Neutral Citation Number: [2022] EWHC 1885 (Admin)

Case No: CO/4227/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/07/2022

Before :

THE HON. MR JUSTICE LANE

- -

Between :

THE QUEEN

on the application of

SARAH BECKER **Claimant**

- and –

PLYMOUTH CITY COUNCIL **Defendant**

- -
- -

Ms Victoria Butler-Cole QC (instructed by **Irwin Mitchell LLP**) for the **Claimant**
Mr David Carter (instructed by **Legal Services, Plymourth City Council**) for the **Defendant**

Hearing date: 23 June 2022

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JUDGMENT

Judgment Approved by the court for handing down.

Mr Justice Lane :

A. SPECIAL GUARDIANSHIP: PRIMARY AND SECONDARY LEGISLATION

1. In 2002, Parliament legislated so as to provide for a person over the age of 18 to become the special guardian of a child. The guardian cannot be the parent of that child. The purpose of a special guardianship order is to provide legal permanence for those children for whom adoption is not appropriate. In broad terms, legal guardianship comprises a form of "halfway house" between adoption, on the one hand, and long term foster care, on the other.

2. The relevant primary legislation comprises sections 14A to 14F of the Children Act 1989, as inserted by the Adoption and Children Act 2002. Section 14F (special guardianship support services) provides:

> "(1) Each local authority must make arrangements for the provision within their area of special guardianship support services, which means –
>
> (a) counselling, advice and information; and
>
> (b) such other services as are prescribed,
>
> In relation to special guardianship.
>
> (2) The power to make regulations under subsection (1)(B) is to be exercised so as to secure that local authorities provide financial support.
>
> …"

3. Section 14A(8) empowers the Secretary of State for Education and Skills to make regulations concerning special guardianship. The current Regulations on the Special Guardianship Regulations 2005 (SI 2005/1109).

4. For our purposes, the following provisions of the 2005 Regulations are relevant:

> "**6 Circumstances in which financial support is payable**
>
> (1) Financial support is payable under this Chapter to a special guardian or prospective special guardian—
>
> (a) to facilitate arrangements for a person to become the special guardian of a child where the local authority consider such arrangements to be beneficial to the child's welfare; or
>
> (b) to support the continuation of such arrangements after a special guardianship order is made

(2) Such support is payable only in the following circumstances—

(a) where the local authority consider that it is necessary to ensure that the special guardian or prospective special guardian can look after the child;

(b) where the local authority consider that the child needs special care which requires a greater expenditure of resources than would otherwise be the case because of his illness disability, emotional or behavioural difficulties or the consequences of his past abuse or neglect;

(c) where the local authority consider that it is appropriate to contribute to any legal costs including court fees, of a special guardian or prospective special guardian as the case may be, associated with -

(i) the making of a special guardianship order or any application to vary or discharge such an order;

(ii) an application for an order under section 8 of the Act;

(iii) an order for financial provision to be made to or for the benefit of the child; or

(d) where the local authority consider that it is appropriate to contribute to the expenditure necessary for the purposes of accommodating and maintaining the child, including the provision of furniture and domestic equipment, alterations to and adaptations of the home, provision of means of transport and provision of clothing, toys and other items necessary for the purpose of looking after the child.

…

13. Assessment and need for financial support

(1) This regulation applies where the local authority carries out an assessment of a person's need for financial support.

(2) In determining the amount of financial support, the local authority must take account of any other grant, benefit, allowance or resource which is available to the person in respect of his needs as a result of becoming a special guardian of the child.

(3) … The local authority must also take account of the following considerations

> (a) the person's financial resources, including any tax credit or benefit, which would be available to him if the child lived with him;
>
> (b) the amount required by the person in respect of his reasonable outgoings and commitments (excluding outgoings in respect of the child);
>
> (c) The financial needs and resources of the child.
>
> …"

B. STATUTORY GUIDANCE

5. In January 2017, the Department for Education issued: *Special guardianship guidance:- Statutory guidance for local authorities on the Special Guardianship Regulations 2005 (as amended by the Special Guardianship) (Amendment) Regulations 2016*. The guidance states that because it is statutory in nature "recipients must have regard to it when carrying out duties relating to the provision of assessing and supporting special guardianship". Paragraph 12 of the guidance explains that the special guardian will have parental responsibility for the child and, subject to certain exceptions, may exercise parental responsibility to the exclusion of all others. The intention is that the special guardian will have clear responsibility for all the day-to-day decisions about caring for the child or young person and their upbringing. Unlike adoption, a special guardianship order retains the basic link with the parents, who remain legally the child's parents, albeit that their ability to exercise parental responsibility is limited.

6. The guidance in respect of regulation 6 (provision of financial support) is given at paragraphs 37-41. Paragraph 37 provides:-

> "financial issues should not be the sole reason for a special guardianship arrangement failing to survive. The central principle is that financial support should be payable in accordance with the Regulations to help secure a suitable special guardianship arrangement where such an arrangement cannot be readily made because of a financial obstacle. Regulation 6 provides that financial support is payable to facilitate arrangements for a person to become the child's special guardian, where this is considered to be beneficial to the child's welfare, and to support the continuation of these arrangements after the order has been made."

7. Paragraph 38 essentially replicates the wording of regulation 6(2). The guidance continues as follows:-

> "39. Payment of financial support under (b) is intended where the child's condition is serious and long-term. For example, where a child needs a special diet or where items such as shoes, clothing or bedding need to be replaced at a higher rate than

> would normally be the case with a child similar of age who was unaffected by the particular condition."

8. Under the heading "Regulation 13: Assessment for financial support" paragraphs 63 to 68 of the guidance provides as follows:

> 63. It is important to ensure that special guardians are helped to access benefits to which they are entitled. Local authorities should therefore endeavour to ensure that the special guardian or prospective special guardian is aware of, and taking advantage of, all benefits and tax credits available to them. Financial support paid under these Regulations cannot duplicate any other payment available to the special guardian or prospective special guardian and regulation 13 provides that in determining the amount of any financial support the local authority must take account of any other grant, benefit, allowance or resource which is available to the person in respect of his needs as a result of becoming a special guardian of the child.
>
> 64. When considering providing financial support the local authority will normally consider the special guardian or prospective special guardian's means and regulation 13 requires that the local authority consider:
>
> > (a) the special guardian or prospective special guardian's financial resources (which should include significant income from any investments, but not their home) including any tax credit or benefit, which would be available to him if the child lived with him. This is consistent with the fact that financial support for special guardians is disregarded for the purpose of calculating income related benefits and tax credits
> >
> > (b) the amount required by the special guardian or prospective special guardian in respect of his reasonable outgoings and commitments, e.g. housing and transport costs, and daily living expenses (but not outgoings in respect of the child)
> >
> > (c) the financial needs that relate to the child (e.g. because of special diet or need for replacement bedding) and the resources of the child (e.g. a trust fund)
>
> 65. In determining the amount of any ongoing financial support, the local authority should have regard to the amount of fostering allowance which would have been payable if the child were fostered. The local authority's core allowance plus any enhancement that would be payable in respect of the particular child, will make up the maximum payment the local authority could consider paying the family. Any means test carried out as appropriate to the circumstances would use this maximum payment as a basis.

