THE LAW OF EDUCATION

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Filing Instructions: Please file this Bulletin after the Bulletins Guidecard and in front of Bulletin 97. **Discard Bulletin 88**, which may be retained outside the binder for future reference. **The Binder will now contain Bulletins 89 to 98.**

HEADLINES

Safeguarding Children The ISA is to be merged with the CRB and the new 'safeguarding' regime will strike a noticeably different balance, as between children in need of protection and adults from whom the children need to be protected. A host of new regulations and advice is described in this issue.

Schools Forums and Schools Funding in England These inter-related and slightly esoteric subjects are back in the news. One function of the increasingly influential schools forums is to keep an eye on their local authorities' schemes of delegation, by which funding is allocated to state schools. We have new Schools Forums Regulations and new DfE rules on schools' budgets.

Contents of this Bulletin

STATUTORY INSTRUMENTS

Teachers: Pay and Conditions

School Teachers' Pay and Conditions Order 2012 (*SI 2012 No 2051*)

This Order gives statutory force to the School Teachers' Pay and Conditions Document 2012. The main changes since the 2011 Document which took effect on 1 September 2012 are, according to the Document itself, as follows:

(*a*) references are made to the Teachers' Standards, rather than the Core Standards (for England only);

(*b*) there have been changes to the annexes in Section 2. Annex 1 no longer includes the Core Standards as these will not apply from 1 September 2012. The Teachers' Standards (which apply in England from 1 September) and the Practising Teacher Standards (which apply to teachers in Wales) have been included in a new Annex 2 for ease of reference;

(*c*) the Document now reflects the new arrangements for teacher appraisal in both England and Wales;

(*d*) a teacher employed full-time must be available for work 195 days/1265 hours per annum. (The figures for the previous two years having been 194 and 1258.5 respectively due to additional public holidays); and

(*e*) references to the General Teaching Council for England (GTCE) have been removed, because of its abolition.

The Order and the Document apply, of course, only to teachers in maintained schools. See the definition of 'teacher' for these purposes in EA 2002, s 122 (**LOE B [6622]**). Teachers in academies and free schools may or may not

have contracts which incorporate all or part of the Document, but one of the alleged advantages of academy or free school status is that the governors can pay the teachers whatever they want – or at least, whatever they can agree when recruiting.

Teacher Appraisal (England)

***Education* (*School Teachers' Appraisal*) (*England*) (*Amendment*) *Regulations 2012* (*SI 2012 No 2055*)**

The compulsory appraisal system for teachers in maintained schools will not apply to teachers to whom the Education (Induction Arrangements for School Teachers) Regulations 2012 (SI 2012/1115) apply. This is an amendment to SI 2012/1115, which seems to have been drafted to capture rather more people than the Minister intended.

School Curriculum (England)

***Education* (*Amendment of the Curriculum Requirements for the Fourth Key Stage*) (*England*) *Order 2012* (*SI 2012 No 2056*)**

This Order removes from the KS4 curriculum in England, with effect from 1 September 2012, something called work-related learning. Work-related learning was (but is no longer) defined in s 85(10) of the 2002 Act (**LOE B [6587]**).

Safeguarding Vulnerable Groups Act 2006

***Safeguarding Vulnerable Groups Act 2006* (*Miscellaneous Provisions*) *Regulations 2012* (*SI 2012 No 2112*)**

The (edited) Explanatory Note says:

> 'These Regulations make a number of changes to existing regulations under the Safeguarding Vulnerable Groups Act 2006, which are consequential upon the implementation of the Protection of Freedoms Act 2012. These Regulations also make a number of new provisions.
>
> Regulations 2 to 7 amend the Safeguarding Vulnerable Groups Act 2006 (Barred List Prescribed Information) Regulations 2008) which set out the information which the Independent Safeguarding Authority is obliged to keep in relation to any individual who is barred. Mostly, these are consequences of the 2012 Act.
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> Regulations 8 and 9 amend the Safeguarding Vulnerable Groups Act 2006 (Barring Procedure) Regulations 2008 to reflect the changes made to the barring procedure by section 67 of the 2012 Act. Under paragraphs 2 and 8 of Schedule 3 to the 2006 Act (as amended by section 67 of the 2012 Act), individuals will no longer make representations in order to be removed from the barred list(s); instead, they will make representations in order not to be included in the barred list(s).

Regulations 10 to 21 amend the Safeguarding Vulnerable Groups Act 2006 (Prescribed Information) Regulations 2008 in light of more changes made by the 2012 Act. Those Regulations set out the information which is to be provided to the ISA by various bodies under various provisions in the 2006 Act. Regulations 11, 12, 13, 14, 15, 18 and 19 make amendments which are consequential upon the repeal of the concept of a "controlled activity" by section 68 of the 2012 Act. Regulations 16 and 20 revoke the regulations which concerned information which local authorities, keepers of relevant registers and supervisory authorities were obliged to provide to the ISA and replaces them with a power to refer information to the ISA. Regulation 17 makes an amendment which is consequential upon the repeal of "monitoring" by section 69 of the 2012 Act. Regulation 21 makes an amendment for the purpose of clarifying the obligation on various bodies to provide details of any court proceedings. All court proceedings taken in relation to the person's conduct are included in the obligation and this amendment simply emphasises, for the avoidance of doubt, that this includes proceedings under the Children Act 1989.

Regulation 28 makes provision under section 50A(1)(*d*) of the 2006 Act which was inserted by section 77(3) of the 2012 Act. Section 50A(1)(*d*) enables the police to use information given to them by the ISA for prescribed purposes and regulation 29 provides that the police can use information given to them by the ISA for the purposes of disclosing it as relevant information on an enhanced criminal record certificate under section 113B(4) of the Police Act 1997.'

***Safeguarding Vulnerable Groups Act 2006* (*Miscellaneous Provisions*) *Order 2012* (*SI 2012 No 2113*)**

The only part of this Order relevant to education law extends the integration of the English and Welsh, Scottish and Northern Irish lists of people who are barred under the revised SVG Act 2006.

***Safeguarding Vulnerable Groups* (*Miscellaneous Amendments*) *Order 2012* (*SI 2012 No 2157*)**

This Order is to tidy up the transition from the previous Government's idea of how the SVG Act would operate across to the current Government's ideas.

