THE LAW OF EDUCATION

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HEADLINES

The Duty to Participate in Education or Training is the modern equivalent of the raising of the school leaving age to 16, although 'ROSLA' seems a long time ago now. Here in 2013, youngsters in England can still leave school at 16, as long as they stay in education or training of some suitable sort. See SIs 2013/1204, 2013/1205, 2013/1242 and 2013/1243.

Headlines

The Death of the National Curriculum in England is not quite with us yet, but the poor old NC is certainly down and wounded. The DfE twists the knife a little further in SI 2013/1487 (see **LOE D [61051]**).

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ACT OF PARLIAMENT/ACTS OF THE NATIONAL ASSEMBLY FOR WALES

The School Standards and Organisation (Wales) Act 2013

The Act has received Royal Assent and is set out with annotations in Division B(W) of *The Law of Education*, starting at **LOE B(W) [601]ff**. Section 1 helpfully summarises the contents of the Act:

Section 1

(1) This Act has 6 Parts.

(2) Part 2 is divided into 3 Chapters containing provisions concerned with maintaining and improving standards–

(*a*) in maintained schools, and

(*b*) in the exercise of education functions by local authorities.

(3) Chapter 1 of Part 2 (including Schedule 1)–

(*a*) sets out the grounds for intervention by local authorities and the Welsh Ministers in the conduct of maintained schools that are causing concern, and

(*b*) provides a range of intervention powers to enable local authorities and the Welsh Ministers to deal with the causes of concern.

(4) Chapter 2–

(*a*) sets out the grounds for intervention by the Welsh Ministers in the exercise of education functions by local authorities that are causing concern, and

(*b*) provides a range of intervention powers to enable the Welsh Ministers to deal with the causes of concern.

(5) Chapter 3 makes provision for the Welsh Ministers to give guidance to the governing bodies of maintained schools, the head teachers of such schools and local authorities on how functions should be exercised with a view to improving the standard of education provided in maintained schools.

(6) Part 3 is divided into 6 Chapters containing provision about the organisation of maintained schools.

(7) Chapter 1 of Part 3 provides for a School Organisation Code about the exercise of functions under Part 3.

(8) Chapter 2 (including Schedules 2 to 4) makes provision requiring the establishment, alteration and discontinuance of maintained schools in accordance with a specified process.

(9) Chapter 3 provides for the rationalisation of school places if the Welsh Ministers are of the opinion that there is excessive or insufficient provision for primary or secondary education in maintained schools.

(10) Chapter 4 provides for the making of regional provision for special educational needs.

(11) Chapter 5 provides for powers for the Welsh Ministers to re-structure sixth form education.

(12) Chapter 6 provides for miscellaneous and supplemental matters relating to school organisation.

(13) Part 4 makes provision for Welsh in education strategic plans, which are to be–

(*a*) prepared by local authorities,

(*b*) approved by the Welsh Ministers, and

(*c*) published and implemented by local authorities (sections 84, 85 and 87).

(14) Part 4 also provides a power exercisable by regulations for the Welsh Ministers to require local authorities to carry out an assessment of the demand among parents for Welsh medium education for their children (section 86).

(15) Part 5 makes provision about miscellaneous functions relating to maintained schools, including provision–

(*a*) requiring local authorities to provide breakfasts for pupils at maintained primary schools at the request of the governing bodies of those schools (sections 88 to 90);

(*b*) amending the existing powers of local authorities and governing bodies to charge for school meals, so that–

(i) a related requirement to charge every person the same price for the same quantity of the same item is removed, and

(ii) a new requirement that the price charged for an item does not exceed the cost of providing that item is imposed (section 91);

(*c*) requiring local authorities to secure reasonable provision for a service providing counselling in respect of health, emotional and social needs for specified school pupils and other children (section 92);

(*d*) requiring governing bodies of maintained schools to hold a meeting if requested to do so by parents in a petition (section 94) and repealing an existing duty to hold an annual parents' meeting (section 95);

(*e*) repealing the Welsh Ministers' duty to issue a code of practice for securing effective relationships between local authorities and maintained schools (section 96).

(16) Part 6–

(*a*) introduces Schedule 5, which makes minor and consequential amendments to other legislation arising from the provisions of this Act;

(*b*) contains definitions that apply for the purposes of this Act generally and an index of definitions that apply to a number of provisions, but not the whole Act (section 98);

(*c*) contains other provisions which apply generally for the purposes of this Act.

Commencement: The School Standards and Organisation (Wales) Act 2013 is not yet in force, except for a power to make regulations (as to which, see SI 2013/1000, below).

STATUTORY INSTRUMENTS

Wales: FE and HE: Local

***Coleg Cambria* (*Incorporation*) *Order 2013* (*SI 2013 No 374*); *Coleg Cambria Further Education Corporation* (*Government*) *Regulations 2013* (*SI 2013 No 375*)**

These two are self-explanatory.

Wales: National Curriculum

***Education* (*National Curriculum*) (*Assessment Arrangements for Reading and Numeracy*) (*Wales*) *Order 2013* (*SI 2013 No 433*)**

The National Curriculum for Wales is prescribed under s 108 of the Education Act 2002, **LOE B [6608]**. These regulations give legal effect to the assessment arrangements for reading and numeracy for pupils who attend schools maintained by a Welsh local authority (other than any established in a hospital).

***National Curriculum* (*Educational Programmes for the Foundation Stage and Programmes of Study for the Second and Third Key Stages*) (*Wales*) *Order 2013* (*SI 2013 No 434*)**

This Order gives legal effect to additional educational programmes for the language, literacy and communication skills and mathematical development areas of learning in the foundation phase in Welsh maintained schools. It also gives legal effect to the additional programmes of study in English, Welsh and mathematics in the second and third key stages in those schools.

***National Curriculum* (*Amendments relating to Educational Programmes for the Foundation Stage and Programmes of Study for the Second and Third Key Stages*) (*Wales*) *Regulations 2013* (*SI 2013 No 437*)**

These Regulations require governors and heads to include (with other required school documents) reports on outcomes under SI 2013/434, above.

Local: School Day and School Year

***West Earlham Infant School and West Earlham Junior School* (*School Day and School Year Regulations*) *Order 2013* (*SI 2013 No 473*)**

Children at two schools in Norwich get an extra day off, this year.

Tribunal Procedure

***Tribunal Procedure* (*Amendment*) *Rules 2013* (*SI 2013 No 477*)**

The Tribunal Procedure Rules, which apply in the HESC Chamber of the First-tier Tribunal (and in many other FTT Chambers), are amended to provide:

- clearer provision regarding the date from which time for applying for costs runs after a case is withdrawn;
- extended power to withdraw a case to circumstances in which a case has been adjourned part heard;
- a time limit for appeals against decisions other than decisions which dispose of all the issues in the proceedings;
- amendments to treat preliminary issues in the same way as decisions which dispose of all the issues in the proceedings, in relation to hearings, the provision of reasons and the rules on appeals; and
- changes to the rules on costs or expenses.

Inspectors of Education, Children's Services and Skills: England (1)

***Her Majesty's Chief Inspector of Education, Children's Services and Skills* (*Fees and Frequency of Inspections*) (*Children's Homes etc*) (*Amendment*) *Regulations 2013* (*SI 2013 No 523*)**

The Explanatory Note says (inter alia):

> 'These Regulations amend Parts 4 (annual fees) and 5 (frequency of inspections) of Her Majesty's Chief Inspector of Education, Children's Services and Skills (Fees and Frequency of Inspections) (Children's Homes etc) Regulations 2007 (SI 2007/694, **LOE D [45361]**). The 2007 Regulations apply in relation to England only.
>
> These 2013 Regulations amend the annual fees paid under the Care Standards Act 2000, the Education and Inspections Act 2006 and the Children Act 1989 to Her Majesty's Chief Inspector of Education, Children's Services and Skills in respect of voluntary adoption agencies, adoption support agencies, children's homes, residential family centres, boarding schools, residential colleges, residential special schools and in respect of local authority fostering and adoption functions.
>
> Regulation 6 amends the 2007 Regulations to remove the requirement that the Chief Inspector inspect premises used by local authorities in their performance of relevant functions (that is, their adoption and fostering functions) at least once in every three year period.'

Wales: Inspectors of Education and Training

***Education* (*Inspectors of Education and Training in Wales*) *Order 2013* (*SI 2013 No 541*)**

Nine new HMIs in Wales.

