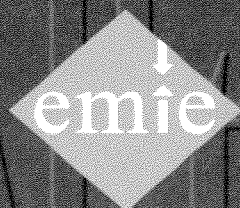


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OF THE LOCAL EDUCATION AUTHORITY

SIMON WHITBOURN
with
KEITH MITCHELL & ROBERT MORRIS

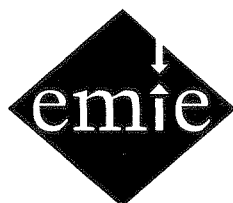


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PREFACE

This book is designed to meet the need for an analysis of the functions and roles of LEAs, based on the requirements of the law of England and Wales. The legal perspective is important, as LEAs are creatures of statute. They operate, in common with the rest of local government, within the doctrine of *vires*: an LEA may lawfully do only those things which are expressed or clearly implied in statute or subordinate legislation, or are essential elements of their discharging their duties, fulfilling their responsibilities and exercising their powers.

That is why the authors have started from statute law, notably but not exclusively the Education Acts, but also encompassing the statutory instruments from which so many of the requirements imposed upon LEAs now depend. Case law is also examined, especially where questions of accountability and challenge arise. As far as possible, the text is updated to 1 June 2000, though the analysis takes account of:

- potentially radical proposals in the Learning and Skills Bill and the Local Government Bill, and a detail in the Criminal Justice and Court Services Bill, presently before Parliament;
- implementation of the Human Rights Act 1998 from 2 October 2000; and
- the Government's proposals for further legislation in the present Session as set out in the consultation document *Special Educational Needs and Disability Rights in Education Bill* (March 2000).

The book is primarily written for: LEA education, legal, and administrative officers and other senior managers, whether employed or consultant; LEA elected members; students of education, education management (whether or not they are enrolled on those enlightened management courses which include the law of education) and local government; school heads, governors and teachers; OFSTED's inspectors in England (who already have in *School Inspection: A Guide to the Law*, September 1999, a clear and mostly accurate outline) and Estyn's in Wales; and national politicians and administrators: anyone, in short, who is interested in the sometimes complex answers to the question "What is the LEA for?"

The question and therefore the answers attempted here are highly topical. Ministers have agreed with critics of the system of local government finance that the machinery is too imprecise to direct resources to the achievement of specific national objectives in schooling. The Government's proposals for local learning and skills councils (LSCs) in England (see Chapter 10 and the

summary of effects of the Learning and Skills Bill) claim that LEAs will have a key, though it seems largely professional, part to play in the new system, but others see the local LSC as a model to replace the LEA (e.g. a source close to [sic] a project funded by the Institute of Public Policy Research; see Peter Kingston: "Local authorities to go?", *The Guardian*, 29.2.2000). And other think-tanks are reportedly about to make proposals for new ways of doing things or new structures intermediate between the partially self-governing maintained school and the Department for Education and Employment or National Assembly for Wales. The Education Action Zone was described by the then Minister of State at DfEE as "the test-bed for the school system for the next century" (Commons Committee *Hansard* on the School Standards and Framework Bill, 7th sitting, 3.2.1998, col 244). And the previous administration had harboured similar ambitions for the grant-maintained schools initiative (e.g. *Self-Government for Schools* (Cm 3315) (1996)). Other relatively new bodies on the educational landscape, such the various other forms of "partnerships" have all been seen, in speculative comments even by Ministers, as replacements for the LEA.

This book, written by people with first-hand knowledge of the law governing LEAs, seeks, without obviously taking sides, to inform what should be an educative and constitutional public debate, by analysing what LEAs do. It also gives some description of good practice in areas where statutory obligations or Ministerial expectations are broadly drawn, and a whole nexus of subtle working relationships with corporate partners and corporate or individual clients has had to be woven to make workable the systems of planning or funding, say, or of responding to social or educational need.

The book is a replacement for, but on a much larger scale than merely a new edition of, the 1994 EMIE monograph *The Functions and Roles of Local Education Authorities*. That ran through several reprints but was quite quickly overtaken:

- by statutory change, in the consolidation of many Education Acts on schooling and fewer on inspection in the Acts of 1996, and by new legislation, in 1997 and 1998, the School Standards and Framework Act of the latter year being followed by a deluge of statutory instruments; and
- through case law, by a growing body of judicial decisions, particularly by way of judicial review and through actions in negligence.

The 1994 study was in part aimed at supplying a concise description of LEAs' functions, as interpreted through their styles of operation, at a time when local government was itself under review, and authority boundaries were being redrawn without any significant public examination of the reasons why the councils had been given, in the course of more than 150 years, particular services to run, secure, or provide for. Nor was there much public debate about

the desirable portfolio of services for which a particular council *should* be responsible. That process of review, however, is over for the time being. It has added half as many again to the number of LEAs in England, and, through direct legislation, more than doubled the number of LEAs in Wales. And the National Assembly for Wales, with, among other powers, that of making subordinate legislation over many areas of education, has started its work, adding to the catalogue of divergences between statutory provisions within the one jurisdiction.

The issues today are more about the nature of services such as education, and about the aspirations of local government, within two countries of the kingdom and within the wider (and arguably more sympathetic) European Union, to promote the well-being of their areas and communities through policies embracing education among many other aspects of cultural, economic and social life.

This book, although providing an analysis of the duties against which LEAs will be inspected, is not just a response to OFSTED's *LEA Support for School Improvement: Framework for the Inspection of Local Education Authorities*. It is, instead, intended to provide a comprehensive overview of the powers and duties of LEAs with the aim of informing current practice and acting as a source for the continuing debate on the future role of LEAs. It also recognises that challenges to LEAs come not only from central government and OFSTED; the courts have arguably exerted as much influence over educational practice in recent years as the politicians. Nor are the challenges always on educational grounds: the Human Rights Act 1998 provides a good example of how the work of an LEA may be affected by decisions wholly outside its area of operation. For this reason, the authors have adopted a different and broader approach to the categorisation of the objectives and functions of LEAs than that used by the DfEE and OFSTED. This should not be seen as implying criticism of their categories, although they may be seen as underplaying the role of the LEA in certain key areas, but as an attempt to invite readers to look beyond their confines when examining and scrutinising the evolving operational and philosophical role of the LEA.

The main writer is Simon Whitbourn, Principal Solicitor, Hampshire County Council, with Keith Mitchell, Director of Education, Durham County Council, and Dr Robert Morris, Editor of *The Law of Education Bulletin*. (Simon Whitbourn and Bob Morris are members of the editorial team for the *Bulletin* of the Education Law Association.) The book is edited by Bob Morris. Specially included is an annex reprinting a recent essay on Ministerial guidance, by Kenneth Poole, solicitor, lately of the editorial triumvirate of Butterworths' *The Law of Education*, the standard textbook.

The authors have been assisted by an advisory group of experts (some of whom have contributed directly to the text) comprising David Bateson, Education Officer, Legislative Support, Essex County Council, John Fowler, Deputy

Head of Education, Culture and Tourism at the Local Government Association, Chris Waterman, General Secretary of the Society of Education Officers and David Whitbread, lately the LGA's Head of Education.

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All those colleagues responded constructively and at short notice; and some have even contributed substantial amendments, which have, wherever possible, been incorporated in the text.

Responsibility for errors in and omissions from the text remains, however, with the authors and editors.

Expressions of opinion are those of the writers and must not be imputed to the National Foundation for Educational Research or the Education Management Information Exchange.

This work is intended to be informative and helpful. It does not, however, purport to give legal guidance or to offer any authoritative interpretation of the law. *Caveat lector.*

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1. THE BIG PICTURE

1.
THE BIG PICTURE

A. Education

"If we are to hold LEAs to account for their performance, we owe it to them to ensure that they have a clear job description and the tools to do that job." (DfEE, 1997)

The role of the Local Education Authority is complex and varied, encompassing many separate roles, and often expressed by different terms – duties, powers, functions, obligations and expectations. Some of these roles are longstanding and, despite a decade nationally of revisionism almost to the point of reticence, continue in place both in law and in practice. Others relate to, and build upon, the need to promote and secure educational improvement in schools and other educational settings in the local area. Others are the product of a new national aspiration for the renewal of local strategic and inclusive activity, in education and other fields.

The new role

"LEAs will take on a more strategic role ... but will have a vital overall responsibility for ensuring that Local Management is effective in delivering better education." (DES, 1988)

"The Government sees a significant continuing role for LEAs ... Their role should be to provide those services and undertake those functions which schools cannot carry out for themselves and which no other agency is better placed to carry out." (DfEE, 1996)

"This new constructive role will replace the uncertainty from which LEAs have suffered in recent years." (DfEE, 1997)

"As the 1990's progressed, the limitations of a school-driven model of education without a clear and complementary LEA role became increasingly apparent." (Audit Commission, Held in Trust, 1999)

The roles and functions of the Local Education Authority – and the perception and understanding of those roles and functions – have been subject to a long period of detailed scrutiny and significant change, as the above extracts confirm only too clearly. A decade of ambivalence,

challenge and reductionism has been followed by a change of Government bringing a new agenda and setting in hand a process of reformulation and clarification. In the same period, the Audit Commission's analysis has moved through a developing perspective from *Losing an Empire, Finding a Role* (1989) to a clear and confident conclusion that the role of the LEA is necessary, albeit likely to be markedly different in future from the past.

That process of significant transition is still happening, and it seems clear that, in an educational world which is everywhere affected by change and the prospect of further change, that evolutionary process will be subject to further evolution towards an ultimate position which cannot safely be categorically defined at present.

It is clear, however, that the picture of the LEA that is portrayed in Government documentation of the previous decade is largely anachronistic, pre-dating as it does the new school-improvement model, the end of the grant-maintained experiment, the powerful social inclusion and lifelong learning agendas and the renewal of local democracy. Despite an original intention to do so, the Government has not yet set out a full, and fully modernised – or, at any rate, an easily accessible and comprehensive – LEA 'job description'. In fairness, DfEE did seriously consider the "job description" project. The main problem was that a simple restatement of primary and secondary legislation would have been superfluous but anything significantly departing from that would not have been legally robust. In these circumstances, it is hoped that this paper will provide an accurate and serviceable guide to the present as well as helping to inform the continuing process of evolution and development that lies ahead. DfEE may wish to recognise it as a proxy for the LEA job description.

It is possible to analyse and define the LEA's role by various models, but this chapter argues that there are seven major roles, ranging from strategy and policy to detail and pragmatism, and from maintenance and monitoring to raising standards and continuous improvement, as shown in Figure 1.

1. The overall local authority role

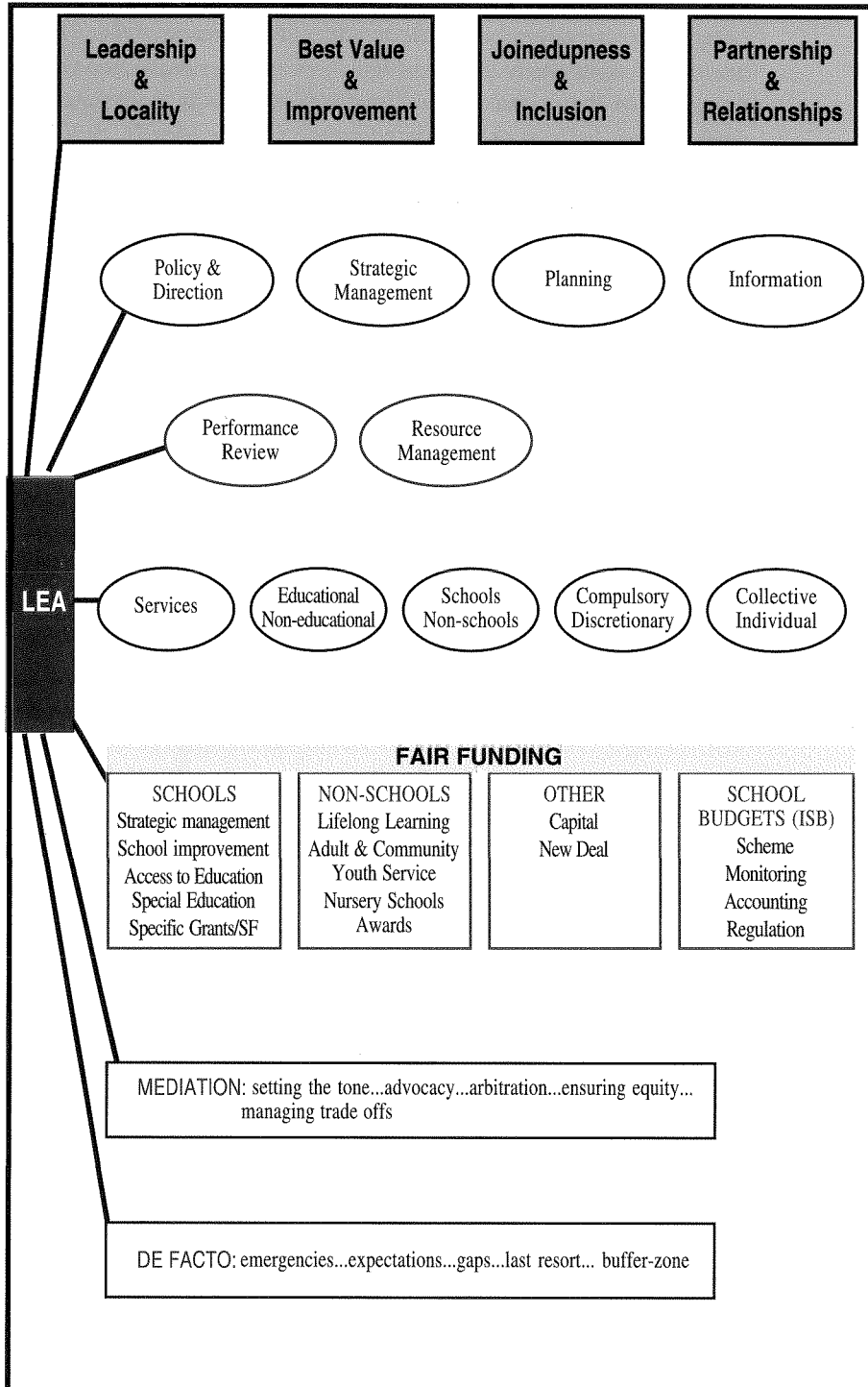
Leadership and Locality

Best Value and Improvement

Joinedupness and Inclusion

Partnership and Relationships

Figure 1. The overall local authority role



“Community leadership is at the heart of the role of modern local government. Councils are the organisations best placed to take a comprehensive overview of the needs and priorities of their local areas and community and lead the work to meet those needs and priorities in the round ... The Government intends to ensure that councils are truly at the centre of public service locally, and they are able to take the lead in developing a clear sense of direction for their communities and building partnerships to ensure the best for local communities.” (Promoting the Well-being of Communities, (1998), 8.1 and 8.7)

“A Best Value authority must make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness.” (Local Government Act 1999)

“The LEA’s task is to challenge schools to raise standards continuously and apply pressure where they do not ... [A]n effective LEA will challenge schools to improve themselves, ready to intervene where there are problems, but not interfere with those schools who are doing well.” (White Paper, Excellence in Schools, 1997)

“The Government intends to introduce legislation to place on councils a duty to promote the economic, social and environmental well-being of their areas and to strengthen councils’ powers to enter into partnerships.” (Promoting the Well-being of Communities, 8.8)

“Effective local partnerships are fundamental to the success of councils’ strategic role... To remove this uncertainty the Government intends to provide councils with clear discretionary powers to engage in partnership arrangements for the bodies, organisations or agencies that operate locally for any purpose which supports their functions, including the function of promoting the economic, social and environmental well-being of the area.” (Promoting the Well-being of Communities, 8.21, 8.23)

“Trust...includes building a mature relationship based on mutual respect.” (Held in Trust, para 19)

The national thrusts in the direction of local renewal, improved standards and outcomes, inclusion and partnership are key elements of the overall local authority role within which the LEA function is set.

2. The authority's overall role as LEA

Policy and Direction

Strategic Management

Planning

Information

"Setting the direction of the local education system by establishing a consensus of view, articulating and communicating a vision for the education service and delivering its policies and practices." (Audit Commission, *Held in Trust*, para 54)

"The LEA's strategic management provides the foundations for success in the quality of the leadership that it offers, the clarity of its strategic direction and vision, the tone that it sets in its LEA-school relationships, and the skilfulness with which information is disseminated and communication channels managed... This area of LEA activity is perhaps that most intangible and difficult to measure but its importance means that it cannot be overlooked." (Held in Trust, para 21)

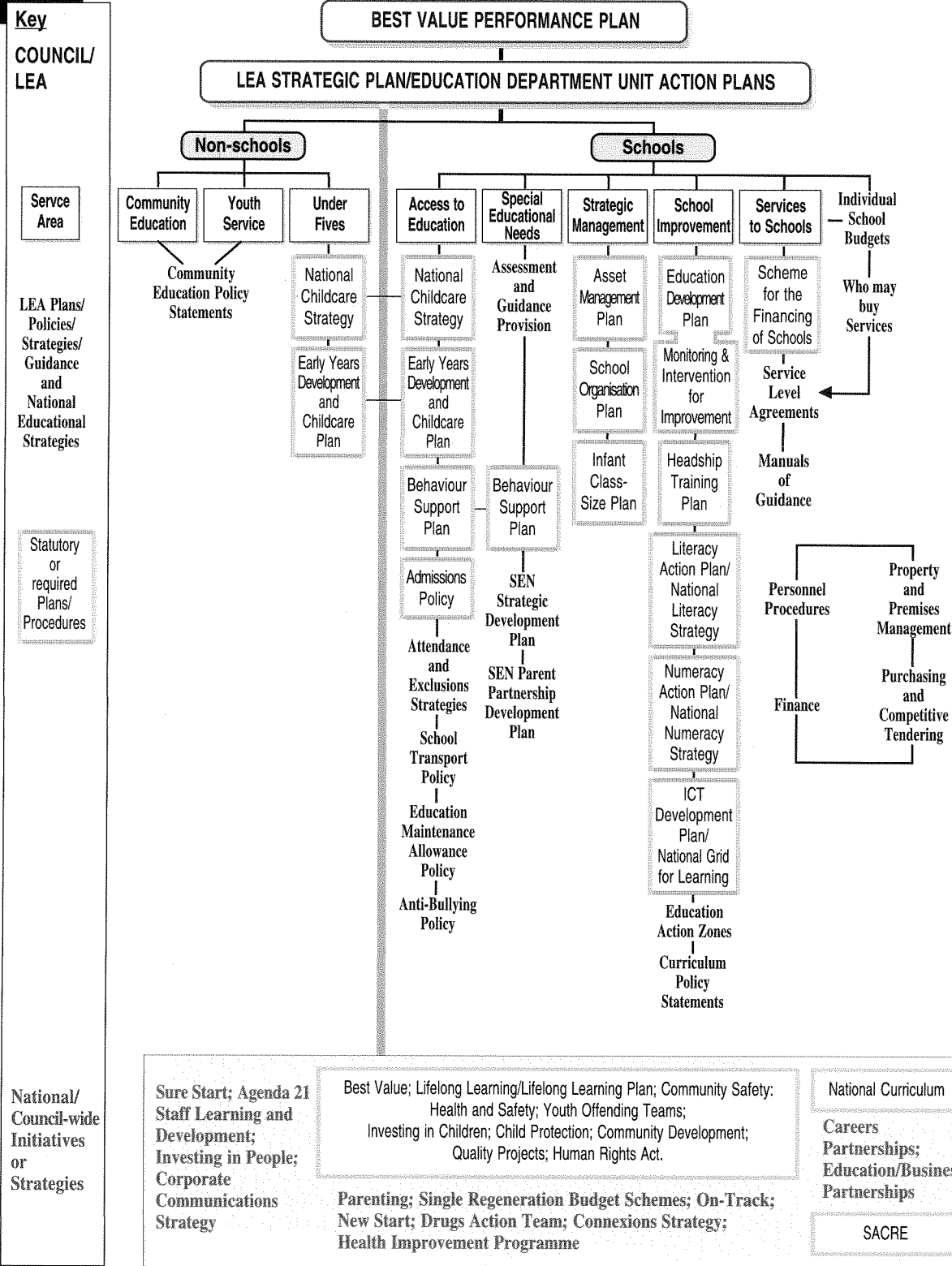
- "The growing importance of cross-cutting issues, such as social inclusion and regeneration, also draws on the LEA's management capacity." (Held in Trust, p. 22)

"Information is the life-blood of an LEA. Without it, none of the other LEA processes can operate effectively." (Audit Commission, *Changing Partners*, p. 27)

A key part of the LEA's overall role is to manage the planning process for the locality and to relate that to wider regional and national agendas, both educational and otherwise. The Audit Commission's report, *Held in Trust* (exhibit 17), helpfully and clearly showed the "different plans and initiatives that have to be developed and integrated", listing some 12 strategic plans ranging from the LEA's own strategic plan to the Education Development Plan, Lifelong Learning Plan and others, to which is added the Best Value Performance Plan (BVPP). A footnote points out that this does not include plans required in respect of wider local authority responsibilities, for example the Children's Services Plan, drugs strategy, crime and disorder reduction strategy, to which now must be added Youth Offending Team strategic activity. That picture, updated and expanded to incorporate all the strategic plans and planning processes which LEAs need to carry out, is shown in Figure 2.

The role of the LEA also includes a significant responsibility to provide information both within the Education Service and outside it, locally and beyond local boundaries. This book includes, in Chapter 6D, an annotated summary of the information duties on LEAs.

Figure 2. Strategies and Plans



3. Performance and resource management

Performance Review

Resource Management

"Setting policy, and getting resources in a manner that reinforces it, are key to the development of an effective local system of education. Yet the loop would not be complete without performance review." (Held in Trust, para 76)

"...LEAs are in a powerful position to influence and shape the provision of educational services; effective resource management is key to ensuring that this money is wisely spent." (Held in Trust, para 63)

The continuing role of LEAs is usefully clarified and confirmed as a result of the Government's *Fair Funding* settlement, and the application of the Best Value regime brings further changes and duties. The exercise of these functions in future not only against the tests of economy, efficiency and effectiveness, but in an explicit context of improved educational standards will be particularly challenging.

4. Services

"... LEAs also have other important functions, including services to schools, SEN, lifelong learning, planning school places and home-to-school transport. These other activities currently account for over 90 per cent of the expenditure retained by LEAs." (Held in Trust, para 98)

"A wide range of services is involved, including finance, personnel, curriculum support and premises-related services such as building maintenance and cleaning." (Held in Trust, p.28)

"... LEAs also have an important and direct part to play in meeting the needs of individual pupils... LEAs have a direct and statutory responsibility for nearly one-quarter of a million children with SEN statements." (Held in Trust, para 44)

It remains a duty of LEAs to make provision, or to secure the provision, of appropriate services for schools under Section 13 of the Education Act 1996 and in accordance with the wider powers of local authorities by virtue of s. 1(1) of the Local Government Act 1972. In regard to special educational needs, the main provision is s. 321 of the Education Act 1996. It is important to recognise the statutory requirements that schools should have access to appropriate services, and the Best Value framework specifically requires that access to reflect relative need and local circumstances.

It is often assumed, wrongly, that all services are of the same standing. Some are necessary or required; some are highly desirable, some

optional; some are educational, some not. Some services are best, or sensibly or by general consent, provided collectively for reasons of accessibility, equity or economy of scale. It seems clear that schools and others should be able to continue to use LEA services where they wish to have access to integrated services, in a Best Value context, within a framework of trust, partnership and continuous improvement.

5. Fair Funding

Schools

Non-schools

Other

Schools' Delegated Budgets

The strategic and overall responsibilities of LEAs, as indicated above, are reflected now accurately and specifically in the *Fair Funding* settlement. That settlement gave emphasis also to non-school funding, and it should be emphasised that it is precisely this latter category which encompasses the wider ranging aspects of the Government's agenda and the local authority role, focusing on Lifelong Learning, strengthening of communities, social inclusion, educational cohesion and a joined-up approach to the world of schools and beyond schools. The Standards Fund (as it is now called in England: Grants for Education Support and Training in Wales) remains a major element of Government and LEA activity, and one specifically targeted on Government priorities. The treatment of capital funding remains an LEA responsibility within the *Fair Funding* methodology. It should also be added that the LEA retains significant duties and responsibilities with regard to the funding delegated to schools, including allocation, monitoring, accounting, regulatory and audit functions, in addition to the continuing fiduciary responsibilities of the LEA's treasurer.

6. Mediation

Setting the Tone

Advocacy

Arbitration

Ensuring Equity

Managing Trade-offs

"... [T]here are many issues concerning the management of education that cannot reasonably be undertaken at a national level – either because of the sheer volume of decisions required or because of the need for in-depth local knowledge." (Audit Commission, *Changing Partners*, February 1998)

"The view of the Secretary of State for Education and Employment that 'if LEAs did not exist, we would have to invent them' may well

*have arisen from years of experience in resolving a myriad of problems around school admissions, exclusions, home-to-school transport arrangements, school reorganisations, arrangements for pupils with special educational needs, student awards, etc – many of which arise from conflicts between the interests of one party and those of another. Such problems cannot be solved fairly within an individual school (since the school is often one of the parties in conflict); nor would it be practical to tackle them in Whitehall or Westminster.” (Audit Commission, *Changing Partners*, p.13)*

1.
THE BIG PICTURE

The role of the LEA as an intermediate local body for resolving systemic or institutional or individual conflicts is longstanding, well used, and, according to the Audit Commission, necessary and desirable. The role includes mediation in a general sense, namely providing a body that is perceived as sub-national, sub-regional, and supra-school, which is capable of considering competing interests and striking a balance on the basis of fairness and local need. The role includes both being proactive and reactive, that is to say setting a tone and a climate within which potential disputes can be resolved before or as they occur as well as after the event.

The need to ensure equality in a local area has been, and remains, an important LEA function, particularly during periods when relative inequality has worsened, and includes attention to the cross-cutting agenda and issues of the greatest controversy. In any complex system, there will be a need to manage the tensions and difficulties that inevitably occur. This is activity which often does not make the headlines – indeed, the greater the invisibility, the greater the likelihood of success – but it is a role which any analysis of structure and any experience of reality would confirm as of significant importance. A well-known example relates to complaints against schools: many of these complaints, strictly in terms of local management, would be dealt with at school level but expectations in the local community seek, and indeed demand, the involvement of the LEA. This is even to an extent the case with colleges of further education, where local elected members remain a conduit for complaints even though LEAs ceased to be responsible for maintaining colleges in 1993.

7. The *de facto* role

Emergencies

Expectations

Last Resort

Buffer Zone

Any comprehensive and complex system, however well designed, has gaps and produces unforeseen or emergency situations. The *de*

and can by definition – except in high-profile emergency situations – escape notice or proper recognition. Emergencies of such severity that they exceed or exhaust the capacity of the individual school or other partner to handle, including school fires, security and health and safety, are obvious examples. Gaps in any system often involve the handling of individual cases or difficult minority groups, often at the margins of formal provision and often at the intersection of various statutory or practical obligations by various bodies. Much LEA provision has grown up in this way, subsequently being incorporated in statutory provision, for example, that now referred to as Pupil Referral Units, and education otherwise than at school provision more generally. Such activity often merges into what may be called duties or obligations of last resort, where no other partner is willing, or in a position, to handle matters, or where circumstances do not clearly fall into the remit of any one agency.

A clear role of LEAs throughout their history, and one which certainly continues today, is to act as a local buffer between national direction or expectation and local or institutional capacity to respond. A recent example is the target-setting mechanisms established under the School Standards and Framework Act 1998. Because the LEA is a locally elected and accountable body, there is also a constitutional and political “buffer” role, as for example in the distribution of Government grant and the annual debates on Standard Spending Assessment or so-called “passporting” (ensuring that money specified by Government is duly placed in the Individual Schools Budget). Another recent example relates to school exclusions, on which, although LEAs do not exclude pupils and where Parliament has at the same time removed the previous LEA power to direct the reinstatement of an excluded pupil, the Government has determined to monitor, set targets and publish data for school exclusions at LEA, not school, level.

B. The Synergism of Local Government: the LEA as Corporate Body

The LEA

The character of the LEA as a corporate body of (primarily) elected members is crucial to its broad legitimacy and the pragmatic discharge of its role. The very term “local education authority” and its abbreviation have been common currency in the public education service since the Education Act 1902 abolished school boards and conferred education functions on county and county borough councils.

In this context, it is relevant to ask why the nominally parallel terms “local social services authority” and “LSSA”, or “local housing authority”, have not caught on in statute or common parlance. “LEA” as a statutory term of art is both helpful and unhelpful: its positive character is to emphasise that it is precisely the *authority*, the county (or, if appropriate in Wales, county borough) council, unitary district council, London borough council or the Common Council of the City of London, that has the duty to “contribute towards the spiritual, moral, mental and physical development of the community” (s. 13 Education Act 1996). “LEA” is an unhelpful appellation where it seems to connote separateness, so that the citizen may refer to the “LEA” as something other than the council, or to the chief executive or county or borough treasurer as outside the LEA, rather than being – as they are – colleagues of the chief education officer, all in the service of the LEA.

Despite, or perhaps because of, its familiarity in education, “LEA” has often been overlooked as simply a statutory term to denote a principal council in exercise of functions under the Education Acts and other relevant legislation, detracting from the fact of the council as a multi-service authority and the aspiration (at least) for it to be for its area something more than the sum of its service parts.

What the linguistic philosopher knows as referential opacity is in part the fault of the legislators. As early as 1944, Beattie and Taylor, in *The New Law of Education*, criticised the new Education Act’s repetition of old terminology. The LEA, if satisfied that any of its pupils “...is suffering from a disability of mind of such a nature or to such an extent that he will...require supervision after leaving school, shall...issue to the local authority for the purposes of the Mental Deficiency Act 1913...a report...” (s. 57(5)).

The commentators drily remark that “...the report to be issued under this subsection will normally be given by the authority in one capacity to itself in another capacity”. Such linguistic contortions remain, however in the Act – see, for example, s. 322 of Education Act 1996, consolidating new provisions from the Act of 1993.

Collaboration

In theory and in best practice, there is much to be gained from close collaboration across local authority services. The reliance of education planning on town and country planning is obvious, most clearly so in the linkage between housing development and the provision of new school places. Education and leisure services have much in common, whether they are actually combined in one department or – at the other

the linkage between housing development and the provision of new school places. Education and leisure services have much in common, whether they are actually combined in one department or – at the other extreme – engaged in constant warfare over ownership of the library service, adult education or youth and community work.

Some collaboration of education and social services is required by statute, such as:

- s. 27 of the Children Act 1989 (inter-authority cooperation) and s. 28 (consultation with LEAs on looked-after children) – though, on the latter, it is sad to note the comment of HM Chief Inspector of Schools (England) in his *Annual Report 1998-99*, at para 402:
“Effective provision for these children depends crucially on liaison between education and social services. This is still rare, but awareness of the need for it is growing...”;
- s. 5 of the Disabled Persons (Services, Consultation and Representation) Act 1986 (disabled persons leaving special education); and
- s. 322 of the Education Act 1996 (special educational needs: duty of health or local [social services] authority to help LEA).

Other collaboration might be regarded as either a matter of common sense, such as that between education welfare officers (or education social workers) with colleagues in social services departments to support children of families with social needs, or as a manifestation of the present Government’s laudable, if patronisingly-labelled, concept of “joined-up government”.

Inter-LEA collaboration is also a matter of common sense, though the format in which Parliament has created self-contained local authorities has been somewhat of an obstacle. But – to take examples from the most recent tranche of local government reorganisations – the Berkshire Education Literacy Service maintained by the former County Council’s successors and the close collaboration between unitary Telford and Wrekin with Shropshire County Council have received favourable publicity.

Greater than the sum of the parts

The LEA is part of the elected and democratically accountable council. It is subject to the constraints (such as the system of local authority finance, or the doctrine of *vires*) and open to the opportunities (such as:

scrutinising of all exclusions from school (HMCI, *op.cit.*, para 399)) offered by local government. Subject to the statutory duty to secure Best Value (Part I of the Local Government Act 1999) in its services, it has recourse to considerable legal, financial, personnel and managerial expertise, largely in-house. Its accountability locally is underpinned not only by the statutory demands of audit and probity, but also in the public political debate about priorities and through its own public relations capacity.

A borough or other unitary LEA is well placed to develop civic consciousness across an identifiable community; a county LEA has the advantages of size and economies of scale also available to the larger city LEAs. The inclusive, corporate role has lately gained renewed support from Ministers: see their comments in (especially) the sections headed “The overall local authority role” and “The authority’s overall role as LEA”, above. And there is practical evidence of Government support, through the present Local Government Bill.

Part I of that Bill is a response of demands by councils and their representative associations over many years to have greater scope to exercise discretion. Though the Bill retains the concept of *vires*, the implied limitation of activity of the public authority to functions expressed or implied by statute, local authorities’ existing *vires* are to be widened. Powers under s. 137 of the Local Government Act 1972 (permitting, within capitation limits, expenditure in the interests of their areas) are to be largely replaced by a duty to act according to what the council considers will promote the economic, social and environmental well-being of their communities. Time – and the readiness or otherwise of Ministers to order amendment, revocation, repeal or disapplication of constraining legislation – will show how imaginatively the new powers will be exercised. In view of the great legislative changes which education has undergone in recent years, and the commitment of Ministers to direct responsibility for the delivery of policy objectives in schooling, it seems unlikely that the Education Acts and their subordinate legislation will themselves be significantly altered by decisions taken under the prospective legislation. There could, however, be initiatives involving LEAs’ education services in, say, cultural, sporting or recreational developments led by the councils acting on their widened discretion.

And yet...

In matters of school effectiveness, assessment of and response to special educational needs, school attendance, funding methodology and the maintenance of the teaching force, there are signs that LEA

officers may increasingly be treated as if they were the branch managers of the central department. Elected members are at the same time at risk of being:

- a) corralled into supervising, publicly auditing, and being first-stage investigators of complaints about, the work of their employees; and/or
- b) excluded from financial decision-making which in their view meets local needs but which, in the view of Ministers, results in unacceptable variations in quality of provision from one area to another.

This process turns local authority into local office, and a tier of governance is unobtrusively removed from the polity. As the Chairman of the Local Government Association wrote in *The Guardian* (31.3.2000):

“The belittling of the role of local councillors by government is not confined to local funding decisions. Their role in leading local communities and representing the interests of their constituents is also under concerted attack.”

(Cllr Sir Jeremy Beecham: “Warning shots from the front line”)

There are, of course, perfectly legitimate questions about the suitability of a system of local government as reformed in substance – as distinct from structure – in the nineteenth century to exercise responsibility for some of the great public services (such as schooling) and institutions dedicated to enhancing the quality of people’s lives (such as adult education institutes) on the threshold of the twenty-first.

Undeniably, there have been changes:

- new forms of participatory democracy have been inserted into the public education service: most notably, school governing bodies statutorily include parent and worker representatives, and seek to embrace people from the wider community;
- accountability has been sharpened by the transmogrification of HMI into OFSTED and Estyn (though HMI themselves are preserved within both; on the names, see Chapter 2, item 15), the work of the Audit Commission and its extension from basic audit to the promotion of good practice, the work of the Commission for Local Administration, the refinement by the courts of judicial review of administrative action (see Chapter 11), and the whole apparatus of assessment and league tables of performance; and more is on the way: the Local Government Bill proposes for

England a Standards Board with investigatory powers and for Wales a further extension of the duties and powers of the Ombudsman;

- society itself has changed, in part through technological change which has brought about new accountability through new and fast forms of communication;
- there has been increasing recourse to litigation (much of it assisted by the availability of legal aid to children deemed to have *locus standi* in education cases), both by way of judicial review and through actions of negligence (see Chapter 11);
- though the pace of constitutional reform has been slower, the state is now part of the European Union, law, with domestic effect, is made and interpreted outside the kingdom, and – again, in progress measurable *per decennium* rather than *per annum* – international law is being imported directly into the domestic judicature, as through the Human Rights Act 1998, fully in force from 2 October 2000;
- Wales has acquired a directly elected Assembly, with two Secretaries for Education, one for Education and Children and one for Education and Training (though a democratic tier of government has yet to be established for any region in England); and
- questions about the fitness of an essentially nineteenth-century institution to discharge the duties in, for example, ss. 13 (general responsibility for education: efficiency) and 14 (primary and secondary education: sufficient schools) of the Education Act 1996, are indeed urgent as well as legitimate and timely.

The problem is that the basic questions are rarely addressed, whereas change, for better, worse or to no demonstrable effect, goes on. The reforms in the Local Government Bill are designed to meet some of the wishes of advocates of more generally powerful local government, though stopping short of substituting a power of general competence for a narrow interpretation of *vires*. On the negative side, as local government apologists would see it, local authorities are used as agencies of central government and the servants of national policy.

It is salutary to recall that the downgrading of the political and the emphasis on the professional at local level by national government is not new. Alan Alexander's chapter in Loughlin, Gelfand and Young's *Half a Century of Municipal Decline 1935-1985* (1985) took a historical perspective on the tendency in legislation from the middle of the nineteenth century onwards to specify the appointment of certain

officers: "The bureaucratic urge for control is characterised by a desire for uniformity which, in itself, is a form of centralisation in that it deprives local authorities of important kinds of discretion" (p. 68). And: "By reducing the contribution of local politicians and increasing that of professionals whom local politicians were bound to employ, this obligation contributed to a uniformity that was conducive to centralisation and control" (p. 69).

An analysis, such as the present work, of the legalities of the functions and roles of LEAs throws up examples of a profound ambiguity about what the LEA *is*, as well as problems over what it is for.

Indeed, at the North of England Education Conference in January 2000 at Wigan, in answer to a questioner who "sensed a profound ambivalence on the part of the Government to LEAs", the Secretary of State issued what became known as the "Wigan challenge":

"It seems to me that it is asking people to redefine their role. I repeat what I have said on previous occasions at the North of England Conference and elsewhere: if education authorities did not exist, we would have to invent them; but we would not invent them in the guise of 1988 or 1992, or even 1998. We would invent them for the coming century. The challenge is not to whine about what has been done by central Government, but to get up and show what education authorities can do in that task, as many of them are doing, with great esteem, recognised by the inspection process, in transforming the life chances of children, rather than turning the service in on itself."

In May 2000 at The Education Network's conference on "What makes a good LEA?", the Secretary of State restated the challenge:

"The question we have to ask ourselves is not whether an education authority should exist – I have said before that if we didn't have authorities we would have to invent something similar. Rather, it is in what form and for which century? What functions have to be carried out by the education authority itself?"

"Over the last ten years we have seen the introduction of the National Curriculum, national assessment and testing, local management, fair funding, the development of the inspection system, and of course the major drive on standards and the implementation of the 1998 School Standards and Framework Act.

"Taken together with the renewed emphasis on equality and intolerance of low standards, it is surely time to address the changes needed for the service of tomorrow."

Mr Blunkett then proceeded, significantly, to put some flesh on the bones:

“Councillors play a vital role in the success of Local Education Authorities. Good, strong and committed leadership in education is vital in raising standards in schools. The new role in overview and scrutiny that many councillors will have will bring more transparency and accountability to local decision-making.

“Local Education Authorities have a duty to promote high standards. What is emerging clearly is that successful Authorities – those that continually improve education standards, challenge and support poorly performing schools – have a chief education officer and senior management personally committed to raising standards and councillors with a firm commitment to education.”

In its notes to the Secretary of State’s speech, the DfEE text had emphasised:

- Through the School Standards and Framework Act 1998, the Government has given the LEA a new, clearly defined role. Whilst the responsibility of a school’s performance rests with the school, the LEA should challenge, support and intervene where necessary. The LEA also provides strategic management and an infrastructure within which schools can work.
- Through Fair Funding, the Government has given the LEA four key roles: school improvement, access for pupils, support for pupils with special educational needs and strategic management. This allows the LEA to support its schools in the delivery of education.

The Secretary of State in his speech expanded on this formula when he said that:

“Education authorities must have clear objectives:

- *school improvement;*
- *fair access, preference, use and maintenance of key assets, information and parental support;*
- *support and intervention for those with special or specialist needs – special educational needs, gifted children, work with those who are alienated;*
- *strategic management – of learning, of personnel and occupational health and in ensuring coherence in the development and investment in ICT.”*

“But to make this happen,” he added, “we have to give support too.” That message is a timely reminder of the need, as he put it, for “genuine cooperation...schools working with schools, schools with community, and schools and LEAs working together with Government to raise standards.”

Mr Blunkett’s speech “More Spending Power for Schools and Less Red Tape”, DfEE press notice 247/00 of 1 June 2000, with elaborate explanatory notes, showed a harsher view of LEAs; it is discussed in Chapter 6D, below.

Perhaps, then, two conclusions stand out in all this: that LEAs (or something similar) must and will continue to exist and that they must and will continue to change. This is a prescription by no means confined to LEAs in today’s ever-changing educational world but, for LEAs, the Secretary of State’s insistence on “change for a purpose”, on support, genuine cooperation and partnership is a message that is welcome and overdue. Perhaps the real challenge now is for all the educational partners to engage in that process constructively and in true partnership and, above all, with an up-to-date and properly informed understanding of the respective contributions which each partner can make to secure the best education service that the nation can afford and that all our children deserve.

2. THE STRUCTURE OF EDUCATION

A Brief Introduction to Education Organisations and Providers

2.
THE STRUCTURE
OF EDUCATION

Education is notorious for its jargon, though possibly less so than the legal profession, and a newcomer to the field may well be confused by the number and nature of bodies which have a role to play in educating pupils and students in this country.

Even those experienced in educational administration may at times wonder at the proliferation of acronyms and mistake an EAF for an EAZ or their GTC for the TTA.

For this reason it was felt that a brief introduction to the main players in the world of LEAs would be of assistance to readers. All will be covered in more detail later in this book, but for the mean time a brief summary of the organisations and individuals likely to be encountered by those working in or with LEAs is provided below.

1. Secretary of State for Education and Employment and Department for Education and Employment

The Secretary of State (constitutionally undifferentiated: to be read not only as he or she as appropriate but also as Education & Employment, or Wales) is under a duty to promote the education of the people of England and Wales (s. 10 Education Act 1996). He must exercise his statutory powers in respect of those bodies in receipt of public funds which:

- a) carry responsibility for securing that the required provision for primary, secondary or further education is made (i) in schools, or (ii) in institutions within the further education sector in or in any area of England or Wales or
- b) conduct schools or institutions within the further education sector in England and Wales,

for the purpose of promoting primary, secondary and further education in England and Wales (s. 11(1)).

In relation to the further education sector, he must exercise his powers with a view to (among other things) improving standards, encouraging diversity and increasing opportunities for choice (s. 11(2)).

Those then are the Secretary of State's general duties. As will be seen from the repeated references throughout this book, the Secretary of State carries out these duties by exercising wide regulation-making powers in respect of most, if not all, LEA functions and by providing guidance or advice to LEAs in a variety of ways.

In four cases, the Secretary of State is required to produce statutory Codes of Practice: the *Code of Practice on the Assessment and Identification of Special Educational Needs* (s. 313 Education Act 1996), the *Code of Practice on School Admissions* and the *Code of Practice on School Admissions Appeals* (both under s. 84 School Standards and Framework Act 1998) and the *Code of Practice on LEA-School Relations* (s. 127 School Standards and Framework Act 1998).

Under the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, by far the larger part of the education functions of the Secretary of State were transferred to the National Assembly for Wales. Readers with an interest in not only educational administration in Wales but also its possible implications for future regional government in England and its actual impact on the jurisdiction known as England and Wales should check the references hereafter to the Secretary of State's functions. For example, statutory instruments may issue from the Assembly or, as in the case of the Education (School Government) (Wales) Regulations 1999, SI 1999/2242 (W.2), jointly under interlocking powers of Assembly and Secretary of State for Wales.

2. Local Authority

Local authorities are incorporated bodies established under Acts of Parliament, but principally the Local Government Act 1972. They consist of county councils, district councils (metropolitan and non-metropolitan), county and county borough councils in Wales and London borough councils. In addition, there are small parish councils and, in Wales, community councils with comparatively few resources and responsibilities. The names of some councils (for example, district councils known as borough councils) can at times confuse the situation, but the categories set out above are an exhaustive list of the local multi-purpose councils which exist in England and Wales today.

The functions of these different types of local authorities differ widely and, in some areas (unitary authorities), one local authority is responsible

for the whole range of principal local authority functions. In others (areas of two-tier authorities), two local authorities carry out the various functions. County councils fulfil the functions relating to, amongst others, education, social services, strategic planning, waste disposal, whilst district councils perform housing, environmental health and local planning control functions.

“Functions”, in the context of local authorities generally, comprise “all the duties and powers of a local authority: the sum total of the activities Parliament has entrusted to it. Those activities are its functions” (per Lord Templeman in *Hazell v Hammersmith LBC* [1991] 2 WLR 372). This point is reinforced by s. 579(1) of the Education Act 1996 specifically in relation to education where it is made clear that an LEA’s functions include its powers and duties (as the word “includes” is used, it suggests that functions can extend beyond that, although where is debatable). Accordingly, a local authority can carry out its functions and also do anything which is calculated to facilitate or is conducive or incidental to the discharge of those functions (see s. 111 Local Government Act 1972).

What then are powers and duties?

In general terms **“a power”** is the discretion given to a public body to do something or not do something. In legislation, powers are usually identified by use of the word “may” as in “the LEA may arrange for [special educational] provision [for a pupil] to be made otherwise than in a school” (s. 319 Education Act 1996). Frequently the exercise of a power is subject to conditions and qualifications and rarely if ever will the LEA have an unqualified discretion. Nonetheless the discretion is one for the LEA to exercise, taking account of all the circumstances and the courts will interfere only if the LEA has acted outside its powers or “unreasonably”.

“Duties” on the other hand are mandatory requirements over, or in respect of, which the LEA has no choice. In legislation, a duty is usually signified by the use of the word “shall” as, for example, in “each LEA shall make arrangements for the provision of suitable education at school or otherwise than at school for those children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them” (s. 19 Education Act 1996). This section imposes a duty on the LEA which must fulfil it even if it does not have the resources to do so (see *R v East Sussex County Council ex p Tandy* [1998] ELR 251). A failure to carry out a duty can be challenged in court or by way of complaint to the Secretary of State and an order of mandamus can be issued forcing an LEA to perform its

duties. (A more detailed discussion of the exercise of powers and duties and the potential for challenge appears in Chapter 11.)

In addition, somewhere between powers and duties are a number of discretionary powers which have become *de facto* duties. A power may become a duty “if prescribed circumstances come into existence or if a failure to exercise a discretion would frustrate a statutory provision” (Kenneth Poole *Education Law* (1988) Sweet & Maxwell, p. 19). These cases normally arise from the administrative law principle that an authority cannot fetter its discretion by adopting over-rigid rules. Thus, if a local authority has a discretionary power, it cannot decide never to use it, but must look at each request for that power to be exercised on its merits. This has been of particular importance in respect of student awards where LEAs had the power to make discretionary awards. The case law established that an LEA could not fetter its discretion by failing to consider a request for a discretionary grant (see, for example, *R v Bexley LBC ex p Jones* [1995] ELR 42 and *R v Warwickshire County Council ex p Collymore* [1995] ELR 217).

As statutory corporations, local authorities can do only what is expressly or impliedly authorised by statute. If they act outside those powers (*ultra vires*) they act unlawfully and may be challenged in the courts or by the district auditor (see Chapter 11).

3. Local Education Authority

Local education authorities (LEAs) are defined by s. 12 of the Education Act 1996. Where county councils exist, the county council is the LEA. In areas of unitary authorities outside London, the unitary authority will be the LEA (or as s. 12(2) says, the LEA for a district in England which is not in a county having a county council is the district council, which means, despite the draftsman’s efforts to the contrary, the same thing). In London, borough councils are the LEAs except in the City of London where the Common Council of the City of London is the LEA for the City. (Being a very small LEA, the City of London is exempted from such statutory requirements as having a SACRE – see item 6 – and from Ministerial expectations such as the establishment of a school admissions forum (item 13).

In Wales, the LEA for a county is the county council and the LEA for a county borough is the county borough council.

4. Chief Education Officer

Each LEA is required to appoint a “fit person” as the LEA’s chief education officer (s. 532 Education Act 1996). The chief education officer, or the person designated as such, is responsible to his or her elected members but, subject to their direction and control, is responsible for the strategic management of the education service within the LEA.

5. Education Committee

Previously LEAs were obliged to appoint an Education Committee of members, voting but non-elected representatives of church interests and co-opted members to discharge the authority’s educational functions. Now such committees are not compulsory, but the authority may appoint such committees wholly or partly for the purpose of discharging any functions with respect to education which are conferred on the authority in its capacity as an LEA (s. 102(1) Local Government Act 1972 and s. 499 Education Act 1996).

Where the education functions are discharged by a committee (and it is not necessary that the committee must include the word “education” in its title), the LEA must arrange for parent governor representatives to be elected on to that committee (s. 9 School Standards and Framework Act 1998, The Education (Parent Governor Representatives) Regulations 1999, SI 1999/1949 and DfEE Circular 13/99 *Parent Governor Representatives on Local Authority Committees Dealing with Education*).

6. Standing Advisory Council on Religious Education

Every LEA is required to constitute a Standing Advisory Council on Religious Education (SACRE) (s. 390 Education Act 1996). Each SACRE consists of a number of groups appointed by the LEA to represent (1) Christian denominations and other religions or denominations of religions which reflect the religious traditions in the LEA’s area, (2) the Church of England, (3) teacher associations and (4) the LEA. In Wales, where there is no established church, there is no counterpart to group (2) for the Church in Wales.

The function of the SACRE is to advise the LEA on such matters as the LEA refers to the SACRE connected with (1) religious worship in community and foundation schools which do not have a religious

character and (2) the religious education to be given in accordance with an agreed or other syllabus (s. 391 Education Act 1996). In addition, the SACRE can determine requests from headteachers of community and foundation schools that the requirement for a daily act of Christian collective worship should not apply to that school (s. 394 Education Act 1996).

More detailed consideration of the role of SACREs can be found in Chapter 3.

7. Schools

A school is an educational institution which is outside the further education sector and the higher education sector. It is an institution for providing (a) primary education, (b) secondary education or (c) both primary and secondary education, whether or not the institution also provides part-time education suitable to the requirements of junior pupils or further education (s. 4(1) Education Act 1996). A number of different types of school exist within the education system: maintained schools (see below), independent schools and non-maintained special schools. Independent schools are schools at which full-time education is provided for five or more pupils of compulsory school age and which is not a school maintained by an LEA or a non-maintained special school (s. 463 Education Act 1996). City technology colleges and the proposed city academies to be established under the Learning and Skills Bill are independent schools for the purposes of the education legislation. Non-maintained special schools are schools which (a) are not maintained schools and (b) are specially organised to make special educational provision for pupils with special educational needs and approved by the Secretary of State under s. 342 of the Education Act 1996 Act.

A **primary** school provides primary education, whether or not it also provides part-time education suitable to the requirements of junior pupils or further education. **Primary education** is (a) full-time education suitable to the requirements of junior pupils who have not attained the age of ten years and six months and (b) full-time education suitable to the requirements of junior pupils who have attained that age and whom it is expedient to educate together with junior pupils within para (a) (s. 2(1) Education Act 1996). A **junior** pupil is a child who has not attained the age of 12 (s. 3(2) Education Act 1996).

An **infant class** is a class within either a primary or infant school which contains pupils the majority of whom will attain the age of five, six or seven during the course of the school year (s. 4 School Standards and Framework Act 1998).

A **secondary school** provides secondary education whether or not it also provides further education. **Middle schools** straddle the primary and secondary age ranges, and are deemed primary if the age range of pupils is wider below than above the age of 11, otherwise secondary. **Secondary education** is (a) full-time education suitable to the requirements of pupils of compulsory school age who are either (i) senior pupils or (ii) junior pupils who have attained the age of ten years and six months and whom it is expedient to educate together with senior pupils of compulsory school age; and (b) full-time education suitable to the requirements of pupils who are over compulsory school age but under the age of 19 which is provided at a school at which education for those of compulsory school age is provided (s. 2(2) and (5) Education Act 1996).

8. Categories of maintained schools

On 1 September 1999 six categories of schools came into existence: community schools (formerly county schools), foundation schools (formerly grant-maintained schools), voluntary controlled schools (formerly voluntary controlled schools), voluntary aided schools (formerly voluntary aided, special agreement or grant-maintained schools which were aided before acquiring grant-maintained status), community special schools (formerly county special schools) and foundation special schools (formerly grant-maintained special schools). With the exception of former grant-maintained schools, which could choose their category, all other schools were allocated a category based on their existing status. Changes to the allocated categories will be permitted after a moratorium imposed by the Secretary of State expires at the end of August 2000. Any proposals for a change in category will have to be made in accordance with regulations still to be issued by the Secretary of State and will require the approval of the local School Organisation Committee under Chapter II of Part II of the School Standards and Framework Act 1998.

The statutory definition of a “school” excludes nursery schools (unless the school is a special school) and pupil referral units.

9. Governing bodies

Each maintained school has a governing body incorporated under s. 36 of and Schedule 10 to the School Standards and Framework Act 1998 and an instrument of government made by order of the LEA determining the composition of the governing body.

Each governing body comprises a number of different types of governor depending upon the nature of the school. These include parent governors, co-opted governors, foundation governors, LEA governors, partner governors, teacher governors, staff governors and, where the headteacher so elects, the headteacher. The size of the governing body and the number of each type of governor are determined by the number of pupils at the school (see Sch. 9 School Standards and Framework Act 1998).

The powers of governing bodies are set out in Schedule 10 to the School Standards and Framework Act 1998. The conduct of governing bodies is regulated by the Education (School Government) (England) Regulations 1999, SI 1999/2163.

The governing body should provide for the school a strategic view which it is the duty of the headteacher and staff to implement. They should also provide support to the school staff, but in addition act as monitor and, in particular, ensure accountability. Thus the headteacher and staff are responsible to the governing body and the governing body is in turn responsible to parents and the community for the overall performance of the school.

See also Chapter 5, on respective responsibilities for school premises, staffing, and LEA duties and powers on constitutional matters concerning governance.

10. Headteacher

Every maintained school must have a headteacher or acting headteacher appointed in accordance with the procedures set out in Schedules 16 and 17 to the School Standards and Framework Act 1998 (see Chapter 5C). The headteacher is responsible for the internal organisation and management of the school and acts *in loco parentis* to the pupils who attend.

