THE LAW OF EDUCATION

Bulletin Editor
Nicholas Hancox BSc LLM Solicitor
(Nicholas Hancox Solicitors: www.nicholashancox.co.uk)

Contents of this Bulletin

Statutory Instruments

Academy Conversions (Transfer of School Surpluses)	4
Early Years	12
Education Grants: Dance and Drama	14
Faith Schools: Local	2,13
FE and HE: Education Loans	15
FE and HE: Fees and Student Support	6
FE and HE: Recognised and Listed Bodies	3
Inspectors of Education, Children's Services and Skills	3, 8,15
Pupil Information and School Performance Information	13
School and Early Years Finance	5
School Information	3
School Organisation	6
Special Educational Needs: Direct Payments	14
Wales FE and HE: Local	4
Wales: FE and HE: Student Support	8
Wales: Inspectors of Education and Training in Wales	8
Wales: Local Curriculum	14
Wales: Pupil Information	7
Wales: Remission of Charges Relating to Residential Trips	2
Wales: School Admission Appeals Code	7
Wales: School Standards and Organisation (Wales) Act 2013 Commencement	4,14

Welsh in Education Strategic Plans and Assessing Demand for Welsh Medium Education 5

Cases Decided and Reported

Disability Discrimination 18
SN v Nottinghamshire County Council (SEN) [2014]

EIA 2006: LA Intervention Supported 15
The Queen on the application of the Governing Body of Uplands Primary School (*Claimant*) *v Leicester City Council* (*defendant*), *Dr Timothy Luckcock* (*Interested Party*) [2013]

Prohibition of Teaching: Duration of Prohibition 27
Adam Walker v Secretary of State for Education [2014]

Special Educational Needs: Late Application: Tribunal Procedure 19
CM v Surrey County Council (*SEN*) [2014]

Special Educational Needs; Educational Provision 16
K&K v The Authority (*SEN*) [2013]

University Examination Results 23
R (*on the application of Crawford*) *v University of Newcastle Upon Tyne* [2014]

Tristram Emery v OIA [2014] 21

STATUTORY INSTRUMENTS

Wales: Remission of Charges Relating to Residential Trips

***Education* (*Remission of Charges Relating to Residential Trips*) (*Wales*) (*Amendment*) *Regulations 2013* (*SI 2013 No 2731*)**

These Regulations amend the Education (Remission of Charges Relating to Residential Trips) (Wales) Regulations 2003 (SI 2003/860, **LOE D(W) [4051]**) to add the receipt of Universal Credit on or after 15 November 2013 as an additional benefit or allowance which entitles the child of a claimant to claim free board and lodging on a residential trip.

Faith Schools: Local (1)

***Designation of Schools Having a Religious Character* (*Independent Schools*) (*England*) (*No 2*) *Order 2013* (*SI 2013 No 2867*)**

Eight schools are designated as having a religious character: two Christian (Brighton and Hove, South Gloucestershire); two Catholic (Dorset); and one each of Jewish (Barnet), Greek Orthodox (Barnet), Hanafi Deoband (Bolton) and Sikh (Hillingdon). One school in Dorset has its designation under an earlier Order revoked.

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

***Inspectors of Education, Children's Services and Skills* (*No 8*) *Order 2013* (*SI 2013 No 2871*)**

This Order appoints the six persons named in the Schedule as Her Majesty's Inspectors of Education, Children's Services and Skills.

School Information

***School Information* (*England*) (*Amendment No 2*) *Regulations 2013* (*SI 2013 No 2912*)**

These Regulations amend the School Information (England) Regulations 2008 (SI 2008/3093, **LOE D [53251]**). The amendments apply to maintained schools. The Explanatory Note says:

> 'Regulation 10 of the 2008 Regulations requires maintained schools to publish the information specified in Schedule 4 to those Regulations on their website. Paragraph 4 of that Schedule requires schools to publish the most recent key stage 2 results, as published in the School Performance Tables published on the Department for Education's website. The Department will no longer combine key stage 2 pupils' reading and writing results to produce an overall English level. Instead, it will report separately on reading and writing results. These Regulations amend paragraph 4 of Schedule 4 to the 2008 Regulations to ensure that the information which the Department publishes is reflected accurately on the maintained schools' websites.'

FE and HE: Recognised and listed Bodies

***Education* (*Recognised Bodies*) (*England*) *Order 2013* (*SI 2013 No 2992*)**

This Order lists all those bodies which appear to the Secretary of State to be recognised bodies within s 214(2)(*a*) or (*b*) of the Education Reform Act 1988 (ie universities, colleges or other bodies which are authorised by Royal Charter or by or under an Act of Parliament to grant degrees, and other bodies for the time being permitted by those bodies to act on their behalf in the granting of degrees). It updates and replaces the list of bodies contained in the Education (Recognised Bodies) (England) Order 2010 (SI 2010/2618), which is revoked.

***Education* (*Listed Bodies*) (*England*) *Order 2013* (*SI 2013 No 2993*)**

This Order lists the name of every 'body' which is not a 'recognised body' but which appears to the Secretary of State either to provide a course which is in preparation for a degree to be granted by such a recognised body and is approved by or on behalf of that body; or to be a constituent college, school, hall or other institution of a university which is such a recognised body. It

updates and replaces the list of bodies contained in the Education (Listed Bodies) (England) Order 2010 (SI 2010/2614, which is revoked.

Wales: School Standards and Organisation (Wales) Act 2013 Commencement (1)

***School Standards and Organisation* (*Wales*) *Act 2013* (*Commencement No 3*) *Order 2013* (*SI 2013 No 3024*)**

Part 4 (ss 84 to 87, Welsh in education strategic plans) of the 2013 Act came into force on 3 December 2013.

Academy Conversions (Transfer of School Surpluses)

***Academy Conversions* (*Transfer of School Surpluses*) *Regulations 2013* (*SI 2013 No 3037*)**

The Explanatory Note comments:

> 'These Regulations revoke the previous Academy Conversions (Transfer of School Surpluses) Regulations 2010 [SI 2010/1938, **LOE D [56751]**], except in relation to conversions occurring before 1st January 2014. They also amend the Education (Pupil Referral Units) (Application of Enactments) (England) Regulations 2007 [SI 2007/2979, **LOE D [48601]**] so that the Regulations apply to Pupil Referral Units converting to Academies.
>
> Regulation 5 makes provision in respect of determining surpluses in federated schools. Regulation 6 sets time limits for notifying proprietors of Academies whether there is, and if so the amount of, a surplus. Regulation 7 makes provision about the procedure for requesting a review by the Secretary of State of any local authority determination. Regulation 8 makes provision about the time limit by which a local authority must pay a surplus to the proprietor of an Academy.'

Wales FE and HE: Local

***Coleg Ceredigion Further Education Corporation* (*Dissolution*) *and Coleg Ceredigion* (*Designated Institution in Further Education*) *Order 2013* (*SI 2013 No 3045*)**

The further education corporation established to conduct Coleg Ceredigion is dissolved with effect from 31 December 2013. Coleg Ceredigion is designated as a new college conducted by a registered company limited by guarantee, for the purposes of s 28 of the Further and Higher Education Act 1992.

Welsh in Education Strategic Plans and Assessing Demand for Welsh Medium Education

***Welsh in Education Strategic Plans and Assessing Demand for Welsh Medium Education* (*Wales*) *Regulations 2013* (*SI 2013 No 3048*)**

These Regulations are made under ss 87 and 98 of the School Standards and Organisation (Wales) Act. The Explanatory Note states 'they provide for the following matters:

(*a*) the circumstances in which a local authority will be required to carry out a Welsh medium education assessment (regulation 3) and the questions and information to be included in such an assessment (Schedule 1);

(*b*) the duration of the plan (regulation 4);

(*c*) the form and content of the plan (regulation 5 and Schedules 2 and 3);

(*d*) the date for submission of the plan to the Welsh Ministers for approval (regulation 6);

(*e*) the date on which the plan must be published (regulation 7);

(*f*) the manner of publication of the local authority's plan (regulation 8);

(*g*) the persons and bodies that a local authority must consult on the draft plan (regulation 9); and

(*h*) the date by which the plan must be reviewed and who must be consulted (regulation 10).'

