THE LAW OF EDUCATION

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Filing Instructions: Please file this Bulletin after the Bulletins Guidecard and in front of Bulletin 98. **Discard Bulletin 89**, which may be retained outside the binder for future reference. **The Binder will now contain Bulletins 90 to 99.**

HEADLINES

No Negligence at School In this issue, we report on three unsuccessful claims of negligence in an education setting.

1. A teacher lost his claim for compensation, after he was hurt throwing a wellington boot in some 'mini-olympics' on a school trip to an educational adventure business.
2. Another teacher was found not to have been negligent in his supervision of a golf lesson, when one of the boys unexpectedly hit another boy with his golf club.
3. A third lady lost her claim against a school, after she was injured by a closing door.

As Lord Justice Tomlinson in the third case helpfully said, 'It needs to be understood that not every misfortune occurring on school premises attracts compensation.'

Contents of this Bulletin

HEADLINES

STATUTORY INSTRUMENTS

Early Years Provision (England)

***Early Years Foundation Stage* (*Exemptions from Learning and Development Requirements*) (*Amendment*) *Regulations* (*SI 2012 No 2463*); *Local Authority* (*Duty to Secure Early Years Provision Free of Charge*) *Regulations 2012* (*SI 2012 No 2488*)**

The eternal conflict inside the DfE between (on the one hand) making sure that children are given the education they deserve and (on the other hand) allowing schools the freedom to decide for themselves what their pupils need, is visible in these Regulations. The DfE has now given itself permission to move a few children in England from one side of the pedagogical conflict to the other. Those pupils will get less protection from the state and their schools (sorry, their Early Years Provision Providers) will get more freedom to teach what they choose to teach. The Explanatory Note puts it differently and says:

> '[These Regulations numbered 2463]… make amendments to the Early Years Foundation Stage (Exemptions from Learning and Development Requirements) Regulations 2008… Part 2 (exemptions in respect of early years providers) of the 2008 Regulations sets out the circumstances in and extent to which the Secretary of State may direct that an early years provider is exempt from the learning and development requirements … in sections 39 to 41 of the Childcare Act 2006. These Regulations make amendments to Part 2 of the 2008 Regulations, and in particular provide that the Secretary of State may exempt a particular description of early years provider which is an independent school which is not an Academy. The Regulations also make provision about conditions which may be imposed by the Secretary of State on making a direction. The Regulations revoke regulations 5 and 6 of the 2008 Regulations which enable an exemption to be granted where the early years provider is temporarily unable to meet the learning and development requirements.'

The second Regulations (numbered 2488) alter the eligibility criteria for free-of-charge early years provision. As we know from s 40 of the Childcare Act 2006 (**LOE C [1343]**), schools (or settings) at which early years provision is provided by providers who are either registered providers of early years provision or providers who would have to be registered providers if they weren't exempt under s 34(2) (**LOE C [1337]**), are obliged to provide early years provision which meets the learning and development requirements in s 41 (**LOE C [1344]**) and the welfare requirements in s 43 (**LOE C [1346]**). This approximates to a curriculum for children in the Early Years Foundation Stage. Many of these children are entitled to attend free of charge for so many hours a year and these Regulations change the eligibility criteria for this free early years provision, from 1 September 2013.

The Explanatory Note says:

> 'Regulation 3 prescribes the description of children for whom an English local authority must ensure prescribed early years provision is available free of charge. A child must have attained the age of three or, if the child is within section 512ZB(4) of the Education Act 1996 (provision of free school lunches and milk) or is a child looked after by the local authority under section 22 of the Children Act 1989, must have attained the age of two. The regulation sets out the age of children by reference to school term dates.'

The Note over-simplifies the relevant law, because the term dates are theoretical term dates, not real term dates. What Regulation 3 actually says is:

'3 Prescribed description

(1) For the purposes of section 7(1)(*b*) of the Act, a young child is of a prescribed description if the young child meets the conditions in paragraphs (2) or (3).

(2) The condition is that the young child—

(*a*) has attained the age of two years at the start of the term beginning on or following the date in paragraph (4); and

(*b*) is an eligible child on or after the date in paragraph (4) applicable to the child in question.

(3) The condition is that the young child has attained the age of three years at the start of the term beginning on or following the date in paragraph (4).

(4) The date is—

(*a*) in the case of a child who was born in the period 1st January to 31st March, 1st April following the child's birthday;

(*b*) in the case of a child who was born in the period 1st April to 31st August, 1st September following the child's birthday;

(*c*) in the case of a child who was born in the period 1st September to 31st December, 1st January following the child's birthday.

(5) For the purposes of this regulation, "term" means a term the dates of which have been set under section 32 of the Education Act 2002.'

An 'eligible child' for these purposes is defined in Regulation 1(2) to mean a young child who is:

(*a*) looked after by a local authority under s 22(1) of the Children Act 1989 (**LOE C [363]**) or

(*b*) within s 512ZB(4) (**LOE B [4022.4]**), of the Education Act 1996.

The Explanatory Note then over-simplifies Regulation 4, saying:

> 'Regulation 4 sets out the amount of free prescribed early years provision that English local authorities must make available. They must make available no less than 570 hours in a year over no fewer than 38 weeks.'

What Regulation 4 actually says is:

'4 Availability of early years provision

(1) For the purposes of section 7(1) of the Act, an English local authority must secure that the prescribed early years provision is available for each young child for a period of 570 hours in any year and during no fewer than 38 weeks in any year.

(2) For the purposes of paragraph (1) and subject to paragraph (3), the first year commences on the date in regulation 3(4) applicable to the child in question, and subsequent years commence on the anniversary of that date.

(3) Where a young child becomes an eligible child on a date after the date in regulation 3(4) applicable to the child in question, the first year commences on the date in regulation 3(4) next following the date on which the young child becomes an eligible child, and subsequent years commence on the anniversary of that date.'

So, to summarise SI 2012/2488, from September 2013, local authorities in England will have to fund early years provision for 570 hours a year spread over 38 weeks, for children whose parents want EYP and who:

- are over 3 on a relevant date; or
- are over 2 on a relevant date and either 'looked after' or eligible for free school meals, or both.

Safeguarding Children: England and Wales

***Protection of Freedoms Act 2012* (*Commencement No 4*) *Order 2012* (*SI 2012 No 2521*)**

The Explanatory Note says:

> 'This Order commences the provisions in the Protection of Freedoms Act 2012 which establish the Disclosure and Barring Service … The Act enables all the functions of the Independent Safeguarding Authority and the Criminal Records Bureau to be transferred to the DBS by Order …[in effect on]… 1 December 2012.'