***Safeguarding Vulnerable Groups Act 2006* (*Controlled Activity and Prescribed Criteria*) *Regulations 2012* (*SI 2012 No 2160*)**

These Regulations are more than just tidying up. The Explanatory Note says:

'These Regulations revoke regulations 2 and 3 of the Safeguarding Vulnerable Groups Act 2006 (Controlled Activity and Miscellaneous Provisions) Regulations 2010 ("the 2010 Regulations") which made provision as to when a responsible person (as defined in section 23(3) of the Safeguarding Vulnerable Groups Act 2006 ("the 2006 Act")) must

not permit another person to engage in a controlled activity in England relating to children or to vulnerable adults (as defined in sections 21 and 22 of the 2006 Act).

Regulation 2 also revokes regulations 4 to 8 of the 2010 Regulations which made modifications to sections 113A and 113B of the Police Act 1997 ("the 1997 Act") which provided that the Secretary of State must issue a notification (rather than a criminal record certificate under section 113A or an enhanced criminal record certificate under section 113B of the 1997 Act) in respect of a person seeking to engage in a controlled activity where that person was not barred from engaging in a regulated activity.

These Regulations also amend the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009 which prescribe the criteria which determine whether a person should be included automatically in the children's barred list or the adults' barred list maintained by the Independent Safeguarding Authority under section 2 of the 2006 Act.

Regulation 3(2) and (3) amends the criteria on the basis of which a person will be included automatically in the children's barred list without having the right to make representations. Regulation 3(4) and (5) amends the criteria on the basis of which a person will be included automatically in the children's barred list with the right to make representations.

Regulation 3(6) amends the criteria on the basis of which a person will be included automatically in the adults' barred list without having the right to make representations. Regulation 3(7) and (8) amends the criteria on the basis of which a person will be included automatically in the adults' barred list with the right to make representations.

In particular these amendments update the criteria for automatic inclusion on the children's and adults' barred lists in light of the Sexual Offences (Scotland) Act 2009 (asp 9) and the provisions in Chapter 4 of Part 5 of the Protection of Freedoms Act 2012 (c 9) in relation to disregarded convictions and cautions.'

See also 'Items of Interest' (below).

FE Teachers' Qualifications

***Further Education Teachers' Continuing Professional Development and Registration* (*England*) (*Revocation*) *Regulations 2012* (*SI 2012 No 2165*)**

According to the Explanatory Note, these Regulations revoke the Further Education Teachers' Continuing Professional Development and Registration (England) Regulations 2007. These Regulations required teachers to complete a minimum number of hours of continuing professional development (CPD) every year, maintain a record of such CPD and make that record

available, as specified. They also required teachers to register and maintain registration with the Institute for Learning.

***Further Education Teachers' Qualifications* (*England*) (*Revocation*) *Regulations 2012* (*SI 2012 No 2166*)**

The current Government is less interested than its predecessor in formal qualifications for FE staff. The Explanatory Note says:

> 'These Regulations amend the Further Education Teachers' Qualifications (England) Regulations 2007. Regulation 1 removes the definitions of "IfL", "ATLS status" and "QTLS status" which has the effect of revoking the regulatory requirements for individuals to register with the Institute for Learning and other related requirements that depend on mandatory IfL registration. In particular, this will remove the requirement for teachers in full teaching roles to complete a process of professional formation to the satisfaction of the IfL and hold QTLS status; and for teachers in associate teaching roles to complete a process of professional formation to the satisfaction of the IfL.'

Auxiliary Aid for Disabled People

***Equality Act 2010* (*Commencement No 10*) *Order 2012* (*SI 2012 No 2184*)**

This Order imposes a new requirement on education authorities, on the governing bodies of maintained schools and on those responsible for academies, free schools and independent schools. The new requirement is to provide an auxiliary aid to prevent discrimination against disabled people. This does not extend to altering existing buildings (See the Equality Act 2010, Sch 3, para 10 (**LOE C [2062]**).

Technically, the Order commences s 31(9) and Sch 2 to the Equality Act 2010 (**LOE C [2061]**) and also s 98 and Sch 13 to the Act (**LOE C [2065]**), in so far as they are not already in force, on 1 September 2012. The effect of this Order is to bring into force provisions regarding the third requirement which were not previously brought into force. The third requirement, as defined in s 20(5) of the 2010 Act (**LOE C [2018]**), is a requirement imposed on a person (referred to as A) to take reasonable steps to provide an auxiliary aid, where a disabled person would, but for the provision of that auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with non-disabled people.

The Order commences provisions regarding this 'third requirement' so far as they relate to:

(*a*) a local authority in England or Wales exercising functions under the Education Acts as defined in section 212 of the Act (**LOE C [2059]**);

(*b*) the responsible body of a school to which section 85 of the Act (**LOE C [2030]**) applies; and

(*c*) the governing body of a maintained school (within the meaning of s 92 of the Act(**LOE B[6587]**)).

Alternative Education: Attendance

***Education and Skills Act 2008* (*Commencement No 8*) *Order 2012* (*SI 2012 No 2197*)**

This Order brings into force on 3rd September 2012 two new provisions of the Education and Skills Act 2008.

Section 155 of the 2008 Act (**LOE B [8148]**) amends s 444ZA of the Education Act 1996 (**LOE B [3884.A1]**) to clarify how the criminal offence under s 444 of the 1996 Act (**LOE B [3884]**) (failure to secure regular attendance at school of registered pupil) applies to children who are receiving alternative educational provision. It also commences some consequential amendments to take account of the extension of the offence

Education Act 2011 Commencement

***Education Act 2011* (*Commencement No 5*) *Order 2012* (*SI 2012 No 2213*)**

Four entirely separate provisions of the 2011 Education Act are brought into force in England and (in one case) in Wales.

England: new PRU Academies Schedule 11, para 2 of the 2011 Act (**LOE B [8794]**) has inserted into EIA 2006 a new s 6A (**LOE B [7406.1]**). As from 1 September 2012, that new section is further (but not yet wholly) in force. It requires any local authority in England, which perceives the need for a new pupil referral unit in its area, to seek proposals for the establishment of an academy PRU, rather than for any type of maintained PRU.