11. Education Action Zones and Education Action Forums

Education Action Zones (EAZs) are established by the Secretary of State by order in areas where it is considered expedient for improving standards of education. The order setting up an EAZ will apply to all or some maintained schools within the area of the zone and can disapply certain statutory provisions relating to schools within the area, including aspects of employment law. Each EAZ is managed by

an Education Action Forum (EAF) comprising stakeholders in education in the area. For discussion of EAZs' place in initiatives to raise standards of schooling, see Chapter 4A, below.

12. School Organisation Committee

Each LEA in England is required to set up a School Organisation Committee for its area (s. 24 School Standards and Framework Act 1998). The constitution and role of each SOC are discussed in Chapter 5A, but the main tasks of SOCs are to approve the LEA's School Organisation Plan and to consider proposals for the establishment, alteration and discontinuance of maintained schools. The National Assembly for Wales is empowered (s. 27) to provide for establishment of SOCs in Wales, but has not yet done so.

13. Admissions Forums

The 'requirement' for each LEA to establish one or more admissions forum(s) is non-statutory but follows from guidance contained in the *Code of Practice on School Admissions* (para 4.5). Each LEA is therefore advised to set up an admissions forum to "be the vehicle for consultation and discussion of issues arising from proposed admission arrangements". Admissions forums will comprise headteachers, governors, LEA members or officers, special educational needs representatives, early years development partners, ethnic minorities, parental and diocesan representatives.

The admissions forum is therefore a means of consultation on admission policies as well as an arena in which disputes over admission arrangements can be resolved locally. In the event of an admissions forum's being unable unanimously to resolve a dispute, the matter can be referred to the Adjudicator.

Further information on the roles of the admissions forum can be found in Chapter 6B.

14. Adjudicator

Adjudicators are appointed by the Secretary of State and their role is to consider certain issues relating to school organisation and admission arrangements which may be referred to them (s. 25 School Standards and Framework Act 1998). Further details on adjudicators can be found in Chapters 5, 6 and 11. The National Assembly for Wales is empowered (s. 27) to introduce into Wales the office of adjudicator, but has not yet done so.

15. Her Majesty's Chief Inspectors of Schools

In England, Her Majesty's Chief Inspector of Schools and his staff, Her Majesty's Inspectors of Schools, are appointed by order of Her Majesty. The Chief Inspector may appoint additional inspectors and other staff (ss. 1–3 and 7–9 School Inspections Act 1996). Together these inspectors and their staff form the Office for Standards in Education (**OFSTED**). The Office of HM Chief Inspector for Wales has recently been styled “**Estyn**” (a genuine Welsh noun-verb [*sic*] denoting reach or stretch), and HMCI(W) herself has adopted the title HM Chief Inspector of Education and Training in Wales, connoting the wider remit to be given to her office under the Learning and Skills Bill when enacted.

The functions of the Chief Inspector are to keep the Secretary of State (or, as appropriate, the National Assembly for Wales) informed about (1) the quality of education provided by, and the standards achieved in, schools, (2) whether the financial resources of schools are managed efficiently and (3) the spiritual, moral, social and cultural development of pupils and (4) to give the Secretary of State advice on any matter connected with schools (s. 2). The Chief Inspector has the power to inspect schools and also either at the request of the Secretary of State or of his own volition to cause the inspection of one or more LEAs (s. 38 Education Act 1997). For further consideration of the role of OFSTED and its relationship with LEAs, see Chapters 4A and 11.

Under the Learning and Skills Bill, the role of the Chief Inspector in England will be extended into the further education sector (clauses 57 to 65 of the Bill and see Chapter 10).

16. Audit Commission

The Audit Commission, established under the Local Government Act 1982, is responsible for appointing each local authority's external auditor and plays an increasingly important role in the work of local government. Its work impacts on LEAs in four ways. First, it appoints the LEA's external auditor who examines the accounts to ensure that there has been no unlawful expenditure (for more detailed discussion, see Chapter 11). Secondly, it monitors the performance of LEAs by establishing indicators against which it measures an LEA's performance and has a key role in monitoring an LEA's response to implementing and achieving Best Value and, thirdly, it can carry out studies to enable it to make recommendations for improving economy, efficiency and effectiveness in the performance of local authority services. Fourth, the Audit Commission may assist with the inspection of any LEA if

requested to do so by the Chief Inspector of Schools (s. 41 School Inspections Act 1996 and see Chapter 11). See also Chapter 6D, below

17. Further Education Funding Council

The Further Education Funding Council for England is appointed by the Secretary of State and, until the provisions of the Learning and Skills Bill come into force, is under a duty to secure the provision of sufficient facilities for full-time education suitable for those of the 16- to 18-year-old population of their area who want it and adequate facilities for part-time education for those over compulsory school age and full-time education for those of 19 and over through specified courses (s. 2 Further and Higher Education Act 1992).

The effects of the Learning and Skills Bill are considered in Chapter 10, but if those provisions are, as is probable, put into effect, the functions of the FEFC will be subsumed within the **Learning and Skills Council for England**. For the new arrangements in Wales, see Chapter 10.

18. Qualifications and Curriculum Authority

The Qualifications and Curriculum Authority (QCA) was established by s. 21 Education Act 1997 and comprises members appointed by the Secretary of State. (The Welsh equivalent, the Qualifications, Curriculum and Assessment Authority for Wales, was established by s. 27 of the same Act and is known as ACCAC, the acronym of its name in Welsh.)

The general function of the QCA is to advance education and training and in so doing to promote quality and coherence (s. 22). In relation to pupils of compulsory school age, the QCA has the additional obligations to (1) keep under review all aspects of the curriculum for maintained schools and all aspects of school examinations and assessments, (2) advise the Secretary of State on such matters concerned with the curriculum for such schools or with school examinations and assessments as he may refer to the QCA, (3) advise the Secretary of State on, and if requested carry out, programmes of research and development for purposes connected with the curriculum or school examinations and assessments, (4) publish information relating to the curriculum and school examinations and assessments and (5) to arrange the audit of assessments (s. 23). If designated by the Secretary of State, the QCA may advise the Secretary of State on the approval of external qualifications (s. 24) and may take on certain responsibilities in respect of the approval of baseline assessments (s. 23(4)).

19. General Teaching Council

General Teaching Councils, for England and for Wales, are to become fully operational from 1 September 2000 under the Teaching and Higher Education Act 1998 (Commencement No. 6) Order 2000, SI 2000/970. Set up under s. 1 of the Act, their role is to give the Secretary of State, the National Assembly for Wales and others advice on standards of teaching and teachers' conduct, the role of the teaching profession, the training, career development and performance management of teachers, recruitment to the teaching profession and medical fitness to teach (s. 2).

The GTCs must establish and maintain registers of teachers containing the name of every person eligible for registration as a teacher (s. 3). The GTCs may decline to register a person and may, under regulations, exercise disciplinary powers and remove a person from the register (ss. 3 and 4). The GTCs, if authorised by regulations, may also issue codes of conduct and professional practice laying down standards expected of registered teachers (s. 5).

20. Teacher Training Agency

The responsibility for training teachers rests, however, with the Teacher Training Agency (TTA). This body, established under the Education Act 1994, has a duty to contribute to raising the standards of teaching, promoting teaching as a career, improving the quality and efficiency of all routes into the teaching profession and securing the involvement of schools in all courses and programmes for the initial training of school teachers (s. 1 Education Act 1997). Generally, the TTA is required to ensure that all teachers are well fitted and trained to promote the spiritual, moral, social, cultural, mental and physical development of pupils and to prepare pupils for the opportunities, responsibilities and experiences of adult life. By the Teacher Training Agency (Additional Functions) Order 2000, SI 2000/1000, the Agency acquired the task of arranging assessment testing of trainee teachers in literacy, numeracy and information and communications technology.

21. Parents

Last, but definitely not least in terms of education providers and enablers, come the parents and although the answer to the question "Who is a parent?" should be straightforward, it is one of the more difficult issues faced by LEAs and schools. It is, though, important as an LEA will have to deal with a parent or parents of a child in many

ways, for example in situations of non-attendance or in respect of special education, and it is very useful to start off by understanding what the education legislation means by a parent.

A pupil's "parent" for the purposes of the Education Acts includes any person (a) who is not a parent of his but who has parental responsibility for him or (b) who has care of him (s. 576(1) Education Act 1996).

2.
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OF EDUCATION

"Parental responsibility" means "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property" (s. 3(1) Children Act 1989). Although the Children Act does not go into any further detail, Department of Health guidance states that parental responsibility is concerned with "bringing up the child, caring for him and making decisions about him, but does not affect the relationship of parent and child for other purposes" (*The Children Act 1989 Guidance and Regulations Volume 1 Court Orders*, para 2.2).

Understanding the term is therefore not easy, nor is trying to assess who may have parental responsibility and/or be a "parent". It can be said, however, that the following may be treated as a child's "parent": the natural mother, the natural father, any person who has a parental responsibility order in respect of the child, a person with a residence order in respect of the child, a local authority where the child is subject to a care order and any person who has care of the child. A foster-parent will be considered to be a parent of the child (see *Fairpo v Humberside County Council* [1997] 1 All ER 183).

It will come as a relief to many when the long promised implementation of the Lord Chancellor's Department report, *The Law on Parental Responsibility for Unmarried Fathers*, Lord Chancellor's Department, March 1998, which suggested changes to the meaning of a "parent" and "parental responsibility", occurs as the current definition leads to confusion and embarrassment.

3. SPIRITUAL, MORAL, MENTAL AND PHYSICAL DEVELOPMENT

A. Curriculum

Background

The LEA's role in shaping of educational provision in maintained institutions has changed enormously over recent years. After decades in which the law was at best vague about the LEA's responsibility for the curriculum, the emphasis now is on what LEAs can do to improve the quality of what goes on in schools. The bulk of duties and powers over what is taught in schools now falls on governing bodies and headteachers. However, LEAs retain a number of residual, though important, responsibilities. The most significant change is with the oversight of the curriculum in maintained schools including its assessment arrangements. Section 23 of the Education Act 1944 left the "secular instruction" of county and voluntary schools (except aided secondary schools) under the control of the LEA subject to provisions, if any, in articles of government for secondary schools and rules of management for primary schools. The Education (No. 2) Act 1986 defined the roles of the LEA, school governing body and headteacher in respect of the school curriculum, although this was overtaken by the Education Reform Act 1988 with the adoption of a National Curriculum. The last explicit LEA duty, to have local curriculum statements, was removed by the School Standards and Framework Act 1998.

However, the LEA can influence the shape of what is taught in schools and its assessment arrangements, in a variety of ways through being the local authority, and doing things incidental to the powers and duties described below and otherwise, for example, support for environmental education using non-education resources, including citizenship and road safety.

General duties

Section 13 of the Education Act 1996 imposes on each LEA a duty to contribute towards the spiritual, moral, mental and physical development of the community by securing that efficient primary, secondary and further education are available to meet the needs of the population in its area. Under this general duty, the LEA must exercise its functions, including those relating to religious education, religious worship and the National Curriculum, with a view to promoting high standards in

the provision of education for all persons of compulsory school age and for all pupils at schools maintained by the authority.

Curriculum duties

These general duties are supplemented by s. 351, which requires the LEA to exercise its functions with a **view to securing** that the curriculum taught at every maintained schools is a balanced and broadly based curriculum which

- promotes the spiritual, moral, mental and physical development of pupils at those schools and of society and
- prepares pupils at maintained schools for the opportunities, responsibilities and experiences of adult life.

The s. 351 duty includes the National Curriculum, religious education and religious worship and is shared with the Secretary of State and the governing body and headteacher of every maintained school. In respect of each maintained school, the LEA, together with the governing body, must exercise its functions with a view to securing that the National Curriculum as subsisting at the beginning of the school year is implemented in the school (s. 357). The headteacher has the primary duty to secure the implementation of the National Curriculum.

The means by which the LEA can exercise its functions with a view to securing that a school's curriculum complies with the law are various. The local education authority will have a professional education staff (see below on Education Development Plans), led by a "fit" person as the chief education officer (s. 532), to advise schools on the statutory requirements. For example, if a headteacher persists in ignoring the law, the LEA can issue a formal warning under s. 14 of the School Standards and Framework Act if non-compliance has resulted in the standards of performance at the school being unacceptably low. An LEA can make a written report on the headteacher to the chair of the governing body under Schedules 16 and 17 of the Schools Standards and Framework Act.

Education Development Plan

The School Standards and Framework Act removed the LEA duty to make and keep up to date a written statement on the LEA's policy on the secular curriculum. The LEA can still shape the direction of the local curriculum using flexibility in local funding arrangements, including the Standards Fund under section 484 of the 1996 Act, and the Education Development Plan under section 6 of the School Standards

and Framework Act. The LEA is able in the Plan to make a statement of proposals (including the funding) to develop the provision of education for children in area by raising standards and improving the performance of schools. The Plan requires the approval of the Secretary of State. The LEA could, for instance, use the Plan to improve the teaching of modern languages by providing additional advisory support and provision of out-of-school activities, or enable schools to gain access to resources to enable the curriculum to be broad and balanced.

National Curriculum Assessment Arrangements

The National Curriculum consists of the attainment targets and programmes of study for each subject but also the assessment arrangements. The Secretary of State can order under s. 356(5)(a)(i) of the Education Act 1996 that local education authorities perform functions in relation to National Curriculum assessment. Thus, for example, paragraph 6 of the Education (National Curriculum) (Key Stage 2 Assessment Arrangement) (England) Order 1999 (SI 1999 No. 2188) requires LEAs to monitor the Key Stage 2 assessments in ten per cent of relevant schools.

Development work and experiments

For community, voluntary controlled or community special schools, the LEA can apply (with the governing body's agreement) under s. 362 to the Secretary of State for a direction to disapply the National Curriculum, or apply it with modifications, for the purpose of curriculum development work. A school can apply with the LEA's agreement (s. 362).

Temporary exceptions for individual pupils – information

The LEA has a duty (s. 366(5)) when informed by a headteacher that a temporary exception has been made to the National Curriculum provision for a pupil to consider whether the pupil's special educational needs should be assessed under s. 323.

Courses leading to external qualifications

LEAs must use their powers to secure that no course of study leading to an external qualification is provided for pupils of compulsory school age unless the qualification has been approved by the Secretary of State and the syllabus has been approved by a designated body (s. 400).

Complaints

Under s. 409 of the Education Act 1996, each LEA shall, after consulting with governing bodies of voluntary aided and foundation schools, and with the approval of the Secretary of State, make arrangements for the consideration and disposal of certain complaints relating to the curriculum and religious education. The range of complaints is limited and extends only to a complaint which is to the effect that the LEA, or the governing body of any community, foundation or voluntary school maintained by the LEA or any community or foundation special school so maintained which is not established in a hospital

- a) has acted or is proposing to act unreasonably in relation to the exercise of a power conferred on it in respect of matters such as the National Curriculum, collective worship, religious education, non-approved external qualifications or syllabuses, the provision of information, or the conduct of an appeal to the governing body about the head's direction to withdraw the provisions of the National Curriculum for a pupil or
- b) has acted or is proposing to act unreasonably in relation to the performance of, or has failed to discharge, a duty imposed on it in respect of such matters (s. 409(1) – (3)).

Such investigations can amount to a considerable commitment of officer time and expertise.

B. Sex Education

Section 403(1) of the 1996 Act places a duty on LEAs, together with governing bodies and headteachers, to take such steps as are reasonable to secure that where sex education is given to any registered pupils at a maintained school, it is given in such a manner as to encourage those pupils to have due regard to moral considerations and the value of family life.

Section 2A of the Local Government Act 1986, more commonly known as Clause 28 because it derived from Clause 28 of the Local Government Bill of 1988, has exercised LEAs and local authorities in general and, on occasions, may have confused school staff over the restrictions on teaching about homosexuality. Although its future is

uncertain at the time of writing, s. 2A currently prohibits a local authority from (a) intentionally promoting homosexuality or publishing material with the intention of promoting homosexuality or (b) promoting the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship.

The Government's intention to repeal "Clause 28" has stirred controversy, in which several drafting devices to compensate, as it were, for the provision's removal have run into determined opposition in Parliament. The writers of this book do not wish to speculate in detail about what may have emerged at the end of the legislative process, but two outcomes seem likely at the time of writing. They are that:

- a) section 403 will have been substantially amended; and
- b) there will be Government guidance on sex education.

C. Political Indoctrination

LEAs, together with governing bodies and headteachers, must forbid (a) the pursuit of partisan political activities by any junior pupils at a maintained school, and (b) the promotion of partisan political views in the teaching of any subject in a school (s. 406 Education Act 1996).

D. Religious Education

LEAs, together with governing bodies, are under a duty to exercise their functions with a view to securing that religious education is given in accordance with the provision for such education included in the school's basic curriculum by virtue of section 352(1)(a) of the Education Act 1996 (s. 69 School Standards and Framework Act 1998).

Schedule 19 to the School Standards and Framework Act 1998 has effect for determining the provision for religious education which is required by section 352(1)(a) of the Education Act 1996 to be included in the basic curriculum of schools within (a) community schools and foundation and voluntary schools which do not have a religious character, (b) foundation and voluntary controlled schools which have a religious character, and (c) voluntary aided schools which have a religious character.

LEAs, again together with governing bodies and headteachers, must exercise their functions with a view to securing that each pupil at a maintained school shall, on each school day, take part in an act of collective worship (s. 70 School Standards and Framework Act 1998). For judicial consideration of this duty, see *R v Secretary of State for Education ex p Ruscoe* 26 February 1993, unreported.

Each LEA is under an obligation to convene an agreed syllabus conference consisting of representatives of Christian and other religious traditions in the area (in numbers reflecting their strengths) together with teacher and LEA representatives (s. 375 and Sch. 31 Education Act 1996). Every agreed syllabus shall reflect the fact that the religious traditions in Great Britain are in the main Christian whilst taking account of the teaching and practices of the other principal religions represented in Great Britain (s. 375(3)). An LEA must also convene an Agreed Syllabus Conference on receipt of written notification from a Standing Advisory Council on Religious Education (Sch. 31, para 3).

Standing Advisory Councils on Religious Education (SACREs) are bodies which must be established by every LEA (s. 390). Their role is to advise LEAs upon such matters connected with (a) religious worship in community schools or in foundation schools which do not have a religious character, and (b) the religious education to be given in accordance with an agreed or other syllabus in accordance with Schedule 19 to the School Standards and Framework Act 1998 as the LEA may refer to the SACRE or as the SACRE sees fit. The relevant matters include, in particular, methods of teaching, the choice of materials and the provision of training for teachers (s. 391(1) and (2)). In addition, SACREs have a duty to consider, upon request from a headteacher of any community school maintained by the LEA or any foundation school which has not been designated as having a religious character, whether it is appropriate that the requirement that there be an act of daily Christian collective worship should apply in the case of the school (s. 394).

The composition and constitution of SACREs are regulated by ss. 390 to 392 of the Education Act 1996. For guidance on SACREs, see DES Circular 1/94 *Religious Education and Collective Worship*.

4. MONITORING AND IMPROVING STANDARDS

A. The Law's Requirements

Introduction

Although there may be concerns at the underplaying of some of the other functions of LEAs by both the DfEE and OFSTED, there is no doubt that a key role of LEAs will be to ensure that educational standards both in schools and amongst its own staff are monitored and improved.

The golden thread

The golden thread, running through everything an LEA does, is the obligation to promote and support educational improvement and high standards of achievement. This responsibility is based on clear general legal duties, but LEAs will only achieve the noble aims by utilising their true strengths as community leaders, facilitators and, above all, partners with other local educational stakeholders. Recourse to legal duties and use of intervention powers can and should only be of last resort. Establishing a general ethos of improvement and high standards, pervading the whole service, is the only way that LEAs will be able to achieve these objectives and, indeed in the light of inspection, ensure their own survival.

The paramount responsibilities placed on LEAs, which must guide virtually all of their work, are twofold.

First, each LEA is under a duty to contribute towards the moral, mental and physical development of the community by securing that efficient primary education, secondary education and further education are available to meet the needs of the population of their area (s. 13 1996 Act).

Secondly, the major imperative for LEAs is the duty to exercise their functions with a view to promoting high standards, so far as such functions are capable of being so exercised (s. 13A). As this duty applies to all education for persons of compulsory school age and persons above or below that age who are registered pupils at schools maintained by the LEA, the duty affects virtually all that an LEA does and, even where certain functions are outside the legal duty, it would

be a foolhardy LEA which did not apply the same ambition to that work as well. In any event, those other functions will have to be subject to a Best Value review and what LEA will seriously argue that it is not prepared to promote high standards in all its work?

To support the whole concept of improvement, specific grants have been made available- see the Education (Education Standards etc. Grants) (England) Regulations 1999, SI 1999/606, and Education (Education Standards Grants) (Wales) Regulations 1999, SI 1999/521. New regulations for England with effect from 1.4.2000 are the Education Standards Fund (England) Regulations 2000, SI 2000/703.

Education Development Plans

In addition to the general duties, the 1998 Act imposes on LEAs other, more specific duties to further the aim of school improvement.

The most important of these is the requirement for an LEA to prepare an Education Development Plan (EDP) or, in Wales, an Education Strategic Plan (ESP) for its area and such further plans as may be required (s. 6(1) of the 1998 Act). An EDP should set out the LEA's proposals for the action it will take to raise the standards of education provided for the children for whom it is responsible and to improve the performance of the schools it maintains.

An EDP must consist of:

- a) a statement setting out the LEA's proposals for developing provision of education for children in its area, whether by
 - i) raising the standards of education provided for such children (whether at schools maintained by the LEA or otherwise than at school), or
 - ii) improving the performance of such schools; and
- b) annexes to that statement

– both of which must contain the material prescribed by the Education Development Plans (England) Regulations 1999, SI 1999/138, or the Education Development Plans (Wales) Regulations 1999, SI 1999/1439, and which may contain such other information as the LEA considers relevant (s. 6(2) and (5)).

The statement of proposals must be submitted to the Secretary of State for approval (s. 6(4) and s. 7).

In preparing the EDP, the LEA must have regard to the education of children with special educational needs (s. 6(6)) and must also consult the governing body and headteacher of every school maintained by the LEA, the appropriate diocesan authorities and anyone else it considers should be consulted (s. 6(7)).

To assist in the preparation of EDPs, the Secretary of State has issued guidance to which (pursuant to s. 6(9)) the LEA must have regard. This guidance is found in the *Code of Practice on LEA – School Relations* (paras 35 to 38).

Section 7 of the 1998 Act sets out the procedure for securing the approval of the Secretary of State to the EDP and the options open to the Secretary of State to approve, modify or reject it. If approved or approved with modifications, the LEA must publish the EDP in accordance with the regulations.

Baseline assessments

As part of the goal to improve standards in schools, governing bodies are required to put in place effective baseline assessment schemes to enable them to obtain a picture of a child's performance when entering primary schooling.

To enable governing bodies to do so, each LEA must select an accredited baseline assessment scheme which they consider suitable to be so adopted (s. 16(4) Education Act 1997). If they wish, LEAs may prepare and seek accreditation of their own assessment scheme (s. 16(3)). For DfEE guidance on baseline assessments, see Circular 6/98 *Baseline Assessment of Pupils Starting Primary School*.

In addition to selecting a scheme, each LEA is required to receive and maintain records of results and exemptions sent to it by primary schools and pass to a designated body (currently the Qualifications and Curriculum Authority) all information received from schools, including details of the school and the scheme used and details of each child assessed (see the Education (Baseline Assessment) (England) Regulations 1998, SI 1998/1551, especially Regulation 8 and Part IV of the Schedule and, for Wales, the Education (Baseline Assessment) (Wales) Regulations 1999, SI 1999/1188).

Literacy and Numeracy Strategies

Examples of non-statutory obligations imposed on LEAs (what the authors have called *de facto* duties) by DfEE decree abound, but the most important in recent years include the requirements imposed in

respect of the “Literacy” and “Numeracy Strategies”. As frequently the case, these *de facto* duties are tied in to the receipt of grant so that, in order to receive grant funding, LEAs are compelled to implement certain DfEE schemes or conditions.

There is no statutory duty on LEAs to implement literacy and numeracy strategies in primary schools maintained by them. Instead, LEAs may apply for a grant from the Secretary of State under the Education (Education Standards etc. Grants) (England) Regulations 1999, SI 1999/606, or, in Wales, the Education (Education Standards Grants) (Wales) Regulations 1999, SI 1999/521, for the support set out in the Schedules to these regulations. If successful, the LEAs are under a quasi-contractual duty to implement the supported activities, failing which the Secretary of State may take action against the LEA under the regulations.

Limit on infant class sizes

Another element in the Government’s effort to raise standards of school education is the aim to limit infant class sizes to 30 by September 2001 (according to the 1998 Act) or by September 2000 (according to DfEE exhortation).

By virtue of s. 1 of the 1998 Act, the Education (Infant Class Sizes) (Transitional Provisions) Regulations 1998, SI 1998/1947, the Education (Infant Class Sizes) (England) Regulations 1998, SI 1998/1973, and the Education (Infant Class Sizes) (Wales) Regulations 1998, SI 1998/1943, where infant class size limits apply, each LEA is under a duty to exercise its functions with a view to securing that that limit is complied with in relation to each infant class (s. 1(6)).

An “infant class” means a class containing pupils the majority of whom will attain the age of five, six or seven during the course of the school year (s. 4).

The 1998 Act leaves much of the detailed provision to the regulations, but it does initially provide that the limit will be 30 pupils during an ordinary teaching lesson conducted by a single qualified teacher and that the duty will come into force with effect to admissions from September 2001. In another example of the imposition of *de facto* duties, however, by making grants available to encourage LEAs to bring forward plans for securing the limits, the DfEE can effectively compel LEAs to take action in advance of the statutory time limits.

In order to demonstrate how it proposes to meet the class size limits, every LEA is required to prepare a statement setting out the arrangements

which the LEA proposes to make for the purpose of securing that any limit imposed on infant class sizes is met at schools maintained by the LEA (s. 2(1)). The statement must contain the information required by the Education (Plans for Reducing Infant Class Sizes) (England) Regulations 1998, SI 1998/1971, and, for Wales, Education (Plans for Reducing Infant Class Sizes) (Wales) Regulations 1998, SI 1998/194. Consultation must take place in accordance with the requirements of the regulations and the statement has to be submitted to the Secretary of State for his approval (s. 2(3) and (5)).

The Education (Infant Class Sizes) (Grants) Regulations 1999, SI 1999/14, make provision for the Secretary of State to pay grants to LEAs in respect of expenditure incurred or to be incurred by them for the purpose of securing that the limits are met (s. 3).

To protect the efforts to reduce class sizes, it was recognised that LEAs could not prepare plans, commit expenditure, turn down applications which would take the numbers in a class above 30, but then find schools having to admit children because they were caught by the normal duty to comply with parental preference and/or decisions made by independent appeal panels. Consequently, the rules for admission appeals (discussed in detail in Chapters 6B and 11) have been amended so that new procedures apply in respect of appeals against decisions to refuse children admission to a Year R (reception) class from September 1999, Years R and 1 from September 2000 and Years R, 1 and 2 from September 2001 onwards.

These modifications to the normal admission procedures are now found in ss. 86(4) and 94 of, together with Schedule 24 to, the 1998 Act. Guidance on their effect can be found in DfEE Circular 12/98 *School Admissions: Interim Guidance* (for admissions before September 2000), the *Code of Practice on School Admissions* (for admissions post-September 2000) and the *Code of Practice on School Admissions Appeals*.

The result is that where a parent expresses a preference for their child to be admitted into an infant class, there is a duty on the admissions authority to comply with that preference unless compliance with the preference would prejudice the provision of efficient education or the efficient use of resources (s. 87(3)(a)) or the other two exemptions from the duty (s. 87(3)(b) and (c)). Prejudice may however arise by virtue of s. 87(4) by reason of measures required to be taken in order to ensure compliance with the infant class size duty.

Where admission is refused on the grounds of such prejudice, the procedure and rules for the subsequent appeal change and the chances

of a parent succeeding are significantly reduced. This is because an appeal panel hearing such an appeal can allow the appeal only if either:

- a) the decision was not one which a reasonable admissions authority would make in the circumstances of the case; and/or
- b) the child would have been offered a place if the admission arrangements had been properly implemented.

Guidance on the effect of this new procedure and, in particular, what is meant by “reasonable” in this context can be found in Annex B to the *Code of Practice on School Admissions Appeals*.

Somewhat surprisingly, the introduction of these new restrictions did not lead to a flood of litigation or complaints to the Ombudsman. The only two decisions involving a class size reduction appeal have been *R v Southend Borough Education Appeals Committee ex p Southend-on-Sea Borough Council* 17 August 1999, unreported, and *R v Richmond London Borough Council ex parte C (a child)* (2000) Times, 26 April. In *Southend*, the judge did not address the changes to the appeal arrangements. Instead, he considered the nature of the evidence which should be presented to appeal committees generally and, although criticising what the particular committee had considered, nonetheless held that they were justified in allowing 32 children into a reception class. In *Richmond*, the judge held that an appeal involving infant class size issues was in no sense a rehearing, but a review, of the LEA’s decision.

Intervention in schools

As the *Code of Practice on LEA–School Relations* makes clear (see paras 4 to 6), there is a presumption in favour of school autonomy, but such autonomy has to be matched with accountability. If schools fail, intervention may be necessary to ensure that the school’s pupils do not suffer. The role of the LEA is central to this process as the means by which external support and intervention can be brought to the assistance of schools.

To facilitate this role, the 1998 Act provides LEAs with a number of powers to intervene where absolutely necessary in the governing body’s and headteacher’s running of a maintained school. A number of the powers may have been in existence prior to the Act, but the benefit of the 1998 legislation is that they are now set out expressly and these, together with the guidance in the *Code of Practice* (see specifically paras 40 to 52), help clarify the action LEAs can take in respect of schools causing concern.

In the recent past, however, there were occasions where an LEA had no way of knowing what was happening in a school until after an inspection report under the School Inspections Act 1996 had been produced. Although this was not common, as effective partnerships between LEAs and schools have usually avoided this problem, it was fair for LEAs to point out that they could do little to improve certain schools if those schools had the power to refuse them access or information. Consequently, the LEA may now carry out an inspection in respect of any school maintained by it where (a) for the purpose of enabling it to exercise any of its functions, the LEA requires information about any matter in connection with the school and (b) it is not reasonably practicable for it to obtain the information in any other manner (s. 25 School Inspections Act 1996). Any LEA officer carrying out such an inspection has a right of entry to the school premises at all reasonable times (s. 25(2)). For guidance, see paragraph 53 of the *Code of Practice*.

Where, as a result of such an inspection or as a result of information from other sources, the LEA discovers that there are concerns about the conduct or organisation of a school, it can issue a warning notice to the governing body (s. 15 School Standards and Framework Act 1998).

Such a notice can however be issued only in certain circumstances. These are that the LEA is satisfied that:

- a) the standards of performance of pupils at the school are unacceptably low and are likely to remain so unless intervention occurs; or
- b) there has been a serious breakdown in the way the school is managed or governed which is prejudicing, or is likely to prejudice, such standards of performance; or
- c) the safety of pupils or staff of the school is threatened (whether by a breakdown of discipline or otherwise); and
- d) the LEA has previously informed the governing body and the headteacher of the matters upon which that conclusion is based; and
- e) those matters have not been remedied to the LEA's satisfaction (s. 15(2)).

The one case on the exercise of powers under s. 15, *R v Rhondda Cynon Taff County BC ex parte Lynwen Evans* 31 August 1999, unreported, has set down a number of principles to be followed. Where an LEA intends to rely on s. 15(2) and particularly s. 15(2)(a) or (b), the

governing body and headteacher should be informed before the issuing of the notice. As the notice would be directed at those already involved who should be aware of most of the circumstances, the prior notification did not have to be particularly detailed nor be in writing. The s. 15 notice did, however, have to be clear and the time for compliance had to be reasonable in terms of the amount of teaching time available to take the necessary steps.

If the governing body and/or headteacher has not remedied the situation satisfactorily, the LEA may give a warning notice to the governing body. The warning notice must be in writing and must set out the matters causing concern, the action which is required and the period within which those matters shall be rectified and action taken (s. 15(3)).

If the governing body fails to comply or secure compliance with the notice to the LEA's satisfaction within the specified period and the LEA gives reasonable notice that it intends to use its intervention powers, then it may do so.

The ability to use the intervention powers also arises in two other situations:

- where a report of an inspection has been made under the School Inspections Act 1996, an opinion has been given that the school has serious weaknesses and a subsequent report has been produced concluding that the school still has serious weaknesses (serious weaknesses are where, although giving its pupils in general an acceptable standard of education, the school has significant weaknesses in one or more areas of its activities); or
- a report of an inspection under the School Inspections Act 1996 has been produced which concludes that special measures are required to be taken in respect of the school and in any subsequent report of an inspection, the report does not state that in the opinion of the inspector special measures were not required to be taken (s. 15(6)).

(NB although inspections of schools are mainly a matter between the school and OFSTED, LEAs do have a duty to prepare a written statement of the action which an LEA, as opposed to the governing body, proposes to take in light of the report or to produce a written statement of why it proposes no action on its part (s. 18(2)(a) School Inspections Act 1996).)

If such situations exist at a school maintained by the LEA, the LEA may exercise the powers of intervention contained in the 1998 Act. These consist of:

- a) the power to appoint such number of additional governors as the LEA thinks fit (s. 16); and
- b) the power to suspend the school's right to a delegated budget (s. 17 and see also Chapter 5B, below); and

in addition, the LEA may intervene, whether or not the conditions laid down in s. 14 apply, where there has been a fundamental breakdown of discipline (see s. 62 of the 1998 Act and Chapter 5B, below).

The proper performance of LEA functions

If LEAs are to continue to play a central role in the provision of efficient and excellent education, it is obvious that they too must strive to be effective and efficient. As has been seen (Chapter 1), LEAs will be required to undergo Best Value reviews across the whole range of their functions as part of the obligation placed on all local authorities. In addition, however, the Secretary of State has a number of powers in place to monitor and require improvements in the standards of LEAs.

Her Majesty's Chief Inspector of Schools in England (and his Welsh equivalent) have the power (or the duty if the Secretary of State or Assembly, as appropriate, directs them to do so) to arrange for any LEA to be inspected (s. 38 Education Act 1997).

Such an inspection will consist of a review of the way in which the LEA is performing any of its functions which relate to the provision of education (a) for persons of compulsory school age (whether at school or otherwise) or (b) for persons of any age above or below compulsory school age who are registered as pupils at any school maintained by the LEA (s. 38(2)).

If the Secretary of State intends to request an inspection, he must first consult the Chief Inspector (but not the LEA) and any inspection so requested shall specify the LEA or LEAs concerned and the functions to which the inspection is to relate (s. 38(4) and (3)).

An inspection will be carried out by one of Her Majesty's Inspectors of Schools or by an additional inspector authorised under paragraph 2 of Schedule 1 to the School Inspections Act 1996 and may be assisted by such persons as the Chief Inspector thinks fit (s. 38(5)).

If the Chief Inspector requests, the Audit Commission may assist with any inspection (s. 41(1)), provided that the Chief Inspector pays the Commission's full costs.

The LEA must provide the Chief Inspector with prescribed information within such time as the relevant regulations require (s. 38(6)). At the time of writing no such regulations were in force, although that has not stopped the Chief Inspector setting out the information required from LEAs in the OFSTED document *LEA Support for School Improvement* which came into effect on 1 September 1999.

The inspector carrying out the inspection or any person assisting him have at all reasonable times a right to enter the premises of any LEA to which the inspection relates and a right to inspect, and take copies of, any records kept by the LEA and any other documents containing information relating to the LEA which the inspector considers relevant to the exercise of his function (s. 40(1)).

The LEA must also give the inspector and his assistants all assistance in connection with the exercise of his functions which it is reasonably able to give (s. 40(2)).

To assist in the inspection process, OFSTED has issued *LEA Support For School Improvement*, the document referred to above, which explains the basis upon which inspections of LEAs will be carried out and indicates to LEAs what functions will be reviewed. LEAs ignore the document at their peril, even though, as this work suggests, the views expressed may not necessarily accord with the law or educational practice.

Following an inspection, the inspector must make a written report on the matters reviewed and shall send copies of the report to the LEA to which the report relates (or if more than one LEA, to all the relevant LEAs) and the Secretary of State (s. 39(1)).

Upon receipt of the report, the LEA must prepare a written statement of the action which it proposes to take in light of the report and the period within which it proposes to take it. The LEA must publish the report and the statement within a prescribed period and in accordance with regulations (s. 39(2) and (3)).

The Chief Inspector may arrange for any report to be published in such manner as he considers appropriate (s. 39(4)).

The Secretary of State has always possessed general default powers to intervene where LEAs have failed to discharge any statutory duty (see s. 497 Education Act 1996 and *Meade v Haringey LBC* [1979] 2 All ER 1016, *R v Secretary of State for Education and Science ex p Chance* 26 July 1982, unreported and *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014).

To deal with LEAs which are not necessarily in default of their statutory duties but which are not performing adequately, the 1998 Act gives the Secretary of State additional reserve powers.

If the Secretary of State is satisfied (either on complaint by any interested person or otherwise) that an LEA is failing in any respect to perform any function relating to the provision of education for persons of compulsory school age or persons above or below that age who are registered as pupils at a school maintained by the LEA to an adequate standard (or at all), the Secretary of State may:

- a) direct an officer of the LEA to secure that that function is performed in such a way as to achieve such objectives as are specified in the direction; or
- b) give an officer of the LEA such directions as the Secretary of State thinks expedient for the purpose of securing that the function (i) is performed, on behalf of the LEA and at its expense, by such person as specified in the direction and (ii) is performed in such a way as to achieve such objectives as are so specified; and

such direction may require that any contract or other arrangements made by the LEA with that person contain such terms and conditions as may be specified (s. 497A Education Act 1996).

Where the Secretary of State considers it expedient that the person specified in the direction should perform other functions in addition to those where there is failure, the Secretary of State may so specify (s. 497A(5)).

Any direction may either be for an indefinite period until revoked or have effect until any objectives specified in the direction have been achieved (s. 497A(6)). Compliance with directions is mandatory and any refusal to comply can be enforced by an order of mandamus.

Where the direction gives power to the person specified in the direction, that person shall at all reasonable times have the right to enter the LEA's premises and a right to inspect and take copies of any records

or other documents kept by the LEA and any other documents containing information relating to the LEA which are relevant (s. 497B(2)). The LEA shall also give the person all assistance in connection with the performance of the function or functions which it is able to give.

Education Action Zones

No discussion of the responsibilities and opportunities to improve standards would be complete without consideration of the new role of Education Action Zones.

Under s. 10 of the 1998 Act, the Secretary of State may, if he considers that it is expedient to do so with a view to improving standards in the provision of education at any particular maintained schools, order that those schools collectively constitute an Education Action Zone (s. 10(1)). Such a Zone will be established initially for three years, but the Secretary of State may provide for the Zone to continue for a further two years.

Where an Education Action Zone is in existence for a group of schools, the Secretary of State may add a school in which the LEA has intervened under s. 15 of the Act (s. 10(3)).

The Secretary of State can include a school only with the consent of the school's governing body (s. 10(4)) and can only enlarge the Zone with the consent of each school which forms part of the Zone.

The order which establishes the Zone must also establish an Education Action Forum (EAF) for the Zone. An EAF is a body corporate. The members of an EAF must include one person appointed by the governing body of each participating school and one or two persons appointed by the Secretary of State (s. 11). The main function or objective of every Forum is the improvement of standards of education at each of the participating schools (s. 12(1)) and, with the agreement of the governing body of a participating school, to further this object the Forum may discharge any function of the governing body on behalf of the governing body (s. 12(2)(a)) or assume full responsibility for the full discharge of that function (s. 12(2)(b)), although governing bodies have not been keen to cede their functions (see Sarah Billington, "Education Action Zones: a progress report", *Education Law* [2000] at page 11).

Schedule 1 to the 1998 Act provides further details of the composition and constitution of EAFs and the detailed provisions relating to the discharge of the functions of governing bodies will be contained in

regulations issued under s. 12(3), although the Secretary of State has indicated that it is expected that within a Zone all schools should transfer similar functions to the EAF.

One key feature of an Education Action Zone is that participating schools can apply to the Secretary of State for an exemption from the conditions of employment imposed by the School Teachers' Pay and Conditions Act 1991 (s. 13).

Education Action Zones are seen as key instruments in improving standards especially in literacy, numeracy and basic skills in targeted areas and there have been a number of orders made setting up Zones, some with optimistic names (see, for example, the Greenwich Time to Succeed Education Action Zone Order 1999, SI 1999/2313, the Speke Garston Excellent Education Action Zone Order 1999, SI 1999/3408, the Epicentre LEAP Ellesmere Port Cheshire Education Action Zone Order 1999, SI 1999/3396 and the South of England Virtual Education Action Zone (No. 2) Order 2000, SI 2000/423).

Establishment of an Education Action Zone brings with it higher levels of funding from the Government, together with anticipated private sector fundraising. Each Zone has received £500,000 of Government grant, but is under a duty to raise a further £250,000 from private sector businesses operating in its area.

It is important, though, to realise that the Zones will have, in reality, a wider role than just improving standards and this is recognised by the desire to involve local businesses and not just for fund raising purposes. The intention is that by providing improvements in basic skills, vocational skills should increase with a consequential benefit to the future workforce in the area (see "Plenty of snap and crackle but where's the radical pop?" *Independent*, 16.3.2000). It should also secure greater inclusion in schools, and Education Action Zones have certain responsibilities to address social exclusion in their areas and specifically to reduce truancy and exclusions.

Though there were early expectations – by Ministers if by nobody else – that EAZs could be a prototype for the LEA of the future (see Preface), there seems to more emphasis now in Government policy on Excellence in Cities projects, with their mini-EAZs.

B. Good Practice Exemplified

Monitoring and intervention for improvement, including strategies for identifying and addressing schools causing concern.

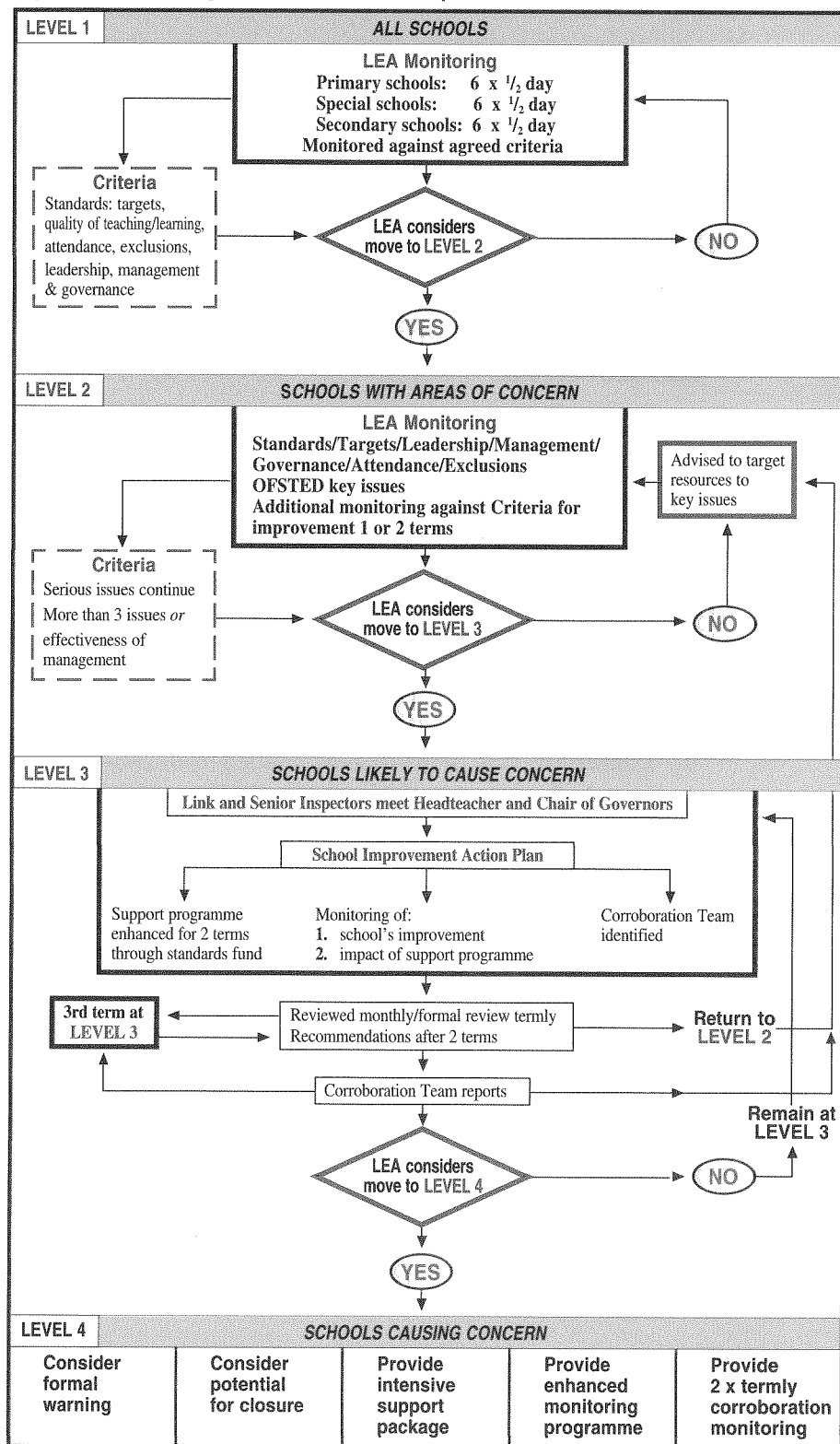
1. Introduction

The following outline of procedures is based on those worked out by one county LEA, but it also incorporates material from other LEAs as supplied to the EMIE Service. It is therefore solidly based in reality. The reader may wish to heed some important provisos, however, that:

- a) the job titles and names of specialist professional groups will vary from LEA to LEA;
- b) the exemplar here is strictly related to *intervention* strategy, and takes no account of the aim of some LEAs to deploy advisers across the whole cohort of schools: only by knowing them well can the LEA spot early signs of difficulty, and, in any case, observed good practice greatly informs the capacity of the adviserate;
- c) there are two countervailing considerations:
 - i) the implied allocation of advisers' time in this exemplar would be regarded as low in some LEAs: but
 - ii) conversely, that, or the strategy implied by b) above, would stretch the resources of many a small LEA; and
- d) the balance between, on the one side, the advisers' curricular/ pedagogic input and, on the other, the advice from the other professionals will vary from LEA to LEA (and probably case to case of schools needing support). The other professional groups include educational psychologists, education welfare officers, accountants, personnel services, safety officers and building surveyors.

Figure 3 summarises the scheme, which is described in more detail below.

Figure 3. Monitoring and Intervention for Improvement



1.1 Monitoring, review and evaluation

The success of strategies to raise standards of achievement by improving the quality of teaching, educational leadership and management depends upon the appropriateness of action plans and the capacity to implement necessary change. To improve quality requires a judgement on action which involves analysing, evaluating and acting on a wide range of information.

1.2 Monitoring

Monitoring is the systematic and routine collection of information about a range of statistical data and first-hand observations relating to schools' performance, to activities in formal plans, particularly the EDP, and to locally and nationally set expectations or targets, all within a given period of time.

Good information and intelligence about all aspects of both the LEA's and schools' performance will help to secure reliable conclusions and evaluations.

1.3 Analysis

The interpretation of information will involve gauging significant differences or changes over time and taking relevant individual circumstances into account.

1.4 Evaluation

Evaluation involves judging the value of activities in terms of the quality of their processes, their impact and their cost-effectiveness. Evaluation will be most valuable when it involves the school through a process of self-evaluation, complemented by an objective judgement from external observers.

1.5 Challenge

Challenge is fundamental to all the monitoring and evaluation activities outlined above. Challenge will be provided through the LEA's programmed visits to schools to:

- agree targets,
- observe teaching and
- validate schools' own processes of self-review.

1.6 Support

Schools will access support for planned developments through their own Standards Fund allocation and other school budgets. Additional support will be targeted at specific schools which are identified

through the regular programme of monitoring and evaluation as being required to make greater improvements.

1.7 Sources of information

Information will be taken from three broad sources for evaluation:

- a) data collection such as academic results, finance, attendance, pupil exclusions, schools' PandAs, LEA profile, LEA's inspection databases, data from OFSTED inspections;
- b) direct observation of schools' activity, through visits by link, phase and subject inspectors; and
- c) judgements made by the school's self-review;

These activities will contribute to establishing the LEA's strategies for determining levels of intervention and support for individual schools.

1.8 The LEA's information database

Evaluative judgements on key information drawn from each of the above monitoring activities should be available to decision makers in both the LEA and schools, from a single source in an easily accessible format. The LEA's schools should be regularly updated with accurate and relevant information as this lies at the heart of the LEA's ability to raise standards. The LEA needs to know how well schools are performing and progressing, the areas where help is needed and the sources of successful practice

1.9 Communication of information and commissioning of activities

An effective LEA should have the means of communicating this information about the state of health of all its schools and of acting on it at short notice.

A valuable part of this process is a cross-departmental team, meeting monthly to review the standards of all schools in the LEA, to identify successful practice and those schools where there are concerns. This group will take into account all aspects of schools' performance, including pupils' performance, attendance and behaviour, progress in addressing key issues, quality of teaching, standards of management and governance.

Where issues of concern are noted, the schools will receive a more intensive level of monitoring, categorised typically at levels 2: ("schools with weak aspects"), 3: ("schools with weaknesses") or 4: ("schools causing concern"). Where necessary, additional support is provided,

either through the priority the school gives to the targeting of its own Standards Fund, or by accessing, in more serious cases, the specifically targeted category of Standards Fund.

1.10 Monitoring of individual schools identified as having weaknesses

Schools identified as having more significant weaknesses should receive more detailed scrutiny. A structure which ensures this is the establishment for such schools of a dedicated monitoring group (“a school-specific monitoring group”), which should meet at least monthly. The composition of this group will depend on the nature of the concerns identified, but will typically include the school’s link inspector and be chaired by a senior inspector. Other officers will bring expertise relevant to the identified concern. This group should report to the cross-departmental team, so that all other senior officers are kept informed about progress. Formal reports on such schools should be presented termly, and a significant improvement is to be expected after two terms of this level of intervention.

For schools “causing concern” this dedicated or school-specific monitoring group should be chaired by a more senior officer, an Assistant Director, the Head of Standards or Chief Inspector.

2. Principles

The above processes will be based on a number of principles for which agreement should always be negotiated with schools:

- the criteria for establishing need are clear, are implemented fairly and ensure that schools will receive the level of support they need when they need it;
- the LEA is committed to the early identification of difficulties in schools so as to intervene preventatively whenever possible;
- the LEA’s processes for identification of need will build on and support schools’ own processes for self-review, but will be supplemented by the LEA’s analyses of data and the first-hand observation by inspectors in classrooms; and
- this partnership approach will encourage schools’ independence and an understanding that they are themselves responsible for bringing about their own improvements.

The basis of this agreement is the *Code of Conduct on LEA–School Relations* and it will be renegotiated as the strategy develops at a local level. This will include issues of:

- transparency
- consultation
- an understanding of the circumstances in which the LEA will use its new and existing powers with schools and governing bodies.

3. The monitoring programme

3.1 Data: the role of statistical analysis

LEAs typically collect and analyse a range of statistical data that contributes to monitoring of performance. These data should include academic performance, attendance, exclusions, disruptive behaviour, financial performance, leadership and management. Following analysis and evaluation, the key information will be entered on to the LEA's schools' database as a first stage in the analysis of schools' performance. In this way, it is able to make its contribution to strategies for improvement and recognition of good practice.

3.2 LEA monitoring programme – the role of the Inspection Service

In terms of time allocation, in order to remain within the guidelines of the *Code of Practice* and to manage the time of inspectors tightly, "visits" are deemed to be half a day (three hours) or their equivalent, except where otherwise indicated. 'Visits' will also require the equivalent of half a day for research and for preparation before and follow-up work afterwards.

A major aspect of the LEA's strategy for monitoring school performance is to gather and use information from direct observations of school practice. Typically each school is assigned a link inspector, whose primary function is to have a clear understanding of the overall performance of the school and to provide appropriate advice in respect of those areas which require improvement. Link inspectors visit schools regularly and with a frequency determined by the level of need. They will draw upon the information available to them from each of the areas of monitoring activities described earlier.

3.3 Monitoring through other LEA contacts

Many of the other LEA services have close contacts with schools and where these are on a formal basis, information about their specialist aspect will also add to the information available on which a judgement will eventually be made.

3.4 Monitoring through OFSTED inspection reports

OFSTED inspection provides a sustained period of direct observation that gives rise to shared judgements about the administrative, academic, professional, managerial and financial strengths and weaknesses of the school.

Following an OFSTED inspection, information from the inspection, the strengths and weaknesses of the school and major issues such as the quality of teaching are translated on to the database to inform other LEA monitoring and support activities.

4.
MONITORING AND
IMPROVING
STANDARDS

4. Identification of schools

4.1 Level 1

4.1.1 All primary schools will receive six half-day visits per year, usually made up from five visits from the link inspector and one from a primary specialist.

4.1.2 Special schools will receive six half-day visits: four from the link inspector, one from the inspector for special educational needs and one to respond to the school's current agenda of self-review.

4.1.3 Secondary schools will receive four half-day visits: a minimum of three from the link inspector and the fourth to respond to the school's current agenda of self-review.

The agenda will include discussions about target-setting and support for school self-review as well as observation of lessons in order to gather evidence about the quality of teaching and the impact of the LEA's EDP priorities.

4.2 Identifying, reporting on and sharing successful practice; level 2

Link and phase specialist visits to primary and special schools will result in best practice being identified.

Where an LEA has identified priority areas for raising attainment, specialist phase or subject inspectors will make a visit to schools or departments where the findings of OFSTED inspection, the outcomes of school self-review or an analysis of performance at either GCSE or in core subjects at the key stages identify them amongst the top ten per cent most effective in the county.

middle management to address successfully the issues raised will be translated to the inspection database for dissemination.