Off-site Provision for Improving Behaviour (England)

***Education* (*Educational Provision for Improving Behaviour*) (*Amendment*) *Regulations 2012* (*SI 2012 No 2532*)**

The Explanatory Note says:

> 'These Regulations amend the Education (Educational Provision for Improving Behaviour) Regulations 2010, which impose requirements relating to the exercise of the powers of governing bodies of maintained schools, to require pupils to attend provision away from the school premises for the purpose of receiving education to improve the pupil's behaviour ('off-site provision') under section 29A(1) of the Education

Act 2002 (**LOE B [6529.1]**). The [2010] Regulations provide that a pupil may only be required to attend off-site provision until the end of the academic year in which the requirement is imposed. Additionally they provide that the requirement to attend off-site provision must be reviewed by the governing body at least every thirty days.

The [2012] Regulations amend the [2010] Regulations [in England from 1 January 2013], to provide that the requirement to attend off-site provision may continue beyond the academic year in which the requirement was imposed, and the governing body must hold review meetings at such intervals as they, having regard to the needs of the pupil, consider appropriate, rather than specifically every thirty days. The parent (or pupil who has attained the age of 18), and the local authority where a statement of special educational needs is maintained for the pupil will be able to request (in writing) a review meeting. Governing bodies will be required to comply with a request if a review meeting has not taken place in the previous 10 weeks.'

Further Education: Exemption from Inspection (England)

***Further Education Institutions* (*Exemption from Inspection*) (*England*) *Regulations* (*SI 2012 No 2576*)**

The Explanatory Note says:

'These Regulations are made under section 125(1A) of the Education and Inspections Act 2006 [**LOE B [7525]**] (inserted by s 42 of the Education Act 2011). Section 125(1A) provides that the duty of Her Majesty's Chief Inspector of Education, Children's Services and Skills under that section (to inspect all institutions within the further education sector and all 16 to 19 Academies at such intervals as may be specified by the Secretary of State) does not apply to prescribed categories of institution in prescribed circumstances.

Regulation 3 prescribes the categories of institution that may be exempt from routine inspection. It provides that all those institutions falling within section 91(3) of the Further and Higher Education Act 1992 [**LOE B [967]**] (all categories of institutions within the further education sector [including sixth-form colleges]) and 16 to 19 Academies are prescribed.

Regulation 4 prescribes the circumstance in which such institutions will be exempt from routine inspection: the institution's overall effectiveness must have been awarded the highest grade (currently the 'outstanding' grade) in its most recent inspection under section 125 of the 2006 Act [**LOE B [7525]**].'

Inspectors of Education, Children's Services and Skills (England)

***Inspectors of Education, Children's Services and Skills Order 2012* (*SI 2012 No 2597*)**

Thirteen lucky people are appointed as HMIs.

Wales: Education Collaboration

***Collaboration between Education Bodies* (*Wales*) *Regulations 2012* (*SI 2012 No 2655*); *Education* (*Wales*) *Measure 2011* (*Commencement No 1*) *Order 2012* (*SI 2012 No 2656*)**

The Commencement Order (SI 2012/2656) brings into force (in Wales, obviously) ss 1 to 9 of the Education (Wales) Measure 2011 (**LOE B(W) [501]** to **B(W)[509]**), with effect from 16 November 2012. All nine sections are about collaboration between education bodies.

Much of the detail is in the accompanying Regulations (SI 2012/2655), whose Explanatory Note says:

> 'The Education (Wales) Measure 2011 enables governing bodies of maintained schools, further education bodies and local authorities [in Wales] to develop joint working arrangements. These Regulations make further provision in relation to the arrangements that may be made for their functions to be discharged by joint committees.
>
> Regulation 1 provides that these Regulations will come into force on 16 November 2012…
>
> Regulation 4 makes provision as to when two or more education bodies [in Wales] may arrange for their functions to be discharged jointly by means of a joint committee (and in the case of a local authority, this means their education functions only).
>
> Regulation 5 makes provision in relation to the establishment by collaborating education bodies of joint committees, including determining its constitution, membership, [quorum] and terms of reference which must be reviewed annually. The [committee] appoints its own chair (who may be removed from office at any time) and may appoint non governor members whose voting rights are determined by the collaborating education bodies (subject to certain restrictions). The joint committee must appoint a clerk to convene its meetings and ensure minutes of its proceedings are drawn up (regulation 6). Regulation 7 provides that a joint committee may appoint "non-governor members", who are not members of the collaborating governing bodies, are not appointed by the local authority and who may be accorded voting rights by the collaborating education bodies (subject to certain restrictions). Non governor members must not be disqualified from being governors … or from the membership of further education bodies under the relevant instrument and articles of governance.

Under regulation 8, joint committees have power to decide who may attend their meetings.

Regulation 9 provides for convening meetings and voting.

Regulation 10 and the Schedule deal with conflicts of interest and the circumstances in which members of a joint committee and others who are otherwise entitled to attend meetings of the joint committee must withdraw from the meeting and not vote. The general principle is that where there is a conflict between the interests of such a person and the interests of the collaborating education bodies, or whether the principles of natural justice require a fair hearing and there is any reasonable doubt about a person's ability to act impartially, they should withdraw from the meeting and not vote.

Regulation 11 deals with the drawing up of minutes of joint committee meetings and the publication of the minutes.'

CASES DECIDED AND REPORTED

Human Rights: Crucifixes in State Schools

Lautsi v Italy* (*App No 30814/06*) *[2011] ECHR 30814/06; judgment on 18 March 2011

This 2011 case about religion and schools has not previously been mentioned in the *Law of Education Bulletin* and we hasten to put that right.

The Grand Chamber of the European Court of Human Rights considered whether the presence of crucifixes in all Italian state-school classrooms was an infringement of the human right of parents to ensure that the education of their children is conducted in accordance with their own (that is, the parents' own) religious and philosophical convictions. In a decision which avoided upsetting the important relationship between the Roman Catholic Church and the Italian State, the Grand Chamber held that there had been no infringement of Article 2 of the First Protocol ('A2P1') to the European Convention on Human Rights and that there was no cause to examine the complaint under Article 14 of the Convention.

Here is the essence of what the Grand Chamber said on the matter:

'57. … the Court observes that the only question before it concerns the compatibility, in the light of the circumstances of the case, of the presence of crucifixes in Italian State-school classrooms with the requirements of [A2P1] and art 9 of the Convention …

59. The Court reiterates that in the area of education and teaching, [A2P1] is in principle the *lex specialis* in relation to Art 9 of the Convention. That is so at least where, as in the present case, the dispute concerns the obligation laid on Contracting States by the second sentence of Art 2 to respect, when exercising the functions they assume in that area, the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions

(see *Folgerø v Norway* 2007…). The complaint in question should therefore be examined mainly from the standpoint of the second sentence of [A2P1]…

60. Nevertheless, that provision should be read in the light not only of the first sentence of the same Article, but also, in particular, of Art 9 of the Convention (see, for example, *Folgerø*, cited above, para 84), which guarantees freedom of thought, conscience and religion, including the freedom not to belong to a religion, and which imposes on Contracting States a "duty of neutrality and impartiality".