66. Regulation 13 provides for when the local authority has discretion to disregard means and for when they must disregard them.

67. The local authority may disregard means where they are considering providing financial support in respect of:

- the initial costs of accommodating a child who has been looked after by the local authority— where a payment made is of the nature of a 'settling-in grant'. It is not expected that this payment would be means tested, but local authorities might for example, want to means test any contribution to an adaptation to the home

- recurring costs in respect of travel for the purpose of visits between the child and a related person with whom they have contact (or would have contact but for prohibitive travel costs) so that, for example, where the local authority wants to underline the value of and facilitate contact for the child with a sibling they can achieve this by not means testing payments to support this

- any special care referred to in regulation 6(2) (b) which requires a greater expenditure of resources than would otherwise be the case because of his illness, disability, emotional or behavioural difficulties, or the consequences of his past abuse or neglect in relation to a child who has previously been looked after by the local authority. This will allow local authorities to provide a financial package for a particular child to facilitate the making of a special guardianship order where they are considering including an element of remuneration in financial support payments to ex-foster carers - so that local authorities can maintain the amount paid to a foster carer who goes on to become a special guardian for the transitional period

68. The only circumstance in which the local authority must disregard means is when they are considering providing financial support in respect of legal costs, including fees payable to a court. This applies where a special guardianship order is applied for in respect of a child who is looked after by the local authority, and the authority support the making of that order, or an application is made to vary or discharge a special guardianship order in respect of that child."

C. THE DEPARTMENT'S MODEL

9. At some point, the Department for Education and Skills produced a "standardised means test model for adoption and special guardianship financial support". This must

have been between the coming into force of sections 14A to 14F of the 2002 Act, in 2004/2005 and the point in 2007, when the DFES was replaced by the Department for Children, Schools and Families and the Department for Innovation, Universities and Skills. The DCSF was replaced in 2010 by the Department for Education, which has current responsibility for the means test model. The Model provides as follows:-

"STANDARDISED MEANS TEST MODEL FOR ADOPTION AND SPECIAL GUARDIANSHIP FINANCIAL SUPPORT"

Introduction

1. The Department for Education and Skills has developed a model means test for adoption and special guardianship financial support The model has been tested with various local authorities and modifications made as a result.

2. Please note that this test is a suggested model only. It is not a statutory requirement for local authorities to use this model in place of their existing system. However, we do recommend its use by local authorities, as we believe that the model developed is fair and that adoptive or special guardian families would benefit from a consistent approach by local authorities.

3. The model proposed is intended to deliver a standard approach to arriving at adoption support or special guardianship support payments (if not always a standard payment), so that adopters and special guardians are treated equitably within the context of what is affordable within existing local authority budgets.

4. For any queries about the model please contact the Adoption Team on adoption.team@dfes.gsi.gov.uk.

Guidance on using means test model

General

5. The model is based on disposable income, and so provides a thorough analysis of the family's financial situation. Key principles of the test are set out in this section.

6. The regulations on adoption and special guardianship support services set out that there must be no reward element in financial payments other than as a transitional provision for foster carers adopting or becoming special guardians for a child for whom they are currently caring.

7. The overall approach used in the test is a snapshot of the family's current circumstances. By this, we mean that if the adopted or special guardian child is already living with the prospective adopters or adoptive parents/special guardian, then the child should be included in the calculations. If the child is not yet placed with the prospective adopters/special guardian, then the child should not be included in the calculations.

8. If a family is in receipt of Income Support, we recommend that the local authority pay the family the applicable maximum payment without assessing their income/expenditure in this test. The figure paid to the family should not include any deductions for child benefit (as they are in receipt of Income Support).

9. Financial support paid to adoptive parents or special guardians under the regulations cannot duplicate (or be a substitute for) any payment to which adopters or special guardians would be entitled under the tax and benefit system. We recommend that local authorities only include benefits that are currently being paid to members of the household. If the local authority believes that there are other benefits to which the household would be entitled, this should be pointed out to the adopters or special guardian. A reassessment after 3 months could then be made which would capture all of the new benefits being received. This could be the case where, for example, a child has recently been placed with the prospective adopters or special guardian, and they have not yet claimed child tax credits.

10. The test is currently worked out on a monthly basis. If local authorities prefer to use weekly figures, the model can be adapted for this.

PROJECTED FAMILY INCOME

Section 1i - Pay

11. This section should include basic net monthly pay, before any deductions for savings schemes social clubs, accommodation/food and loans. However, the income figure used should exclude any payments into pension funds.

12. Where one (or both) of the parents or special guardian is self-employed, the only income which should be considered is 'drawings' as this is the equivalent of pay from an employer. Any profit from the business sitting in a bank account (and thereby not being reinvested) should be taken into account as capital under section 1 iv: other sources of income.

13. If one (or both) of the parents or special guardian does receives overtime, fees, bonus/commission and/or gratuities on a regular basis (for example annual bonuses) should be included as part of the monthly payment (i.e. if the payments are annual these should be divided by 12 to give a monthly amount to be included in the 'basic net monthly pay' section). If local authorities are using weekly figures the extra income should be calculated on this basis.

Section 1ii Benefits and pensions (parents)

14. Where the parents or special guardian receive individual benefits (i.e. those that are not calculated on a household basis) these should be included in this section. If the benefit payments are currently received weekly, please multiply by 52 and divide by 12 to give a monthly amount. Benefits to be entered in this section are:

- Employer's sick pay (after compulsory deductions)
- Incapacity benefit
- Statutory maternity, paternity and/or adoption pay and/or maternity allowance
- Bereavement benefit
- Working tax credit (if paid directly and not as part of pay and excluding any childcare element received)
- All pension payments received
- Other benefits

15. In relation to working tax credit, our understanding is that an employed person currently receives working tax credit within pay from his employer. If this is the case, the amount will be included in the basic net monthly pay section. All those who receive working tax credit will receive an award notice which sets out how much they will receive. This award notice will provide the information needed for this section of the test.

16. Where a childcare element is paid as part of the working tax credit this should be disregarded for the income section of the test. The existence of this type of credit needs to be considered when completing the expenditure section on childcare (see below).

17. Any other benefits received by the parents, for example help with costs associated with disability or mobility, should be recorded in the 'other benefits' section.