England and Wales: Alleged Offences by Teachers Section 13 and Sch 4 of the 2011 Act (**LOE B [8713]** and **B [8787]**) insert new ss 141F and 141G into the 2002 Act (where they will be **B [6641.6]** and **B [6641.7]**). These sections give, as from 1 October 2012, a shelter of confidentiality to teachers who are accused by their pupils of committing certain offences. The confidentiality ceases if the teacher is found guilty, either in a court or after a Secretary-of-State or GTC-for-Wales disciplinary decision. Breach of the confidentiality is a criminal offence and there are more details in new Sch 11B (**LOE B [8787]**).

England: Basic Skills for Adults The Education Act 2011, s 73 (**LOE B [8773]**) is brought into force in England, for all remaining purposes, on 1 August 2013. Section 73 amends s 88 of the ASCL Act 2009 (**LOE B[8288]**) and requires the Chief Executive of Skills Funding to secure free basic skills education for certain people aged 19 and over.

England: Free Early Years Provision Section 1 of the 2011 Act (**LOE B [8701]**) will be brought fully into force next September. Section 1 of the 2011 Act substitutes (from 1 September 2013) a new s 7 into the Childcare Act 2006 (**LOE C [1310]**) and (from 1 September 2012) added new ss 13A and 13B to that Act (**LOE C [1316.1]** and **C [1316.2]**).

The new s 7 (of the 2006 Childcare Act) is the important one, or it would be, if it said anything useful. What it actually says is remarkably similar to the old s 7. Both the old and the new versions of s 7 say that free 'early years provision' must be provided in accordance with Regulations prescribed by the Secretary of State. The current (2012–13) regulations are the Local Authority (Duty to Secure Early Years Provision Free of Charge) Regulations 2008 (SI 2008/1724 (LOE **D [51351]**) as amended by SI 2010/301). There is also statutory guidance in a DfE document called *Statutory Guidance for Local Authorities on the Delivery of Free Early Education for Three and Four Year Olds and Securing Sufficient Childcare – From September 2012*, which was issued under reference DFE-00066–2012 in May 2012. Presumably, there will be changes in the Regulations for September 2013 or 2014.

Safeguarding Vulnerable Groups Act 2006

Safeguarding Vulnerable Groups Act 2006 (*Commencement No 8 and Saving*) *Order* (*SI 2012 No 2231*)

The Explanatory Note says:

> 'This Order brings into force further provisions of the Safeguarding Vulnerable Groups Act 2006 and makes a saving provision in relation to the repeal of certain provisions in the Criminal Justice and Court Services Act 2000. Article 2 brings into force on 10th September 2012 provision in the 2006 Act relating to provision of information from the Independent Safeguarding Authority to keepers of relevant registers and the ability for supervisory authorities to request information and be provided with information by the ISA. Article 3 brings into force provisions in the 2006 Act relating to the list of persons who will be entitled to request barred list information from the ISA at the same time as the provisions in the 2006 Act which enable that barred list check to be done (which were inserted by the Protection of Freedoms Act 2012) are brought into force. This will be done by a commencement order made under the 2012 Act at a later date. Article 4 fully commences the repeal of the disqualification order regime in the 2000 Act when the up-dating system in relation to Criminal Record Bureau certificates in the 2012 Act is brought into force. Article 5 makes a saving provision to ensure that anyone subject to a disqualification order at the time the repeal is fully commenced may still appeal against their disqualification order or request a review of their disqualification order.'

Schools Forums (England)

Schools Forums (*England*) *Regulations 2012* (*SI 2012 No 2261*)

Schools Forums are to be re-constituted from 1 October 2012 to reflect the fact that maintained secondary schools, once the mainstay of our secondary education system, are now often outnumbered in a given local authority area by the new academy schools. Schools Forums are of course heavily involved in local school funding debates – some think that this consultative role in

school funding is their only real function – so the changes in school funding due on 1 April 2013 also have an impact on the constitution and role of the schools forums.

The DfE has made these new regulations, which come with an explanatory memorandum as well as an explanatory note, and it has also issued new guidance, in case any of us missed a point. The Schools Forums (England) Regulations 2010 (SI 2010/344 as amended) have been revoked.

One unmissable point is that the (national) Education Funding Agency now has 'observer status' on all local authority schools forums. This reflects the reality of the expansion in numbers of academy schools and the fact that they are funded by the DfE instead of by the local authority and consequently highlights the increasing centralisation. School education is no longer the local government service that it used to be.

Schools forums are intended to contain representatives of all of the major sectors of state-funded education. Forum members are therefore elected by assorted groups of proprietors, governors and headteachers in nursery, primary, secondary and special schools – and now also in pupil referral units. Academies elect or select their own people and the early years and 14–19 settings and the various faith groups may also find themselves represented, if their (pupil) numbers warrant it. The local authority is represented (in voting form) by a member or officer who knows little or nothing about schools; Directors of Children's Services, executive members of the local authority and officers involved in education or education finance are not allowed to vote. These people are nevertheless entitled to attend but fewer of them will now be allowed to speak. There will also now be 'an observer appointed by the Secretary of State'. The purpose of this functionary's presence is surely to reflect and enforce the increasing national centralisation of school education, although that is not what the official description of his or her purpose says.

What does a schools forum do? The local authority is obliged to consult its schools forum annually about its schools budget and about any proposal to put out to tender a large contract for goods or services funded out of that budget. The local authority may consult the schools forum about other school-funding matters, if they wish.

Aside: The word 'forum' is now, apparently, an English word, with an English plural, 'forums'. Not long ago, 'forum' was a Latin word, with a Latin plural, 'fora'. One of the delights of language is that it never stands still.