4.3 Level 2

Schools will be deemed to require an enhanced level of monitoring if, as a result of the LEA monitoring or of OFSTED inspection, up to three issues have been identified. Concerns about any of the following indicators would form the basis of more detailed analysis:

- i) although OFSTED has not formally identified the school as having serious weaknesses or requiring special measures, there is a key aspect of the school that is highlighted in the OFSTED report as particularly weak;
- ii) the post-inspection action plan is seriously deficient;
- iii) the amount of value added in the school is very low as measured by:
 - baseline assessment (four- or five-year-olds) to key stage 1 assessments (seven-year-olds), or
 - key stage 1 assessments to key stage 2 assessments (11-year-olds), or
 - key stage 2 assessments to key stage 3 assessments (14-year-olds), or
 - key stage 2 assessments to GCSE examinations, or
 - key stage 3 assessments to GCSE examinations;
- iv) the school's assessment results are considerably lower than might have been expected considering the context of the school as measured by free school meals and as measured against the performance of schools with a similar intake;
- v) the school is falling below its agreed targets, or consistently sets unchallenging targets;
- vi) the LEA is receiving a large number of complaints from parents, staff, governors or pupils;
- vii) the exclusion rate in the school is considerably higher than for schools with a similar intake;
- viii) the attendance rate in the school is considerably lower than for schools with a similar intake;
- ix) concerns are expressed about the effectiveness of the governing body;

- x) concerns are expressed about the quality of teaching and learning or the behaviour of pupils or the management and leadership in the school;

4.3.1 Primary schools at this level should receive an additional monitoring visit per term from a member of the divisional team, and a further visit per term as appropriate, by another LEA officer determined as relevant to the nature of the concern.

4.3.2 Special schools will receive an additional monitoring visit per term from a member of the divisional team, a further visit per term as appropriate, by one or more specialist inspector and/or another LEA officer determined as relevant to the nature of the concern(s).

4.3.3 Secondary schools at level 2 will receive an additional half day's monitoring visit (a full day's visit in the case of English, maths or science) to each identified subject department (identified by the above criteria with particular reference to analysis of statistical data) with the possibility of a return visit after one term to report on the progress made, plus an additional visit per term as appropriate from any other officer, dependent on the nature of the concerns.

Schools will be required to indicate how they intend to effect relevant improvements and may be recommended to seek external support.

4.3.4 Support for schools at level 2

The authority's EDP will usually indicate the ways in which the LEA is committed to supporting schools which are underperforming. A number of priorities will provide the means for offering additional help where it is needed.

For the national priorities, literacy, numeracy, and ICT, and in most LEAs, also for their other identified priorities, the LEA will provide both centre-based courses and in-school support to secure the development of these schools. This is largely covered by the Standards Fund Partnership Agreement, which is used by all schools in the LEA and is often supported by additional funds from the retained element of the Standards Fund or the LEA's budget, where this has been agreed by the consultation process for the EDP.

Link inspectors draw headteachers' attention to the provision of relevant courses and access to school-based developments where the school has not already identified them and ensure that the school's professional development programme is consistent with the School Development Plan and the school's identified needs.

4.4 Level 3

4.4.1 Criteria for judgement

Schools will be judged to require a higher level of monitoring if, in the light of enhanced monitoring at level 2:

- concerns are not being addressed within the allocated two terms;
- there are more than three areas (as defined under the level 2 criteria) causing concern, or
- there are serious questions concerning the effectiveness of the senior management.

Information leading to decisions about the need to use this enhanced level of monitoring should be reviewed monthly at the meeting of the cross-departmental team. When this information is reviewed by the departmental team, it will in most cases already have been shared with the school. The LEA's code of conduct will ensure that judgements about a school will not be recorded without the headteacher first being made aware of them. In the vast majority of cases, this issue will have arisen from a conversation between the headteacher and an LEA officer. In other cases a decision must be made about the means of sharing this information with the school.

4.4.2 Process for agreeing level 3

In the case of a school being considered for level 3 monitoring and support, the school will always be aware of the increasing concerns which they and the LEA share. Therefore the regrading at level 3 can often be achieved by a visit to the school by the link inspector.

Following this visit, a more formal meeting will be held between the headteacher, chair of governors, link inspector and the relevant senior inspector. If this is not considered appropriate to the specific circumstances, then the headteacher and chair of governors will be invited to a meeting chaired by a very senior officer (Chief Inspector, Head of Standards) and attended by the link inspector and a senior inspector to discuss the concerns identified and the plans the school has to improve the situation.

4.4.3. Monitoring at level 3

At level 3, schools will receive an additional monitoring visit per half term from a member of the divisional team, a visit per term by the senior inspector and a further termly visit as appropriate by any other officer relevant to the nature of the concerns identified.

Any such school will be required to provide a school improvement action plan to enhance its School Development Plan and meet the issues identified. Resources will be made available from the Standards Fund grant 1(b) to help the school to implement this action plan. The school will be supported in this action planning by intensive work with the link inspector, and the eventual allocation of funds will be agreed by the Head of Education Standards. The support to be provided by the LEA will be negotiated with the Manager of Curriculum and Professional Development, through the CPD Strategic Management Team.

4.4.4 Support for schools at level 3

In allocating resources from Standards Fund category 1b (Targeted School Improvement), the LEA has agreed the following principles:

- funds will be devolved to identified schools in relation to need, clearly reflected in priorities costed within action plans agreed with the LEA;
- funds will, therefore, not be devolved on a formula basis;
- not all available funds will be devolved at the beginning of the financial year in order to retain flexibility at LEA level to meet further needs, or reflect varying rates of progress.

Schools are also able to purchase support from the LEA's Curriculum and Professional Development Service, from this fund or from the school's own budget.

4.5 Monitoring progress at level 3

For every school at this level of intervention a school-specific monitoring group will be established, chaired by the relevant senior inspector, attended by the link inspector and any other officer relevant to the nature of the concerns identified in the school. This group will report to the cross-departmental team on the improvement made by the school, orally after one term, and a written report after two terms. The link inspector will provide a written report at the end of two terms about the effectiveness of the LEA's support package.

The cross-departmental team will consider the evidence and consider appropriate action to be taken after two terms. This may be that the school will revert to level 2 or even to level 1. Alternatively, if a school has not made sufficient progress after two terms, it may receive a further term's monitoring and support and/or the Head of Standards will commission a formal monitoring visit to take place, by an appropriate "corroboration" team identified by the Chief Inspector.

If the recommendation of this team is that the progress made by the school is unsatisfactory, the Head of Education Standards will report the matter to the Director of Education with the recommendation that the school be issued with a formal warning notice.

The timescale for each school to improve is between two terms and one year.

5. Monitoring of and intervention in schools “causing concern”

(including schools requiring special measures, schools with serious weaknesses and schools for which a warning notice has been issued)

A school will fall into this category if:

- LEA monitoring and school review indicates that the school has weaknesses and is not responding to level 3 support;
- OFSTED inspection deems the school to have serious weaknesses;
- a sudden unforeseen crisis occurs;
- OFSTED inspection deems the school to be in need of special measures.

5.1 Intervention in schools deemed by the LEA or by an OFSTED inspection to have serious weaknesses, including schools where a formal warning has been issued

5.1.1 Review the evidence

The link inspector will review the evidence (from LEA or OFSTED findings) with the headteacher and the governing body, and the agreement reached will form the basis of the further involvement of the LEA. In the case of an OFSTED inspection, this review will take place as soon as possible after the feedback to governors, with a second meeting taking place after the publication of the report. Every attempt will be made to achieve a consensus about the action which needs to be taken.

The LEA will work closely to support the governors' preparation of a school improvement action plan which the LEA believes will remove the causes of the weaknesses identified.

5.1.2 Establishing monitoring and support

A school-specific monitoring group will be established, chaired by the Head of Standards (Chief Inspector), and three separate teams will be established:

- a *consultancy team*, to work with the school to secure an appropriate action plan and then make two monitoring visits per half term;
- a *corroboration team*, to visit the school for a day every half term to report on the progress made by the school; and
- a *support team*, according to the needs in the action plan, which will include staff from the Inspection and Advisory Service, the CPD Service and other services within the education department. It will also include headteachers, working on a secondment basis for the LEA, and other consultants from outside the LEA as appropriate to the needs of the school. This will be funded by the Standards Fund grant for targeting on schools causing concern and will be devolved to the school.

4.
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STANDARDS

5.2 Initial decisions and consideration of the need to issue a formal warning

Following the initial review, the Head of Education Standards will convene the school-specific monitoring group to consider the evidence.

It is to be hoped that by use of the foregoing processes within the scope of the DfEE *Code of Practice*, a consensus will be reached on the actions which should be taken. If it does prove impossible to reach an agreed course of action with the governors and headteacher, the LEA will use its powers under the School Standards and Framework Act to issue a formal warning to the school. This can enable the LEA to consider the need to:

- appoint additional governors;
- suspend the school's right to a delegated budget and other delegated powers;
- impose and fund an action plan from the targeted Standards Fund;
- make recommendations to the governing body on any action related to the position of headteacher.

A senior inspector supported by the Head of Education Standards will present the decisions taken to a specially convened governing body meeting.

From this point onwards, LEA involvement will be in two strands:

- monitoring and evaluation of improvement;
- action planning and school support.

5.2.1 Monitoring visits

The first visits will take place within one month of the identification of the concerns and the senior inspector will report monthly to the school-specific monitoring group and the cross-department team on the improvement made by the school. The following formal reports will be made termly to the cross-department team, which is in a position to make decisions about the future recommendations for the school:

- the senior inspector will report about the improvements effected;
- the link inspector will report on the effectiveness of the support provided to the school through the negotiated support package;
- the corroboration team leader will report about the school's progress.

The Head of Standards supported by the cross-department team will consider the evidence and consider appropriate action. For a school with serious weaknesses, the school will be expected to remove the causes of the weaknesses within one year. The school's action plan and the LEA statement of support should reflect this.

For a school where a formal warning notice has been issued, the LEA will expect the school's action plan to indicate a timescale that is commensurate with the compliance period of the notice.

If at any time the recommendation of the monitoring teams is that the progress made by the school is unsatisfactory, the Head of Education Standards will report the matter to the Director of Education with the recommendation either that additional powers are required or that OFSTED be requested to make a further inspection.

5.3 Action planning and securing improvements

The school link inspector supported by the Chief Inspector/Head of Standards will act as the key adviser to the governing body and:

- Support the school in making a detailed analysis of the key issues and the body of the report.
- Provide guidance on the action plan and exemplars of good practice. In particular, the link inspector will support the headteacher and governors as they:

- identify the most significant actions required for each key issue;
- identify the methods to be used to monitor progress;
- specify detailed success criteria by which the school may measure progress.
- Provide critical appraisal of the structure, content and timescale for the action plan.
- Provide guidance on the support mechanisms which the LEA can bring to the action plan. Information about resources from the additional school improvement grant in the Standards Fund will be made available so that the school can plan to supplement its own resources in implementing its action plan. The LEA will make available the expertise of specialist inspectors and curriculum support teachers and negotiate their deployment in a support package as required by the school.

The Head of Standards will provide quality assurance of the action plan for the LEA.

5.4 Statutory duties of the LEA

In the case of those schools identified by OFSTED as having serious weaknesses, the LEA will prepare a statement of action following completion of the action planning process. In accordance with Circular 6/99 *Schools Causing Concern* the LEA will:

- assess the scope for closure and transference of pupils to neighbouring, better-performing schools;
- confirm its view that the action plan will address the issues satisfactorily within the given time periods;
- describe, following discussion with the school, its arrangements for evaluating and monitoring the effectiveness of the school's actions and the LEA support.

The school-specific monitoring group will consider the action plan and coordinate the LEA commentary on the school improvement action plan together with the LEA's own statement of intended action.

5.5 Intervention in schools where there has been a sudden unforeseen crisis

While most of the above actions apply, the situation may be more intractable and the LEA may have to extend the timescale while still maintaining close monitoring and providing an intensive support package for the school.

In this case, the LEA's response is closer to the plans for supporting a school requiring special measures, and the timescale for improvement is two years. The following section applies to these schools as well as to schools which, having been inspected, are deemed to require special measures.

5.6 Intervention in schools which require special measures

5.6.1 Any school placed on special measures will receive immediate assistance on the construction of the action plan via the school link inspector. This process will also be overseen and supported by a senior inspector and the Head of Standards.

5.6.2 The statement of planned LEA action and commentary on the school's action plan, including a statement on the school's viability and target date for the removal from special measures, will be produced by the relevant senior inspector and the Chief Inspector in consultation with the Head of Education Standards. Target dates for removal from special measures will be within a two-year timescale.

5.6.3 Any decisions regarding the appointment of additional governors or the suspension of financial delegation will be taken:

- i) initially, if necessary, during the preparation of the LEA statement of action; or
- ii) after an initial period of LEA support, probably one year, if these issues remain/become a cause for concern.

In both instances, the Head of Standards will make recommendations to the senior management team of the education department, who will then decide the appropriate course of action.

5.6.7 During a period of special measures, all schools will receive regular visits by the school's link inspector to monitor the progress of the action plan. This will be weekly. It will also involve feedback to the governing body.

5.6.8 It may also be necessary to allocate additional staff to the school in the form of advisers or consultants. This will be done after agreement with governors, where possible, and of the SSMG.

In addition, alongside HMI monitoring visits, the LEA will provide focused evaluations of key issues through in-school observation including a formal visit of two or more inspectors after each two terms. Feedback from these visits will be provided to the senior managers of the school.

5.6.9 During OFSTED monitoring visits, the link inspector will liaise with the visiting HMI and also represent the LEA on feedbacks. If appropriate, the inspector, Chief Inspector or Head of Standards will also be in attendance. Following each monitoring visit, the LEA will review its planned monitoring and evaluation arrangements with the school.

5.6.10 Liaison with diocesan bodies requires a review in respect of many school improvement activities.

5.7 Support for schools causing concern

The school-specific monitoring group will also agree an individually tailored package of support for schools requiring special measures which will also be eligible for the funds allocated through the Standards Fund grant for targeted schools. The same criteria will apply as at level 3 for the allocation of these funds, except that schools in level 4 will have priority of access to the funds if there is a shortfall.

The action plan and associated package of support will be agreed if they are in line with the issues identified and consistent with the criteria laid down in the Standards Fund Circular. Schools at this level may be directed towards sources of support within and outside the LEA and the appropriate services will be commissioned to negotiate with the school the detail of the package to be delivered by the LEA.

Once the action plan is in place the link inspector will coordinate an evaluation of the effectiveness of the support package and of the school's internal review of progress against the timescale prescribed.

5.8 Evaluation

The link inspector will discuss performance targets with the school's senior management team and governors, and how they relate to the LEA's criteria for evaluating the effectiveness of its support. In particular, discussion will focus upon:

- i) progress towards raising standards evidenced by:
 - consistent planning;
 - challenge to pupils;
 - effective use of the results of assessment in lesson planning;
 - improvements in levels of National Curriculum attainment.
- ii) progress towards improved quality of teaching evidenced by:
 - an increased proportion of satisfactory teaching observed;
 - achievement of targets.

- iii) progress towards improved management and governance evidenced by:
 - a strategic development plan that incorporates priorities, measurable objectives, financial implications, staff development, monitoring and evaluation strategies and projected completion dates;
 - clear strategies for the headteacher and relevant senior staff to monitor teaching and learning in classrooms;
 - implementation of a rigorous timetabled programme for monitoring teaching and sharing good practice;
 - provision of training and time for subject coordinators to monitor their own subjects;
 - accountability of governors through their monitoring of standards and progress; their evaluation; and the decisions for action that result.
- (iv) other criteria drawn from the key issues specific to the school.

The strategies for evaluating the effectiveness of the LEA's support will include:

- reviewing the school's documentation, including the outcomes of the school's own process of self-evaluation;
- lesson observation;
- observations of governors' meetings and staff meetings and a review of the minutes of meetings;
- interviews with governors, staff and pupils;
- analysis of outcomes of internal and external assessments;
- other outcomes of the support specific to the school's need.

5. THE MAINTENANCE OF SCHOOLS

Although the role of LEAs is changing rapidly from being a provider of education to being an enabler of school improvement, the fact cannot be ignored that LEAs are responsible for the maintenance of schools in the public sector. This is a role that is increasingly reduced by legislation and by ministerial decree but, nonetheless, LEAs remain responsible for providing, funding and staffing the majority of schools in the country.

OFSTED, in *LEA Support for School Improvement*, does unfortunately underplay the importance of these tasks, although the various duties encompassed within the heading of “maintenance” merit brief reference in OFSTED’s functional categorisation under Access and Strategic Management (*op. cit.*, pp. 6 and 7). Without a building, without funds and without staff, no school could function and, whilst self-government [*sic*] of schools can of course be developed to allow governing bodies to take on responsibility for all aspects of maintenance, the authors believe that the role of LEAs in providing the structure of education deserves separate analysis and consideration.

In this chapter, therefore, the role of LEAs in providing, supplying and physically supporting the majority of maintained schools will be examined under the headings:

- ◆ The Provision of Schools and School Buildings
- ◆ Funding
- ◆ Staffing.

A. The Provision of Schools and School Buildings

Introduction

Amidst the emphasis on the self-government of schools, the role of LEAs in providing the structure in which education is provided can be overlooked. Despite the period of opting out and the continuing role of voluntary aided schools, the great majority of schools are provided and maintained (in construction and repair terms) by LEAs.

The Fair Funding regime and OFSTED, in *LEA Support for School Improvement*, recognise that the provision of school buildings forms part of the strategic management role of LEAs, but, given the importance and cost of this responsibility, the briefest of mentions in both scarcely does justice to the legal and practical reality.

To many, the fundamental role of the LEA, besides providing strategic leadership and a force for improvement, is its provision of schools and school buildings, the allocation of resources to extend and improve, and its responsibility to ensure that schools are of a standard in which children can learn. Indeed, while not perhaps giving sufficient weight to the importance of this area, OFSTED will nonetheless criticise LEAs which fail to maintain school buildings to an appropriate, or even, in some cases, basic, standard (see, for example, the inspection of Sheffield LEA, 2 February 2000).

There is also a considerable overlap between the strategic management function and the responsibility to secure access by providing sufficient school places and removing surplus places where necessary. Although it is in theory possible for an LEA to own no school of its own, but to supply places through schools maintained by other bodies, the history of state provision means that, short of a revolutionary transfer of ownership, LEAs will continue to be the main owner and builder of schools for the foreseeable future.

This chapter will therefore examine the duties and powers imposed upon LEAs to provide, build and keep in good repair those schools which they still legally own.

Establishment of schools

History

Until the 1830s, the state played little part in the development of schools, with the main responsibility being left to private bodies, charities and the churches. Only in 1833 were the first government grants paid to school promoters and inspections of schools were carried out only from 1840, though not quite in the same form as OFSTED inspections 150 years later.

What those inspections showed was a woeful lack of schools in many parts of the country. To meet this shortfall, legislation was passed to encourage the establishment of schools. The most important were the School Sites Acts of 1841, 1844, 1849, 1851 and 1852 and the Elementary Education Act 1870. The School Sites Acts encouraged the transfer of land for the purpose of establishing schools and building houses for schoolteachers with the incentive of allowing automatic

reverter of the site to the conveyer of the land should the land cease to be used for those purposes. At that time, the problems which became apparent when the schools became too small or obsolete in the 1960s had perhaps not been foreseen.

The School Sites Acts did not however provide a system of schools throughout the country and, to fill the gaps, school boards were set up under the Elementary Education Act 1870 in areas where there were not enough church schools. These boards were able to raise a rate and to acquire, by way of gift or sale, land upon which public elementary schools could be built. A number of schools were subsequently built which were owned and maintained by the school boards and which complemented the provision of “voluntary” schools by the churches. If, however, there were areas where the church schools were sufficient, there was no need for a school board and, hence, no need for school board schools.

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In 1902, LEAs were created to take over the functions of school boards, including the ownership and maintenance of school board schools. They continued, however, to work alongside church schools and although by the 1940s LEAs had become the main providers of schools, the church continued to supply a significant number of school places. This fact was recognised by the Education Act 1944 and the partnership between LEAs and churches was enshrined in the legislation.

For a more detailed consideration of the work of LEAs in building and adapting school premises – with incidentally profound curricular implications – see Stuart Maclure, *Educational Development and School Building* (1984), Longman.

This history therefore explains perhaps one of the most surprising elements of LEA responsibility: that whilst an LEA is under a duty to secure that sufficient school places for providing primary and secondary education are available in their area (s. 14 Education Act 1996), it need not itself provide a single school.

This duty is discussed in more detail elsewhere, but the wording of s. 14 plainly reflects the responsibility of LEAs (as successors to school boards), not necessarily to establish schools, but to monitor and ensure that gaps are filled. Ironically, the view of LEAs as monitors of educational standards rather than actual providers is not far removed from the role of their Victorian predecessors. Just as a school board, if satisfied that there was adequate alternative school provision in its area, could decide not to establish any schools, so an LEA could come to the same conclusion.

Along similar lines, in *R v Secretary of State for Education and Science ex p Avon County Council* (1990) Times, 15 June, it was held that an LEA is entitled and required to take into account the provision of all schools (including independent schools) in its area to determine what numbers and types of schools are required to secure that there are sufficient school places available.

Schools cannot be regarded, however, as sufficient unless they are sufficient in number, character and equipment to provide all pupils with the opportunity of appropriate education (s. 14(2)). “Appropriate education” means education which offers such variety of instruction and training as may be desirable in view of the pupils’ different ages, abilities and aptitudes and the different periods for which they may be expected to remain in school, including practical instruction and training appropriate to their different needs (s. 14(3)).

The practical reality, however, is that the providers of the majority of schools are LEAs.

Establishment of new schools

In order to fulfil their functions, LEAs have the power to establish primary and secondary schools inside or outside their administrative borders (s. 16(1) and (2) of the 1996 Act). Under s. 17 of the 1996 Act, an LEA may also establish nursery schools, although this power appears to be limited to the LEA’s administrative area.

The powers that enable an LEA to acquire land, in order to build these new schools, are contained in ss. 530 and 531 of the 1996 Act. Section 531 enables an LEA to acquire land for the purposes of a community school by agreement and s. 530 allows an LEA to seek an order from the Secretary of State to purchase compulsorily any land (whether within or outside its area) which is required for the purposes of any school which is to be maintained by it or which it has power to assist, or is otherwise required for the purposes of its functions under the 1996 Act. If s. 530 is invoked, the LEA will have to comply with the authorisation procedure contained in the Acquisition of Land Act 1981 and the regulations made thereunder.

If an altruistic soul wishes to give land to an LEA for the purposes of a school or for a purpose connected with education, s. 529 of the 1996 Act gives the LEA power to accept such a gift on trust. To avoid any complications, s. 529(3) makes it clear that although the land would be vested in the LEA as trustee, any school which is established as a result will be a community school. Albeit now in different terms, this

provision replicates the effects of the Elementary Education Act 1870 where school boards were able to accept gifts of land which would then be held on trust for elementary education purposes.

The only difference is that land given free of charge or conveyed at an undervalue under the 1870 Act is held on charitable trust (see *Hampshire County Council v Attorney General* 4 May 1994 unreported) whereas gifts under s. 529 should not create such trusts as they will be used to build community schools which by statutory definition cannot be charities.

An LEA is expressly prohibited from acquiring land required for the purposes of a voluntary school unless it is satisfied that the expenditure incurred will not include any sums which should have fallen to be borne by the governing body of the voluntary school (s. 532(2)).

In order to establish a community school, or a community special school, an LEA will need to comply with the formal procedures to establish such schools. The procedure is now set out in ss. 28 and 31 of and Schedule 6 to the School Standards and Framework Act 1998 and the Education (School Organisation Proposals) (England) Regulations 1999, SI 1999/2213. (In Wales, the Education (School Organisation Proposals) (Wales) Regulations 1999, SI 1999/1671, will apply). An important change from the old procedure is that proposals will no longer have to be submitted to the Secretary of State; instead the proposals will need to be submitted to the local School Organisation Committee for determination (In Wales, though, School Organisation Committees have yet to be established and the roles of the Committee and Adjudicator are performed by the National Assembly for Wales).

Under s. 28, where an LEA proposes to establish either a community or foundation school, it is required to publish statutory proposals in the form and in the manner prescribed by the 1999 Regulations. A copy of the published proposals should be sent to the School Organisation Committee for the LEA's area (s. 28(6)). Before doing so, however, the LEA must consult such persons as appear to it to be appropriate (s. 28(5)). Before publishing the proposals and during the course of the procedure, the LEA should have regard to any guidance published by the Secretary of State, which is currently found in DfEE Circular 9/99 *Organisation of School Places*.

Once the proposals are published, any person may make an objection to them (para 2 of Schedule 6), which should be sent to the promoting LEA within two months of the date of publication (reg 7 of the 1999

regulations). The LEA must then send copies of all objections to the School Organisation Committee, together with its comments.

If no objections are received or the objections which have been received are subsequently withdrawn, the LEA determines whether the proposals should be implemented within four months of the date of publication (para 4). If, however, objections have been received and not withdrawn or no objections are outstanding, but the LEA has failed to make a determination within four months, it is necessary for the SOC to consider the proposals (para 3). (For the rules concerning the establishment and conduct of the SOC, see s. 24 of and Sch. 4 to the 1998 Act and the Education (School Organisation Committees) Regulations 1999, SI 1999/700.)

The SOC has the power to reject the proposals, approve them without modification or approve them with such modification as it thinks desirable after consulting the prescribed persons and bodies. In reaching a decision, the SOC should have regard to guidance from the Secretary of State and the LEA's School Organisation Plan.

Where the proposals are determined by the LEA or are approved by the SOC, the LEA must implement the proposals in the form in which they were determined or approved (para 5). There is, however, provision for the LEA to request that the proposals be modified after consultation with the prescribed persons and bodies or implemented at a later date (para 5(2)).

The procedure for the establishment of community or foundation special schools is set out in s. 31 of and Schedule 6 to the 1998 Act and does not materially differ from the procedure for community and foundation schools set out above.

Procedures for the establishment of other categories of new schools by bodies other than LEAs are also set out in s. 28 and Schedule 6, together with details of those bodies, including LEAs, which are responsible for implementing the proposals. Relating to these proposals, there are occasions where an LEA may give assistance to the governing bodies of voluntary aided schools. Where the assistance takes the form of the LEA providing premises, the LEA comes under a duty to transfer its interest to the school trustees, or if there are no such trustees, to the foundation body (para 20). Similarly, where an LEA is to provide a site (but not playing fields) for a voluntary controlled, foundation or foundation special school, the LEA must transfer its interest in the site and buildings to the school trustees, or if none, to the foundation body, or, if that does not exist, the governing body (para 16).

Maintenance, control, alteration and rationalisation

LEAs are under a duty to maintain any community, community special, voluntary controlled, foundation, foundation special, voluntary aided and maintained nursery schools within their areas (s. 22(1)) School Standards and Framework Act 1998).

In the case of a community, community special or maintained nursery school, the duty to maintain includes the duty to defray all the expenses of maintaining it and the duty to make premises available to be used for the purposes of the school (s. 22(3)).

For a foundation, voluntary controlled and foundation special school, the duty consists of the defraying of all the expenses of maintaining it, together with the duty to provide new premises in certain circumstances (s. 22(4) and see also Schs. 3 and 6).

For voluntary aided schools, the duty to maintain includes defraying all expenses of maintaining the school, except those which are required to be met by the governing body under para 3 of Schedule 3 to the 1998 Act and the duty to provide new premises in certain circumstances (s. 22(5) and see para 4 of Sch. 3 or para 14 of Sch. 6). The maintenance of schools once established, through funding, is discussed below.

Control and use

The control and use of maintained school premises is governed by s. 40 of and Schedule 13 to the 1998 Act. This provides that the occupation and use of community and community special school premises, both during and outside school hours, shall be under the control of the governing body, subject to any direction given by the LEA, any transfer of control agreement or any requirement of an enactment or regulations made under it (Sch. 13, para 1). The LEA may give such direction as to the occupation and use of the premises as it thinks fit.

In respect of use outside school hours, the governing body must have regard to the desirability of the premises being made available for community use. More particularly, in order to promote community use, the governing body may enter into a transfer of control agreement with any person or body. Before doing so, however, the governing body must obtain the LEA's consent to the agreement (para 2(1) and (2)).

In the case of foundation and foundation special schools, the control of the premises is solely a matter for the governing body and the LEA

cannot give directions as to the use of the premises, nor is its consent required before the governing body can enter into a transfer of control agreement (para 3).

With voluntary controlled and voluntary aided schools, the occupation and use of the premises is under the control of the governing body but is subject to:

- a) in the case of voluntary controlled schools, such direction as the LEA thinks fit, subject to allowing the governing body to decide the use of the premises on Saturdays when not required for school purposes or for a purpose connected with education or the welfare of the young and permitting foundation governors to decide the use of the premises on Sundays (paras 5 to 7);
- b) in the case of voluntary aided schools, a direction from the LEA to require the governing body to provide accommodation on the school premises on not more than three weekdays in any week, free of charge, for a purpose connected with education or the welfare of the young and only when the premises are not required for school purposes (paras 5 to 7).

In spite of the principles of control set out above, LEAs are considered to be the rateable occupiers of community and voluntary controlled school premises. In *Kent County Council v Ashford Borough Council and Others* (1999) Times, 7 September, the Court of Appeal held that in the case of a voluntary controlled school, the LEA not the governing body was the rateable occupier of the school buildings. The court decided that the scheme of financial management adopted by the LEA did not touch on the occupation or control of the school premises. That is perhaps understandable, but what is difficult to understand is how the court ignored the sections set out above which provided that, subject to limited directions from the LEA, the occupation and use of such a school is under the control of the governing body. The consequence of the decision was that the LEA lost an entitlement to charitable rate relief amounting to £6 million, but it may have wider implications in clouding what was already a fairly unclear picture of responsibility.

The position has, however, now been confirmed by s. 78 of the 1998 Act, which states that for the purposes of Part III of the Local Government Finance Act 1988 (provisions dealing with non-domestic rating), the occupier of a maintained school shall be deemed to be the LEA in the case of community, voluntary controlled and community special schools and the governing body in all other cases.

Whoever is in control, however, maintained schools benefit from the provision in s. 547 of the Education Act 1996 which makes it a criminal offence for a person who is present on school premises, including playing fields, without lawful authority, to cause or permit a nuisance or disturbance to the annoyance of persons who lawfully use the premises. A police constable who has reasonable cause to suspect that a person is committing or has committed this offence may remove him from the premises. The LEA (in the case of community and voluntary controlled schools) or the governing body (in the case of voluntary aided or foundation schools) may authorise a person other than a police constable to take this action, although concern for the safety of staff may suggest that the removal of trespassers is best left to the police. Proceedings under s. 547 can be brought only by a police constable, the LEA or, in the case of voluntary aided or foundation schools, a person authorised by the governing body. For the offence to be committed, it is not necessary for the persons annoyed to be on the premises at the same time as the offender causes the nuisance or disturbance. Glue sniffers who sniffed glue on a school playground and left the apparatus behind to be discovered by pupils were held to have been properly found guilty of the offence (*Sykes v Holmes* (1985) CLR 791), so it could be used equally against drug users who leave their needles behind or dog walkers whose dogs leave faeces on playing fields, although there may be evidential problems proving who left what, where and when.

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Parents do, though, cause particular problems and it was once thought that they had no more than a bare licence to enter school premises and that this could be revoked if they behaved unreasonably. This is, however, no longer the case following the Court of Appeal's decision in *Wandsworth LBC v A* [2000] EdCR 167. The LEA had obtained an injunction against a parent who had been causing a problem in one of its schools. The Court of Appeal accepted that parents have no licence to roam at will, enter classrooms during lessons or interfere with the professional work of education. However, they did not accept that parents were in the same position as milkmen or postmen or any casual enquirer at the school. They then considered the type of buildings to which the public may have access and the steps which a local authority could take to prevent or to terminate that access. First, in the case of property to which members of the public are not normally invited, a local authority has the unfettered right to give or withhold permission to visitors and there is no requirement placed on the local authority to give a visitor an opportunity to make representations before he is banned. The second category was identified as premises belonging to

the local authority which are usually open to the public in general, although there is no statutory duty placed upon the authority to permit the public to have access. Here, before the local authority can forbid a member of the public from entering, it is required to give the individual an indication of what it is proposing to do and an opportunity to make representations why that course should not be taken. The case of a parent visiting the school their child attends was held to be within a third category, even stronger than the second one. A parent's interest, in public law terms, in being on school premises was even greater than a member of the public using a recreation ground or a library and, therefore, before she could be banned from the site, the headteacher had an obligation to give the parent the opportunity to make representations. Although not suggesting that the headteacher had to conduct a formal investigation or something resembling a trial, the Court of Appeal nonetheless found that the headteacher should have written to the parent asking for her comments and giving her a short time for reply. As he had not, the court concluded that the parent's licence to use the school premises had not been properly terminated.

Asset Management Plan

In respect of schools which are maintained by an LEA, the LEA is under an obligation to prepare an "Asset Management Plan" setting out the priorities for capital expenditure on schools and the approach proposed locally to dealing with them (reg 2 Education (Education Standards etc. Grants) (England) Regulations 1999). Standards Fund grants are available for supporting the preparation of such plans.

Standards of premises

Under s. 542 of the 1996 Act and the Education (School Premises) Regulations 1999, SI 1999/2, LEAs are under a duty to secure that maintained school premises conform to prescribed standards. The only exceptions to this duty occur where the Secretary of State has directed that the standards may be relaxed, for example, if the nature of the site makes it unreasonable to require conformity or, if a school is to have an additional or new site, certain circumstances apply (for all the circumstances see s. 543). Guidance on the standards can be found in DfEE Circular 10/96 *The 1996 School Premises Regulations*, albeit in the context of the 1996 Regulations, the predecessors to the 1999 version.

The duty is an absolute one (see *Reffell v Surrey County Council* [1964] 1 All ER 743), which may cause LEAs some problems since the creation of the new framework for schools. The duty applies to all maintained schools, so will include voluntary aided and foundation

schools. The question may be rhetorical, but how can an LEA ensure that the duty is met in schools which it neither owns nor controls and into which it has no right of access for maintenance purposes? The problem is not necessarily limited to voluntary aided and foundation schools, for, although the LEA may own community and voluntary controlled schools, it does not – paradoxically in the case of VC – control them. In addition, given the division of responsibility for repairs first established under local management, LEAs do not have responsibility for many factors which may affect the standard of the premises. Fair Funding has further prejudiced the LEA's position by enabling governing bodies to take the money delegated to them for repair and maintenance and use outside contractors rather than the LEA's own architects or buildings staff. It may not be long therefore before an LEA is held responsible for injury caused by a breach of its absolute duty under s. 542 in circumstances where it could not have prevented the accident because it does not own, control or inspect the premises in question. It is true that in the case of community schools, LEAs may still give directions, which could encompass a direction as to the standard of the premises, but nonetheless it is a worrying potential liability for LEAs.

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In addition to the duty to ensure that premises meet the prescribed standards, occupiers of premises owe duties to users of sites under the Occupiers' Liability Acts 1957 and 1984, the Health and Safety at Work etc. Act 1974 and the Environment Act 1990.

Under the Occupiers' Liability Acts in particular, the occupier, or person having control, of premises is under a duty to take such care as in all the circumstances of the case is reasonable to see that a visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted to be there (s. 2(2) Occupiers Liability Act 1957). The Occupiers Liability Act 1984 imposes a duty of care (usually a lesser duty) in respect of persons other than visitors. Parents are more than mere visitors and have certain rights to enter schools (see *Wandsworth LBC v A*, above).

Invariably, in the case of community schools, it is the LEA who will be sued for any breach of the Acts, although it is possible that the governing body may fall within the definition of occupier by virtue of the provisions of Schedule 13 of the 1998 Act. The *Kent County Council* case may, however, direct liability back on to the LEA as, according to the Court of Appeal, *de facto*, even if not *de jure*, occupier of community and voluntary controlled schools. The point may however be academic as the cost of any claim made against the governing body of a community or voluntary controlled school will be an expense of maintaining the school and hence should be payable by the LEA.

For some cases on the responsibility of LEAs for accidents caused by defective premises, see, for example, *Ching v Surrey County Council* [1910] 1 KB 736 (pothole in playground); *Morris v Caernarvon County Council* [1910] 1 KB 840 (heavy door on spring unsuitable for use by young children); *Jackson v London County Council and Chappell* (1912) 76 JP 217 (contractor leaving dangerous materials in playground); *Gillmore v London County Council* [1938] 4 All ER 331 (highly polished floor used for PE); *Lyes v Middlesex County Council* (1962) 61 LGR 443 (unstrengthened glass panel in door); and *Reffell v Surrey County Council* [1964] 1 All ER 743 (use of untoughened glass in door).

Under the Health and Safety at Work etc. Act 1974, a duty is imposed on all persons having control of premises to any extent to ensure, so far as is reasonably practicable, that the premises, means of access and any plant or substance are safe and without risk to health (s. 4 Health and Safety at Work etc. Act 1974). Although it has not been tested in the courts, as in the case of the Occupiers Liability Acts, both the LEA and the governing body of community and voluntary controlled schools may fall within the ambit of the Act. In *Moualem v Carlisle City Council* (1994) Times, 8 July, a local authority was held to owe a duty under s. 4 towards children at an indoor play centre, so the precedent is probably there for a similar claim to be made against an LEA in respect of similar activities at schools.

Under the Management of Health and Safety at Work Regulations 1992, SI 1992/2051, the LEA must arrange to organise, control and review how the health and safety measures in schools are managed.

One consolation for LEAs, though, is that it is the governing body which is responsible under the Environmental Protection Act for keeping school land clear of litter and refuse (s. 89 Environmental Protection Act 1990). So clearing up dog faeces, although many LEA officers will feel it to be within their job description, is a matter for governing bodies.

In addition, LEAs clearly need to be conscious of the obligations imposed by the Disability Discrimination Act 1995. Although the provisions of the Act do not apply to the provision of education itself (although see the DfEE Consultation Document *SEN and Disability Rights in Education Bill* for proposals to remove this exemption), the Act can apply to the access to and use of any place which members of the public are permitted to enter (s. 19(3) Disability Discrimination Act 1995). Consequently, there may an obligation to ensure that disabled parents or other users of school premises, particularly community facilities, are not denied access because of their disability.

Alterations and Rationalisation

Similar provisions to those applying to the procedure for establishing schools apply in the case of proposals to alter maintained schools. Thus where an LEA proposes to make a prescribed alteration to a mainstream community school or a prescribed alteration to a foundation school, being an enlargement of the school premises, the LEA must publish proposals (s. 28(1)(b) and (c) School Standards and Framework Act 1998. For a judicial consideration of what is meant by significant changes as defined by s. 573 of the 1996 Act (see *R v Downes ex p Wandsworth LBC* 14 January 2000, unreported). The proposals must be in the form and manner prescribed by the Education (School Organisation Proposals) (England) Regulations 1999, SI 1999/2213, or, in Wales, the Education (School Organisation Proposals) (Wales) Regulations 1999, SI 1999/1671.

The process for dealing with objections and determining applications is the same as for the establishment of schools set out above, with the ultimate decision, if objections are received, being for the School Organisation Committee.

Alterations to community and foundation special schools are dealt with in virtually the same way under s. 31 of the 1998 Act.

Most LEAs, as part of their school organisation planning, will seek to rationalise the provision of school places. If, however, the Secretary of State takes the view that the provision for primary or secondary education in maintained schools in the area of any LEA or in any part of such an area is excessive, he may direct an LEA to exercise its powers to make proposals for the establishment, alteration or discontinuance of schools (s. 34 of and para 2 of Sch. 7 to the 1998 Act). In respect of any foundation, voluntary or foundation special school, the Secretary of State may direct that the governing body shall issue proposals for the alteration of their school (para 2(2)(b)).

If the contrary situation applies and the Secretary of State believes that the provision for primary or secondary education in maintained schools in the area of an LEA or part of an LEA's area is insufficient, he may make a direction requiring an LEA to exercise its powers to make proposals for the establishment, alteration or discontinuance of schools (para 3). Similar directions may be made in respect of foundation, voluntary and foundation special schools as apply in the case of excess places.

If no proposals are forthcoming, the Secretary of State may make such proposals as might have been made by the LEA or governing body (para 5) and the procedure for such proposals by the Secretary of State

is governed by paragraphs 6 to 8 of Schedule 7. If, however, the LEA or governing body does publish proposals, they are dealt with in the same way as all other proposals to establish, alter or discontinue, i.e. under s. 28, Schedule 6 and the 1999 Regulations.

Change of category

An analogous process to the alteration of premises applies to proposals to change the categorisation of a school allocated with effect from 1 September 1999. Under the School Standards and Framework Act 1998, new categories of school were introduced which have been considered throughout this book (s. 20 and Sch. 2). Former county schools were allocated the new category of community school, aided and special agreement schools were deemed to be voluntary aided schools, controlled schools became "new" voluntary controlled schools. County special schools similarly became community special schools. Only former grant-maintained and grant-maintained special schools had any freedom to choose their new category. These schools were given an indicative category by the DfEE, normally foundation or foundation special school or voluntary aided in the case of grant-maintained schools which had formerly been aided or special agreement before acquiring grant-maintained status (para 4 of Schedule 2 and see the Education (Allocation of Grant-maintained and Grant-maintained Special Schools to New Categories) Regulations 1998, SI 1998/1969). They could, though, elect to accept their indicative category or choose to be allocated a different category. Some did, but many chose to accept their categorisation as foundation schools.

The 1998 Act does, though, make provision for schools to change their categories at some later stage (s. 35 and Sch. 8). Initially a moratorium was imposed on any changes (except in the case of voluntary aided schools wishing to become voluntary controlled), but that ends on 31 August 2000 (reg. 3 Education (Change of Category of Maintained Schools) (England) Regulations 1999, SI 1999/2259).

From that date on, maintained schools may propose to change their categories and, if they do so, must follow the procedures laid down in paragraph 2 of Schedule 8 and the Education (Change of Category of Maintained Schools) (England) Regulations 1999, SI 1999/2259). These, in effect, require governing bodies, once they have decided to publish proposals to change their category, to follow the procedures for alteration or discontinuance under ss. 28 and 31 discussed above and below, with the ultimate decision normally resting with the School Organisation Committee.

Discontinuance and disposal

For many reasons, LEAs wish to close schools, for example, through their own rationalisation plans or in consequence of a direction from the Secretary of State under Schedule 7 to the 1998 Act.

The procedure for closing community, foundation, voluntary schools or maintained nursery schools is contained in s. 29 of and Schedule 6 to the 1998 Act. Proposals to discontinue community and foundation special schools are governed by s. 31 and Schedule 6.

The principles are similar to those applying to establishment and alteration. If an LEA proposes to discontinue a maintained school or maintained nursery school, it must first publish statutory proposals (s. 29(1), see above). The proposals shall be in the form and manner prescribed by the relevant regulations and the LEA must consult such persons as appear to it to be appropriate (for the extent of consultation required and the steps to be taken by an LEA in response, see *R v Leeds City Council ex p N* [1999] ELR 324). In so doing, the LEA must have regard to the guidance of the Secretary of State contained in DfEE Circular 9/99 *Organisation of School Places*. Copies of the proposals, together with prescribed additional information about the proposals, must be sent to the SOC for the area (s. 29(5)).

Once the proposals are published, any person may make an objection to them (para 2 of Schedule 6) which should be sent to the promoting LEA within two months of the date of publication (reg 7 of the 1999 Regulations). The LEA must then send copies of all objections to the SOC together with its comments on the objections.

If no objections are received or the objections, which have been received, are subsequently withdrawn, the LEA is responsible for determining whether the proposals should be implemented and must do so within four months of the date of publication (para 4). If, however, (1) objections have been received and not withdrawn or (2) no objections are outstanding, but the LEA has failed to make a determination within four months, it is necessary for the SOC to consider the proposals (para 3).

The SOC has the power to reject the proposals, approve them without modification or approve them with such modification as it thinks desirable after consulting the prescribed persons and bodies. In reaching a decision, the SOC should have regard to guidance from the Secretary of State and the LEA's School Organisation Plan.

Where the proposals are determined by the LEA or are approved by the SOC, the LEA must implement the proposals in the form in which they were determined or approved (para 5). There is however provision for the LEA to request that the proposals be modified after consultation with the prescribed persons and bodies or implemented at a later date (para 5(2)).

Similar provisions apply to the discontinuance of community and foundation special schools (s. 31).

The discontinuance of a school often leads to an LEA establishing a new school on the same site, for example if the LEA discontinues an infant and junior school on the same campus and then creates a new primary school in their place. On other occasions, however, as a consequence of discontinuance, the LEA may be faced with having to dispose of the site.

In principle, the LEA has the general power, available to all local authorities, to dispose of school sites and obtain capital receipts as a result under s. 123 or s. 127 of the Local Government Act 1972. This power is, however, subject to a number of restrictions.

First, following national concern at the widespread disposal of school playing fields, section 77 of the 1998 Act introduced controls on the ability to dispose of any playing fields which are, immediately before the date of disposal, used by a maintained school for the purposes of the school or which are not then so used, but have been so used at any time within the period of ten years ending with that date (s. 77(1)). "Playing fields" are defined as "land in the open air, which is provided for the purposes of physical education or recreation, other than any prescribed description of land" (s. 77(7)).

Consequently, before disposing of the playing fields or former playing fields, the LEA must obtain the consent of the Secretary of State. Guidance on the use of s. 77 and the criteria to be adopted by the Secretary of State can be found in DfEE Circular 3/99 *The Protection of School Playing Fields*. The number of school playing fields sold to developers is claimed to have decreased from 40 per month to three per month after the introduction of these measures (*Independent*, 14.3.2000).

Similar controls are exercised by the Secretary of State over any proposal by an LEA to change the use of current playing fields or land used as playing fields within the last ten years. Unless the Secretary of State's consent is obtained, the playing fields cannot be used for purposes which do not consist of or include their use as playing fields by a maintained school for the purposes of the school (s. 77(3)).

This control does not, however, apply where the land will become used in connection with the provision by the local authority of educational facilities for a maintained school or any recreational facilities (s. 77(4)).

Second, where an LEA wishes to dispose of schools originally built under the Elementary Education Act 1870, particular issues may arise. If the conveyance of the original land to the school board stated that the land was “to be held upon trust for the purposes of an elementary school within the meaning of the Elementary Education Act 1870” or used similar words, the land may be held subject to a charitable trust. This may mean that any proceeds of sale will not belong absolutely to the LEA, but will be held on trust for charitable, educational purposes. This restriction arises from the decision of Morritt J in *Hampshire County Council v Attorney General* 4 May 1994, unreported, where he held that land originally conveyed to a school board either by way of gift or at a discounted price, using the wording set out above, was subject to a charitable trust. His decision left open the possibility that land conveyed at full value was not so encumbered, although the Charity Commission has maintained that these sites too are charities. The consequence is that if land affected in this way is sold, either the charitable trusts will have to be transferred to the site of any new school established to replace the old school or a Charity Commission scheme will be required to set up a charitable fund from which awards and grants can be made.

Third, if school land has been obtained by compulsion under s. 530 of the 1996 Act, the *Crichel Down* principle will apply. This requires a local authority, when considering disposing of land acquired under a compulsory purchase order, to first offer the land back to the original owner.

Fourth, there are the rules relating to the reverter of sites. As this chapter started with an examination of how “state” schools were first established in the 19th century, it is ironic that as the section comes to an end, it is necessary to look back to those same times. However much education is modernised, the reality is that the structure is still based on the foundations of schooling built between 1841 and 1880.

As mentioned when looking at the history of schooling, under the series of School Sites Acts between 1841 and 1852, individuals were encouraged to provide land for schools with the incentive being that, if land ceased to be used for a school, the land would revert back to its original owner. (Land ceases to be used for the purpose for which it was originally granted under the 1841 Act when it ceases to be used as a school, but also where a denominational school changes in character

to a non-denominational school, see *Fraser and Fraser v Canterbury Diocesan Board of Finance* [2000] Times, 22 February.) What the creators of these Acts had perhaps not envisaged was that the land would continue to be used well into the next century and that when, eventually, the school closed, ascertaining the original owner would prove a nightmare for LEAs. Even where a revertee could be found, it was discovered that they frequently had no power to dispose or even use the land, leading to a number of sites falling into disrepair. As a result, the Reverter of Sites Act 1987 was passed. This Act provides that where land should have reverted to the successor to the original owner, the land, instead of reverting back, is held on trust by, usually, the LEA (s. 1(1)). The statutory trust requires the trustee to sell the land and stand possessed of the net proceeds of sale upon trust for the persons who would have otherwise been entitled to the ownership of the land upon reverter (s. 1(2)).

If the LEA is unable to locate the person to whom the land should have reverted, it may apply to Charity Commissioners for a scheme which extinguishes the rights of the person to whom the land should have reverted and requires the LEA to hold the proceeds on sale for such purposes as the Commissioners permit (s. 2). Before making an application, the LEA must have taken such steps as are reasonably practicable to locate the revertee, including placing notices in two national newspapers and one local newspaper and on the relevant land. A period of not less than three months must be given for the revertee to come forward, after which, if no claim has been made, the LEA can apply to the Charity Commissioners (s. 3).

Where the Commissioners make an order, public notice must be given and a copy must be available for public inspection in the locality of the land. An appeal to the High Court against the order can be made by the Attorney General, the trustees of the statutory trust, a beneficiary or any two or more local inhabitants (s. 4).

Problems arose under the 1987 Act where land, originally conveyed under the 1841 Act, had formed part of a larger piece of land. In *Marchant v Onslow* [1994] 2 All ER 707, the court held that, when a site which had been conveyed pursuant to the 1841 Act ceased to be used for school purposes, the site reverted to the same ownership as that of the other land or estate of which it originally formed part. Where, however, the land conveyed was a freestanding site and did not form part of a larger estate or parcel of land, it reverted to the original grantor or his successors in title. The 1987 Act has also generated litigation in respect of entitlement to the proceeds of a fire insurance policy following the destruction by fire of a school conveyed under the 1841 Act (*Habermehl v HM Attorney General* 31 July 1996, unreported).

In addition to disposal of school sites by LEAs, it is also possible for governing bodies of voluntary and foundation schools to sell their land. Because of the provisions governing the establishment of these schools, the LEA enjoys certain rights in connection with the disposal of the property. Section 76 of and Schedule 22 to the 1998 Act govern the disposal of land used for the purposes of foundation, voluntary and foundation special schools. Where the land is held by the school's governing body, the consent of the Secretary of State is required before the land can be sold and, as a condition of disposal, the Secretary of State may either order that the land be transferred to the LEA for such sum as he may determine or that the LEA is entitled to the whole or part of the proceeds of sale (Sch. 22, para 3). (Different rules apply to the disposal of land by a foundation body or trustees of foundation, voluntary or foundation special schools – see paras 2 and 3.)

B. Funding

Introduction

As part of their duty to maintain schools, LEAs, in addition to providing accommodation, are under an obligation to finance all maintained schools within their areas.

An LEA is therefore required to maintain not only community and controlled schools, but also voluntary aided and foundation schools, even though the LEA does not own the land or employ the staff at the latter types of school. Previously under the 1988 and 1996 Acts, LEAs had not been responsible for directly maintaining grant-maintained and grant-maintained special schools, as these schools were funded by the Funding Agency for Schools (FAS), since abolished. From 1 April 1999, however, the FAS's role disappeared and the paymaster for all maintained schools became once more the LEA.

In addition to explicit statutory functions outlined below, it should be noted that good finance teams spend a great deal of time not only monitoring budgets but also in providing advice and support. The guidance covers how to handle accounting systems, budget review, reprofiling expenditure and helping schools through licensed deficits. Whether this is a *de facto* role or an implied duty is probably not worth debating.

To provide for the financing of all maintained schools under the framework introduced by the 1998 Act, new arrangements, known as Fair Funding, were introduced with effect from 1 April 1999. These were intended to produce a clearer division of responsibility between

LEAs and schools and to ensure further delegation of funds to governing bodies. A DfEE Consultation Paper, entitled *Fair Funding: Improving Delegation to Schools*, was issued in May 1998 and the implementing regulations, the Financing of Maintained Schools Regulations 1999, SI 1999/101, soon followed.

The aims of the new financial framework included raising standards, developing the self-management of schools, increasing accountability and transparency, achieving equality in distribution and ensuring value for money. To promote the other main aim of providing clarity in the division of responsibility between LEAs and maintained schools, the 1999 Regulations sought to identify those areas for which the LEA must still retain responsibility for expenditure and those areas where schools should be given freedom to spend.

Accordingly, LEA expenditure is divided into three categories: non-school expenditure, ongoing school-related commitments and the Local Schools Budget.

Non-school expenditure includes education (except in primary and special schools) for children under five, adult and community education, student awards, the youth service and revenue funding of capital expenditure relating to these services. Ongoing school-related commitments include servicing and repayment of school-related capital debts, early redundancy and retirement costs arising from decisions taken before 1 April 1999 and expenditure on recruitment and retention schemes.

All other LEA expenditure, known as the “Local Schools Budget”, is considered in more detail below.

When considering the specific rules governing LEA expenditure, however, it should be remembered that these financial arrangements do not operate in isolation, but form part of the general financial management of local authorities. These general provisions are outside the scope of this work, but it should never be forgotten that the arrangements for education finance continue to fall within the responsibilities of the chief financial officer, who is charged with the proper administration of the authority’s financial affairs (s. 151 Local Government Act 1972). An excellent analysis and summary of the law relating to local government finance can be found in Andrew Arden QC, Jonathon Manning and Scott Collins *Local Government Constitutional and Administrative Law* (1999), Sweet and Maxwell.

The Local Schools Budget

The aim of Fair Funding, as under its predecessor local management, is to ensure that each maintained school within an LEA's area has an allocated budget share (s. 45 School Standards and Framework Act 1998). To arrive at that budget share, the process and calculations required by ss. 46 and 47 of the 1998 Act and the Financing of Maintained Schools Regulations must be completed. These regulations are issued on an annual basis and the current version is the Financing of Maintained Schools (England) Regulations 2000, SI 2000/478, together with the Financing of Maintained Schools (England) (No. 2) Regulations 2000/1090.

The first step is to ascertain the Local Schools Budget. This consists of the LEA's central expenditure, together with the amounts which will ultimately be delegated to the governing bodies of the maintained schools in the LEA's area.