Section 1ii - Benefits (family/children)

18. Where benefits are received by the family or household, as opposed to being paid directly to the parents, they should be recorded in this section. This is primarily for benefits which are

calculated on the basis of composition. Benefits to be included in this section are:

- Income Support
- Jobseeker's Allowance
- Child tax credit per household
- Child benefit for each child, excluding the child/children who are the subject of this assessment application

19. If a member of the household receives Income Support or Jobseeker's Allowance, the amount per household should be recorded here. Also see paragraph 8 above, where it is recommended that where the only income families receive is Income Support, the applicable maximum payment should be made to the family.

20. Benefits which should be included in this section are child tax credit received for each child, at the time that the test is applied. All those who received child tax credit should receive an award notice setting out how much they will receive.

21. Child benefit should be included for each child living in the household, excluding the child/children who are the subject of this assessment application. Current rates for child benefit can be found by clicking here.

22. Housing benefit should also be excluded from this section, as it is disregarded for the purposes of the expenditure section below.

Section 1iv — Other sources of income

23. Where the family receive income from capital, savings and/or investments, this should be assessed in terms of net monthly interest only, as paid. This is the income that is routinely available to the family, and should be clearly shown on statements/similar. Any interest received from Government Child Trust Funds should not be included in this section.

24. If the family receive income from boarders/lodgers, this should be calculated on a weekly basis (then multiplied by 52 and divided by 12 to give a monthly amount if the test is being completed on a monthly basis). To calculate the weekly income, ail weekly payments for board and lodging must be added together, a £20 disregard applied and then 50 per cent of any excess over £20 for each person deducted: This is how income from boarders/lodgers is calculated for income support purposes.

25. Examples of the approach for income from boarders/lodgers are as follows:

Boarder/lodger 1	
Weekly payment	£55
Deduct £20 (disregard)	-£20
	£35
Deduct 50% remainder	£17.50
Income from boarder/ lodger 1	**£17.50**
Boarder/lodger 2	
Weekly payment	£60
Deduct £20 (disregard)	£20
	£40
Deduct	50%
Income from boarder/ lodger 2	**£20**

26. Where the family receive income from rent on an unfurnished property, this should be calculated on the following basis: monthly income received in rent after the deduction of any costs. Deductions can be made for:

- Interest payments on the mortgage (but not mortgage capital payments);
- Repairs;
- Council tax (if paid by the family being assessed)
- Agents' fees; and
- Insurance (buildings)

27. If income is received from furnished properties, the same calculation applies as above for unfurnished property, but an extra 10% deduction from the monthly rent received can be made as a 'wear and tear allowance'.

28. The approach used in paragraphs 25 and 26 above is consistent with that used for calculating income from property for the purposes of income tax. If the person who is the subject

of the assessment has completed a recent tax return, local authorities may ask to see a copy of this. The tax return should have the information needed for this section of the test.

29. Other income to take into consideration includes maintenance payments received for any child in the household and existing adoption or special guardian allowances (including enhancements for special needs) paid for any child. This latter may be paid where, for example, the family have adopted or become a special guardian for a child with a different local authority and therefore receive a separate allowance.

Section 1v - Income relating to the child/children being adopted or becoming a special guardian child

30. This section relates to the child/children being adopted or becoming a special guardian child only. Any regular interest on capital and/or income in which the child/children has a legal interest and entitlement should be included here. This could be, for example, a savings account, trust fund, property or other legacy.

31. Payments from Criminal Injuries Compensation Awards should not be included. Any interest received from Government Child Trust Funds should not be included in this section.

32. Please also consider any other income to which the child/children might be entitled. This section does not record child benefit for the adopted or special guardian child, which will be deducted from the final payment resulting from this means test.

Income calculation

33. The means test spreadsheet will automatically calculate the household monthly income, and will also apply a 20% disregard to this income figure.

PROJECTED FAMILY EXPENDITURE

Section 2i — Home expenditure

34. This section should include mortgage payments, made up of capital and interest, and also including any endowment payments linked to the mortgage. If the family pays rent, the monthly amount actually paid should be recorded here, after any deductions made for housing benefit. The only other outgoing which should be included in this section is council tax paid; this should be the amount paid after the deduction of any council tax benefit received by the household or discount for single adult households or second homes.

Section 2ii - Other outgoings

35. Where the family pay regular monthly repayments on loans for housing improvement (e.g. extensions/new kitchens) or transport costs (e.g. new car), we suggest that these are included in this section. Local authorities will need to decide in relation to the individual circumstances as to whether a loan repayment should be included here. Some loans may have been taken out by the adoptive or special guardian family to meet a new need incurred as a result of the adoption or special guardianship order buying a larger car).

36. Other payments which can be included in this section include maintenance payments relating to court orders, private pension contributions and national insurance if self-employed or not working.

37. The section for 'reasonable' child care costs will need to be determined by each local authority depending on (a) the circumstances of the family in question (e.g. how many hours the parents work). and (b) local costs for child care services. Costs recorded in this section should be those paid after any childcare element paid as part at the parents working tax credit. All those who receive working tax credit will receive an award notice which sets out how much they receive.

Section 2iii - Core regular family expenditure

38. General household expenditure on items such as food, transport, clothes, recreation should be calculated using the Income Support allowance rates, but increased by 25%. The latest rates can be found by clicking here. The calculations below are based on the rates for 2005-6 as an indication:

Personal Allowance	**Normal monthly rate**	**125% of normal monthly rate (for use in this means test)**
Single adult aged 16-17	£146.68	£183.35
Single adult aged 18-24	£192.83	£241.04
Single adult aged 25 or over	£243.53	£304.41
Couples both aged 18 or over	£381.98	£477.48
Lone parent aged 16-17	£146.68	£183.35
Lone parent aged 18 or over	£243.53	£304.41
Dependent children	£190.15	£237.69

39. In completing the means test, local authorities will need to calculate the appropriate figure for the family being assessed. For example, for a household with a couple (parents) and 2 dependent children the core regular family expenditure should be recorded as £952.86 (made up of couple's allowance of £477.48 and 2 allowances for dependent children of £237.69 each).

CALCULATION

40. The spreadsheet will calculate the household's monthly disposable income.

41. Local authorities will need to enter the appropriate maximum payment for the household, depending on the number and age of the child/children being adopted or becoming special guardian children, and the circumstances of the child e.g. special needs.

42. We understand that most local authorities will have a payment structure for fostering allowances consisting of a core allowance paid for all children, plus enhancements linked to, for example, special needs. This payment structure will be linked to local variations in the cost of living and individual local authority budgets. We recommend that adoption and special guardianship maximum payments are tied to these allowances. This would result in a different maximum payment in individual cases, determined by the needs of the child, against which amount the test is run.