Faith Schools

***Designation of Schools Having a Religious Character* (*Independent Schools*) (*England*) (*No 2*) *Order 2012* (*SI 2012 No 2265*)**

The following schools have their religious character recognised in this Order:

- Rimon Jewish Primary School (Barnet)
- Niskham Primary School (Birmingham; Sikh)

- Niskham High School (Birmingham; Sikh)
- Tauheedul Islam Boys' High School (Blackburn with Darwen); Islam
- St Augustine's Academy (Central Bedfordshire; Church of England)
- St Michael's Catholic Secondary School (Cornwall)
- Al-Madinah School (Derby; Islam)
- Enfield Heights Academy (Enfield; Christian)
- Beckel Keys Church of England Free School (Essex)
- Avanti House School (Harrow; Hindu)
- Barrow 1618 Church of England Free School (Shropshire)
- Emmanuel Community School (Waltham Forest; Christian)
- Atherton Community School (Wigan; Christian)

Teachers: Pensions

***Teachers' Pensions* (*Amendment*) (*No 2*) *Regulations 2012* (*SI 2012 No 2270*)**

The Explanatory Note says:

> 'These Regulations, which come into force on 1st October 2012, make amendments to the Teachers' Pensions Regulations 2010. The amendments make changes to the arrangements for members to opt into and out of the Teachers' Pension Scheme. This is to assist employers with employees in, or eligible to join, the Scheme in complying with certain of the requirements set out in the Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010. Those Regulations prescribe arrangements … for employers to enroll jobholders who are not active members of a pension scheme into a compliant scheme with effect from the automatic enrolment date, to process opt-out notices where these are received, and to re-enroll those who opt out at three-yearly intervals.
>
> There is an extended phasing-in of the employers' duties under the Act. Some of the amendments to the Teachers' Pensions Regulations 2010 apply only when the automatic enrolment date has been reached (regulations 3, 4 and 7). Thereafter, an employment which falls into Parts 2 or 3 of Schedule 2 is no longer pensionable on election, although an existing election remains effective (regulation 3). The employer is under a duty to enrol jobholders who are not members of any scheme into an eligible scheme without requiring any election by the jobholder.
>
> Other changes take immediate effect when these Regulations come into force. These include the reduction of the minimum age for membership of the Scheme from 18 to 16 (regulation 4) and the power for a member to opt into and out of the Scheme in respect of individual employment

contracts (regulations 6, 7 and 8). Definitions of the Pensions Act 2008, "automatic enrolment date" and "the Scheme" are added to the Glossary in Schedule 1 (regulation 9).'

CASES DECIDED AND REPORTED

Special Educational Needs; Academies

SC v The Learning Trust* (*SEN*) *[2012] UKUT 214* (*AAC*); *decision issued on 21 June 2012

The Appellant and her son's father appealed to the First-tier Tribunal against a decision of the Respondent, which runs education services on behalf of the London Borough of Hackney, not to name Mossbourne Community Academy in her son's Statement of Special Educational Needs. The parents wanted their son to be admitted to Mossbourne for Year 7, but the academy school had not agreed to be named.

The First-tier Tribunal had struck out the parents' appeal on the ground that it had no reasonable prospect of success: Mossbourne was not a maintained school and therefore s 324(5)(*b*) and para 3 of Sch 27 of the Education Act 1996 did not apply to it and the Funding Agreement between the school and the Secretary of State did not include any agreement to implement decisions of the Tribunal. The Appellant appealed successfully to the Upper Tribunal against the FTT decision. In the Upper Tribunal Administrative Appeals Chamber, Judge Rowland considered that the decision of the First-tier Tribunal should be set aside and that the appeal should be heard. Here is part of what he said in his decision:

'**9.** Although, as the First-tier Tribunal pointed out, academies are independent schools rather than maintained schools for the purposes of Part IV of the Education Act 1996 (concerned with special educational needs), they are still part of the state education system and it would be surprising if, on important matters, they did not owe duties to parents and children broadly similar to those owed by maintained schools. A difference, of course, is that maintained schools are, by statute, largely controlled by local authorities whereas academies have a contractual relationship with the Secretary of State. The consequence is that duties may be enforceable in different ways and be expressed in different ways. However, once the structural differences are penetrated, the similarities become more apparent. Ultimately, though, this case turns on the construction of the particular funding agreement for Mossbourne, for which the broad scheme of education law and practice provides no more than a backdrop.

10. The first ground of appeal … is that the First-tier Tribunal erred in having regard to the potential enforceability of a decision in favour of the parents when considering whether or not to strike out the appeal. I reject this ground of appeal. The appeal was not struck out under rule 8(3) of the 2008 Rules for lack of jurisdiction but under rule 8(4)(*c*) for lack of any reasonable prospect of success. A school ought not to be

named in a statement of special educational needs if it is under no obligation to consider admitting a child who is named in a statement and has made it clear that it will not do so. The question whether a decision will be enforceable is obviously relevant to the question whether, in practical terms, an appeal has any prospect of success. The Appellant's representatives are right that enforceability may not be determinative, since a favourable decision may confer a practical advantage on a party without actually being enforceable, but it is plainly relevant. Indeed, an appellant may be able to point to a potential practical advantage such that proceedings should not be struck out, even though his or her appeal is ultimately bound to be dismissed (see *Welsh Ministers v Care Standards Tribunal* [2008] EWHC 49 (Admin); [2008] 1 WLR 2097). The question whether there might have been any practical advantage in the appeal proceeding in this case even if the decision was not enforceable is raised by the second ground of appeal and the question whether the First-tier Tribunal was right in its view as to enforceability is raised by the third ground. As an independent ground, this first ground fails.

11. The second ground of appeal is that the First-tier Tribunal erred in concluding that Mossbourne would not admit the Appellant's son if the parents' appeal were successful. The Respondent, through Ms Sarah Hannett of counsel, instructed by Ms Breda Maynard, submits that the First-tier Tribunal was entitled to conclude that Mossbourne would not change its position. However, the real burden of the ground of appeal seems to be that the First-tier Tribunal merely assumed that Mossbourne would not change its position, without actually addressing its mind to the issue (see paragraph 16 of its decision). What is also said is that, at the very least, Mossbourne would have been under a public law duty to reconsider its position in the light of the First-tier Tribunal's decision. This is a point that is best considered together with the third ground of appeal.

12. I turn then to the third ground of appeal, which raises the key issue in this case. It is submitted that the First-tier Tribunal erred in finding that a decision in favour of the parents would be unenforceable. Three alternative methods of enforcement are proposed, but it is sufficient that I merely consider the role of the Secretary of State under paragraph 26 of Annex 3 to the [Mossbourne] funding agreement.

13. It is worth setting out in full the Secretary of State's submission, put in by Ms Rachel Landau of the Legal Advisor's Office of the Department for Education.