In that connection, it should be pointed out that States have responsibility for ensuring, neutrally and impartially, the exercise of various religions, faiths and beliefs. Their role is to help maintain public order, religious harmony and tolerance in a democratic society, particularly between opposing groups (see, for example, *Leyla Sahin v Turkey* [2005] ECHR 44774/98, para 107). That concerns both relations between believers and non-believers and relations between the adherents of various religions, faiths and beliefs.

61. The word "respect" in [A2P1] means more than "acknowledge" or "take into account"; in addition to a primarily negative undertaking, it implies some positive obligation on the part of the State … Nevertheless, the requirements of the notion of "respect", which appears also in Art 8 of the Convention, vary considerably from case to case, given the diversity of the practices followed and the situations obtaining in the Contracting States. As a result, the Contracting States enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals. In the context of [A2P1] that concept implies in particular that this provision cannot be interpreted to mean that parents can require the State to provide a particular form of teaching …

62. The Court would also refer to its case-law on the place of religion in the school curriculum (see essentially *Kjeldsen v Denmark* [1976] ECHR 5095/71, paras 50–53; *Folgerø*, cited above, para 84; and *Hasan and Eylem Zengin v Turkey* [2007] ECHR 1448/04, paras 51 and 52). According to those authorities, the setting and planning of the curriculum fall within the competence of the Contracting States. In principle it is not for the Court to rule on such questions, as the solutions may legitimately vary according to the country and the era. In particular, the second sentence of [A2P1] does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum. On the other hand, as its aim is to safeguard the possibility of pluralism in education, it requires the State, in exercising its functions with regard to education and teaching, to take care that information or knowledge included in the curriculum is conveyed in an

objective, critical and pluralistic manner, enabling pupils to develop a critical mind particularly with regard to religion in a calm atmosphere free of any proselytism. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that the States must not exceed …

63. The Court does not accept the [Italian] Government's argument that the obligation laid on Contracting States by the second sentence of [A2P1] concerns only the content of school curricula, so that the question of the presence of crucifixes in State-school classrooms would fall outside its scope. It is true that a number of cases in which the Court has examined this provision concerned the content and implementation of the school curriculum. Nevertheless, as the Court has already emphasised, the obligation on Contracting States to respect the religious and philosophical convictions of parents does not apply only to the content of teaching and the way it is provided; it binds them "in the exercise" of all the "functions" – in the terms of the second sentence of [A2P1] – which they assume in relation to education and teaching … That includes without any doubt the organisation of the school environment where domestic law attributes that function to the public authorities. It is in that context that the presence of crucifixes in Italian State-school classrooms is to be placed …

64. In general, the Court considers that where the organisation of the school environment is a matter for the public authorities, that task must be seen as a function assumed by the State in relation to education and teaching, within the meaning of the second sentence of [A2P1].

65. It follows that the decision whether crucifixes should be present in State-school classrooms forms part of the functions assumed by the respondent State in relation to education and teaching and, accordingly, falls within the scope of the second sentence of [A2P1]. That makes it an area in which the State's obligation to respect the right of parents to ensure the education and teaching of their children in conformity with their own religious and philosophical convictions comes into play.

66. The Court further considers that the crucifix is above all a religious symbol. The domestic courts came to the same conclusion and in any event the Government have not contested this. The question whether the crucifix is charged with any other meaning beyond its religious symbolism is not decisive at this stage of the Court's reasoning. There is no evidence before the Court that the display of a religious symbol on classroom walls may have an influence on pupils and so it cannot reasonably be asserted that it does or does not have an effect on young persons whose convictions are still in the process of being formed. However, it is understandable that the first applicant might see in the display of crucifixes in the classrooms of the State school formerly attended by her children a lack of respect on the State's part for her

right to ensure their education and teaching in conformity with her own philosophical convictions. Be that as it may, the applicant's subjective perception is not in itself sufficient to establish a breach of [A2P1].

67. The Government, for their part, explained that the presence of crucifixes in State-school classrooms, being the result of Italy's historical development, a fact which gave it not only a religious connotation but also an identity-linked one, now corresponded to a tradition which they considered it important to perpetuate. They added that, beyond its religious meaning, the crucifix symbolised the principles and values which formed the foundation of democracy and western civilisation, and that its presence in classrooms was justifiable on that account.

68. The Court takes the view that the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the respondent State. The Court must moreover take into account the fact that Europe is marked by a great diversity between the States of which it is composed, particularly in the sphere of cultural and historical development. It emphasises, however, that the reference to a tradition cannot relieve a Contracting State of its obligation to respect the rights and freedoms enshrined in the Convention and its Protocols …

69. The fact remains that the Contracting States enjoy a margin of appreciation in their efforts to reconcile exercise of the functions they assume in relation to education and teaching with respect for the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions (see paras 61–62 above). That applies to organisation of the school environment and to the setting and planning of the curriculum … The Court therefore has a duty in principle to respect the Contracting States' decisions in these matters, including the place they accord to religion, provided that those decisions do not lead to a form of indoctrination …

70. The Court concludes in the present case that the decision whether crucifixes should be present in State-school classrooms is, in principle, a matter falling within the margin of appreciation of the respondent State. Moreover, the fact that there is no European consensus on the question of the presence of religious symbols in State schools … speaks in favour of that approach. This margin of appreciation, however, goes hand in hand with European supervision (see, for example, *mutatis mutandis*, *Leyla Sahin*, cited above, para 110), the Court's task in the present case being to determine whether the limit mentioned in para 69 above has been exceeded.

71. In that connection, it is true that by prescribing the presence of crucifixes in State-school classrooms – a sign which, whether or not it is accorded in addition a secular symbolic value, undoubtedly refers to Christianity – the regulations confer on the country's majority religion preponderant visibility in the school environment. That is not in itself

sufficient, however, to denote a process of indoctrination on the respondent State's part and establish a breach of the requirements of [A2P1]…

72. Furthermore, a crucifix on a wall is an essentially passive symbol and this point is of importance in the Court's view, particularly having regard to the principle of neutrality … It cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities …

74. Moreover, the effects of the greater visibility which the presence of the crucifix gives to Christianity in schools needs to be further placed in perspective by consideration of the following points. Firstly, the presence of crucifixes is not associated with compulsory teaching about Christianity … Secondly, according to the indications provided by the Government, Italy opens up the school environment in parallel to other religions. The Government indicated in this connection that it was not forbidden for pupils to wear Islamic headscarves or other symbols or apparel having a religious connotation; alternative arrangements were possible to help schooling fit in with non-majority religious practices; the beginning and end of Ramadan were "often celebrated" in schools; and optional religious education could be organised in schools for "all recognised religious creeds"… Moreover, there was nothing to suggest that the authorities were intolerant of pupils who believed in other religions, were non-believers or who held non-religious philosophical convictions. In addition, the applicants did not assert that the presence of the crucifix in classrooms had encouraged the development of teaching practices with a proselytising tendency, or claim that the second and third applicants had ever experienced a tendentious reference to that presence by a teacher in the exercise of his or her functions.