43. After the local authority maximum payment has been entered manually, the box marked 'amount of payment to adopters or special guardian, will show the payment that the test has calculated for adopters or the special guardian. This amount is calculated on the following basis:

- Where the family's disposable income is less than £0, the spreadsheet will show the local authority's maximum payment. This is because the adopters or special guardian have provided evidence via the disposable income calculation that shows they do not have the means to accommodate any further expenditure.

- Where the family's disposable income is higher than £0, the spreadsheet will calculate a figure that is a percentage of the maximum payment. As the disposable income figure rises above zero, the percentage of the maximum payment that the adopters or special guardian be tapered at a set rate of 50%. This rate means that for every pound of monthly disposable income a family is found to have, they will have 50 pence deducted from the monthly maximum payment.

44. We understand that many local authorities determine payments to adopters or special guardians based on the allowances they pay foster carers, and then deduct child benefit from the final amount. This is to reflect that child benefit can be claimed by adopters and special guardians but not foster carers. The appropriate amount of child benefit for the child/children who are the subject of the test should be entered into the

> spreadsheet. Please note that the maximum payment used to calculate the payment to adopters should not take into account any child benefit the adopters might receive (i.e., should not deduct it) as the spreadsheet allows the child benefit to be deducted after the payment has been calculated.
>
> 45. The final payment shown will be the calculation of the means test minus child benefit entered by the local authority.

D. THE DEFENDANT'S WORKING PRACTICE

10. At some unspecified point which, again, must have been during the existence of the Department for Education and Skills, the defendant, Plymouth City Council, formulated a "Working practice for adoption and special guardianship financial support" ("WP"). Under the heading "Introduction", paragraphs 3 and 4 provide as follows:-

> "It is necessary to have a standard approach to arriving at adoption support or special guardianship support payments (if not always a standard payment), so that adopters and special guardians are treated equitably within the context of what is affordable within existing local authority budgets.
>
> 4. Plymouth City Council has a model, based on the Department of Education's model, which forms the basis for the calculation of these allowances".

11. Forty paragraphs follow, all under the general heading "Guidance on using means test model". Many of these paragraphs reproduce, *verbatim*, the text of the Department Model, including the use of the first person plural, such as in paragraph 8:-

> "8. If a family is in receipt of Income Support, we recommend that the local authority pay the family the applicable maximum payment without assessing their income/expenditure in this test. The figure paid to the family should not include any deductions for child benefit (as they are in receipt of Income Support)" .

12. The WP, however, adds these words to paragraph 8:-

> "Reference should be made to paragraph 17. Only if income support is the only benefit in payment should the maximum allowance be awarded."

13. Paragraph 17 reads:-

> "17. If a member of the household receives Income Support or Jobseeker's Allowance, the amount <u>per household</u> should be recorded here. Also see paragraph 8 above, where it is recommended that where the <u>only</u> income families receive is Income Support, the applicable maximum payment should be made to the family."

14. As can be seen, paragraph 17 reproduces paragraph 19 of the Department's Model.

15. The WP's provisions concerning projected family income follow those in the Department's Model (model paragraphs 11 to 32; WP paragraphs 11 to 32). Although the WP contains no equivalent of Model paragraph 33, which refers to "a 25 per cent disregard" being applied to the income figure, Miss Butler-Cole's position, on behalf of the claimant, was that the provisions in the WP concerning income were not in dispute.

16. Turning to projected family expenditure, WP paragraphs 33 to 36 follow Department's Model paragraphs 34 to 37. From this point however, there are significant differences. Department's Model at paragraph 38 deals with general household expenditure on items such as food, transport, clothes and recreation by using the Income Support allowance rates, increased by 25 per cent. The box which follows paragraph 38 of the Model, and the wording of paragraph 39, make it clear that the general household expenditure will be calculated by reference to the Income Support position, not just of the special guardian, but others in the household, including dependent children. Although there may be a question as to whether such children include those subject to the special guardianship order, there is, in my view, no doubt that it includes other dependent children of the special guardian. As we shall see, this is of potential significance in the present case, since at the time of the challenged decision, the claimant had two such dependent children.

17. As we have seen, under the heading "Calculation", the Department's Model paragraphs 40 to 45 states that the spreadsheet will calculate the household's monthly disposable income; and that local authorities will need to enter the appropriate maximum payment for the household, depending, *inter alia* on the "circumstances of the child e.g. special needs". Paragraph 42 recommends that adoption and special guardianship maximum payments should be tied to the payment structure for fostering allowances, which comprise a core allowance paid for all children, "plus enhancements linked to, for example, special needs." That structure will be linked to local variations in the cost of living and individual local authority budgets.

18. Paragraph 43 of the Department's Model then explains what should be done. Where the family's disposable income is less than £0, the local authority's maximum payment should apply. For every pound, however, that the family's disposable income is higher than £0, the percentage of the maximum payment is to be "tapered at a set rate of 50 per cent. This means that for every pound of monthly disposable income families are found to have, they will have 50 pence deducted from the monthly maximum payment."

19. By contrast, the provisions under the heading "CALCULATION" in the WP read as follows:-

> "38. The total household weekly income is calculated.
>
> 39. 25% of this is recorded as this is disregarded in lieu of general household expenditure.
>
> 40. A personal allowance for the carer (single person or couple) is established. This is based on income support rates.
>
> 41. The amount of weekly allowable expenditure is established.

> 42. The figures from parts 39, 40 and 41 above are added together then deducted from the total weekly income.
>
> 43. This leaves the amount of disposable weekly income. This is deducted from the base allowance which is based on the fostering allowance. From this is also deducted an amount for child benefit as this should be claimed. Where the family's disposable income is less than £0, the maximum payment will be payable (i.e. base amount less child benefit). This is because the adopters or special guardian have provided evidence via the disposable income calculation that shows they do not have the means to accommodate any further expenditure.
>
> As the disposable income figure rises above zero, the percentage of the maximum payment that the adopters or special guardian be tapered at a set rate of 100%. This rate means that for every pound of monthly disposable income a family is found to have they will have £1 deducted from the monthly maximum payment."

20. I can now turn to the facts of this case and to the details of the challenge brought by the claimant.

E. THE FACTS

21. The facts are as follows. The claimant is the paternal grandmother of two children, K and R, who at the relevant time were respectively aged 6 and 5. K and R suffered neglect whilst living with their mother. A social worker for the children asked the claimant to take the children home with her to ensure that they were kept safe. Initially, they were placed with the claimant under an interim care order; but the claimant subsequently became their special guardian. The social worker's request occurred in September 2018. The claimant says that, after the children came to live with her, she was strongly encouraged to obtain a special guardianship order. During this process, the claimant made it plain that she already had considerable responsibilities in caring for her own children. Her daughter, who has now turned 18, is said to require support (she is currently at University, but living at home with the claimant). The claimant's youngest son, H, is autistic. At the time of the decision, he was 14 years old and attended a specialist school.