School and Early Years Finance

***School and Early Years Finance* (*England*) *Regulations 2013* (*SI 2013 No 3104*)**

The Explanatory Note says:

> 'These Regulations make provision for the financial arrangements of local authorities in relation to the funding of maintained schools and providers of prescribed early years provision in England, for the financial year 2014–2015. The School Finance (England) Regulations 2012 [SI 2012/335, **LOE D [58601]**] are revoked. The School and Early Years Finance (England) Regulations 2012 [SI 2012/2991, **LOE D [60501]**] remain in force. These Regulations define the *non-schools education budget* (regulation 4 and Schedule 1), the *schools budget* (regulation 6 and Schedule 2), *central expenditure* and the *individual schools budget* (regulation 8 and Schedule 2). They require local authorities to determine budget shares for schools maintained by them and amounts to be allocated in respect of early years provision in their area, in accordance with the appropriate formulae (regulations 10 and

11). They impose a minimum funding guarantee (regulation 19 and Schedule 4) and requirements in relation to local authorities' schemes (regulation 26 and Schedule 5).'

FE and HE: Fees and Student Support

***Education* (*Fees and Student Support*) (*Amendment*) *Regulations 2013* (*SI 2013 No 3106*)**

The Explanatory Note says:

> 'These Regulations amend the Education (Student Support) Regulations 2011 (SI 2011/1986 [**LOE D [57851]**]) … the Higher Education (Basic Amount) (England) Regulations 2010 (SI 2010/3021 [**LOE D [57301]**]) … and the Higher Education (Higher Amount) (England) Regulations 2010 (SI 2010/3020 [**LOE D [57251]**]) …
>
> Regulations 5, 7, 8 and 9 amend the provisions dealing with the designation of full-time, distance learning, part-time and postgraduate courses to make explicit that the Secretary of State has the power to suspend or revoke the designation of courses which have previously been designated by the Secretary of State for student support purposes. Regulation 6 makes a technical amendment to clarify which periods of previous study are taken into account when calculating fee loan entitlement. Regulations 10 and 11 amend the Basic Amount Regulations and Higher Amount Regulations so that the maximum fee caps for students undertaking sandwich work placement years, overseas study years, Erasmus study and work placement years are aligned with the maximum fee loan amounts in the Student Support Regulations.'

School Organisation

***School Organisation* (*Establishment and Discontinuance of Schools*) *Regulations 2013* (*SI 2013 No 3109*); *School Organisation* (*Prescribed Alterations to Maintained Schools*) (*England*) *Regulations 2013* (*SI 2013 No 3110*)**

The Explanatory Notes to SI 2013/3109 state:

> 'The Regulations prescribe various matters relating to proposals for the establishment and discontinuance of schools pursuant to the provisions contained in Part 2 of the Education and Inspections Act 2006.'

The 'various matters' include:

- provisions about competition notices published by a local authority inviting proposals for the establishment of a foundation, voluntary or foundation special school (other than one providing education suitable only to the requirements of persons above compulsory school age), or an Academy, and about proposals for the establishment of a new school made pursuant to a competition notice;

- provisions about proposals made, either by a local authority or the governing body, to discontinue a maintained school;
- proposals to establish schools in an area outside the area of the relevant local authority.

The Explanatory Notes to SI 2013/3110 state:

> 'Regulation 3 with Schedule 1 provides that governing bodies of maintained schools can publish and determine their own 'foundation proposals' with rights of referral to the adjudicator in certain circumstances. Foundation proposals are defined in regulation 3 as a change of category from a community school, voluntary aided or voluntary controlled school to a foundation school, or from a community special school to a foundation special school; for foundation and foundation special schools only the acquisition of a foundation, and a change in the instrument of government so that the majority of governors may be foundation governors.'

SI 2013/3110 also prescribes other alterations capable of being published by the governing body of a maintained school and alterations capable of being published by a local authority to maintained schools.

Wales: Pupil Information

***Education* (*Information About Individual Pupils*) (*Wales*) (*Amendment*) *Regulations 2013* (*SI 2013 No 3137*)**

These Regulations amend the Education (Information About Individual Pupils) (Wales) Regulations 2007 (SI 2007/3562, **LOE D(W) [8851]**). The Explanatory Note states that Regulation 2 amends the 2007 Regulations so as to require a governing body of a maintained school to provide to a local authority:

- additional information to that it is already required to provide by virtue of the 2007 Regulations in relation permanent exclusions of pupils; and
- information in relation to fixed period exclusions of pupils.

Wales: School Admission Appeals Code

***School Admission Appeals Code* (*Appointed Day*) (*Wales*) *Order 2013* (*SI 2013 No 3141*)**

This Order appoints 1 January 2014 as the day on which a new School Admission Appeals Code comes into force, issued under ss 84 and 85 of the School Standards and Framework Act 1998 by the Welsh Ministers. This version of the Appeals Code replaces the School Admission Appeals Code which came into force on 15 July 2009.

According to the Explanatory Note, the main changes introduced by the Code are:

'(*a*) admission authorities must ensure that all panel members receive training every three years;

(*b*) when holding appeals, admission authorities may utilise their own buildings if necessary providing this is suitably distanced from the work of the admission authority; and

(*c*) panel members must consider whether the admission arrangements comply with the Part 3 of the SSFA 1998 and the Code on School Admissions.'

The 2014 Welsh Admission Appeals Code applies to all appeals heard on or after 1 January 2014.

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

***Inspectors of Education, Children's Services and Skills* (*No 9*) *Order 2013* (*SI 2013 No 3158*)**

This Order appoints the nine persons named in the Schedule as Her Majesty's Inspectors of Education, Children's Services and Skills.

Wales: Inspectors of Education and Training in Wales

***Education* (*Inspectors of Education and Training in Wales*) (*No 2*) *Order 2013* (*SI 2013 No 3159*)**

This Order appoints the four persons named in the Schedule Her Majesty's Inspectors of Education and Training in Wales.

Wales: FE and HE: Student Support

***Education* (*Student Support*) (*Wales*) *Regulations 2013* (*SI 2013 No 3177*)**

The (necessarily lengthy) Explanatory Note states:

'These Regulations provide for financial support for students who are ordinarily resident in Wales taking designated higher education courses in respect of academic years beginning on or after 1 September 2014. They consolidate, with some changes, the Education (Student Support) (Wales) Regulations 2012 [SI 2012/3097, **LOE D(W) [14651]**] …

These Regulations revoke the 2012 Regulations subject to the provisions of regulation 3 explained below. The 2012 Regulations will continue to apply to the provision of support to students in relation to the academic year which begins on or after 1 September 2013 but before 1 September 2014. …

To qualify for financial support a student must be an "eligible student". Broadly, a person is an eligible full-time student if that person falls within one of the categories listed in Part 2 of Schedule 1 and also satisfies the

eligibility provisions in Part 2 of the Regulations (separate eligibility provisions apply to students undertaking distance learning, part-time and post-graduate courses and Parts 11 to 13 of the Regulations refer).

The Regulations apply to students ordinarily resident in Wales wherever they study on a designated course in the United Kingdom. For the purposes of these Regulations a person who is ordinarily resident in Wales, England, Scotland, Northern Ireland, the Channel Islands or the Isle of Man as a result of having moved from one of those areas for the purpose of undertaking a designated course is considered ordinarily resident in the place from which that person moved (Schedule 1, paragraph 1(3)). An eligible student must also satisfy any requirements elsewhere in the Regulations; in particular the specific requirements applicable to each type of financial support.

Support is only available under the Regulations in respect of "designated" courses within the meaning of regulations 5, 78, 95, 124 and Schedule 2.

The distinction between old system eligible students and new system eligible students (introduced by the Assembly Learning Grants and Loans (Higher Education) (Wales) Regulations 2006) in relation to financial support to students for full-time courses is retained (regulation 2(1)).

Old system eligible students are eligible students attending courses that started before 1 September 2006, gap year students starting courses before 1 September 2007 and certain other categories of student. The following grants and loans are available to old system eligible students subject to the conditions prescribed in the relevant regulations—

- Grant for fees (regulations 16 to 18);
- Fee contribution loan (regulation 22);
- Grant for disabled students' living costs (regulation 29);
- Grants for dependants (regulations 30 to 35);
- Grant for travel (regulations 37 to 39);
- Higher education grant (regulation 40); and
- Loans for living costs (Part 6).