Inspectors of Education, Children's Services and Skills: England (2)

***Inspectors of Education, Children's Services and Skills* (*No 2*) *Order 2013* (*SI 2013 No 542*)**

22 new HMIs in England.

Local: Educational Endowments (1)

***Diocese of Lincoln* (*Educational Endowments*) (*Rippingdale Church of England School*) *Order 2013* (*SI 2013 No 549*)**

A faith school is closed and some assets are redistributed.

Apprenticeships: England

***Apprenticeships* (*the Apprenticeship Offer*) (*Prescribed Person*) *Regulations 2013* (*SI 2013 No 560*); *Apprenticeships* (*Modification to the Specification of Apprenticeship Standards for England*) *Order 2013* (*SI 2013 No 575*)**

These two SIs on apprenticeships are for noting only.

HE and FE: Student Loans

***Education* (*School Loans*) (*Repayment*) (*Amendment*) *Regulations 2013* (*SI 2013 No 607*)**

The repayment of a student loan is, in effect, an income tax, levied on a former student, so let us not descend into the detail.

Free School Lunches and Milk: England

***Free School Lunches and Milk* (*Universal Credit*) (*England*) *Order 2013* (*SI 2013 No 650*)**

When the government invents a new form of benefit, there are consequential amendments. Here, the children of people getting the new Universal Credit may also get free school milk and free school meals under the wonderfully-numbered s 512ZB(4) of the Education Act 1996, **LOE B [4022.2]**)

FE and HE: Local

***University of Wales, Newport Higher Education Corporation* (*Dissolution*) *Order 2013* (*SI 2013 No 664*)**

This one is self-explanatory.

Children, Schools and Families Act 2010 Commencement

***Children, Schools and Families Act 2010* (*Commencement No 3*) *Order 2013* (*SI 2013 No 668*)**

This Order commences one section only (s 8) of the CSF Act 2010. The section concerns Local Safeguarding Children Boards.

Careers Guidance: England

***Careers Guidance in Schools Regulations 2013* (*SI 2013 No 709*)**

Pupils in England have to have careers guidance under EA 1997, s 42A, **LOE B [5083.1]**, and these Regulations extend the age range for careers guidance (in England only) from 'Year 9 to Year 11' to 'Year 8 to Year 13'. Lest there be any doubt, the Regulations make it clear that students already in the sixth form do not have to have guidance about options at 16+.

Pupil Registration: England

***Education* (*Pupil Registration*) (*England*) (*Amendment*) *Regulations 2013* (*SI 2013 No 756*)**

These Regulations make two small, but important, changes: The explanatory note says:

> 'These Regulations amend the Education (Pupil Registration) (England) Regulations 2006… to prohibit the proprietor of a maintained school granting leave of absence to a pupil except where an application has been made in advance and the proprietor and the proprietor considers that there are exceptional circumstances relating to the application …
>
> The 2006 Regulations [are further] amended to provide that the name of the pupil must be deleted from the school's admissions register where the pupil will cease to be of compulsory school age before the school next meets and either the pupil (where they are 18) or their parent has indicated that they will no longer attend the school or where the pupil does not meet the academic entry requirements for the school's sixth form.'

Our narrative footnote at **LOE A [1526.1]** will have to be updated, when these changes take effect in September 2013, because in these Regulations, the DfE is correcting the anomaly described in that footnote.

Penalty Notices: England

***Education* (*Penalty Notices*) (*England*) (*Amendment*) *Regulations 2013* (*SI 2013 No 757*)**

Penalties levied by local authorities after 1 September 2013 under the Education (Penalty Notices) (England) Regulations 2007 (SI 2007/1867, **LOE D [47551]**) will have to be paid a little sooner.

School Information: England

***School Information* (*England*) (*Amendment*) *Regulations 2013* (*SI 2013 No 758*)**

The Explanatory Note says that these Regulations amend the School Information (England) Regulations 2008 (SI 2008/3093, **LOE D [53251]**) on 1 September 2013. They impose an additional requirement on maintained schools to publish specified details relating to the Year 7 literacy and numeracy catch-up premium grant on a website.

Inspectors of Education, Children's Services and Skills: England (3)

***Inspectors of Education, Children's Services and Skills* (*No 3*) *Order 2013* (*SI 2013 No 787*)**

Ten more new HMIs in England.

Local: Educational Endowments (2)

***Diocese of York* (*Educational Endowments*) (*Ellerton Priory Church of England School*) *Order 2013* (*SI 2013 No 920*)**

A faith school is closed and some assets are redistributed.

Apprenticeships, Skills, Children and Learning Act 2009

***Apprenticeships, Skills, Children and Learning Act 2009* (*Commencement No 6*) *Order 2013* (*SI 2013 No 975*)**

The explanatory note says that 'this Order brings into force provisions of the Apprenticeships, Skills, Children and Learning Act 2009 on 31st May 2013. The following provisions … [have been] commenced—

(*a*) section 145, which provides that a recognised body (a person recognised by Ofqual under section 132 of the Apprenticeships, Skills, Children and Learning Act 2009 to award qualifications) may only award a particular form of a qualification if conditions are met. One of those conditions is that the body has assigned a number of hours of guided learning to any qualification that is relevant for the purposes of the Education and Skills Act 2008. The 2008 Act imposes a duty on people under 18 to participate in education or training if they have not attained a level 3 qualification (the level of attainment demonstrated by obtaining A-levels in two subjects);

(*b*) section 146, which requires Ofqual to set and publish criteria which a recognised body must apply when determining whether a qualification is relevant for the purposes of the 2008 Act and, if so, the number of hours of guided learning that should be assigned to a form of the qualification;

(*c*) section 266 and Schedule 16 so far as they relate to the repeal of section 9 of the Education and Skills Act 2008, **LOE B [8009]**. Section 9, [which has never been brought into force and now will never be brought into force, would have amended]… section 24 of the Education Act 1997, which has itself been repealed [previously].'

Wales: School Standards and Organisation (Wales) Act 2013

***School Standards and Organisation* (*Wales*) *Act 2013* (*Commencement No 1*) *Order 2013* (*SI 2013 No 1000*)**

Nothing significant is brought in by this Order, except that the Welsh Ministers may now make Regulations under the 2013 Act.

Wales: Apprenticeships, Skills, Children and Learning Act 2009

***Apprenticeships, Skills, Children and Learning Act 2009* (*Commencement No 4*) (*Wales*) *Order 2013* (*SI 2013 No 1100*)**

There is a lot of detail here about apprenticeships in Wales.

Inspectors of Education, Children's Services and Skills : England (4)

***Inspectors of Education, Children's Services and Skills* (*No 4*) *Order 2013* (*SI 2013 No 1118*)**

Another ten new HMIs in England.

Wales: School Admissions

***School Admissions* (*Variation of Admission Arrangements*) (*Wales*) *Regulations 2013* (*SI 2013 No 1140*)**

The explanatory note says that these Regulations prescribe the circumstances in which a [school] admission authority [in Wales] may vary the admission arrangements they have determined for a particular school year (in addition to the circumstances set out in s 89(5) of the School Standards and Framework Act 1998, **LOE B [5630]**). Regulation 3 provides that an admission authority [in Wales] may, without further procedures or approval from the Welsh Ministers, vary the admission arrangements that they have determined for any relevant age group where such a variation is necessary to give effect to the School Admissions Code; the implementation of approved proposals; or a correction to any omission or misprint in the admission arrangements. In those circumstances, the procedures for changing admission arrangements in s 89(5) to (7) of the SSFA 1998 do not apply.