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Under the 2000 Regulations, the LEA's central expenditure is limited to the four areas of LEA responsibility identified by the Secretary of State and adopted by OFSTED in *LEA Support for School Improvement*. The four areas are strategic management, access, LEA support for school improvement and special educational expenditure

Strategic management addresses the overall management of the LEA's responsibilities and includes expenditure on:

- the chief education officer and his or her staff (infelicitously called "personal staff" in the regulations)
- corporate planning for the education service
- administration of committees and other member bodies
- internal and external audit
- the LEA's statutory financial duties
- financial monitoring of non-delegated expenditure
- personnel management for staff funded by non-delegated expenditure
- legal services in respect of the LEA's statutory responsibilities
- the preparation of cross-service statutory plans
- grant-funded and matched expenditure for cross-service programmes
- support for IT systems.

Access, according to the DfEE, refers to the LEA's responsibilities for "providing an education infrastructure of school places, buildings and facilities, admission arrangements and enforcement of attendance". It therefore includes expenditure on:

- preparation of the LEA's asset management plan
- management and implementation of the LEA's capital programme
- the planning and supply of school places, including the preparation of the School Organisation Plan
- servicing School Organisation Committees and admissions forums
- home-to-school transport
- clothing grants, boarding grants and educational maintenance allowances
- Education Welfare Service.

LEA support for school improvement includes expenditure on:

- preparation of the LEA's Education Development Plan
- monitoring and challenging schools' educational performance
- implementation of the programme in the approved EDP
- support for schools causing concern
- support to turn around failing schools and schools with serious weaknesses
- any other non-delegated activities included in the EDP.

Finally, special educational expenditure encompasses LEA expenditure on:

- educational psychology services
- statementing of pupils
- support for pupils with special educational needs
- education otherwise than at school
- preparation of Behaviour Support Plans
- Pupil Referral Units.

Individual Schools Budget

Once the elements of central LEA expenditure under the above headings have been ascertained, these should be deducted from the Local Schools Budget to leave the sum which should be distributed to schools, known as the Individual Schools Budget (ISB) (s. 46(2)).

Under the previous local management schemes, LEAs had been required to delegate at least 85 per cent of the ISB. In some LEAs this figure had not been achieved and, even in those LEAs where it had been, schools had expressed dissatisfaction at the levels of expenditure which had been retained centrally by LEAs (figures from the National Association of Head Teachers indicated that the national average percentage of delegation was 80.3 per cent with the “worst” (as the NAHT perceived it) LEA delegating 71.7 per cent: *Local Government Chronicle* 10.12.1999). Consequently, under Fair Funding, LEAs were required to move towards 100 per cent delegation of the ISB.

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This requirement for the first time caught a number of centrally provided services which were excluded from the definition of expenditure which could be retained centrally. Thus schools now receive delegated funds in respect of the following services:

- repairs and maintenance
- school meals
- financial, personnel and legal services
- curriculum, advisory and training services
- school library services
- school insurance
- music service (subject to specific provisions)
- ancillary services, i.e. any other LEA schools services which do not fall within the definitions of central expenditure.

Although the regulations require 100 per cent delegation, schools may buy back into the LEA for the provision of some or all of the services affected.

School budget shares

Each school's budget share is then determined by the LEA dividing up the ISB amongst the maintained schools in its area (s. 47), but subject to the rules laid down in the Financing of Maintained Schools Regulations. In particular, the regulations set out the factors the LEA

must take into account when determining each school's budget share and the procedure for consultation on the allocation methods the LEA proposes to use.

Schemes

To regulate the distribution of school budget shares and also to provide a mechanism by which the Secretary of State can monitor an LEA's compliance with the Act and regulations, section 48 of the 1998 Act imposes a duty on each LEA to prepare a scheme dealing with such matters connected with the financing of schools maintained by the LEA as are required to be dealt with in the scheme or by regulations made by the Secretary of State. The regulations (currently the Financing of Maintained Schools Regulations 2000) may include details of how surpluses and deficits may be carried forward into the next financial year, amounts which may be charged by the LEA against a school's budget share, the terms on which services and facilities are to be provided to schools by the LEA and the imposition of conditions, which must be complied with by schools, in relation to the management of their delegated budgets.

In theory, an LEA has some discretion as to what conditions and rules it may impose in its scheme, but in reality the scheme, in order to obtain the approval of the Secretary of State, must contain the information prescribed by the regulations and, although some flexibility is allowed in respect of the imposition of local conditions, for example to address insurance arrangements, s. 48(3) ensures that the Act and the regulations will always prevail in the event of any inconsistency or ambiguity.

The procedure for preparing and publishing the scheme is set out in Schedule 14 to the 1998 Act. This Schedule re-emphasises the central control mechanism of the Secretary of State by requiring that, firstly, all schemes must be submitted to the Secretary of State for approval (Sch.14, para 1(1) and (4)) and, secondly, that LEAs should have regard not only to the Regulations but also to any guidance issued by the Secretary of State as to the provisions he regards as appropriate for inclusion in the scheme (para 1(2)).

Before submitting the scheme to the Secretary of State, the LEA must consult the governing body and headteacher of every school maintained by the LEA (para 1(3)(b)).

The scheme cannot come into force until approved by the Secretary of State (para 1(4)), who may modify the scheme as he thinks fit after consulting the LEA. In the event of the LEA's failing to submit a scheme within the time limits set by the Secretary of State or submitting

a scheme which the Secretary of State does not believe accords with the guidance, the Secretary of State may, after consulting the LEA, impose a scheme which makes such provision as he thinks fit.

The approved scheme must be published by sending a copy to the governing body and headteacher of every school maintained by the LEA and making a copy available for reference at all reasonable times and without charge at each school maintained by the LEA and at the LEA's principal office (reg 27 1999 Regulations).

Delegated budgets

Having calculated each maintained school's budget share and having published its scheme to show how the share was calculated, the LEA is under a duty to provide every maintained school with a delegated budget (s. 49(1)). The only exception is if the governing body's right to a delegated budget has been suspended under s. 51 (see below).

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It must be remembered, however, that, by delegating a budget to a school, the LEA does not give or transfer the ownership of that money to the governing body. As s. 49(5) makes clear, any amount made available to the governing body by the LEA remains the property of the LEA until spent by the governing body or headteacher. When the budget is spent, it is taken to have been spent by the governing body or headteacher as the LEA's agent. Thus any contract entered into by the governing body using money from its delegated budget is in law a contract between the LEA and the supplier, and the governing body is not a contracting party. Any enforcement action is therefore taken against the LEA, not the governing body. This does, however, mean that an LEA can be held responsible for a contract entered into by a governing body of a voluntary aided or foundation school using delegated funds. Whether governing bodies of foundation schools or, indeed, the contractors with whom they contract appreciate this is debatable.

This position was confirmed in *R v Yorkshire Purchasing Organisation, ex parte British Educational Suppliers Ltd* [1998] 2 ELR 195, where the Court of Appeal held that a maintained school with a delegated budget, even though incorporated, was an agent of the LEA.

The only exceptions to this principle are in respect of the repayment of the principal or interest on a loan taken out by the governing body, provided that their LEA's scheme allows such schools to take out loans, and expenditure which has to be met by the governing body of a voluntary aided school.

The effect of financial delegation is set out in s. 50 of the 1998 Act, which defines the respective powers and duties of the LEA and governing body in relation to a school's budget share. As so often, it will be no surprise that the duties fall on the LEA, the powers on the governing body!

Where a maintained school has a delegated budget in respect of the whole or part of a financial year, the LEA has the duty to secure that there is available to be spent by the governing body a sum equal to the school's budget share for the year (or if it only has delegation for part of that year, a sum equal to that portion of the school's budget share for the year which has not been spent). The amounts must be made available to the governing body in accordance with the timings in the scheme.

The governing body then has the power to spend the amounts made available for any purposes of the school or for such purposes as may be prescribed in regulations (s. 50(3)). The governing body may delegate its powers to spend to the headteacher, but s. 50(3) does not allow it to pay allowances to governors otherwise than in accordance with the statutory scheme for governors' expenses and allowances contained in paragraph 6 of Schedule 11 to the 1998 Act.

Although, the governing body is an incorporated legal entity, and thus personal liability should not fall on individual governors anyway in the absence of fraud or bad faith, s. 50(7) expressly states that governors shall not incur any personal liability in respect of anything done in good faith in the exercise or purported exercise of their powers to spend the sums made available to them by the LEA. In the absence of fraud by an individual governor, it is hard to understand when in law governors might be personally liable and this provision has always appeared to serve no purpose other than perhaps to provide a reassurance to prospective governors that they will not be bankrupted because of decisions which they may take as governors. The provision serves no purpose as, first, any liability should fall on the incorporated governing body, and, secondly, but most importantly, as the governing body acts as the LEA's agent for the purposes of spending the delegated budget (see s. 49(5)(b)), the LEA will remain liable to meet any claim which may be made as a result of the governing body's spending its delegated budget. As this will apply even if the governing body has incompetently or negligently exercised its powers, this might be described as a *de facto* duty on the LEA to meet the cost of a governing body's commercial ineptitude.

A number of LEAs, having experienced such difficulties, now make specific provision in their schemes to address these potential problems.

It has also been suggested that the scheme may make clear that governing bodies should seek advice before entering into certain contracts, with the proviso that, if that advice is not taken, the governing body will be treated as if it had acted in bad faith and thus the governors might leave themselves open to personal liability.

Financial statements

To further regulate the delegation of budget shares to schools, LEAs are required to produce financial statements before the beginning of each financial year ("the budget statement") and after the end of each financial year ("the outturn statement") (s. 52 of the 1998 Act). The outturn statement should contain details of the LEA's planned expenditure in that year and, taken from the budget statement, the expenditure actually incurred by the LEA in the year and any other resources allocated by the LEA in that year to maintained schools. Again, the detail and form of these statements are left to regulations issued by the Secretary of State (see the Education (Budget Statements and Supplementary Provisions) Regulations 1999, SI 1999/451, for the financial year 1 April 1999 to 31 March 2000, and the Education (Budget Statements) (England) Regulations 2000, SI 2000/576, which apply to the financial year commencing on 1 April 2000. Like the Financing of Maintained Schools Regulations, these regulations appear annually.).

The LEA must supply the governing body and headteacher of each maintained school with a copy of the relevant parts of every budget and outturn statement (s. 52(4) and reg 8) and shall publish the statements by supplying a copy to the Secretary of State and making a copy available for reference by parents and other persons at all reasonable times and without charge at each education office of the LEA (reg 5).

If the Secretary of State directs, an LEA must require the Audit Commission to make arrangements for certifying either part or all of an LEA's budget or outturn statement as the Secretary of State may specify (s. 53 of the 1998 Act)

Suspension of financial delegation

As the delegation of budget sums to schools increases and the LEA has become more of a cheque processor than a controller of expenditure, the role of the LEA to regulate and ensure propriety in education expenditure has diminished. With schools now being responsible for upward of 80 per cent of an LEA's revenue expenditure, an LEA can have little influence over how, and upon what, schools spend the LEA's money.

Nonetheless, under local management, it was recognised that there needed to be some check on a governing body's ability to spend the LEA's public money and so, under the Education Reform Act 1988, LEAs were given the responsibility for monitoring the management of delegated budgets by governing bodies. Those provisions, slightly strengthened to allow an LEA to address standards through withdrawal of the delegated budget (see ss. 14 and 17 1998 Act), can now be found in s. 51 of and Schedule 15 to the 1998 Act.

Under paragraph 1 of Schedule 15, the LEA may suspend the governing body's right to a delegated budget where it appears to the LEA that the governing body of a school which has a delegated budget (a) has been guilty of a substantial or persistent failure to comply with any delegation requirement or restriction or (b) is not managing in a satisfactory manner the expenditure or appropriation of the school's delegated budget share.

In order to ensure that LEAs do not use this power in an arbitrary fashion, in considering whether or not to suspend a governing body's right to a delegated budget, the LEA must have regard to the *Code of Practice on LEA-School Relations*. Paragraphs 129 to 135 deal expressly with the suspension of delegated powers. In paragraph 135, the Secretary of State has set out principles to be followed by LEAs, or at least to which an LEA must have regard in exercising its functions. These include:

- a) suspension of delegation should happen only in exceptional circumstances and is not a mechanism for improving school financial management or performance;
- b) the LEA must be clear in its notice to explain to the governing body if it is acting under its powers of intervention to improve standards or to address financial mismanagement or non-compliance with scheme requirements;
- c) suspension of delegation must be used with a constructive purpose;
- d) the LEA should always explain the reasons which led to suspension, the evidence upon which it relies and how it believes suspension will help;
- e) suspension is a transitional mechanism, not a permanent state; and
- f) suspension of delegation should be used only as a means of creating an opportunity in which positive action can be taken, to resolve the immediate problem and ensure that it does not recur.

The LEA should give the governing body not less than one month's notice in writing of the suspension, unless, by reason of any gross incompetence or mismanagement on the part of the governing body or other emergency, it appears to the LEA to be necessary to give the governing body a shorter period of notice or to give the governing body notice suspending their right to a budget with immediate effect (Sch. 15 para 1(2)). The notice must specify the grounds for the suspension, giving particulars of:

- a) any alleged failure on the part of the governing body to comply with any delegation requirement or restriction;
- b) any alleged mismanagement; and
- c) if applicable, the grounds upon which the LEA has decided to give less than one month's notice (paragraph 1(3)).

The notice must also be given to the headteacher of the school and a copy should be sent to the Secretary of State (para 1(5) and (6)).

Once the right of a governing body to a delegated budget has been suspended, the LEA may review the suspension at any time when it thinks appropriate (para 2(1)(b)). The LEA must, however, review every suspension before the beginning of the next financial year, unless the suspension took effect less than two months before the beginning of that financial year (para 2(1)(a)). When reviewing suspension, the LEA must give the governing body and headteacher of the school an opportunity to make representations. Having reviewed the suspension, the LEA may:

- a) revoke it with effect from the beginning of the next financial year following the review (if the review takes place before the new financial year); or
- b) revoke it with effect from such time as the LEA may determine, if the LEA has held the review at any other time (para 2(3)); or
- c) decide not to revoke the suspension.

In any case, the LEA must give the governing body and headteacher notice in writing of its decision (para 2(4)).

In the case of a decision to suspend the budget or not to revoke the suspension, the LEA must include in the written notice details of the fact that the governing body, but not the headteacher, may appeal to the Secretary of State against the imposition of the suspension or the

decision not to revoke the suspension (para 3(1)). Such an appeal must be brought within two months of the LEA's decision. The Secretary of State may allow or reject the appeal and in determining the appeal must have regard to the gravity of the default on the part of the governing body and the likelihood of it continuing or recurring (para 3(4)).

Where an LEA does suspend a governing body's delegated budget, it does not mean that the LEA must take over all the governing body's functions. The LEA may decide to devolve back to the governing body such decision-making powers as it feels the governing body can manage. For example, the LEA may wish to retain responsibility for staffing expenditure, if that is where the problem has arisen, but may be happy to allow the governing body to be responsible for non-staff related expenditure.

The most significant effect of the suspension of a school's delegated budget relates to the governing body's powers in respect of staffing and this is discussed below.

C. Staffing

Introduction

Of all the divisions of responsibility between LEAs and schools, the understanding of the respective duties and liabilities towards staff probably causes most confusion. Before the advent of local management, the situation was comparatively clear. LEAs appointed and dismissed both non-teaching and teaching staff in county, voluntary controlled and special agreement schools. In voluntary aided schools, the situation has always been different as the governing body was the employer, but, by and large, in all other schools, both the staff and, perhaps more importantly, the law could easily identify the employer.

Following the introduction of local management in the Education Reform Act 1988, the position was considerably confused. Ask most teaching staff in schools and they would point to either the headteacher or the governing body as their employer. Local management did indeed mean that the governing body took on responsibility in county and voluntary controlled schools for advertising, interviewing, appointing, promoting and disciplining and dismissing the majority of school staff, but in law the employer nonetheless remained the LEA, despite the fact that it had little control over the process. The situation in voluntary aided and grant-maintained schools was different, with the governing body being solely responsible. This difference has

continued under the School Standards and Framework Act 1998 in respect of voluntary aided and foundation schools, which will be discussed separately below.

As a consequence of this confusion, there has been considerable litigation, mainly in the employment tribunals, and regulations to try and clarify the situation, but, as will be seen below, clarity is sadly lacking.

The other problem in the area of staffing is that people think of headteachers and teaching staff as being the only employees where issues arise, but it must of course not be forgotten that the LEA employs a considerable number of other people outside of school who are necessary to perform the whole range of its educational and/or administrative functions. This latter category will be considered first before attention is drawn to the far more complex and potentially more litigious field of responsibility for school-based staff.

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LEA staff

The first appointment for all LEAs is the chief education officer. Section 532 of the Education Act 1996 requires the LEA to appoint a fit person to be the chief education officer of the authority. The requirement is not necessarily to appoint somebody as the “chief education officer”, provided that there is somebody designated with that function within the authority. Hence a number of LEAs, particularly looking towards the modernising agenda, have decided that the role of chief education officer should fall within strategic directorates or other departments which have not traditionally been seen as part of the education function, such as libraries, culture and leisure services.

The general powers by which the chief education officer is appointed by the LEA are the same powers that enable local authorities to appoint staff to carry out their functions. Section 112 of the Local Government Act 1972 permits a local authority to appoint such staff on such terms and conditions as it considers appropriate to carry out its functions, provided that such appointments are always made on merit (see s. 7(1) Local Government and Housing Act 1989). In employing such staff (and indeed this will apply to school staff as well), the local authority is not able to act altruistically, for example by imposing out of the ordinary pay rises (see *Roberts v Hopwood* [1925] AC 578 and *Pickwell v Camden LBC* [1983] 1QB 962), and obviously, except where exemptions are allowed in the legislation, the local authority cannot discriminate on grounds of race, disability or sex.

Equally obviously, the general principles relating to unfair dismissal, redundancy etc. apply to such local authority staff, although it is usually quite clear who is the employer in respect of any claim.

Thus an LEA will employ a number of administrative staff from the chief education officer downwards, including education officers, education psychologists, education welfare officers and inspectors and advisers under their general powers. Only where other statutes make express reference to the employment of specific staff will they be employed under other powers.

Community and voluntary controlled school staff

Having covered the relatively simple parts of employment in LEAs, it is now necessary to turn to the more complicated arrangements for the employment of staff (both teaching and non-teaching) in community and voluntary controlled schools. (The employment of staff in voluntary aided and foundation schools is considered separately.)

Perhaps the first point to consider is what duty does an LEA have to employ staff in the first place? The answer to a layman would appear obvious, but of course in legal terms that would be too simple and a general duty needs to be found under which local education authorities and school governing bodies can make provision for the employment of staff within schools.

The starting point, therefore, before considering the individual details of staff employment, is, perhaps bizarrely, regulation 4 of the Education (Teachers' Qualifications and Health Standards) (England) Regulations 1999, SI 1999/2166. Under this Regulation, each LEA is under a duty to ensure that at any school there shall be employed a staff of teachers suitable and sufficient in numbers for the purpose of securing the provision of education appropriate to the ages, abilities, aptitudes and needs of the pupils, having regard to any arrangements for the utilisation of the services of teachers employed otherwise than at the school in question.

It is possibly debatable how an LEA might enforce this duty if, for example, a governing body of a community school decided not to employ sufficient staff or employ inappropriate staff, but if such irrational behaviour were to occur, it is likely that the LEA could withdraw the delegated budget and then take control of employment at the school itself (see below). Alternatively, the complaints mechanism considered in Chapter 11 could also be invoked.

Despite all the misconceptions to the contrary, an incorporated governing body of a community or voluntary controlled school cannot enter into

contracts of employment (s. 88 and para 2(2)(b) of Sch. 7 Education Act 1996) and so cannot in law be an “employer”.

The exact nature of the relationship of the LEA with school staff is dependent upon whether or not the school has a delegated budget.

Schools with delegated budgets

In the most common case, where a community, voluntary controlled or community special school has a delegated budget, the governing body has the responsibility for appointing staff, filling vacancies, disciplining, suspending and where necessary, dismissing staff.

Appointment of staff

Where a vacancy arises for the post of headteacher or deputy headteacher, the governing body must notify the LEA of the vacancy in writing before taking any steps (Sch.16, para 3 School Standards and Framework Act 1998). If the vacancy will not be filled by the time the previous postholder leaves, the governing body must either recommend to the LEA a person’s appointment as acting headteacher or deputy headteacher or engage or make arrangements for the engagement of a person to provide their services as acting head or deputy headteacher, otherwise than under a contract of employment with the LEA (Sch.16 para 4). Thus in the latter case the governing body could arrange to take on a seconded person to act as headteacher or deputy headteacher or make other arrangements with independent consultants.

If the governing body recommends someone to act, the LEA must appoint the person recommended, unless they do not meet the staff qualification requirements applicable to that appointment. Similarly, the governing body is not allowed to engage the services of a person as acting headteacher unless he or she too meets all staff qualification requirements applicable to that post.

So far as a permanent appointment is concerned, although many LEAs will advertise on behalf of governing bodies, it is the governing body which is responsible for advertising the post. The governing body is then responsible for appointing the selection panel who, once having short-listed candidates, must notify the LEA in writing of the names of selected applicants (Sch.16, para 6).

Upon receipt of the details of the applicants from the selection panel, the LEA has 14 days to make written representations that any applicant selected by the panel is not a suitable person for the appointment. If the LEA does make such a representation in respect of an applicant, the selection panel shall not recommend that person to the governing body

for appointment unless the panel has considered those representations and notified the LEA in writing of its response.

The selection panel will recommend, if it feels able to do so, the appointment of one of the short-listed applicants to the governing body and if the recommendation is approved by the governing body, the governing body recommends the applicant in question to the LEA for appointment. The chief education officer of the LEA or his/her representative has the right to attend, for the purpose of giving advice, all proceedings, including interviews of the governing body and of any selection panel (para 18(1)) and is under a duty to offer such advice as he/she considers appropriate with respect to the appointment or engagement of a headteacher or deputy headteacher (para 18(2)).

Where the governing body approves a recommendation of the selection panel and recommends that person for appointment to the LEA, the LEA must appoint that person unless he or she does not meet the staff qualification requirements which are applicable in relation to their appointment.

The procedure for the appointment of other teachers is broadly similar. Where a vacancy in any teaching post (whether full-time or part-time) at the school arises and the governing body is satisfied that it cannot be replaced by a temporary appointment, the governing body must, in conjunction with the headteacher, draw up a specification for the post and send a copy to the LEA (Sch.16, para 11).

The LEA may then nominate for consideration for appointment to the post any person who appears to it to be qualified to fill it and who is either employed by the LEA or is employed by the governing body of a foundation, voluntary aided or foundation special school maintained by the LEA.

Unless the governing body either accepts for appointment a person so nominated by the LEA or decides to recommend to the LEA for appointment a person currently employed at the school, the governing body is required to advertise the vacancy at any time after it has sent a copy of the specification to the LEA. The governing body is able, if it so wishes, to advertise even if it has received a nomination by the LEA.

Where the governing body does advertise a vacancy, it shall interview such applicants and such persons nominated by the LEA as the governors think fit or, where it considers it appropriate to do so, either recommend to the LEA for appointment one of the applicants

interviewed or notify the LEA that it accepts for appointment any person nominated by the LEA.

As in the case of head and deputy headteachers, the chief education officer (or his/her representative) has the right to attend, for the purpose of giving advice, all proceedings of the governing body relating to the appointment or engagement of teaching staff (para 18(1)). In contrast, however, to his/her rights in respect of the appointment of a head or deputy headteacher, the chief education officer in respect of other teaching staff is able to give advice only if requested to do so by the governing body (para 18(3)). Nonetheless, if the chief education officer does give advice in respect of any appointment, the governing body is under an obligation to consider that advice before determining the matter (para 18(4)).

Where the governing body either recommends to the LEA or notifies the LEA that it accepts for appointment any person nominated by the governors, the LEA shall appoint that person unless he or she does not meet such staff qualification requirements as are applicable in relation to that appointment.

In some cases, if the governing body believes that a temporary appointment could fill a vacancy where the post is not required for more than four months, the governing body may recommend a person for appointment to the post on such terms as to the duration of the appointment as the governing body may specify and the LEA shall appoint that person unless he or she does not meet the appropriate staff qualification requirements.

In respect of non-teaching staff, where the governing body requires the appointment of a person to work in a non-teaching post at the school, it may recommend a person to the LEA for appointment to the post. Such a recommendation will have to be in writing and must specify:

- a) the duties to be performed (including hours of work);
- b) such terms (if any) as to the duration of the appointment as are proposed;
- c) the grade (on the scale of grades currently applicable in relation to employment within the LEA) which the governing body considers appropriate; and
- d) where the LEA has a discretion with respect to the remuneration to be paid, the determination of any matter to which that discretion applies and which the governing body considers appropriate in the case of the person recommended for appointment (para 20).

Before making such a recommendation, however, the governing body should have consulted, in addition to the headteacher, the chief education officer. The LEA will have a discretion with respect to the remuneration to be paid so long as any provisions regulating the rates of remuneration or allowances payable either do not apply in relation to that appointment or leave to the LEA a degree of discretion as to the rate of remuneration or allowances.

Where a recommendation is received by the LEA, the LEA shall appoint that person unless he/she does not meet such staff qualification requirements as are applicable in relation to that appointment (para 21).

“Staff qualification requirements” for these types of post relate to any requirements contained in regulations made by the Secretary of State, currently the Education (Teaching Qualifications and Health Standards) Regulations 1999, SI 1999/2166. These requirements relate to the qualifications held, registration, health and physical capacity and fitness of teachers or other persons employed or otherwise engaged to provide their services in work that brings them regularly into contact with persons who have not attained the age of 19. (For more detailed guidance on the various requirements, see DfEE Circular 4/99 *Physical and Mental Fitness to Teach of Teachers and of Entrants to Initial Teacher Training*.)

In addition to ensuring that teachers meet the educational qualifications set out in these regulations, the LEA is also under a duty to carry out pre-employment checks to ensure that it does not employ anyone barred from teaching by the Secretary of State (List 99) and should also check the criminal backgrounds of staff whose posts involve substantial unsupervised access to children. (For further information on the procedures for placing teachers on List 99 and the effect of such action, see DFE Circular 11/95 *Misconduct of Teachers and Workers with Children and Young Persons*. For guidance on pre-employment checks on criminal backgrounds, see DFE Circular 9/93 *Protection of Children: Disclosure of Criminal Background of those with Access to Children* (or, for Wales, Welsh Office Circular 54/93).)

In exercising its powers in respect of staffing and with respect to advising governing bodies, the LEA must have regard to the *Code of Practice on LEA–School Relations* (particularly paras 99–111).

Upon appointing staff, the normal obligations on an employer to send particulars of the employment to the employee under the Employment Rights Act 1996 will apply and this obligation will be solely on the LEA. As s. 1(3) of the Employment Rights Act requires the particulars

to include the name of the employer, it is surprising that there is still confusion over the identity of a teacher's employer, but nonetheless confusion exists, especially when it comes to terminating employment (see below). The written particulars must also include such matters as the date when the employment began or the date upon which the period of the person's continuous employment began and the terms of employment, such as remuneration, hours of work, holiday entitlement, sick leave, pension details and notice. Although often considered as the "contract of employment", the written particulars are in fact only evidence, albeit very strong evidence, of the actual contract (see *Parkes Classic Confectionery v Ashcroft* (1973) 8 ITR 43).

The appointment of the clerk to the governing body is dealt with under different arrangements. Regulation 26 of the Education (School Government) Regulations 1999, SI 1999/2163 places a duty on the LEA to appoint the first clerk to the temporary governing body of a new school which will be a community, voluntary controlled or community special school or a foundation or foundation special school where the LEA published the proposals for the establishment of the school.

In an established community, voluntary controlled and community special school with a delegated budget, the LEA is under a duty to appoint the person selected by the governing body to be its clerk (reg 23).

Performance, discipline, suspension and dismissal

At a community, voluntary controlled or community special school with a delegated budget, the responsibility for supervising the performance and discipline of staff rests primarily with the governing body (subject to certain responsibilities in respect of the appraisal of teaching staff under the Education (School Teacher Appraisal) Regulations 1991, SI 1991/1511).

Prior to the School Standards and Framework Act 1998, the LEA's responsibility was limited to responding to requests from the governing body to implement disciplinary and dismissal determinations. That response is still part and parcel of the LEA's role, but following concerns that LEAs were powerless to intervene where schools were underperforming because of the activities of its staff, the 1998 Act has introduced a mechanism by which the LEA can bring to the governing body's attention underperformance by the headteacher and require the governing body to take action (see below).

Nonetheless, the normal role of the LEA is limited to reacting to the disciplinary action of governing bodies.

Under paragraph 22 of Schedule 16 to the 1998, Act the regulation of the conduct and disciplining of school staff is under the control of governing body. Within this control is the power both on the part of the governing body and the headteacher to suspend any person employed to work at the school where his or her exclusion from the school is required (para 24). When exercising such power of suspension, the governing body or headteacher is under a duty to inform the LEA.

Where the governing body, having properly investigated, determines that any person employed by the LEA to work at the school should cease to work there, it must notify the LEA in writing of its determination and the reasons for it (para 25(1)).

If that person is employed to work solely at the school (and he does not resign), the LEA shall, before the end of the period of 14 days beginning with the date on which notification was given by the governing body, either (a) give him/her notice terminating the contract of employment, or (b) terminate the contract without notice if the circumstances are such that the LEA is entitled to do so by reason of that person's conduct. (If the person concerned is not employed to work solely at the school, the LEA shall require him or her to cease to work at the school.) In the case of the clerk to the governing body, if the governing body determines to dismiss the clerk and so notifies the LEA giving its reasons, the LEA is under a duty to dismiss the clerk (reg 24 Education (School Government) (England) Regulations 1999, SI 1999/2163).

The chief education officer or his/her nominee has a right to attend for the purpose of giving advice all proceedings of the governing body relating to a determination that a person be dismissed. The governing body is under an obligation to consider that advice before making a determination.

Before notifying the LEA of its determination, the governing body is required to make arrangements for giving any person in respect of whom it proposes to make a determination under paragraph 25(1) an opportunity of making representations as to the action the governors propose to take (including, if he/she so wishes, oral representations to such person or persons as the governing body may appoint for the purpose), and have regard to any representations made by him/her (para 27(1)). The governing body is also required to make arrangements for giving any person in respect of whom it has made a determination under paragraph 25(1) an opportunity of appealing against it before the governing body notifies the LEA (para 27(2)).

In two cases, the point at which a person is dismissed has exercised the courts. In *Howard v Brixington Infants School and Devon County Council* [1999] ELR 91, the governing body determined that a teacher should be summarily dismissed from the school and notified the LEA. The teacher appealed to the governing body, but the LEA went ahead and notified the teacher of his summary dismissal. The Employment Appeal Tribunal held that this was unlawful and that the LEA should have awaited the hearing of the teacher's appeal before dismissing him in the way it had done. The tribunal recognised, however, that this could prevent school staff being summarily dismissed even in circumstances, such as in the case itself, where such action may have been justified.

In *Drage v Governors of Greenford High School* (2000) Times, 28 March, CA, the Court of Appeal had to decide the effective date of termination of a teacher's employment. The teacher had been dismissed for gross misconduct and had appealed. The Court of Appeal held on the facts that the effective date of termination was the date when the decision was confirmed on appeal, not the date of the original decision to dismiss, as the dismissal was not to be implemented until after the appeal was heard.

So far as payments in respect of dismissal are concerned, it is for the governing body to determine

- a) whether any payment should be made by the LEA in respect of the dismissal, or for the purpose of securing the resignation, of any member of the staff of the school, and
- b) the amount of any such payment (s. 57(1) School Standards and Framework Act 1998).

The LEA shall take such steps as may be required for giving effect to any determination of the governing body under s. 57(1) and shall not make, or agree to make, a payment in relation to which that subsection applies except in accordance with such a determination.

Costs incurred by the LEA in respect of any premature retirement of a member of the staff of a maintained school shall be met from the school's budget share for one or more financial years except in so far as the LEA agrees with the governing body in writing (whether before or after the retirement occurs) that they shall not be so met (s. 57(4)).

Costs incurred by the LEA in respect of the dismissal, or for the purpose of securing the resignation, of any member of the staff of a

maintained school shall not be met from the school's budget share for any financial year except in so far as the LEA have good reason for deducting those costs, or any part of those costs, from that share (s. 57(5)). Thus, if the LEA considers that a dismissal is likely to be found to be unfair by an Employment Tribunal, the LEA may deduct the whole or part of those costs from the school's budget share (see also para 180 of DFE Circular 2/94: *Local Management of Schools*).

Schools without delegated budgets

The above sets out the position in the normal case where a community, voluntary controlled or community special school has a delegated budget. If, however, such a school does not have a delegated budget, the provisions of Schedule 16 of the 1998 Act do not apply. Instead, the number of teachers and non-teaching staff to be employed at the school shall be determined by the LEA and the LEA may appoint, suspend and dismiss teachers and other staff at the school as the LEA think fit (s. 54 School Standards and Framework Act 1998) subject to consulting the governing body to such an extent as the LEA thinks necessary. The LEA may appoint the clerk to the governing body, subject to appropriate consultation (Regulation 25 Education (School Government) (England) Regulations 1999, SI 1999/2163).

Underperformance of headteachers

To meet the concerns about the conduct of certain headteachers, paragraph 23 of Schedule 16 to the School Standards and Framework Act 1998 provides the LEA with the opportunity, indeed duty, to raise its worries with governing bodies. Where the LEA has any serious concerns about the performance of the headteacher of a school, it must make a written report of its concerns to the chairman of the governing body, at the same time sending a copy to the headteacher. The chairman of the governing body must notify the LEA in writing of the action which he proposes to take in the light of that report. In determining whether to make a report, the LEA must have regard to any guidance given from time to time by the Secretary of State which is currently contained in the *Code of Practice on LEA-School Relations* (paras 112 and 113). In summary, the LEA should make such reports only in rare cases where it has grounds for concluding that the headteacher's performance is having a significantly detrimental effect on the performance management or conduct of the school or would have such an effect if action were not taken. The report should not come as a surprise, and, before issuing any report, the LEA should always consider whether its concern would be better pursued through the appraisal mechanism. The Secretary of State (para 113d)) has indicated that concerns which might appropriately trigger the making of the report by the LEA include:

- a) the school has been found following inspection to require special measures or to have serious weaknesses and the LEA considers that the post-inspection plan is seriously deficient;
- b) standards of performance in assessments or public examinations have worsened significantly for reasons attributable to the headteacher's performance;
- c) there has been a pattern of repeated and serious complaints over a period of time from parents, staff, governors or pupils which has not been satisfactorily addressed; or
- d) there is significant evidence of continuing and systematic weaknesses in the management of the school or in its financial controls which, if not tackled, risk serious disruption to the school's continuing operation.

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The report must state the grounds for the LEA's concern and the evidence upon which it relies. The LEA should also advise the chairman of governors on action which it may be appropriate to take. The LEA must also allow the headteacher the opportunity to make representations to the chairman of the governing body and to the LEA about the report, if necessary being accompanied by a friend.

Staff at voluntary aided and foundation schools

Voluntary aided and foundation schools with delegated budgets

As the governing body of foundation, voluntary aided and foundation special schools do, in contrast to community and voluntary controlled schools, have the power to enter into contracts of employment, the regime for the employment of staff at these schools is significantly different. Under s. 55 of the 1998 Act, Schedule 17 to the 1998 Act applies where these schools have delegated budgets.

The LEA's role in respect of these schools is significantly reduced. In order, however, to redress some of the concerns expressed about the conduct of grant-maintained schools and, more importantly, because of the relationship with the LEA as maintaining authority, greater rights are now accorded to the LEA than appeared under the previous legislation.

Where a selection panel of a governing body selects for interview applicants for the post of headteacher or deputy headteacher, the panel must notify the LEA in writing of the names of the applicants selected and the LEA has a period of 14 days to make written representations

that any of the applicants is not suitable for the appointment. Such a person shall not be recommended for appointment by the governing body unless the selection panel has considered those representations and notified the LEA in writing of its response (Sch.17, para 7).

In respect of appointments, the chief education officer of the LEA does not automatically have rights to advise the governing body. Instead, under paragraph 2 of Schedule 17 the governing body of the foundation, voluntary aided or foundation special school has the power to agree with the LEA to accord to the LEA's chief education officer advisory rights in relation to the appointment, engagement or dismissal of teachers at the school. If the governing body cannot agree to give such rights, it is possible to apply to the Secretary of State to determine that it would be appropriate that such advisory rights should be accorded to the chief education officer. As with community etc. schools, references to the chief education officer include any officer of the LEA nominated by the chief education officer.

Where no advisory rights are granted, nonetheless the LEA still has the responsibility for determining whether a person is suitable for appointment. In so doing, the LEA must have regard to guidance given from time to time by the Secretary of State.

Where an agreement granting advisory rights is in force, the chief education officer has the right to attend, for the purpose of giving advice, all proceedings of the governing body and selection panels relating to the appointment or engagement of school staff.

Whether or not an agreement is in place to afford advisory rights, the LEA continues to have a duty (Sch.17, para 22) where it has any serious concerns about the performance of the headteacher of the school to make a written report of its concerns to the chairman of the governing body (copying its report to the headteacher). The chairman of the governing body then becomes under a duty to notify the LEA in writing of the action which he proposes to take in light of the report. The same guidance, which applies to reports on the performance of headteachers in community etc. schools, applies in the case of foundation, voluntary aided and foundation special schools (para 113 of the *Code of Practice on LEA-School Relations*).

If advisory rights have been granted, the chief education officer or his/her nominee may attend meetings relating to the dismissal of staff at such schools, but apart from this, the LEA has no involvement in the dismissal of staff employed by the governing body of the school.

Voluntary aided and foundation schools without delegated budgets

If, however, the delegated budget of the school has been withdrawn, Schedule 17 ceases to apply (s. 55(2) 1998 Act) and the number of teachers and non-teaching staff to be employed at the school shall be determined by the LEA. Except with the consent of the LEA, the governing body shall not appoint any teacher to be employed at the school or engage or make arrangements for the engagement of any person to provide services as a teacher at the school or dismiss any teacher. In return, the LEA may give the governing body directions as to the educational qualifications of the teachers to be employed for providing secular education or require the governing body to dismiss any teacher at the school (s. 55(5)).

Although no issue has arisen yet, this power does raise implications with regard to responsibility for proceedings relating to dismissal. For example, if a teacher dismissed by the governing body following a direction from the LEA claims unfair dismissal, who should be liable? On general principles (see below) the employer would retain responsibility, i.e. the governing body, but it does seem somewhat unfair if the governing body have no choice in acting upon the direction of the LEA and the LEA can then itself avoid responsibility.

5.
THE
MAINTENANCE
OF SCHOOLS

Newly Qualified Teachers

In respect of the arrangements for the induction of newly qualified teachers, each LEA is the “appropriate body” under the Teaching and Higher Education Act 1998 for maintained schools and non-maintained special schools within its area. As such, it has responsibility for deciding whether newly qualified teachers have met the relevant induction standards. Together with headteachers, the LEA is also responsible for a newly qualified teacher’s training and supervision during induction. In order to fulfil these responsibilities, LEAs will therefore need to ensure that headteachers and governing bodies know their duties for monitoring, supporting, guiding and assessing newly qualified teachers and are capable of meeting them. Guidance on the respective tasks involved in induction can be found in DfEE Circular 5/99, *The Induction Period for Newly Qualified Teachers*.

In the case of independent schools, the “appropriate body” will be either the LEA for the area in which the school is located or the Independent Schools Council Teacher Induction Panel.

In addition to the guidance in Circular 5/99, the LEA, when acting as an appropriate body, must have regard to the relevant regulations

(currently the Education (Induction Arrangements for School Teachers) (England) Regulations 1999, SI 1999/1065) and the *Code of Practice on LEA-School Relations*. Teacher induction should also be covered within the relevant sections of the LEA's Education Development Plan.

At the end of the period of induction, the headteacher must complete a formal assessment of the new teacher and make a recommendation to the LEA on whether the teacher has met the professional standards required for the successful completion of that induction period.

The LEA will decide whether or not the new teacher has successfully completed the induction period or whether there are exceptional circumstances, which would justify the period being extended. It is expected (in the *Code of Practice*) that governing bodies and headteachers will allow the LEA access to the school, where necessary, to enable it to perform this task properly.

LEAs must notify the Secretary of State (by providing electronic lists) and the General Teaching Council of their decisions. In the first year of the induction programme's operation, the new teacher is able to appeal against the LEA's decision to the Secretary of State. Once the GTC is established, it will handle appeals (see the Education (Induction Arrangements for School Teachers) (England) Regulations 1999, reg 17 and Sch. 2).

School meals staff

To add further complication to a chaotic situation, the position of school meals staff employed to work in schools is again different. What was especially confusing was, however, confused even more, first as a consequence of the competitive tendering of school meal contracts and then by the 1998 Act, under which the responsibility for providing school meals could be transferred to governing bodies.

By virtue of paragraph 30 of Schedule 16 to the 1998 Act, the Secretary of State is empowered by regulations to make provision for the appointment, discipline, suspension and dismissal of persons employed at community, voluntary controlled or community special schools solely in connection with the provision of meals.

The relevant regulations are now the Education (School Meals Staff) (England) Regulations 1999, SI 1999/2258 (for Wales, the Education (School Meals Staff) (Wales) Regulations 1999, SI 1999/2802). These

provide that in general the LEA is responsible for appointing, disciplining, suspending and dismissing school meals staff at schools. Before taking such action, however, the LEA should consult with the governing body (reg 2).

If, however, the Secretary of State has made an order requiring the governing body of a school to take over the responsibility of the LEA to provide school lunches and, where necessary, to provide school lunches free of charge, the governing body may either agree with the LEA that the LEA will supply the lunches or else may decide to supply the lunches itself.

If the governing body agrees that the LEA will supply the lunches, the LEA will be responsible for the appointment, disciplining, suspension and dismissal of school meals staff at the school, subject to consulting the governing body beforehand (reg 3). The governing body in this situation may, however, decide that a member of the school meals staff should cease to work at the school. If it does, it must give written notice and details of its reasons to the LEA and the LEA shall thereupon require the person to cease to work at the school (reg 3(4)).

If the governing body has not agreed with the LEA that the LEA should supply the lunches, the governing body will be responsible for appointing, disciplining, suspending and dismissing school meals staff in the same way as it is responsible for other school-based staff, although, of course, the LEA will remain the employer in law of the staff (reg 4 and paras 20 to 22 and 24 to 29 of Sch.16 to the 1998 Act).

In the case of voluntary aided, foundation and foundation special schools, the position is more straightforward as, in all cases, the governing body will be responsible for appointing, disciplining, suspending, dismissing and employing school meal staff, except where the provision of school meals has been contracted out.

Other education-related employment issues

Discussion of the general responsibilities of an employer is beyond the scope of this work, but a number of issues of wider application do have an effect on the employment of school-based staff. These are briefly discussed below, but it is not the authors' intention that issues such as sexual, racial or disability discrimination should be dealt with in detail as those topics are far better covered elsewhere in specific texts on employment law. In this section, we will deal only with issues which are related to the principles of staffing discussed above.

Continuity of employment

Under normal employment principles, if an employee moves from one employer to another, unassociated employer, there is a break in his (or her, as appropriate) employment which means that when calculating his entitlement to various benefits or when calculating time periods before he can make statutory claims, for example for unfair dismissal, he cannot include the time spent in his previous employment.

In the school environment, this could have led to an unwillingness amongst staff in maintained schools to move on and between schools. Within formerly LEA-maintained schools (county and voluntary controlled, as they then were), there was no problem, as the staff were always employed by the same employer and therefore, if a member of staff transferred from one county school to another, there was no change in employer and no break in continuity.

The problem was, however, that, if staff moved between county or voluntary controlled schools and voluntary aided or grant-maintained schools, there was a change of employer and hence a possibility that there would be a break in the continuity of employment. Consequently, to meet this problem, provision was made to allow teachers to move within the different types of state school within, in effect, the area of an LEA without breaking their continuity of employment. This provision can now be found in s. 218(7) of the Employment Rights Act 1996. If either an employee of the governors of a school maintained by an LEA is taken into the employment of the LEA or an employee of an LEA is taken into the employment of the governors of a school maintained by the LEA:

- a) his period of employment at the time of the change of employer counts as a period of employment with the second employer; and
- b) the change does not break the continuity of the period of employment.

Transfer of undertakings

Related to continuity of employment is the problem facing staff in undertakings which are taken over by or transferred to another employer. The Acquired Rights Directive 77/187/EEC (OJ L61/26) and the Transfer of Undertakings (Protection of Employment) Regulations 1981, SI 1981/1794, which were introduced to meet the UK's obligations under the Directive, provide certain protection to staff affected by the transfer of the business to which they belong. In general, the directive and regulations aim to ensure that staff are not dismissed simply by virtue of the transfer and that they continue to be employed by the

transferee employer on the same terms and conditions of employment that they enjoyed prior to the transfer.

Substantial case law has established that the regulations apply to the public sector, for example to protect school cleaning and catering staff who were employed by LEAs, but who transferred into the private sector when the work was put out to competitive tender.

In the school context, the regulations have had little impact, partly because transfers hardly ever arise and partly because of the provisions governing continuity of employment. In respect of the closure of schools and the establishment of new schools, however, the regulations have been used in an attempt to protect the position of teachers at the closed school.

In *National Union of Teachers v Governing Body of St Mary's Church of England (Aided) Junior School* (1996) Times, December 16, a voluntary aided school was closed and replaced by a new school. The teachers at the closed school were made redundant. The regulations could not apply on the facts so the union sought to rely on the Directive itself. The Directive would have direct effect in the circumstances only if the governing body was considered to be an emanation of the state under European law. The Court of Appeal accepted that the governing body was an emanation of the state and so the protection set out in the Directive could have a direct effect on the actions in respect to the closure of the school. Thus, in principle, where an aided or foundation school closes and a new school is created with a new governing body, the staff may be protected by the 1981 regulations and the Directive.

Where, however, a community or community special or voluntary controlled school closes in similar circumstances and a new school is created, neither the Directive nor the 1981 regulations can apply as there is no change in the employer (i.e. the LEA) even if there is a change in the governing body which appoints the staff. This is evident from the Court of Appeal's decision in *Governing Body of Clifton Middle School and Others v Askew* [1999] ELR 425, [1999] EdCR 800. In that case, Mr Askew was employed by the LEA to teach at a middle school sharing a site with a first school. The LEA decided to cease to maintain the two schools and established a single primary school instead and as a result Mr Askew was dismissed by reason of redundancy. He then tried to argue that he was protected by the Directive and regulations as there had been a transfer of the school and that he had therefore been unfairly dismissed as his employment did not carry over into the new school. The court dismissed this argument and made clear that teachers were employed under contracts of service with LEAs and

not by governing bodies. Consequently, when the new school opened, there could not have been any change of employer as the LEA had employed the staff at the old school and would employ the staff at the new school. There was thus no qualifying transfer between employers and Mr Askew could therefore not rely on either the Directive or the 1981 regulations.

The Education (Modification of Enactments Relating to Employment) Order 1999

Despite the legislation and now, following the *Askew* decision, the case law making clear that governing bodies are not the employers of school-based staff, for certain purposes governing bodies can be deemed to be the employer. It is perhaps no wonder therefore that some confusion continues to ensue!

The Education (Modification of Enactments Relating to Employment) Order 1999, SI 1999/2256, modifies a number of pieces of legislation where governing bodies have delegated budgets, with the effect that any reference to an employer in that legislation is deemed to be a reference to the governing body (art. 3(1)). The legislation affected is set out in the schedule to the Order and includes certain parts of the Sex Discrimination Act 1975, the Race Relations Act 1976, the Disability Discrimination Act 1995 and the Employment Relations Act 1996.

In addition, where a person employed at a school with a delegated budget is dismissed by the LEA following the procedure set out in Schedule 16 to the 1998 Act, provisions relating to dismissal in the Employment Relations Act 1996 (for example the right of an employee to be given reasons for his dismissal by his employer) are to be read as if the governing body is the employer (art. 4(1) of the 1999 Order).

If an employee at school wishes to make an application to an employment tribunal in respect of his employment, the application should be issued and proceedings should be carried on against the governing body, not the LEA (art. 6(1) and (2)). The governing body is, however, required to notify the LEA within 14 days of receiving notification of the application and the LEA is then entitled to apply and be added as an additional party to the proceedings. This may be important as even though the governing body may be the “true” respondent to any application, any decision of the tribunal (except a direction that the employee be reinstated or re-engaged) has effect against the LEA, not the governing body (art. 6(3), but see also s. 57(5) School Standards and Framework Act 1998 for the LEA’s power to deduct the costs of an action for unfair dismissal from the school’s budget share).

The 1999 Order does not apply to voluntary aided and foundation schools as they are clearly the sole employer of the staff at the school and there is therefore no need for the Order to deem that they, not the LEA, should be treated as the employer for the purposes of the respective legislation.

Discrimination

As mentioned above, a detailed consideration of the law against discrimination is outside the scope of this work. Nonetheless, it is perhaps worth reminding readers of the main principles and prohibitions as, clearly, the amount of litigation against discrimination in the employment field is increasing.

Discrimination against employees or potential employees is prohibited on grounds of sex or marital status by s. 3 of the Sex Discrimination Act 1975. "Sex" does not, however, extend to sexual orientation, so it is not currently unlawful to discriminate against a person by reason of their homosexuality alone (see *Grant v South West Trains Ltd* [1998] 1 All ER (EC) 193, *Smith v Gardner Merchant Ltd* [1998] 3 All ER 852 and *Pearce v Governing Body of Mayfield School* (2000) Times, 19 April). Whether, though, this can withstand the introduction of the Human Rights Act 1998 is, perhaps, debatable.

Discrimination on the grounds of colour, race, nationality or ethnic or national origin is banned by s. 3 of the Race Relations Act 1976. It is also unlawful to discriminate against any disabled person on the grounds of disability, within the statutory definition of the word (s. 1 Disability Discrimination Act 1995). For guidance on the implications of the 1995 Act for LEAs and schools, see DfEE Circular 3/97 *What the Disability Discrimination Act (DDA) 1995 Means for Schools and LEAs*. For the latest proposals on disability rights in education, see the DfEE's Consultation Document *SEN and Disability Rights in Education Bill*.

The law prohibits two types of discrimination: direct and indirect. Direct discrimination occurs in this context where an employer treats an applicant for a job or an employee less favourably on grounds of sex or marital status (s. 1(1)(a) Sex Discrimination Act 1975) or race (s. 1(1)(a) Race Relations Act 1976) than the employer would treat other persons. Less favourable treatment on grounds of disability is also unlawful, but only if the employer cannot show that the treatment in question is justified (s. 5(1) Disability Discrimination Act 1995).

Indirect discrimination occurs where an employer applies a requirement or condition, which he would apply to persons of either sex or marital status (in the case of the Sex Discrimination Act 1975) or to persons of any racial group (in the case of the Race Relations Act 1976), but which is such that the proportion of persons of a particular sex, marital status or racial group who can comply with the requirement or condition is considerably smaller than the proportion of persons not of that sex, marital status or racial group who can do so. The aggrieved person must be able to show that he or she suffers detriment by reason of not being able to comply with the condition or requirement and the employer can produce a defence to the claim if it can be shown that the condition or requirement is justifiable irrespective of the sex or racial group of the person to whom it is applied (s. 1(1)(b) Sex Discrimination Act 1975 and s. 1(1)(b) Race Relations Act 1976). An example of indirect discrimination under the 1975 Act concerns part-time employees where the majority of part-time employees in certain jobs are female. To prevent part-timers from enjoying certain benefits, such as the right to belong to an occupational pension scheme, therefore disadvantages more women than men and is therefore indirectly discriminatory (see *R v Secretary of State for Employment ex parte Equal Opportunities Commission* [1994] 2 WLR 409).

Indirect discrimination is not, however, prohibited by the Disability Discrimination Act 1995.

One discrimination issue of particular relevance for LEAs is the responsibility of a school and the LEA for the acts of pupils as opposed to employees. What if, instead of the typical case of a teacher being subjected to less favourable treatment on the grounds of sex, race or disability by a fellow employee, the treatment is meted out by pupils or their parents?

In *Bennett v Essex County Council and the Chair and Governors of Fryern's School* 5 October 1999, unreported, EAT, the LEA was held liable for the racial abuse directed against a teacher by pupils. The Employment Appeal Tribunal held that a teacher could succeed in a claim for racial discrimination if she could show that the racial harassment by pupils was something which was sufficiently under the control of the LEA and governing body that they could, by the application of good education practice, have prevented the racial harassment or reduced the extent of it. In *Go Kidz Go v Bourdouane* EAT/1110/95, unreported, the employer of a member of staff at a playgroup was held responsible under the same principles for the sexual harassment committed by a parent of a child at the group. Most recently in *Pearce v Governing Body of Mayfield School* (see above), the Employment Appeal Tribunal held that the question to be asked

was whether the event in question was something which was sufficiently under the control of the employer that he could, or was able to, have prevented the harassment or reduced the extent of it. In that case, the teacher had been subjected to homophobic abuse from pupils both inside and outside school and inside and outside school hours. *Obiter*, as the abuse was not capable of amounting to sexual discrimination anyway, the Tribunal held that, “before finding a school, or any similar body, to have subjected an employee to discrimination, not only must the steps be identified which the school failed to take and could have taken, but also there must have been a conclusion that the taking of those steps could have prevented or reduced discrimination, so as to hold that the school was in those circumstances guilty of subjecting its employee to the discrimination by the absence of those steps being taken”.

Terms and conditions of employment

Under the School Teachers’ Pay and Conditions Act 1991, the statutory conditions of employment of headteachers and teachers are contained in the *School Teachers’ Pay and Conditions Document* (annually revised and reissued). This document forms part of a teacher’s contract of employment and places statutory duties on, and gives statutory rights to, teachers. Only the salaries and pay scales set out in the document can be applied to teaching staff (except in the case of schools exempt from the document in Education Action Zones or schools which are exempted by order – see, for example, the Education (Islamia Primary School Brent) (Exemption from Pay and Conditions) Order 1999, SI 1999/2879), although some flexibility is given to governing bodies, in the case of governing bodies with delegated budgets, or to the LEA, in respect of schools without delegated budgets or in respect of teaching staff within a centrally provided service. Where governing bodies are empowered by the document to make decisions, the LEA is under a duty to act on the governing body’s decision. Guidance on the operation of the document can be found in DfEE Circular 12/99 *School Teachers’ Pay and Conditions of Employment 1999*.