A new system eligible student is an eligible student who started their course on or after 1 September 2006 and is continuing on that course after 31 August 2014, or starts their present course on or after 1 September 2014, and is not an old system eligible student. The following grants and loans are available to new system eligible students subject to the conditions prescribed in the relevant regulations—

- Fee grant (regulation 19);
- New fee grant (regulation 20);
- Fee loan (regulations 23 and 24);
- New fee loan (regulation 25);

- New private institution fee loan (regulation 26);
- Accelerated graduate entry fee loan (regulation 27);
- Grant for disabled students' living costs (regulation 29);
- Grants for dependants (regulations 30 to 35);
- Grant for travel (regulations 37 to 39);
- Maintenance grant or special support grant (regulations 41 to 48);
- Loans for living costs (Part 6); and
- College fee loans (Schedule 4).

The Assembly Learning Grants and Loans (Higher Education) (Wales) Regulations 2009 introduced two new sub-categories of new system eligible student, namely a "2010 cohort student" and a "2010 gap year student". The Assembly Learning Grants and Loans (Higher Education) (Wales) Regulations 2011 introduced a further two new sub-categories of new system eligible student, namely a "2011 cohort student" and a "2011 gap year student". The Assembly Learning Grants and Loans (Higher Education) (Wales) (No 2) Regulations 2011 then introduced one further new category of new system eligible student, namely a 2012 cohort student. A 2012 cohort student is a new system eligible student who begins the present course on or after 1 September 2012 and the relevant provisions will continue to apply to students who begin the present course on or after 1 September 2014. The definition of 2012 cohort student in regulation 2(1) also provides that certain categories of students are not classed as 2012 cohort students. The term "new cohort student" ("*myfyriwr carfan newydd*") in regulation 2(1) also collectively describes 2010 cohort students, 2011 cohort students and 2012 cohort students.

Part 2 of these Regulations concerns eligibility.

Part 3 of these Regulations makes provision for applications for support (regulation 9), time limits for applications (regulation 10) and regulation 11 and Schedule 3 specify the information that must be provided by applicants.

Part 4 of these Regulations provides for fee support, in the form of grants for fees and fee loans.

Regulation 20 provides for the payment of a new fee grant to 2012 cohort students. Regulation 23 provides for the payment of fee loans to new system eligible students who do not qualify for a fee grant. A new cohort student (other than a 2012 cohort student) falls within that category. Regulation 24 provides for the payment of fee loans to students who qualify for a fee grant under regulation 19. The payment of fee loans under regulations 23 and 24 will only apply in relation to courses beginning before 1 September 2012.

The fee loans available in respect of courses beginning on or after 1 September 2012 are set out in regulations 25 to 27. Regulation 25 provides for the payment of a new fee loan to 2012 cohort students who undertake courses at publicly funded institutions. Regulation 26 provides for the payment of a new

private institution fee loan to 2012 cohort students who undertake courses at private institutions. Finally, regulation 27 provides for the payment of an accelerated graduate entry fee loan to students who begin accelerated graduate entry courses on or after 1 September 2012.

These Regulations also provide for new levels of fee support for certain 2012 cohort students who are undertaking a study year abroad or a work placement as part of a designated course. This includes students who are undertaking a work placement or study year abroad as part of a sandwich course or an Erasmus year. The relevant support is set out in regulations 20, 25 and 26 and a related change is made to the definition of "Erasmus Year" in regulation 2(1).

Part 5 of these Regulations makes provision for grants for living costs which includes grants for travel for certain categories of eligible student.

It provides that the amount of maintenance grant or special support grant payable to a new system eligible student will differ according to whether the student is a new system eligible student who is not a new cohort student (regulations 42 and 46); a 2010 cohort student and a 2012 cohort student (regulations 43 and 47); or a 2011 cohort student (regulations 44 and 48).

Regulation 32 makes provision for the childcare grant which is payable in respect of childcare charges incurred in relation to children who are dependent on an eligible student, including children who are born after the beginning of the academic year. This regulation also now enables the Welsh Ministers to limit the amount of childcare grant payable where an eligible student does not submit details of the childcare provider.

Regulations 30 to 35 make provision for the grants for dependants. Regulation 34 provides that the residual income of any partner or adult dependant in the prior financial year and the net income of any child dependant in the prior financial year will be taken into account when calculating the amount of any grants for dependants. However, where a dependant's income for the current financial year is likely to be 15 per cent less than their income in the prior financial year, the Welsh Ministers may assess the dependant's income on the basis of the current financial year. Regulation 35 provides definitions of "dependant", "residual income", "net income", "prior financial year" and "current financial year" for these purposes. Equivalent provision is made in respect of part-time grants for dependants in Part 12 of these Regulations.

Part 6 makes provision for loans for living costs. Such loans are payable to both old system eligible students and new system eligible students.

The amount of loan payable to a new system eligible student may differ according to whether the student is a new system eligible student who is not a new cohort student (regulation 52); a 2010 cohort student, a 2012 cohort student or a 2012 accelerated graduate entry student undertaking their first year of study (regulation 54); or a 2011 cohort student (regulation 55).

Part 7 sets out general provisions relating to loans made under the Regulations.

Part 8 and Schedule 4 make provision for "college fee loans". These are loans in respect of the college fees payable by a qualifying student to a college or permanent private hall of the University of Oxford or to a college of the University of Cambridge in connection with attendance of a qualifying student on a qualifying course.

Part 9 and Schedule 5 continue to make provision for the means-testing of students taking designated full-time courses. A contribution from the student is calculated on the basis of household income. The contribution is to be applied to specified grants and loans until it is extinguished against the amount of the particular grants and loans for which the student qualifies.

Part 10 makes provision for payment of grants and loans.

Part 11 makes provision for support to students who are undertaking designated distance learning courses.

Part 12 and Schedule 6 make provision for support for part-time courses. Regulation 98 makes provision for a new part-time fee loan which is available to eligible part-time students who start designated part-time courses on or after 1 September 2014. The level of new part-time fee loan will vary according to whether the designated part-time course is provided by an institution in Wales or an institution in England, Scotland or Northern Ireland. The level of new part-time fee loan will also vary according to whether the designated part-time course is provided by a publicly funded institution or private institution in England, Scotland or Northern Ireland. The new part-time fee loan will be available to new eligible part-time students who study designated part-time courses at an intensity of study above 25 per cent.

Regulation 99 makes provision for a new part-time course grant, which is means tested, and available to eligible part-time students who start designated part-time courses on or after 1 September 2014. The new part-time course grant will be available to eligible part-time students who study designated part-time courses at an intensity of study above 50 per cent.

Part 13 makes provision for postgraduate students with disabilities.

Regulations 29, 32, 37, 41, 45, 83, 100 and 129 make provision (in part) for students who become eligible for certain types of support part way through an academic year. They provide that such students will now only qualify for the relevant support in respect of the academic quarters following the event which triggers their eligibility.

Part 14 makes amendments to the 2012 Regulations in relation to "compressed first year courses". These are courses in which the first year of study is undertaken on a compressed basis. The definition of "academic year" is also amended for this purpose.'

Early Years

***Local Authority* (*Duty to Secure Early Years Provision Free of Charge*) *Regulations 2013* (*SI 2013 No 3193*)**

The Explanatory Note states:

'… These Regulations prescribe early years provision for young children of a prescribed description.

Regulation 2 prescribes that early years provision which an English local authority must secure free of charge is provision provided by an early years provider to whom section 40(1) of the Childcare Act 2006 Act applies … 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 must have attained the age of two and meet certain eligibility criteria. 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.

Regulation 5 revokes the Local Authority (Duty to Secure Early Years Provision Free of Charge) Regulations 2012 [SI 2012/2488, **LOE D [60401]**).'

