of school provision and to meet parental wishes.
40. The Council issued a consultation document on the use of the Site, for a consultation period from 20 January 2012 to 16 March 2012 (“the Consultation Paper”). It is this document which the claimants, on their alternative case, maintain was misleading.
41. The foreword and executive summary in the Consultation Paper referred to the distinct consultation being conducted by the Diocese and urged the public to make their views known; it again referred to the Council’s longstanding support since about 2002 (or 2004, as stated elsewhere in the paper) for the establishment of a Catholic secondary school in the borough, but invited views on both sides of the debate about whether the Site should be used for the proposed new Catholic schools; and it provided a summary of the situation, including “the key issues” which had been raised during discussion and debate in previous months. Under that heading, the foreword and executive summary set out the following bullet points (each with some short explanatory text): “Principle of Catholic schools and faith schools per se”; “Requirement for a Catholic school in borough”; “Number of school places”; “Quality of schools”; “Use of public funds”.
42. There was then a heading, “The Council’s position to date”, with the following text:
- “In the following pages, we provide further information on some of the above issues. It may be more information than some wish to absorb, however. So in summary, let me state the Council’s public positions on the above issues, *to date*. We will use the results of this consultation to evaluate those positions, and to help make a final decision.” [emphasis in original]

43. The foreword and executive summary then set out short summaries of the Council's position in relation to each of the bullet points identified previously, which included the following:

“\* Requirement for a Catholic school in borough

The demand for Catholic education at secondary level is easily apparent. 80% of pupils from our Catholic primaries go onto Catholic secondary schools elsewhere, resulting in over 200 students travelling out of borough per year. Travel can be long, and the demand for places out of borough is increasing, as it is in the rest of the state school system. We believe that take-up of places at an in-borough Catholic secondary school will be strong. We also can see that demand for places at the six Catholic primary schools in the borough is very high. We therefore support the aim of new Catholic schools being supported in the borough.

\* Number of school places

We also know there will be a rise in demand for school places across (and outside) the borough over the next four to five years, and we need to provide for that demand. There are many variables in predicting and providing school places, which make it without doubt a difficult but vital task. However, the timing of providing school places is also important. If too many places are provided too early, it makes it difficult for schools, both new and old, to manage their budgets, and ongoing improvements at existing schools may be undermined. Nevertheless, we are confident that we will be able to provide sufficient places as required over the coming decade, including a new community school if demand rises to such a level ...”

44. The body of the Consultation Paper expanded on these and other points. Increasing demand for places in primary schools and an expansion programme in existing schools to accommodate it for a period was referred to. The Council stated that since it had “a basic need for additional primary school places, it would meet the cost of the proposed Catholic primary school.” There is some significance for present purposes in the reference to a need for additional school *places*, rather than a new school.
45. It was noted in the Consultation Paper that the anticipated requirement for a new state-funded non-faith secondary school had somewhat receded, so that it was thought that such a school might be required from September 2016, although it might be possible to manage demand without a new school “for several years after that”. The Council added, “What is clear is that establishing a new community [i.e. non-faith]