The pay and conditions of non-teaching staff employed by an LEA will depend upon the nature of the employment and the appropriate local government conditions of service which apply to the particular post.

Pensions

LEA staff and school-based staff are eligible to participate in pension schemes authorised under the Superannuation Act 1972, if they elect to do so. The scheme for teachers is governed by the Teachers’ Pensions Regulations 1997, SI 1997/3001, and the scheme for other local government employees by the Local Government Pension

Schemes Regulations 1997, SI 1997/1612. The Teachers' Scheme is administered by the central Teachers' Pension Agency, whilst the Local Government Scheme is administered locally by a number of pension fund authorities.

The detail of these schemes is outside the scope of this work. However, it should be noted that following a number of pensions scandals, the regulation of all pension funds, including those applying to LEA staff, is now far more stringent.

The other relevant development concerns the ability of part-time employees to join the two pension schemes. Following changes to the relevant regulations, most part-time employees are now eligible to belong to the schemes, but this was not always the position. Because more women tend to be employed on a part-time basis, it was argued that this amounted to indirect sexual discrimination. In *Vroege v NCIV Instituut voor Volkshuisvesting BV and Another* (1994) Times, 7 December, the Court of Justice of the European Communities held that where part-time workers were excluded from occupational pension schemes, sexual discrimination, in that case based upon Article 119 of the EEC Treaty on equal pay for men and women, could arise during the period when those part-time employees were prevented from belonging to the schemes.

This decision led to a flood of claims to the employment tribunals in England and Wales, with many part-time or former part-time employees seeking retrospective membership of occupational pension schemes and/or increased benefits. To address some of the issues arising from these claims, particularly concerning the time limits for bringing claims and the period of time in respect of which a claim could be brought, a number of test cases were pursued through the national courts and then to the European Court of Justice.

Although the Advocate General of the Court gave an Opinion (*Preston and Others v Wolverhampton NHS Trust and Others*, 14 September 1999, unreported) which suggested that many claims would fail for being out of time, the ECJ took a different view. In *Preston and Others v Wolverhampton Healthcare NHS Trust and Others* 16 May 2000, unreported, the ECJ held that claims for retrospective admission to pension schemes should not be limited simply to a period of two years daring back from the date of claim. Instead, a claimant could seek admission for a period daring back to April 1976. A claimant did, however, have to issue their claim within six months of the termination of their employment with the employer who denied them access to the

relevant pension scheme. The ECJ did, though, also hold that, where part-time employees were in a stable employment relationship resulting from a succession of short-term contracts concluded at regular intervals in respect of the same employment to which the same pension scheme applied, the six-month period ran from the end of the final contract in that relationship, not from the end of each individual contract. This latter finding will be of particular significance to LEAs which employed, and still employ, many part-time staff, such as supply teachers and school secretaries, under a succession of short-term, often termly, contracts.

The position of further education lecturers, many of whom have lodged claims, will be especially interesting. The refusal to admit part-time lecturers to the Teachers' Pension Scheme occurred during a time when most were LEA employees, prior to the transfer of responsibility for FE under the Further and Higher Education Act 1992. If the result of the ECJ decision is that they have to be retrospectively admitted to the scheme, will the LEA be liable to pay the necessary employer's contributions or will the liability have transferred to the relevant further education college? Where the staff continued to be employed by a FE college after 1 April 1993, it is submitted that the liability will be transferred to the college. Section 26 of the FHE Act 1992 transferred the contracts of employment of staff employed at the further education establishments from the LEAs to these establishments and s. 26(3) transferred all the LEAs' rights, obligations and liabilities. More contentious may be the transfer of liability in respect of part-time staff who had ceased to be employed at the establishment before the transfer. Although these claims may lead to arguments in the employment tribunals between LEAs and colleges, it is probable that the liability for these claims should transfer as well under s. 23(2) of the 1992 Act as a general liability.

Irrespective of the impact of the ECJ decision on claims from further education lecturers, the decision, once it has been considered by the House of Lords, will involve LEAs in a significant number of claims and, if the press response to the judgement is to be believed, significant cost.

Vicarious liability

Although the liability of LEAs is discussed elsewhere (see Chapter 11), the issue of vicarious liability often arises in connection with the employment of staff. In general terms "vicarious liability" is the liability an employer owes for the acts of his employee during the course of the employee's employment with the employer.

In the context of an LEA, the principle therefore extends to the responsibility of an LEA for the actions of its staff, including, because it is in law the employer, the actions of staff employed at community and voluntary controlled schools.

The act for which the LEA is responsible must, however, occur “during the course of the employee’s employment” with the LEA. What this means is that the employer will be held responsible for an act of an employee only which is expressly or implicitly authorised by the employer, or is an unauthorised manner of doing something which is authorised or is incidental to the thing the employee is employed to do. In the school setting, it is obvious that an LEA is vicariously liable for the negligent act of a teacher supervising a PE lesson (for example, *Gibbs v Barking Corporation* [1936] 1 All ER 115, *Ralph v London County Council* (1947) 111 JP 548 and *Affutu-Nartoy v Clarke* (1984) Times, 9 February) or a chemistry lesson (for example, *Crouch v Essex County Council* (1966) 64 LGR 240).

The liability does not, however, extend to activities outside the member of staff’s employment or to what the law describes as frolics of the employee’s own. Deliberate criminal misconduct is an example of the type of action for which the employer will not be held liable. For example, in *Lister v Hesley Hall Limited* (1999) Times, 13 October, the owner and manager of a residential school was held not to be liable for the sexual and physical assaults on pupils carried out by a teacher at the school as his actions were outside the course of his employment. Similar principles should apply to staff employed by LEAs (see *Trotman v North Yorkshire County Council* [1998] ELR 625).

Indemnity

Although the principle of vicarious liability will mean that most legal actions will be issued against the employing LEA or governing body, there is nothing to prevent a claimant suing the individual they believe was responsible for their injury or loss. To protect staff in this position from personal liability and having to take out their own insurance, s. 265 of the Public Health Act 1875 (as amended by the Local Government (Miscellaneous Provisions) Act 1976 provides that “no matter or thing done, and no contract entered into by any local authority... and no matter or thing done by any... officer of such authority or other person whomsoever acting under the direction of such authority shall if the matter or thing were done or the contract were entered into *bona fide* ...subject them or any of them personally to any action liability claim or demand whatsoever”. Thus the staff of an LEA should benefit from this protection if acting *bona fide*.

Health and safety responsibilities

Just as an LEA is responsible for the breach of duties by its staff, it is under a direct duty to its staff both under the health and safety legislation and also at common law to protect them from harm. Under ss. 2 and 3 of the Health and Safety at Work etc. Act 1974, an employer is under a duty to ensure, so far as is reasonably practicable, that the health and safety and welfare of employees are protected. The employer in these circumstances is the LEA in the case of community and voluntary controlled schools.

For an illustration of a case where LEAs have been held in breach of their duties to ensure the safety of their staff see, for example, *Moore v Kirklees MBC* 30 April 1999, unreported. The LEA was found liable for an injury to a dinner lady caused by a statemented child where the dinner lady had not been forewarned of the pupil's behaviour and had not been given appropriate training in dealing with it. In contrast, in *Purvis v Buckinghamshire County Council* [1999] ELR 231, [1999] EdCR 542, a welfare assistant in a school's special educational needs department suffered a back injury after restraining a five-year-old pupil with behavioural and learning difficulties. Her claim for damages was dismissed as the pupil had been appropriately placed, the claimant had been in the department for two years and was experienced and it was unclear how training might have helped her deal with the situation. Though there had technically been a breach of the LEA's duties under the Manual Handling Operations Regulations 1992, SI 1992/2793, in that no assessment had been made of such an incident, that had not contributed to the accident. If it had contributed, the outcome might have been different.

As a general principle, responsibility for health and safety matters resides at all levels of management. In other words, every individual employee is under a duty to conduct him- or herself in a safe manner, and every layer of management is required to take proper cognisance of health and safety matters in exercise of its particular responsibility. At senior management levels, this includes taking active steps to ensure that others are aware of, and appropriately trained to discharge (see *Purvis*, above), these duties.

6. OTHER SUBSTANTIAL FUNCTIONS

A. Early Years and Childcare

The statutory basis underpinning Early Years Development and Childcare Partnerships and Plans is contained in ss. 117 to 124 of the School Standards and Framework Act 1998.

The Government announced its broad policy approach to early years services in May 1997. The key element of the policy is that early years services should be planned in each local authority area through an Early Years Development Plan (referred to as the Plan or the EYDP), drawn up by the local authority in full co-operation with a body which represents all the relevant early years interests in the area. These bodies were initially called Early Years Development Partnerships (referred to as EYDPs or the Partnership).

All local authorities set up Partnerships in 1997 and in February 1998 submitted EYDPs to the Secretary of State for approval. This meant that every authority had an approved EYDP.

On 19th May 1998, the Government published *Meeting the Childcare Challenge*, a Green Paper on establishing a National Childcare Strategy covering children from 0 – 14 years. Acknowledging the vital links between care and education, especially in the early years, the Green Paper proposed that the national strategy should be planned and delivered by local childcare partnerships, building on the existing Partnerships, each of which would thus become an Early Years Development and Childcare Partnership (referred to as the EYDCP or the Partnership). It further proposed that EYDPs should be extended to cover childcare, becoming Early Years Development and Childcare Plans. The Government's guiding principles, outlined in the National Childcare Strategy, for the future developments of early years and childcare services are: quality, affordability, diversity, accessibility and partnership.

Details of the statutory arrangements

Statutory references below are to Part V of the School Standards and Framework Act 1998. See also the Education (Nursery Education and Early Years Development) (England) Regulations 1999, SI 1999/1329, and the Education (Nursery Education and Early Years Development) (Wales) Regulations 1999, SI 1999/1099.

Section 117 of the Act defines “nursery education” as full-time or part-time education suitable for children who have not attained compulsory school age (whether provided at schools or elsewhere).

The primary legislation now places a duty on the LEA to ensure that there is enough provision of nursery education for children of a prescribed age, initially four years, in whatever type of setting meets the required standards (s. 118(1)). The plan must include a statement of proposals on how the LEA will meet this statutory duty.

When determining whether the provision of nursery education is sufficient for its area, an LEA may have regard to any facilities which it expects to be available outside the area for providing nursery education. In this, the LEA shall have regard to any guidance given by the Secretary of State (s. 118(2)).

It is the responsibility of the LEA to establish a partnership for its area, (s. 119(1)). In carrying this out, the LEA is one of a number of members of the wider group promoting effective partnership working and supporting that work through management of the resources attached to the planning mechanisms. The LEA must have regard to any guidance by the Secretary of State in establishing the partnership and determining its constitution (s. 119(2)). The LEA also has the power to establish a sub-committee of the partnership for any part of its area (s. 119(3)).

Responsibility for convening, servicing and facilitating meetings and proceedings of the partnership is the duty of the LEA (s. 119(4)).

The partnership, in conjunction with the LEA, has a duty to review the sufficiency of nursery education in the area, and to prepare the Early Years Development and Childcare Plan (s. 119(5)). The Secretary of State may confer on partnerships additional functions, which may impact on the LEA to action or facilitate (s. 119(6)).

It is the duty of the LEA to prepare the Early Years Development and Childcare Plan and develop further such plans, in conjunction with the Early Years Development and Childcare Partnership (s. 120(1)). Subsections (2)–(4) of s. 120 prescribe what the development plan should consist of, and there are detailed guidance documents as to its content and format.

The LEA has a duty to submit the plan by a specified date to the Secretary of State for approval (s. 121(1)). The Secretary of State may require modifications to the plan. It is the duty of the LEA to implement an approved plan (s. 121(3)).

Quarterly reports to the DfEE are required of the LEA, in order for the LEA's proposals and their implementation to be kept under review (s. 121(5)).

The LEA has the power, with the agreement of the partnership, to submit modifications of an approved plan to the Secretary of State for approval (s. 121(8)).

The LEA shall publish the plan in a way which may be prescribed (s. 121(9)).

Section 123(1) places a duty on any LEA or other person providing nursery education and their employees to have regard to the provisions of the SEN *Code of Practice*.

Section 124(1) gives the LEA a power to provide assistance with travel arrangements for children receiving nursery education otherwise than at school.

B. School Admissions

General principles

Recently, sections 84–109 of the School Standards and Framework Act 1998 and subordinate legislation made thereunder have made significant changes to the law on school admissions. The basic principles, however, are those originally enshrined in the Education Act 1980, that:

- a) children are to be admitted to maintained schools in accordance with their parents' preferences (subject to specified practicalities);
- b) a school must admit up to its admission number, which is based on a normally historically determined standard number (and, nowadays, under Sch. 23 to the 1998 Act, the standard number can be changed only by invoking procedures involving:
 - i) (in England) the school organisation committee and, in the event of its not being of one mind, the adjudicator; or,
 - ii) in the case of a general variation of standard numbers according to "class or description" of school, the Secretary of State);
- c) special rules protect:
 - i) the religious character of denominational voluntary and foundation schools;

- ii) the selectivity of remaining grammar schools; and
- iii) partial selectivity according to aptitude in certain curricular areas (now unequivocally legalised by ss. 100 and 102) under specified conditions;
- d) each school has an admission authority, which in the case of a community or controlled voluntary school will usually be the LEA, but otherwise, and for an aided or foundation school, the governing body; and
- e) the admission authority must make arrangements for dissatisfied parents to appeal to an impartial tribunal (now called the appeal panel) if their preferences are not met.

Whether or not it is the admission authority for any particular school, however, the LEA has a central set of functions in admissions.

A place at school: general duty of the LEA

First, it has the general duty, under s. 14 of the Education Act 1996, to secure that there are available in its area sufficient schools “in number, character and equipment to provide for all pupils the opportunity of appropriate education” (subs. (2)). That general duty, in predecessor legislation, was characterised as a target duty in *Meade v London Borough of Haringey* [1979] 2 All ER 1016, rather than absolute, though the LEA must be able to show reasonable cause (such as an emergency) why it cannot at a particular instance fulfil the duty; and it must take all statutory steps to overcome obstacles to its fulfilment (*per Woolf LJ*, as he then was, in *R v Inner London Education Authority ex parte Ali and Another* [1990] COD 317).

The general duty is restricted to provision “for their [*sic*] area”, and so the LEA is under no duty to secure provision of schooling for pupils at large from outside its area (but see under “Admissions: procedures”, below).

LEA duty in respect of individuals

But, in respect of an individual child of compulsory school age, the LEA has arguably stronger duties, which are set out in detail in Chapter 8 on Inclusion, to see that he or she is receiving full-time education in school, or other institutional setting, through LEA-provided tuition, or otherwise (including privately, at home, subject to the LEA’s satisfying itself that the education is suitable). It has, moreover, an explicit *duty* to make arrangements for the education of sick children, expellees and others, otherwise than at school, for example in a pupil referral unit (s. 19 Education Act 1996).

On admissions of children with statements of special educational needs, see Chapter 7. On the effects of the statutory limitation of infant class sizes, see Chapter 4A.

The LEA also has the power to direct (subject to certain conditions) a school maintained by it to admit a child who has no place at any of the schools at a reasonable distance from his/her home (ss. 96, 97 School Standards and Framework Act 1998). The existence of this *power* is further ground for inferring a *duty* to see that every child needing a school place has one. Similarly, an LEA is empowered (s. 18 Education Act 1996) to make arrangements for a pupil to be educated at a school not maintained by it or any other LEA. Finally, the parent's statutory defence against conviction for failing to ensure his or her child's regular attendance at school (s. 444(4) of the 1996 Act) implies a corresponding duty of the LEA to enable the child to attend school, if necessary by securing suitable transport or a boarding place.

On school transport, see Chapter 9.

Admissions: procedures

As to the procedures for admissions, the LEA has the explicit duty to make arrangements "for enabling...the parent...to express a preference [refined by subsequent and subordinate provisions to mean an unspecified number of ranked preferences]...and to give reasons for [the] preference" (s. 86(1) School Standards and Framework Act 1998). On materially the same provisions in the 1996 Act, the Court of Appeal held that, since parents were entitled to express a positive preference and if they wished to give their reasons, any LEA's secondary school admission arrangements which operated basically by inertia, in that parents living in the designated catchment of a particular school could assume that their children would be allocated places there automatically and as a priority, were inconsistent with what the Act required (*R v Rotherham MBC ex parte Clark and Others* [1998] ELR 152).

If the parent of a child resident outside the LEA's area expresses preference for a school maintained by the LEA, that LEA must treat the preference on the same footing as if the application came from one of its residents, i.e. must comply with it unless one of the standard specified exceptions applies. This principle, enunciated now in subs. (5) of s. 411 of the 1996 Act, was confirmed by the Court of Appeal in *R v Greenwich London Borough Council ex parte Governors of the John Ball Primary School* [1990] Fam Law 469. The judgment declared unlawful a decision by the newly created Greenwich LEA to give priority to its own residents for admission to a secondary school,

thus excluding applicants (other than siblings who were already pupils at the school) from the neighbouring LEA. Following *Greenwich*, there was concern among LEAs whether school catchment areas (as distinct from the sibling rule, or relative proximity of home to preferred school) were lawful. Advice from the then DFE (Annex C of Circular 6/93, since withdrawn) was very cautious; it recommended that any catchment should be drawn by reference to “physical barriers, such as a river or motorway”. But the courts subsequently confirmed the lawfulness of the catchment area: in judgment on a case in which racial discrimination had been alleged (*R v Bradford MBC ex parte Sikander Ali* [1994] ELR at 312B); and even where the LEA boundary happened to form a substantial part of the school catchment boundary (*R v Wiltshire CC ex parte Razazan* [1997] ELR 370, CA; and *R v Rotherham MBC ex parte LT* [2000] ELR 76, [2000] EdCR 39, CA).

Section 92 of the 1998 Act puts LEAs under a duty to publish for each school year specified information about admissions to their maintained schools. The Education (School Information) (England) Regulations 1998, SI 1998/2526 as amended, require every LEA to publish a “composite prospectus of admission information” relating to all maintained schools in its area or each relevant part of its area (or beyond) (regs 7A and B). The content of the prospectus is defined by Sch.1A to the regulations.

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Section 89 of the 1998 Act requires admission authorities to consult over their proposed arrangements and, by implication, changes year by year. The Education (Relevant Areas for Consultation on Admission Arrangements) Regulations 1999, SI 1999/124 covering England and Wales, set out ground rules for determination, by the LEA (after consultation[!]), of the relevant areas for such consultations.

Ministerial expectations

Furthermore, the statutory *Codes of Practice on School Admissions* for England and for Wales, creatures of the 1998 Act, recommend establishment of local admissions forums to assist the coordination of admission arrangements and the discussion of related issues across all the admission authorities in the area, and involving also dioceses, headteachers, Early Years Development Partnerships (for primary school matters), parents and others – and, in England, city technology colleges (though these are in law independent schools, albeit substantially dependent on public funds). The LEA is under no duty to set the forum (or forums) up, but the *Codes* are persuasive, and assume (see paras 4.5, 4.8 of the *Code* for England and 5.19 of that for Wales) that the LEA will be the prime mover in its establishment and the provider of its facilities and clerking.

Implications for LEA functions and roles

Admissions have in recent years been a much-legislated area of the public education service. Legislative activity has followed decades in which what was originally s. 76 of the Education Act 1944 (education in accordance with parents' wishes), supplemented from 1950 until its withdrawal in 1981 by the *Manual of Guidance (Schools No. 1)*, served as the only statutory basis for what is loosely called "choice" of school. Primary legislation in 1980, 1986, 1988, 1993 and 1998 has refined and made more elaborate the rules governing admission to school and arrangements for meeting, if possible, parents' preferences; and included, but later removed, a power for the Secretary of State to determine his or her own scheme of coordinated arrangements for school admissions in an area. In England, the right of objection to proposed admission arrangements to the adjudicator or (in cases involving religious matters) the Secretary of State for determination are the present long-stop means of resolving controversial problems which cannot be settled locally.

And the school organisation committee, steward of the LEA's school organisation plan, is intended as an anterior device for minimising the occasions on which complex and controversial problems had to be referred to Ministers to sort out where LEAs and other local actors could not find agreement.

Whether the current statutory provisions amount to increase or reduction of LEA powers is debatable. What is surely beyond doubt is that the admission provisions entail a considerable administrative workload for the LEA, which must deploy its local and legal knowledge and its diplomacy even in circumstances where its explicit duties or powers are not formally in play.

C. School Governance

Constituting temporary governing bodies

An LEA is under a duty, once proposals for the establishment of any new maintained school have been approved, to make arrangements to constitute a temporary governing body in accordance with the Education (New Schools) (England) Regulations 1999, SI 1999/2262. An LEA may make an arrangement for a temporary governing body as soon as proposals have been published in anticipation of approval. If so, the arrangement lapses if either the proposal is withdrawn or is not approved (Regulation 5).

Instruments of government

Each LEA is required to make, by order of the authority, an instrument of government for every maintained school (grouping two or more schools under a single governing body is no longer allowed) in accordance with Schedule 12 of the School Standards and Framework Act 1998 and with regulations made by the Secretary of State (Education (School Government) (Transition to New Framework) Regulations 1998, SI 1998/2763, and the Education (Transition to New Framework) (New Schools, Groups and Miscellaneous) Regulations 1999, SI 1999/362).

An LEA is under a duty to vary an instrument of government following a review by either a governing body or the LEA and where a variation appears to be appropriate (paragraph 4 of Schedule 12 to the 1998 Act).

The LEA is under a duty to secure that a copy of the instrument of government (and, where any variation is made to the instrument of government, a copy of the order varying the instrument and a consolidated version of the instrument incorporating all variations) is provided to:

- a) every member of the governing body (or where appropriate the temporary governing body) of the school;
- b) any trustees under a trust deed relating to the school; and
- c) in the case of a Church of England or Roman Catholic Church school, the appropriate diocesan authority or, in the case of a new school which has not opened, the diocesan authority which will be the appropriate diocesan authority when the school opens (Regulation 5 Education (School Government) (England) Regulations 1999, SI 1999/ 2163).

The LEA also has a duty in relation to any new school to make an instrument of government not later than the school opening date, i.e. the date when the school first admits pupils (reg 3 Education (New Schools) (England) Regulations 1999, SI 1999/2262). There is also an obligation to ensure that a permanent governing body is constituted, under the instrument of government, as soon as practicable after the school opens and no later than the end of the first term in which the school first admits pupils (reg 36). The LEA must step in, if the clerk fails to do so within a reasonable period, to convene the first meeting of a temporary governing body (reg 26).

Appointment of governors

The LEA is required to appoint persons to LEA governorships on maintained school governing bodies. The *Code of Practice on LEA–School Relations* urges LEAs to make appointments promptly and that they should not allow vacancies to remain unfilled for an unreasonable period (paras 85 and 86). LEAs should also publish the process and criteria by which they identify candidates for appointment. It should always be remembered, though, that LEA governors are not delegates, and cannot be mandated by the LEA to take any particular line. Their first loyalty should be to their school and the community it serves (para 85).

An LEA may, however, remove governors which it has appointed. The *Code of Practice on LEA–School Relations* makes clear that LEAs do have the power of removal for good reason (paragraph 86). In *R v Warwickshire County Council ex parte Dill-Russell and Another* (1990) Times, 7 December, the Court of Appeal held that maintaining the political balance after changes brought about by local elections was a lawful reason for replacing LEA nominees on governing bodies. LEA governors may not, however, be removed simply because they do not support the LEA's view on an issue or vote against the LEA (see *Brunyate v ILEA* [1989] 2 All ER 417).

Governors' allowances

An LEA may, in accordance with the provision of a scheme made by it, pay such allowances to the governors of maintained or maintained special schools which do not have delegated budgets and any institution providing higher or further education which is maintained by the LEA as is permitted by the Education (Governors' Allowances) Regulations 1999, SI 1999/703 (s. 519 Education Act 1996).

So far as information and training are concerned, the LEA is under a duty to secure that all governors are provided, free of charge, with such information as the LEA considers appropriate in connection with the discharge of their functions as governors and to make available, also free of charge, such training as the LEA considers necessary for the effective discharge of those functions (para 7 of Sch. 11 to the Education Act 1996).

See also s.v. "Governing bodies" in Chapter 2, item 9, and the preceding two sections of the present chapter.

D. Information and Intelligence

The reader will be greatly relieved that this section does not seek to fulfil one of the original objectives for it, that it should be an exhaustive catalogue of the law's informational requirements on LEAs. For the purposes of this book, an LEA education department did indeed assemble a list of as many sets as possible of the information as it is required to produce annually. Though the mass of detail is collatable and explicable, it became quite clear that:

- a) the resultant commentary would not be a chapter but a complete book; but
- b) it would be unreadable; and
- c) it would need frequent updating, as some of the Government's requirements are changed each year.

Instead, the commentary below seeks to group in broad categories and contextualise the information which LEAs must collect, collate, submit (e.g. to the Secretary of State and/or – in Wales – the National Assembly), interpret or publish. Particular emphasis is laid on the purposes of processing the information.

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General duties

First, the power of the Secretary of State to require information is nothing new. Section 92 of the Education Act 1944 has survived and now appears – with extensions – in the consolidatory Education Act 1996. But the 1944 formulation –

“Every [LEA] shall make to the Minister [of Education, as he then was] such reports and returns and give him such information as he may require for the purpose of the exercise of his functions under this Act”

– is itself a re-enactment of provision consolidated in the Education Act 1921.

Under s. 29 of the 1996 Act (as amended), this duty upon the LEA is complemented by duties to:

- provide data for research to assist the Secretary of State; and
- furnish him with information on SEN provision (from the 1993 Act) (see Chapter 7 of this book); and
- publish “at such time or times and in such manner as may be required by regulations...such information as may be so

required with respect to [the LEA's] policy and arrangements in respect of any matter relating to primary or secondary education" (from the 1980 Act, as amended in 1992).

The intentions here are plain. The third indent above imposes a set of requirements as to publication, and it provides, in an increasingly complex service, for prescription by regulation.

Particular duties

The LEA duties cited above are broad and catch-all in purpose. Specific new or newly defined requirements from legislation of 1996 onward are exemplified below. In general, however, discussion of requirements to collect and publish information are examined in the substantively relevant chapters of this book. Some cross-references are therefore given in the notes below.

School Inspections Act 1996

The lesser consolidation of 1996 also draws together such requirements from earlier legislation as what is now its s. 18 (preparation and submission to Secretary of State and HM Chief Inspector of statement of the LEA's additional special measures, or of reasons for not proposing any, in respect of a school found upon OFSTED inspection to need special measures).

Education Act 1997

Section 9 (inserted as s. 527A Education Act 1996) requires publication of the LEA's statement setting out the authority's arrangements for the education of children with behavioural difficulties. The Local Education Authority (Behaviour Support Plans) Regulations 1998, SI 1998/644, lay down *inter alia* the manner of the publication of the plan and its revisions, and prescribe publication of revisions triennially.

By reg 8 of and Part IV of the Schedule to the Education (Baseline Assessment) (England) Regulations 1998, SI 1998/1551, and similar provisions in the corresponding SI for Wales (1999/1188), made under s. 18, the LEA, having received from schools notification of baseline assessments is required to pass them on promptly to a body designated by the Secretary of State. This "post office" function, as it first appears, delivers to the LEA material it can use in its discussions with schools about subsequent pupil progress, including target-setting. (On baseline assessments, see Chapter 4A.)

For OFSTED inspections of the LEA, the latter is required: (a) to provide HM Chief Inspector with such information as may be prescribed, in such format, at such notice, or at such times as may be prescribed (s.

38(6)) (at the time of writing no such regulations had been made: see next paragraph and Chapter 4A); and (b) to publish the inspection report and its action plan drawn up in response thereto (s. 39(3)). The Education (Publication of Local Education Authority Inspection Reports) Regulations 1998, SI 1998/880, prescribe the manner and timing of such publication by LEAs in England and Wales. (See also Chapter 11C.)

As to the information which HM Chief Inspector for England requires for an inspection of the LEA, Appendix 2 of *LEA Support for School Improvement: Framework for the Inspection of Local Education Authorities* 1999, published by the Office of HM Chief Inspector "in conjunction with the Audit Commission", gives a non-exhaustive list of 74 items of information. The document says that "LEAs may provide information in a format that they find convenient; this may include copies of existing analyses, reports, policies and guidelines." A rough check suggests that fewer than ten per cent of the items might not be immediately available, but could be assembled reasonably speedily. All are related to the LEA's statutory functions, including the operation of the Government's specific-grant regimes. A note earlier in the OFSTED document promises some changes to accord more closely with Best Value measurement (see below).

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School Standards and Framework Act 1998

For informational duties relating to the LEA's plan for reducing infant class sizes (s. 2), see under "Limit on infant class sizes" in Chapter 4A.

Similarly, on the duties connected with Education Development Plans, see Chapters 3 and 4A.

Under s. 9 of the Act (adding subs. (6) to s. 499 of the 1996 Act), the LEA must take all reasonable steps to inform those qualified to stand and vote that parent governor representatives are to be elected to committees "wholly or partly for the purpose of discharging any functions with respect to education which are conferred on [it] in [its] capacity as [LEA]".

As to duties to publish proposals, drafts and notices, as appropriate, in connection with the school organisation plan and proposals of significant changes to schools themselves (ss. 26, 28, 29, 31 *et alibi*), see the discussion in Chapter 5A.

On the annual preparation of, consultation on, and publishing the scheme of financial delegation for the schools the LEA maintains (s. 48) and publication of budget and outturn statements (s. 52), see Chapter 5B.

On the annual publication of admissions arrangements of maintained schools in the LEA's area and of those maintained by other LEAs, and of non-maintained schools (s. 92), see Chapter 6B.

Finally, on publication requirements in respect of the Early Years Development Plan, see Chapter 6A.

The significance and utility of information

There are considerable demands for good and timely information to enable the fulfilment of broad general duties such as those of the Secretary of State to promote the education of the people (s. 10 Education Act 1996; see Chapter 2); or enormous specific responsibilities such as his duty "to make such arrangements as he considers expedient for securing that sufficient facilities are available for the training of teachers to serve in [maintained] schools... [etc.]" (s. 11A, deriving from the 1944 Act). Similarly, the LEA's broad duties to secure the provision of efficient education (s. 13 Education Act 1996) or of sufficient schools (s. 14) rely on an intelligence capacity without which planning is ineffective. But there are numerous specific duties – see, for example, Chapters 1 and 4–8, for which total mastery of the basic information is prerequisite.

As is pointed out at several points in this book, it is not its purpose to argue for retention of the LEA in its present (or any other) form, or to take a notably polemical or defensive stance on the subject. Others, however, from Ministers in the bright lights of the conference platform down to those who operate in the dark depths of think-tanks, have raised questions about the future of the institution. Accordingly, this book, which is intended to analyse LEAs' functions and roles, should be a helpful factual basis for a discussion of what LEAs do, especially where the law imposes duties or gives powers and responsibilities. The information and intelligence functions are an important element of what goes on; it is linked – arguably, very closely – with the exercise of political discretion and local democratic accountability, and – by definition – with good management of services to pupils and their parents, adult learners, schools and other establishments. The managerial and the political are connected, and both depend crucially on accurate factual intelligence.

There is also, and necessarily, a strong relationship with central government and, in Wales, with the National Assembly, and their departments and agencies. In this chapter, the following two subsections examine examples of the relationship where the supply, some of it mutual, of information is at a premium.

Performance Indicators: where do they come from?

The Department for the Environment, Transport and the Regions issued on behalf of itself, the Audit Commission (on which, see Chapter 11) and the Home Office *Best Value and Audit Commission Performance Indicators for 2000/2001: Vol 1 The Performance Indicators* in December 1999. Following enactment of the Local Government Act 1999, this was the first combined guidance to local authorities on producing and publishing the now-complementary:

- Best Value performance indicators (BVPIs) to be specified under s. 4 of the Act and
- Audit Commission performance indicators (ACPIs) as prescribed by ss. 44 and 46 of the Audit Commission Act 1998, but based on experience of the past seven years.

The book sets out statutory guidance on BVPIs, under s. 5 of the 1999 Act, relating to England only (except in respect of housing, council-tax benefit, and police and fire authorities), other matters being within the responsibility of the National Assembly for Wales. The book anticipated (without prejudice) publication “early in the New Year” of the necessary order setting out the BVPIs. In fact, the Local Government (Best Value) Performance Indicators Order 2000, SI 2000/896, was not made until 29 March; it came into force in England (and Wales, though not for LEAs in Wales) on 20 April. General indicators are set out in Schedule 1 (on “corporate health”), and 27 education indicators are listed in Schedule 4. These are for the most part about aspects of schooling, but adult education, student awards and the youth service are also covered.

The indicators selected show that care has been taken to use material that, as far as possible, has already been assembled for other purposes. Thus, although the emphasis in the PIs is on outputs and outcomes, expenditure figures are also required. These are obtainable from budgetary statements made under the Financing of Maintained Schools Regulations 1999, SI 1999/101, which have separate schedules for England and for Wales, and which have been subject to separate sets of amending regulations. Other expenditure details are to be taken from the form RO1, the revenue outturn forms which have been issued for many years by the DETR (and its predecessor) or the Welsh Office and which play a central part in the annual calculation of local authorities’ service expenditure for revenue support grant purposes. Pupil data are derived from the similarly longstanding Forms 7 and 11, the annual pupil count, and 618G, the teaching staff and educational psychologists return.

Information for the purposes of the Education (School Performance Targets) (England) Regulations 1998, SI 1998/1532, supplies the necessary data for PIs on pupil attainment. Though detail on exclusions and unauthorised absences is calculated by DfEE, the data originate from returns which LEAs have been making to the department.

Information on school places is derived from computations used for, *inter alia*, education planning, capital programmes and the operation of admission arrangements.

The relationship between the LEA's (statutory and non-statutory) planning processes and the overall performance plan for better value in the council as a whole is graphically illustrated by Figure 2 in Chapter 1A.

ACPIs for England are included in the DETR/Audit Commission/Home Office guidance, with the formal Publication of Information Direction 1999 (England). ACPI requirements include detail of home tuition for permanent excludees (see Chapter 8 of this book), numbers and proportions of statemented children (see Chapter 7), and adult education attendances.

The Education Standards Fund and other specific grants

The Education Standards Fund (in Wales, GEST) is the principal means whereby the Secretary of State (or, in Wales, the National Assembly) can secure the introduction of national policy priorities by that most eloquent of stimuli, money. The Standards Fund is administered through annual sets of regulations (normally amended in-year with the addition of new categories of grant-aided expenditure), the most recent being the Education Standards Fund (England) Regulations 2000, SI 2000/703.

The grants have evolved over two decades, originally and controversially introduced by Secretary of State Sir Keith Joseph as education support grants limited to 0.5 per cent of total education expenditure under the Education (Grants and Awards) Act 1984 and later known as Grants for Education Support and Training. The expenditure limit was relaxed, and the number of headings of grant-aided expenditure increased, from 21 in 1987/88 to 46 for 1999/2000 (SI 1999/606). The same number represented the total for 2000/01, but SI 2000/703 replaced lapsed items with 18 new purposes. There are obvious administrative tasks in the processing of such grants, including accounting for the expenditure and reporting progress on the activities aided, and in preparing bids through the Department has simplified this process and promises to do more.

And some activities themselves are dedicated to the provision of information, whether by the formulations, submission and publication of a plan, or otherwise. Examples are:

- asset management plans: not themselves prescribed in primary legislation, but provided for in SI 1999/606 (item 32), and the basis for capital development over the coming years;
- Excellence in Cities plans: again, not in primary legislation but covered in the 1999 (item 37) and 2000 grant regulations (items 41,42);
- implementation of the Early Years Development Plans, within item 5 of 1999 and item 8 of 2000: “Support for the training and development of staff providing nursery education when the education provided is included in an education authority’s [*sic*] early years development plan”; and
- introduction of Lifelong Learning Development Plans, including support for practical measures: item 15(a) and (b) of 1999, item 28 (a) and (b) of 2000.

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Servicing the informational requirements of the various grants in this programme unsurprisingly features prominently in the workload notes of the LEA which kindly carried out an internal survey for this book.

An interesting exchange occurred in the examination of the Permanent Secretary at DfEE before the Education and Employment Committee of the Commons on the Department’s funding report for 2000 (Nicholas Barnard “In defence of his political masters”, *TES*, 19.5 2000). The Permanent Secretary acknowledged that problems of centralisation and bureaucracy remained and that the Standards Fund was a particular case. He indicated that simplification was being studied. His remarks were in effect confirmed by Secretary of State Mr Blunkett himself before the same committee a few days later (23.5.2000, unconfirmed minutes). Mr Blunkett defended the Standards Fund, as a means of (a) overcoming the “historic inequity” of distribution of the unhypothecated revenue support grant through standard spending assessments, and (b) targeting resources directly to priority activities. On the perception of bureaucracy, he pointed out that the present system had simpler bidding than had been entailed by Grants for Education Support and Training, and that further simplification of distribution was being considered. He gave further detail still in a speech on 1 June 2000 (and see DfEE notes attached to press notice 247/00, of 1 June 2000 “More Spending Power for Schools and Less Red Tape” – Blunkett).

The repeated efforts of the present and the previous Governments to cut the bureaucratic burden, albeit mostly directed at relieving perceived impositions on schools, are commendable, but administration of a large service, for hundreds of thousands of schoolchildren and adult learners, involving thousands of schools and other institutions, will always be complex. The 1 June announcement is clear as to its good intentions, but there are questions about the audit of expenditure committed by schools about to exercise their promised freedoms to vire between heads of expenditure and carry resources through the end of the financial year to the end of the school year. There is also the question of fundamental principle, about the extent to which the headteacher as a salaried rather than elected public officer should be given the apparently wide discretions proposed in the announcement. If one part of the answer is that the head will be subject to detailed regulatory control and auditorial checking, then nothing has been gained from the alleged move to greater freedom. And the DfEE notes make it clear that sweeping away the “paperwork” is achievable through greatly increased reliance on electronic communication.

On a more modest scale, the PIs and HM Chief Inspector’s demands discussed above are good examples of sensitive requirements of data collected for multiple purposes. Ultimately, however, the commentator has to fall back on the conjugation:

I am an administrator: my decisions are grounded upon intelligence.

You are a manager: you need sound data upon which to manage.

He, she, or the corporate it, is a bureaucrat: a bureaucrat makes unreasonable demands for information.

This comment is not intended to be cynical: those who are seised of the importance of an activity – support for students, say, or the LEA’s duty under regulations to monitor key stages 2 and 3 assessments, or the education of travellers’ children – will put up with, and even add to, the volume of information seen as essential to doing the job properly and getting the full available reimbursement or grant for it. The Audit Commission has a schools’ financial benchmarking database on the Internet (www.schools.audit-commission.gov.uk). Its compilation has involved gathering from volunteer LEAs school-level financial information in a variety of formats, depending on the systems used by each LEA (source: letter 16.5.2000 to EMIE from Audit Commission).

For a concise account of the certainty of intelligence in the support of schools, see paras 1.8 and 3.1 in Chapter 4B.

And, for an extended example of a blend of the statutorily required and the locally devised deployment of information on school effectiveness, see Chapter 4B.

7. SPECIAL EDUCATIONAL NEEDS

Introduction

Of all areas of LEA responsibility, the most litigated must be the field of special educational needs. Partly because of the specific and individual nature of the duties owed, partly because of effective campaigning organisations, the legislation relating to children with special educational needs has been closely and frequently examined by the courts.

If anything, this trend is likely to continue in the short and medium term as a greater awareness of children's rights, the Human Rights Act 1998 and the promised new SEN and Disability Rights in Education Bill will impose more obligations on LEAs. (At the time of writing, the DfEE had published its *Consultation Document on the SEN and Disability Rights in Education Bill*, which will cover rights for disabled people in education in schools and in post-16 education and special educational needs. Wherever possible, reference has been made to the proposals in the *Consultation Document*, but for obvious reasons, this chapter provides an analysis of what the law is at the date of writing, not what the law may be when the Bill is taken through Parliament.)

The importance of this field is therefore correctly recognised by OFSTED identifying special educational provision as one of its four groups of functions (*LEA Support for School Improvement*, p. 6). Where the authors of this work may take issue with OFSTED, though, is in respect of some of the functions included within this grouping. In particular, OFSTED include "looked-after children" and "joint working with Social Services to improve the educational attainment of looked-after children" within special educational provision. Why? This seems to be based on the assumption that looked-after children must by definition have special educational needs, which is both offensive and inaccurate. It would have been far preferable for OFSTED to include this function under its "Access" head as the importance of a local authority's work (as both LEA and social services authority) with looked-after children is to ensure that whether they have special educational needs or not, they have access to or are included in the normal educational process. For this reason, the authors of this work deal with such children under the heading of "inclusion". Similarly,

the authors question whether the management of Pupil Referral Units should also be included by OFSTED under the special educational provision heading. Again, given the variety of pupils for whom PRUs provide support, it is suggested that this function is better dealt with under access or, in this work, inclusion.

Although in the scheme of things minor criticisms, it is of concern to the authors that, in drawing up its special educational provision grouping and including the above functions, OFSTED has not followed the definitions of special educational provision set out in the legislation. For the purposes of this work, however, the authors intend to deal in this section only with an LEA's responsibilities towards children with special educational needs as defined in the Education Act 1996.

Definitions

A child has "special educational needs" for the purposes of the 1996 Act if he (or, as appropriate, she: to be understood here *passim*) has a learning difficulty which calls for special educational provision to be made for him (s. 312(1)). A child has a "learning difficulty" if either (a) he has a significantly greater difficulty in learning than a majority of children of his age, (b) he has a disability which either prevents or hinders him from making use of educational facilities of a kind generally provided for children of his age within the area of the LEA or (c) he is under compulsory school age and is, or would be if special educational provision were not made for him, likely to fall within (a) or (b) when of that age (s. 312(2) Education Act 1996).

"Special educational provision" means (a) in relation to a child who has attained the age of two, educational provision which is additional to, or otherwise different from, the educational provision made generally for children of his age in schools maintained by the LEA and (b) in relation to a child under that age, educational provision of any kind (s. 312(4)).

Thus, simply by reason of being a looked-after child or attending a PRU, a child may not have special educational needs. Nor does an exceptionally gifted child have special educational needs simply by reason of being intellectually abler than his or her peers. Only where a gifted child has learning difficulties such as dyslexia will such a child have special educational needs within the 1996 Act (see *R v Secretary of State for Education ex p C* [1996] ELR 93).

General Principles – the Code of Practice

In exercising their functions in respect of children with special educational needs, LEAs must have regard to a statutory code of practice issued by the Secretary of State under s. 313 of the 1996 Act. The current *Code of Practice on the Identification and Assessment of Special Educational Needs* (“the *SEN Code*”) was issued by the Secretary of State in 1993 and came into effect on 1 September 1994. In March 1998, a supplement to the *SEN Code* was issued to provide “guidance on the application of the Code to providers outside the maintained sector of education who provide nursery education as part of an Early Years Development Plan”. A review of the *SEN Code* is currently taking place, although, at the time of writing, no date had been set for its possible implementation. The DfEE’s *Programme of Action* stated that a revised Code would come into effect during the academic year 2000/2001. The *Consultation Document on the SEN and Disability Rights in Education Bill* neither confirms nor denies this timetable but does state that the Government will revise the *SEN Code* and the DfEE will consult widely.

General Principles

- children with SEN normally to be educated in mainstream schools

The second principle to which LEAs must always have regard when exercising their SEN functions is contained in s. 316 of the 1996 Act. This provides that any LEA, in exercising its functions in respect of a child with special educational needs who should be educated in a school, shall secure, subject to certain conditions, that the child is educated in a school which is not a special school, i.e. a mainstream school, unless it is incompatible with the wishes of his parents. The conditions are that educating the child in a school which is not a special school is compatible with (a) his receiving the special educational provision which his learning difficulty calls for, (b) the provision of efficient education for the children with whom he will be educated and (c) the efficient use of resources.

The *Consultation Document on the SEN and Disability Rights in Education Bill* suggests that the Government wants to strengthen the right to a mainstream place (by replacing s. 316) whilst simultaneously giving parents the right to insist on a special school. The consultation is worded: “The principles of the new provision would be that a child with SEN *shall* be educated within a mainstream setting unless:

- a. this is incompatible with the wishes of his or her parents; or
- b. a school or local authority [presumably this means LEA in practice] cannot take reasonable steps to adapt its provision to secure a place for them in a mainstream setting without:
 - i) prejudicing the efficient education of the children with whom he or she will be educated; or
 - ii) incurring unreasonable public expenditure.”

General Principle

- **children should be educated in accordance with parents' wishes**

The third general principle was not until recently considered a relevant factor in respect of an LEA's special educational needs functions. The general obligation on LEAs imposed by s. 9 of the 1996 Act to have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure, was thought to apply to functions other than special educational needs on the basis that the parts of the Act dealing with special education stood apart from the remainder of the Act. This belief was, however, shown to be mistaken in *C v Buckinghamshire County Council and the SEN Tribunal* [1999] ELR 179.

In the *Buckinghamshire* case, the Court of Appeal held that there was nothing in the 1996 Act to suggest that the general principle that pupils were to be educated in accordance with the wishes of their parents was intended to be disregarded in the case of children with special educational needs. The result of this is that, in exercising their special educational needs functions, LEAs must always have regard to the principle that pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure. Thus, a parental preference for a maintained school is binding in the absence of the LEA's showing that such a placement is not compatible with the two qualifications (i.e. that the school is unsuitable to the child's age, ability or aptitude or to his special educational needs, or the attendance of the child at the school would be incompatible with the provision of efficient education for the children with whom he would be educated or the efficient use of resources (Sch. 27, para 3(3)(a) and (b)).

It is clear, however, that parental preference cannot prevail if the school they prefer is unsuitable. In *Forbes v Brent LBC and Vassie* 30 September 1999, unreported, the Court held that parents did not have a veto on mainstream education and a veto could not override the LEA's primary duty to make proper and adequate provision for the child's needs. If the school put forward by the parents was unsuitable, that should be the end of the matter and their preference could not override the proper educational placement.

A preference for a non-maintained or independent school must also be considered by the LEA, together with the qualifications to s. 9, but the preference is not binding as such. Instead it is an important relevant consideration for the LEA, and on appeal the SEN Tribunal, to take into account. (For further judicial consideration of the relationship between s. 9 and SEN, see also *Lane v Worcestershire County Council and Hughes* 15 March 2000, unreported, where the court held that parental wishes were relevant but not an overriding factor.)

The LEA's duties

An LEA's responsibilities for special education fall into two categories: general duties owed towards all children and specific duties owed towards individual children and/or their parents. It is the number and precision of the latter type of duties which have caused so much difficulty for LEAs in the courts and have also enabled parents to obtain far greater redress through the SEN Tribunal and, on appeal, the High Court.

The first of the responsibilities imposed on LEAs is the duty in s. 315 of the Education Act 1996 to keep under review the arrangements made by the LEA for special educational provision.

In carrying out this duty (as with all other duties and powers towards children with special educational needs), the LEA must have regard to the *SEN Code*. It must also, to the extent that it appears necessary or desirable for the purpose of coordinating provision for children with special educational needs, consult the governing bodies of maintained schools in the LEA's area.

This obligation to keep arrangements under review is general and does not apply to specific pupils whose progress and review of needs is covered by s. 328(5) of the 1996 Act. It does not therefore impose a duty on an LEA, for which damages can be recovered, to, in effect, "keep an eye on" specific children placed by an LEA in residential schools (see *P v Harrow LBC* [1993] 2 FCR 341).

Children with special educational needs

Children with special educational needs fall into two categories. First, there are those children who have special educational needs, but for whom it is not necessary for the LEA to determine the special educational provision which any learning difficulty they have calls for. Secondly, there are those children with special educational needs for whom it is necessary for the LEA to determine the special educational provision which any learning difficulty they have calls for.

It is to the second category of children that LEAs owe specific duties enforceable through the SEN Tribunal, the courts or the Secretary of State. That does not, however, mean that duties are not owed to children in the first category (in effect, children without statements of special educational needs). Those children are owed duties, not by the LEA (except in the case of maintained nursery schools) but by the governing bodies of maintained schools. Section 317 of the 1996 Act provides that the governing body of a maintained school (and the LEA in the case of a maintained nursery school) shall:

- a) use its best endeavours, in exercising its functions in relation to the school, to secure that, if any registered pupil has special educational needs, the special educational provision which his learning difficulty calls for is made;
- b) secure that, where the headteacher or designated special educational needs governor has been informed by the LEA that a registered pupil has special educational needs, those needs are made known to all who are likely to teach him; and
- c) secure that the teachers in the school are aware of the importance of identifying, and providing for, those registered pupils who have special educational needs (s. 317(1)).

Further, where a child who has special educational needs is being educated in a maintained mainstream school, those concerned with making special educational provision for the child shall secure, so far as is reasonably practicable and is compatible with:

- a) his receiving the special educational provision which his learning difficulty calls for;
- b) the provision of efficient education for the children with whom he will be educated; and
- c) the efficient use of resources,

that the child engages in activities of the school together with children who do not have special educational needs (see s. 317(4)).

Although these duties are mainly imposed on governing bodies, LEAs should remember that the duties apply to them in respect of maintained nursery schools.

In the *DfEE Consultation Document on the SEN and Disability Rights Bill*, it is proposed that governing bodies (and the LEA in the case of maintained nursery schools) should be under a duty to notify parents of a decision by the school that their child has special educational needs (p. 27, para 7).

Children with special educational needs for whom the LEA is responsible

The above duties will apply to all children with special educational needs whether or not they have a statement of special educational needs. More specific and precise duties are, however, imposed on LEAs in respect of the second category of children, namely those who have special educational needs and it is necessary for the LEA to determine the special educational provision which any learning difficulty the child may have calls for.

In respect of these children, the responsible LEA must exercise its powers with a view to securing that such children are identified (s. 321(1)). For this purpose, an LEA is responsible for children who are in its area and who are:

- a) registered pupils at maintained schools and maintained special schools; or
- b) pupils at non-maintained or independent schools where the fees are paid by the LEA; or
- c) where (a) or (b) do not apply, registered pupils at a school and have been brought to the attention of the LEA as having, or probably having, special educational needs; or
- d) not registered pupils at a school, but are not under the age of two or over compulsory school age and have been brought to the LEA's attention as having, or probably having, special educational needs (s. 321(3)).

For a consideration of when the LEA's responsibility comes to an end, see *R v Oxfordshire County Council ex p B* [1997] ELR 90.

Alleged failures on the part of LEAs or their staff to identify a child's special educational needs have been the source of much litigation in

recent years. In theory, following the decision of the House of Lords in *X v Bedfordshire County Council* [1995] ELR 404, a negligent failure by the staff of an LEA could lead to a child recovering compensation from the LEA, although more recent decisions (see *Christmas v Hampshire County Council* [1998] ELR 1 and *Phelps v Hillingdon LBC* [1998] ELR 587) have limited the circumstances in which pupils will be able to recover damages (see Chapter 11).

Assessments of special educational need

Where an LEA is of the opinion that a child for whom it is responsible has, or probably has, special educational needs and it is necessary for the authority to determine the special educational provision which his learning difficulty may call for, the LEA is under a duty to carry out an assessment of the child's special educational needs (see s. 323(1) and (2)). To initiate an assessment, the LEA must serve notice on the child's parent informing him (or, as appropriate, her or them: see Chapter 2, item 21) that it proposes to make an assessment of his educational needs, of the procedure to be followed, the name of an officer who can provide information and of his right to make representations and submit written representations to the LEA within a specified period.

Where the specified period has expired and the LEA remains of the opinion that, having taken into account any representations made and evidence submitted, the child has, or probably has, special educational needs and it is necessary for the authority to determine the special educational provision which his learning difficulty may call for, the LEA is under a duty to make an assessment of his educational needs and to notify the parents accordingly.

Parents may also request that the LEA carry out an assessment of their child's special educational needs under s. 329 of the 1996 Act. The LEA is under a duty to comply with such a request where:

- a) the LEA is responsible for the child but no statement is maintained;
- b) no assessment has been made within the period of six months ending with the date on which the request is made; and
- c) it is necessary for the LEA to make an assessment because the child has, or probably has, special educational needs and it is necessary for the LEA to determine the special educational provision which any learning difficulty he may have calls for (s. 329(1)).

If the LEA determines not to comply with the request, it must give notice of that decision to the parent and inform him that he may appeal to the SEN Tribunal against the determination (s. 329(2)).

In the DfEE *Consultation Document on the SEN and Disability Rights Bill*, it is proposed that schools will also be given the power to request a statutory assessment (p. 28).

The procedure and requirements in respect of the making of an assessment are set out in Schedule 26 to the 1996 Act and in the Education (Special Educational Needs) Regulations 1994, SI 1994/1047 as amended (s. 323(5)).

It should be noted that parents cannot appeal against the LEA's decision to carry out an assessment. Whether this lack of remedy can withstand the implementation of the Human Rights Act 1998 is a moot point, but it is possible that an LEA's decision could be challenged on the basis that it may interfere with the right to respect for private or family life (Art. 8 of the European Convention on Human Rights), particularly where an assessment may lead to a statement specifying that a child should attend a residential school.

To assist parents, a number of LEAs have established parent partnership arrangements. To strengthen these arrangements, the DfEE *Consultation Document on the SEN and Disability Rights Bill* proposes that all LEAs will be required to offer a parent partnership service and provide schools and local agencies with information about the services available. The services will include providing parents of any child identified as having SEN with access to an independent parental supporter.

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Statements of special educational needs

After carrying out an assessment, the LEA may decide that, although the child may have special educational needs, it is not necessary for the LEA to determine the special educational provision which any learning difficulty he may have calls for, i.e. the child's ordinary school should be able to meet his needs without any intervention from the LEA. This decision may be reached even if the LEA has originally proposed to issue a statement, but has changed its mind following representations made in response to the proposed statement or evidence received subsequently to the service of the proposed statement on the parents (see *R v Isle of Wight Council ex p S* 30 September 1992, unreported). If, however, the LEA decides not to issue a final statement, it must give notice of this fact to the parents and inform them of their right to appeal to the SEN Tribunal (s. 325).