> "1. The Secretary of State does not wish to make an application to be joined as a respondent in these proceedings at this stage but welcomes the opportunity to make a written response to clarify his views on the matters raised by the Upper Tribunal in its Observations dated 31 May 2012 (the Observations) in relation to this appeal This submission does not seek to comment on the

details of this particular case, but rather intends to address the wider issues that appear to be relevant in light of the Observations.

2. The Secretary of State wishes to make it clear at the outset that the Department's policy is that parents who wish an Academy to be named in a child's statement of Special Educational Needs (SEN) should have the same rights of appeal to the First-tier Tribunal (the Tribunal) in relation to the statement as parents who wish for a maintained school to be named.

3. All funding agreements between the Secretary of State and Academies require that where a local authority proposes to name an Academy in a statement of SEN made in accordance with section 324 of the Education Act 1996, the Academy must consent to being named, except where admitting the child would be incompatible with the provision of efficient education for other children, and where no reasonable steps may be made to secure compatibility. In determining whether a child's inclusion would be incompatible with the efficient education of other children, the Academy is required to have regard to any relevant guidance issued by the Secretary of State to maintained schools. Where there is any disagreement between the Academy and the local authority over the proposed naming of the Academy in a statement of SEN, the funding agreements make provision for the Academy to request the Secretary of State to make a determination.

4. The vast majority of funding agreements, namely those that were entered into from 2010 onwards, also place a contractual obligation on Academies to admit a child where they are named by a local authority in a statement, or where the Tribunal has determined that an Academy should be named following a parental appeal. This includes cases where the Secretary of State may have previously determined that an Academy was not under an obligation to admit and so a local authority had named a different school but the Tribunal had determined on appeal that the Academy should be named.

5. However, the Secretary of State is aware that there are a very small number of Academies with funding agreements that were entered into prior to 2010 that, whilst specifying that the Secretary of State's determination in the event of a disagreement between the Academy and the local authority is final, do not specify this to be subject to any right of appeal to the Tribunal, nor that any decision of the Tribunal is to be binding.

6. The Secretary of State considers that the absence of any reference to an appeal to the Tribunal by a parent in the provisions of these pre-2010 funding agreements does not mean that no such right exists, nor that the Tribunal has no role to play.

> However, he agrees with the views of the Upper Tribunal expressed in paragraph 6 of the Observations that, in such cases, in the event of an appeal to the First-tier Tribunal by a parent, the Tribunal would stand in the shoes of the local authority and, were the Academy to disagree with an order for it to be named on the child's statement of SEN, the Secretary of State would then have the final say as to whether the Academy should be named. Were the Secretary of State to subsequently determine that the Academy should be named then the Academy would be obliged under the terms of the funding agreement to comply with this. Should an Academy refuse to comply, the Secretary of State could seek to enforce compliance by way of an application to the courts for specific performance of the funding agreement.
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> 7. In practice, in cases relating to pre-2010 funding agreements, the Department would always expect an Academy to act reasonably and not fetter a parent's right to appeal to the Tribunal in relation to the naming of the Academy in their child's statement of SEN. Furthermore, were the Tribunal to order a local authority to name an Academy with a pre-2010 funding agreement the Secretary of State finds it very difficult to envisage circumstances in which he would disagree with the Tribunal should an Academy refer the matter to him for determination."…

16. The Respondent submits that the Secretary of State's analysis fails to consider three important points.

17. First, it is submitted by the Respondent that the funding agreement contains no requirement, either express or implied, that Mossbourne admit a child whose statement of special educational needs names it as a result of an order of the First-tier Tribunal and, secondly, it is submitted that the dispute mechanism in paragraph 26 does not apply where a child is named in a statement following an order of the First-tier Tribunal.

18. It is true that there is no equivalent of section 324(5)(*b*) of the 1996 Act in the funding agreement (unless, perhaps, it can be considered part of "admissions law" for the purposes of clause 9(*c*)). However, it is the clear – and I think undisputed – implication of paragraph 24 of the funding agreement that, where a child is named in a statement following a proposal of a local authority, Mossbourne must admit the child. Why else would there be a need to impose a duty to consent to being named?

19. The question is then whether the word "proposes" in paragraph 24 and the phrase "proposed naming" in paragraph 26 have the effect that paragraphs 24 and 26 would not apply if the First-tier Tribunal orders the local authority to name Mossbourne in the statement. The Respondent submits that there is no "proposed naming" in those circumstances. I disagree, for two reasons. First, the language is no less apt where the First-tier Tribunal has ordered the naming than it is in other cases because, in the context of this particular funding agreement,

any such order is necessarily subject to the consent of Mossbourne or the Secretary of State. Secondly, I can see no proper reason why the parties to the funding agreement should have wished to draw a distinction between a case where a proposal comes on the initiative of a local authority and a case where the local authority is required to make it by the First-tier Tribunal. In particular, why should Mossbourne be the sole arbiter of what is compatible with the provision of efficient education of other children in the latter case, when subject to the Secretary of State's ultimate decision in the former case?

20. The third point argued by the Respondent is that paragraph 26 of Annex 3 of the funding agreement says that Mossbourne "may ask the Secretary of State to determine whether the Mossbourne Community Academy should be named", which, it submits, confers an unfettered discretion and also makes no provision for the local authority to require the Secretary of State to determine the issue. I do not accept that there is an unfettered discretion as to when to exercise the power. The word "may" is presumably used because a disagreement may be resolved. However, if it is clear that a disagreement will not be resolved, it seems to me that there is a clear public law duty on Mossbourne to refer the matter to the Secretary of State. Otherwise, the purpose of the provision would be frustrated. If Mossbourne failed to refer it, the local authority could no doubt itself draw the Secretary of State's attention to the case.