75. Lastly, the Court notes that the first applicant retained in full her right as a parent to enlighten and advise her children, to exercise in their regard her natural functions as educator and to guide them on a path in line with her own philosophical convictions …

76. It follows from the foregoing that, in deciding to keep crucifixes in the classrooms of the State school attended by the first applicant's children, the authorities acted within the limits of the margin of appreciation left to the respondent State in the context of its obligation to respect, in the exercise of the functions it assumes in relation to education and teaching, the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

77. The Court accordingly concludes that there has been no violation of [A2P1] in respect of the first applicant. It further considers that no separate issue arises under Art 9 of the Convention.'

Negligence (1)

Blair-Ford v CRS Adventures Ltd [2012] EWHC 2360 (QB); judgment on 13 August 2012

Mr Blair-Ford, a teacher accompanying a school group on a residential adventure activity course, threw a wellington boot backwards through his legs, overbalanced and was catastrophically injured. He was taking part in a fun 'Mini-Olympics'. His claim for personal injury failed. The risk of injury was not such that steps should have been taken to guard against it. There was no foreseeable real risk and 'extremely sad though it be, this was a tragic and freak accident for which no blame can be established'.

Academies: Judicial Review

R on the application of Moyse v Secretary of State for Education [2012] EWHC 2758 (Admin); judgment on 15 August 2012

Susan Moyle is the mother of a pupil at Downhills Primary School and co-chair of the Friends of Downhills, the school's parent teacher association. She applied for permission to challenge by judicial review a decision of the Secretary of State for Education to enter into a funding agreement whereby the school would become an academy with effect from 1 September 2012. Permission was refused, but there was full argument and Kenneth Parker J was satisfied that the judgment could be published and, if appropriate, referred to in any future case tackling the same or similar issues.

HE and FE: Student Support: Ordinary Residence

R (on the application of Arogundade by her fiancé and litigation friend, Trevor André James) v Secretary of State for Business, Innovation and Skills [2012] EWHC 2502 (Admin); judgment on 7 September 2012

The claimant sought judicial review of the Secretary of State's decision that she did not meet the ordinary residence qualification for a grant under the Education (Student Support) Regulations 2009 (SI 2009/1555, **LOE D [54201]**). The claim failed. Ordinary residence for the purposes of paragraph 5(1)(*c*) of Sch 1 Part 2 to the 2009 Regulations requires lawful residence and would not include residence in breach of the immigration rules.

The 2009 Regulations have been revoked except in relation to the provision of support to students in an academic year which begins on or after 1 September 2010 but before 1 September 2012. See the Education (Student Support) Regulations 2011 (SI 2011/1986, **LOE D [57851]**).

Negligence (2)

Hammersley-Gonsalves v Redcar and Cleveland Borough Council [2012] EWCA Civ 1135; judgment given on 13 July 2012

The Respondent boy was one of a group of 22 pupils, all aged 11 or 12 years, taking part in a golf lesson given by his PE teacher on school premises. It was

the group's seventh golf lesson and their first opportunity to play the game outside. They were well-behaved and had been instructed to walk outside in single file, each carrying a golf club and a ball, and not to swing the club or hit anything until told to do so. Their teacher was at the back of the group and the trial judge found that he was unable to see what happened when another pupil swung his club completely unexpectedly and accidentally struck the Respondent, injuring him.

The trial judge at first instance said:

> '… not to see what the pupils were doing and whether they were fulfilling instructions given, bearing in mind their age, notwithstanding the previous history is, in my judgment, an inadequate standard of supervision and care'.

Negligence was established, but the Council, which owns the school, appealed the decision.

In the Court of Appeal, Pill LJ said this:

> '[9] On behalf of the Appellants, Mr Edwards submits that, having regard to the instructions given, the level of supervision cannot be criticised, with pupils who are in the 11 to 12 age group and are normally well behaved. The judge did not accept that anyone else swung a club. There was no evidence of previous accidents involving golf clubs. No criticism was made at the hearing of the staffing ratio, and Mr Williams has confirmed that criticism of the staffing ratio has not been and is not a part of the Respondent's case.
>
> [10] The first issue is whether the supervision was negligent, in that the teacher could not see the actions of all the pupils at one time. A spontaneous piece of misbehaviour by a pupil, such as that by Matthew, might go unobserved until it was too late. I have no difficulty in accepting the judge's findings that Mr Fowle could not see the actions of every pupil at every moment. The basis for the finding against the Appellants was that, had Mr Fowle kept proper lookout or positioned himself differently, the accident would not have happened. In seeking to uphold the conclusion of the judge, Mr Williams relies on the judge's finding that Mr Fowle could not and did not see what had happened. That is not challenged on this appeal; the question is whether that justifies a finding that Mr Fowle was negligent.
>
> [11] I have difficulty in seeing how this claim can succeed without an allegation in relation to the staffing ratio, which has advisedly not been made. It appears to me obvious that however observant a teacher is, however careful the lookout he is keeping, he could not and could not be expected to see every action of each of 22 boys walking in crocodile fashion as these boys were. On the judge's findings, I do not consider that a lack of adequate or proper supervision has been established. The boys were 11 to 12 years old, had had previous golf instruction, were well-behaved generally and on this occasion. There is no background of bad behaviour. The action of Matthew was wholly unexpected. I do not

consider that Mr Fowle's failure to see the quick and unexpected swing gives rise to a finding of negligence against him. He could not be expected to see every action of every member of the group, wherever he positioned himself.

[12] Although the point has not been argued, I do add a finding in relation to the staffing ratio. In the circumstances described, I do not consider that closer supervision of this group by having one or more extra teachers standing close enough to observe every action of every member of the group was reasonably required. Given their age, the instruction they had received, and the activity being followed, the Appellants' system, as applied by Mr Fowle, was reasonable and did not fall below the standard reasonably required.

[13] I mentioned the question of causation and the judge's references to it. Even if Mr Fowle's failure to observe the swing was negligent, it would have been necessary for the Respondent also to establish that the failure was causative of the accident that actually happened. With respect, the judge has not adequately addressed that question in the paragraph cited. There is no finding that on a balance of probabilities, action by Mr Fowle would have prevented the accident.

[14] Accordingly, I would allow this appeal. I add only that this was an unfortunate accident and one feels sympathy for a boy who received the unpleasant injury the Respondent did, without any fault whatever on his part. However, in my judgment the Appellants cannot be held responsible for the accident which happened.'

Rimer and Black LJJ both agreed, with Rimer LJ adding:

'The judge found that Mr Fowle did not see the incident causing the injury to the Claimant. The judge did not, however, find that his inability to do was because of any negligence on his part, nor was there any basis for doing so. It followed that there was no basis for any finding that Mr Fowle was in breach of the duty of care he owed to the Claimant.'

Appeal allowed.