22. As well as neglect, the claimant believes that domestic violence may have occurred, whilst the children were living with their mother, and that they had witnessed other distressing incidents, including a cat being put on a barbeque.

23. Both K and R were said by the claimant to have been traumatised by their experiences. K is receiving "life story" therapy. The claimant describes K and R wetting their beds on "nearly …a nightly basis, sometimes twice a night" (first witness statement at paragraph 11). R "can be violent and destructive, he chews and licks his clothes" (paragraph 19). The claimant says that R "has done a lot of damage in my home" and that "he is very aggressive and has a tendency to chew not just his clothes, he has chewed his bed rails and has written all over the sofa and walls. He needs to be

constantly supervised due to his violent nature towards both his sister and the pet dog" (paragraph 19).

24. R has recently been diagnosed with Attention Deficit Hyperactivity Disorder and is under investigation for Foetal Alcohol Spectrum Disorder (claimant's second witness statement, paragraph 3).

25. There has been an extensive correspondence between the claimant and the defendant, regarding the provision of special guardianship financial support, since the claimant became the special guardian of K and R. The decision under challenge is that of 10 September 2021, which followed the claimant notifying the defendant and changes in her circumstances; namely, that her housing benefit would change from 13 September 2021 and that payment to her of child tax credit would also reduce on 27 September 2021.

26. As a result, the defendant reviewed the claimant's award, calculating it at a rate of £168.16 per week from 27 September 2021.

27. The decision set out the claimant's weekly income, comprising income support, child tax credit, child benefit and a carers allowance. The letter then turned to the claimant's weekly allowable expenditure in respect of rent, council tax and car finance.

28. The letter described the relevant calculation as follows:-

> "Calculation of the allowance"
>
> A – The total weekly household income is calculated.
>
> B – A percentage of this is disregarded in lieu of general household expenditure.
>
> C – A personal allowance for the carer (single person or couple) is established, this is based on income support rates.
>
> D – The amount of weekly allowable expenditure is established.
>
> E – The figures from parts B, C, D are added together the [sic: presumably 'then'] deducted from A (the weekly income).
>
> F – This leaves the amount of "disposable" weekly income referred to as "taper" value.
>
> This taper value is then deducted from the base allowance for each child. The base allowance is based on the fostering allowance.
>
> From the base allowance is deducted child benefit as this amount can be claimed from the Department of Work and Pensions for each child (which foster carers cannot claim).

29. The calculation was follows:-

> **"From 27 September 2021**
>
> The calculation relating to your assessment is as follows:
>
> A – 417.93
>
> B – 104.48
>
> C – 74.70
>
> D – 112.91
>
> E – 292.09
>
> F- 125.84 (taper amount, which is divided by the number of children for whom the allowance is being claimed).
>
> £125.84 divided by 2 = £62.92
>
> Base allowance for child aged based on South East rate, for child up to 5 this is £153 per week, for child aged over 5 this is £169 per week.
>
> Calculation summary
>
> Base allowance less taper less child benefit = award
>
> K £169 - £62.92 - £14 = £92.08
>
> R £153 - £62.92 - £14 = £76.08"

30. The reference to the South East rate is explained by the fact that the claimant and her family (including K and R) live in the South East of England.

F. THE GROUNDS OF CHALLENGE

31. I can now turn to the grounds of challenge. Ground 1 asserts that the defendant "has wrongly means-tested the claimant, despite her being in receipt of Income Support". The claimant submits that both the Department model and the defendant's WP are ambiguous. They both recommend that those in receipt of Income Support should not be means-tested. However, both documents later refer to means-testing only in the context where Income Support is the sole income.

32. The claimant submits that this is irrational because there is, in practice, no situation in which someone would only be in receipt of Income Support. A person in receipt of income support is automatically entitled to child tax credit if they have a child. Since the 2005 Regulations require income which would be available to the person if the special guardian child lived with them to be taken into account, this will, the claimant says, always include child tax credits. The defendant's witness evidence states, in alleged direct contradiction to the regulations, that such benefits will be taken into account if the child had not been formally placed with the carer. The claimant says that

the Department's Model makes the same error, stating at paragraph 7 that the model should not include the child if not yet placed with the special guardian.

33. Even if child tax credits are only counted when they are actually being paid, the claimant says that the period of "Income Support only" would exist only for a matter of weeks, between the making of the special guardianship order and the credits being applied for. Accordingly, either both models have pointlessly included provision about a situation that will not exist, or will exist only for a minimal period; or a different interpretation of the relevant text is needed to give it meaning. If the word "income" in the phrase "where the only income families receive is Income Support" means earnings, or income as distinct from benefits, the models would be coherent.

34. Further support for that interpretation is said to come from the fact that since the Department's Model provides that actual income from all sources is reduced by 20 per cent as part of the calculation; and actual expenditure on certain items, and an allowance for core expenditure, is made that is 125 per cent of the Income Support personal allowances, then it is inherently extremely unlikely that a person in receipt only of benefit income would ever come out with an income surplus under the model.

35. Ground 2 argues that the defendant's WP, as used to means-test the claimant, does not take proper account of her household expenditure.

36. The claimant submits that the 25 per cent disregard, as set out at paragraphs 37 and 39 of the WP, (which is said to be the way in which the defendant takes account of general household expenditure on items such as food, transport, clothes, recreation and utility bills), is incapable of generating a rational sum for such expenditure. The factual evidence adduced by the claimant, as to her actual expenditure, is said to illustrate the inevitable discrepancy between reality and the defendant's WP. The model allocated her £104.48 a week (the 25 per cent deduction) and £74.70 (the personal allowance), giving a weekly total expenditure of a figure of approximately £179 at the time of the decision under challenge. The claimant's weekly expenditure at the time the claim was issued was, however, such that the £179 was almost entirely taken up by utilities, council tax, car (excluding car finance, which is paid for separately) telephone, insurance, TV licence, petrol and pet food. This leaves out of account the cost of food, which for the whole household was the same amount again, and any allowance for clothing or recreational activities. Even taking account only of food, clothing and recreation for the claimant and her son, and not K and R, the defendant's allowance is said to be obviously substantially below these basic costs.

37. Furthermore, under this ground, it is alleged that no account has been taken by the defendant of the needs of K and R in respect of their day to day care or as to items identified in the statutory guidance, such as replacement bedding.