- secondary school to open in 2013 could create too much community school provision and therefore represent poor value for money”. The Council said that the Site “offers the possibility of establishing a high-quality, five-form entry Catholic secondary school to meet local demand and obviate the need for Richmond Borough children to travel outside the borough for their secondary education. Such provision would meet that demand, increase local choice and free up some places within the borough’s community [i.e. non-faith] secondary schools.”
46. Section 6 of the Consultation Paper was headed “Impact and risk assessment”. It drew attention to the Council’s duty under section 14 of the 1996 Act to secure sufficient schools in its area and to exercise its functions with a view to securing diversity in the provision of schools and increasing opportunities for parental choice. It stated, “The provision of additional school places will meet the local authority’s statutory duty and the wishes of residents who would like their children to be educated in schools in Richmond upon Thames.” The Council stated that “At this stage” (i.e. subject to assessment of the responses to the consultation) it considered that it was appropriate to use the Site for a Catholic secondary school from 2013 onwards, “rather than either seeking to establish a new community secondary school at that time or ‘moth-balling’ the site until such time as a community secondary school would be required.”
47. In my view, on a fair reading of the Consultation Paper, the Council made clear its provisional view (subject to the outcome of the consultation) that there was not a current need for a new state school in its area and its provisional view that introduction of the Catholic schools proposed by the Diocese would be beneficial, in that they would increase diversity of school provision, improve parental choice and help meet parental wishes for places at Catholic schools in-borough rather than having to send children to Catholic schools out of borough. Contrary to Mr Wolfe’s submission, the heading “Requirement for a Catholic school in the Borough” and associated text was not a statement by the Council that it considered there was a “need” for a Catholic school in its area, but a general discussion of one issue which had been raised in the course of public debate.
48. The Council’s consultation included an on-line and paper survey by means of questions for residents. In relation to the proposed new Catholic primary school it included such questions (under the headings “Agree with primary school: What are your reasons?” and “Disagree with primary school: What are your reasons?”) as, respectively, “I believe more Catholic primary school places are needed in the borough” and “I do not believe that more Catholic primary school places are needed in the borough” or “I do not believe that more primary school places overall are needed in the borough”. In relation to a proposed new secondary school the questions and range of answers were somewhat different (e.g. “I believe Catholic parents in Richmond should have the choice of an in-borough Catholic secondary school”), but also on occasion used the language of “need” in a rather indirect way (“I do not believe that another secondary school is needed in the borough”).
49. I do not consider that anything contained in the Consultation Paper or associated questionnaires constitutes evidence that the Council thought there was a “need” (in



- the section 6A sense) to establish a new school in its area. I discuss the distinction between “need”, as used in section 6A, and more general assessments that it might be beneficial or desirable to have new Catholic schools in the borough further below.
50. In my view, reference to other documents relied on by Mr Wolfe also does not assist the Claimants’ case on this point.
  51. He relied on an email dated 26 July 2011 from Councillor Paul Hodgins to Dr Vince Cable, in which Councillor Hodgins said that whatever happened with the Catholic school proposals, acquisition of the Site “provides us with much needed primary and secondary capacity” and spoke of the Council “needing to add another secondary to provide more capacity”. This email was in very general and abstract terms and in my view was fully consistent with what the Council had said in the Strategy Paper and other assessments since then. There was a developing need for new capacity, which made it a good idea to acquire the Site, but that fell well short of a precise assessment that there was a current “need” for any new school in a section 6A sense. Section 6A was not in existence, let alone in force, at the time of this email and there is nothing whatever to indicate that Councillor Hodgins was intending to refer to the technical concept of “need” which it employs. The email concluded, “Ultimately we are working towards an overall system in Richmond Borough that has increased quality, choice, and capacity. The promotion of a Catholic secondary school needs to be seen in this context”. That is a statement consistent with the Council’s case before me that it did not think there was a “need” (in the section 6A sense) for a new school in its area.
  52. Similar points also apply in relation to the further email relied on by Mr Wolfe, dated 15 July 2011, from Mr Whitfield to Councillors, to inform them on progress with provision of Catholic secondary education in the borough, in which he referred to purchase of the Site as being helpful in terms of providing for the Council’s “secondary need” and “primary need” in the borough.
  53. Nor do I consider that anything said in the Consultation Paper or associated questionnaires was liable to mislead the public into thinking that the Council thought there was a “need” (in the section 6A sense) for new Catholic schools, in circumstances where (as I find to be the case) it did not. Statements in the Consultation Paper fell well short of indicating that the Council thought there was anything so pressing as to amount to a current “need” (in the section 6A sense) to establish such schools, and the views of the Council set out in it were in any event expressed to be provisional and subject to review in the light of the responses to the consultation.
  54. On a fair reading, the use of the word “needed” in the questionnaire did not indicate in the context in which it was used that the Council might be thinking that there was a “need” for schools (in the technical section 6A sense). The questionnaires were addressed to the general public and used language in an entirely natural, non-technical sense. They would have been understood in that way. In ordinary language, notions of need, requirement and desirability shade into each other. It made perfect