Vicarious Liability (1)

JGE v Trustees of the Portsmouth Roman Catholic Diocesan Trust [2012] EWCA Civ 938; judgment on 12 July 2012

The High Court case, which determined a preliminary issue, was reported at p 17 of **LOE Bulletin 93**. The issue was whether the diocesan bishop might be vicariously liable for the alleged torts of a priest of his diocese. This question arose because a former resident of a children's home alleged that she had been abused by a priest at the time she lived in the home. Although not an education case, it was included because of the potential for similar issues arising in a school or other education setting. At first instance, the trial judge

determined the issue in favour of the Claimant. The Trust appealed, but the appeal was dismissed and leave to appeal to the Supreme Court was refused. Ward LJ said this:

> **'[81]** The result of each of the tests leads me to the conclusion that Father Baldwin is more like an employee than an independent contractor. He is in a relationship with his bishop which is close enough and so akin to employer/employee as to make it just and fair to impose vicarious liability. Justice and fairness is used here as a salutary check on the conclusion. It is not a stand-alone test for a conclusion. It is just because it strikes a proper balance between the unfairness to the employer of imposing strict liability and the unfairness to the victim of leaving her without a full remedy for the harm caused by the employer's managing his business in a way which gave rise to that harm even when the risk of harm is not reasonably foreseeable.'

Appeal dismissed.

Teacher Discipline: Safeguarding Children

Webster v General Teaching Council [2012] EWHC 2928 (Admin); judgment on 5 October 2012

A young teacher was suspended for two years by the Professional Conduct Committee of the General Teaching Council for having an inappropriate relationship with a pupil at the school where she worked. She appealed to the High Court, but the High Court found no basis for concluding that the case had been decided wrongly by the PCC. The appeal failed.

X County Council v D UKEAT/0155/12/RN; decision on 23 October 2012

Two drama teachers appealed to the Employment Tribunal claiming they had been unfairly dismissed. Their school's disciplinary committee had found that they were guilty of gross misconduct for allowing pupils under their supervision to produce and act in a play for their GCSE examination that included sexual content which was age-inappropriate; for failing to prepare pupils adequately for the possible psychological damage of acting in productions containing challenging material; for acting in a manner likely to bring the school into disrepute by supervising a public performance containing such scenes without adequately preparing either the Senior Management in the school or the audience for the type of production they would be watching; and for acting unprofessionally in failing to bring to the attention of Senior Management the nature of the material they were considering. The list of abusive and deviant sexual practices depicted in this 'school play' is truly horrifying, but the Employment Tribunal upheld the teachers' claim.

Not surprisingly, the education authority and the school's governing body appealed. The EAT reached a different conclusion: the ET's decision had been perverse. The EAT ordered that the case be remitted to a freshly constituted employment tribunal.

Negligence (3)

Richards v Bromley London Borough [2012] EWCA Civ 1476; judgment given on 16 November 2012

The Court of Appeal dismissed a claim for damages for personal injury. The Appellant had been injured on school premises when a door closed on her heel. She was fifteen years old at the time of the incident. Some months earlier, there had been a very minor incident involving another pupil with the same door. As a consequence, the caretaker decided to carry out remedial work during the holidays later in the school year.

Tomlinson LJ said this:

> '14. I would not go all the way with the judge in saying that the injury to Miss Richards was impossible to predict. It is sufficient to conclude, as I do, that the injury to Miss Carpenter did not render reasonably foreseeable the more serious and very different laceration injury to Miss Richards. What happened to Miss Carpenter has only a superficial similarity to that which happened to Miss Richards. In any event the trivial nature of the earlier incident and the risk which it brought to light, seen in the context of thirty years safe use of the doors by thousands of children and staff, rendered reasonable both the nature of the remedial action which the school authorities proposed to take and the timescale within which they proposed to do it.
>
> 15. It was most unfortunate that Miss Richards should have suffered her unpleasant injury only weeks before the work was scheduled to be done. She has my sympathy. Sympathy however is an insufficient basis on which to subvert the law of tort. It needs to be understood that not every misfortune occurring on school premises attracts compensation. I would dismiss this appeal.'

Appeal dismissed.

Vicarious Liability (2)

Catholic Child Welfare Society v Various Claimants (FC) [2012] UKSC 56; judgment on 21 November 2012

Like the *JGE* case above, this case reviewed the application of the principles of vicarious liability in the context of the abuse of children. Lay brothers of a Christian institute worked at a residential school for boys in need of care. They had contracts of employment with the managers of the school. At first instance, the managers of the school were held to be vicariously liable, but they challenged the court's finding (confirmed by the Court of Appeal) that the other defendants were not also vicariously liable. (For a report of the Court of Appeal decision, see **LOE Bulletin 87**, p 24.)

The judges in the Supreme Court reached a different conclusion and allowed the appeal. Lord Phillips gave the judgment:

'[88] In this case both the necessary relationship between the brothers and the Institute and the close connection between that relationship and the abuse committed at the school have been made out.

[89] The relationship between the brothers and the Institute was much closer to that of employment than the relationship between the priest and the bishop in JGE. The Institute was subdivided into a hierarchical structure and conducted its activities as if it were a corporate body. The brothers were subject to the directions as to their employment and the general supervision of the Provincial, their superior within that hierarchical structure. But the relationship was not simply one akin to that of employer and employee. The business and mission of the Institute was the common business and mission of every brother who was a member of it.

[90] That business was the provision of a Christian education to boys. It was to achieve that mission that the brothers joined and remained members of the Institute.

[91] The relationship between the Institute and the brothers enabled the Institute to place the brothers in teaching positions and, in particular, in the position of headmaster at St William's. The standing that the brothers enjoyed as members of the Institute led the managers of that school to comply with the decisions of the Institute as to who should fill that key position. It is particularly significant that the Institute provided the headmasters, for the running of the school was largely carried out by the headmasters. The brother headmaster was almost always the Director of the Institute's community, living on the school premises. There was thus a very close connection between the relationship between the brothers and the Institute and the employment of the brothers as teachers in the school.

[92] Living cloistered on the school premises were vulnerable boys. They were triply vulnerable. They were vulnerable because they were children in a school; they were vulnerable because they were virtually prisoners in the school; and they were vulnerable because their personal histories made it even less likely that if they attempted to disclose what was happening to them they would be believed. The brother teachers were placed in the school to care for the educational and religious needs of these pupils. Abusing the boys in their care was diametrically opposed to those objectives but, paradoxically, that very fact was one of the factors that provided the necessary close connection between the abuse and the relationship between the brothers and the Institute that gives rise to vicarious liability on the part of the latter.

[93] There was a very close connection between the brother teachers' employment in the school and the sexual abuse that they committed, or must for present purposes be assumed to have committed. There was no Criminal Records Bureau at the time, but the risk of sexual abuse was recognised, as demonstrated by the prohibition on touching the children in the chapter in the Rule dealing with chastity. No doubt the

status of a brother was treated by the managers as an assurance that children could safely be entrusted to his care. The placement of brother teachers in St William's, a residential school in the precincts of which they also resided, greatly enhanced the risk of abuse by them if they had a propensity for such misconduct.