Pupil Information and School Performance Information

***Education* (*Pupil Information and School Performance Information*) (*Miscellaneous Amendments*) (*England*) *Regulations 2013* (*3212*)**

These Regulations remove requirements in the Education (Pupil Information) (England) Regulations 2005 (SI 2005/1437, **LOE D [40351]**) as follows:

- the requirement on a head teacher to include key stage 3 assessment or attainment information (where applicable) in the annual report to parents; and
- the requirement on the governing body of a maintained school or the local authority to include key stage 3 assessment information (where applicable) in the record it transfers to another school when a pupil ceases to be registered at the former school and becomes registered at the latter school.

They also remove the requirement in the Education (School Performance Information) (England) Regulations 2007 (SI 2007/2324, **LOE D [48151]**) on the governing body of a maintained school or the proprietor of an Academy or a CTC to provide key stage 3 pupil assessment information (where applicable) to the local authority or the Secretary of State.

Faith Schools: Local (2)

***Designation of Schools Having a Religious Character* (*Independent Schools*) (*England*) (*No 3*) *Order 2013* (*SI 2013 No 3268*)**

The Leeds Christian School of Excellence in Leeds is designated as a school having a religious character (Christianity).

Wales: Local Curriculum

***Education* (*Local Curriculum for Pupils in Key Stage 4*) (*Wales*) (*Amendment*) *Regulations 2014* (*SI 2014 No 42*)**

These Regulations amend the Education (Local Curriculum for Pupils in Key Stage 4) (Wales) Regulations 2009 (SI 2009/3256, **LOE D(W) [11101]**). Consequently, the minimum number of courses that a local authority must include in its local curriculum is 25, of which three must be vocational (reg 2(*a*)).

They also repeal regs 5 to 7 of the 2009 Regulations so that there is no longer a requirement for courses of study in the local curriculum, nor for a pupil's choices of local curriculum courses, to have a minimum points value (reg 2(*b*)).

Education Grants: Dance and Drama

***Education* (*Grants etc*) (*Dance and Drama*) (*England*) (*Revocation*) *Regulations 2014* (*SI 2014 No 80*)**

The Education (Grants etc) (Dance and Drama)(England) Regulations 2001 (SI 2001/2857) which made provision for grants to be paid by the Secretary of State to listed institutions, in respect of dance and drama students selected by the institution are revoked.

Special Educational Needs: Direct Payments

***Special Educational Needs* (*Direct Payments*) (*Pilot Scheme*) (*Extension and Amendment*) *Order 2014* (*SI 2014 No 166*)**

The Explanatory Note states:

> 'Article 2 of the Order extends the duration of the pilot scheme made under the 2012 Order [Special Educational Needs (Direct Payments) (Pilot Scheme) Order 2012, SI 2012/206, **LOE D [58501]**] to allow the local authorities named in Schedule 2 to the 2012 Order to continue to make direct payments in accordance with the pilot scheme until 30th September 2015. It also amends the Order so that with effect from 1st September 2014 the duty on the local authority to consider any new requests for direct payments or provide advice and information about direct payments is removed.'

Wales: School Standards and Organisation (Wales) Act 2013 Commencement (2)

***School Standards and Organisation* (*Wales*) *Act 2013* (*Commencement No 4 and Savings Provisions*) *Order 2014* (*SI 2014 No 178*)**

Subject to article 3, the following provisions came into force on 20 February 2014:

(*a*) Chapter 1 of Part 2 (intervention in conduct of maintained schools);

(*b*) Chapter 2 of Part 2 (intervention in local authorities);

(*c*) section 96 (repeal of provision for code of practice for local authority school relations);

(*d*) section 99 (minor and consequential amendments) in so far as it relates to the amendments made by Part 1 of Schedule 5;

(*e*) Schedule 1 (governing bodies consisting of interim executive members);

(*f*) Part 1 of Schedule 5 (minor and consequential amendments relating to Part 2 of the 2013 Act); and

(*g*) paragraphs 32 and 34(2) of Part 3 of Schedule 5 (repeal of section 58 of the Education and Inspections Act 2006).

Article 3 of this Order provides that any act, declaration or direction that the Welsh Ministers have made under or relating to their powers in ss 496 to 497A of the Education Act 1996 continue to apply, and a further direction, in relation to the same matters, may also be made under ss 496 to 497A of the 1996 Act.

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

Inspectors of Education, Children's Services and Skills Order 2014 (SI 2014 No 261)

This Order appoints five more Inspectors of Education, Children's Services and Skills.

FE and HE: Education Loans

Further Education Loans (Amendment) Regulations 2014 (SI 2014 No 290)

These Regulations amend the Further Education Loans Regulations 2012 (SI 2012/1818, **LOE D [59951]**). They remove the Advanced Apprenticeship Framework and the Higher Apprenticeship Framework from the list of further education courses designated under reg 4(1) of those Regulations, and make consequential changes.

CASES DECIDED AND REPORTED

EIA 2006: LA Intervention Supported

The Queen on the application of the Governing Body of Uplands Primary School (Claimant) v Leicester City Council (defendant), Dr Timothy Luckcock (Interested Party) [2013] EWHC 4128; judgment given on 29 November 2013

The Governors of a community primary school unsuccessfully challenged the decision of their education authority to intervene in the running of their

school under Part IV of the Education and Inspections Act 2006. The Interested Party was the school's head teacher.

The head teacher had been overseeing staff restructuring and relationships between the staff and governors were poor. A large number of staff submitted a collective grievance about the head teacher and a collective grievance about the governing body to the local authority. The governors and the authority jointly commissioned an independent investigation into the problems at the school, but following its delivery, the governors did not act as agreed with the council. The authority then took steps to intervene and suspended the school's delegated budget and suspended the head teacher.

The governing body challenged the intervention. Although the authority had promised to seek to engage with the governing body, and had failed to do so in the matter of the suspension of the head teacher, the outcome in the High Court was that there would be no order as it was 'inconceivable that any attempt to engage with the governing body on that issue would have led to a different outcome'.

Special Educational Needs; Educational Provision

K&K v The Authority* (*SEN*) *[2013] UKUT 0624* (*AAC*); *decision on 5 December 2013

A central issue in this case was the meaning of the phrase 'taught in small groups' in Part 3 of a pupil's Statement of Special Educational Needs. A consultant educational psychologist had expressed her opinion that the pupil, JJ, should be taught in small groups for all academic subjects, and the provision was included in JJ's Statement. JJ attended a mainstream school. When JJ later moved into Year 8, teaching for two of the five academic subjects (science and technology) was provided in small supported groups rather than in small classes and the parents appealed to the First-tier Tribunal. The parents and the authority both agreed that JJ should be taught in small groups for academic subjects, but disagreed as to what the phrase 'taught in small groups' meant.

The First-tier Tribunal did not resolve the issue. It decided that JJ's Statement should specify that JJ be taught in small groups for three of the five subjects ('the Modified TSG Provision'). Part 3 of the Statement made no reference to small groups for science and technology; only for English, Maths, and Modern Foreign Languages. It retained the disputed wording but did not explain who was correct about what it meant, ie whether it meant 'taught in small classes with a dedicated teacher', or 'taught in a small supported group within a whole class setting'. The FTT concluded that the mainstream school could provide for JJ's educational needs and that the parents' preference for an independent school was over-provision and would involve unreasonable public expenditure.