- sense to ask people if they thought more Catholic primary school places were needed in the borough as part of a consultation aimed at trying to inform the Council's general assessment whether use of the Site to provide such places might be a good idea. In that regard, it should also be emphasised that in these questions what was being addressed was whether there was a need for more school *places*, rather than for more schools as such. So the question could not on any view readily be understood as being directed to a section 6A issue. Similarly, a reference to not believing "that another secondary school is needed in the borough" is, in context, a perfectly natural way for a member of the public to be invited to express a view to the effect that such a school is not required or is not a good idea for use of the Site in the circumstances. Contrary to Mr Wolfe's submission, all this is a long way away from giving a misleading impression that the Council thought that there was any "need" for any new school under section 6A.
55. RISC wrote a letter to the Council dated 6 February 2012 drawing attention to section 6A, which had come into effect on 1 February. It correctly pointed out that the transitional provision in the Commencement Order governing proposals already published under sections 10 or 11 of the 2006 Act did not apply, since the Diocese's proposals had not at that stage been published, but were still at the stage of being consulted upon prior to publication. RISC asserted that the Council was failing to comply with its obligation in section 6A and requested that the Council end the current process immediately.
56. The Council replied by letter dated 9 February 2012. It observed that the Diocese could now publish its proposals under section 11(1A) of the 2006 Act (as amended) and denied that the Council was in breach of any obligation under section 6A. Although perhaps clumsily expressed, I think it is clear that the basic point being made was that the Council had not at that stage decided there was any requirement for a new school on the Site (whether a Catholic school or under section 6A), but would be considering the position at a meeting of Cabinet on 24 May 2012.
57. On 2 March 2012 the Diocese, having finished its pre-publication consultation, published its proposals under section 11(1A) of the 2006 Act (as amended) to establish the new Catholic voluntary aided primary and secondary schools.
58. In April 2012 the Council published its summary of findings from the consultation under the Consultation Paper. It included a reference to frequent comments received "that there are no Catholic secondary schools in the borough and one is needed". Although emphasised by Mr Wolfe, this reference carries the claimants' case no further forward.
59. The Council's officers (led by Mr Whitfield) then prepared a Report for Cabinet on the use of the Site ("the Report"). The Report rehearsed the background referred to in previous papers and reviewed the results of the consultation. It noted growing demand for secondary school places, but not to the point where all eight in-borough secondary schools were likely to be full within the foreseeable future. The Report drew attention to section 6A, now in force, but set out the officers' view that, whilst

- there was high demand for Catholic secondary school places in the borough, there was not a “need” to establish a new secondary school which would engage the operation of section 6A. The officers reported, “There are sufficient places at present, and to seek to open a new school providing additional community [i.e. non-faith] places in 2013 could create too much community school provision and therefore represent poor value for money.” It was also noted that if the Site were made available for a non-faith school in 2013 that would have an adverse impact on recruitment and retention of pupils at other state schools in the borough (see paras. [34]-[35] above).
60. Similarly, in relation to primary school provision, the Report noted, “There is not currently a need to establish a new primary school in order to provide an overall sufficiency of primary school places ..., but the provision of additional Catholic primary school places would meet the wishes of parents to have accessible Catholic school places and is desirable as it would provide greater choice for parents.” Again, the officers’ view was that there was not a need (in a section 6A sense) to establish a new primary school.
61. The Report recommended approval of the Diocese’s proposals to establish the two new voluntary aided Catholic schools and provision of the Site to the Diocese for implementation of those proposals. At the meeting of the Council’s Cabinet on 24 May 2012 the Council accepted those recommendations and made the decisions which are the subject of review in these proceedings.
62. The meeting of the Cabinet was broadcast to the public via the internet. There was a debate in which Mr Whitfield again emphasised that the Council had no current need to create new schools, and that to create new community (i.e. non-faith) school places would be detrimental to existing state schools in the borough (see paras. [34]-[35] above). He explained that that point also applied in relation to the creation of any faith Academy on the Site, since 50% of the places at such a school would be community places, which would create the risk of a departure of pupils and the funding associated with them from existing state schools in the borough. He also noted that a faith Academy would not have sufficient faith places to meet the current level of demand for in-borough Catholic school places.

### *Legal Analysis*

#### *Ground 1: section 6A*

63. A principal strand in Mr Wolfe’s submissions for the Claimants is that factors relevant to the sufficient provision of education, diversity of provision and fostering parental choice under sections 13 and 14 of the 1996 Act are also relevant to the assessment by a local authority whether there is a “need” to establish a new school, for the purposes of section 6A of the 2006 Act. I accept that such factors may be relevant under section 6A, depending on a local authority’s assessment of the overall situation in its area. But it does not follow that whenever a local authority considers that it might be beneficial for there to be additional educational provision in the form

of establishing a new school in its area, it must be taken to think that there is a “need” to establish a new school, in the sense in which that term is used in section 6A.