21. In my judgment it follows that the funding agreement is perfectly workable in a way that is consistent with a parent's statutory right of appeal to the First-tier Tribunal under section 326 of the 1996 Act, without any straining of language. A local authority or, on appeal, the First-tier Tribunal ought not to name Mossbourne unless it is satisfied that the admission of the child would be compatible with the provision of efficient education to other pupils there and that therefore its view is that Mossbourne should admit the child. If an appeal is successful and the local authority is ordered to name Mossbourne, that order would be subject to the consent of Mossbourne or the Secretary of State. However, it would be made in the expectation that Mossbourne would – or, at least, in their view should – give their consent. The local authority must therefore propose to Mossbourne that the statement be amended in the light of the First-tier Tribunal's decision. Mossbourne would at least be bound to have regard to the First-tier Tribunal's reasoning and it would no doubt also have regard to the likelihood of the Secretary of State agreeing with the First-tier Tribunal if the case were referred to him. If it still refused its consent, the case would be referred to the Secretary of State. If he decided that Mossbourne should not be named, the local authority would refer the case back to the First-tier Tribunal, which would be able to review its decision under section 9 of the Tribunals' Courts and Enforcement Act 2007 and rule 48 of the 2008 Rules. (The Respondent submits that there would have been no "change of circumstances" but I disagree because the decision of the

First-tier Tribunal would have been made on the basis that the necessary consent would, or might, be forthcoming and the decision of the Secretary of State that Mossbourne should not be named would clearly alter that position.) If either Mossbourne or the Secretary of State accepted that Mossbourne should be named, the First-tier Tribunal's order would be fully effective, albeit possibly not always within the prescribed time limit.

22. It will be seen that I accept the Appellant's submission, made in relation to the second ground of appeal, that Mossbourne is under a public law duty to reconsider its position in the light of a decision of the First-tier Tribunal. It is, I think, implicit in Mossbourne's letter to the Secretary of State that it does in fact do so. It would be irresponsible and irrational not to look at a decision by an expert and experienced tribunal on the very issue on which Mossbourne has to express a view. It is unnecessary on this appeal for me to consider in what circumstances, if any, Mossbourne could properly not accept the First-tier Tribunal's view. It is sufficient to note that the Secretary of State, who would be required to settle any dispute, gives the highest possible respect to decisions of the First-tier Tribunal.

23. The position of Mossbourne – and, I suspect, any other academy – is therefore totally different from that of a private independent school, which does not have any obligation to admit a child otherwise than on its own terms. On the contrary and as one might expect, an academy's position is not greatly different from that of a maintained school. The First-tier Tribunal is not entitled to strike out a case merely because the academy's current view is that it will not admit the child in question, although it could in theory strike an appeal out on the basis that the appellant had no prospect of persuading the First-tier Tribunal to take a different view from that of the academy. I also observe that more recent funding agreements explicitly make decisions of the First-tier Tribunal determinative and also impose an express duty to admit a child who has a statement of special educational needs naming the academy in question.'

Appeal allowed.

Academies: Disability Discrimination Claim; Upper Tribunal Proceedings

ML v Tonbridge Grammar School [2012] UKUT 283 (AAC); SB v West Bridgford Academy); joint decision issued on 1 August 2012

What happens to a disability discrimination claim brought against the governors of a maintained school, if the school is converted to an academy before the claim is determined?

In two cases which were heard together (*ML v Tonbridge Grammar School* and *SB v West Bridgford Academy*), Judge Rowland in the Upper Tribunal

directed that the relevant county councils (Kent, Nottinghamshire) be substituted as the respondent to proceedings in place of the schools' governing bodies, but also set out his reasoning as to how and why the responsible body of an academy might nevertheless take part in proceedings. Here is part of what he said:

'**7.** The duty not to discriminate in relation to the provision of education in schools is imposed by both the 1995 Act and the Equality Act 2010 on the "responsible body", which is the governing body or the local authority in respect of maintained schools and the proprietor in respect of independent schools, including academies (see schedule 4A to the 1995 Act and section 85(9) of the Equality Act 2010). It follows that claims brought before the First-tier Tribunal under those statutes must be brought against the relevant responsible body.

8. The Academies Act 2010 provides that a maintained school may be "converted into" an academy. Previously, it had been necessary to discontinue the maintained school under Part 2 of the Education and Inspections Act 2006 and then create a new academy. Nothing in the Academies Act 2010 expressly says what happens to the governing body of the maintained school upon conversion. It does not provide that it is converted into the governing body of the academy. Indeed, the Act makes no mention of an academy having a governing body. However, the funding agreements (which are Academy agreements for the purposes of the Act) entered into by the Secretary of State with the Academy Trusts for each of the schools involved in these proceedings both provide that the academy will be governed by a governing body who are the directors of the Academy Trust, which is in turn a charity incorporated as a company limited by guarantee (see section 12 of the Act) and is the proprietor. In each case, article 48 of the Articles of Association of the company provided that the governors of the maintained school would be governors of the academy for as long as they would have been governors of the maintained school. On the other hand, some such governors might have resigned upon the conversion and, in any event, in each case further governors were to be appointed or elected from the outset …

19. What is submitted by Mr Wolfe is that, when a school is converted into an academy under the Academies Act 2010, it is effectively the same institution with, in particular, the same staff. There is in those circumstances, he submits, no reason why the right of action in respect of discrimination should not remain against the institution and why the same remedies should not be sought from that institution. On the other hand, the effect of the right of action becoming one to be claimed against a local authority means that the "coercive" remedies, as opposed to a declaration, become unobtainable or pointless. He submits that that cannot have been intended.

20. I accept one premise upon which that submission is made. It would not be appropriate to make any of the envisaged orders (ie, orders other

than a declaration) against a person or body that was not currently the responsible body. (There is in any event no question of an order to admit a pupil to a school in a case where a maintained school has been converted into an academy because there are other "appeal arrangements" for admissions in respect of both types of school (see section 28K of the 1995 [Disability Discrimination] Act and paragraph 13 of Schedule 17 to the Equality Act 2010).)

21. I also have some doubt as to whether it would be appropriate to make any of the envisaged orders, other than a declaration or an order requiring a formal written apology to be made, against a school if the claimant's child had left the school, because the claimant would not then have sufficient interest to enforce the order. It seems to me that the words "on the person" in what are otherwise words of inclusion in both section 28I(4)(*a*) of the 1995 Act and paragraph 5(3)(*a*) of Schedule 17 to the Equality Act 2010 make it plain that Parliament had in mind the making of orders that would prevent further unlawful discrimination in relation to the particular child concerned.