38. Ground 3 submits that the WP used to assess the claimant does not take into account the additional needs of the children, K and R. This is despite the fact that the 2005 Regulations require consideration to be given to payments in connection with the additional needs of the children subject to the special guardianship order. The statutory guidance says the maximum payment will be the foster allowance, plus any enhancement. The WP does not include any element that reflects the additional needs of the children. There is said to be no reasoning on the part of the defendant for this departure from the statutory guidance. It is difficult to imagine what cogent reason

could be given, in the light of the fact that in an e-mail of 20 January 2021 (bundle, page 400) the defendant told the claimant that:-

> "the team leader is not aware of any discrepancy between [the WP] and the [Department's] model document that disadvantages SG carers. It is not the intention of Plymouth City Council to do so … local authorities are not required to comply with the guidance in any event and the guidance itself sets this out, however Plymouth City Council has adopted this and work to the spirit of it".

39. It is said in respect of ground 3 that it is difficult to discern from the witness statements of the defendant or the grounds of defence whether the defendant accepts that K and R have the additional needs identified by the claimant, or at all. It is submitted that this court can accept the claimant's evidence that they do, not least since R has been diagnosed with ADHD and is being investigated for foetal alcohol syndrome.

40. Ground 4 contends that the WP used to means-test the claimant has generated an allowance which makes her continued care of K and R unsustainable. The argument is that, if grounds 1 to 3 fail, the defendant's decision is still irrational as, having applied its WP, and being informed that the resulting calculation bears no meaningful relationship to the claimant's position, and that she is at risk of having to cease to be the special guardian of K and R as a result, the defendant has not asked herself whether its payment decision should be amended, in order to ensure the stability of the current arrangements.

G. CASE LAW

41. The lawfulness of decisions taken by local authorities in relation to financial support for special guardians has been considered by this court on two previous occasions. In B v London Borough of Lewisham [2008] EWHC 738 (Admin), Black J held that the London Borough of Lewisham had failed to have lawful regard to paragraph 65 of the statutory guidance. At paragraph 54 of her judgment, Black J held that although the guidance did not have the force of a statute, "the local authority had a duty substantially to follow it unless there was good reason to do differently". Nothing that Lewisham had argued in the proceedings "comes close to justifying a radical departure". The council had failed to understand the central importance that paragraph 65 gives to the amount paid by way of fostering allowances and therefore cannot have had regard to those allowances in the way in which they we are required to do.

42. At paragraph 57, Black J held that there "can be little doubt that it was intended that there should be a range of placement options for children who are not living with their own parents". The intention of the legislation, as shown by regulation 6, was that "financial support should be made available to special guardians to ensure that financial obstacles do not prevent people from taking on this role". Putting the matter at its lowest, "a local authority is not free, in my view, to devise a scheme which fails to do what is required by regulation 6 or which dictates that some types of placement for a child carry a significant financial disadvantage in comparison with others or, worse, would impose such a financial strain on a carer that they would be forced to choose another type of placement".

43. In R (TT) v London Borough of Merton [2012] EWHC 2055, (Admin), Edwards-Stuart J was concerned with the policy of the London Borough of Merton, whereby it declined to follow aspects of the Department's Model. At paragraph 44 his judgment, Edwards-Stuart J observed that it was accepted by the parties that the Model "does not carry the same weight as the Special Guardianship Guidance. It is, as it says, a suggested model only."

44. At paragraph 68 of his judgment, Edwards-Stuart J found that Merton had not complied with paragraph 65 of the guidance and had "produced no reasons, cogent or otherwise, for not doing so". Its decision to adopt a level of allowance for special guardians of two-thirds of the Fostering Network's minimum allowances "was unlawful and must be quashed".

45. The judge, however, rejected the claimant's challenge to the form of means test adopted by Merton. At paragraph 45 of the judgment, it was recorded that Merton had considered the Department's Model but concluded that it did not take into account the actual needs of the individual family concerned. It identified four aspects with which it disagreed:-

> "(1) The government's recommendation was that where the special guardian was in receipt of Income Support, he/she should be paid the maximum locally set allowance. Merton rejected this on the basis that it suggested that Income Support was not enough to meet the needs of any family, regardless of their individual circumstances.
>
> (2) Whilst the Model provided that the first 20% of a prospective special guardian's income should be disregarded, Merton rejected this on the basis that actual needs must be considered.
>
> (3) The Model provided that in order to determine a family's core expenditure on household items, Income Support rates should be used with an uplift of 25%. Merton rejected this on the ground that the assessment should be of essential need and that the Income Support rates should be used without any uplift. The policy states that this "*ensures that all families are treated fairly and equally*". I find this last comment hard to follow - I am at a loss to see how any family that included a special guardian would be treated less fairly than any other such family by the adoption of Income Support rates plus 25% when calculating predicted expenditure or, alternatively, why families with a special guardian should be treated on exactly the same basis as families with natural children.
>
> (4) The Model suggested that where a family has a disposable income, only 50% of that disposable income should be taken into account. Merton rejected this. The effect of this is that Merton appropriates any assessed disposable income in diminution of the allowance it pays to the special guardian.

> 46. In relation to the last point, in fairness to Merton it should be made clear that the method adopted by Merton's means test is to take the cared for child's tax credit into account when assessing the special guardian's family income but to ignore the cost of caring for the child when assessing the expenditure. Thus the inclusion of the child tax credit without deducting the corresponding expenditure might well result in a surplus. However, this has given rise to a further point."

46. Edwards-Stuart J dealt with the challenge made by the claimant to ease departures from the Department's Model as follows:-

> "69. I can deal fairly shortly with the challenge to the form of means test adopted by Merton. It is quite true that Merton has, at various points, departed from the means test suggested and adopted an approach less favourable to special guardians. However, in the case of each departure it has given reasons for adopting a different approach that I have already summarised. Whilst many people might regard Merton's approach to some of the points as mean, the question is whether it was unlawful."
>
> 70. It is, common ground that the model means test suggested by the Department for Education and Skills does not carry the same weight as the Guidance. The Department says that its adoption is recommended in order to achieve fairness and consistency between special guardians in different local authorities.
>
> 71. Although it is essentially a matter of impression, I am unable to conclude that the differences adopted by Merton, even when taken cumulatively, are ones that no reasonable local authority could have taken. If put on a *Wednesbury* basis, therefore, this ground of challenge therefore fails.
>
> 72. However, as I have already mentioned, Miss Scolding submits that an issue involving fundamental human rights involves a more sophisticated level of scrutiny than for mere *Wednesbury* unreasonableness: there has to be both a rational connection and a fair balance between ends and means. The reasons given by Merton, for departing from the Model are, in my judgment, perfectly rational. As to the fair balance, I do not think that it can be said that the balance struck by Merton, whilst capable of being described as somewhat mean, is unfair.
>
> 73. But there is a further ground for rejecting this part of the claim. It is well accepted that local authorities have a wide margin of appreciation in matters such as the allocation of resources, which is effectively to what this amounts. The fact that Merton may adopt a more stringent approach to means testing than, say, Westminster does not begin to found the basis for an allegation that the balance struck by Merton is unfair. Merton's resources may be more limited than those of

> Westminster but the demands on those resources just as great. Merton has to determine its priorities and allocate its resources accordingly. In these circumstances I do not see how the court can intervene on an application for judicial review save in the clearest of cases."