***School Admissions* (*Infant Class Sizes*) (*Wales*) *Regulations 2013* (*SI 2013 No 1141*)**

The explanatory note says:

> 'These Regulations impose, for the purpose of section 1 of the School Standards and Framework Act 1998, **LOE B [5502]**, a limit on class sizes for infant classes at maintained schools in Wales. They revoke and replace the Education (Infant Class Sizes) (Wales) Regulations 1998 and the Education (Infant Class Sizes) (Wales) (Amendment) Regulations 2009…, adding new categories to the excepted pupils and changing the circumstances in which pupils cease to be excepted.
>
> The limit imposed is the maximum of 30 pupils in an infant class at any time while an ordinary teaching session is conducted by a single school teacher (or, where the session is conducted by more than one school teacher, a maximum of 30 pupils for every teacher)… However, where certain types of children ("excepted pupils") cannot be provided with education at the school in an infant class in which the limit is not exceeded without a relevant measure being taken which would prejudice efficient education or the efficient use of resources, those children are not to be counted for the purposes of ascertaining whether or not the limit of 30 pupils is exceeded …
>
> Excepted pupils are—
>
> (*a*) children whose statements of SEN specify that they should be educated at the school concerned and who were admitted to the school outside the normal admission round;
>
> (*b*) children who are looked after by local authorities, or who [are]… looked after (″previously looked after children″) as a result of being adopted or being placed with a family or given a special guardian and are admitted to the school outside a normal admission round;
>
> (*c*) children initially refused admission to a school but subsequently offered a place outside a normal admission round by direction of an Admission Appeal Panel, or because the person responsible for making the original decision recognises that an error was made in implementing the school's admission arrangements;
>
> (*d*) children who the maintaining local authority confirmed cannot gain a place at any other suitable school within a reasonable distance of their home because they have moved into the area outside the normal admission round, or they desire a religious education, or a Welsh speaking education and the school in question is the only suitable school within a reasonable distance;
>
> (*e*) children who were admitted to the school outside the normal admission round after which the school has arranged its classes the effect of which would mean that the school would have to take a relevant measure if such children were not excepted pupils;

(*f*) children of armed forces personnel who are admitted outside the normal admission round;

(*g*) children whose twin or other siblings from a multiple birth are admitted as non-excepted pupils;

(*h*) children who are registered pupils at special schools, but who receive part of their education at a mainstream school; and

(*i*) children with special educational needs who are normally educated in a special unit in a mainstream school, who receive part of their lessons in a non-special class.

If at any time it becomes possible for an excepted pupil to be provided with education at the school in an infant class in which the limit is not exceeded (for example, because a non-excepted child leaves the class, an additional infant class is created, or an additional teacher is appointed) that child ceases to be an excepted pupil (regulation 5(2)).

The exceptions in respect of previously looked after children, children of armed forces personnel and twins or other siblings from multiple births will apply in respect of admissions from the 2014/2015 school year. All other exceptions will apply from the 2013/2014 school year.'

***School Admissions* (*Common Offer Date*) (*Wales*) *Regulations 2013* (*SI 2013 No 1144*)**

The explanatory note says that these Regulations are made under ss 89B and 138A of the SSFA 1998, **LOE B [5360.2]** and **LOE B [5699.1]**. They come into force [in Wales] on 8 July 2013 and apply in relation to admission to secondary schools [in Wales] for the academic year 2015/2016 and in relation to admission to primary schools [in Wales] for the academic year 2018/2019 and subsequent academic years …

1 March (or the next working day) [is]… the date on which decisions in relation to secondary school admissions are to be communicated to parents [and] 16 April (or the next working day) [is]… the date on which decisions in relation to primary school admissions are to be communicated to parents.

Local: Educational Endowments (3)

***Diocese of Lichfield* (*Educational Endowments*) (*Holy Trinity Church of England School*) *Order 2013* (*SI 2013 No 1145*)**

An endowed teacher's house is sold and the proceeds of sale assets are redistributed. But, mysteriously, see SI 2013/1245, below.

Wales: Apprenticeships (1) to (3)

***Apprenticeships* (*Issue of Apprenticeship Certificates*) (*Wales*) *Regulations 2013* (*SI 2013 No 1190*); *Apprenticeships* (*Designation of Welsh Certifying Authority*) *Order 2013* (*SI 2013 No 1191*); *Apprenticeships* (*Specification of Apprenticeship Standards for Wales*) *Order 2013* (*SI 2013 No 1192*)**

For noting only.

Pupil Information: England

***Education* (*Individual Pupil Information*) (*Prescribed Persons*) (*England*) (*Amendment*) *Regulations 2013* (*SI 2013 No 1193*)**

The explanatory note says that these Regulations make amendments to regulation 3 of the Education (Individual Pupil Information) (Prescribed Persons) (England) Regulations 2009 (**LOE D [54404]**), and came into force on 28th June 2013.

> 'Regulation 3 of the 2009 Regulations prescribes persons and categories of person to whom individual pupil information may be provided. It is amended to omit the reference to the British Educational Communications and Technology Agency (Becta); to prescribe various bodies in respect of schools designated as having a religious character; and to prescribe a category of person carrying out specified activities and who require individual pupil information for the purpose of promoting the education or well-being of children in England.'

Wales: Apprenticeships (4)

***Apprenticeships* (*Transitional Provision for Existing Vocational Specifications*) (*Wales*) *Order 2013* (*SI 2013 No 1202*)**

For noting only.

Duty to Participate: England (1), (2)

***Education and Skills Act 2008* (*Commencement No 9 and Transitory Provision*) *Order 2013* (*SI 2013 No 1204*)**

This is the ninth commencement order made under the Education and Skills Act 2008. It reflects the changes wrought by the Education Act 2011, s 74 (**LOE B [8774]**).

Bearing in mind that Part 1 of the ESA 2008 applies only in England, the explanatory note to the Commencement Order says: 'Article 2 brings into force on 28th June 2013 the following provisions of Chapters 1, 2 and 6 of Part 1 of the 2008 Act (duty to participate in education or training)—

(*a*) section 1, **LOE B [8001]**, which sets out the persons to whom the duties in Part 1 apply, is commenced partially so that the duty on young people in England to participate in education or training applies until 'the first anniversary of the date on which the person ceased to be of compulsory school age' rather than to the age of 18 (Article 3 of this order brings s 1 of the Act fully into force on 26th June 2015);

(*b*) section 2, **LOE B [8002]**, which creates the duty to participate in education and details the ways in which young people may fulfil that duty;

(*c*) section 3, **LOE B [8003]**, which sets out the definition of level 3 qualification;

(*d*) section 4, **LOE B [8004]**, which sets out the definition of full-time education or training;

(*e*) section 5, **LOE B [8005]**, which sets out the definition of full-time occupation;

(*f*) section 6, **LOE B [8006]**, which defines relevant training or education for people who are fulfilling the duty to participate through the route described in s 2(1)(c);

(*g*) section 7, **LOE B [8007]**, which provides for the dates on which a relevant period begins and ends to be set by regulations;

(*h*) section 8, **LOE B [8008]**, which sets 'sufficient' relevant education and training;

(*i*) section 10, **LOE B [8010]**, which establishes a duty on local authorities to promote participation in education or training of young people in their area who are subject to the duty to participate in s 2;

(*j*) section 11, **LOE B [8011]**, which places a new duty on certain educational institutions in England to promote attendance for the purpose of enabling young people to meet the duty to participate in s 2;

(*k*) section 12, **LOE B [8012]**, which places a duty on local authorities to identify those young people in their area who are subject to the duty to participate and are not participating;

(*l*) section 13, **LOE B [8013]**, which sets out educational institutions' duties if they believe that a person is not fulfilling the duty to participate in education or training;

(*m*) section 14, **LOE B [8014]**, which sets out the information that educational institutions must provide to enable local authorities to identify young people who are not participating;

(*n*) section 16, **LOE B [8016]**, which sets out certain bodies that may share information about a young person with a local authority in order for it to fulfil its functions;

(*o*) section 17, **LOE B [8017]**, which allows information held by local authorities and their service providers to be shared and used for the purposes of Part 1 of the Act;

(*p*) section 18, **LOE B [8018]**, which requires a local authority to have regard to any guidance issued by the Secretary of State when exercising their functions under Part 1 of the Act; [**NOTE:** Statutory Guidance was issued by the DfE in March 2013.]

(*q*) section 39(1) and (2), **LOE B [8039]**, which amends s 63A of the Employment Rights Act 1996, which establishes a right to paid time off for young people aged 16–19 if they do not already have a level 2 qualification, so that it does not apply to people subject to the duty to participate;

(*r*) sections 62(1), (2), (5) and (6), **LOE B [8062]**, and 64(1), (2) and (5), **LOE B [8064]**, which set out how the duties in the Act apply in relation to Crown employees and those employed in the House of Commons; and

(*s*) section 66, **LOE B [8066]**, which contains interpretation provisions.'

Article 4 of the Order makes a transitory provision in relation to s 39(2) of the 2008 Act, **LOE B [8039]**, which applies until s 29, **LOE B [8029],** is brought into force.

***Duty to Participate in Education or Training* (*Miscellaneous Provisions*) *Regulations 2013* (*SI 2013 No 1205*)**

These Regulations make further and detailed provision in relation to the new 'duty to participate' in education or training until the age of 18 (or until attaining a level 3 qualification if earlier). Level 3 equates to two 'A' levels, but other equivalents are available.