22. On the other hand, a declaration does not require enforcement and an order for an apology – whether to the child or, as the First-tier Tribunal might consider more appropriate, to the parents – may have a wider purpose than merely preventing further discrimination against the child in question. In this context, an apology must include an acceptance that the action or omission did amount to unlawful discrimination, implying or explicitly conveying an assurance that there will not be a repetition. To the extent that an apology is an acceptance that an act or omission has been unlawful, an order that a school apologise can be regarded as part of the vindication of the claimant. To the extent that an apology is also an assurance as to future conduct, an order that there be an apology gives teeth to the declaration.

23. However, if the governing body of the maintained school has ceased to exist and its liabilities have been transferred to the local authority, an order for an apology is inappropriate because an "apology" by a local authority would not add anything to a declaration.

24. Mr Oldham and Mr Lawson submit that, if a claim survives at all upon a school being converted into an academy, it is enough that the claimant can be vindicated through a declaration and it does not matter that other orders cannot be made. I am not persuaded that the vindication of a claimant is the only, or even the main, purpose of the legislation. The right of appeal to the First-tier Tribunal is, in my judgment, intended to be a means of improving practice in schools with a view to eliminating disability discrimination against all pupils and the Act expressly contemplates improvements being made for the benefit of the child concerned in litigation before the First-tier Tribunal.

25. On the other hand, I do not accept Mr Wolfe's submission that it is necessary for the First-tier Tribunal to have the power to make orders against an academy in order to achieve the broader aim.

26. Orders of the First-tier Tribunal generally take effect simply because responsible bodies behave responsibly and comply with orders. There are means of enforcement but resort to them should be unnecessary. The Secretary of State has a role under section 28M of the 1995 Act, sections 496 and 497 of the Education Act 1996 (as applied by section 87 of the Equality Act 2010) and, in the case of academies, through the enforcement of obligations under funding agreements …

27. But an obligation to take appropriate action may also be imposed by a declaration, or even a mere finding, made in proceedings in which the responsible body has been a respondent or has otherwise had an opportunity to take part. A declaration or finding that, for instance, a policy was unlawful or inadequate would imply an obligation to amend the policy and would, in practice, be enforceable through the same mechanisms as an order, if a responsible body chose not to accept the obligation. Thus, if I am right that a specific order, say, to amend a policy should not be made in a case where the claimant no longer has a child at the school, it may nonetheless be the effect of a decision in proceedings against a responsible body of that school that the responsible body would be placed under an obligation, owed in practice to other parents and children, to amend the policy …

28. The same approach can be applied if a maintained school is converted into an academy and the liabilities of the responsible body of the maintained school are transferred to the local authority, provided the responsible body of the academy has had an opportunity to take part in the proceedings. A person or body cannot generally be regarded as bound by findings made in proceedings in which he, she or it has not been able to play a full part. However, it is the *opportunity* to participate that is vital. If an opportunity is offered but declined, the person or body cannot complain if adverse findings are relied upon by the Secretary of State in exercising his statutory or contractual powers or by parents bringing judicial review proceedings.

29. Moreover, the responsible body of an academy cannot avoid an issue being investigated by the First-tier Tribunal merely by refusing to participate in the proceedings, even if there is no contest between the other parties …

31. Rule 9(2) of the 2008 Rules [SI 2008/2699] gives the First-tier Tribunal a very broad power to add persons or bodies as respondents to proceedings, although a person or body should not, in my judgment, be added as a respondent without their consent unless the law requires it. Thus, even if a local authority is substituted for the dissolved responsible body of a maintained school under rule 9(1)(*b*) as a respondent in a case where the maintained school has been converted into an academy, there is no reason why the responsible body of the academy should not be added as a second respondent if it consents …

32. Being added as a respondent is not the only way the responsible body of an academy might take part in the proceedings. It might merely

co-operate with a local authority, while the local authority conducts the case or it might, as Tonbridge Grammar School has done, agree with the local authority to conduct the local authority's case. In such cases, there is no need for the academy to be added as a second respondent.

33. However, walking away from the case should not be regarded as a responsible option, given that the purpose of the legislation is to enable the First-tier Tribunal to examine an allegation of discrimination with a view to giving an authoritative decision as to whether the approach of a school needs to be modified …

34. Academies are unlikely to wish to gain a reputation for not taking seriously their duties under the 1995 Act and the Equality Act 2010 and I imagine that the Secretary of State will take a dim view of those that do so. If the relevant personnel and the policies have not changed significantly upon conversion, the academy is likely to wish its staff's approach to be vindicated, not least because they will wish to know that they are entitled to take the same approach the next time that the issue arises. If, upon reflection, it considers that there was unlawful discrimination, it ought to be keen to make it clear that the same approach will not be taken by the academy in the future. If it refuses to take part in the proceedings, an academy will, as Mr Oldham recognised, have to accept that its staff and policies may be criticised. It will, of course, be open to the First-tier Tribunal, having considered the parties' views, to direct that copies of its decision be sent to the governors of the academy and, if it thinks it necessary, also to the Secretary of State and, as I have said, it will be also open to the parents to give any criticisms greater publicity.

35. What role a local authority respondent plays in proceedings will depend on the circumstances …

36. In *ML v Tonbridge Grammar School*, it is necessary only formally to substitute the local authority as the respondent in place of the governing body of the discontinued maintained school …

37. In *SB v West Bridgford Academy*, the First-tier Tribunal was right to take the view that the relevant liability had passed to the local authority …'

ITEMS OF INTEREST

The Funding of State Schools in England

The DfE published a document on 28 June 2012 called 'School Funding Reform: Arrangements for 2013–14' and this document discusses at great length the formulae* according to which the amount of government funding for each individual state school is, and will be, calculated. (The document was previewed at consultation stage in LOE Bulletin 96, p 25.)

***ASIDE:** Unlike the word 'forum' whose plural (according to the DfE) is now 'forums', the word 'formula' has (so far) in DfE documents retained its Latin plural, 'formulae'. Surely the move to an English form of plural, 'formulas', cannot be far away.

Many and serious are the changes currently in progress (and planned for April 2013) in the funding of state schools in England. The DfE thinks, rightly or wrongly, that all similar schools should be funded in a very similar way and with very similar funds. The DfE believes that central, not local, government should decide how state schools are funded and the DfE repeatedly fails to understand why one local authority might want to spend more per pupil (or less per pupil) than another local authority, whether they be down the road from each other or on opposite sides of the country. One voter's local taxation is another voter's postcode lottery.