H. DISCUSSION

47. Before dealing with the individual grounds of challenge, it is necessary to examine the significance, in public law terms, of the Department's Model. There is, in the present case, a hierarchy of instruments. At the apex is the primary legislation; namely, sections 14A to14F of the Children Act 2002. As we have seen, section 14 F(2) contains Parliament's decision that local authorities shall provide financial support to those undertaking the role of special guardian. Effect is given to this through regulations 6 and 13 of the 2005 Regulations. This is the next level; viz secondary legislation.

48. After this in the hierarchy is the special guardianship guidance. As that guidance states, recipients it must have regard to it when carrying out duties relating to the provision of assessing and supporting special guardianship. Failures to do this led to the quashing of the decisions in the Lewisham and Merton cases.

49. As in Merton, the present case is concerned with a local authority's decision to depart from the Department's Model.

50. The leading case on the nature of statutory guidance is R v Ashworth Hospital Authority ex party Munjaz [2005] UK HL 58. In that case, the statutory guidance comprised a Code of Practice issued by the Secretary of State. At paragraph 21 of the judgments, Lord Bingham said this:-

> "21. It is in my view plain that the Code does not have the binding effect which a statutory provision or a statutory instrument would have. It is what it purports to be, guidance and not instruction. But the matters relied on by Mr Munjaz show that the guidance should be given great weight. It is not instruction, but it is much more than mere advice which an addressee is free to follow or not as it chooses. It is guidance which any hospital should consider with great care, and from which it should depart only if it has cogent reasons for doing so. Where, which is not this case, the guidance addresses a matter covered by section 118(2), any departure would call for even stronger reasons. In reviewing any challenge to a departure from the Code, the court should scrutinise the reasons given by the hospital for departure with the intensity which the importance and sensitivity of the subject matter requires."

51. At paragraph 69, Lord Hope said:-

> "69. The Court of Appeal said in para 76 of its judgment that the Code is something that those to whom it is addressed are expected to follow unless they have good reason for not doing so: see R v Islington London Borough Council, ex p Rixon

> (1996) 1 CCLR 119, per Sedley J at p 123. Like my noble and learned friend Lord Bingham of Cornhill I would go further. They must give cogent reasons if in any respect they decide not to follow it. These reasons must be spelled out clearly, logically and convincingly. I would emphatically reject any suggestion that they have a discretion to depart from the Code as they see fit. Parliament by enacting section 118(1) has made it clear that it expects that the persons to whom the Code is addressed will follow it, unless they can demonstrate that they have a cogent reasons for not doing so. This expectation extends to the Code as a whole, from its statement of the guiding principles to all the detail that it gives with regard to admission and to treatment and care in hospital, except for those parts of it which specify forms of medical treatment requiring consent falling within section 118(2) where the treatment may not be given at all unless the conditions which it sets out are satisfied."

52. In R v London Borough of Islington ex parte Rixon [1997] ELR 66, Sedley J was concerned with both statutory guidance and non-statutory practice guidance issued by the Department of Health. So far as statutory guidance was concerned, Sedley J held that a failure to comply is "unlawful and can be corrected by means of judicial review" and that "the greater the departure, the greater the need for cogent articulated reasons …".

53. Sedley J held that although the practice guidance "lacks the status accorded by s.7 of the 1990 Act, it is …something to which regard must be had in carrying out these statutory functions". Sedley J accordingly held that any failures to follow the policy guidance and practice guidance were not "beyond the purview of the court".

54. In Merton, the defendant, had, as we have seen, given reasons for departing from the Department's Model. In the present case, the defendant's officers are unable to offer an explanation for the differences between the Department Model and the WP as regards treatment of general household expenditure.

55. None of the present officers was responsible for the creation of the WP and there appears to be no corporate record that might shed light on the matter.

56. In the face of this difficulty, Mr Carter relied upon the principle, articulated by Lord Mustill in R v Home Secretary, ex party Doody [1994] 1AC 531, that "the law does not at present recognise a general duty to give reasons for an administrative decision"(564E).

57. In the present context, however, the issue is not whether the WP (and, hence, the challenged decision) is unlawful because the defendant has advanced no reasons for its adoption. Rather, the lack of reasons may make it more difficult for the defendant to resist the rationality challenge, that lies at the heart of the claimant's grounds. In particular, the claimant alleges irrationality in the wider sense than "pure" *Wednesbury* unreasonableness, in that she submits the defendant in effect failed to have regard to relevant considerations, in the way in which it departed from the Department's Guidance.

Ground 1

58. The difficulty faced by the claimant in making good Ground 1, is that there is, here, no difference between the Department's Model and the WP. As I have explained, paragraph 8 of the former is reproduced in paragraph 8 of the latter. The same is true of paragraphs 17 of the Department's Guidance and at paragraph 19 of the WP.

59. I consider that Ground 1 fails for the following reasons.

60. First, Ms Butler-Cole's acceptance on behalf of the claimant that it is not conceptually impossible for somebody to be in receipt of "Income Support" only; albeit that the period of time is likely to be short, defeats the argument that paragraph 8 of the Department's Guidance is irrational. It is, accordingly, unsurprising that (as far as one can tell) there has been no challenge to this provision of the Guidance hitherto.

61. Secondly, paragraph 8 proceeds merely as a recommendation. It sits apart from the normative language in paragraphs 11 *et seq*., which set out the process where means testing is undertaken by a local authority. I am, of course, aware that paragraph 2 of the Department's Guidance does no more than "recommend" the use of the entirety of the Guidance. The position, nevertheless, remains that if a local authority decides to means-test, paragraphs 11 et seq. comprise a code.

62. Finally, the force of the recommendation in paragraph 8 is necessarily tempered by the language of the Regulations and the statutory guidance. Regulation 13(2) requires that the local authority must take account of any grant, benefit, allowance or resource (other than by means of the special guardianship allowance) which is available to the person. Subject to exceptions in paragraphs (4) and (5), which are irrelevant for present purposes, the local authority must also take account of the person's financial resources; in other words, means-testing.

63. Paragraph 64 of the statutory guidance states that, when considering providing financial support, "the local authority will normally consider the special guardian or prospective special guardian's means. Although paragraph 64 may have been written with an eye to paragraph 8 of the Department's Guidance, it is, nevertheless, the position that means-testing is very much the "default" option for a local authority.