Local: Educational Endowments (4)

***Diocese of Lichfield* (*Educational Endowments*) (*St John's Church of England School*) *Order 2013* (*SI 2013 No 1221*)**

Another endowed teacher's house in the Diocese of Lichfield (but more valuable, this time) is sold and the proceeds of sale assets are redistributed.

Duty to Participate: England (3),(4)

***Apprenticeships, Skills, Children and Learning Act 2009* (*Consequential Amendments to Part 1 of the Education and Skills Act 2008*) *Order 2013* (*SI 2013 No 1242*)**

The Explanatory Note says that Article 2(2) amends s 3 of the 2008 Act (meaning of 'level 3 qualification') so as to amend the reference to prescribed external qualifications and external qualifications of a prescribed description to instead refer to prescribed qualifications and qualifications of a prescribed description. The rest of this SI is no less straightforward.

***Duty to Participate in Education or Training* (*Alternative Ways of Working*) *Regulations 2013* (*SI 2013 No 1243*)**

As the Explanatory Note helpfully says that s 2 of the ESA 2008, **LOE B [8002]**, places a duty on persons over the compulsory school age to participate in education or training until the age of 18 (or until attaining a level 3 qualification if earlier). There are three ways in which a person might participate in education and training: appropriate full-time education, a contract of apprenticeship, or part-time education or training alongside full-time occupation. These Regulations concern the third of those ways of meeting the duty.

Section 5 of the 2008 Act, **LOE B [8005]**, sets out the meaning of 'full-time occupation'. A person is in full-time occupation if he or she works for at least

20 hours per week under a contract of employment, or in any other way that is prescribed. These Regulations prescribe three alternative ways of working: self-employment, working otherwise than for reward (for example, voluntary work), or as the holder of an office. Persons who work in these ways for at least 20 hours per week will be in full-time occupation for the purposes of the 2008 Act.

Local: Educational Endowments (5) (possibly)

***Diocese of Lichfield* (*Educational Endowments*) (*Holy Trinity Church of England School*) *Order 2013* (*SI 2013 No 1245*)**

Oh! SI 2013/1245 looks remarkably similar to SI 2013/1145; it is the same Diocese, the same house, the same trusts, the same signatory and it bears the same date, but it has a different SI number.

Provision of Education Information: England

***Information as to the Provision of Education* (*England*) *Regulations 2013* (*SI 2013 No 1255*)**

The explanatory note says, with one additional phrase: 'These Regulations amend the Information as to Provision of Education (England) Regulations 2008, **LOE D [49151]**, which prescribe the information that local authorities are required each year to provide to the Secretary of State in relation to the provision of primary and secondary education in their area. These Regulations [which are not part of the 'Localism Agenda'] require local authorities to provide information about any changes in capacity in individual schools from the previous year, and forecasts of any change in capacity for a three year period. This information should include information about the number of places added to each age group, the type of accommodation provided, whether the places added and accommodation provided is temporary or permanent, the cost and source of funding for all places added, whether the total costs included monies spent on schools maintenance and the unit cost of each place added.'

Welsh FE and HE: Student Loans

***Cancellation of Student Loans for Living Costs Liability* (*Wales*) *Regulations 2013* (*SI 2013 No 1396*)**

The explanatory note says: 'These Regulations govern the student loan liability of students who receive loans for living costs from the Welsh Ministers in respect of the academic year 2013/2014. [They]… provide for up to £1,500 of each borrower's living costs loan liability to be cancelled in certain circumstances, with effect from the day after the date on which their first loan repayment is considered to have been received.'

Inspectors of Education, Children's Services and Skills: England (5)

***Inspectors of Education, Children's Services and Skills* (*No 5*) *Order 2013* (*SI 2013 No 1448*)**

And one more.

Wales: Apprenticeships (5)

***Apprenticeships* (*Alternative Welsh Completion Conditions*) *Regulations 2013* (*SI 2013 No 1468*)**

For noting only.

National Curriculum: England

***National Curriculum* (*Exceptions for First, Second, Third and Fourth Key Stages*) (*England*) *Regulations 2013* (*SI 2013 No 1487*)**

These Regulations decimate the centralist or 'top-down' system of having a detailed and prescribed National Curriculum for primary and secondary-phase pupils in maintained schools in England. (Remember that the curriculum in academies and free schools is controlled only by the funding agreement with the DfE and that independent schools can anyway teach (more or less) what they want, above the Early Years phase.)

The National Curriculum for England is 'disapplied with exceptions' in maintained schools in England, for all four Key Stages in the school year 2013 to 2014. The exceptions are that the National Curriculum for the three core subjects (maths, English and science) will remain compulsory for pupils in Year 1 and Year 2 and in Year 5 and Year 6.

The National Curriculum at Key Stage 4 (Year 10 and Year 11) is abolished for the school year 2014 to 2015.

These Regulations do not affect the other two parts of the Basic Curriculum set out in s 80 of the EdA 2002, **LOE B [6580]**, namely religious education and (secondary-phase) sex education, both of which remain compulsory, unless the parents opt out.

CASES DECIDED AND REPORTED

Further and Higher Education: VAT

Brockenhurst College v Commissioners for Her Majesty's Revenue and Customs [2013] UKFTT 153* (*TC*); *decision issued on 5 November 2012

Brockenhurst College was in dispute with HMRC over VAT in respect of supplies made by its College Restaurant and some supplies of entertainment services made by its Department of Dramatic Arts. Their case was that supplies from the restaurant, used by training chefs, restaurant managers and

hospitality students, were exempt supplies of education and/or vocational training and not a taxable supply of catering. The provision of concerts or performances given by students as part of their educational course was also claimed to be an 'exempt supply' for VAT.

The College argued that the restaurant was a training restaurant for students. The catering courses were supervised and observed by teachers while students prepared and served members of the public, who paid £10 per head for a meal. This was less than the actual cost of providing the meal. The training was required as part of the NVQ or other qualifications which the students were undertaking.

The Tribunal judge agreed. The operation of the College Restaurant was an integral part of the provision of educational and vocational services. It was required as part of the examination body requirement and as part of the course and curriculum. It was a closely related supply to the supply of education and therefore exempt from charging VAT.

Further and Higher Education: Student Complaint

R* (*on the application of Kwao*) *v University of Keele [2013] EWHC 56* (*Admin*); *judgment on 24 January 2013, F [2013.1]

Yet again, a student who omitted to take his case first to the Office of the Independent Adjudicator found the Court unwilling to intervene.

Mr Kwao, who was awarded a Masters degree in place of the Doctorate he had hoped to achieve, brought a claim for judicial review. His claim failed. The decision not to award a Doctorate, but only a Masters degree was not unreasonable and had not been procedurally flawed. The claimant had not taken his case to the OIA and therefore, even had his case of procedural irregularity been meritorious, he would have been refused relief on the basis of the availability of an alternative remedy.

Special Educational Needs (1)–(3)

CW v Hertfordshire County Council [2013] UKUT 090* (*AAC*); *decision on 7 February 2013

Hertfordshire decided that it would cease to maintain a statement of special educational needs for a student who had been offered a place at a college. His parents appealed against the decision to the First-tier Tribunal. The FTT upheld the appeal. It appears that the FTT saw its task as reviewing whether or not the local authority had made its decision in the proper way.

The FTT decision was overturned in the Upper Tribunal. The Tribunal's powers were set out in para 11(3) of Sch 27 to the Education Act 1996. This provision gave the Tribunal only two options: to dismiss the appeal (with the effect that the statement is no longer maintained) or to order the statement to continue as it stands or with amendments. The form of disposal was dictated by the Tribunal's decision on the issue it had to decide, namely, whether it was

any longer necessary to maintain a statement. Its task was not to undertake a review of the decision-making process.

SM v Hackney Learning Trust [2013] UKUT 078 (AAC); decision on 14 February 2013

The Upper Tribunal concluded in this case that the decision of the First-tier Tribunal did not involve an error of law. The practical issue was whether a child should continue to attend the school maintained by his local authority or be moved to the different school maintained by a different authority which his sister attended. The legal argument concerned how, if at all, s 9 of the Education Act 1996 applied.

Upper Tribunal Judge, Edward Jacobs, determined that s 9 was irrelevant to the case. The Tribunal had to decide whether the qualifications set out in para 8(2) of Sch 27 to the Education Act 1996 applied. If either or both applied, the local authority was not under a duty to name the school which the mother requested. If neither applied, it was under that duty. The Tribunal had found, and was entitled on the evidence to find, that paragraph 8(2)(*b*) applied because of the considerable additional expense for the local authority. It was not obliged or permitted to consider s 9.