If, on the other hand, following an assessment, the LEA concludes, in light of the representations made and evidence produced, that it is necessary for it to determine the special educational provision which the child's learning difficulty calls for, the LEA shall make and maintain a statement of the child's special educational needs in the prescribed form (s. 324 and the 1994 Regulations). In particular, the statement must give details of the LEA's assessment of the child's special educational needs and specify the special educational provision to be made for the purpose of meeting those special educational needs including (a) specification of the type of school or other institution which the LEA considers would be appropriate for the child; (b) if the LEA is not required to specify the name of a school, for which the parents have expressed a preference under Schedule 27 to the 1996 Act, in the statement, specification of the name of any school or institution which the LEA considers appropriate for the child and should be specified in the statement; and (c) any special educational provision for which arrangements shall be made by the LEA otherwise than in school and which the LEA considers should be included in the statement (s. 324(3) and (4)).

When serving the statement on the child's parents, the LEA must also give them notice that they have the right to appeal to the SEN Tribunal against the description of the child's special educational needs, the special educational provision specified in the statement or, if no school is named in the statement, that fact (s. 326). Although on its face s. 326 does not appear to give parents the right to appeal against a school specified in part 4 of the statement, parents can in effect appeal against the placement in two ways. First, they can construct their appeal so as to question the special educational provision set out in part 3 with the effect that the LEA's chosen school no longer is appropriate. Alternatively, they can make an appeal against the LEA's decision to name a particular school. This is because s. 324(3) requires an LEA, when specifying the special educational provision to be made for the child, to include particulars of the type of school and the name of the school it considers appropriate (see s. 324(4)(a) and (b)), and the term "special educational provision", when used in s. 326, can include the named school.

Where such a statement is maintained by the LEA, the LEA must, unless the child's parents have made suitable arrangements, arrange that the special educational provision specified in the statement is made for the child and may arrange that any non-educational provision specified in the statement is made for him in such manner as the LEA considers appropriate (s. 324(5)(a)). If the name of a maintained school is specified in the statement, the governing body of that school is under a duty to admit him or her into the school (s. 324(5)(b)). This obligation

applies even if the LEA responsible for the child is different from the LEA responsible for the school (see *R v Chair of Governors and Headteacher of a School ex parte T* [2000] EdCR 223).

Educational or non-educational provision

The Education (Special Educational Needs) Regulations 1994 require that a statement of a child's SEN shall:

- specify the special educational provision (in terms of facilities and equipment, staffing arrangements, curriculum or otherwise) which the LEA considers appropriate to meet those needs; and
- specify any additional non-educational provision
 - a) which, unless proposed to be made available by the education authority, the LEA is satisfied will be made available by a district health authority, a social services authority or some other body, and
 - b) of which, in the LEA's opinion, advantage should be taken if the child is properly to benefit from the special educational provision specified.

In accordance with the Schedule to the 1994 Regulations, the special educational provision which the LEA is required to provide should appear in Part 3 of a child's statement of special educational needs, the non-educational provision which the LEA may arrange in Part 6.

The distinction between special educational provision, which *must* therefore be arranged for the child by the LEA, and non-educational provision, which the LEA *may* arrange, has provided much debate and resulted in a number of cases in the courts, commencing with the decision of *R v Lancashire County Council ex parte M* [1989] 2 FLR 279 and culminating in the Court of Appeal's decision in *Bromley LBC v Special Educational Needs Tribunal and Others* [1999] ELR 260.

The *Lancashire* case involved a child who required intensive speech therapy as a result of a congenital speech deformity. After considering the history of speech therapy provision, the Court of Appeal held that the identity of the provider of the therapy was immaterial. The crucial test was whether the nature of the provision itself could be characterised as educational or non-educational. Finding that the speech therapy in that case was educational in nature and therefore should have appeared under Part 3 of the statement, Balcombe LJ (at p. 580) set out a method of comparison which has subsequently been adopted in a number of decisions.

“To teach,” he said, “an adult who has lost his larynx because of cancer might well be considered as treatment rather than education. But to teach a child who has never been able to communicate by language, whether because of some chromosomal disorder...or because of some social cause (e.g. because his parents are themselves unable to speak, and thus he cannot learn by example as normally happens) seems to us just as much educational provision as to teach a child to communicate by writing.”

Although the judgment left open the possibility that some forms of speech therapy could be non-educational, the reality of Balcombe LJ’s analysis is that most forms of speech therapy, whether implemented by speech therapists or teachers/special needs assistants, are likely to be educational and should appear in Part 3 of a statement.

The decision caused problems for most LEAs. Under the National Health Service Reorganisation Act 1973, “educational” speech therapists had transferred to the NHS together with the funding, so the *Lancashire* case left LEAs with the duty to provide the therapy but without the resources to do a proper job. A further flaw in the decision was that the court considered the role of only speech therapists in providing speech therapy. In concluding that speech therapy could be provided only by a speech therapist, the court omitted to consider the role of teachers and learning support assistants (particularly in special schools) in delivering “speech therapy” or improving communication skills as an integral part of the teaching task.

As a consequence, some LEAs started to employ their own therapists. Others tried to frame Parts 3 and 6 of statements so as to ensure some input from speech therapists in Part 6, but with the majority of programmes being implemented by school staff under Part 3. In many cases, this ensured that a child could receive therapy throughout the school day, which occasional visits from NHS speech therapists could not achieve, but it was still unsatisfactory for parents, especially when the reprioritisation of NHS resources meant that no speech therapists were available.

Such a situation arose in Harrow in 1996, where the local Health Authority, for reasons of financial stringency, was able to provide only one half of the therapy (in this case, this included speech, occupational and physiotherapy) specified in a child’s statement. When the parents became aware of the reduction in provision, they launched a judicial review against the LEA and the LEA in turn initiated judicial review proceedings against the local Health Authority. The two cases came

before Turner J in *R v London Borough of Harrow ex p M* and *R v The Brent and Harrow Health Authority ex p London Borough of Harrow* [1997] ELR 62.

Acknowledging that the dispute arose from the “chronic underfunding of public bodies who have a statutory duty to fulfil, but only a limited budget out of which to meet, their statutory obligations”, the judge held that the duty on an LEA under s. 324 was personal. If the LEA’s education department requested help from a health authority or a social services department and that help were provided, the LEA would have made the required arrangements. If, however, that help was not, for whatever reason, available, the LEA was under a continuing obligation to ensure that the provision was made available. The duty on the LEA was not an ‘ultimate’ one, but it was a duty for which the LEA was and continued to be primarily responsible.

Although a number of cases subsequent to the *Lancashire* case have pointed out that the Court of Appeal said only that speech therapy is capable of being special educational provision, not that it has to be (see *re L* [1994] ELR 16 and *C v SEN Tribunal* [1997] ELR 390), the reality for LEAs is that most cases of speech therapy will, in law, be special educational provision and should appear in Part 3 of statements.

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The question, however, of whether occupational therapy, physiotherapy, nursing care and social welfare provision are special educational provision or non-educational provision is still not resolved and the case law, certainly pre-*Bromley*, is inconsistent.

In some cases, judges have been reluctant to interfere in educational, or perhaps more correctly, non-educational decisions unless the LEA has acted *Wednesbury* unreasonably. See, for example, *C v SEN Tribunal* [1997] ELR at page 400. For *Wednesbury* see under *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

In other cases, however, judges have been prepared to state categorically that certain types of provision cannot, as a matter of law, be considered educational. In *B v Isle of Wight Council* [1997] ELR 279, McCullough J concluded that the occupational therapy and physiotherapy envisaged in that case were not capable of amounting to educational provision.

In *R v London Borough of Lambeth ex p MBM* [1995] ELR 374, Owen J held that the provision of a lift to enable a child to access the upper floors of her school was non-educational provision. “If”, he said, “the

provision of a lift is necessary, it is necessary to assist M's mobility and not as special educational provision. The installation of a lift would be no more special educational provision than is the provision of M's wheel chair."

In *Bradford Metropolitan Council v A* [1997] ELR 417, the issue was whether nursing care for a child, who was severely visually impaired, epileptic and had cerebral palsy, was educational or medical. Brooke J held that although certain types of provision fell in a borderline area where it was a matter of discretion for the LEA into which part of the statement they placed the provision, nursing care was not such a provision. In his view, such care "fell fairly and squarely into the category of non-educational needs, which are the needs of the child for which the authority consider that provision is appropriate if a child is to properly benefit from the special educational provision."

In *C v SEN Tribunal* [1997] ELR 390, Dyson J considered occupational therapy and physiotherapy in respect of a child with limited movement, epilepsy and poor visual awareness and who could not stand or take steps without assistance. In the event, the judge did not find it necessary to decide whether occupational therapy or physiotherapy was lawfully placed in Part 5 of the statement. Instead, he adopted the position that there was room for a difference of opinion "as to which side of the line the therapy specified for [the child] in Part 5 fell.... In borderline cases where the tribunal does not interfere with the LEA's classification, I think that the court should be very slow to find that the tribunal has erred in law... [I]t is only in the clearest cases that the court should find an error of law arising from a failure by a tribunal to interfere with an LEA's classification of provision" (at p. 399). Nonetheless, he went on to express the opinion that occupational therapy and physiotherapy were not special educational provision (at p. 400).

Residential care and the provision of a 24-hour curriculum have also become areas of contention. In *G v Wakefield City MBC* 96 LGR 69, G suffered from profound and multiple learning difficulties, but her biggest problem was her home environment. Her home was not suitable for her needs and her mother was disabled and therefore incapable of carrying or lifting her. Laws J concluded that the provision of, in effect, residential and/or respite care was not special educational provision. "Economic problems faced by the child's parents, where for example different and perhaps more spacious living accommodation would in an ideal world be suitable for the family because of the child's physical difficulties," he held, "are not ordinarily within the remit of the SEN Tribunal. Nor are difficulties associated with a parent's disabilities, where the effect is that the child is, in physical terms, more difficult to look after."

In view of this, it is very hard to draw any conclusions from the case law or, indeed, any true principles to assist in determining whether a particular type of provision is educational or non-educational. With one or two exceptions identified above, there is clearly no hard and fast rule, no hard edge between educational and non-educational. All that can perhaps be said is, as per Laws J in *G*, that there must be a direct relation between the therapy or provision and the child's learning difficulties in order for it to be regarded as educational.

It was hoped that the decision of the Court of Appeal in *Bromley LBC v Special Educational Needs Tribunal and Others* [1999] ELR 260 would settle the point, but unfortunately, though probably for the very valid reason that the judiciary felt unwilling to interfere in areas of educational judgement, this did not happen and the law is still very uncertain. According to Sedley LJ "special educational provision is, in principle, whatever is called for by a child's learning difficulty. A learning difficulty is anything inherent in the child which makes learning significantly harder for him than for most others or which hinders him from making use of ordinary school facilities ... the LEA is required to distinguish between special educational provision and non-educational provision ... Two possibilities arise here: either the two categories share a common frontier so that one stops where the other begins; or there is between the unequivocally educational and the unequivocally non-educational shared territory of provision which can intelligibly be allocated to either ... to interpose a hard edge or common frontier does not get rid of definitional problems; it simply makes them more acute. And this is one of the reasons why, in my judgement, the second approach is the one to be attributed to Parliament. The potentially large intermediate area of provision which is capable of ranking as educational or non-educational is not made the subject of any statutory prescription precisely because it is for the local authority, and if necessary the SENT, to exercise a case-by-case judgement which no prescriptive legislation could ever hope to anticipate. ... It is true that the LEA's functions (which include both powers and duties: see Section 579(1)) will include the elective making of arrangements for non-educational provision as well as the mandatory making of arrangements for educational provision pursuant to Section 324(5)(a); but it is the fact that Health, Social Services and other authorities can be enlisted to help in the making of special educational provision which gives some indication of a possible breadth of the duty. [Consequently] the Tribunal's conclusion that physiotherapy, occupational therapy and speech therapy were all measures which related directly to [the child's] learning difficulties and therefore amounted to a special educational provision was a conclusion properly open to it provided that it is not read as meaning that these therapies were exclusively educational."

Having considered all this case law, therefore, perhaps the best advice for an LEA is to fall back on McCullough J's comments in *B v Isle of Wight Council*: "All that anyone can do when judging whether a 'provision' is 'educational or non-educational' is to recognise that there is an obvious spectrum from a clearly educational (in the ordinary sense of the word) at one end to the clearly medical at the other, take all the relevant facts into account, apply common sense and do one's best."

In such circumstances, however, it is inevitable that disputes between LEAs and parents will continue, particularly as the more complex types of provision are developed and more holistic approaches to a child's needs are encouraged. So long as the various agencies involved have different statutory obligations and responsibilities, the educational/non-educational dichotomy is likely to continue to exercise tribunals and courts.

Content of statements

It is not just the educational/non-educational dichotomy which has exercised the courts. Even more litigation has been generated over the content or legality of statements issued by LEAs.

Many LEA officers will recall the bad old days of special educational needs when statements could amount to one or two sentences of bland generalisations which were of no use to either the child or the school. That practice should now hopefully have died out as it is clear from the legislation, the *SEN Code* and case law that statements must be detailed enough to enable all concerned in a child's education to understand what special educational provision is required. The point was first considered in *R v Secretary of State for Education ex p E.* (1991) Independent, 8 May, when Nolan J at first instance compared the substantive parts of a statement of special educational needs to a doctor's diagnosis (Part 2 – the assessment of the child's special educational needs) and a doctor's prescription (Parts 3 and 4 – the special educational provision and placement). That analogy was adopted by the Court of Appeal which went on to lay down general principles applicable to the content of statements. The Court of Appeal recognised that if the special educational provision, which the child requires for all his needs, can be determined and provided by his ordinary school, then no statement of special educational needs is necessary. If, however, the LEA decides that it, as opposed to the school, is required to make arrangements itself for the special educational provision which he requires, the LEA is under an obligation to make a statement. That statement must then set out all the child's special educational needs and

all the special educational provision that he requires whether provided by his ordinary school or the LEA.

This decision led to what could be described as a radical change in practice by LEAs and most statements post-*E* followed the guidance provided by the Court of Appeal. There was, however, always argument over the degree of specificity required in a statement, especially with regard to the special educational provision. LEAs argued that the provision needed to be recorded in terms which allowed both the LEA and schools a degree of flexibility in teaching the child; parents, on the other hand, believed that their children would not receive the education to which they were entitled unless the provision was detailed with precision. Surprisingly, the issue was not litigated until 1997 when the case of *L v Somerset County Council* [1998] ELR 129 came before Laws J.

In *L*, it was held that a statement had to be sufficiently specific and clear so as to leave no room for doubt as to what has been decided is necessary in the individual case. Although in some cases flexibility should be retained, in most others greater detail, including the specification of the number of hours per week, will be required of the LEA. *L* concerned a pupil with special educational needs placed at a mainstream school. It may be possible that, where a pupil is placed in a special school, the degree of specificity may be less to ensure greater flexibility within an environment specifically designed to meet the needs of such children.

7.
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Placement

An equally contentious area is the placement specified in Part 4 of the statement. LEAs have the power to specify a maintained or maintained special school in Part 4 or, where appropriate, an independent school or non-maintained special school. Where it is inappropriate for the special educational provision to be made in a school, the LEA also has power to arrange for the provision, or part of it, to be made otherwise than in a school (s. 319). In extreme cases, an LEA may arrange for the provision to be made outside England and Wales in an institution which specialises in providing for children with special educational needs (s. 320).

Frequently, disputes arise where parents wish their children to attend specialist independent or non-maintained schools, whereas the LEA believe that either a mainstream maintained or maintained special school are appropriate for the child.

The argument is important, not only in terms of finding the right school for the child, but also in respect of ascertaining responsibility for funding the placement. If a non-maintained or independent school is named either initially by the LEA, or on appeal by the SEN Tribunal, the LEA becomes responsible for meeting the fees under s. 324(5).

Cases on this point include *R v Hackney LBC ex p C* (1995) Times, 7 November, *R v Kent County Council ex p W* [1995] ELR 362, *C v SEN Tribunal* [1997] ELR 390, *Surrey County Council v P and P* [1997] ELR 516 and *White v Ealing LBC*, *Richardson v Solihull MBC*, *Solihull MBC v Finn* [1998] ELR 203 and [1998] ELR 319, although not all with consistent results.

The *Surrey* case is important as a reminder that LEAs are not obliged to make the best possible education available, but only to meet the needs of the child. *C v SEN Tribunal* reiterated the point that an LEA was entitled to conclude that educating a child at the parent's preferred school was an inefficient use of resources when that school, while suitable, was much more expensive than the LEA's preferred option. In calculating the cost, the costs of provision specified in Part 5 of the statement should be excluded since, in that case, they were to be borne by the health authority. The reasoning in this decision was followed by the House of Lords in *B v London Borough of Harrow and Others* [2000] ELR 109. Overturning the decision of the Court of Appeal, the House of Lords held that, in determining whether placement of a child in a school maintained by an adjoining LEA was incompatible with the efficient use of resources, only the resources of the placing LEA should be considered and not the resources of the LEA responsible for the maintenance of the school which the child would attend. That appears to decide the issue so far as the resources of other public bodies are concerned. One issue which remains, though, is whether the resources of other departments than education within the one authority, particularly social services, should be taken into account in deciding what is incompatible with the efficient use of resources. The reasoning in *C* should however apply, in that social service provision is usually non-educational provision, albeit provided by the same authority, and its cost should be excluded from consideration.

In *R v Hackney LBC ex p C*, the Court of Appeal held that naming a school in Part 4 of a statement did not automatically render the LEA liable for all the fees at the school. The parents wanted their child to attend a non-maintained school, which the LEA considered suitable, but only with additional support, which the LEA was willing to provide. The court held that the naming of the school in these circumstances did not impose a duty on the LEA to fund all the fees.

Whether this is correct is debatable in light of *R v Kent County Council ex parte W*, where Turner J appeared to take the opposite view. In this case, it was held that the LEA had failed to make suitable arrangements to make the necessary special educational provision for the child; the LEA could not in the circumstances argue that this was a case of the parents making arrangements. The LEA therefore had an obligation to fund the entire cost of the placement.

The result of these cases is that an LEA, contemplating naming the parents' preferred school in such circumstances, needs to be very careful how it words Part 4 of the statement. This doubt is supported by the decision of Dyson J in the *White* case. There it was held that although there was no absolute duty to name a school in a statement, if a school was named, the LEA was under a duty to arrange and pay for the placement. The normal solution, therefore, is, first, to name the maintained school that the LEA believes to be appropriate and then to record that the parents have chosen to place their child at the non-maintained school for which they are making suitable arrangements, other than for the support which the LEA is willing to fund.

Similar problems over wording have arisen with respect to school transport. In *R v Havering LBC ex p K* [1998] ELR 402, the LEA agreed to name the parents' preferred school, on condition that the parents met the transport costs. This was not however recorded in the statement. Later, the parents could not afford to pay the transport costs and the LEA attempted to alter the placement and require the child to attend its originally preferred school. This was held to be unlawful by the court as the non-maintained school was the named school in Part 4 and, in the absence of the LEA lawfully amending the statement, the LEA continued to be responsible for the placement, together now with the transport costs. The moral of the case is that if an LEA is prepared to name a school on the basis that the parents will meet the transport costs, that agreement needs to be recorded in the statement along the following lines: "Part 4: X School, provided that Mr and Mrs Z will meet the costs of transporting A to and from school. In the event that Mr and Mrs Z are no longer able to meet these costs, B School is the appropriate school."

The DfEE's *Consultation Document on the SEN and Disability Rights in Education Bill* recognises the problems that can occur and proposes to amend the 1996 Act so that LEAs need specify only the type of school, but not name any particular school that the LEA considers would be appropriate for the child, in circumstances where the parents have themselves made suitable arrangements for educating the child in an independent school.

Another issue relating to placement concerns the ability of an LEA or the SEN Tribunal to place a child in a school beyond its “designation”. To a certain extent the problem has been resolved by the implementation of the two separate sets of regulations relating to maintained and non-maintained special schools (the Education (Maintained Special Schools) (England) Regulations 1999, SI 1999/2212, and the Education (Non-Maintained Special Schools) (England) Regulations 1999 SI 1999/2257), but the issue may still arise in respect of certain placements.

Under s. 324(4), the LEA is required to name the type of school and, subject to certain conditions, to name the school which it considers would be appropriate for the child. That appears to provide a wide discretion to the LEA to name the school which it believes will best meet the child’s needs. In *City of Sunderland v SEN Tribunal and Others* [1996] ELR 283, however, the judge took a more restrictive view of the LEA’s powers based on his interpretation of the regulations then applying to both maintained and non-maintained special schools (Education (Special Schools) Regulations 1994, SI 1994/652). In that case, the issue concerned whether or not a child could be placed at a maintained special school when that school had not been approved by the Secretary of State to take children of the child’s age.

The regulations stated that a governing body could not admit a child to a school unless he fell within the category specified in the arrangements approved by the Secretary of State in respect of (i) the number, age and sex of day and of boarding pupils and (ii) their respective educational needs (paras 1 and 7 of Part II of the Schedule to the 1994 Regulations). Brooke J held that a child whose age was beyond the approved age range for the school could not lawfully be admitted by the school’s governing body.

Similarly, in *In re B* 4 August 1999, unreported, Latham J held that an LEA could decline to name a special school if to do so would lead to the approved number of places for the school being exceeded.

In contrast, however, in *Ellison v Hampshire County Council* 30 July 1999, unreported, Tucker J held that where the issue was not a child’s age or sex (i.e. the objective criteria under (i) above), but was the subjective assessment of the child’s special educational needs, the *Sunderland* case could be distinguished. “The question of what school is appropriate is not necessarily determined by the designation of a particular school although that is obviously a factor to be taken into account. If other or extra provision can be made for a child’s educational needs as recognised in the statement, then a school may, despite certain initial apparent disadvantages, be an appropriate school.”

The position was therefore that a child could not be placed in a school if he or she was not of the same sex or age as the designation or their admission would put the school above its designated number, but a child could be admitted if the school was “appropriate”, even if the child’s special educational needs did not match the type of need for which the school was approved. Tucker J’s judgement was upheld by the Court of Appeal (*Ellison v Hampshire County Council* 24 February 2000, unreported), although the Court preferred to find that placement was a question of educational judgement properly left to the LEA and SEN Tribunal.

These provisions still apply in the case of admission to non-maintained special schools as paragraphs 1 and 7 of Part II of the Schedule to the 1994 Regulations now appear in the same form in the Education (Non-Maintained Special School) (England) Regulations 1999 (see paras 1 and 7 of the Schedule).

In the case of admission to maintained special schools, however, the regulations have changed significantly and the only restrictions on a child’s admission to such a school are found in Regulation 19 of the Education (Maintained Special Schools) (England) Regulations 1999. These provide that no child is to be admitted into a maintained special school unless:

- a) a statement of special educational needs is maintained for him;
- b) he is admitted for the purposes of an assessment of his special educational needs and his admission is with the agreement of the LEA, the headteacher of the school, the child’s parent and any person whose advice is sought as part of that assessment; or
- c) he is admitted following a change in his circumstances, with the agreement of the LEA, the headteacher of the school and the child’s parent (reg 19(1)).

Thus, the only real condition attached to a child’s admission to a maintained special school is that he has a statement naming that school. Although an LEA must clearly have regard to his or her age and sex, the numbers at the school and the special educational provision which the school provides (otherwise the LEA’s decision could be challenged on normal administrative law principles of unreasonableness), the important factor in future will be the appropriateness of the placement. If, with additional support, a child with particular needs can be accommodated at a school designated for a different type of need it will not be unlawful for that school to admit him.

Review of statements

Once the statement is made, the LEA is under an obligation to keep the statement under review (s. 328(5)) and must review it within 12 months of the making of the statement or a previous review. In addition, parents may ask the LEA for a further assessment at any time provided that an assessment has not been made within the period of six months prior to that request and it is necessary for the LEA to make a further assessment (s. 328(2)).

Amending and ceasing to maintain statements

A statement of special educational needs is not a rigid or permanent document; it should change to reflect the changing needs of the child. Consequently, the legislation makes provision for the amendment of statements or, where the child's needs have changed to the point where it is no longer necessary for the LEA to determine the special educational provision which the child's learning difficulty may call for, the cessation of the statement.

The procedures are governed by paragraph 9 of Schedule 27 to the 1996 Act and paragraphs 6:34 to 6:37 of the *SEN Code*.

Particular issues have arisen in respect of the termination of an LEA's responsibility when a child with special educational needs moves into the post-16 sector. The *SEN Code* is not particularly helpful in these cases as paragraph 6:36 states that "a statement will remain in force until the LEA ceases to maintain it, or until the child is no longer the responsibility of the LEA, for example, if he or she moves into the further or higher education sector, or to social services provision, in which case the statement will lapse. The LEA may cease to maintain a statement for a child only if it believes that it is no longer necessary to maintain it." This advice is unhelpful as, firstly it refers to a statement lapsing, which is not a term appearing in the legislation and, secondly, the examples of responsibility ceasing are not exclusive.

Again, it has been left to the courts to find some semblance of order in all this. The first case was *R v Dorset County Council ex p Goddard* [1995] ELR 109. This case involved a young person whose needs required him to be educated in an independent school. In these circumstances, it was unlawful for the LEA to try to claim that, as he was over 16, it ceased to have responsibility for the pupil, that his statement should therefore lapse and that the Further Education Funding Council should take over the liability to fund the placement. The LEA

was therefore forced to maintain a statement whilst he remained at school.

If, however, the pupil moves into a further education institution, such as an FE college, and his special educational needs can be met by that institution, it is no longer necessary for the LEA to maintain a statement and its responsibility ceases: see *R v Oxfordshire County Council ex p B* [1997] ELR 90.

An LEA does not, however, have a duty to provide a statement and special educational provision for a child who attends university. In the case of *R v Portsmouth City Council ex p Faludy* [1999] ELR 115, a child with dyslexia obtained a place at Cambridge University. The parents argued that his special educational needs should have been met by the LEA. The court disagreed and held that the LEA had no power to provide support in a higher education institution. Although s. 319 of the 1996 Act, which gives an LEA power to make special educational provision otherwise than in a school, could in principle apply to a university, s. 1(4) of the 1996 Act had the effect of ensuring that an LEA had no power or duties with regard to higher education and thus could not fund special educational provision at university.

7.
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Parental request for reassessment

It is also possible for parents to request that, where a statement is maintained for their child, the LEA carry out a reassessment of his special educational needs. The LEA must comply with such a request unless an assessment has been made within the period of six months ending with the date on which the request is made and where it is necessary for the LEA to make a further assessment (s. 328(2)). If the LEA refuses to comply with the request, the LEA must give notice of that fact to the child's parent and must inform the parent of his right to appeal to the SEN Tribunal against the LEA's decision (s. 328(3)).

The role of the Social Services Department

Before leaving special education, for completeness, reference should be made to the responsibility of social services authorities towards children with special educational needs. The wider role of the local authority in respect of social services is discussed elsewhere, but in respect of children with special educational needs there is one particular responsibility which must be considered.

Where it appears to an LEA (in this context, its education officers) that a local authority (in principle, any local authority, but in this context specifically the social services department) could, by taking any specified action, help in the exercise of any of the LEA's SEN functions, the LEA may request the help of the authority (s. 322(1) of the 1996 Act). The social services department whose help is so requested shall comply with the request unless it considers that:

- a) the help requested is not necessary for the purpose of the exercise by the LEA of those functions; or
- b) the request is not compatible with its own statutory or other duties and obligations or unduly prejudices the discharge of any of its functions (s. 322(2) and (3)).

Although the duty placed on the social services department is, in effect, a secondary duty to that of the LEA, if help is requested by the LEA the social services department must justify any decision to refuse to help by pointing to one of the grounds contained in s. 322(3)(b). The duty also applies internally. Although it was initially thought that s. 322 could apply only to a request from an LEA to another LEA or the social services department of another local authority, it is now established (see *G v Wakefield MDC* 96 LGR 69) that the section can apply to a request from an authority's LEA to the same authority's social services department.

8. INCLUSION

Earlier in this work, we have talked of *de facto* duties imposed on LEAs by the Secretary of State without any legal foundation, usually through departmental circular or letters from the DfEE (and see the annex to this book).

Perhaps the area where most “*de facto* legislating” occurs is in respect of the LEA functions which broadly fall within the ambit of the term “inclusion”. For the purposes of this work, the term will not include special education, which warrants a chapter of its own (see above), but does include the LEA’s responsibilities to deal with discipline in, and exclusion from, schools, attendance and education welfare, behaviour support, education otherwise than at school and a miscellany of welfare functions. Some other functions, such as school transport, school lunches and clothing grants, might also be considered as part of the LEA’s responsibility to achieve social inclusion, but have been included elsewhere in this work as they can more commonly apply to a broader range of children than just the socially excluded.

OFSTED, in *LEA Support for School Improvement*, underplays the importance of the LEA’s role in this field and, but for brief reference to promoting and enforcing attendance and advising on disciplinary policies under “Access”, seems to believe that the LEA’s tasks in this area are now reduced. That is an understandable misconception as the legislative changes have certainly removed much of the LEA’s powers to ensure the inclusion of pupils within school, but, at the same time, LEAs are tasked by the Secretary of State with the responsibility for reducing exclusions and increasing inclusion (through guidance offered by the Secretary of State in the two Circulars on Social Inclusion: DfEE Circulars 10/99 *Social Inclusion: Pupil Support* and 11/99 *Social Inclusion: The LEA Role in Pupil Support*) yet at the same time are held responsible by the headteacher associations (see *The Independent* 30/12/99) for preventing them exercising effective discipline in their schools. As a result of such concerns expressed by the headteacher associations, a letter (“Exclusions from School”) was sent by the head of the DfEE’s School Inclusion Division to all schools on 21 January 2000 modifying part of the guidance in Circular 10/99 and giving notice of proposed amendments to the associated regulations, when Parliamentary time permitted.

Before the 1998 Act came into force, there could be some strength in the view that the LEA could reinstate pupils into schools from which they had been excluded, but with the 1998 Act that power was lost, so that now the LEA has no power whatsoever to direct the reinstatement of pupils. The LEA does have the right to appear and make representations at exclusion review meetings held by governors and at independent appeal panel hearings, but it is allowed only to make its views known. Perhaps it is testimony to the advocacy skills of some LEA officers that so many exclusions are, according to the NAHT, being overturned, or, perhaps more realistically, it is symptomatic of the fact that the law believes that heads should act properly, fairly and in accordance with the correct procedure and that if they do not, their decisions will be overturned. (For a detailed analysis of the LEAs' role in dealing with certain aspects of inclusion, see the Audit Commission's report *Missing Out: LEA Management of School Attendance and Exclusion* (1999).)

Other areas where OFSTED set out under "Access" what it believes are the functions of an LEA include "advising on policies to maintain discipline", "planning and implementing an action plan for raising the attainment of minority ethnic pupils in support of the DfEE's Ethnic Minority Achievement Grant" and "policies and practices for ensuring traveller children are able to access schools" (see page 7, *LEA Support for School Improvement*) – all laudable aims but examples of OFSTED imposing *de facto* responsibilities on LEAs on the basis of governmental guidance and direction, rather than legal obligation.

Having set out what might be included under inclusion and what might not, for the purpose of this work, only the following functions will be considered:

- ◆ education welfare and attendance
- ◆ Youth Offending Teams
- ◆ Behaviour Support
- ◆ education otherwise than at school
- ◆ discipline
- ◆ looked-after children.

Education welfare and attendance

This is a classic area in which the duty of an LEA to ensure children have access to an appropriate education (legal) overlaps with the DfEE's view that LEAs also have an obligation to promote good attendance (*de facto*). There is no question that promoting good attendance is preferable to exercising enforcement powers, both from the interests of the LEA in costs terms and the interests of ensuring that parents and children are persuaded to work within the system, rather than being confronted with, and punished by, it. The latest DfEE guidance in Circular 11/99 is therefore merely the latest position statement on the development of the education welfare officer over the last few years from truancy officer to social worker.

The Government has however recognised that irregular attendance prevents children properly benefiting from their years of education and often leads to low attainment. Children who are not in school are also more easily drawn into criminal or anti-social behaviour. It has therefore committed itself to reducing unauthorised absence from school by one-third by 2002.

In legal terms, LEAs have clearly defined responsibilities where it becomes apparent that children are not receiving proper education (although it should be noted that the Government were proposing to transfer the responsibility for education welfare from LEAs to schools; see "Schools to take on truancy control", *TES*, 5.11.1999).

Parents of children of compulsory school age are under a duty to secure that their children receive suitable education by regular attendance at school or otherwise (s. 7 Education Act 1996).

Where children are not in school and it becomes apparent to the LEA that a child of compulsory school age in its area is not receiving suitable education, either by regular attendance at school or otherwise, the LEA is under a duty to serve a notice in writing on the parent of the child requiring him (or her, or them, as the case may be, *passim*) to satisfy the LEA that, within the period specified in the notice, the child is receiving suitable education (s. 437(1) Education Act 1996). "Suitable education" for these purposes means "efficient full-time education suitable to his age, ability and aptitude and to any special educational needs he may have" (s. 437(8)).

If the parent fails to satisfy the LEA that the child is receiving suitable education and the LEA believes it is expedient that the child should

attend school, the LEA shall serve on the parent an order (known as a school attendance order) requiring the parent to cause the child to become a registered pupil at a school named in the order (s. 437(2)).

Before issuing a school attendance order, the LEA must first serve a written notice on the parent informing him of its intention to serve the order, specifying the school which the LEA intends to name and, if it thinks fit, suitable alternatives, and informing the parent of his ability to apply for places at alternative schools in the circumstances specified under s. 438(3) of the Act (s. 438(2)). If the parent applies for the child to be admitted to one of those alternative schools, that school, will generally be named in the order. If the parent does not put forward such a school, then the school which the LEA indicated it intended to name will be named in the order.

Where the LEA intends to name a school, it must first consult the governing body (s. 439(5)(a)) and if the school is the responsibility of another LEA, that LEA (s. 439(5)(b)). A school cannot be named in an order if (1) the effect of admitting the child would be to take the school above its fixed admissions number and (2) the LEA is not responsible for determining the admissions arrangements at the school, i.e. is not the admissions authority, unless there is no other maintained school within a reasonable distance of the child's home (s. 439(1) to (3)).

Once the school attendance order is made, it continues in force for so long as the child is of compulsory school age unless it is revoked by the LEA or a court directs that it should cease (s. 437(4)). The LEA must inform the governing body and headteacher of the maintained school named in the order that the order has been made and the governing body is then under a duty to admit the child (s. 437(5) and (6)).

Once a school attendance order is in force, the parent of a child without a statement of special educational needs may request that it be amended or revoked.

If at any time the parent applies for the child to be admitted to a maintained school other than the one named in the order, the child is offered a place and the parent requests that the order be amended accordingly, the LEA must comply with the request (s. 440(2)).

If the parent applies to the LEA for education to be provided at a school which is not maintained by an LEA, the child is offered a place under arrangements made by the LEA under which it pays the fees and the parent requests that the LEA amends the order, the LEA shall comply with the request (s. 440(3)).

If the parent applies for the child to be admitted to a non-maintained school, where the LEA is not responsible for the arrangements, the child is offered a place and the school is suitable to his age, ability, aptitude and to any special educational needs he may have and the parent requests that the order be amended, the LEA shall comply with that request (s. 440(4)).

If the parent applies to the LEA requesting that the order be revoked on the ground that arrangements have been made for the child to receive suitable education otherwise than at school, the LEA is obliged to comply with the request unless it is of the opinion that no satisfactory arrangements have been made for the education of the child (s. 442(2)). If the LEA refuses to revoke the order, the parent may refer the question to the Secretary of State (s. 442(3)) who may give such direction as he thinks fit. A parent cannot apply for the order to be revoked if his child has a statement of special educational needs and the name of the school in the order is the school specified in the statement (s. 442(5)).

If a parent on whom a school attendance order is served fails to comply with the requirements of the order, he is guilty of an offence under s. 443 of the Act, unless he proves to the court that he is causing the child to receive suitable education otherwise than at school.

School attendance orders work only where a child is not a registered pupil at a school. Where a child of compulsory school age is a registered pupil, if he fails to attend regularly, his parent is guilty of an offence (s. 444(1)). The offence is one of strict liability (see *Bath and North East Somerset District Council v Warman* [1999] ELR 81 and *Jarman v Mid-Glamorgan Education Authority* [1985] LS Gaz R 1249), although a parent prosecuted under s. 444 has a number of defences available.

First, a child should not be taken to have failed to attend regularly by reason of his absence from the school:

- a) with authorised leave;
- b) at any time when he was prevented from attending by reason of sickness or any unavoidable cause; or
- c) on any day exclusively set apart for religious observance by the religious body to which his parent belongs (s. 444(3)).

Secondly, the child shall not be taken to have failed to attend regularly at the school if the parent proves:

- a) that the school at which the child is a registered pupil is not within walking distance of the child's home; and
- b) that no suitable arrangements have been made by the LEA for any of the following: (i) his transport to and from the school, (ii) boarding accommodation for him at or near the school, or (iii) enabling him to become a registered pupil at school nearer to his home (s. 444(4) and see *Essex County Council v Rogers* [1987] AC 66, [1986] 3 All ER 321).

Specific provision is made to protect children of traveller families (s. 444(6)).

With both types of prosecution (s. 443 and s. 444), there is no duty on the LEA to prosecute if the conditions for prosecution exist. The LEA always has the discretion to prosecute or not and although prosecution is the only way of promoting good attendance in certain cases, in many cases it is not. For example, although parents may be separated and one parent be absent from the home and child and so have no ability to influence attendance, he or she will in principle be as guilty as the person with whom the child resides. In other cases, the parents may do all they can to get the child to school, but the child may be stronger than the parents and there is no physical way in which the parents can secure that the child attends. In these circumstances, fairness might persuade an LEA not to exercise its discretion to prosecute.

In any event, before instituting any proceedings against a parent, the LEA must consider whether it would be appropriate (instead of or as well as instituting proceedings) to apply for an education supervision order with respect to the child (s. 447(1)).

Previously, apart from ordering education supervision orders, magistrates could only consider a range of fines upon the conviction of a parent, although on one occasion the Greenwich stipendiary magistrate imposed a bail condition requiring a mother to escort her non-attending 13-year-old to school (see James Montgomery "Truants' parents feel force of law", *TES*, 10.5.1996). The Government has recently announced its intention to increase the level of punishment, including the introduction of prison sentences, in the Criminal Justice and Court Services Bill (see "Parents face massive fines", *TES*, 1.10.1999 and "Parents of truants face three-month jail terms", *Independent*, 17.3.2000), but until they are introduced there is one recent innovation available to magistrates, namely parenting orders, which can require parents to attend for counselling or guidance sessions for up to three months and may include other requirements to help prevent further pupil absence.

The Secretary of State has issued guidance to LEAs as to how they should exercise their functions relating to the promotion and enforcement of attendance (see Circular 11/99 *Social Inclusion: the LEA Role in Pupil Support*, especially Chapters 1 and 2 “Managing Attendance” and “Legal Action to Enforce Attendance”).

As part of the general effort to reduce non-attendance and the consequential anti-social behaviour that can result (the typical example being the absent children who make a nuisance of themselves at shopping centres), the Government introduced a new police power to deal with truants in the Crime and Disorder Act 1998.

If a police officer has reasonable cause to believe that a child or young person found by him in a public place is of compulsory school age and is absent from school without lawful authority, the officer may remove him to designated premises or to the school from which he is absent (s. 16(3)).

“Public places” include private premises to which the public may have access, such as shops, shopping centres and amusement arcades (s. 14 of the Crime and Disorder Act).

This power is available only in certain circumstances and does not apply to all children found absent from school. First, a police officer above the rank of superintendent must direct that the powers can be used within a specified area and for a specified time. Secondly, the local authority must designate premises to which the children and young persons may be removed and inform the chief officer of police of these premises (s. 16(1)).

These powers are very much to be used in areas where there are particular problems with truancing and to enable a multi-agency approach involving the police, LEA and Youth Offending Team to identify suitable areas and suitable times. In particular, the powers will be used in areas where schools have particularly high levels of unauthorised absence, including significant levels of post-registration truancy, in areas where schools are experiencing difficulty with high levels of parentally condoned unjustified absence and in areas where juvenile crime is prevalent, especially during the day.

Cooperation between LEA officers and police will be vital to ensure that the powers are only used against children who are truancing and not against those who are absent with permission. The LEA will also have to find suitable premises to be designated. In most cases, children will be returned to local schools – either their own (which will not need to be designated) or to another school chosen as a “reception centre”

(which will require designation). Other places can be used, such as LEA offices or offices within shopping centres, but the children cannot be taken to police stations.

Youth Offending Teams

Local authorities with responsibility for education and social services are required by s. 39 of the Crime and Disorder Act 1998 to establish multi-agency Youth Offending Teams (YOTs) to act in conjunction with the police, probation and health services. YOT members must include at least one of each of the following: a probation officer; a police officer; a social worker; a person nominated by the health authority; and a person nominated by the chief education officer (s. 39(5)). Other appropriate persons, including representatives from the voluntary sector, may be invited on to the YOT.

YOTs have a duty to coordinate the provision of Youth Justice Services and to carry out functions outlined in the youth justice plan for the area (s. 39(7)). The latter are plans drawn up annually by each local authority working in cooperation with the chief officer of police, probation committee and the health authority (s. 40). Each plan must be submitted to the Youth Justice Board for England and Wales, which is also responsible for monitoring the operation and performance of YOTs.

The intention is that the various members of the YOTs will work in partnership to develop a consistent and unified approach to working with young offenders and so prevent offending by children and young persons.

Behaviour Support

Every LEA is under a duty to prepare, and from time to time review, a statement setting out the arrangements it is making or proposing to make in connection with the education of children with behavioural difficulties (s. 527A Education Act 1996).

The arrangements that must be covered by the statement include:

- a) the arrangements made or to be made by the LEA for the provision of advice and resources to schools maintained by the LEA, and other arrangements made or to be made by it with a view to (i) meeting requests by such schools for support and assistance in connection with the promotion of good behaviour and discipline

on the part of their pupils and (ii) assisting such schools to deal with general behavioural problems and the behavioural difficulties of individual pupils;

- b) the arrangements made or to be made by the LEA for the provision of suitable education at school or otherwise than at school for those children of compulsory school age who may not receive such education unless such arrangements are made for them (see s. 19 Education Act 1996); and
- c) other arrangements made or to be made by it for assisting children with behavioural difficulties to find places at suitable schools (s. 527A(2)).

The statement should also deal with the interaction between these arrangements and the arrangements made by the LEA for children with special educational needs (s. 527A(3)).

The statement must be prepared following consultation prescribed by the Secretary of State and, once produced, must be published as and when prescribed by regulations. The regulations shall also make provision for when and how the statement needs to be revised (s. 527A(4) and (5)).

The relevant provisions can be found in the Local Education Authority (Behaviour Support Plans) Regulations 1998, SI 1998/644. Thus, in the course of preparing the statement (known as a Behaviour Support Plan), the LEA must consult the headteacher and governing body of every maintained school and the teacher in charge and, where in place, the management committee of Pupil Referral Units, trade unions and persons representative of teachers and staff other than teachers employed in the LEA's schools, parents' representatives, further education principals, the director of social services, every diocesan authority, health authority, probation committee, Chief Constable, careers service organisation, TEC and clerk to the justices, together with representatives of voluntary organisations working with disaffected children and young persons within its area (reg 3).

Every consultee should receive a draft of the plan and a letter containing prescribed information as to what the consultee is being asked to do.

Once the plan has been produced, it must be made available for inspection by members of the public at public libraries and such other places as may be reasonable. Copies must also be sent to the Secretary of State, the Chief Inspector and every consultee as well as to anyone else who asks for one (reg 4).

In preparing the Behaviour Support Plan and implementing it, LEAs must have regard to any guidance issued by the Secretary of State (s. 527A(6)). The current guidance is contained in DfEE Circular 1/98 *LEA Behaviour Support Plans*.

Education otherwise than at school

As already mentioned, s. 19 of the 1996 Act imposes an obligation on every LEA to make arrangements for the provision of suitable education at school or otherwise than at school for those children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them (s. 19(1)). "Suitable education" is defined as efficient education suitable to a child's age, ability and aptitude and to any special educational needs he may have (s. 19(6)).

In the case of *R v East Sussex County Council ex p Tandy* [1998] ELR 251, it was held that, in respect of such children, s. 19(1) imposes a duty which is owed to each individual child who falls within the ambit of the subsection. The child in that case suffered from myalgic encephalomyelitis and found it difficult or impossible to attend school. The LEA provided home tuition under s. 19, but as a result of financial pressure, decided to reduce that tuition from five hours to three hours per week. The House of Lords held that such a cut was unlawful. The duty under s. 19(1) was owed not to all children within the class, but to each such child individually. In those circumstances, the pressures on the LEA's financial resources were not a relevant factor in determining what was suitable education for the child and therefore, because the LEA had acted solely for financial reasons, its decision to reduce the hours was unlawful. To permit an LEA to avoid performing its statutory duties on the grounds that it preferred to spend its money in other ways would, in the Lords' view, downgrade a duty to a mere power and could not be accepted.

Thus, when considering what arrangements to make for children out of school within s. 19(1), LEAs have an individual duty to each child to provide suitable education and what is suitable will be based solely on educational grounds; financial difficulties in making the provision cannot lawfully be taken into account.

Excluded pupils, as well as sick ones, fall within the same duty. DfEE Circular 11/99 advises (paragraph 5.19) that excluded pupils should receive about five hours of supervised education or other activity a day.

LEAs are required to have regard to any guidance by the Secretary of State (s. 19(4A)). In effect, therefore, LEAs should provide 25 hours of tuition a week to those children out of school and they will have to show educational reasons why they do not believe that they should do so. The fact that they cannot afford to do so or do not have enough home tutors is, per *Tandy*, irrelevant. It is also noteworthy that in *Tandy* the LEA found that it could not afford five hours of home tuition per week let alone the 25 now required. This area may therefore result in further litigation especially once the Human Rights Act 1998 comes into force and children start to benefit from the right not to be denied education under Article 2 of the First Protocol to the European Convention on Human Rights.

LEAs have a duty to make arrangements for children, i.e. persons not over compulsory school age. For those over this age (young persons), there is only a power. Thus LEAs may make arrangements for the provision of suitable education otherwise than at school for those persons who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them (s. 19(4)).

In either performing their duty under s. 19(1) or exercising their power under s. 19(4), LEAs must have regard to guidance given by the Secretary of State which is currently found in DfEE Circular 11/99 and, in particular, Chapter 4, which provides guidance on "LEA responsibility for arranging education outside school".

8.
INCLUSION

As part of their responsibilities to children outside school, LEAs have the power to establish Pupil Referral Units to provide education specially for such children (s. 19(2)) and can secure the provision of boarding accommodation at such units (s. 19(3)). Schedule 1 to the 1996 Act provides for the conduct of these units and the differences from "normal" schools. Chapter 6 of DfEE Circular 11/99 also sets out in detail information on the conduct of the units and guidance on how they should operate. The key differences between PRUs, which are legally both a type of school and education otherwise than at school, and schools are that PRUs have management committees, not governing bodies; there can be dual registration of pupils at PRUs and schools; PRUs have teachers in charge, not headteachers; the curriculum need not be the full National Curriculum; and premises requirements are modified.

Discipline and exclusion

As indicated at the start of this section, the role of the LEA in respect of pupil discipline has been much diminished. Before 1 September 1999, the LEA had the power to reinstate excluded pupils at county or voluntary controlled schools and so could assist inclusion by ensuring that children were not inappropriately excluded either because the school had acted too harshly or because there would be no other alternative provision available.

From 1 September 1999, however, an LEA no longer has any power to reinstate an excluded pupil. Instead, all it has is the right to be informed by the headteachers of all maintained schools of all permanent exclusions or fixed-term exclusions of more than five school days in any one term or where the pupil would lose the opportunity to take a public examination (s. 65(4) School Standards and Framework Act 1998).

Of course, the emphasis of the statutory guidance (Circular 10/99 *Social Inclusion: Pupil Support*, to which, under s. 68, the headteacher, governing body, LEA and any appeal panel must have regard) is on intervention before the need to exclude arises and the key role of the LEA in offering support to schools (see especially Chapters 3 to 6), but there will be occasions where a school will consider an exclusion to be necessary.

Each governing body is required to establish a pupil discipline committee (regs 42(3) and 48 Education (School Government) Regulations 1999, SI 1999/2163). Where a headteacher has resorted to exclusion, the discipline committee should decide whether or not to confirm permanent exclusions or fixed-term exclusions of more than five days or where a public examination will be missed (s. 66(2)). The LEA has the right to make representations to the committee about the exclusion and to have those representations considered by the committee. In addition, the LEA must be allowed to attend the committee and make oral representations which the committee must take into account (s. 66(2)(b),(c) and (d)). But however strongly the LEA feels about a particular exclusion, it cannot direct the headteacher to reinstate the pupil, only attempt to persuade the committee to do so.

Some assistance is theoretically available in the DfEE guidance in Circular 10/99. This sets out good practice and the considerations which the headteacher must take into account before excluding. If the headteacher fails to follow the guidance, the exclusion should normally be overturned by the governing body or the appeal panel; whether that will happen in reality is debatable. It is of course accepted that the most

important role of the LEA is to support schools and intervene before the situation escalates to the need for an exclusion, but there is considerable conflict between the *de facto* responsibilities placed on LEAs to reduce the number of excluded pupils and the legal removal of the LEA's power to reinstate.

Where pupils are permanently excluded, the LEA is under a duty to make arrangements for enabling parents, or the excluded child him or herself, to appeal against the decision of the governing body not to reinstate the pupil (s. 67(1)). The arrangements must be made in respect of permanent exclusions from all maintained schools, including those, such as voluntary aided and foundation schools, for which the LEA is not admission authority.

The rules and procedures under which appeal panels operate are set out in Schedule 18 to the 1998 Act and in Circular 10/99. These provide that, although the appeal is against the decision of the governing body and that therefore the parties are the parents and the governing body, the LEA has the right to make written representation, attend the hearing and make oral representations and that those representations must be taken into account by the panel (paragraph 10(2) of schedule 18).

Although the independence of these appeal panels has been increased by the 1998 Act, their future remains uncertain in light of the Human Rights Act 1998 and its implementation of Article 6 of the European Convention on Human Rights into UK law. Article 6 provides that where a person's civil rights are being determined, he is entitled to a fair hearing before an impartial and independent tribunal. Although (see Chapter 11, below) it is arguable that a place at a school is not a civil right as such (see *Simpson v UK* considered in that chapter), it is debatable whether appeal panels will withstand challenge under the Human Rights Act, given that the body responsible for arranging the appeal and appointing the panel members will be making representations to the panel in an attempt to assist its decision.

Exclusions and their legality or the legality of the appeal arrangements have exercised the courts frequently in recent years and, with the introduction of the Human Rights Act, are likely to continue to do so. Most of the cases have been decided on their individual facts, but consideration of some of the decisions may be useful in providing guidance on what to do or not to do in the future.

The most important case, as it was decided by the Court of Appeal, was *R v Camden LBC and the Governors of Hampstead School ex p H* [1996] ELR 360. In this case, a child had been attacked with an air

pistol, but the attacker was reinstated on appeal. The Court of Appeal held that, before reinstating an excluded pupil, the appeal body must investigate the effect that the proposed reinstatement would have on the victim. This has now been made a mandatory consideration for all appeals, together with the determination of whether permanent exclusion was used in accordance with the Secretary of State's guidance, the broader interests of staff (in addition to other pupils) at the school, the school's published discipline policy and, where other pupils were involved in the same incident, the fairness of the permanent exclusion in relation to the sanctions imposed on the other pupils involved (see para 35 of Circular 10/99). The *H* case also made clear that although there need not be, on every occasion, searching inquiries involving the calling of masses of oral evidence, the inquiries which were carried out had to be reasonably thorough and impartial.

In *R v Board of Governors of Stoke Newington School and others ex p M* [1994] ELR 131, the court made clear that the principles of natural justice had to apply to the exclusion appeal process. In this case, the decision challenged was that of the governors' exclusion panel, but the same principle would apply to independent LEA-arranged appeal panels. A member of the panel was the excluded child's subject teacher and head of year and had knowledge of the child's behaviour. This, the court held, rendered the panel decision unlawful as there was a real likelihood of bias against the pupil.

R v Neale and Another ex p S [1995] ELR 199 is an interesting decision in that the judge, though not strictly being required to do so, indicated that it might be lawful to exclude a child or at least decide not to reinstate a child on the basis of his parent's behaviour. In contrast in *R v Board of Governors and Appeal Committee of Bryn Elan High School ex p Whippe* [1999] ELR 380, the judge found that the behaviour of a parent (who was the school's former headteacher) could be relevant to a decision to exclude but only in respect of the effect that that behaviour might have on his child, normally well-behaved, to go on behaving badly in any future situations where her father's dismissal as a headteacher would come up as an issue. The DfEE guidance in Circular 10/99 at paragraph 6.4 advises that exclusion should not be used for punishing pupils for their parents' behaviour.

In *R v Newham LBC and Another ex p X* [1995] ELR 303, the judge, though considering a decision to exclude a 15-year-old boy in his GCSE year to be worthy of review by the court, dismissed a suggestion by the boy's barrister that a headteacher had no jurisdiction to discipline a child in relation to behaviour off the school premises saying that it would be "a very sad thing" if that were the case.