[94] This is not a borderline case. It is one where it is fair, just and reasonable, by reason of the satisfaction of the relevant criteria, for the Institute to share with the Middlesbrough Defendants vicarious liability for the abuse committed by the brothers. I would allow this appeal.'

Appeal allowed.

ITEMS OF INTEREST

Data and Information: The Information Commissioner's 2012 Guidance to Schools.

The Information Commissioner's Office issued a document (on its website) in November 2012, summarising the advice it gave to schools in 2012. The ICO's useful summary of that summary is as follows:

- **Notification** – make sure you notify us accurately of the purposes for your processing of personal data.
- **Personal data** – recognise the need to handle personal information in line with the data protection principles.
- **Fair processing** – let pupils and staff know what you do with the personal information you record about them. Make sure you restrict access to personal information to those who need it.
- **Security** – keep confidential information secure when storing it, using it and sharing it with others.
- **Disposal** – when disposing of records and equipment, make sure personal information cannot be retrieved from them.
- **Policies** – have clear, practical policies and procedures on information governance for staff and governors to follow, and monitor their operation.
- **Subject access requests** – recognise, log and monitor subject access requests.
- **Data sharing** – be sure you are allowed to share information with others and make sure it is kept secure when shared.
- **Websites** – control access to any restricted area. Make sure you are allowed to publish any personal information (including images) on your website.
- **CCTV** – inform people what it is used for and review retention periods.
- **Photographs** – if your school takes photos for publication, mention your intentions in your fair processing/privacy notice.

- **Processing by others** – recognise when others are processing personal information for you and make sure they do it securely.
- **Training** – train staff and governors in the basics of information governance; recognise where the law and good practice need to be considered; and know where to turn for further advice.
- **Freedom of information** – after consultation, notify staff what personal information you would provide about them when answering FOI requests.

School Admission Appeals: 2010/11 Statistics

The latest Statistical First Release came out on 4 October 2012 and relates to the academic year 2010–2011, but (surprisingly) it fails to capture the figures for academies.

Maintained-school admission appeals in 2010/11 were down slightly from the 2009/10 number. In 2010/11 there were:

- 1,541,630 admissions;
- 83,470 appeals made;
- 60,010 appeals heard; and
- 16,710 appeals that were successful.

Secondary school appeals were more successful than primary school appeals (34% succeeded, as opposed to 23%), but there were more primary appeals made. 43% of appeals were successful in North East England, but only 7% succeeded in Inner London.

Allegations of Abuse (where the allegation is against a teacher etc)

The DfE issued on 1 October 2012 some fresh Statutory Guidance on allegations of abuse, where the allegation is made against a teacher or other member of staff. The guidance is directed to all kinds of school, to local authorities, to heads, to staff and to governors. In issuing this guidance, the Department is still shifting the balance slightly away from the victim and slightly towards the alleged perpetrator. This process is not unrelated to the implementation (in England and Wales) of the new ss 141F to 141H of the Education Act 2002 (**LOE B [6641.6]** to **LOE B [6641.8]**), two of which were mentioned in **Bulletin 98**, p 7.

The Department's Key Points are:

- If an allegation is made against a teacher the quick resolution of that allegation should be a clear priority to the benefit of all concerned. At any stage of consideration or investigation, all unnecessary delays should be eradicated.

- In response to an allegation staff suspension should not be the default option. An individual should only be suspended if there is no reasonable alternative. If suspension is deemed appropriate, the reasons and justification should be recorded by the school and the individual notified of the reasons.
- Allegations that are found to have been malicious should be removed from personnel records and any that are not substantiated, are unfounded or malicious should not be referred to in employer references.
- Pupils that are found to have made malicious allegations are likely to have breached school behaviour policies. The school should therefore consider whether to apply an appropriate sanction, which could include temporary or permanent exclusion (as well as referral to the police if there are grounds for believing a criminal offence may have been committed).
- All schools and FE colleges should have procedures for dealing with allegations. The procedures should make it clear that all allegations should be reported straight away, normally to the headteacher, principal or proprietor if it is an independent school. The procedures should also identify the person, often the chair of governors, to whom reports should be made in the absence of the headteacher or principal, or in cases where the headteacher or principal themselves are the subject of the allegation or concern. Procedures should also include contact details for the local authority designated officer (LADO) responsible for providing advice and monitoring cases.

DfE Advice: Protection of School Playing Fields and Public Land

The DfE issued on 7 November 2012 some new Advice on the protection of school playing fields and public land. The advice is for local authorities, governing bodies, foundation bodies, trustees, diocesan authorities, voluntary bodies, academies and sports organisations. It is 'non-statutory advice' and it describes the main circumstances in which local authorities, governing bodies, foundation bodies and trustees need to seek the consent of the Secretary of State for Education to dispose, or change the use, of land used by schools, including playing field land. It also describes how the Secretary of State will assess applications for consent to dispose, or change the use, of such land and links to a form called SATPF1, upon which such applications must be made.

The narrative at **LOE A [3329]** ff will now have to be up-dated, although of course, the substantive law cannot have been changed by this non-statutory advice.

The relevant statutory provisions include:

- The School Premises (England) Regulations 2012 (**LOE D [60151]**);
- Section 77 of the School Standards and Framework Act 1998 (**LOE B [5608]**);

- Schedule 22 to the SSFA 1998 (as amended) (**LOE B [5572]**);
- Schedule 1 to the Academies Act 2010 (as inserted by Sch 14 to the Education Act 2011) (**LOE B [8621]**);

DfE Advice: Screening, Searching and Confiscation in Schools in England

The DfE has issued (on 28 November 2012) some fresh 'Advice' on screening, searching and confiscation in schools. (They have also issued similar advice for FE colleges, as to which see below.) The new 'Advice' for schools replaces the 2007 'Guidance' called Screening and Searching of Pupils for Weapons: Guidance for School Staff.

Here are some extracts from the new Advice:

'This advice is intended to explain schools' powers of screening and searching pupils so that school staff have the confidence to use them. In particular it explains the use of the power to search pupils without consent. It also explains the powers schools have to seize and then confiscate items found during a search. It includes statutory guidance which schools must have regard to …

'*What legislation does this advice relate to?*

- Education Act 1996;
- Education and Inspections Act 2006;
- The Schools (Specification and Disposal of Articles) Regulations 2012;
- The School Behaviour (Determination and Publicising of Measures in Academies) Regulations 2012; and
- Health and Safety at Work etc Act 1974

'*Who is this advice for?* This advice is aimed at headteachers, school staff and governing bodies in all schools in England. This guidance applies to all schools except sixth forms or FE colleges.