The appeal was dismissed.

DJ v Gloucestershire County Council [2013] UKUT 0112 (AAC); decision issued on 28 February 2013

Refusing to attend school is not a special educational need.

Child R repeatedly refused to get out of his parents' car and go into school. His parents wanted a statement of SEN which would name the school and specify boarding rather than day provision. The local authority produced a 'note in lieu' and the parents appealed unsuccessfully to the First-tier Tribunal. The judge in the Upper Tribunal also dismissed the appeal. The FTT had proceeded correctly on the basis that the child's refusal to attend school did not call for special educational provision and was not therefore a 'special educational need' with s 312 of the Education Act 1996.

Note: This case appears on the Judiciary website as '*DJ v Secretary of State for Work and Pensions*', but that may be a mistake.

Disability Discrimination: Examinations

ML v Kent County Council [2013] UKUT 0125 (AAC); decision on 1 March 2013

Kent County Council was substituted for Tonbridge Grammar School as the respondent after the Grammar School became an academy. (See also the case of *ML v Tonbridge Grammar School* [2012] UKUT 283 (AAC) reported in **LOE Bulletin 98** at p 16.)

The 2013 case concerned the arrangements the school had made for the appellant's daughter when she was sitting her International Baccalaureate

examinations. The student suffered from mild dyslexia and showed symptoms of anxiety and depression. The school's IB co-ordinator made arrangements for her to have extra time and a concessionary approach to the marking of all her examinations, but did not apply to have any of her examinations re-scheduled. Her parents brought a claim under s 281(1) of the Disability Discrimination Act 1995. The claim was dismissed in the First-tier Tribunal. The FTT did not find that the student had been placed at a substantial disadvantage. The FTT considered it highly improbable that an application to have any of the examinations re-scheduled would have succeeded, had an application been made.

The judge in the Upper Tribunal was inclined to accept the submission that the FTT had misidentified the 'substantial disadvantage' to which it was claimed the student had been subjected, but did not regard that as a fatal flaw. He did not consider it plausible that the FTT had overlooked evidence from the Appellant that she had telephoned the IBO and been told that it would at least have considered such a request and would likely have granted it. It did not follow that the IBO was bound to re-schedule the examinations or that the school was bound to ask it to do so. Upper Tribunal Judge Mark Rowland said:

> '**19.** There are at least two bases upon which the IBO could properly have decided not to reschedule the examinations. The first is that making that adjustment would have given the claimants' daughter an advantage by comparison with other candidates and that the more equitable approach having regard to the imperative of maintaining confidence in the qualification would have been to give her special consideration in the marking, as it did. That approach would involve compensating for a disadvantage rather than removing it but the need to provide a level playing field for candidates could amount to a justification for doing so. The second is that rescheduling, while removing one disadvantage, would have given rise to an equivalent or worse disadvantage by requiring the candidate to spend a night away from home immediately before the rescheduled examination. That would be a justification for retaining the original timetable that gave rise to the equal or lesser disadvantage.
>
> **20.** The first of those considerations was pre-eminently a matter for the IBO but the IB coordinator was not obliged to ask for rescheduling if an application was bound, in practice, to fail on that ground. The second of those considerations was one on which an IB coordinator would probably be better placed to form a view than the IBO, because a school would know the candidate. I do not consider that an IB coordinator is required to ask the IBO to reschedule examinations if that is not in the candidate's best interests and the IBO ought, on an objective view of the case, therefore to reject the application, even though there may be a possibility that it might not. It is true that the question in the event of there being a claim under the 1995 Act or its successor would be whether the application would have actually been a bad one rather than whether it was reasonably thought to be so at the

time, so that, in a case of possible doubt, caution would favour making the application. Nonetheless, an IB coordinator is not a mere advocate for a parent and the IBO is entitled to expect him or her to exercise a degree of professional judgment before making an application, particularly as it may be appropriate to consider a package of adjustments as in *Burke v College of Law* [2012] EWCA Civ 37. I do not mean to suggest that an IB coordinator should not apply for rescheduling or other special arrangements merely because he or she considers that the application will probably fail, provided that he or she considers that there is a good case to be made. But he or she is not required to make a clearly bad application. The word "reasonable" in section 28C(1) clearly refers to the reasonableness of requiring the responsible body to take the identified step.

21. The First-tier Tribunal focussed on the first of the two possible considerations that I have identified … The clear implication was that the First-tier Tribunal considered that an application for rescheduling ought to fail, given the other adjustments already accepted. That amounts to a finding that, if the IBO considered such an application properly, the application was bound to fail …

22. Mr Wolfe submitted that the First-tier Tribunal had no evidence upon which to base its judgment that the claimants' daughter would have been placed in an advantageous position had an application for rescheduling been granted. However, members of the First-tier Tribunal include people with substantial experience of educational matters and I do not accept that the relevant panel in this case was not entitled to make the judgment it did.

23. On the basis of the First-tier Tribunal's findings, it inevitably follows that the IB coordinator was right in her view that an application for rescheduling was bound to fail. Mr Wolfe pointed to the head teacher having said that an application would be made and also criticised the IB coordinator's reasons for believing that an application was bound to fail. As to the former, it seems clear that the head teacher left the matter to the IB coordinator, who sought special consideration in marking instead and the worst that can be said is that the school may not have appreciated that a promise by the head teacher was not being fulfilled and may have failed to explain as early as it could have done why it had reconsidered what application should be made. No criticism has been made of the application for special consideration in marking. As to the IB coordinator's contemporaneous reasoning, since the test is objective, it does not matter if her reasoning was flawed, as long as it did not lead to the school failing to take a reasonable step.'

Appeal dismissed.

Special Educational Needs (4)

LS v Oxfordshire County Council (SEN) [2013] UKUT 0135 (AAC); decision on 11 March 2013

The First-tier Tribunal dismissed an appeal against a refusal to make a statement of special educational needs for a boy, C. (The Council had issued a Note in Lieu instead.) C's mother appealed to the Upper Tribunal. The grounds of appeal raised these issues:

- The correct test to be applied in deciding whether a statement of SEN is needed;
- Whether the Tribunal had failed to make sufficient findings of fact about the arrangements in place at the Council or at the school; and
- The Tribunal's omission to consider the implications of the school's imminent conversion to Academy status.

The judge in the Upper Tribunal rejected the submission that the FTT had failed to apply the correct test or had reached an unreasonable decision. The tribunal was 'plainly aware of the test of necessity under s 324 [EA 1996] and referred to the relevant paragraphs in the Code of Practice …it had regard to local funding arrangements …'

The second ground was made out in part. The Tribunal's reasons did not meet the required standard.

The third ground was upheld. There were three questions which needed to be addressed:

- Did the Tribunal need to know that the school was, within days, going to become an Academy?
- Should the Council have informed the Tribunal about that impending change of status?
- Could it have made any difference to the outcome if it had?

The Upper Tribunal judge decided that the answer to these questions was 'yes'. It was important for the Tribunal to know about the impending change in the school's status as a statement of SEN or Note in Lieu was a 'living instrument', a forward-looking document, and the fact that the delegated system of funding had just days to run was a material consideration.

There was no doubt that the Council should have informed the Tribunal and should have had a system in place so that someone in the authority knew and could have advised the Tribunal at an earlier stage of the planned change.

The third question was whether it could have made any difference to the outcome, not whether it would have done so. It could not be right as a general statement that the Tribunal did not need to consider the adequacy or sustainability of local authority funding and, while equivalence of funding was certainly an important factor, resourcing was not the only factor in making a decision on a s 324 appeal. In deciding whether a statement is

'necessary', 'the move to being an Academy, with the inevitable changes in funding, accountability and enforcement, needed at least to be considered'.

Appeal allowed. Case remitted for re-hearing by a different FTT.

Home to School Transport

R (on the application of M) v London Borough of Hounslow [2013] EWHC 579 (Admin); judgment on 15 March 2013, F [2013.2]

Sales J was asked to consider the extent of a local authority's duty to provide home to school transport for eligible children. In the face of the claimants' argument that transport should be provided from the child's home unless the parents consented otherwise, he held that:

> '(i) The phrase "home to school travel arrangements" in section 508B does not require provision of transport between the child's home and school in every case; and
>
> (ii) Section 508B permits the Council in an appropriate case to designate pick-up points (other than the child's home) which are imposed as opposed to consented to by the child's parents.'