The money spent on the education of pupils in state schools comes, almost all, from people paying taxes to HMRC. (Some schools also raise significant funds locally from sponsors, donors, lettings, and parent fundraising.) Central government spends the taxation income and it becomes government expenditure. For maintained schools, the DfE gives a lot of money to local authorities and thus central government expenditure becomes local authority income. Local authorities also get income from the Council Tax, but that is an increasingly small proportion. Business Rates are collected locally (by the Councils) and passed over to the central government, which then counts it and hands the money back out to the local authorities, but it is shared out according to a formula approximating to perceived need and not at all according to how much they paid in.

The calculation starts with something called DSG (Dedicated Schools Grant), which is largely based on pupil numbers. DSG is comprised of three blocks, the Schools Block, the Early Years Block and the High Needs Block. The DfE is keen to see local authorities delegating to schools the power to spend the Schools Block money and only in exceptional circumstances will the local authorities be able to retain funding in their Schools Block for the provision of central education services – and not delegate it to schools. These exceptional circumstances are:

1. Where the maintained schools agree that a service should be provided centrally. This does not mean what it says; the decision to allow a service to be provided centrally is not made by maintained schools. It is made on their behalf by the Schools Forum. The funding will go to the schools anyway by a process called delegation. Then it will be taken back by a process called de-delegation. This de-delegated money can be spent on contingencies, free school meals admin., insurance, licences, subscriptions, staff costs or supply cover, support for minority ethnic or under-achieving pupils, behaviour support and libraries and museums. Another way in which Schools Block money can be de-delegated is where schools choose to buy services form their local authority. Academies can also buy these services if they wish.
2. A permitted continuation of local and historic commitments.

3. Statutory functions such as the co-ordinated school pupil admissions system, the carbon reduction commitment and (ironically) the cost of running the Schools Forum.
4. Equal pay back-pay.
5. Funding non-SEN places in independent schools.
6. A growth fund for schools with significant growth in pupil numbers.

Each local authority has a formula by which each of its maintained schools can calculate their share of the School Block money. From 2013–14, the number of factors upon which these formulae can be based must be reduced. Each formula will become simpler. The formulae will be weighted towards pupil characteristics, rather than towards factors based on school organisation or school building types. From 2013–14, each delegation formula is meant to contain only ten factors on which to base the calculation. (Actually, there are 13 factors, but the DfE has bundled some of them together to make it look like ten):

1. Per-pupil factor. What used to be called age-weighted pupil units are mandatory. They may have three different rates; one for Key Stages 1 and 2, the others for Key Stage 3 and Key Stage 4.
2. Deprivation is another mandatory factor, measured by free school meals and /or by something called IDACI banding.
3. Looked After Children numbers.
4. Low-cost, high incidence SEN.
5. Other SEN costs, up to a locally-set limit.
6. English as an Additional Language costs
7. A single lump sum of (in 2013–14) up to £200,000 per school. This is designed to protect small, rural schools.
8. Split site costs, (actual) business rates and PFI costs (3 factors bundled as one).
9. Exceptional premises factors; eg if the school is in a Listed Building.
10. Sixth form costs and pupil turnover (2 factors bundled as one). Sixth form costs are not intended to come out of DSG anyway, but some local historical commitments will be honoured. Pupil turnover takes account of pupils enrolling and departing during the year, instead of at the beginning or end of a year.

Each local authority must have its formula approved by the Education Funding Agency, which will use much the same formula for its local academy funding. The EFA also distributes funding for maintained-school sixth forms. The DfE predictably wants to find a way of allocating this money directly from the EFA to the institutions, instead of paying it through the local authority system.

There are always transitional protections and minus 1.5 per cent is the protection given here. This means that a school whose budget is reduced by the introduction of the new formula will (broadly, but for some schools it will be more complicated than that, because some factors are excluded from the protection) only lose 1.5% of its budget year on year. The EFA will deal with complaints from schools that their funding is unreasonable, but complaining schools will need to show that the way the formula has been applied to them is unreasonable; it will not be enough to say that they are short of money.

Deferring Ofsted Inspections

Ofsted issued a document on 24 August 2012 with revised criteria for the deferral of school inspections. Much as many schools might want a deferral, the inspection will usually go ahead as announced. Allowable reasons for a deferral include the fact that the entire school will be at Alton Towers for the day.

Safeguarding Children: Disclosure and Barring

The Independent Safeguarding Authority's website recently said:

> 'From 10 September 2012 changes to disclosure and barring services have been introduced by the Coalition Government which will affect employers and other organisations working with vulnerable groups, including children. These changes include amendments to the definitions of regulated activity with vulnerable groups including children. Controlled activity; planned – but not implemented – registration and continuous monitoring have all been abolished.
>
> 'Other important changes include:

- The ISA can only bar a person from working in regulated activity if it believes the person is, has been or might in the future, engage in regulated activity. The only exception to this is where a person is convicted or cautioned of a relevant (automatic barring) offence and is not eligible to submit representations against their inclusion in a barred list.
- Where a person is cautioned or convicted of a relevant (automatic barring) offence with the right to make representations, the ISA will ask the person to submit any representations before making a final decision.
- Local Authorities, Keepers of Registers and Supervisory Authorities will have a power to refer to the ISA rather than a duty.
- The ISA has additional duties and powers to share information with professional bodies such as the General Medical Council, the Care Quality Commission etc. and other organisations.'

The ISA website has also announced its own decease:

'In December 2012 the Criminal Records Bureau (CRB) and the Independent Safeguarding Authority (ISA) will merge into the Disclosure and Barring Service (DBS). This new organisation will provide a joined up, seamless service to combine the criminal records and barring functions. Further legislative changes will come into force during 2013 and 2014. These details will be published on the forthcoming DBS website.'

(See also SIs 2012 Nos 2112, 2113, 2157 and 2160, above.)

Local Government Ombudsman and Schools

The LGO's jurisdiction has been reduced (from 1 August 2012), so that they may no longer investigate complaints about the internal management of schools. That leaves the following areas of school life within their jurisdiction:

- school transport services;
- special educational needs;
- school admissions;
- permanent exclusions from a school;
- children who are out of school.

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