64. Apart from saving time and expense on the part of the local authority, there has been no suggestion that means-testing someone who is solely dependent on income support (or on income support plus child tax credits etc) will necessarily produce a result which is financially less advantageous to that person.

65. Ground 1 accordingly fails.

Ground 2

66. At this point, one enters the interstices of the process, beginning at paragraph 11, by which the Department Model means-tests, by reference to income and expenditure. To reiterate, the Department's Model deals with projected expenditure (other than rent, council tax, regular monthly repayments on loans etc) by using the income support allowance rates, increased by 25 per cent. The table and paragraph 39, immediately below it, make it evident that the relevant personal allowance, as regards income

support, will cover not only the special guardian and their partner (in the household) but also dependent children.

67. By contrast, the WP assesses general household expenditure by "disregarding 25 per cent of the household income". Although, at paragraph 40, the WP takes in the personal allowance for the guardian (including any partner) based on income support rates, no account is taken of dependent children.

68. I do not consider anything turns on the fact that, initially, the defendant regarded the 25 per cent "disregard" as relating only to utility bills, rather than as also relating to food, transport, clothes and recreation. Nor do I accept that the claimant's case under this ground is necessarily made good because she has filed evidence which, on its face at least, shows that the 25 per cent disregard from income does not accurately represent her relevant expenses. In both the Department's Model and the WP, we are in the realm of notional, not actual, calculations. The question is whether the defendant's notional approach is valid in public law terms.

69. I accept that the parties have been unable to identify a published rationale for the Department's Model to alight on income support allowance rates, increased by 25 per cent, as the notional yardstick for these forms of regular family expenditure. All one can do is note the statement at paragraph 1 that the Model "has been tested with various local authorities and modifications made as a result". There is, however, no suggestion on the part of the defendant that paragraphs 38 and 39 of the Department's Model (together with the table) is either conceptually incoherent or unduly generous. We have seen how, in Merton, the local authority rejected the 25 per cent uplift by reference to income support rates "on the ground that the assessment should be of essential need and that income support rate should be used without any uplift." Although he declined to find in favour of the claimant in this regard, Edwards-Stuart J was nevertheless puzzled by Merton's contention that it ensured "that all families are treated fairly and equally".

70. Be that as it may, the present defendant's WP departs from the Department's Model in a much more fundamental respect, in that it rejects the "income support" approach altogether. Ms Butler-Cole is, I consider, correct to submit that this strikes at the coherence of the defendant's scheme.

71. Unlike Merton, the defendant in the present case has not only sought to justify the differences; it has, in the e-mail of 20 January 2021 (see above) asserted that it is "not aware of any discrepancy between this and the model document that disadvantages SG carers." That, however, is precisely what has happened. The defendant has departed in a way that has produced a material financial disadvantage, by taking no account of the claimant's dependent children.

72. As I have said, the position here is fundamentally different from that in respect of paragraph 8 and the question of whether to undertake a means test at all. Since the defendant has decided to means-test, by reference to the Department's Model, it cannot then proceed to destroy the coherence of that model. But that is what paragraphs 37 to 39 of the WP do, as paragraph 36 above makes plain.

73. Ground 2 also challenges the provisions in paragraph 43 of the WP, which set the "taper" at 100 per cent rather than the 50 per cent contained in paragraph 43 of the Department's Guidance. Although Ms Butler-Cole was critical of the WP in this

disregard, in her oral submissions, I did not take her to press the point (which had not found favour with Edwards- Stuart J in Merton). Since, for the reasons I have given, the claimant's decision falls to be quashed, I do not consider it necessary to reach a conclusion on this matter.

Ground 3

74. I am not persuaded that the defendant's WP is unlawful, in that it fails to include any element that reflects the additional needs of the children subject to the guardianship order. That is not the purpose of the WP or indeed, the Department's Model, both of which are concerned with when, and, and if so, how to means test. As has been seen, regulation 6 (2)(b) provides that support may be provided where the local authority considers that the child needs special care which requires a greater expenditure of resources that would otherwise be the case, because of illness, disability, emotional or behavioural difficulties or the consequences of past abuse or neglect.

75. I accept that the claimant has filed evidence to the effect that K and R have such additional needs, in that they wet their beds frequently and therefore run through more bedding than would otherwise be normal; and that R is destructive of his clothes and household items. There is also more recent evidence concerning R's diagnosis of ADHD and the investigations being made to ascertain if he suffers from foetal alcohol spectrum disorder.

76. Ms Butler-Cole submits that the defendant has not taken issue with any of this and that, so far as concerns post-decision developments of the kind just described, the judicial review is in the nature of a "rolling" set of proceedings. Mr Carter says, in response, that the claimant does not appear to have made any application to obtain additional support by reason of the additional needs of K and R.

77. It is undoubtedly the case that, whatever else might be said about the defendant's decision-making in respect of the WP, it has responded to requests from the claimant for additional assistance. The defendant has facilitated the claimant's acquisition of a larger car, given the need (amongst other things) to take K to and from her therapy sessions.

78. The reality of the matter is that the ordinary process of communication, whereby requests for additional assistance can be made and properly assessed, has been put to one side by both parties, in the light of the present proceedings. That is not a criticism of the claimant or the defendant. It does, however, mean that the defendant cannot properly be criticised for not treating the contents of the claimant's witness statements as request for further assistance. Following the conclusion of these proceedings, it will be possible for the parties to resume this dialogue, which will include the defendant forming a view on the extent of the additional costs being sought by the claimant.

79. Ground 3 accordingly fails.

80. After a draft of this judgment was circulated, Ms Butler-Cole requested "additional reasons", on the basis that (a) paragraph 65 of the statutory guidance says that, in determining the amount of any ongoing financial support, a local authority should have regard to the amount of fostering allowance which would have been payable if the child were fostered; and (b) paragraph 42 of the Department's Model recommends that

adoption and special guardianship maximum payments are tied to the payment structure for fostering allowances, which "[w]e understand that most local authorities will have".

81. The plain fact is, however, that the evidence of the children's special needs remains unresolved, for the reason given in paragraph 78 above. Unlike Ground 2, it is not possible to conclude that the defendant's eventual decisions on the amounts to be paid in respect of the children's additional or special needs are bound to be incoherent (and thus irrational), if it transpires that these amounts are not tied to the fostering scheme (which may or may not be the case).

Ground 4

82. The claimant's stance is that Ground 4 falls to be considered if grounds 1 to 3 fail. Since Ground 2 has succeeded, it is, accordingly, unnecessary to address Ground 4. The challenged decision will be quashed. A new decision will need to be made in the light of this judgment. That will need to happen, irrespective of the defendant's ongoing work to review the WP as a whole.

83. I invite counsel to agree, if possible, an order that reflects this judgment. Otherwise, they should make their respective written submissions on its contents.