Further and Higher Education: Student Discipline

R on the application of Agarwal v University of Nottingham [2013] EWHC 1015 (Admin); decision on 21 March 2013

The claimant student failed in a challenge to a letter from the respondent university, in which the University declined to re-open a decision to terminate his studies there.

Prior to being offered a place to study medicine at the respondent university, the claimant was summarily dismissed for misconduct from his position as an occupational therapist. He did not disclose this to the University or to another hospital where he worked prior to taking up his place at the University. Subsequently, the Health Professionals Council investigated and decided to strike him off their register. The claimant disclosed none of this to the University, but the HPC did and the University began its own investigation into his lack of disclosure. The result was that the University decided to terminate his studies on the medical course 'on the grounds that he was not fit to practise due to reasons of dishonesty and probity'.

The claimant appealed unsuccessfully against this decision and complained unsuccessfully to the OIA, although the OIA did recommend that the University amend its practice in relation to minute-taking 'in order to recall that it considered all available sanctions and the reasons for applying the selected sanction'. Meanwhile, a statutory appeal against his removal from the HPC register by the claimant was allowed with an agreement scheduled to the consent order that a lesser sanction would be imposed on reconsideration.

Some months later, the claimant wrote to the University and asked it to re-consider its decision to terminate his studies there. The University wrote back refusing to do so and the claimant challenged the decision in that letter. He alleged a failure to take into account flaws in the previous decision. But Philip Mott QC, sitting as a Deputy High Court Judge, rejected this challenge. The points had already been addressed at the appeal stage and in the response of the OIA. They appeared to be 'a collateral attack on a decision which it is now far too late to review'. The second ground of challenge, that there had been inadequate consideration of the claimant's mitigation, failed for similar reasons.

The third ground, an allegation of irrationality or inadequacy of reasons, was also rejected. The University's Fitness to Practise Committee had been dealing with dishonesty and probity whereas the HPC was dealing with professional competence. The HPC decision and sanction were therefore irrelevant to the validity of the Fitness to Practise Committee decision. The answer to the point that public law requires proper reasons for a decision was that any error had been cured by explanations that had been given to the claimant. It could 'have done nothing in fact to undermine the fairness of the procedures or the claimant's understanding of the reasons for the sanction imposed upon him'.

The final ground of challenge, that there had been an alleged unlawful assumption of power by the Registrar, also failed. The claimant asserted that he was not a person eligible to sit on a Fitness to Practise Committee and therefore it was wrong for him to have conducted a review of that decision. But that was 'a fundamental misunderstanding of what was happening. Nobody was purporting to, nor was anybody required to, review the decision again'.

The student's claim failed in its entirety.

Exclusion: Disability Discrimination

P v Governing Body of A Primary School [2013] UKUT 154 (AAC); decision on 25 March 2013

A 10-year-old pupil, Y, was permanently excluded from primary school. Y's parents appealed against the decision to the First-tier Tribunal. They also claimed that there had been unlawful discrimination against Y. Y has Asperger's Syndrome and ADHD.

The First-tier Tribunal held an expedited hearing. They decided that, in relation to the reasons for the permanent exclusion, Y was not 'disabled' under s 6 of the Equality Act 2010, and that the exclusion was not in breach of s 85(2)(*e*) of the Equality Act 2010. Reinstatement was refused. They stated that all allegations of discrimination apart from the permanent exclusion remained to be determined. The parents of Y appealed to the Upper Tribunal.

The Upper Tribunal decided that the decision of the FTT was wrong in law. The appeal was referred to the FTT to be heard again, to be heard with the other issues that had been adjourned while the question of permanent exclusion was considered separately.

Upper Tribunal Judge, David Williams, commented that neither party had assisted the expedition of the case before the FTT and referred to 'a barrage of evidence and application'. He added:

> **'58.** The starting point in this appeal must be the identification of the reasons why Y was permanently excluded.
>
> **59.** I understand, though no argument was presented about this at the hearing, that new rules about exclusions of pupils from schools in England came into effect just a few weeks before the events that gave rise to this appeal. The statutory provisions are now those in section 51A of the Education Act 2002 as amended by section 4 of the Education Act 2011. The procedure for the School and any similarly placed school are now to be found in the School Discipline (Pupil Exclusions and Reviews)(England) Regulations 2012 (SI 2012/1033) in effect from 1 09 2012. This is again new law since the decision in *X v T [Governing Body of X Endowed Primary School v SENDIST, Mr and Mrs T and the National Autistic Society* [2009] EWHC 1842 (Admin)].
>
> **60.** The current procedures largely confirm the previous two-stage process involved in excluding a pupil permanently from a school, though aspects and details are changed. The head teacher takes a decision permanently to exclude, giving reasons for it. The matter must then be referred to the governing body within a strict time limit. The governing body must then decide whether to confirm the exclusion or to reinstate the pupil. That decision must be notified in writing again with reasons. There is no suggestion that this procedure was not followed here.
>
> **61.** However, it is in my view important to note (*a*) that the duty under the 2000 Act is a duty imposed on the governing body, and (*b*) a permanent exclusion cannot take effect unless the governing body confirms it. I did not hear argument on this, but it appears to me clear that the real cause of any enduring disadvantage to a pupil subject to this procedure is a decision not to reinstate. Further, it is only when the governing body has taken such a decision that a claim that the governing body has failed in its duty not to discriminate against a pupil by exclusion can be said to have crystallised. The reason or reasons why a governing body confirms an exclusion are therefore in my view of primary importance as they may endorse or replace the original reasons for exclusion …
>
> **63.** I have discussed above how the head teacher informed the parents of the original decision and then presented the case to the Governing Body. The record shows that the Governing Body did not accept that approach without question …

64. It is not entirely clear from its decision how the First-tier Tribunal addressed the decision making process of the School and the express reasons given by the head teacher and Governing Body … Even if the role of the Governing Body is regarded (in my view wrongly) as secondary, there is still a need to examine the list of reasons given by the head teacher … What the First-tier Tribunal appears to have done is to have concentrated on the events at the time of the exclusion, not the reasons given for it. And it appears to have brought the actions of the head teacher and of the Governing Body together in a way that does not reflect the full evidence.

65.… It has concentrated on aspects of the process taking into account "all facts leading to the actual exclusion". And while it then concludes that the records show a tendency to physical abuse, it does not make a clear finding on the reasons actually given for the exclusion and refusal to reinstate.

The test to be applied under regulation 4

66. Regulation 4 can only be applied to this claim that there was discrimination in permanently excluding Y after the Tribunal has identified why Y was excluded. Mr Wolfe submitted that the only proper finding was that Y was excluded for a series of reasons, and that while regulation 4 might apply to some of them, it did not apply to all of them. The Tribunal did not get that far. Its finding was in effect that events amounting to physical abuse by Y had occurred and that this justified the exclusion. That is the wrong approach. I must therefore find the Tribunal to have erred in law on this point. It is only after the reasons for exclusion have been determined that it can be considered whether Y was "not disabled under section 6 Equality Act 2010".

67. The next point of law raised for the appellant is whether the tribunal adopted the correct interpretation of the question whether Y was "disabled under section 6'. Having found that Y "would appear to be disabled in other respects" it found that Y was not disabled because of the exception to the definition of disability of a tendency to physical abuse. This arises if, as Mr Wolfe argued, the reasons why Y was excluded either did not evidence physical abuse, or evidenced that together with other reasons.

68. I have already indicated that although Mr Wolfe may dispute the correctness of the decision I adopt the meaning given to "condition" in *X v T*. With that wider meaning in mind, the question then is: Is the conduct of Y evidenced in this appeal evidence of a condition of "tendency to physical … abuse of other persons"?…

70. I consider that the phrase "physical abuse" must be read as a whole … they should be interpreted as ordinary words. I resist the temptation to adopt any further definition. I am satisfied here that the events described in the evidence as actions of Y can be found as fact to be, on the evidence before the First-tier Tribunal, physical abuse and

that the extent of those actions can properly be described on the evidence as showing a tendency to physical abuse. I therefore consider that the tribunal could on the evidence identify those actions as showing that Y had the condition of the tendency of physical abuse of others regardless of any finding or assumption that the only reason why Y engaged in those activities was the effect on Y of the ADSD and AHD.