JJ's parents appealed successfully to the Upper Tribunal. The Upper Tribunal Judge allowed the appeal and set aside the decision of the First-tier Tribunal:

'21 In my judgment, the [First-tier] Tribunal was wrong in law not to resolve the point. After all, the Tribunal specifically decided to include the Modified TSG Provision within the statement … The Tribunal, in my judgment, had a choice. It could have addressed and resolved the controversy, and if it decided that the true meaning was clear, then it could justifiably have retained that wording. Alternatively, it could have avoided the controversy, and adopted alternative and clearer language to deal clearly with what the statement was intended to mean. What in my judgment was legally unsatisfactory was to retain wording known to be disputed, without addressing the dispute …

27 I accept the submissions made on behalf of JJ's parents … I agree with the Authority that the Tribunal must have concluded that small classes were unnecessary for JJ in relation to science and technology. I do not accept that such a conclusion involved no (or no clear) departure from Ms Fenty's [the consultant educational psychologist's] evidence. I agree with the Authority that, in principle, a Tribunal may reasonably rely on its own expertise, and may reasonably depart from expert opinion before it. I also accept that it is permissible for a Tribunal to consider evidence as to whether existing provision is working, to 'influence' its conclusion as to what provision is needed. What, in particular, I cannot accept is that the Tribunal gave legally sufficient reasons to explain what it was doing, and why, in this case …

29… there is in my judgment no getting away from the following straightforward points, which arise out of the Tribunal's reasoning in the present case. (1) The Tribunal does not say it is relying on own experience to depart from Ms Fenty's expert opinion (it did refer to its 'experience' in describing the Mainstream School as 'exceptional'). (2) The Tribunal does not refer to Ms Fenty's evidence as to JJ's need for small classes, including in science and technology … , nor articulate a reason for departing from Ms Fenty's opinion. (3) The Tribunal does not here refer to progress …

30 Further, leaving aside whether science and technology could be taught using small supported groups rather than in small classes, the Tribunal did not in my judgment give legally adequate reasons for making no provision at all as to science and technology in the Statement. The Tribunal's reasons do not say that it wished to avoid undue specificity as to science and technology and wished instead to allow for flexibility 'on the ground' as to 'specialist' arrangements at the Mainstream School. The Tribunal does not explain why, if this was its approach, specificity was retained elsewhere in the statement, including the "ten pupils" formula in the Modified TSG Provision for English, Maths and Modern Foreign Languages.

31 For these reasons, I cannot accept the Authority's defence of the Tribunal's decision, in circumstances where the reasons do not in my judgment support the characterisation sought to be placed on them …

32 The question whether JJ needed small classes for Science and/or Technology clearly had knock-on implications as to the choice of placement at a suitable school. JJ's parents' case was, and remains, that the Mainstream School could not be identified as suitable for JJ, once her need for small classes was recognised. That would have needed answering. In particular, if the Authority wished to put forward available modifications at the Mainstream School, it would be necessary to conduct a very different analysis of cost of placement …'

Appeal allowed.

Disability Discrimination

SN v Nottinghamshire County Council (SEN) [2014] UKUT 0002 (AAC); decision issued on 2 January 2014

A pupil, J, was disabled and struck a member of staff in consequence of her disability. The school, which knew that she was disabled, then put in place arrangements which allowed J to continue her education at the school but in a different way from before. A claim was made that the school's conduct towards J after the incident and the arrangements it made in respect of her continuing education constituted 'unlawful disability discrimination' under s 15 of the Equality Act 2010. Permission to appeal to the Upper Tribunal was allowed on two grounds:

'… [I]n essence the first ground was a reasons challenge in respect of how the tribunal had dealt with the application of section 15 to the facts, while the second ground related to whether the tribunal's conclusions about the courses proposed for J and the qualifications to which they might lead were open to it on the evidence.'

The judge in the Upper Tribunal said this:

'1**4.** The correct approach to the giving of reasons is conveniently summarised in *LS v Oxfordshire County Council (SEN)* [2013] UKUT 0135 (AAC) at paragraphs 32 to 33:

"32. There is no disagreement between the parties as to the proper legal test to apply as regards the adequacy (or not) of a tribunal's reasons. In short, the purpose of a tribunal's reasons "remains what it has always been, which is to tell the parties in broad terms why they lose or, as the case may be, win" (*UCATT v Brain* [1981] IRLR 225 at 227 per Donaldson LJ; see also *Meek v Birmingham City Council* [1987] IRLR 250. That basic test applies equally in special educational needs cases (*W v Leeds City Council and SENDIST* [2005] EWCA Civ 988, [2006] ELR 617 at [52]–[54] per Ward LJ, *H v East Sussex County Council* [2009] EWCA Civ 249, [2009] ELR 161 at [16]–[19] per Waller LJ and now *DC v London Borough of Ealing* [2010] UKUT 10 at [38]–[46]).

33. The case law also shows that the duty to provide adequate reasons must be seen in the context of the proceedings in the case as a whole. So the parties' prior knowledge of the nature of the dispute and the

relevant contentions on appeal will be relevant in deciding whether the reasons are adequate. It follows that the reasons do not need to be spelt out in the level of detail required for a stranger to the dispute (see eg *Derby Specialist Fabrication Ltd v Burton* [2001] ICR 833 at paragraph 32 per Keene J (as he then was))…" …

21. Even if one approaches the matter fully mindful of Ms Jackson's submissions, in her skeleton argument to the Firsttier Tribunal, that certain steps were proportionate and that the statement of reasons was being written for an informed audience, I still consider the reasons inadequate. …

22. The assessment of proportionality is an evaluative one and nowhere else in the decision indicates that such an evaluation took place either. In my view the lack of any reasons as to why, if such were the case, the tribunal considered the means to be proportionate is a significant omission. Section 15 of the Equality Act is a form of discrimination peculiar to disability discrimination cases. It does not require the person claiming to be discriminated against to point to a comparator, merely to unfavourable treatment "because of something arising in consequence of [that person's] disability" (a broadly expressed test). The role of subsection (1)(b) in ensuring that (in layman's terms) unfavourable treatment regrettably experienced by a disabled person goes no further than it needs to is thus a critical one in cases of this type. Some sort of explanation is called for and it is one which a tribunal such as this, constituted with specialist members, is well equipped to provide.

…

24. As I consider that the tribunal's confusion of "aims" and "means" and the lack of any reasons in respect of its assessment of proportionality are sufficient to obscure both from the appellant and from the Upper Tribunal how it reached its decision on a key issue and thus fall foul of the tests summarised in *LS*, I need not dwell on other shortcomings in the reasons that there may have been …

25. As to the second ground … I am satisfied that there was evidence to support paragraph 32 [of the First-tier's decision as set out in para 13: "that the measures which the school … put in, were proposed with the intention of giving [J] every opportunity of achieving the same qualifications"].'

Appeal allowed.

Special Educational Needs: Late Application: Tribunal Procedure

CM v Surrey County Council (SEN) [2014] UKUT 0004 (AAC); decision issued on 6 January 2014

An SEN appeal to the First-tier Tribunal was submitted three or four weeks after the deadline. An extension of time was refused and the appeal was not

admitted. The applicant appealed to the Upper Tribunal. The judge in the Upper Tribunal set aside the First-tier Tribunal's decision and allowed the appeal.

> '24. … I cannot discern that any consideration was given to the underlying merits of the case. Such consideration is normally to be expected … If, as appears to have been the case, the judge considered that the particular period of delay was significant, one would expected this to have been balanced against his perception, on a necessarily initial view, of the merits. The decision shows no sign of this having been done …
>
> 25. I am inclined to suspect that there may be a residual perspective on the part of the tribunal that it is only the explanation for the delay that is relevant. The September 2010 guidance ["How to appeal against a SEN decision – a guide for parents" on the www.justice.gov.uk website] does suggest this, in its limitation to "special circumstances which meant that you were not able to send your appeal in time". Such a mistaken view might be fostered by a reading, in isolation, of rule 20(4) [First-tier Tribunal (Health, Education and Social Care Chamber) Rules 2008, SI 2008/2699], which only requires there to be furnished "the reason why the application notice was not provided in time", as opposed to the reasons more generally why an extension of time should be permitted. However, in my view, the terms of the rule reflect that reasons for delay are almost always likely to be relevant to a decision to extend time and are likely to be only in the knowledge of a prospective appellant rather than the tribunal, whereas other factors would be likely to be in the tribunal's knowledge, including from the application form, without the specific requirement imposed by rule 20(4)(*a*) to include reasons for delay.
>
> 26. I remain of the view therefore that the merits of the case did fall to be considered and that the tribunal was in error of law in failing to address – even by implication – all relevant factors.
>
> 27. Was the tribunal required to hold a hearing? In my view it was not under a duty to hold a hearing, but had the power to do so. Regulation 23 of the HESC Rules imposes an obligation to hold a hearing (with certain exceptions) before making a decision "which disposes of proceedings". While I accept that the position is not entirely clear and I have not received argument on the point, it seems to me that the better view is that an application which is not admitted does not make it to the stage of being "proceedings" at all. …
>
> 31. It appears to me that having found the decision to be in error of law, I should set it aside …
>
> 32. There will be cases …where it will be particularly important for the tribunal to bear in mind that as the application form contains no field asking for an appellant's grounds for submitting that time should be extended, and that the Guidance puts the test in misleading terms, there

may be more reason to have an oral hearing than might otherwise be the case see *KS* at [13] and [14] [*R(KS) v First-tier Tribunal and the Criminal Injuries Compensation Authority* [2012] UKUT 281 (AAC); [2013] AACR 9]…

34. It is for the First-tier Tribunal to decide whether any changes to its Guidance and/or forms are desirable.'

Appeal allowed.