Although the need to take care when relying upon identification evidence has been stressed (*R v Roman Catholic Schools, ex parte S* [1998] 3 ELR 304), the courts had been reluctant to impose rules of criminal evidence on headteachers and appeal panels. This trend away from unduly onerous evidence gathering still applies, although the Court of Appeal, in *R v Headteacher and Independent Appeal Committee of Dunraven School ex parte B* [2000] ELR 156, went further than before in imposing strict rules of evidence in exclusion appeals. The court held first that school governors (the case involved an internal appeal committee although the principles should apply to all exclusion appeals) were there to provide an essential independent check on the judgement of a headteacher. They therefore could not only review the headteacher's decision to check that it was not unreasonable. They had to establish the primary facts and reconsider the decision to exclude. Second, the parent had to know the case being presented against their child. Third, although a decision to exclude was not a criminal proceeding, the consequences which follow could be as serious as a criminal trial. The governors had therefore acted incorrectly in preventing the parents' knowing what was in a witness's statement and was said by a witness to the governors. The problem was that the school wished to protect the identity of an informant. The Court of Appeal said that if the governors had wanted to consider the informant's evidence, they should have considered whether his identity could have been concealed and, if it could not, they should have continued without his evidence. The court did however dismiss a claim that the Codes of Practice under the Police and Criminal Evidence Act 1984 should have prevented the headteacher interviewing the excluded pupil without another adult present. Those codes, the court held, could not act as more than a touchstone outside the criminal justice process although, perhaps giving warning for future cases, they did indicate that the Codes might be used as an aid to determining whether improper pressure had been brought by the headteacher on the pupil.

An appeal panel has no power to delegate any of its functions to its chairman (*R v Schools Appeal Tribunal of the Wakefield Diocesan Board of Education ex p J* [1999] EdCR 566).

On the subject of racial discrimination, in *R v Governors of McEntee School ex p Mbandaka* [1999] EdCR 656, the challenge to a decision to uphold an exclusion was dismissed on technical grounds, but the judge made clear that, if there had been substance in an allegation that there was racial discrimination in the disproportionate nature of the punishment, he would have considered the exclusion unlawful.

What most of the cases indicate is that if panels act in accordance with the relevant guidance, use common sense and apply natural justice, their decisions should be safe. An example of how not to do it came from a governing body of a city technology college. In *R v Governors of Bacon's City Technology College ex p W* [1998] ELR 488, the judge criticised breaches of natural justice in the governors' proceedings which included arbitrary time limits, lack of control of the business, failure to give reasons for rejecting the appeal, one-sided presentation of the facts and a failure to allow the parent a fair hearing. Although he accepted that the child had been involved in a nasty incident, the judge quashed the decision to uphold the exclusion.

That deals with the behaviour of individual pupils. One power which LEAs have retained in respect of behaviour is found in s. 62 of the 1998 Act. This provides the LEA with the power to take such steps in relation to a maintained school as it considers are required to prevent the breakdown, or continuing breakdown, of discipline at the school (s. 62(1)).

The power may be exercised only where, in the opinion of the LEA (i) the behaviour of registered pupils at the school or (ii) any action taken by pupils or their parents is such that the education of any registered pupils at the school is, or is likely in the immediate future to become, severely prejudiced and the governing body has been informed in writing of the LEA's opinion (s. 62(2)).

Alternatively, the power may be used where the governing body has been warned that the safety of pupils or staff of the school is threatened (whether by a breakdown of discipline or otherwise) under s. 15(2) of the 1998 Act, the governing body has failed to secure compliance with the warning to the LEA's satisfaction and the LEA has given reasonable notice to the governing body that it proposes to exercise its power to take steps to prevent the breakdown, or continuing breakdown, of discipline (s. 62(3)).

Steps to be taken are at the discretion of the LEA, but may include giving directions to the governing body or headteacher (s. 62(4)).

Because of the sensitivity of such intervention, the LEA, before exercising this power, is required to have regard to the *Code of Practice on LEA-School Relations*. Specific guidance can be found in paragraphs 138 to 140. The Code makes clear that the power is one of last resort and that on the rare occasions when it is used it should be exercised in accordance with the following principles.

- a) It should be used only in exceptional cases. There must be, either currently or in immediate prospect, a breakdown of discipline at the school. "Breakdown" implies problems such that the school can no longer function in an orderly way, that staff cannot maintain discipline, that large numbers of pupils are truanting or that the safety or welfare of pupils or staff is at risk.
- b) The LEA must inform the governing body in writing before it acts and such a notice should not come as a surprise as matters should already have been discussed. This does not mean that in the appropriate circumstances the LEA cannot act speedily.
- c) The power should be used only with the purpose of creating an opportunity in which constructive action can be taken to resolve the immediate problem.

When issuing a notice under s. 62, the LEA must make clear upon which statutory ground it is relying. Where an LEA based its s. 62 notice upon prejudice to education, but relied upon the contention that the safety and welfare of staff and pupils were at risk, the notice was invalid (*R v Rhondda Cynon Taff County Borough Council ex p Lynwen Evans* 31 August 1999, unreported).

Looked-after children

Although looked-after children, i.e. children looked after by the social services department, are not necessarily an inclusion issue, there are frequently problems in ensuring that these children receive an efficient education and therefore discussion falls most naturally under this chapter. A "looked-after child" is defined in s. 22 of the Children Act 1989 as a child in the care of a local authority or who is provided with accommodation by the authority in the exercise of any functions which stand referred to its social services committee under the Local Authority Social Services Act 1970. "Accommodation" means accommodation which is provided for a continuous period of more than 24 hours (s. 22(2) Children Act 1989).

It is the duty of any local authority which is looking after a child to:

- a) safeguard and promote his welfare; and
- b) make such use of services available for children cared for by their own parents as appears to the authority to be reasonable in his case (s. 22(3)).

These duties do not however give rise to a right for a looked-after child to sue should they be performed negligently. In *Holtom v Barnet LBC and Another* [1999] ELR 255, the Court of Appeal held that it would be contrary to the public interest and not just and reasonable to impose a duty of care on a local authority exercising parental responsibilities for a child in care.

Where the local authority proposes to provide accommodation for a looked-after child in an establishment at which education is provided for children accommodated there, it must, so far as is reasonably practicable, consult the LEA before doing so (s. 28(1)). Where such a proposal is implemented, the local authority must inform the LEA of the arrangements and, if the child ceases to be accommodated, the LEA must again be told.

Looked-after children are thus not *per se* an LEA function, being a social services responsibility, but clearly if “joined-up thinking” or joint working is to mean anything, LEA education department staff must strive to ensure, together with their social services colleagues, that such children in care are properly included within the education system.

OFSTED certainly believes that it is one of the LEA’s functions, although it treats such children as being part of the LEA’s special educational provision function rather than an access issue. With respect, that is wrong as by no means all children in care fall within the special educational needs spectrum and it is an insult to some of these children, especially those who go on to further and higher education, to regard them so. Nonetheless, any local authority as a whole which fails the children entrusted to its care should be wary of a visit from OFSTED.

Guidance on the education of looked-after children is now to be found in the comprehensive joint DfEE and Department of Health document *Guidance on the Education of Children and Young People in Public Care*. A similar version of this guidance is to be issued in Wales.

9. ANCILLARY AND MISCELLANEOUS FUNCTIONS

The phrase “ancillary functions” in any legislation usually conjures up images of the unimportant and obscure: what the draftsman could not fit in elsewhere and, therefore, chose to place together at the back of the statute, just before sections which define certain words or explain when the Act comes into force.

In the education context, however, a significant number of functions are included within the category of ancillary or miscellaneous functions in both the 1996 and 1998 Acts. So far as possible, the authors have considered these functions in specific chapters. For example, the *Code of Practice on LEA–School Relations* appears under Part VII of the 1998 Act headed “Miscellaneous and General”, yet the effects of the Code are so important that, as will have been seen, it is referred to throughout all the chapters dealing with the substantive functions of LEAs.

Nonetheless, a number of functions remain which are incapable of being shoe-horned into any of the other categories, but it would be a mistake to treat them as ancillary and peripheral. It is true that some of the functions considered below may be unimportant, unused and, in certain cases ignored by OFSTED, but others, particularly school transport, constitute a vitally important responsibility, which in many cases can have significant resource implications. The main aspects dealt with below are:

- ◆ school transport
- ◆ milk and meals
- ◆ clothing
- ◆ board and lodging
- ◆ expenses and scholarships
- ◆ cleanliness of pupils.

School transport

Probably the most important responsibility which the draftsman has seen fit to designate as ancillary is the responsibility of an LEA to arrange transport in certain cases. Or, in the words of OFSTED, “assessing the need for, and providing, free home-to-school transport” (see page 7 of *LEA Support for School Improvement*). As will be seen, the role is wider than just considering free transport, but as it can involve expenditure and, often, over-expenditure running to millions, it is proper for OFSTED to rate it highly as an “access” issue.

Under s. 509 of the 1996 Act, an LEA is under a duty to make arrangements for the provision of transport and otherwise as it considers necessary, or as the Secretary of State may direct, for the purpose of facilitating the attendance of persons receiving education:

- a) at schools;
- b) at any institution maintained or assisted by the LEA which provides further education or higher education or both;
- c) at any institution within the further education sector; or
- d) at any institution outside both the further and higher education sectors, where a Further Education Funding Council has secured provision for those persons under the Further and Higher Education Act 1992 (s. 509(1) Education Act 1996).

In considering whether or not it is required to make such arrangements in respect of a particular person, the LEA must have regard, amongst other things, to:

- a) the age of the person and the nature of the route, or alternative routes, which he could reasonably be expected to take; and
- b) any wish of his parent for him to be provided with education at a school or institution in which the religious education provided is that of the religion or denomination to which his parent adheres (s. 509(4)).

Any transport provided under these provisions must be provided free of charge (s. 509(2)).

The duty to provide such transport is inextricably linked with the duty on parents to secure the attendance of their child and, in particular, the defence under s. 444(4) and (5) of the 1996 Act which may be available in any non-attendance prosecution (see *George v Devon County*

Council [1988] 3 All ER 1002). Under this defence, a child is not to be taken to have failed to attend regularly if the child's school is not within walking distance (3.218688km for a child who is under eight and 4.828032 km for a child who has reached eight, in each case measured by the nearest available route) and no suitable arrangements have been made by the LEA for his transport to and from the school (s. 444(4)(b)(i)). (The precision of the measurement results from the law's having gone metric; the distances were respectively two and three miles.)

What may or may not be "suitable arrangements" have been considered in *R v Rochdale MBC ex p Schemet* [1993] 1 FCR 306, *R v East Sussex County Council ex p D* [1991] COD 374, *R v Essex County Council ex p C* (1993) Times, 9 December and *re S (Minors)* [1995] ELR 98, especially in the context of parental preference. In *ex p D*, the child had been allocated a place at a school within walking distance of his home, but his parents expressed a preference for him to attend a school 12 miles away, for which the LEA was not prepared to provide transport. Although finding the legislation surprising, the judge held that the LEA's decision was not irrational and that the "suitability" in the context of s. 509 relates to the suitability of the arrangements for transport or for attendance at a school nearer home. It does not require consideration of the suitability of the preferred and/or alternative schools. As Rose J said, "if Parliament wishes free transport to be provided for those children who have to travel long distances in order to enable them to attend the school in accordance with their parents' preferences, Parliament must say so. In my judgement it has not yet said so and it is not for me to say so." A similar conclusion was reached in *ex parte C* and *re S* by the Court of Appeal.

If free transport is not provided to a child who lives beyond walking distance of his school, in principle, the LEA could never enforce that child's attendance. Consequently, the practical reality of s. 509(1) is that LEAs will provide free transport to children of compulsory school age who live beyond walking distance from their school (although frequently conditions are attached if the parents have expressed a preference for a school which is not their "catchment" school and which is further away than that "catchment" school) and whose attendance the LEA will therefore be facilitating. Beyond that, however, there is no further obligation as many LEAs have accepted in withdrawing free transport provision to students attending further education provision. Nevertheless, s. 509(5) of the Act requires the LEA to make for FE students provision which is "no less favourable" than that for pupils of the same age attending school.

Walking distance is not, however, the geographical extent of the duty to provide transport under s. 509(1) because of the obligation to have regard to the age of the child and/or the nature of the route. Thus in certain circumstances where a child is particularly young or vulnerable or where the only available route is unsafe, the LEA will be under a duty to arrange transport under s. 509(1) even if the child lives within walking distance of the school (see *Essex County Council v Rogers* [1987] AC 66, where the House of Lords held that for a route to be available under s. 444(5) it must be “a route along which a child accompanied as necessary can walk and walk with reasonable safety to school”).

Any arrangements made must be for the full distance; an LEA cannot just provide transport for the journey from the child’s home to a point which is within walking distance of the school and then require the child to walk that distance or require the parents to pay for that part of the journey (*Surrey County Council v Ministry of Education* [1953] 1 All ER 705).

Where arrangements are made, the transport must be “non-stressful” (*R v Hereford and Worcester County Council ex p P* [1992] 2 FCR 732). The transport must not therefore be too long or circuitous nor be overcrowded. It must allow a child to reach school without undue stress, strain or difficulty such as would prevent him from benefiting from the education the school has to offer. For a decision on the obligation to provide seat belts, prior to the change in the law on the fitting of seat belts in school coaches and minibuses, see *R v Gwent County Council ex p Harris* [1995] ELR 27.

Where the LEA is not under a duty to provide transport, it has the power to do so (s. 509(2)).

The provision of school transport in the future may be affected by other developments affecting local authorities generally. For example, local authorities are required to set out an integrated strategy for reducing car use and improving children’s safety on the journey to school within their local transport plans and, in the Transport White Paper issued in July 1998, *A New Deal for Transport: Better for Everyone*, it is envisaged that local authorities will be required to develop an integrated transport policy which encourages more children to get to school other than by car.

Milk and meals

An LEA may provide registered pupils at any school maintained by the LEA with milk, meals and other refreshment, either on the school premises or anywhere else where education is provided (s. 512(1)). There is no power – analogous to that in respect of clothing (see below) – to provide for otherwise eligible pupils at independent schools.

If an LEA decides not to provide such sustenance, it can be compelled to do so. Where an LEA receives a request by or on behalf of registered pupils at a school maintained by the LEA, it shall provide school lunches for those pupils, unless:

- a) in the circumstances it would be unreasonable for it to do so; or
- b) the pupil making the request is not of compulsory school age and is being provided with part-time education (s. 512(1A)).

If lunches are provided as result of a request from or on behalf of a pupil, the lunches may be provided either on the school premises or anywhere else where education is provided and take such form as the LEA thinks fit (s. 512(1B)).

A “school lunch” is defined as “food made available for consumption by the pupil as his midday meal on a school day, whether involving a set meal or the selection of items by him or otherwise” (s. 512(6)).

The new provisions, allowing requests to be made, were inserted by the 1998 Act and are intended to meet concerns that if meals were not available at midday some children might be deprived of proper nutrition. To support this aim, the LEA, or governing body where the function has been transferred (see below), is now under a duty to secure that where it provides school lunches, the food meets prescribed nutritional standards or other nutritional requirements (s. 114 of the 1998 Act).

Except in the cases of children whose parents are in receipt of income support or of an income-based jobseeker’s allowance, the LEA must charge for any milk, meal or refreshment provided and charge every pupil the same price for the same quantity of the same item (i.e. prices must be the same throughout the LEA and cannot differ in different types of school) (s. 512(2)).

In respect of children whose parents are in receipt of income support, an income-based jobseeker’s allowance, or support provided under

Part VI of the Immigration and Asylum Seekers Act 1999, the LEA is under a duty to ensure that a school lunch is provided free of charge and, if it provides milk, that that milk is free as well (s. 512(3)).

LEAs must provide at any school maintained by them such facilities as they consider appropriate for the consumption of any meals or other refreshment brought to the school by registered pupils (s. 512(4)).

Following the introduction of the School Standards and Framework Act 1998, the Secretary of State has power to transfer some or all of the duties of LEAs to provide school lunches, provide free school lunches and provide milk free of charge to governing bodies (see s. 512A of the 1996 Act). The Education (Transfer of Functions Concerning School Lunches) (England) Order 1999, SI 1999/2164, was made in July 1999 and effected this transfer in all English LEAs and the Education (Transfer of Functions Concerning School Lunches) (Wales) and (Wales) (Number 2) Orders 1999, SIs 1999/610 and /1779, achieved the same effect in Wales. As a result, the duties to provide free school lunches and paid school lunches transfer to those governing bodies whose budget share includes an amount in respect of meals and other refreshments. Where such duties are imposed on governing bodies, LEAs are no longer subject to the corresponding obligations.

Clothing

An LEA may provide clothing for any pupil who is a boarder at an educational institution maintained by the LEA, any pupil at a nursery school maintained by the LEA and any child in a nursery class maintained by the LEA (s. 510(1) of the 1996 Act).

In addition, an LEA has the power to provide clothing for any pupil for whom it is providing board and lodging elsewhere than at an educational institution maintained by it and for whom special educational provision is made in pursuance of arrangements made by the LEA (s. 510(2)).

In other cases, if it appears to an LEA that a pupil at a school maintained by it or a special school (whether maintained by it or not) is unable by reason of the inadequacy or unsuitability of his clothing to take full advantage of the education provided at the school, the LEA may provide him with such clothing as in its opinion is necessary for the purpose of ensuring that he is sufficiently and suitably clad while he remains a pupil at the school (s. 510(3)).

An LEA may provide clothing in these circumstances for:

- a) pupils at a school maintained by the LEA or at an institution maintained by the LEA which provides further or higher education or both;
- b) persons who have not attained the age of 19 and who are receiving education at an institution within the further education sector; and
- c) persons who make use of facilities for physical training further to the LEA's functions in respect of recreation and social and physical training (see Chapter 10, below) (such articles of clothing as the LEA may determine suitable for the physical training so provided (s. 510(4)).

Finally, an LEA may, with the consent of the proprietor of a school not maintained by the LEA (other than a special school) and on such financial and other terms, if any, as may be agreed between the proprietor and the LEA, make arrangements, in the case of any pupil at the school who is unable by reason of the inadequacy or unsuitability of his clothing to take full advantage of the education provided at the school, to provide him with such clothing as in the LEA's opinion is necessary for the purpose of ensuring that he is sufficiently and suitably clad while he remains a pupil at the school (s. 510(5)). Any such arrangements must, however, secure, so far as is practicable, that the expense incurred does not exceed the expense which would have been incurred by the LEA if the pupil had been a pupil at a school maintained by the LEA (s. 510(6)).

Clothing includes footwear (s. 579(1)).

These powers are subject to the conditions laid down in the Education (Provision of Clothing) Regulations 1980, SI 1980/545. These provide the LEA with the power, where it makes clothing available, to require the parent to pay such sum as the LEA thinks the parent can pay without financial hardship (reg 3).

Clothing tends to become an issue in three cases:

- whether there are any different rules for primary or secondary pupils or, indeed, whether school uniform policies should legally differ between those imposed in secondary schools and primary schools;
- in respect of LEAs having the power to provide clothing or whether they have the power to make "clothing grants"; and
- most importantly, in the enforcement of school uniform policies

The first point can be dealt with fairly easily. The belief, often among education welfare officers and schools, that the LEA can provide clothing only to secondary school pupils, is erroneous; there is no such restriction.

The second point is trickier and, strictly, the power allows only the provision of clothing, not the payment of a grant for a parent to purchase clothing. The concern is clearly that if a parent receives money, there is no guarantee that the clothing will be purchased. In practical terms, however, an LEA cannot keep a stock of clothing and it is probably reasonable to say that the LEA has power to make a grant to a parent to buy clothing under s. 111 of the Local Government Act of 1972 on the grounds that it facilitates the exercise of the LEA's powers. To avoid misuse of the money, an LEA could either pay only on receipt of an invoice or issue vouchers for use in clothing stores for certain clothing.

The issue of school uniforms and uniform policies is less easy to address and is, to a certain extent, outside the scope of this work as it is a matter for individual governing bodies. Nonetheless, it can have an effect on LEAs when the enforcement of a policy leads to non-attendance or the LEA is asked for guidance on what policies may contain.

Advice issued by the DfEE makes clear that, as part of the governing body's responsibility for the conduct of the school (see DFE Circular 7/87 *Education (No 2) Act 1986: Further Guidance*), the governing body should decide whether school uniform should be worn or not. Provided that the governing body takes account of all relevant factors, including the LEA's policy on uniform grants, the imposition of a reasonable uniform policy is lawful.

What can a school do, though, if a parent refuses to send their child to school in accordance with the policy? Based on the old case of *Spiers v Warrington Corporation* [1954] 1 QB 61, the answer would be that the school can refuse to admit the child and that the parents can be prosecuted for non-attendance. That decision might now, though, be questioned, especially as it was heard at a time when the rules on exclusion were virtually non-existent. As it stands, however, it remains authority for allowing an LEA to prosecute parents for non-attendance if they refuse to abide by the school's uniform policy. What is clear, though, is that a pupil should not normally be excluded for breaching the school's uniform policy (see DfEE Circular 10/99 *Social Inclusion: Pupil Support*, paragraph 6.4).

The case is also of questionable value because the rule in question involved a girl who wanted to wear trousers to school, but the school's policy insisted that girls must wear skirts. Nowadays that might not be considered a reasonable or indeed lawful rule as it may amount to sexual discrimination. Surprisingly, given the number of schools which still maintain such policies, the point has not been tested in the courts, although a case was to be brought against the governing body of Whickham Comprehensive School, Gateshead ("Once more unto the breeches", *TES*, 4.6.1999). This case was, however, resolved before reaching court with the governing body agreeing to allow the pupil to attend in trousers. If it had gone to trial, it would have been highly probable that the rule would have been considered unlawful under the Sex Discrimination Act 1975 (just as in the same way that a ban on female teachers wearing trousers would equally infringe the 1975 Act).

In similar vein, schools and LEAs, in enforcing non-attendance, should be aware of traditional dress among certain ethnic or racial groups. Any rules which discriminated against dress such as turbans worn by Sikh boys or the need for Muslim girls to cover their legs would be unlawful under the Race Relations Act 1976.

Board and Lodging

Where an LEA is satisfied with respect to any pupil that:

- a) primary or secondary education suitable to his age, ability and aptitude and to any special educational needs he may have can best be provided for him at a particular maintained or maintained special school, but
- b) such education cannot be so provided unless boarding accommodation is provided for him otherwise than at school,

the LEA may provide such board and lodging for him under such arrangements as it thinks fit (s. 514(1)).

Where an LEA is satisfied with respect to a pupil with special educational needs that provision of board and lodging for him is necessary to enable him to receive the required special educational provision, it may provide such board and lodging for him under such arrangements as it thinks fit (s. 514(2)).

Where an LEA makes board or lodging arrangements, it must, so far as practicable, give effect to the wishes of the pupil's parent as to the

religion or religious denomination of the person with whom the pupil will reside (s. 514(3)).

Where such boarding provision is made, however, the LEA must charge the pupil's parents such sum, if any, in respect of the board and lodging as in the LEA's opinion the parents are able to pay without financial hardship, but the LEA may not charge if education suitable to the pupil's age, ability and aptitude or special educational needs could not otherwise be provided for him (s. 514(4) and (5)). If a charge is made, however, the LEA may not make a profit and if the parent defaults, the sum is recoverable as a civil debt (s. 514(6) and (7)).

Any board and lodging provision made available should comply with the requirements of the Children Act 1989 with regard to the care and supervisory arrangements for the pupil. It is also important to note that the function is that of the LEA; there is no power for the governing body of a maintained school to make its own board and lodging arrangements.

Expenses and scholarships

LEAs retain a residuary power, significantly modified as a result of the abolition of the Assisted Places Scheme and the changes to discretionary student awards, to pay expenses and make awards or scholarships in certain cases. Under s. 518 of the 1996 Act, an LEA may, for the purpose of enabling persons to take advantage of any educational facilities available to them:

- a) pay such expenses of children attending community, foundation, voluntary or special schools as may be necessary to enable them to take part in any school activities, or
- b) grant scholarships, exhibitions, bursaries and other allowances in respect of persons over compulsory school age (s. 518(1)).

In exercising this power, however, the LEA must follow the relevant regulations, which include the Scholarships and Other Benefits Regulations 1977, SI 1977/1443, the Local Education Authority (Post-Compulsory Education Awards) Regulations 1999, SI 1999/229, and the Local Education Authority (Payment of School Expenses) Regulations 1999, SI 1999/1727. See also the Education Maintenance Allowances (Pilot Areas) Regulations 1999, SI 1999/2168, as amended.

Before the abolition of the Assisted Places Scheme, an LEA could not legally adopt a policy of not making such awards; instead, the LEA had to ensure that it considered any applications on merit (see *R v Hampshire*

County Council exp W [1994] ELR 460). That is no longer the case and an LEA may, in accordance with the legislation, determine the extent to which it will exercise these powers in each financial year and may determine not to exercise the powers at all (s. 518(2)).

Medical inspection

LEAs are required to make arrangements for encouraging and assisting pupils to take advantage of the provision for medical and dental inspection and treatment made for them under the National Health Service Act 1977 by the relevant health authority (s. 520(1)). If a parent gives notice to the LEA that he objects to the pupil availing himself of such provision, the pupil must not be encouraged or assisted to do so (s. 520(2)). And an old case had established the unwisdom of trying to examine an unwilling child (*Fox v Burgess* (1922) 1KB 623, discussed in R. Barrell *Legal Cases for Teachers* (1970) Methuen, pp. 151–3).

Cleanliness of pupils

Although now little used because the problems they were designed to address have by and large disappeared with changes in society, LEAs still retain the powers to take action to deal with children infested with vermin or in a foul condition. Aficionados of this subject will wish to note the circumstances in which it is unreasonable to refuse a child admission (*Bowen v Hodgson* (1923) 93 LJKB 76).

An LEA may, by directions in writing, authorise a medical officer of the LEA to examine the persons or clothing of pupils in attendance at schools maintained by the LEA whenever, in the medical officer's opinion, such examinations are necessary in the interests of cleanliness (s. 521). If it is necessary to examine a female pupil, the examination cannot be made by a man unless he is a registered medical practitioner (s. 521(3)).

A "medical officer" is defined as a registered medical practitioner who is employed or engaged (whether regularly or for the purposes of any particular case) by the LEA or whose services are made available to the LEA by the Secretary of State (s. 579(1)). Thus in order lawfully to examine a pupil, the doctor or nurse must be employed or engaged beforehand by the LEA so that the LEA can call them "theirs". If not, there is a danger that any person examining a child will be guilty of either civil or criminal assault.

If, after the medical practitioner has examined the pupil, the person or clothing of that pupil is found to be infested with vermin or in a foul condition, any officer of the LEA may serve a notice on the pupil's parent requiring him to cleanse the pupil's person and clothing within a specified period (s. 522(1)). The notice should warn the parent that, unless satisfactory cleansing takes place, the pupil will be cleansed under arrangements made by the LEA (s. 522(2)).

If the medical officer remains unsatisfied as to the child's cleanliness at the end of the period, he can order that the pupil be cleansed under arrangements made by the LEA (s. 522(4)). Such an order authorises any officer of the LEA to cause the pupil to be cleansed and, for that purpose, to convey the child to, and detain him at, any premises provided by the LEA for the cleansing (s. 522(5)). Thus the order will provide a defence to any claim of assault or false imprisonment.

The LEA has a duty to make arrangements for securing that any pupil required to be cleansed may be cleansed (either at the request of the parent or under a medical officer's order) at suitable premises, by suitable persons and with suitable appliances (s. 523(1)). Where a female pupil is to be cleansed, only a registered medical practitioner or a woman authorised for the purpose by the LEA may perform the task (s. 523(2)).

If the medical officer believes that a pupil's clothing is infested or in foul condition, but action cannot be taken immediately, the medical officer may direct that the pupil be suspended from the school until such action is taken if he considers it necessary to do so in the interests either of the pupil or of other pupils at the school (s. 524).

If, after the pupil's person or clothing has been cleansed, he is again infested with vermin or in a foul condition at any time when he is attending the school and that condition is due to the neglect on the part of his parent, the parent is guilty of an offence under s. 525 of the Act.

These powers are rarely, if ever used, for a variety of reasons. The infestations and conditions which they were designed to address are, fortunately, no longer prevalent, but there are also practical difficulties in performing these types of examinations. There is naturally a fear of action for assault should an examination be carried out without meeting the exact conditions and, as the conditions are ambiguous, those fears are well grounded.

Firstly, there is no definition of what is meant by "infested with vermin" or "in foul condition". Dictionary definitions are inconsistent.

Chambers defines “vermin” as “obnoxious insects such as bugs, fleas and lice, troublesome animals such as mice, rats, animals destructive to game such as weasels, polecats, also hawks and owls” – a wide range of pests but, assuming few pupils are infested with polecats nowadays, it suggests that the legislation should deal primarily with fleas and lice. Similarly, there is no definition of “infested”. Relying on the dictionary again, this suggests a “besetting or swarming about” (*Chambers*), which is not helpful and although the terminology may appear pedantic, it is not when an incorrect application of the powers could lead to criminal prosecution.

“Examination” is also not defined, which leads on to perhaps the biggest problem in the legislation: what can a headteacher or teacher do by way of checking a pupil? An “examination” can be performed only by an authorised medical officer, so the head cannot “examine” the child. But what does examination involve? A cursory glance or a good rummage around?

Again possibly pedantic, until we consider the biggest bugbear which affects many schools and to which these powers on the surface would appear to apply: head lice or the dreaded nits. These creatures would appear to fall within the definition of “vermin”, but they are not considered to be unclean. This has led medical officers to decline to carry out examinations as they feel that a search to check for head lice is not necessary in the interests of cleanliness. Without that initial examination, the LEA has no further power to take action to cleanse the child. Nor can anyone else, including the headteacher, carry out the examination. Thus headteachers are left in a very unsatisfactory situation. But could the headteacher check a child’s head without it being an examination and does the headteacher have the ability to do so under common law (the old *in loco parentis*) powers? The issues are outside the scope of this work, but, because it is doubted if there is any clear answer, it does suggest that the provisions on cleanliness require considerable re-examination.

Research, conferences and trusts

An LEA can make such provision for conducting, or assisting the conduct, of research as appears to it to be desirable for the purpose of improving the educational facilities provided for its area (s. 526)

An LEA may organise, or participate in the organisation of, conferences for the discussion of questions relating to education and expend such sums as may be reasonable in paying, or contributing towards, any

expenditure incurred in connection with conferences for the discussion of such questions including the expenses of any person authorised by it to attend such a conference (s. 527).

An LEA can accept, hold and administer any property on trust for purposes connected with education (s. 529).

Financial assistance to non-maintained schools

On the principle that an LEA need not actually provide schools itself, but could provide sufficient school places through the non-maintained sector, and/or in recognition of the need to place some children with special educational needs outside the maintained sector, LEAs have power to assist any primary or secondary non-maintained school (whether inside or outside the LEA's area) and make arrangements for pupils to be provided with primary or secondary education at such schools (s. 18). Assistance cannot be provided other than in accordance with regulations made by the Secretary of State.

Supply of teachers to day nurseries

Tucked away in s. 515 is the power to enable LEAs to make available to a day nursery (i.e. a day nursery provided by local authorities for pre-school and other children under the Children Act 1989) the services of any teacher who:

- a) is employed by it in a nursery school or in a primary school having one or more nursery classes; and
- b) has agreed to provide his services for the purposes of the arrangements.

10. LEARNING AND SKILLS

A. Education from 16+

The 16+ milestone

Over 60 years ago, the Spens Report (*Secondary Education*, HMSO, 1938, reprinted 1950) asserted:

“The adoption of a minimum leaving-age of 16 years may not be immediately attainable, but in our judgment must even now be envisaged as inevitable.” Ch IX, para 19

Provision for raising the leaving-age to 16 when “practicable” was enshrined in s. 35 of the Education Act 1944 but achieved only on 1 September 1972 by the Raising of the School Leaving Age Order (SI 1972/444) made under that section of the Act. Eventual triumph over the vicissitudes of war, post-war reconstruction, austerity and demography contributed much to the symbolic status of the new upper age of compulsory schooling.

Similarly, the connotations of “sixth form”, deriving largely from independent and grammar schools, have made the institution, in many people’s view, a hallmark of the successful comprehensive school. Very few schools, it appears, have followed through the “key stages” of the Education Reform Act 1988 and adopted the non-statutory and unofficial term “key stage 5” in place of “the sixth”. Unsurprisingly, one of the controversial features of the new policies is the involvement of school sixth forms both in the new funding and planning arrangements and in the purview of “training” interests.

The aspirational words used by Spens and quoted above resonate in a new context in the Prime Minister’s Foreword to *Bridging the Gap* (Cm 4405), Social Exclusion Unit, July 1999:

“A few decades ago only a minority stayed in education until 18 or 21. But as we move into an economy based more on knowledge, there will be ever fewer unskilled jobs. For this generation, and for young people in the future, staying at school or in training until 18 is no longer a luxury. It is becoming a necessity.” (p. 6)

This, and some more tentative predictions in the White Paper *Learning to Succeed* (Cm 4392), have been translated in the *Connexions* strategy document of early 2000 into:

“...our clear goal that all young people should stay in learning until 18 and beyond.” (para 1.3)

Current legislation

This chapter was written while the Learning and Skills Bill was making its way through Parliament. Based closely on policies for England outlined in the Green Paper *The Learning Age* (Cm 3790) (1998) and the White Paper *Learning to Succeed* (Cm 4392) (1999), the Bill is an attempt, by no means the first by Governments of recent years, at radical change in 16+ education and training. In the Learning and Skills Council *Prospectus* (December 1999), published shortly before the Bill itself, Ministers stressed the forward-looking nature of the proposed arrangements, “a new system of post-16 learning...which is coherent and accessible and is notably responsive to the needs of individuals, businesses and communities” (Secretary of State Mr Blunkett, in the Foreword), involving a cultural shift in attitudes to learning.

On the one hand, the *Prospectus* argues that “the new framework must cater for the future needs of individuals, employers and the economy, [and] not perpetuate historic [*sic*] irrelevant patterns of delivery” (para 3.6). On the other hand, the document acknowledges *passim* the achievements of the several actors, whether continuing (e.g. LEAs, colleges) or retiring (e.g. the FE Funding Councils), on whose successes the new systems will build.

The operation of the new arrangements will in time show whether this latest attempt at substitution of a form of client empowerment for capture or dominance by the provider or producer – to use terms common in the discourse of the Conservative administrations of the 1980s and early 1990s – will succeed where at least by implication earlier initiatives have failed. The dichotomy between provider- and consumer-led provision, though, is itself illusory: consumers’ needs are often expressed by reference to what is currently provided, albeit with modifications, and indeed it would do a disservice to providers of education and training to assume that their programmes have been largely *unresponsive*.

And there is a tension, exemplified also throughout the schools system, between national standards and requirements and the local articulation of priorities, in a geographically small country within a large and

growing European political union, at a time when communications are good and workforces are expected to be unprecedentedly mobile and adaptable.

The key to the new proposals is the representative (and largely business-led) and responsive character of the local learning and skills councils in England, and the Council for Education and Training and its regional structure in Wales, within the new structures, as briefly described below.

New structures

The structures of the FE Funding Councils and Training and Enterprise Councils (TECs) are to be replaced by the Learning and Skills Council (LSC) for England and the National Council for Education and Training (CETW) for Wales. These councils' main duties include securing the provision of "proper" (as defined) facilities for education and training for the 16–19 age group and of "reasonable" (as defined, including having regard to resources) facilities for education and training 19+. These duties exclude higher education. The LSC must establish local learning and skills councils, which will be *inter alia* conduits for pump-priming moneys from the national body and will be allowed some freedom to adapt national programmes.

The LSC for England must appoint two committees, for young people's and adult learning.

The constitutional difference between the non-departmental public bodies is that the LSC will be answerable to, and subject to directions of, the Secretary of State, and the CETW will be responsible to the National Assembly for Wales, as an Assembly-sponsored public body.

There are to be 47 local LSCs in England in place of 72 Training and Enterprise Councils, and the CETW will replace the four present TECs in Wales; it will be under a duty to appoint regional committees (Sch. 5 to the Bill).

New arrangements for inspection

In England, there is to be an Adult Learning Inspectorate, a new non-departmental public body, responsible for inspecting FE and training 19+ (and 16+ LSC-funded training on employers' premises); and the remit of HM Chief Inspector of Schools is to be extended to cover FE. In Wales, the expanded role of HMCI is reflected in the change of title to HMCI of Education and Training in Wales.

Territorial Loss

The Explanatory Notes to the Bill (HL Bill 96-EN, paper 52/3, 24.03.00) suggest a 15–20 per cent overall reduction in staff funded by public money to administer 16+ education and training. The FE Funding Councils, creatures of the Further and Higher Education Act 1992, and their inspectorate and regional structures will be abolished when the Bill is enacted and implemented, as will the TECs and the Training Inspectorate of the Training Standards Council (TSC). The TECs are not statutory corporations but private companies established in 1989 by the then Secretary of State for Employment under general powers in the Employment and Training Act 1973; most of the TECs' work has been founded upon contracts for particular services. Similarly, the TSC is a private company limited by guarantee, operating under an annual contract with Government. There will inevitably be great upheaval on what may legitimately be called the training side, comparable to that attendant on the abolition of the Manpower Services Commission and its regional and sub-regional structures in 1987/88.

For their part, LEA members and officers are likely to be keenly interested in the (metaphorically) territorial changes and the new statutory functions and more informal roles which their authorities will perform following the present legislation:

- positively, because of Ministers' emphasis on local responsiveness, consultation and collaboration within the new arrangements, but also
- negatively, because the legislation of the past 12 years has significantly reduced LEA *vires* in post-16 education, notably:
 - removal of local authority HE, initially to the régime of the Polytechnics and Colleges Funding Council, under the Education Reform Act 1988 (including abolition of the National Advisory Body for Public Sector HE and removal of the statutory function of the Regional Advisory Councils (RACs) for FE in respect of advanced FE);
 - removal (and incorporation) of not only mainstream FE colleges but also sixth-form colleges (hitherto in law, schools) to the new FE sector presided over by the FEFCs, under the Further and Higher Education Act 1992 (including the final *de facto* abolition of the national framework of RACs);
 - substitution of a power to participate in provision of the careers service by non-profitmaking or private companies under the Trade Union Reform and Employment Rights Act 1993, for the duty to provide the service under the Employment and Training Act 1973; and

- reduction of the responsibilities of the LEA as principal grant-awarding body for HE students as an incidental result of legislation from the Education (Student Loans) Act 1990 (repealed 1998) to the Teaching and Higher Education Act 1998.

The LEA in the new framework

References to clauses below are to those of the text of the Bill (as amended in Committee of the House of Lords and published on 17 February 2000). The powers and duties of the respective actors are set out in so far as they affect or directly interest LEAs, and so what follows is not an exhaustive list of functions of the LSC/CETW and inspectorial bodies.

Powers

The Bill would empower:

- the LSC and CETW** to make grants to an LEA for 16+ education in schools, the money to be channelled to the schools through the Local Schools Budget (cls 7, 36, respectively). LEAs will have discretion to give additional funds to their schools. There are to be further consultations on the new funding arrangements, on which the Explanatory Notes do not envisage implementation before 2002/03. “The Government committed itself in the consultation paper to maintaining sixth forms’ funding levels in real terms (where pupil numbers do not fall)” (p.12);
- the LSC only**, to forge links between education/training and employment for young people aged 15-19 (cl 8) (but, as to the CETW, see the duty summarised at 2(a) below);
- any LEA** to establish and maintain a secondary school exclusively for 16–19-year-olds (effectively, reinstatement of a power exercisable before the FHE Act 1992), subject to statutory publication, and as appropriate approval, of proposals (cl 98) (with a corresponding protection of properly established LEA-maintained 16–19 schools from being incorporated into the LSC/CETW sector without agreement of the governing body and LEA (cls 99, 100));
- the LSC or CETW** to publish proposals in respect of an “inadequate sixth form” (this is the term used in headings and side notes of the Bill) at, or constituting, an LEA-maintained school that it cease to provide 16–19 education (“inadequacy” as it is defined in the Bill, and resting essentially on two seriously adverse inspection reports) (cl 101 and Sch. 7) (the actual closure (or otherwise) to be determined through the machinery of Part II of, and Schedule 6 to,

the School Standards and Framework Act 1998, that is, after the opportunity for statutory objection: in England, reference to the school organisation committee and if necessary the adjudicator; in Wales, to the National Assembly);

- e) **the Secretary of State in England** (by cls 102–111, presently outlining a *power*, but amounting virtually to a duty through the *de facto* commitments in the Command papers to secure provision of an integrated support service for youngsters aged 13–19), by directing LEAs or making arrangements through a variety of bodies including LEAs, to “encourage, enable or assist (directly or indirectly) effective participation by young persons in education or training”. As the Explanatory Notes put it:

“In practice, the Secretary of State will use these new powers to integrate and build on the existing range of services currently provided at local level by careers service companies, youth service and other statutory and voluntary services for young people.”

Clause 104 specifically empowers LEAs to make arrangements, comply with Ministerial directions and provide or collaborate in the supply of services.

- f) **a further or higher education** corporation to provide or collaborate in secondary education at key stage 4, after consultation with the LEA (cl 114). (This is a relaxation of present controls; it loosens the LEA’s control over the education of some secondary-aged pupils who may attend FE or HE colleges.);

- g) **any LEA** to provide FE “in connection with local LSC plans” (quotation from the Explanatory Note, but the phrase appears not to be justified on the face of the Bill). As to the generality of the provisions here, there is some downgrading as well as extension of functions:

- the LEA’s duty to provide (since the FHE Act 1992, what amounted to non-vocational) FE becomes a power;
- its providing 16–19 education continues as a power, though with the addition of part-time to the existing power in respect of full-time, and a power to provide full-time or part-time FE from 19+ (Sch. 8, paras 23–25);
- and, interestingly, the LEA’s former duty to provide recreation and social and physical – by convention, one of the statutory bases of the youth service – is reduced to a power (cl 109). The Connexions document’s reassurance to LEAs should be read

against that background: “It remains the Government’s intention, that LEAs continue to provide youth services, and retain the powers to do so.” (p. 52)

At House of Commons Committee stage, the Government brought forward an amendment which would empower the **National Assembly for Wales** to direct local authorities to provide, secure and participate in youth support services for 11–25-year-olds.

Duties

The Bill would place duties on:

- a) **the CETW only**, to promote education and training and employers’ participation therein (cl 33);
- b) **the LSC and CETW** to have regard to the needs of persons with learning difficulties, to statements of special educational needs, and to assessments of SEN made by an LEA in the subject’s final year of schooling (cls 13 and 41, respectively, with cl 113);
- c) **the LSC only**, to appoint local LSCs (formally regarded as its committees), whose duties would include preparation of annual plans, on which any LEA in each local LSC’s area would be a statutory consultee (cl 22(5)(b));
- d) **every LEA** in England to make provision of 16+ education and training in accordance with the local plan, upon direction of the Secretary of State and given reasonable financial support therefor by the (national) LSC (cl 23); and
- e) **every LEA** in England to have regard to the local LSC’s plan when it prepares its school organisation plan, and the school organisation committee and, if appropriate, the adjudicator to have analogous duties (Sch. 8, para 36).

10.
LEARNING AND
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Conclusion on 16+

Where the proposals being enshrined in the prospective Learning and Skills Act 2000 differ from previous policies is in:

- a) the strong inter-connection of all publicly funded 16+ education with all publicly-funded training. Repeal (Sch.10 to the Bill) of the much-criticised Schedule 2 to the FHE Act 1992, which drew a sharp distinction between FE leading to recognised and mostly vocational qualifications and essentially non-vocational FE, is a manifestation of the new integration. So also is the mandatory collaboration at local level, seen more clearly in the proposals for England; and

- b) the hands-on responsibilities assumed by present Ministers for service delivery. This is underpinned by a commitment to a corporate approach (though never labelled as such) exemplified in:
 - i) the existence and continuation of the interdepartmental Ministerial Group;
 - ii) the judgement of seven senior Ministers that:
"...teenagers, and those who try to work with them, are still all too often let down by a system which tends to treat the problems that young people face in isolation, and to deliver a piecemeal response down separate channels and through professionals only able to deal with issues one by one."
(Foreword to *Connexions* document, p. 4)

Within the mandatory collaboration, LEAs will have the duties and powers outlined earlier in this chapter. But the way in which the parties to the statutorily compulsory partnership fulfil their functions, including matters of attitude and style of working, will determine the success or otherwise of the new arrangements – as will the willingness of Ministers in England to keep much of the operation at arm's length in their directions to the LSC, and the lightness (or otherwise) of touch which the LSC applies in its dealings with its "committees", the local LSCs.

In Wales, the development of the National Assembly and its relationships with quangos, their regional committees, and totally restructured local government, will be equally critical to the outcomes for 16+ education and training.

And, as in so much of the Government's thinking about new ways of delivering services locally, it is much easier to identify functions and roles of LEAs as professional organisations than as corporate bodies of elected members.

For the avoidance of doubt, the reader is reminded that clause and schedule numbers in the Bill cited above relate to a particular print of it. Please check against the numbering of the [prospective] Learning and Skills Act 2000.

B. The Youth Service

The youth service is a term familiar to its millions of participants and to the community at large but is unknown to statute. Such statutory reference as there is avoids even faintly contemporary language such as “social education” (see below), and yet the service is an excellent example of the LEA as both provider (ironically, of the “statutory” service) and enabler (of voluntary youth organisations in its area). The stark fact is that youth work has always been, in statute law, very much an adjunct to the LEA’s functions (originally, as a major provider of FE). The Learning and Skills Bill is likely to perpetuate the modest status of this element of the public education service.

Statutory basis

The service itself, as a nationally recognised entity, originated in emergency measures taken in or in anticipation of both the World Wars. The two bases of youth work as LEA functions in the Education Act 1944 were:

- s. 41 (general duties of LEAs with respect to FE): a duty to secure “adequate facilities”, including “leisure-time occupation, in such organised cultural training and recreative activities as are suited to their requirements, for any persons over compulsory school age who are able and willing to profit by the facilities provided for that purpose”; and
- s. 53 (duty to secure provision of facilities for recreation and social and physical training (RSPT)): a duty in connection with duties in respect of primary, secondary and further education; such facilities to include adequate facilities for RSPT; LEAs empowered, with specific Ministerial approval, to establish, maintain and manage, or assist therewith “...camps, holiday classes, playing fields, play centres, and other places (including playgrounds, gymnasiums, and swimming baths...)...and [they] may organise games, expeditions and other activities...” – having regard (subs. (2)) “to the expediency of cooperating with ...voluntary societies and bodies...”

Language and origins

The label “Youth Service” came from reports by the Youth Advisory Council: *The Youth Service After the War* (1943) and *The Purpose and Content of the Youth Service* (1945). The “RSPT” language, quaint by today’s standards, derives from *powers* in s. 17 of the Education Act 1918, consolidated into the Act of 1921 and amplified by the Physical Training and Recreation Act 1937.

Statutory destinations

Section 41 was restated, still in terms of duty, by s. 120 of the Education Reform Act 1988, mainly because, as the old s. 41 depended on either an approved LEA development plan or association with a county college, LEAs no longer technically had *vires* to provide most FE, including such of the youth service as might be purported to be under that section. Amended substantially by the Further and Higher Education Act 1992 to take account of the establishment of the FE Funding Councils and the division of FE into (broadly) vocational and non-vocational, the law still required LEAs to make the sort of provision under the latter category as they had before. The amended requirement was consolidated into s. 15 of the 1996 Act and is to be repealed under the Learning and Skills Bill.

Section 53, again phrased as a duty, was consolidated into the Education Act 1996 (as s. 508). As noted earlier in this chapter, the Learning and Skills Bill proposes reducing the non-school provision of s. 508 to a power.

Demands for specific duties

The Thompson Report (*Experience and Participation* (Cmnd 8686)(1982)) was one of many authoritative documents to criticise the vagueness of the statutory basis for the youth service; it also attacked the “anaemic” recognition of the voluntary sector. Attempts had been made in 1973, 1974, 1975 and 1979 by Private Members’ Bills to define in statute the LEA duty in respect of the youth service. They foundered, to the chagrin of youth-service lobbyists, on the rocks of Governmental nervousness about the cost implications of a properly defined duty and local government’s increasing dislike of being told in prescriptive detail by Parliament what to do.

The future

The *Connexions* document (p. 52) envisages that the youth service “will make an important contribution to the wider work of the Connexions Service”, i.e. will not be central to it, though LEA outreach and detached youth workers are expected to be incorporated into the multi-disciplinary teams of Personal Advisers.

C. Careers

To a certain extent, the fate of careers education and guidance is another example of the decreasing role of LEAs as service providers and the centralisation of education functions.

Under the Employment and Training Act 1973, LEAs were originally responsible for the provision of a careers service within their administrative areas. With effect from 10 August 1993, however, that role was diminished when the Trade Union Reform and Employment Rights Act 1993 transferred the responsibility for providing careers advice to the Secretary of State and now the LEA's role, with one or two exceptions, is limited to assisting in the provision of careers services through joint ventures or partnership arrangements.

Thus it is the duty of the Secretary of State to secure the provision of services for assisting persons undergoing relevant education to decide (a) what employments, having regard to their capabilities, will be suitable for and available to them when they cease undergoing such education, and (b) what training or education is or will be required by and available to them in order to fit them for those employments, and for assisting persons ceasing to undergo relevant education to obtain such employments, training and education (s. 8 Employment and Training Act 1973).

The services required to be provided include (a) giving of assistance by collecting, or disseminating or otherwise providing, information about persons seeking, obtaining or offering employment, training and education, (b) offering advice and guidance, and (c) other services calculated to facilitate the provision of such services (s. 8(2)).

In order to enable him to carry out his duties, the Secretary of State, under s. 10, may make arrangements with (a) LEAs or (b) persons of any other description, or (c) LEAs and persons of any other description acting jointly, under which they undertake to provide, or arrange for the provision of, services in accordance with the arrangements (s. 10(1)). The Secretary of State may also by giving directions to LEAs require them to provide, or arrange for the provision of, services in accordance with the directions; and in doing so the Secretary of State shall have regard to the requirements of disabled persons. Such directions may require LEAs: (a) to provide services themselves or jointly with other authorities or persons, (b) to arrange for the provision of services by other authorities or persons, or (c) to consult and

coordinate in the provision, or in arranging for the provision, of services with other authorities or persons (s. 10(3)). These arrangements may allow charges to be made for the provision of services in accordance with the approved arrangements (s. 10(5)).

Careers service providers must comply with any guidance given by the Secretary of State and shall furnish the Secretary of State, in such manner and at such times as he may specify in the arrangements or directions or in guidance given, with such information and facilities for obtaining information as he may so specify (s. 10(6)).

LEAs have the power (a) to provide services or arrange for the provision of services in accordance with arrangements made, or directions given (including services provided outside their areas) by any such means (including by the formation of companies for the purpose) as they consider appropriate, and (b) to employ officers and provide facilities for and in connection with the provision of the services or arranging for the provision of the services but, where directions are given to LEAs, the power conferred on them must be exercised in accordance with the directions (s. 10(8)).

With the consent of the Secretary of State, where an LEA is providing careers services, it may provide, or arrange for the provision of, more extensive services than under the arrangements with the Secretary of State and may employ more officers and provide more facilities accordingly (s. 10(9)).

To assist in the provision of careers services, the functions of an LEA are (s. 10A) specifically stated to include the power to enter into any agreements for the supply of goods and services with any person (other than another local authority) who provides, or arranges for the provision of, careers services. The supply of goods authorised under s. 10A can only last for two years from the day the careers service provider starts providing services in the area and must be on such terms as can reasonably be expected to secure that the full cost of making the supply is recovered by the LEA (s. 10A(5) and (6)).

The supplies authorised include the supply by the LEA to the person of any goods, the provision by the LEA of any administrative, professional or technical services, the use by the person of any vehicle, plant or apparatus belonging to the LEA and the placing at the disposal of the person of the services of any person employed in connection with the vehicle or other property in question and the carrying out by the LEA of works of maintenance in connection with land or buildings for the maintenance of which the careers services provider is responsible.

The LEA may purchase and store any goods which in its opinion it may require for these purposes.

Within maintained schools, responsibility for ensuring that pupils receive proper careers education and have access to guidance materials and to up-to-date reference materials within their last three years of compulsory schooling rests with the governing body. In the case of Pupil Referral Units, however, the LEA, together with the teacher in charge, is under a duty to ensure that pupils at the unit receive such advice (s. 43 Education Act 1997). For guidance on careers education in schools, see DfEE Circular 5/98 *Careers Education in Schools: Provision for Years 9–11*.

See also *s.v.* “Connexions”, below.

D. Work Experience

As will be seen below, strict rules apply to the employment of children. In order, therefore to enable and encourage children at school to attend authorised programmes of work experience, specific provision has been made to allow children in their last two years of compulsory education to take on such work. (A child is in his last two years of compulsory schooling from the beginning of the last two school years during the whole or part of which he is of compulsory school age (s. 560(2))).

Consequently under s. 560 of the Education Act 1996, an LEA, or a governing body acting on behalf of an LEA, with a view to providing a pupil with work experience as part of his education, may lift the statutory restrictions where employment is arranged or approved by the school or the LEA for a pupil in his or her last two years at school. These arrangements cannot, however, override the statutory prohibition (including byelaws) on children working in certain areas of work or avoid the restrictions imposed in other areas of juvenile employment in respect to, for example, the minimum age for particular work (s. 560(3) and (4)).

Advice on work experience was originally provided in DES Circular 7/74 *Work Experience*, although that advice may now be somewhat out of date. More recent advice was provided in guidance issued by the DfEE on 12 May 1999 entitled *Work Experience—Legal Responsibility and Health and Safety*. The DfEE’s *Work Experience: A Guide for Schools* (1996) is currently under revision.

Work experience is encouraged as part of the general social inclusion agenda (see paragraph 4.25 of DfEE Circular 10/99 *Social Inclusion: Pupil Support*). To this end, pupils may spend some of the week on work-related learning programmes in school, FE colleges or with an employer. The extra time for work-related learning is freed by dropping two of the pupil's other subjects. Some FE colleges offer tailored programmes for secondary pupils at key stage 4, part-time or full-time as agreed with the school which may be combined with work-related learning.

E. Connexions

Spanning both careers education and guidance and work experience, as well as a number of other areas, is the Government's Connexions Service. This will comprise a new youth support service for all 13–19 year-olds, bringing together advice and support agencies to create a single point of access for young people (see "A new service to make Connexions" *TES*, 7.4.2000; further detail is given (for England) in the Connexions strategy document). The main partners will include the various career service providers, youth services, Youth Offending Teams and the education welfare service.