Reasonable adjustments

71. The other error of law raised by Mr Wolfe on which I consider I should comment is that of reasonable adjustments. As he rightly contended, the Tribunal did not look at this at all. If the Tribunal had followed through from the written decision of the Governing Body then it would have to address the contention of that body in its confirmation of the exclusion, that "the school has put in place all recommended strategies to include and support Y". That is put as one of the reasons for exclusion. If so, that interacts with the decision the tribunal did take and the decision it should take in a number of ways. It might be that the tribunal found that all reasonable adjustments had been made. It might be that it found (as happened in *X v T*) that some adjustments were made but that others should have been made. Its focus did not have to open up all the various points made by both parties about discrimination. But the question whether the Governing Body and the School had done enough to meet the required standard of adjustments with a view to avoiding permanent exclusion was made directly relevant to the decision to exclude and not readmit by the terms of the decision of the Governing Body itself.

Conclusion

72. I therefore find that the Tribunal did err in law in a material way in that it failed properly to identify the reasons why Y was permanently excluded and not readmitted and that it failed to consider whether the Governing Body was right to take the view that there were reasonable adjustments in place with a view to stopping the exclusion from happening.

73. I am satisfied that the approach taken by the Tribunal to the interpretation and application of the exclusion provided in regulation 4 of the 2010 Regulations was correct in law. It was the failure adequately to identify the facts to which it should be applied that constituted the error …

74. … I direct that this appeal be referred to the First-tier Tribunal for rehearing, that rehearing to take place together with the hearing of the matters left outstanding at the previous hearing …'

Special Educational Needs (5)

Harrow Council v AM [2013] UKUT 157 (AAC); decision on 27 March 2013

F, who was born in 2001, attended a mainstream special school until July 2012. At the time of the tribunal hearing his developmental level was said to be of between 6 and 12 months. There was a dispute about where his education should continue. The council wanted him to attend a maintained day special school for students from 11 to 19. His mother wanted him to be included in a mainstream school. The First-tier Tribunal decided that Part 4 of the statement of special educational needs for F should specify 'A maintained mainstream secondary school where [F] will be educated with other pupils who have severe and complex disabilities, which has appropriate facilities, expertise and access to extensive therapy involvement and provision'.

The Council applied for permission to appeal. A different Tribunal judge refused permission to appeal, but decided the decision should be reviewed in part pursuant to Rule 47(1). The Council appealed to the Upper Tribunal. The application was stayed until after the First-tier Tribunal had sent out its decision on the review application. Another Tribunal judge purported to review the review decision. This point was addressed by the judge in the Upper Tribunal, who decided that the decision had been made without jurisdiction.

In the Upper Tribunal the three grounds relied on were:

- the Tribunal had failed to provide any reasons as to what reasonable steps [as to F's education in a mainstream school] were required, or why they were required, and also failed to consider the costs of such steps and provide reasons as to why the steps were reasonable given the cost;
- the Tribunal erred in law by considering whether F's placement at the mother's preferred school or generally in mainstream was 'inclusive' or otherwise; and
- that by giving evidence to itself it acted contrary to the rules of fairness when concluding that there were other mainstream schools available when no evidence had been presented that this was the case.

The judge in the Upper Tribunal decided that the FTT had erred in law:

> '**29.** In considering whether, in the present case, the provision of education for F in a mainstream school would be incompatible with the provision of efficient education of other children in each of its own schools, it is necessary to consider not only the effect on the other children presently in each of its schools and reasonable steps that may be taken in that regard, but also the position of the notional additional children who would have to be introduced there to enable F's special needs to be met, since one of the provisions that has to be made for him is to ensure that he is educated with other similarly disabled children. As the tribunal found, the plan to educate him at Whitmore in isolation

was profoundly unsuitable for him, so that the council would not be performing its duty there unless other children with severe and complex disabilities were there with him.

30. Where in my judgment the tribunal erred in law was in its approach to the question what mainstream schools could be considered. At least in the absence of the clear availability of a suitable place at a mainstream school outside the area of the council, the tribunal, in considering the effect on other children, could only consider mainstream schools within the council's area. It would have to consider the effect not only on the children already at those schools but also on the other children with severe and complex disabilities, who would, if legally possible, have to be brought in from other schools to enable F to be educated with them. If their inclusion with F at, for them, a new mainstream school would be incompatible with the provision of efficient education for them, then that would be a basis on which the council could establish exception (b) to the rule in section 316.

31. The tribunal attempted to resolve this difficulty by relying on its own knowledge that "there are mainstream schools where [F] would not receive his education in isolation, and where he could experience inclusion in a more meaningful way than would be possible at Whitmore." In my judgment it erred in law in this respect in that it should not, at least on the evidence before it, and possibly at all, have had regard to schools outside the council's area. It is also unclear whether any of those unnamed schools could make a place available for F at that time and it would not appear from its decision at least that any of them was within reasonable travelling distance of F's home in Harrow …

32. A further issue which is raised on this appeal is whether the tribunal erred in law in relying on its own knowledge without inviting submissions from the parties on the facts in question. I note that in *Richardson v Solihull MBC; White v London Borough of Ealing*, [1998] ELR 319, a tribunal, faced with a parental choice of an American school for autistic children concluded from their own experience that a school could be found in this country which was appropriate for their special educational needs …

35. I do not consider that this establishes any general rule that a tribunal may in effect rely on evidence within its own knowledge that is not available to the parties. It may, of course, rely on its own expertise but that is different from factual evidence. In the case before the Court of Appeal, it was found that the failure to raise the question with the parties did not affect the decision of the tribunal. It would inevitably have come to the same conclusion. The general rule remains the same as it has always been, that a tribunal ought not to rely on its own knowledge without giving the parties an opportunity to comment. If it does so, and there is something that might usefully have been said in response, then there will have been a breach of natural justice, or now a

failure to comply with the requirements of article 6 of the European Convention on Human Rights, and the decision will be set aside.

36. That appears clearly from the judgment of Lawrence Collins J in *Lucie M v Worcestershire CC*, [2003] ELR 31, where he stated at paragraph 11:

"Fifthly, the lay members of a Tribunal specifically appointed for their educational expertise may use that expertise in deciding issues before the Tribunal, but they may not use it to raise and decide other issues which the parties may not have had an opportunity to consider (for example the choice of a specific school which neither party had considered): *Richardson v. Solihull Metropolitan BC* [1998] ELR 319 at 322. That is because although it is a specialist tribunal with members appointed for their expertise, it is important that the Tribunal obeys the rules of natural justice and that members should not give evidence to themselves which the parties have had no opportunity to challenge: *ibid* at 338."

37. This appears to me simply to restate the rule of natural justice identified by Lord Diplock in *Mahon v Air New Zealand*, [1984] AC 808, at 821, (and cited by Mann J in *R v Mental Health Review Tribunal ex p. Clatworthy*, [1985] 3 All ER 699 at 704) …

38. In the present case, the tribunal, in relying on its own factual knowledge, overlooked that there could be issues as to the appropriateness of the schools that they had in mind and, if any were suitable, as to the availability of a place at one of them for F. It is plain that representations could also have been addressed to the tribunal as to whether the council could be compelled to prove that the exception to the basic rule in section 316(3)(*b*) extended to other schools outside its area, and as to potential impossibility of its being able to find a place for F there. Accordingly, the tribunal did err in law in failing to draw the attention of the parties to the matters within the knowledge of its members on which it relied and that did deprive the council of an opportunity of dealing with the relevance of those facts. For that reason also, the decision of the tribunal must be set aside.

39. At least on the basis of the evidence before me, a possible consequence of the failure to inform the parties of the facts on which the tribunal wished to rely is that the council was required to do something that was impossible in practice, namely to compel a school outside its area, but which could be accessed sensibly by F, and which had other pupils with severe and complex disabilities, to accept him as a pupil. It is important that a tribunal should not put a local education authority in the position of being in effect ordered to do the impossible.

40. In this respect it is also important that the tribunal should form some view of the reasonable adjustments that may need to be made to prevent incompatibility so as to accommodate a pupil at a school. Such adjustments will need to be carried out in a way that is not incompatible with the provision of efficient education for other children. In some

cases this may take time, perhaps months, and may have to wait until there are school holidays, but during this time provision must be made for the education of the child. In those circumstances, it is open to the tribunal to name as an interim measure a school that is not mainstream until the authority has had a reasonable opportunity of making those adjustments. This may involve an investigation of the work needed at different schools in the area, and a determination of the time that should be allowed for them.

41. I am not able to substitute my own decision for that of the tribunal and I must therefore remit the matter to be reheard by a new tribunal.'