64. As a matter of the ordinary use of words, the idea that there is a “need” to establish a new school imports a stronger sense of a compelling requirement for a new school to be established than simply thinking that it would be beneficial for a new school to be established. That impression is strongly reinforced by the scheme of Part 2 of the 2006 Act (as amended).
65. In my judgment, it is implicit in the scheme of Part 2 that there is a distinction between the concept of a “need” to establish a new school (under section 6A) and a more general assessment by a local authority whether it might be beneficial for a new school to be established. If a local authority thinks there is a “need” to establish a new school, the obligation under section 6A to seek proposals for the establishment of an Academy is triggered. But the Act contemplates that a local authority may act to foster or approve proposals for establishment of a new school in other circumstances, where in a wider and more general sense it thinks it may be beneficial to do so.
66. Under section 7, a local authority may (with the consent of the Secretary of State) invite proposals for the establishment of new schools of various types, including an Academy. This power exists alongside the obligation in section 6A, and is not swallowed up by it. It would make no sense of the scheme in Part 2 of the 2006 Act to say that every time a local authority thought it might be beneficial for a new school to be established in its area it should be taken to think there was a “need” for a new school, since that would suggest that there would be no practical scope for the operation of section 7. In order to act properly pursuant to section 7, a local authority has to think that it may be beneficial for a new school to be established, in a sense falling short of thinking that there is a “need” to establish a new school (in which case section 6A would apply).
67. Similarly, where a proposal is made under section 10 or section 11 to establish a new school, paragraph 8 of Schedule 2 requires the local authority to consider whether the proposal should be approved (and in some cases, under paragraph 10 of Schedule 2 it is for the adjudicator to consider this question). A local authority or the adjudicator could only properly approve a proposal if they considered it to be in some way beneficial in the public interest. There is no indication that the test governing approval of proposals under sections 10 and 11 is so narrow as to turn on a question of need, rather than a more general assessment of what would be beneficial in the public interest. Again, section 6A does not swallow up these provisions.
68. It will be a matter of fact and degree, for the assessment of the local authority, whether factors relevant under sections 13 and 14 of the 1996 Act are of such weight and of such a pressing nature that they lead to the conclusion on the part of the local authority that there is a “need” to establish a new school in its area, for the purposes of section 6A. A local authority is entitled to take a practical approach, looking to see the extent to which there is a requirement for educational provision to ensure that children in its area have proper access to education. In the present case, for example,

- the Council was entitled to have in mind that the demand for Catholic school places was being met, and had been for many years, by parents sending their children to Catholic schools in neighbouring areas (just as a local authority would be entitled to have in mind, say, any pattern of parents sending their children to private schools). Section 6A is concerned with what a local authority “think”, which indicates that the assessment of “need” is a matter of evaluative judgment for the authority. Further, in assessing whether there is a “need” for a new school, the local authority may be expected to look at the whole picture of educational provision in its area, and the availability or otherwise of school places at existing schools will be likely to be a very important factor which the local authority may properly take into account.
69. I also accept the submission by Mr Lewis QC for the Council that section 6A is concerned with whether a local authority thinks that there is a current need to establish a new school. That is the trigger for its obligation to invite proposals for the establishment of an Academy. Section 6A does not impose such an obligation where a local authority merely thinks that there may be a need for a new school at some point in the future (but not yet).
70. On the basis of these legal points, I think there is really no doubt on the facts of the case, as reviewed above, that the Council has acted lawfully in making the assessment that it does not think that a new school needs to be established in its area, and hence that no duty has arisen under section 6A. The Council’s assessment was that there was no “need” (in a section 6A sense) for a new school to be established, but rather that it was merely desirable in its assessment of the public interest and having regard to factors relevant under sections 13 and 14 of the 1996 Act that the Diocese’s proposals to establish the two new Catholic schools should be approved and the Site made available for the implementation of those proposals.
71. The Council’s assessment of these matters cannot be impugned as irrational or in any way unlawful.
72. In the course of his submissions, Mr Wolfe sought to contend that the Council had regard to a legally irrelevant consideration, by taking into account the potential negative consequences for other state secondary schools in its area of creating new non-faith school places. He observed that seven of the eight existing state secondary schools in the borough are Academies, and suggested that the potential negative impact upon them of proceeding with different forms of school provision on the Site was only properly of concern to the Secretary of State (who funds the Academies), not the Council.
73. I do not accept this suggestion. The obligation to ensure sufficiency of education in its area (which includes the idea of the overall quality of education being provided), parental choice and diversity of provision under sections 13 and 14 of the 1996 Act is an obligation on the Council, even if the schools providing the education may be funded by others (such as the Secretary of State). In my view, a local authority is entitled, when making an assessment under section 6A whether there is a “need” for a new school, to have regard to the overall impact on educational provision in its area.