University Examination Results

Tristram Emery v OIA [2014] EWCA Civ 109, CA; judgment given on 23 January 2014

President of The Queen's Bench Division:

'**1.** This is an application for permission to appeal against an order of Philip Mott QC, sitting as a Deputy Judge of the High Court, refusing permission to bring an application for judicial review: it follows refusal on paper by Sir Stanley Burnton. The appellant, Mr Tristam Emery, sought to challenge a decision of the respondent, the Office of the Independent Adjudicator for Higher Education ("OIA") dated 30th August 2012.

2. Mr Emery, who appears in person, was an undergraduate student at the University of Warwick between September 2008 and the summer of 2011…

9. [A University] review panel, having considered the Board of Examiners' decision and Mr Emery's submissions, did not uphold his complaint [about exam results]. He was notified by the university that his appeal had been rejected by a "Completion of Procedures" letter of 4th August 2011.

10. Mr Emery then appealed to the OIA, which considers student complaints under the Higher Education Act 2004. On 13th June 2012, the OIA gave a preliminary decision concluding that the complaint was "not justified", and inviting Mr Emery to respond if he did not agree. Mr Emery provided a response on 27th June 2012, but on 30th August 2012, the OIA confirmed its decision of "not justified" in a formal decision letter. That confirmation was of course the fourth consideration of Mr Emery's challenge. This is the decision being challenged. .

11. The OIA is amenable to judicial review on familiar public law principles – illegality, irrationality and procedural impropriety – following the decision of the court in *R v ex parte Siborurema v OIA* [2007] EWCA Civ 1365 (**LOE F [2007.13]**). Mr Mott QC, on the application for permission to bring judicial review, had to consider whether Mr Emery had an arguable case for quashing the decision. He concluded that he did not. The test for the Court of Appeal in this application for permission to appeal is whether Mr Emery stands a 'real

prospective of success' in convincing this court that the judge was wrong, or can demonstrate some other compelling reason why the case should be heard by this court.

12. The judge had to consider Mr Emery's five broad grounds for impugning the decision of the OIA. The judge's conclusions on those five grounds also provide the basis for appeal to the Court of Appeal. They are: inadequacy of reasoning; relevant considerations not taken into account; fettered discretion; error of law or jurisdictional fact; and irrationality.

13. In my judgment, there is no real prospect of success in arguing that the OIA failed to give adequate reasons by means of its preliminary decision and its formal Decision Letter. The OIA is not compelled to give exhaustive reasoning: it needs to give sufficient reasoning that a party can comprehend and formulate an appeal (see paragraph 52.11.5 of the current Civil Procedure Practice).

14. As to his second ground …, I am afraid has no real prospect of success. …

15. The third ground of purported error of law is premised on OIA's disinclination (correctly) not to trespass on the "academic judgment" of the Board of Examiners. The Board found that, having regard to his illness, Mr Emery was unlikely to perform so well in any retake of examinations as would have a material impact on his degree. This was based on a holistic view of his academic performance and not merely a question of counting the numbers.

16. Mr Emery, rightly, does not challenge that finding, but says that the OIA erred by accepting the finding of "unlikely to attain the mark necessary for a higher degree class" as meaning that they could not review the consequent decision that sitting the missed examinations was not to his academic advantage. Mr Emery says that the OIA was entitled to reassess whether he advantage, notwithstanding finding that a change of degree class was unlikely.

17. I need not decide this point as to whether or not OIA was or was not so entitled, but it seems unimpeachable for a university to make a decision based on its academic judgment, and in doing so to exclude a different course of action – with greater attendant costs – which would (in their judgment) be likely to create no difference in outcome. This ground therefore also fails.

18. Mr Emery's fourth ground is that the OIA fettered its discretion, demonstrated by saying that:

"Since the university acted in accordance with its regulations the OIA could only intervene with this decision if we found the regulations to be inherently unfair or to have been unreasonable applied in your case."

19. Mr Emery contends this section falls foul of the holding of the Deputy High Court Judge in *R ex parte Budd* [2010] EWHC 1056 (Admin) …

22. … In *Budd*, the OIA erred in law by restricting themselves to a test of unfairness (although ultimately the OIA's decision survived review in that case). The OIA did not make the same mistake in the present appeal, instead seeing whether the regulations have been "unreasonably applied" as well as reviewing whether the university regulations were themselves "unfair". This ground of appeal cannot succeed …

25. I add two comments by way of further postscript: I note that the judge at paragraph 11, commenting on paragraph 74 of *Siborurema*, referred to the possibility of Mr Emery having a civil claim against the university independent of his public law challenge to the decision of the OIA. Although this is, no doubt, an accurate statement of law, I offer my own reflection. Any candidate who, having had an internal review by the university upheld by the OIA and then failed to obtain permission judicially to review that decision who chooses to bring a claim against his university, which itself would inevitably be constrained by respect of the courts for academic judgment would run a very serious risk of his action being dismissed as having no prospect of success. With great respect to Mr Emery three years on, it seems to me that he must now move on.

26. My second comment is more positive. Mr Emery has now embarked upon a study of the law …'

R (*on the application of Crawford*) *v University of Newcastle Upon Tyne [2014] EWHC 162* (*Admin*)*; judgment given on 31 January 2014*

The interesting aspect of this case was the interrelationship between the courts and the OIA for university students seeking better exam results than those initially awarded.

Andrew Grubb, sitting as a deputy High Court judge, said:

'**[1]** The Claimant registered at the University of Newcastle ("the University") in October 2005 to study for a Bachelor of Medicine and Bachelor of Surgery degree ("MBBS" degree)… In 2010, he failed his final year (Stage 5) examinations … On 15 June 2011, the Claimant was informed that he had again failed his final Stage 5 examinations …[H]e had been given a "B" grade (which is a borderline fail) in the "Clinical and Communication Skills" ("Skills") domain (as it has been called) in the assessment, which is part of the Stage 5 examination process …

[3] … On 1 August 2011, the Claimant's [internal University] appeal was rejected by the Appeal Adjudicator.…

[80] On 13 August 2011, the Claimant made a complaint to the OIA concerning the way in which his appeal had been dealt with by the

University … In that complaint, the Claimant's grounds raise the issue of the double weighting of the Communication grade and that it was not in accordance with the MBBS Stage 5 Handbook and that if his mark had been calculated "on the basis of a simple average" he would have passed; that he was not given an opportunity to respond to Dr Lunn's second memorandum; and that the Adjudicator had wrongly accepted an assurance from Dr Lunn that the Claimant had failed his examination instead of reaching his own conclusion on the facts.

[81] Before any decision was made on his complaint to the OIA, on 25 August 2011 the Claimant applied within the University to the Academic Registrar for a review of the appeal decision by the Adjudicator … That review was sought on the basis that the University, subsequent to the Appeal Adjudicator's decision had changed the wording in the MBBS Stage 5 Handbook so as to point out that the individual criteria and weighting for the MOSLER and OSCE are not published and that in the final examination different weighting may be applied to different criteria depending on the components and focus of the given station within the examination. In his application for review, the Claimant states "In the light of this fundamental change in the Handbook, I am applying to the Adjudicator for a review of his/her decision to reject my appeal."…

[88] Following the grant of permission in these proceedings on 24 May 2012, on the Claimant's application these proceedings were stayed on 2 July 2012. On 20 July 2012 the Claimant wrote to the OIA inviting the OIA to reopen its investigation of his complaint. The Claimant now relied only on two aspects of his earlier complaint, namely that the University had incorrectly calculated his mark for the "Skills" domain in the MOSLER and that the University had unfairly failed to disclose to him Dr Lunn's second memorandum prior to the decision of the Appeals Adjudicator. On 8 October 2012, the Defendant made further detailed submissions and supplied supporting documentation (see pp 202 – 263 of the Defendant's bundle).