'*Searching*

- School staff can search a pupil for any item if the pupil agrees [although] the ability to give consent may be influenced by the child's age or other factors.
- headteachers and staff authorised by them have a statutory power to search pupils or their possessions, without consent, where they have reasonable grounds for suspecting that the pupil may have a prohibited item. Prohibited items are:
  - knives or weapons
  - alcohol
  - illegal drugs

– stolen items

– tobacco and cigarette papers

– fireworks

– pornographic images

– any article that the member of staff reasonably suspects has been, or is likely to be used:

(i) to commit an offence

(ii) to cause personal injury to, or damage to the property of, any person (including the pupil)

- headteachers and authorised staff can also search for any item banned by the school rules which has been identified in the rules as an item which may be searched for. [**Note:** This provision applies to academies through The School Behaviour (Determination and Publicising of Measures in Academies) Regulations 2012 (**LOE D [58751]**).

'Confiscation

- School staff can seize any prohibited item found as a result of a search. They can also seize any item, however found, which they consider harmful or detrimental to school discipline.'

The new Advice also seeks to reassure schools that the powers to search are compatible with schools' obligations under ECHR Article 8. The Department says that Article 8 is not an absolute right, but interference with it must be just and proportionate. One of the items for which a statutory search may be made (under EA 1996, s 550ZA ff (**LOE B [4090.1]** ff) is an item prohibited by School Rules. This is clearly an invitation for all schools to revise their Rules!

Your Editor was delighted to see that use of common law powers (of a teacher in loco parentis to search pupils, lockers and desks without using the Education Act (see **LOE A [2964]**)) is helpfully supported in the new Advice, whereas the previous Guidance seemed to suggest that only the Statutory Power was ever going to be good enough.

Department of BIS Advice: Screening searching and confiscation at FE and Sixth Form Colleges and 16–19 Academies

In parallel with the DfE advice for schools described above, the Department for BIS has issued similar Advice for the FE sector. It starts off disarmingly: 'This advice replaces any previous advice issued by BIS, DfE, DIUS or DfES' but we think it means 'any similar previous advice', not 'all previous advice'.

The new BIS advice is of course very similar to the new DfE advice, but, for obvious reasons, it makes a much more definite distinction between students over 18 and those under 18. It says, 'This advice is intended to explain colleges' powers of screening and searching students so that principals and

staff have the confidence to use them when it is considered necessary. In particular it explains the use of the power to search students without consent. It also explains the powers colleges have to seize and then confiscate items found during a search. It includes statutory guidance to which colleges must have regard.'

Swimming Pool Incident (Essex)

A Press Release from the Health and Safety Executive dated 14 November 2012 said:

> 'Essex County Council has been fined for safety failings after a child with severe learning and physical disabilities almost drowned in his school's swimming pool. The 9-year-old boy, from Harlow, who cannot be named for legal reasons, was pulled from the water blue in colour and needed resuscitation after the incident during a school swimming session at Harlow Fields School and College on 23 March last year.
>
> The council was prosecuted by the Health and Safety Executive (HSE) after an investigation found that it had failed to provide schools, including Harlow Fields, with adequate information and guidance on how to safely manage and run their swimming pools. Chelmsford Magistrates' Court heard today (14 November) that the boy and the rest of his class had been in the pool with inadequate supervision. After coming round at the pool side, he was taken by to … hospital where he had to stay for 26 hours. His mother, speaking in a statement taken as part of the HSE investigation, said that her son was now frightened of water and was generally not as happy as before.
>
> Magistrates heard that the council, as the employer, should have provided the school with sufficient information to prepare operating and emergency plans for the swimming pool, and should have taken steps to ensure the guidance had been followed. Essex County Council pleaded guilty to breaching Section 3 of the Health and Safety at Work etc Act 1974, and was fined £20,000 and ordered to pay costs of £10,110.
>
> Speaking after the hearing, an HSE Inspector … said: "This incident could have ended in tragedy and clearly demonstrates the need for local authorities to provide clear and up-to-date training, guidance and information to schools where they are the employer, so that schools can safely manage their swimming pools. It also demonstrates that local authorities have a duty to ensure that where issues have been identified with schools not following guidance, remedial steps are taken to rectify these failings. HSE will not hesitate to prosecute those who put lives at risk and compromise safety".'

School Attendance: Draft Advice

The DfE is consulting on some draft advice on school attendance, as from 1 November 2012. The DfE says,

'The Government is determined to improve school attendance and ensure schools tackle all forms of absence because there is clear evidence that any absence from school can and does impact on children's attainment. This document, issued for consultation, aims to provide clear and concise guidance on the legal framework for promoting attendance. Schools are required to maintain an accurate attendance register and must follow up all unexpected absences.

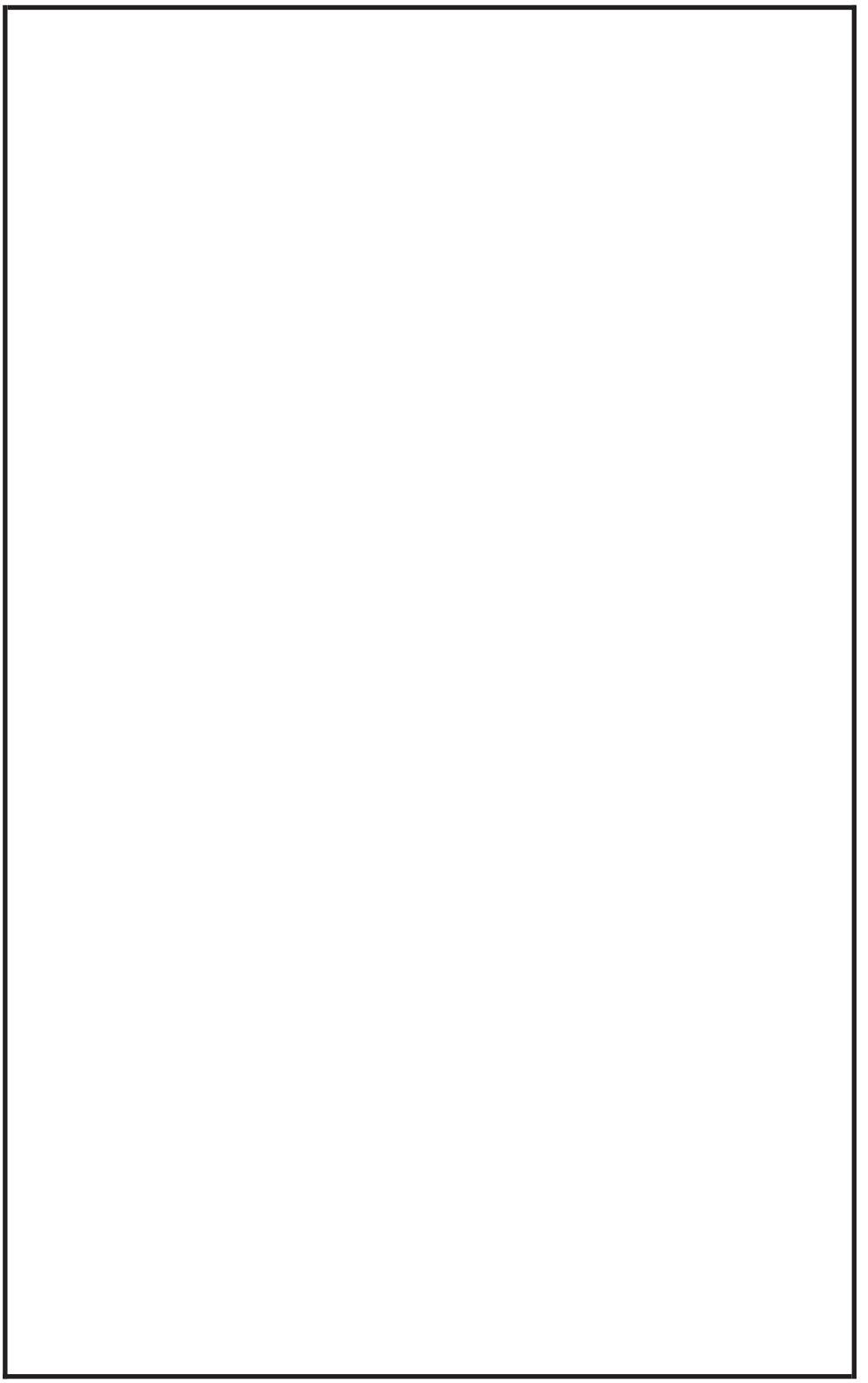
'Maintained schools are required to meet for a minimum of 380 sessions (190 days). Governing bodies determine the length of the school day and sessions. By law, parents whose children are of compulsory school age (5–16) and registered at school are responsible for ensuring their children attend school regularly. If they fail to do so there are a range of measures available that schools can use – parenting contracts, parenting orders and penalty notices. As a last resort local authorities can prosecute parents.