The test for the obligation in section 6A (whether a local authority “think a new school needs to be established in their area”) involves a very general judgment, in relation to which a wide range of factors are potentially relevant. The range of potentially relevant factors to which a local authority may have regard, if it thinks them relevant in the particular circumstances of the case before it, include the full range of matters relevant to provision of education in its area under sections 13 and 14 of the 1996 Act: see para. [63] above.

*The Secretary of State’s additional submission*

74. Parliament has not spelled out clearly in Part 2 of the 2006 Act, as amended, how the different powers and obligations set out in it relate to each other. A local authority which thinks it desirable to invite proposals to establish new schools under section 7 may, in the light of proposals made or simply because of a change of circumstances (or a change of control of the local authority, leading to a new assessment of the situation being made by the local authority), in the course of the section 7 exercise come to think that there is a need to establish a new school in its area. What then? Does section 6A suddenly bite, so that the section 7 exercise has to be brought to an end? Similarly, if proposals are published under section 10(2) or section 11(1A), but the local authority thereafter comes to “think a new school needs to be established in their area”, does section 6A suddenly apply so that the local authority has to stop consideration of the proposals on their merits and instead proceed to seek proposals for the establishment of an Academy?
75. Mr Wolfe submits that in this sort of case section 6A operates and, because of the duty imposed by it on the local authority, the local authority may not proceed to consideration of the proposals which have been put forward. In effect, the duty in section 6A trumps any other procedure under Part 2 of the 2006 Act. Mr Hopkins for the Secretary of State disputes this. In particular, he submits that where, as here, a proposal has been published under section 11(1A) of the 2006 Act to establish a new school, the local authority remains obliged under the terms of the Act to consider that proposal on its merits. It is not required (indeed, not entitled) to halt the statutory procedure which has been set in motion for consideration of the section 11(1A) proposal.
76. On this issue I consider that the submission of Mr Hopkins is correct. Where a proposal for a new school is put forward under section 11(1A) it is done so as a matter of entitlement on the part of the proposer, as set out in that provision, and will likely have involved time, effort and expense on the part of the proposer in consulting on it as required by section 11(6). Section 11(8) then states: “Schedule 2 has effect in relation to the consideration, approval and implementation of proposals under this section.” Paragraph 8 of Schedule 2 states that such proposals “must be considered” by the local authority, and in certain cases the local authority “must refer [a proposal] to the adjudicator” (paragraph 10). (Similar points may be made about a proposal put forward in response to a notice issued under section 7: such a notice invites the making of proposals, which will involve time, effort and cost on the part of the