[89] On 28 January 2013, the OIA issued its formal decision on the Claimant's complaint which it found "Not Justified"…

[95] Following the OIA's formal decision, these proceedings were again pursued.

[96] I have set out in some detail the procedures followed both within the University and to the OIA by the Claimant because it is important to see in context the Claimant's complaint about procedural irregularity …

[117] Consequently, despite the failure by the University to provide the Claimant with Dr Lunn's second memorandum in breach of its Academic Appeals Procedure, for the reasons I have given, it is not appropriate to grant any discretionary remedy in public or private law in respect of that failure …

[129] Having failed on issues 1, 2 and 3, the Claimant's claims for judicial review and in contract are dismissed.

Issue 4: available "alternative" remedy

[130] As a consequence, it is not strictly necessary for me to deal with "issues 4" and "5" raised by the Defendant. However, I heard detailed submissions in respect of "issue 4" and so I will express my views briefly.

[131] The Defendant relies upon the existence of the complaints procedure to the OIA as an effective "alternative" remedy so that, even if the Defendant acted unlawfully, the court should refuse to grant the Claimant any relief. He relied upon two decisions of this court in *R (Carnell) v Regent's Park College* [2008] EWHC 739 (Admin); [2008] ELR 268 and *R (Peng Hu Shi) v Kings College London* [2008] EWHC 857 (Admin), [2008] ELR 414. He submitted that in *Carnell* Black J refused to grant permission to bring judicial review proceedings because of the existence of the OIA procedure even where, as in that case, the procedure was no longer available because of the OIA's rule that a complaint could not be considered once judicial review proceedings were commenced. Mr Cornwell submitted that in *Peng Hu Shi*, Mitting J had dismissed the Claimant's application for judicial review where the individual had failed to pursue a claim to the OIA – *a fortiori* here where the Claimant had done so.

[132] In relation to the Claimant's contract action, Mr Cornwell submitted that no difference in principle should apply where an effective alternative remedy was available and he relied upon *Clark v University of Lincolnshire and Humberside* [2000] 3 All ER 752, [2000] 1 WLR 1988, [2000] ELR 345 especially at 29, 30 and 38 dealing with abuse of the court's process. Mr Cornwell also relied upon *Moroney v Anglo – European College of Chiropractic* [2008] EWHC 263 (QB); [2009] ELR 111 at 20 where Underhill J (as he then was) said that "Other things being equal, I would be inclined to regard it as an abuse of process for a student to bring proceedings in the curts unless and until he has exhausted that domestic remedy."

[133] Mr Speaight submitted that the Claimant in this case had properly invoked the OIA's jurisdiction and that procedure was now completed. He submitted that *Peng Hu Shi* was distinguishable since the Claimant there had not gone to the OIA at all. *Carnell* was, likewise, distinguishable as the Claimant there had, through his own fault, deprived himself of the alternative remedy by seeking judicial review first. He submitted that it would be a "naked invitation to abandon the rule of law" if, on completion of the OIA's procedure, the Claimant could not seek judicial review.

[134] Mr Speaight relied upon the decision of the Court of Appeal in *R (Maxwell) v Office of the Independent Adjudicator* [2011] EWCA Civ 1263,[2012] PTSR 884. Mr Speaight submitted that the Court of

Appeal had recognised that, following a determination of the OIA on a complaint, it was open to the student who was alleging disability discrimination to bring or continue County Court proceedings on that basis (see Mummery LJ at 34). Likewise, here, Mr Speaight submitted the Claimant was entitled to pursue this application for judicial review and to bring a concurrent claim in contract.

[135] Mr Cornwell submitted that *Maxwell* was not a case concerned with whether an individual could bring a judicial review claim raising the same issue which could (or which had been) considered by the OIA. Mr Cornwell submitted that *Maxwell* was a case where the Claimant was judicially reviewing the actual decision of the OIA and the court's recognition that, where disability discrimination was alleged the individual could subsequently pursue a claim in the Country Court, was distinguishable.

[136] The argument that the existence of the OIA operates as a discretionary *bar* to judicial review (as Mr Cornwell puts it in his skeleton argument) is not without difficulty.

[137] There is no doubt that the availability of an effective alternative remedy may lead a court not to grant permission to bring judicial review proceedings (see, for example, *R v SSHD, ex parte Swati* [1986] 1 All ER 717, [1986] 1 WLR 477, [1986] Imm AR 88, *per* Sir John Donaldson MR at p 485). Judicial review is a remedy of "last resort".

[138] In *Carnell*, Black J refused permission to bring judicial review proceedings on the basis that a complaint to the OIA was an adequate remedy even though the OIA had declined jurisdiction because that Claimant had made a claim for judicial review. At 30, Black J said this:

"**30** I have considered the question of the OIA very carefully. The fact that the OIA complaints procedure is no longer available is by virtue of the Claimant choosing not to pursue it initially and then maintaining that course following receipt of the acknowledgement of service of the other parties. He would have been within the Rules of the OIA scheme had he abandoned his judicial review proceedings at that stage and submitted his claim to the OIA with a request for it to be entertained out of time. The circumstances of this case are not, in my judgment exceptional in such a way as to justify the exercise in my discretion to grant permission for judicial review when that original remedy would have been available to the Claimant had he made different choices."

[139] The permission stage in these proceedings has, of course, long passed. Permission was granted on 24 May 2012 at an oral hearing.

[140] I have already considered above the relevance of the OIA procedure to the Claimant's case under "issue 2". Although not determinative, it is relevant to the exercise of discretion (together with other matters) whether to grant any remedy for the unfairness of the Academic Appeals Procedure for the reasons I gave above.

[141] I have considerable doubt, however, whether the fact that the Claimant had pursued a complaint to the OIA would bar the Claimant from relief if he had made good his argument under "issue 1" on the construction and application of the MBBS Stage 5 Handbook.

[142] *Maxwell*, I accept, was a different kind of case where the individual had an entitlement to make a claim before the County Court for disability discrimination. Perhaps it went no further than recognising that the County Court retained jurisdiction after the OIA decision. So, of course, does this court in its judicial review jurisdiction.

[143] I find it difficult, however, to contemplate that the "alternative" procedure of the OIA (once completed) could be considered, whatever the OIA's expertise in educational matters, as providing the only remedy on the issue of legality raised by "issue 1" in this case. The argument that judicial review is a remedy of "last resort" which is at the heart of the "effective alternative remedy" point may not, in itself, justify the refusal of relief when, as here, the alternative remedy has been pursued albeit unsuccessful. That has, as I have made clear in relation to "issue 2", some bearing on how discretion should or should not be exercised in granting a remedy for the unfairness in the procedure followed by the Appeal Adjudicator. But, in that its relevance lies in the substance of the individual's complaint and how it was dealt with by the OIA rather than simply by a bald reliance on the fact that another "alternative" procedure has been followed. I recognise, however, the broad thrust of Mitting J's comments in *Peng Hu Shi* may point in a different direction. Having expressed that view, as it is not necessary to reach a concluded view in this case, I prefer not to …

Decision

[146] The claim is dismissed.

Judgment accordingly.

Prohibition of Teaching: Duration of Prohibition

Adam Walker v The Secretary of State for Education [2014] EWHC 267 (Admin); judgment issued on 14 February 2014

A teacher convicted of using threatening behaviour towards children (albeit not in a school setting) challenged the permanence of his being prohibited from teaching by the Secretary of State under s 141B of the Education Act 2002 (**LOE B[6641.2]**).

Judge Clive Heaton QC said:

'**[1]** The Appellant Adam Walker, acting in person, appeals against a decision of the Secretary of State for Education (SSE) made on 20 June 2013 to impose a prohibition order upon him with no possibility of review. The SSE.. resists the appeal.

The background to the SSE decision

[2] On 23 April 2011 the Appellant, a schoolteacher, attended a St Georges Day parade organised by the English Cultural Society which concluded at the Green Tree public house in Tudhoe.