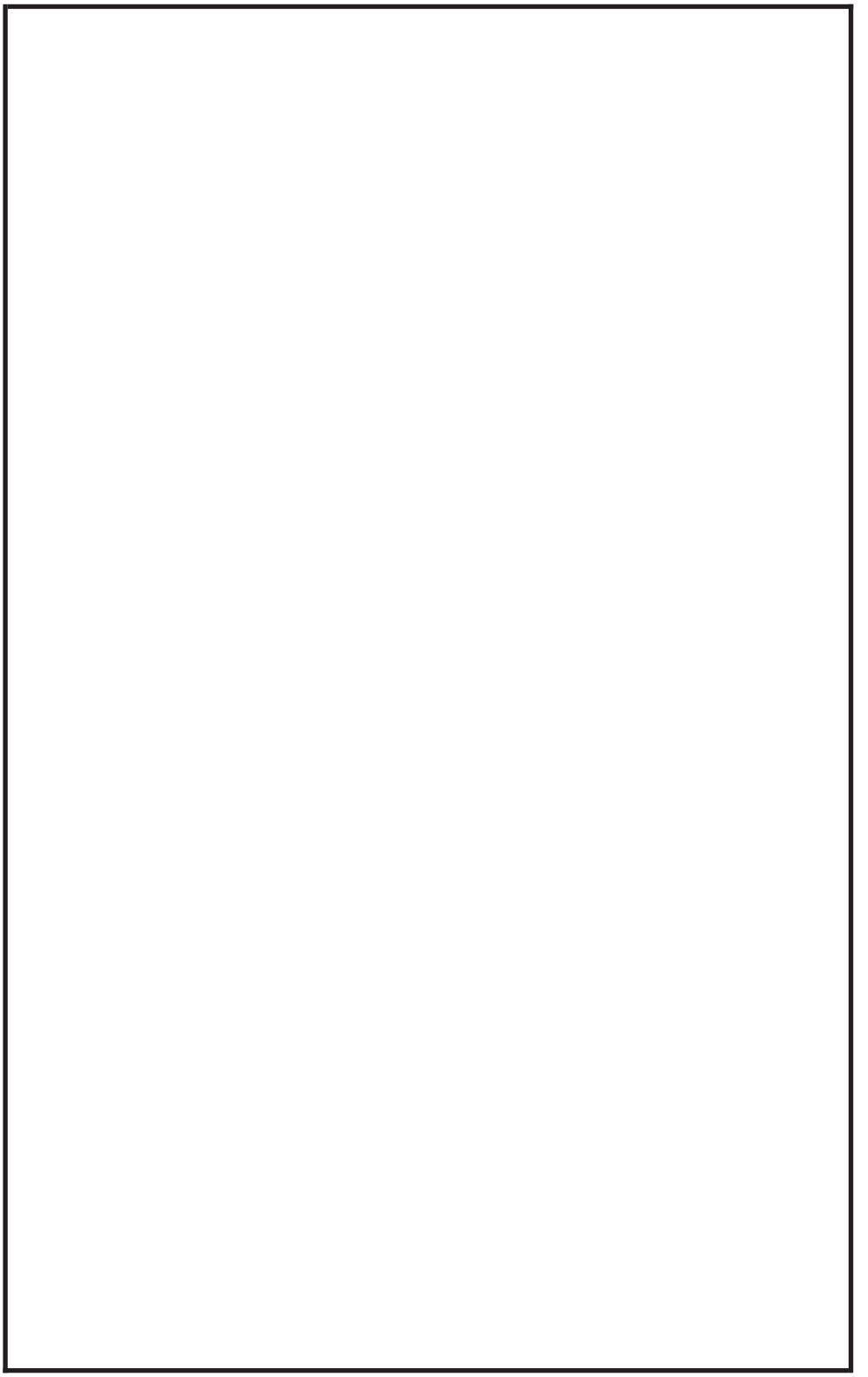
[The DfE is] 'asking for feedback on how clear and helpful the guidance is, and whether any other advice should be included …

'Attendance: Persistent absence is a serious problem for pupils. Much of the work children miss when they are off school is never made up, leaving these pupils at a considerable disadvantage for the remainder of their school career. The Department has changed the definition of persistent absence to deal with the reality of pupil absenteeism in schools and its impact on their learning. The threshold at which a pupil is defined as persistently absent has been reduced to 15 per cent, down from 20 per cent. Some schools tend to take action to intervene when pupils near the persistent absent threshold, but nearing 20 per cent is too late. Lowering the threshold will ensure that schools take action sooner to deal with absence. The Government will look at the possibility of further lowering the threshold over time.

'School day and year: All maintained schools and non-maintained special schools must open to educate their pupils for at least 380 half-day sessions (190 days) in each school year, unless this is reduced by Parliament. All schools are free to decide how long their school day should be. The law requires the school day to be divided into two sessions with a break in between. There is no legal requirement regarding the length of the break, or the two sessions.'

The consultation period runs until 13 December 2012.





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