Special Educational Needs: Ombudsman's Jurisdiction

R on the application of NR v Local Government Ombudsman (Defendant) and London Borough of Hillingdon (Interested Party) [2013] EWHC 1335 (Admin); decision issued on 23 April 2013

There were three issues to be determined: two substantive issues relating to the extent and exercise of powers of the Local Government Ombudsman and the third issue was costs. The claim was brought by the mother of NR, a young person with significant special educational needs. Responsibility for NR's education lay with the London Borough of Hillingdon. The placement he was attending broke down and for a period he was not attending any school or receiving any structured education. Hillingdon then offered him a placement at a day school. On appeal the SEND Tribunal ordered that the mother's preferred school be named in part 4 of NR's statement. This school was an independent special school and, after an introductory period, NR would attend on a 51 week full boarding basis.

The claimant complained to the Ombudsman. The Ombudsman recommended Hillingdon pay financial compensation for loss of education for three terms and loss to NR of socialisation and support of speech and language therapy (£4000) and an additional payment (£3500) for the time and trouble in pursuing the complaint and distress. The claimant began judicial review proceedings. The Ombudsman's solicitors wrote saying the Ombudsman would review the first decision and the claimant withdrew her claim. But the parties agreed the court should determine costs. The Ombudsman wrote setting out the Review Decision. That decision was that compensation of £7000 be awarded. The claimant again sought judicial review. She argued that the Ombudsman had not followed LGO policy guidance as regards compensation but her claim was rejected. The Claimant also unsuccessfully challenged the Ombudsman's decision that, due to s 26(6) of the Local Government Act 1974, it was outside her jurisdiction to consider the suitability of education provision named in the statement of special educational needs. Section 26(6) says that the Ombudsman may not conduct an investigation if the person affected has a right of appeal. In this instance, the Complainant had a right of appeal to SEND. In the interests of practical reality and fairness, the parties agreed that there should be no order as to costs.

School Attendance

A County Council v C [2013] All ER (D) 241 (Apr); judgment given on 30 April 2013

A fifteen-year-old girl, M, was failing to attend school regularly. Her mother was charged with committing an offence under s 444 of the Education Act 1996, but at trial was found not guilty. The appellant authority appealed to the High Court. The appeal was allowed.

The justices had been wrong in law to find that M's 'chaotic lifestyle' had amounted to an 'unavoidable cause' within the meaning of s 444(2A). They had been wrong to find that the respondent had not failed to cause M to attend school and they should have convicted her of an offence. It would be proper to remit the case to the magistrates' court with a direction that the respondent be convicted pursuant to s 444(1) of the Act.

ITEMS OF INTEREST

Safeguarding Children: A New Edition of 'Working Together'

The DfE has issued, under reference 00030–2013, the 2013 version of 'Working Together to Safeguard Children'. It takes up 97 pages of A4 or one megabyte on your computer. 'Working Together 2013' took effect on 15 April and replaces 'Working Together 2010'. But schools and colleges need to know that it does not replace 'Safeguarding Children and Safer Recruitment in Education', nor does it replace 'Dealing with Allegations of Abuse against Teachers and Other Staff'. Indeed, 'Working Together 2013' is mainly for local authorities, Local Safeguarding Children Boards and the like, dealing as it does with high-level procedures and serious case reviews.

Free Schools: Numbers

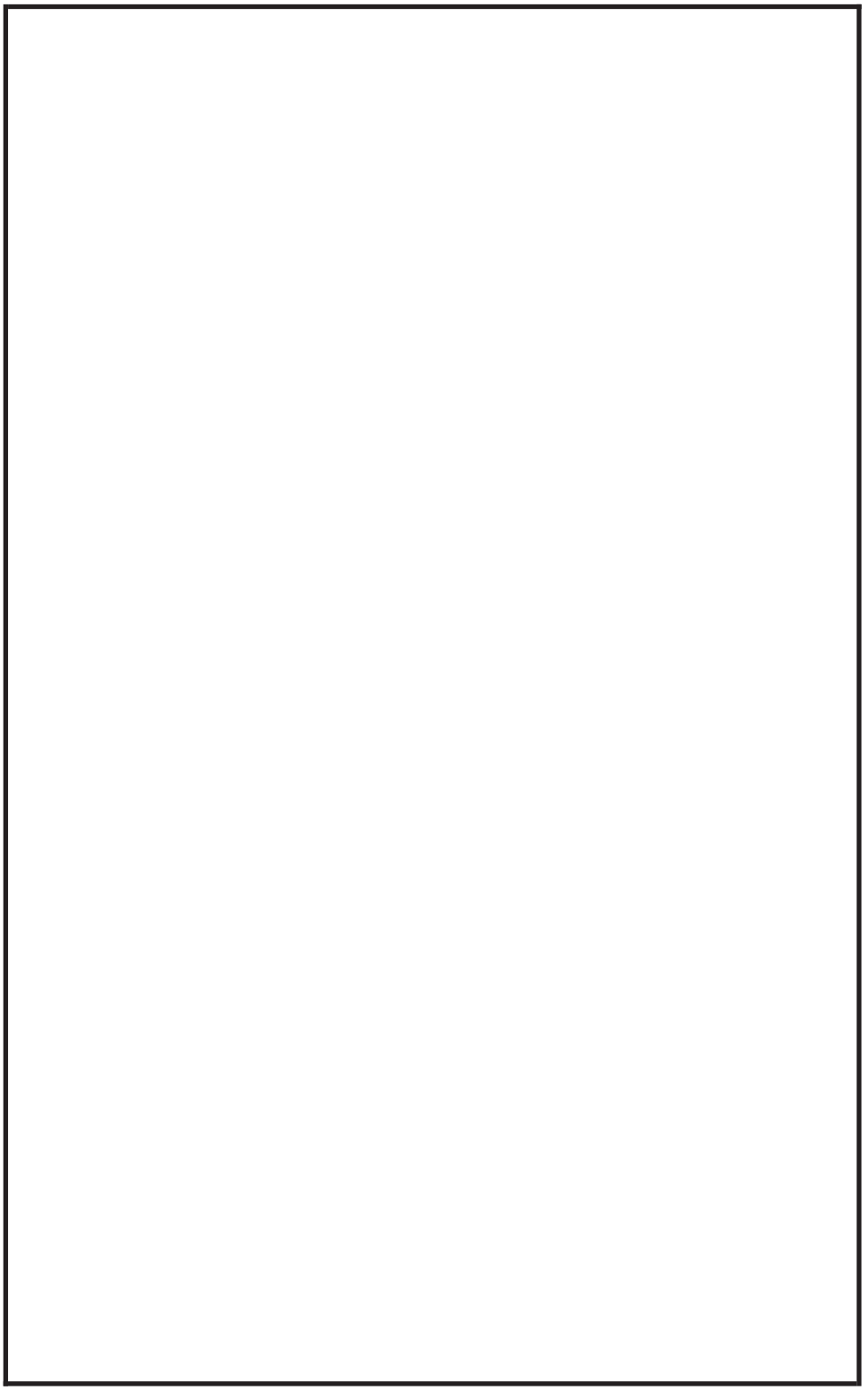
The DfE, keen as ever to promote its support for Free Schools, issued (in May 2013) a raft of statistics to show how many there are. In the school year 2012–2013, there are 81 Free Schools up and running. Another 102 are in the pipeline, some with planned start dates in September 2013 and others heading for 2014. To put the school numbers in context, there are about 17,000 maintained schools in England and (in the June 2013 figures from the DfE) almost 3,000 academies.

More impressive than the very small number of free schools, actual and proposed, is the wide range of school types in this new sector. Some are 4 to 19. Others are 14 to 19 or 16 to 19. Some are 5 to 14. There are almost as many primary phase free schools as secondary phase. Eight are special free schools and 16 are alternative provision free schools. Fifteen will be faith schools and a further ten will have some faith connection.

Pupil numbers at the free schools are hard to find, because, like most new schools, they usually start with a single year group and grow with each annual intake. Nevertheless, the DfE says that the 183 free schools will have 130,000 pupils, when they are full.

DfE: Governors' Handbook and Policies and Documents List

The new 100-page Governors' Handbook replaces the old Governors' Guide to the Law and was issued by the DfE on 14 May 2013. Even more useful, in your Editor's view, is an eight-page list of all the policies and similar documents that the governors and proprietors of schools are supposed to have and to keep constantly up-to-date. There are thirty of these documents but, to be fair, the keeping of documents like the Pupils' Attendance Register is not something that causes many volunteer school governors to have sleepless nights.



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Published by LexisNexis

Printed by Hobbs The Printers Ltd

ISBN 978-1-4057-7673-8