[3] Three boys aged 12, 11 and 10 at the time … had been chased off [a bouncy castle] by a third party who had told them they were too old to play upon it.…

[4] At the Appellant's sentencing before the Crown Court the prosecution accepted that at least two of the boys I have referred to then directed verbal abuse toward the Appellant who they thought was seeking to move them on out of the car park. Having issued that abuse the three boys then jumped onto their bicycles and made off. The Appellant's response to this chain of events was to get into his car and follow the boys. He has described himself as feeling provoked and frustrated by the boys' abuse.

[5] The three boys cycled together and the Appellant followed them closely in his car. In his sentencing remarks in the Crown Court the Judge described what followed in this way:

"This was a crazy thing to do. You obviously had a rush of blood to the head. I accept that to some extent you were provoked by these boys but they were only boys. They were only children and what you did was extremely dangerous. You set off after them in your vehicle and drove so close to them that had any of them come off their bikes accidentally the chances are you would have not been able to stop. You might have injured them. You might even have killed them. That is why you are charged with dangerous driving and no doubt why you pleaded guilty to it … ."

[6] The boys came to a halt, abandoned their bicycles and ran off. The Appellant got out of his car and slashed the tyres of the bicycles with the Stanley knife he had been using earlier.

[7] The incident did not finish there. The Appellant then turned to one of the boys. He had the Stanley knife in his hand still. He shouted and swore at the boy. The Appellant in the hearing before me was anxious to emphasise that he had not threatened the boy, but accepted that his behaviour was threatening. The boy said to the police afterwards that he had never been as frightened in his life as he was at that moment …

[12] Ultimately on 7 September 2012 the Appellant was sentenced to 18 months imprisonment suspended for the offences of dangerous driving and having a bladed article, with other sentences in respect of the other matters and consequential orders.

[13] The Appellant was a school teacher …

[14] The matter was heard by a professional conduct panel on 19 June 2013. The panel had the power to recommend the making of a prohibition order; that is an order preventing the Appellant from teaching. However, the panel could also recommend a review period for

that order. If such was provided for once the review period had expired the Appellant could apply for a review with the objective of having the prohibition lifted.

[15] … The recommendation was that there should be a prohibition order, but that there should be a review period of two years.

[16] The regulatory process from that point is that the recommendation of the panel goes to a decision maker nominated by the SSE. The decision maker in this case was Mr Alan Meryick an official in the Department acting on behalf of the SSE under the principles in *Carltona Ltd v Commissioners of Works*.

[17] Mr Meryick issued his decision on the following day 20 June 2013. Mr Meryick determined that there should be a prohibition order, but that there should not be a review period. His reasons are set out at p 215 of the bundle. It is that decision against which Mr Walker appeals to me …

Discussion and conclusions

[45] I turn firstly to the alleged procedural irregularities in the decision making process of Mr Meryick put before me by Mr Walker.

[46] … The Appellant could not direct me to any provision which would restrict the SSE's decision maker from giving weight to a matter not given weight, or given less weight, by the panel. In my judgment there is no such restriction upon the decision maker and he was therefore entitled to take the Appellant's threatening behaviour into account …

[55] … [T]he Appellant failed to demonstrate before me that he was dealt with more harshly than was appropriate by the decision maker's decision to prohibit him from teaching with no opportunity for review.

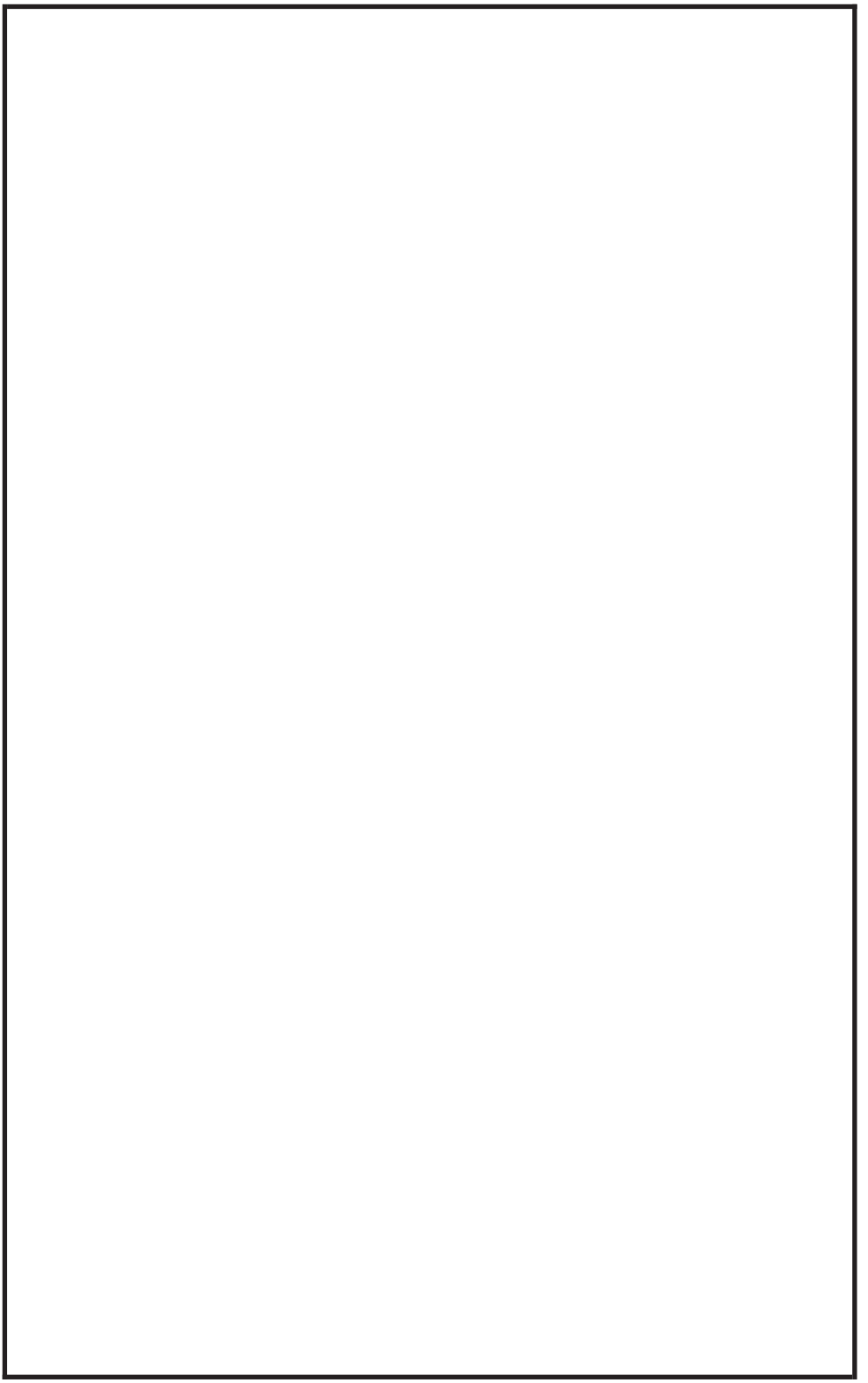
[56] That leaves me then with the final, but perhaps most conspicuous, argument of the Appellant; that the SSE, Mr Michael Gove, personally intervened in his case, that intervention being motivated by political bias …

[63] The Appellant's case that Mr Gove intervened personally in his disciplinary process so to ensure that he was prohibited from teaching for life is ultimately constructed upon nothing more than suspicion and innuendo. I reject his argument as lacking any credible evidential base at all.

Decision

[64] I am wholly unpersuaded by any of the arguments put before me by the Appellant. The appeal is dismissed.

[65] The unsuccessful Appellant will pay the Respondent's legal costs …'



Correspondence about the content of this Bulletin should be sent to: Nicola Eathorne, Content Delivery, LexisNexis, 30 Farringdon Street, LONDON, EC4A 4HH (tel: 01503 269250). For online services queries, please contact +44 (0)84 5370 1234; Fax: +44 (0)20 8662 2012.

Subscription and filing enquiries should be directed to LexisNexis Customer Services Department (tel: +44(0)84 5370 1234)

Published by LexisNexis

ISBN 978-1-4057-7677-6