- proposer, and section 7(7) provides that Schedule 2 has effect in relation to such proposals).
77. The statutory language is clear, and in relevant places is mandatory. There is no suggestion that the rights of proposers or the obligations on a local authority under these provisions are to be regarded as subject to the distinct provision in section 6A.
78. Further, since these provisions requiring a local authority (or, as the case may be, the adjudicator) to consider proposals operate in relation to proposals put forward by persons by virtue of rights set out in or arising under the Act itself and where they are likely to have invested time, money and effort to put them forward, it would require strong and clear language to indicate that Parliament's intention was that their rights to have their proposals considered on their merits was to be removed. No such language has been used. The natural inference, therefore, is that Parliament did not intend section 6A to operate to disapply the obligation of a local authority (or, as the case may be, the adjudicator) to consider such proposals on their merits.
79. That is not to say that the possibility that proposals might be invited for the establishment of an Academy would be irrelevant to the consideration to be given to proposals made under section 11(1A) or other provisions of Part 2. When considering whether to approve such proposals under Schedule 2 to the 2006 Act a local authority might consider that it was, overall, more beneficial for educational requirements to be met by inviting proposals for establishment of an Academy, or the Secretary of State might issue guidance under paragraph 8(6) suggesting that consideration be given to such a possibility.
80. There is no Secretary of State guidance which is relevant to the situation which has arisen in the present case. The Council had good reasons to approve the proposals made by the Diocese, and to prefer them to any possibility of seeking instead to invite new proposals to be put forward for establishment of an Academy (see para. [62] above). There was no error of law in the way in which the Council approached the question whether to approve the proposals by the Diocese.
81. Mr Wolfe submitted that the interpretation of the 2006 Act (as amended) should be informed by statements in Parliament, relying on *Pepper v Hart* [1993] AC 593. He suggested that statements by Ministers in Parliament indicated that the intention was that where an obligation under section 6A arose, a local authority should not proceed to consider proposals made under section 11(1A).
82. The short answer to this is that I was not taken to any statement in Parliament which came remotely close to satisfying the stringent criteria laid down in *Pepper v Hart* which determine whether ministerial statements qualify as aids to the construction of primary legislation. No statement in Parliament addressed distinctly the particular issue of what a local authority should do when faced with a valid proposal under section 11(1A) to establish a school if it also thought that a new school was needed in its area. Reference was made in debate to the Minister's letter dated 20 October 2011, quoted above. That letter also does not address this particular issue; but it is

- consistent with the view that the intention was that a local authority faced with a proposal made under section 11(1A) should proceed to consider that proposal on its merits.
83. Mr Wolfe also sought to gain support for his submissions from The Schools White Paper 2010: The Importance of Teaching, which stated the Government's ambition to be "that Academy status should be the norm for all state schools" and set out the general objective that "In practical terms, where there is a need for a new school, the first choice will be a new Academy or Free School." But again, the White Paper does not provide specific guidance about what should be done when a third party proposer has published proposals under sections 7, 10 or 11 of the 2006 Act, or regarding the interaction of those provisions and Schedule 2 with section 6A. The White Paper is expressed in general terms which cannot outweigh the specific points relevant to the true construction of Part 2 of the 2006 Act as amended to which I have referred above.
84. Since I have had to consider the general effect of Part 2 of the 2006 Act, I should perhaps mention one final point. It is possible that a case could arise in which a local authority thinks there is a need for a new school in its area and therefore, in compliance with its duty under section 6A, seeks proposals for the establishment of an Academy; and, while that is going on, a third party puts forward proposals for a new school under section 10(2) or section 11(1A). In such a case, I think that the local authority would be required to consider the latter proposals in accordance with the procedure laid down in Schedule 2 to the 2006 Act, but in doing so would be entitled to have regard to the possibility that educational needs in its area might be about to be met by the establishment of an Academy. That might be a basis on which it would be entitled to conclude that the proposals ought not to be approved.

*Ground 2: consultation*

85. There was no significant dispute between the parties about the relevant law on this part of the case. Where a public consultation is embarked upon, it must be carried out properly, which obligation includes a requirement to set out "sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response": *R v North and East Devon Health Authority, ex p. Coughlan* [2001] QB 213, para. [108]. The claimants' complaint under this Ground is that the Consultation Paper was materially misleading, in that it gave the impression that the Council thought there was a need (in a section 6A sense) for new schools, whereas in fact it did not think that.
86. I reject this Ground of challenge. As is clear from my examination of the contents of the Consultation Paper and associated questionnaires, properly read in the context in which it was sent out and having regard to the stated purpose of the consultation (namely to ask the public about the use of the Site), I do not consider that there was anything misleading in it. It asked sensible questions which could readily be understood by members of the public. It contained no express statement that the Council considered that there was a current "need" (in the technical section 6A sense)



for new schools to be established on the Site; nor was there any implied representation to that effect.

*Conclusion*

87. For the reasons set out above, I dismiss this claim for judicial review. In light of the conclusion I have come to on the substantive merits of the claim, it is unnecessary to go on to consider further submissions addressed to me by Mr Lewis for the Council that I should in any event refuse relief in the exercise of my discretion.