A Connexions Service national unit based at the DfEE in Sheffield and London from spring 2000 will administer and monitor the scheme, answerable to the interdepartmental Ministerial Group (chaired by the Secretary of State for Education and Employment) and assisted by a National Advisory Council. At the level of each local Learning and Skills Council, a Connexions partnership will be established, charged with producing a three-year business plan and under contract with the National Unit to secure its delivery, through, for example, bidding for grants from the national unit. LEAs should have a key role to play in establishing these partnerships and developing provision within their areas. At LEA level (or, exceptionally, the level of grouped LEAs), there will be a local management committee chaired by the LEA chief executive or person of similar status, and served by a local manager and staff. It will have responsibility for local delivery.

It is quite likely that the opportunity for LEA leadership here will produce a *de facto* influence well beyond the new statutory functions. As to the present careers service, its resources will be subsumed into the Connexions programme, whereas the other agencies (youth work, education welfare, etc.) will be contributors to it.

The aim of the scheme will be to increase participation in learning up to the age of 19, prevent disaffection and promote social inclusion and give practical support to overcome personal, family or social obstacles. A national network of personal advisers (PAs) will support and advise teenagers who need help. The PAs will be at the core of the new service. They will be drawn from the careers service and “deployed” in schools, FE/training/employment, community and voluntary bodies, social services departments and Youth Offending Teams. Secondment is mentioned, but the document also outlines “A new Profession of Personal Adviser” and it seems that some PAs will be employees of Connexions Partnerships

The ubiquitous OFSTED will play a leading part in the audit and inspection of the service and target-setting and benchmarking will be developed to enable the quality of the delivery to be monitored.

Further information on the scheme and details on the pilot projects can be found at www.connexions.gov.uk.

F. Juvenile Employment

Every LEA is responsible for enforcing the legislation which affects the employment of children and, where the employment of children is permitted, each LEA can issue byelaws to regulate that employment.

The starting point for juvenile employment is that no child under the age of 13 can be employed in any way (s. 1 Children Act 1972). The employment of other children (who are defined as persons who are not over compulsory school age (s. 558 Education Act 1996)), where not specifically controlled by other legislation, is subject to byelaws issued by LEAs under s. 18 of the Children and Young Persons Act 1933. In order to comply with the UK’s obligations under the European Community Directive on the Protection of Young People at Work 1994 (1994/33/EC), the Department of Health introduced model byelaws for adoption by LEAs in 1998.

An LEA also has the power, by notice served on an employer, to prohibit or restrict the employer employing a pupil registered at a maintained school if it considers the employment to be prejudicial to health or otherwise to render him unfit to obtaining the full benefit from the education provided for him (s. 559(1) Education Act 1996).

In order to enable the LEA to decide whether it should exercise this power, the LEA may compel the employer to provide the LEA within a specified period with such information as the LEA considers necessary to allow it to ascertain if the child is being employed in a manner as to render him unfit to benefit from the education provided for him (s. 559(2)). The LEA's power to enter premises under s. 28(1) and (3) of the Children and Young Persons Act 1933 applies to these provisions as much as it applies to its general enforcement role under the 1933 Act (s. 559(5)).

Specific occupations which are prohibited by other legislation include:

- employment in any industrial undertaking, including mines and quarries, manufacturing industry, construction and the transfer of passengers or goods by road, rail or inland waterway (s. 1(1) Employment of Women, Children and Young Persons Act 1920);
- employment involving a child riding on or driving a vehicle, machine or agricultural implement (s. 7 Agriculture (Safety, Health and Welfare Provisions) Act 1956);
- cleaning machinery where doing so may expose children to injury (s. 18 Offices, Shops and Railway Premises Act 1963);
- effecting any betting transaction, or being employed, in a licensed betting office (s. 21 Betting, Gaming and Lotteries Act 1963);
- employment of children in the bar of licensed premises (s. 170 Licensing Act 1964);
- employment on a ship registered in the UK, except as permitted by regulations (s. 51 Merchant Shipping Act 1970);
- handling any load likely to cause a child injury (Manual Handling Operations Regulations 1992).

No child may be engaged in street trading unless authorised to do so by local authority byelaws (s. 20 Children and Young Persons Act 1933).

Detailed provisions regulate child performances in the entertainment industry. Section 37 of the Children and Young Persons Act 1963 provides that no child shall take part in:

- a) any performance in connection with which a charge is made,
- b) any performance in licensed premises,
- c) any broadcast performance or performance included in a programme service, or

- d) any performance recorded by whatever means with a view to its use in a broadcast or such a service or in a film intended for public exhibition,

unless a licence has been granted by the local authority in whose area he resides or, if he does not reside in Great Britain, by the local authority in whose area the applicant or one of the applicants for the licence resides or has his place of business (s. 37(1) and (2)).

A licence is not however required if (a) in the six months preceding the performance he has not taken part in other performances covered by s. 37 on more than three days; or (b) the performance is given under arrangements made by a school or made by a body of persons approved for the purposes of this section by the Secretary of State or by the local authority in whose area the performance takes place, and no payment in respect of the child's taking part in the performance is made, whether to him or to any other person, except for defraying expenses (s. 37(3)).

Under the Children (Performances) Regulations 1968, SI 1968/1728, the Secretary of State has prescribed conditions to be observed with respect to the hours of work, rest or meals of children taking part in performances. Guidance on the 1968 Regulations can be found in *The Law on Performances by Children: A Guide to the Children (Performances) Regulations 1968 and Related Provisions* Home Office (1968). A licence issued by the LEA granting approval to the performance must specify the times, if any, during which the child in respect of whom it is granted may be absent from school for the purposes authorised by the licence. A child absent during the times specified in the licence is treated as being authorised to be absent for the purposes of pupil registration (s. 37(6) and (7)).

An LEA cannot, however, issue a licence to a child under 14 unless (a) the licence is for acting and the application therefor is accompanied by a declaration that the part he is to act cannot be taken except by a child of about his age, or (b) the licence is for dancing in a ballet which does not form part of an entertainment of which anything other than ballet or opera also forms part and the application for the licence is accompanied by a declaration that the part he is to dance cannot be taken except by a child of about his age, or (c) the nature of his part in the performance is wholly or mainly musical and either the nature of the performance is also wholly or mainly musical or the performance consists only of opera and ballet (s. 38(1) Children and Young Persons Act 1968).

11. Accountability and Challenge

A. Introduction

Although the increasing trend for litigation and the greater emphasis on the inspection of LEA services are seen as fairly recent innovations, LEAs have always been subject to checks and outside scrutiny and have never been free to act without restraint.

Litigation in particular is seen as a recent problem with the apparent Americanisation of the English legal system leading to claims against LEAs which would never have been countenanced in the past. But LEAs have always been subject to legal action and the case law on the liability of school staff dates back to *King v Ford* (1816) 1 Stark 421, when a schoolmaster who encouraged an infant pupil under his care to use fireworks was held responsible for the “mischief which ensued”.

There is no doubt, though, that there has never been such close scrutiny of the work of an LEA, partly through the political stress on “education, education, education” and partly because, to a certain extent, LEAs are on probation and, for many within government, will be required in the next few years to justify their continuing existence.

Similarly there is also no doubt that the number of claims brought against LEAs through the courts are increasing both in terms of civil actions for damages and judicial review of LEA decisions. This is partly a reflection of the greater willingness amongst parents and pupils to resort to the courts to resolve disputes, but also reflects the trends in judicial thinking which have led to the courts exercising greater control over the actions of public authorities.

As public authorities, local authorities and LEAs are subject to the doctrine of *vires*. This means that they cannot do anything other than that which the law, through statute and regulation, permits. Local authorities currently lack the power of general competence and consequently, to justify any action, the authority must be able to point to the statutory duty or power which allows it to carry out the particular act. If it cannot do so, it acts *ultra vires* or outside its powers and the court may intervene in the course of a judicial review. The restriction on the powers of local authorities by recent Governments, together with a greater enthusiasm for challenging decisions through the courts,

has been a significant factor in the increasing amount of litigation affecting LEAs. The impending introduction of the Human Rights Act 1998 is likely to lead to LEAs facing even closer scrutiny by the judiciary.

This chapter will therefore consider the mechanisms by which LEAs can be held accountable by parents, pupils and others involved in their work and will also examine in detail the judicial remedies now available against LEAs.

B. Statutory Accountability

Secretary of State for Education and Employment

Although there has been criticism of the apparent recent trend towards centralisation in education with more and more powers being reserved to the Secretary of State, the Secretary of State has, certainly since 1944, always retained reserve powers to deal with abuses committed by LEAs.

Under s. 495 of the 1996 Act, any dispute between an LEA and a governing body of a school as to the exercise of any power conferred or the performance of any duty imposed by or under the Education Acts may be referred to the Secretary of State (who may intervene despite any enactment which makes the exercise of a power or the performance of a duty contingent upon the opinion of the LEA or of the governing body). The Secretary of State has a discretion to determine any dispute referred to him in this manner (s. 495(2)).

This dispute resolution mechanism applies both ways. Thus if a governing body is dissatisfied with the exercise of an LEA's powers, it can complain to the Secretary of State, just as in the same way an LEA can complain to the Secretary of State about the exercise of a governing body's power. Section 495 cannot, however, be utilised unless the dispute is referred to the Secretary of State; it does not allow the Secretary of State to intervene of his own volition.

Under s. 496 of the 1996 Act, if the Secretary of State is satisfied (either on a complaint by any person or otherwise) that a body to which s. 496 applies has acted or is proposing to act unreasonably with respect to the exercise of any power conferred or the performance of any duty imposed by or under the Education Acts, he may give such directions as to the exercise of the power or the performance of the duty as appear

to him to be expedient (and may do so despite any enactment which makes the exercise of a power or the performance of a duty contingent upon the opinion of the body) (s. 496(1)).

Section 496 applies to any LEA and the governing body of any maintained or maintained special school.

Under s. 496, it is not necessary for a complaint first to be referred to the Secretary of State; instead the Secretary of State can act of his own volition.

Although in the past there have been concerns that the Secretary of State has not acted as quickly as the situation may warrant, recourse should really be had to s. 496 before any court action is contemplated. Although the case law is inconsistent, a number of decided cases have indicated that before considering judicial review, an aggrieved individual should just complain to the Secretary of State. Similarly, a complaint to the Secretary of State is not necessarily precluded where an LEA is alleged to have acted *ultra vires* (i.e. outside its powers) or contrary to natural justice (see *Herring v Templeman* [1973] All ER 581). Here, the courts have recognised that the Secretary of State is equally capable of considering the unreasonableness of an LEA's or school's actions as a court. The question of when the statutory procedure should be invoked and when an aggrieved parent or pupil should seek judicial review will be discussed below.

It is important to remember, however, that the question of deciding whether or not the LEA has acted or is proposing to act "unreasonably" is to be decided in accordance with the legal definition of "unreasonableness" as opposed to the lay understanding of the phrase. Thus in order to intervene, the Secretary of State must show that the LEA was acting in a way in which no reasonable LEA would act (see *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014).

In addition to s. 496, the Secretary of State has a general default power where, if he is satisfied (either on a complaint by any person interested or otherwise) that either an LEA or a governing body of a maintained school or special school has failed to discharge any duty imposed on it by or for the purposes of the education legislation, he may make an order:

- a) declaring the LEA or governing body to be in default in respect of that duty, and

- b) giving such directions for the purpose of enforcing the performance of the duty as appear to him to be expedient (s. 497(1)).

Any direction given shall be enforceable, on an application to the court made on behalf of the Secretary of State, by an Order of Mandamus, i.e. a court order requiring the LEA or the governing body to comply with the direction.

The s. 497 power is slightly different from the s. 496 power in that it applies only to the discharge of duties whereas s. 496 allows the Secretary of State to intervene if he believes the LEA are unreasonably exercising a power. Because of the importance of the discharge of duties, however, s. 497 does provide the Secretary of State with a far more effective means of enforcing his decision, firstly by direction and secondly by court order if necessary.

Again, a person may complain under s. 497(1) before taking action through the courts, although the judiciary are somewhat inconsistent in deciding when the availability of this complaints mechanism means that an application for judicial review should be rejected. For example, in *Meade v Haringey LBC* [1979] 2 All ER 1016, it was held that the existence of the complaint mechanism did not exclude an application to the courts for damages or an injunction by a parent who suffered damage when an LEA failed to perform its statutory duty. However, that case is different from judicial review as the parents were seeking damages. Where parents ask the court to invoke its discretionary jurisdiction to grant relief against the action of a public body by way of judicial review proceedings, there may be circumstances where the courts will prefer the parents to have gone through the statutory process beforehand, rather than going immediately to court.

As has been discussed in connection with the monitoring and improvement of education, to meet the concern that whilst some LEAs might be complying with their statutory duties they were not performing to the maximum standard, the School Standards and Framework Act 1998 introduced into the Education Act 1996 power for the Secretary of State to issue directions where he is satisfied (either on a complaint by any person interested or otherwise) that an LEA is failing in any respect to perform any function to an adequate standard (or at all) (s. 497A(2)). If the Secretary of State decides to exercise his powers he can direct an officer of the LEA to secure that the function which is being performed to an inadequate standard, or not at all, is performed in such a way as to achieve objectives set out in the Secretary of State's direction. The Secretary of State may give an LEA officer such

directions as the Secretary of State thinks expedient for the purpose of securing that the function:

- is performed on behalf of the LEA and at its expense by such a person as is specified in the direction, and
- is so performed in such a way as to achieve such objectives as are specified in the direction (ss. 497A(3) and (4)).

This power can therefore be used where the Secretary of State believes a function is being provided inadequately and wishes to outsource the performance of that function by bringing in external consultants or other education providers.

Inspection of LEAs

Following on, or perhaps more pertinently, preceding, the default power of the Secretary of State to deal with inadequate performance is the new regime for the inspection of LEAs.

In summary, Her Majesty's Chief Inspector of Schools in England, or his equivalent in Wales, may arrange for any LEA to be inspected or shall arrange for such an inspection if requested to do so by the Secretary of State (s. 38(1) Education Act 1997).

An inspection carried out by the Chief Inspector will consist of a review of the way in which the LEA is performing any of its functions (of whatever nature) which relate to the provision of education, either for persons of compulsory school age (whether at school or otherwise) or for persons of any age above or below that age who are registered as pupils at schools maintained by the LEA.

The LEA is required to provide the Chief Inspector with such information as may be prescribed and within such a period and in such a form as regulations may lay down (s. 38(6)).

Any inspector appointed to carry out an inspection of an LEA and any person assisting him shall have at all reasonable times a right of entry to the premises of the LEA and a right to inspect and take copies of any records kept by the LEA and any other documents containing information relating to the LEA which the inspector considers relevant to the exercise of his functions (s. 40(1)).

An LEA is required to give the inspector and any person assisting him all assistance in connection with the inspection which it is reasonably able to give (s. 40(2)).

When an inspection has been completed, the inspector is required to make a written report on the matters reviewed and to send copies to the LEA and the Secretary of State (s. 39(1)). Where an LEA receives a copy of a report, it is under an obligation to prepare a written statement of the action which it proposes to take in the light of the report and the period within which it proposes to take it (s. 39(2)). The LEA is also required to publish the report and its statement in response in accordance with the Education (Publication of Local Education Authority Inspection Reports) Regulations 1998, SI 1998/880. The Chief Inspector may also arrange for the report to be published in such manner as he considers appropriate (s. 39(4)). Whether this power enables a Chief Inspector to issue reports to the press in advance of any agreed release date or agreed press launch, as appears to have happened in the case of the inspection of Leicester City Council LEA (see correspondence between Sir Jeremy Beecham, Chairman of the Local Government Association, and the Secretary of State, 12 August 1999), is debatable. It is hard to imagine that the power given to the Chief Inspector applies to publication in this manner.

When carrying out an inspection, the Chief Inspector may request the assistance of the Audit Commission, and the report of the Inspector can be produced in conjunction with the Audit Commission (s. 41).

Adjudicator

Although perhaps not strictly falling under accountability or challenge, the adjudicator does play a role in dealing with objections to certain decisions of LEAs.

The Secretary of State is under an obligation to appoint such number of persons to act as adjudicators for the purposes of the 1998 Act as he considers appropriate (s. 25(1) of the 1998 Act).

Schedule 5 to the Act sets out the provisions concerning the appointment, tenure of office, remuneration of, and staffing for, adjudicators, together with certain rules regarding the procedure to be adopted by the adjudicator in determining matters referred to him (Sch. 5, para 5).

In principle, the adjudicator has a role in two areas of LEA responsibility.

First, if a School Organisation Committee cannot unanimously agree either a School Organisation Plan (or subsequent revised Plan) or any proposal for the establishment, alteration or discontinuance of a maintained school, the matter should be referred to the adjudicator.

Secondly, under the *Code of Practice on School Admissions*, LEAs are recommended to establish admission forums as a vehicle for consultation and discussion of issues arising from proposed admission arrangements (see para 4.5 of the *Code of Practice*). Most disputes over admission arrangements will therefore be discussed by admission forums, but, where an admission authority objects to the admission arrangements determined by another admission authority and all attempts to resolve the matter locally between admission authorities or through the admissions forum have failed, the admission authority may refer the objection to an adjudicator (para 4.10 of the *Code of Practice*). Parents may refer objections over existing partial selection in a similar fashion.

Adjudicators exercising their admissions functions are not able to consider objections about aspects of admission arrangements for which other statutory procedures are required. For example, the adjudicator will be able to consider disputes about the admission arrangements for grammar schools, but not about the principle that a grammar school selects its pupils on the basis of high academic ability. The Secretary of State will retain the power to consider and determine disputes on admission criteria relating to religious or denominational issues (para 4.11).

The adjudicator will, however, be able to determine that an admission authority seeking to continue to make provision for partial selection should cease to do so even where that selection was introduced following the approval of statutory proposals under earlier legislation. The 1998 Act prevents new selection by ability being introduced and allows objections, following petition, to be made to existing selective arrangements. The adjudicator can therefore, for example, make a determination on an objection by an admission authority that another admission authority is seeking to give priority to some pupils on the basis of aptitude (para 4.12).

In either case, the procedure for referrals to adjudicators is set out in the Education (References to Adjudicator) Regulations 1999, SI 1999/702.

The adjudicators have initially been involved in disputes concerning selective education (see *Times Educational Supplement*, 30.7.1999; 6.8.1999; 10.9.1999; 5.11.1999 and 21.1.2000). A ruling of the adjudicator concerning selection in Wandsworth was recently overturned by the High Court (*R v Downes ex p Wandsworth LBC* 14 January 2000, unreported), though a challenge to another decision of an adjudicator by Wirral MBC was unsuccessful (*R v The Schools Adjudicator ex p Wirral MBC* 20 December 1999, unreported). In the

Wandsworth case, the adjudicator was held to have acted unlawfully in making a decision without having regard to the fact that the consequence of his decision could have been a significant change to the character of a school. Specific statutory procedures were in place to govern such a change and the adjudicator should not have sought to secure such a change by a back door route.

The Commissioner for Local Administration (otherwise known as the Ombudsman)

The Commissions for Local Administration were established by the Local Government Act 1974 and their powers extended by the Local Government and Housing Act 1989.

Their jurisdiction relates to complaints of injustice in consequence of maladministration in connection with action taken in the exercise of administrative functions by or on behalf of a local authority (s. 26(1) Local Government Act 1974).

Their jurisdiction is thus not just limited to educational functions but extends across the broad range of local authority functions, though it is, as stated above, limited to administrative functions. It is also important not to be misled into believing that the jurisdiction relates to maladministration alone; the Act is specific in saying that the jurisdiction relates to injustice in consequence of maladministration in connection with administrative functions.

Although the definition of “administrative functions” may be pedantic, it is nonetheless important and it has been held that “administrative functions” include the decision-making function (see *R v Local Commission for Administration ex p Croydon* [1989] 1 All ER 1033) but not the decision itself. In effect, the jurisdiction is to examine the procedure rather than the merits of a decision and is to a certain extent akin to the court’s supervisory functions in respect of judicial reviews. Although neither maladministration nor injustice is defined, a working definition of maladministration includes “bias, neglect, inattention, delay, incompetence, ineptitude, adversity, turpitude, arbitrariness, and so on” as *per* Lord Denning in *R v Local Commissioner for Administration ex p Bradford MBC* [1979] 1QB 287. Thus maladministration is concerned with faulty administration or inefficient or improper management of affairs. If the Ombudsman, having investigated, believes personally that the decision was wrongly taken, but is unable to point to any maladministration, he is prevented from questioning the decision (see *ex parte Bradford*).

Because of the Ombudsman's *raison d'être*, injustice has a wide meaning, but nonetheless should apply only in circumstances where an aggrieved complainant has no legal remedy. Thus injustice may include a "sense of outrage" caused by unfair and incompetent administration even where no legal loss has occurred (see *R v Parliamentary Commission ex p Balchin* [1997] COD 146).

As a result of the vagueness of the definitions, however, there is the opportunity for individual Ombudsmen to take different interpretations of their function, which unfortunately can lead to some uncertainty. Areas where, for example, there is uncertainty as to what constitutes maladministration would include the failure to comply with a Code of Practice or where there has been a failure to honour an existing commitment.

On the other hand, it does not necessarily follow that if a local authority acts unlawfully, it will be guilty of injustice in consequence of maladministration.

Examples of circumstances where the Ombudsman has found maladministration in the education context are:

- failure to keep parents informed during the course of the assessment of their child's special educational needs (see numerous complaints);
- failure to issue a statement of special educational need, which led to a child being denied appropriate education for a school year (*Complaint No. 95/B/2431 against Dorset County Council*);
- delay in dealing with a child's statement of special educational needs (see numerous complaints);
- failure to ensure speech therapy support was provided as specified in a statement (*Complaint No. 95/A/2849 against Islington LBC*);
- failure to establish an admissions limit which accurately reflected the capacity and resources of the School (*Complaint No. 96/C/1237 against Bury MBC*);
- failure to follow the *Code of Practice on Admission Appeals* (*Complaint No. 96/C/1448 (and others) against Kingston upon Hull City Council* in respect of the old Code of Practice);
- including disqualified persons on appeal panels, flaws in procedure and lack of training of members (*Complaints Nos. 99/0228/A01/000 and 99/0228/A01/001 against the Appeal Committee of Corpus Christi Roman Catholic High School*);

- failings in admission information, use of waiting lists and inconsistencies in measuring distances (*Complaints Nos 98/C/2464, 98/C/2770 and 98/C/2753 against Wirral Metropolitan Borough Council*);

and two rare examples of complaints investigated by the Ombudsman into non-school-related matters:

- insecure (i.e leaky) handling of grant application by prominent member of the local community (*Complaint No. 98/A/1835 against the London Borough of Tower Hamlets*); and
- failure to give timely advice (result of late information from DfEE) to a student on liability to pay tuition fees (*Complaint No. 98/C/2809 against Birmingham City Council*).

Many other examples of findings in respect of education can be found in Butterworth's *Law of Education* bimonthly Bulletin.

The jurisdiction of the Ombudsman extends to any member or officer of the local authority or anyone to whom the authority have delegated this function. It is perhaps a moot point whether any person carrying out the functions of the LEA, in response to a determination by the Secretary of State that a function is being inadequately performed (s. 497A of the 1996 Act), falls within the jurisdiction of the Ombudsman as it is not clear that in this case the authority has delegated its functions to that individual. Similarly, it would appear that the jurisdiction does not extend to Education Action Zones and Education Action Forums, but it does include School Organisation Committees (para 4 of Sch. 30 to the 1988 Act). Adjudicators are not subject to the jurisdiction of the Local Government Ombudsman but are subject to a central government equivalent, the Parliamentary Commissioner (para 9 of Sch. 5 to the 1998 Act).

Similarly, paragraph 4 of Schedule 30 to the 1998 Act has amended the Local Government Act 1974 so that the Ombudsman's jurisdiction does extend to admission appeals panels set up by the governing bodies of foundation or voluntary schools as well as admission and exclusion appeal panels established by LEAs.

The Ombudsman cannot investigate a matter in respect of which the complainant has, or had, a right of appeal or review to a tribunal, a Minister or a remedy by way of proceedings in court unless the Ombudsman is satisfied that in the particular circumstances of a case it is not reasonable to expect the person aggrieved to resort, or have resorted, to those procedures.

In *R v Commissioner for Local Administration ex parte H* [1999] ELR 314, parents complained to the Ombudsman in an attempt to obtain compensation. The parents had previously issued against their LEA judicial review proceedings, which had been compromised by an agreed settlement. The consent order reflecting this settlement, because it was in judicial review proceedings, could not order compensation for past loss and therefore the parents had attempted to recover this compensation through the Ombudsman procedure. The Ombudsman declined to investigate the complaint and the Court upheld this decision on the basis that the parents had already obtained a remedy by way of proceedings in a court of law and Parliament clearly intended that the Ombudsman should investigate only where such a route was not open.

In contrast, in *R v Local Commissioner for Local Government for North and North East England ex parte Liverpool City Council* 24 February 2000, unreported, the Court of Appeal declined to overturn a report of the Ombudsman on the basis that the complainants had alternative remedies available to them, in particular through judicial review. The Ombudsman had decided that it would be very difficult, if not impossible, for the complainants to obtain the necessary evidence in judicial review proceedings, whereas her powers allowed her to compel the disclosure of documents, interview staff and conduct a fact-finding investigation. She had also taken the view that the complainants were a group in modest housing, unlikely to have the means to pursue the remedy. The Court of Appeal saw nothing wrong in this approach and felt that the Ombudsman had correctly exercised her discretion in concluding that it would have been unreasonable for the persons aggrieved to have had to resort to judicial review.

Certain items are specifically excluded from the Ombudsman's jurisdiction and those relevant to education include:

- a) the commencement or conduct of civil or criminal proceedings before a court of law;
- b) action taken in relation to contractual or commercial transactions and any other transactions in the discharge of functions under a Public General Act other than those required for the procurement of goods and services;
- c) the appointment, removal, pay, discipline, superannuation of staff and any other personnel matters;
- d) secular instruction in maintained schools, teaching and conduct of the curriculum, internal organisation and management or discipline in such schools.

Complaints must be in writing identifying the action alleged to constitute maladministration and must be made by or on behalf of a member of the public who claims to have sustained injustice in consequence of maladministration. The complaint may be made by an individual or a body corporate or incorporate, but not by a local authority or any other public authority or body, which includes the governing body of a maintained school. The complaint must normally be made within 12 months of the time when the person aggrieved first had notice of the matters he believes constituted maladministration, although the Ombudsman may dispense with this time limit if it is reasonable to do so.

Before investigating, however, the Ombudsman must be satisfied that the complaint has been brought to the notice of the local authority and that the local authority has been afforded a reasonable opportunity to investigate and reply to a complaint itself (s. 26(5) Local Government Act 1974).

Currently, investigations are conducted in private, although there have been suggestions that, with the introduction of the Human Rights Act 1998, there will be a need for the Ombudsman to conduct public hearings. The Ombudsman must, however, provide an opportunity both to the authority and to the individual to comment on any allegation contained in the complaint and the authority's response.

The Ombudsman has all the powers of the court in relation to the attendance and examination of witnesses and the production of documents (for example, to issue a witness summons or subpoena); he may require members and officers of the authority, and anyone else who he considers is able to furnish information or produce documents relevant to his investigation, to produce such information and documents. The Ombudsman cannot, however, be given information or documents which are legally privileged or protected by the privilege against self-incrimination (s. 29 (7) of the 1974 Act).

If the Ombudsman decides not to conduct an investigation, he must give a statement of his reasons for not doing so to the complainant. If, however, he decides to issue a report, the report will not normally identify any individual, but may name a member whose conduct constitutes maladministration and which constituted a breach of the *National Code of Local Government Conduct*. Within two weeks of receipt of the report, the authority must give public notice by way of newspaper advertisement or otherwise that the report is to be made available to the public for inspection without charge for a period of three weeks starting no later than one week after first notification.

Anyone can take copies or extracts from the report during this period and the authority is obliged to provide copies on payment of the authority's reasonable charge. Obstruction of the right to inspect or copy the report is a criminal offence (s. 30(6)).

The authority must consider any report which concludes that injustice had been caused by maladministration (s. 31(1)), although the duty at this stage may be delegated to a committee, sub-committee, or even potentially an officer, within three months of receipt of the report, or such longer period as the Ombudsman allows. The authority must notify the Ombudsman what action it has taken or proposes to take (s. 31(2)). It is implicit that the authority is not bound to accept the Ombudsman's conclusions and could consider other reports, for example, from an officer.

If, however, the Ombudsman does not receive the necessary notification or if he is not satisfied with the authority's actual or proposed course of action, or if within a further three months, he does not receive confirmation that the authority has taken action which satisfies him, he must make a further report setting out these facts and making his recommendations. The recommendations are within the discretion of the Ombudsman and should relate to the action which the authority should take both to remedy the injustice caused to the individual complainant and to prevent similar injustice in the future (s. 31(2B)). In addition, the Ombudsman may also require the authority by notice to arrange for publication of a statement to be agreed between himself and the authority containing details of any recommendations he has made in the further report which the authority has not taken, together with supporting material as to his reasons, and any statement from the authority as to why it proposes to take no action or other action to that recommended. Publication will be in two editions of a newspaper circulating in the authority's area and, if the authority does not arrange publication, the Ombudsman can step in and do so himself. If such a further report is issued, it must be considered by the full authority and cannot be delegated as can the first report.

As far as the actual recommendations are concerned, the Ombudsman has considerable freedom. This should clearly provide an adequate remedy for any injustice found and can include financial compensation. Often an award is made for time, distress and inconvenience caused to the complainant and for expenses properly incurred. Section 1(3) makes it clear that the authority does have the power, whether or not recommended to do so, i.e. in an attempt to resolve the complaint amicably, to incur expenditure in making payments to a person who has suffered injustice in consequence of the maladministration.

Monitoring Officer

Again a general power or means of challenging unlawful decisions, the Monitoring Officer is a statutory appointment which must be made by each local authority (s. 5 Local Government and Housing Act 1989).

The Monitoring Officer is under a duty to prepare a report to the authority in respect of:

- any proposal, decision or omission of the authority or committee, sub-committee, or officer, or employee of the authority which appears to the Monitoring Officer to have given rise to, or be likely to, or would give rise to contravention by the authority or any committee or sub-committee of the authority, or by any person holding any office of employment under the authority, of any enactment or rule of law or of any Code of Practice made or approved by or under any enactment ; or
- any injustice in consequence of maladministration in connection with administrative functions.

Thus, if it came to the attention of the Monitoring Officer that the LEA, whether through its members or officers, were proposing to act in any of the above ways, he should prepare a report to the authority.

Audit

The audit of local authority accounts is another general mechanism to provide a check on financial expenditure by local authorities and (for the purposes of this book) LEAs in particular.

There are two types of audit: internal audit and, perhaps more importantly in terms of most challenge, external audit.

Internal Audit

The chief finance officer of every local authority must maintain an adequate and effective internal audit (reg 5 Accounts and Audit Regulations 1996, SI 1996/590).

In order to carry out the audit, the chief finance officer (or his authorised representative) has a right of access at all times to any documents he requires relating to the accounts of the authority and has a power to require from any officer or member such information and explanation as he thinks necessary.

Guidance on the performance of internal audit is found in the Auditing Practices Board's *Guidance for Internal Auditors* and CIPFA's

Application of the APB's Guideline "Guidance for Internal Auditors" in Local Government. The latter document defines internal audit as "an independent appraisal function established by the management of an organisation for the review of the internal control system as a service to the organisation. It objectively examines, evaluates and reports on the adequacy of internal control as a contribution to the proper economic, efficient and effective use of resources."

With a few exceptions, the internal audit function is performed by an authority's own internal audit department, although a number of authorities have voluntarily contracted out the activity. Usually the department is located within the finance department, which ensures it does fall within the chief finance officer's responsibilities.

In addition to the general objectives, internal audit also specifically addresses value for money and the prevention and detection of fraud.

External audit

In the context of this work, the most important audit function with respect to LEA functions is the role of the external auditor.

The accounts of all local authorities must be externally audited (see the Audit Commission Act 1998) and the role of the external auditor forms one of the oldest means of accountability (and possibly liability). Although the principal work of external auditors does relate to the annual accounts, their role continues throughout the financial year.

The external auditor is appointed by the Audit Commission and may be an officer of the Commission (known as the "District Auditor") or an individual or firm of individuals such as an accountancy firm.

The duties of the auditor, set out in s. 5 of the Audit Commission Act 1998, require the auditor to satisfy himself that:

- the accounts prepared by the local authority have been prepared in accordance with the appropriate Regulations and comply with other statutory provisions;
- proper practices have been observed in the compilation of the accounts; and
- the local authority has made proper arrangements for securing economy, efficiency and effectiveness in the use of its resources and has published such information in relation to this as is required by the Audit Commission Act 1998.

In carrying out his task, the auditor must comply with the current *Code of Audit Practice* and must also follow the relevant auditing standards published by the Auditing Practice Board. In the course of the audit, the auditor is required to consider whether, in the public interest, he should make a report on any matter coming to his notice in order that it may be considered by the local authority or brought to the attention of the public. If such a matter does come to his attention, he must consider whether to report immediately or at the conclusion of the audit.

To enable the audit to be carried out, the auditor has a right of access at all reasonable times to any documents of the authority which appear to him to be necessary for the purposes of the audit and is empowered to require any necessary information and explanation from the person holding or who is accountable for the document. Where necessary he may require a person to appear before him to provide the information or explanation or to produce the document (s. 6 of the 1998 Act). Non-compliance with a request from the auditor can be a criminal offence (s. 6(6)).

In addition to the audit of the accounts for a financial year, if a local government elector so applies or if the auditor produces a public interest report, the Audit Commission may direct that an extraordinary audit be held (s. 25(1)) and, in addition, the Secretary of State may also direct the Commission to direct that an extraordinary audit be held if it appears to him to be desirable to do so in the public interest (s. 25(2)).

Where the auditor makes a public interest report, it must be sent to the local authority concerned and, once received, must be considered by the authority. Similarly, any document short of a report, such as a management letter which contains written recommendations, must also be considered. Consideration must occur within four months of receipt of the report, or such other time as the auditor allows, but at a meeting the authority must decide whether the report requires any action or whether the recommendation is to be accepted and what, if any, action is to be taken in response. This duty may not be delegated.

If an immediate public interest report is received, the authority must publicise the fact in at least one local newspaper identifying the subject matter of the report and state that the public may inspect the report and take copies. All members of the authority must also be supplied with copies.

At each audit, any person interested (which includes anyone with a financial interest in the accounts (see *Marginson v Tildsley* (1903) 67

JP 226)) may inspect the accounts to be audited and all books, deeds, contracts, bills, vouchers and receipts relating to them and make copies.

Where requested, the auditor must give a local government elector or his representative an opportunity to question him about the accounts, provided that no questions can be asked about personal information relating to staff.

Any local government elector may object to the accounts on two grounds (s. 16 of the 1998 Act), that:

- the matter is one on which the auditor could take action under either ss. 17 or 18 of the 1998 Act; or
- it is any other matter in respect of which the auditor could make a public interest report.

Section 17 provides the auditor with power to apply to the court for a declaration if he believes that an item of account is contrary to law. Section 18 allows the auditor to take action if he believes that any person has failed to bring into account a sum which should have been brought into account (which failure has not been sanctioned by the Secretary of State), or that a loss has been incurred or deficiency caused by the wilful misconduct of any person. If so, the auditor must certify that the sum or the amount of the loss or deficiency is due and recoverable from that person.

If the auditor refuses to apply to the court for a declaration, the objector may within six weeks of the notification of the decision require the auditor to state in writing his reasons for that decision. The objector may also appeal against the decision to the court and on appeal the court has the same power as on an auditor's application.

If the auditor does not certify that a sum or amount is due, the objector may require the auditor to state his reasons in writing and again may also appeal to the court against the decision (ss. 17 and 18 of the 1998 Act).

Following the Westminster City Council case (*Porter v Magill* (1997) 96 LGR 157, QBD and [1999] LGR 375, Court of Appeal), the role of the auditor in recent years in local government has taken on a significantly increased profile. Not only have auditors been querying items found in annual accounts, but they have also been giving views on the legality or otherwise of action taken or proposed to be taken by local authorities.

In many cases, that quasi-advisory role is helpful to authorities, but on occasion it has led to disputes, particularly where legal advice differs, and it is therefore important to understand what powers the auditor does have in respect of unlawful items of account and/or failure to account and wilful misconduct.

Unlawful items of account

Under s. 17 of the 1998 Act, where it appears to the auditor carrying out an audit that an item of account is contrary to law and the item is not sanctioned by the Secretary of State, the auditor may apply to the court for a declaration that the item is contrary to law (s. 17(1)).

“Contrary to law”, although having been considered in a number of cases, has not been clearly defined. It must include items of expenditure which are *ultra vires* the authority (see, for example, *North Tyneside MBC v Allsop* (1992) 90 LGR 462) and may also include items relating to the exercise of a discretionary power which is contrary to the principles of administrative law. In other words, the auditor could consider an item of account to be contrary to law if (a) the authority had taken into account matters which it ought not to have taken into account, or (b) it had refused or neglected to take into account matters which it ought to take into account, or (c) it had come to a conclusion so unreasonable that no reasonable authority could ever have come to it (*Giddens v Harlow District Auditor* (1972) 70 LGR 485). Examples of items contrary to law include a decision to pay local authority employees a higher minimum wage than was otherwise prevalent in the area (*Roberts v Hopwood* [1925] AC 578) or a decision to pay a landlord of a requisitioned property a higher amount than might otherwise have been necessary (*Taylor v Munrow* [1960] 1 All ER 455).

If a local authority charges an item of expenditure to the wrong account, then that too may be “contrary to law”.

If the auditor does believe that an item is contrary to law, he can apply to the court and the court may make the declaration sought or refuse to do so. If it makes the declaration, then it may also order that any person responsible for incurring or authorising the expenditure shall repay it in whole or part. If there are two or more persons responsible, then they are jointly and severally liable (s. 17(2)(a)). If the unlawful expenditure exceeds £2,000 and the person responsible is or was a member of the local authority, the court may also order him to be disqualified from being a member for a specified period.

In addition, the auditor has power to apply for judicial review of any decision of a public body he is appointed to audit which it is reasonable to believe would have an effect on the accounts of the body (s. 24).

Failure to account and wilful misconduct

If it appears to the auditor while carrying out the audit that any person has failed to bring into account a sum which should have been brought into account (which failure has not been sanctioned by the Secretary of State) or that a loss has been incurred or deficiency caused by the wilful misconduct of any person, the auditor must certify that the sum or amount of the loss or deficiency is due from that person (s. 18(1)).

The sum at issue may be recovered by both the auditor and/or the local authority and if it is due from two or more persons, they are jointly and severally liable for it. The power to recover, however, is subject to any order made by the court on appeal from a decision of the auditor.

A person aggrieved by the certificate of the auditor that a sum is due from him, or a person who has made an objection but the auditor has decided not to issue a certificate, may require the auditor to state his reasons for the decision and/or may appeal against the decision to the court.

On appeal, the court may confirm the decision, quash the decision and/or give any certificate which the auditor could have given. The court may also make provision for the local authority in relation to whose accounts the appeal is brought to pay the expenses in connection with the appeal of the auditor, the person to whom the appeal relates or the person bringing the appeal (s. 18(10)).

If the certificate relates to any loss or deficiency caused by the wilful misconduct of a person who is or was a member of a local authority and the amount certified exceeds £2,000, that person is disqualified from being a member of a local authority for five years (s. 18(7)).

The definition of “wilful misconduct” has been considered by the courts, but is again not precisely defined. It includes a wrongful omission to act where the person knows the omission to be wrongful or is recklessly indifferent whether it is wrongful or not (*Forder v GWR* [1905] 2 KB 532) or “deliberately doing something wrong knowing it to be wrong or with reckless indifference whether it is wrong or not” (*Graham v Teesdale* [1983] 81 LGR 117). This definition was adopted in the well-known case of *Porter v McGill* [1999] LGR 375.

In *Lloyd v McMahon* [1987] AC 625, it was held that to delay setting a rate for an improper reason was unlawful conduct. It would therefore follow that failing to set, or delaying setting, a budget would equally be wilful misconduct.

Best Value

As indicated above, the role of the auditor is changing from one of enforcer to one of adviser. This trend will continue under the Local Government Act 1999 and the introduction of Best Value inspections. Under Best Value, local authorities will be obliged to secure continuous improvement in the way their functions are exercised having regard to a combination of economy, efficiency and effectiveness. Performance indicators will be produced by the Secretary of State for the Environment, Transport and the Regions based upon recommendations made by the Audit Commission.

Where local authorities are required to produce Best Value plans, these plans will have to be audited by the authority's external auditor. In addition, the Audit Commission may carry out an inspection of an authority's compliance with the requirements of the Best Value regulations at its own discretion, but may do so if prompted by an external auditor's recommendation or if the Secretary of State for the Environment, Transport and the Regions so requires.

C. Statutory Appeals

To deal with a wide range of disputes, Parliament has created a number of statutory administrative tribunals with the intention of keeping disputes out of the courts and providing an alternative mechanism for seeking resolution.

A number of these may impact generally upon the responsibilities of the LEA, such as the Lands Tribunal or the Social Security Tribunal, but in this work we propose to deal only with the three tribunals which tend to have the most direct impact on the functions of LEAs.

The first, the Employment Tribunal, is obviously of wider application, dealing with the whole range of employment issues, but the other two, the Special Educational Needs Tribunal and Independent Appeal Panels, are specifically created under the education legislation to deal with educational disputes.

Employment Tribunal

The employment tribunals, formerly known as industrial tribunals, operate under the Employment Rights (Dispute Resolution) Act 1998 and in accordance with the Employment Tribunals (Constitution and Rules of Procedure) Regulations 1993, SI 1993/2687, as amended. The President of the employment tribunals has overall responsibility for their organisation, but a number of regional chairmen, appointed by the Lord Chancellor, have a responsibility for the administration of justice by the tribunals within specified areas. The general administration of the employment tribunals is carried out by the Employment Tribunal Service, an executive agency set up by the Department of Trade and Industry.

The membership of each individual employment tribunal normally comprises a legally qualified chairman and a representative from each side of industry, all three of whom are selected from separate panels.

The jurisdiction of employment tribunals is derived from a significant amount of legislation, although they are normally seen as dealing primarily with complaints of unfair dismissal (under the Employment Rights Act 1996), or complaints of unlawful discrimination on the grounds of sex or marital status (Sex Discrimination Act 1975), or complaints of unlawful discrimination on the ground of race (Race Relations Act 1976) or complaints of unlawful discrimination on the ground of disability (Disability Discrimination Act 1995). There are other claims which can be brought, such as complaints regarding equal pay under the Equal Pay Act 1970 and a whole raft of less common types of application, such as complaints relating to payment of unpaid contributions to occupational pension schemes (Pension Schemes Act 1993). There are also a number of claims which have the potential to develop and increase, such as complaints by employees relating to time off for dependants, complaints by workers relating to detriment in working time and complaints relating to time off for young persons for study or training, all under the Employment Rights Act 1996, which implemented European Community law.

In addition, since 1994 the employment tribunals have jurisdiction to hear and determine certain claims for damages for breach of contract of employment (see the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, SI 1994/1623).

Special Educational Needs Tribunal

The Special Educational Needs Tribunal was set up under the Education Act 1993 and started work on 1 September 1994. The constitution and principal rules for the operation of the Tribunal, together with details of the rights of appeal which it can consider, are now set out in the Education Act 1996 and the Special Educational Needs Tribunal Regulations 1995, SI 1995/3113.

Prior to the 1993 Act, parents of children with special educational needs had limited rights of appeal against decisions taken in respect of their children to local appeal panels. The rights of appeal were restricted and there was concern that the powers of the panels did not always provide a suitable remedy for dissatisfied parents.

Consequently, the 1993 Act created a new national independent tribunal with power to consider a wide range of appeals, wholly independent of LEAs, and with, in principle, the power to order LEAs to take certain action. The intention of creating an informal tribunal whose decision would be accepted by all parties has, unfortunately, not been fully realised and the *Consultation Document on the SEN and Disability Rights In Education Bill* proposes a number of changes. Firstly, a new requirement will be imposed on LEAs to establish independent conciliation arrangements for resolving disputes with parents as there are, according to the DfEE, currently no procedures for dispute resolution other than the Tribunal (p. 27, para 5). That might perhaps be because the Tribunal was intended to be the means of resolving disputes but has, as many anticipated, become too formal and involves too many lawyers to provide an effective and welcoming means of resolving disputes. Secondly, the DfEE proposes to ensure that LEAs fully comply with Tribunal orders, improve the effectiveness of the Tribunal and reinforce and strengthen parental rights in relation to appeals directed to the Tribunal (p. 28, para 12).

The Tribunal comprises a President, a chairmen's panel appointed by the Lord Chancellor and a lay panel appointed by the Secretary of State for Education and Employment (s. 333 of the 1996 Act). Members of the chairmen's panel must be legally qualified for at least seven years and no person may be appointed to the lay panel unless they have knowledge and experience in respect of children with special educational needs or local government (reg 3 Special Educational Needs Tribunal Regulations 1995).

Each individual tribunal will consist of a member from the chairmen's panel who will chair the tribunal, together with two members of the lay panel. The President may sit as chairman and may also make decisions in respect of applications made during the course of the tribunal proceedings (frequently known as interlocutory applications).

The Tribunal has jurisdiction to consider appeals against the following decisions:

- a refusal to comply with a parental request for an assessment of their child's education needs (s. 329(2) of the 1996 Act);
- a decision, the LEA having made an assessment, not to make a statement of special educational needs (s. 325(2));
- the description in a statement of special educational needs made by an LEA of the child's special educational needs, the special educational provision specified in the statement or, if no school is named in the statement, that fact (s. 326(1));
- a refusal to carry out another assessment of a child for whom the LEA maintains a statement of special educational needs (s. 328(2));
- a refusal to comply with a parental request for the school named in a statement of special educational needs to be substituted with the name of a maintained school specified by the parent (Sch. 27, para 8);
- the description of the LEA's assessment of a child's special educational needs, the special educational provision or, if no school is named, that fact in an amended statement of special educational need made by the LEA (Sch. 27, para 10);
- a decision to cease to maintain a statement of special educational needs (Sch. 27, para 11).

The law concerning special educational needs issues which arise during appeals to the Tribunal is discussed in more detail in the chapter on special educational needs (Chapter 7).

It is important to note, however, that tribunals are required (or perhaps, more correctly, advised, as the President has no power to compel a tribunal to do something) to look at the child's needs and provision at the date of the hearing and not look back to the needs at the date the statement was issued, which could be some time beforehand, nor to question the actions of the LEA (see guidance note issued by the President of the Tribunal in March 1996). This requirement or advice, however, appears to fly in the face of the legislation, which makes clear

that the appeals are against the decision or determination of the LEAs. Here, the interests of the child appear to have outweighed the strict letter of the law.

An appeal to the Tribunal cannot postpone the LEA's decision pending the outcome of the appeal (*Camden LBC v Hadin* [1996] ELR 430) and so a statement made by an LEA which is challenged comes into effect unless and until overturned by the tribunal. There are proposals (see the *DfEE Consultation Document on the SEN and Disability in Education Bill*) to change this and to ensure that, where an LEA decides to cease to maintain a statement, the statement will continue in force pending the outcome of an appeal. It is not, however, proposed that when a statement is amended, the "old" content of the statement should continue to apply pending an appeal against the content of the amended statement.

The decision of a tribunal is binding on the parties and refusal on the part of the LEA to comply with the tribunal's order can lead to a complaint to the Secretary of State. If, however, an LEA, due to a genuine mistake, incorrectly records the terms of the tribunal's decision when it issues a revised statement to parents in a manner more favourable to the parents, there is no obligation on the LEA to meet that incorrect provision (*R v Wirral MBC and Governors of Elleray Park School ex p B* 17 February 2000, unreported). This does not, of course, allow an LEA to choose to put its own interpretation on a tribunal's decision and amend a statement in a way that is at variance with the tribunal's order and/or wording.

Two means of challenging the decision of the Tribunal are available.

First, a party can ask that the Tribunal's decision be reviewed (reg 31). The Tribunal, however, has power to review only on the grounds that:

- its decision was wrongly made as a result of an error on the part of the tribunal staff;
- a party who was entitled to be heard at a hearing, but failed to appear or be represented, had good and sufficient reasons for failing to appear;
- here was an obvious error in the decision of the tribunal which decided the case; or
- the interests of justice require it.

The President of the Tribunal issued guidance in 1996 (see [1996] ELR 278) on the circumstances in which a tribunal would agree to review a decision. He made clear that the purpose of the review is to reconsider

a decision which is technically flawed and not to raise errors of law. Review will therefore be used only where there has been a fundamental procedural error, fraud or simple cases of minor error or omission.

Given these parameters, very few cases of review succeed and the only other option open to parties is to appeal to the High Court on a point of law under s. 11 of the Tribunals and Inquiries Act 1992. The parties can either ask that the tribunal state a case for determination by the High Court (but only during the course of proceedings – see *Brophy v SENT* [1997] ELR 291), or by bringing an appeal directly to the High Court. For a detailed consideration of the methods available for challenging decisions of the SEN Tribunal, see Simon Whitbourn “Challenging decisions”, *Solicitors’ Journal*, 24.9.1999.

Independent Admission and Exclusion Appeal Panels

As briefly discussed in the sections on admissions and exclusions (see, respectively, Chapters 6B and 8), one of the duties of an LEA is to make arrangements for the establishment of independent appeal panels to consider appeals against the refusal to admit children to community and controlled schools and against decisions to exclude children from all maintained schools.

There is a certain irony in an LEA’s being required to make arrangements for panels to consider appeals against its own decisions (in the case of admissions). That irony might become more of a problem with the implementation of the Human Rights Act 1998, which requires an impartial and fair tribunal when a person’s civil rights are determined. It is debatable whether or not a tribunal such as an appeal panel can be independent or impartial if it is arranged by one of the parties.

Nonetheless, at the moment, appeal panels are there to play a role and, even after the Human Rights Act comes into force in October 2000, there may be considerable debate over whether or not a place at a school is in fact a civil right entitled to protection under the Act (see *Simpson v UK* discussed below).

Admission appeals

Under s. 94 of the School Standards and Framework Act 1998, an LEA is required to make arrangements for enabling the parent of a child to appeal against:

- any decision made by or on behalf of the LEA as to the school at which education is to be provided for the child, and

- in the case of a community or voluntary controlled school maintained by the LEA, any decision made by or on behalf of the governing body refusing the child admission to the school.

Schedule 24 to the 1998 Act sets out the constitution of admission appeal panels and the procedure relating to the making and hearing of such appeals.

The decision of an appeal panel is binding on the LEA or the governing body as appropriate (s. 94(6)).

These appeal panels must consist of either three or five members appointed by the LEA from persons who are “lay members” and from persons who have experience in education, are acquainted with educational conditions in the area of the LEA, or are parents of registered pupils at a school. On each appeal panel, one member must come from each group. Members of the LEA or of the governing body of the school in question and any person employed by the LEA other than a teacher are disqualified from membership. In addition, any person who has or at any time has had any connection with the LEA or the school or a person employed by the LEA or the school of a kind which might reasonably be taken to raise doubts about his ability to act impartially in relation to the LEA or the school, is also disqualified (Sch. 24, para 1).

The LEA may pay certain allowances to members of appeal panels (Sch. 24, para 5), is under an obligation to advertise for lay members (para 6) and must provide an indemnity to members of any appeal panel against any reasonable legal costs and expenses incurred in connection with any decision made by them in good faith (para 7).

Brief rules of procedure are set out in Part II to Schedule 24. These require an appeal panel to give the appellant an opportunity of appearing and making oral representations and to be accompanied by a friend or be represented. In the event of disagreement between members, the matter shall be decided by a simple majority vote and in the case of an equality of votes, the chairman of the panel shall have a second or casting vote.

Further guidance, to which all appeal panels must have regard, is contained in the *Code of Practice on Admission Appeals*.

One particular point, which all appeal panels, with the exception of those for which the reduction of infant class sizes is an issue, must

consider, is the need for a “two-stage” process in all “prejudice” appeals. (Where the reduction in infant class sizes is an issue, the nature of the appeal changes and the two-stage process is unnecessary. Appeal panels may allow an appeal only if either (a) the decision was not one which a reasonable admissions authority would make in the circumstances of the case; and/or (b) the child would have been offered a place if the admission arrangements had been properly implemented. The appeal is therefore not a rehearing of the parent’s case, but a review, on limited grounds, of the admission authority’s decision: see, *R v Southend Borough Education Appeals Committee ex p Southend-on-Sea Borough Council* 17 August 1999, unreported and *R v Richmond London Borough Council ex parte C (a child)* (2000) Times, 26 April.)

The courts (see *R v South Glamorgan Appeals Committee ex parte Evans* 10 May 1984, unreported and *R v Commissioner for Local Administration ex parte Croydon LBC* [1989] 1 All ER 1033) have held that there are two distinct stages involved in an appeal other than one in respect of admission to an infant class:

- first: a factual stage for the appeal panel to decide as a matter of fact whether prejudice would arise were the child to be admitted; the onus at this stage is on the representative of the admissions authority;
- second: a balancing stage for the appeal panel to exercise its discretion balancing between the degree of prejudice and the weight of the parental factors before arriving at a decision (see paragraph 4.56 of the *Code of Practice*).

If the appeal panel is not satisfied at the first stage that there would be prejudice if a child were admitted, the appeal panel should allow the appeal in the case of an appeal from a single child. If it is satisfied that there is prejudice, the appeal panel need to go on to the second stage and balance the prejudice against the merits of the parental case.

The *Code of Practice* (paras 4.65 – 4.68) provides guidance on the conduct of multiple appeals, although it is possible that other methods of conducting multiple admission appeals used by a number of LEAs are as valid as that set out in the *Code*.

Exclusion appeals

Under s. 67 of the 1998 Act, an LEA is required to make arrangements for enabling a parent (or if the excluded pupil is over 18, the pupil) to appeal against any decision of a governing body not to reinstate a pupil who has been permanently excluded from a maintained school.

The procedure for the making and hearing of appeals is governed by Schedule 18 to the 1998 Act and, in addition, appeal panels must have regard to DfEE Circular 10/99 *Social Inclusion: Pupil Support*.

The decision of an appeal panel is binding on the pupil and/or the parent, the governing body, the headteacher and the LEA (s. 67(3)).

The constitution of exclusion appeal panels is exactly the same as for admission appeal panels. Thus they must comprise three or five members from the persons eligible to be "lay members" and persons who have experience in education, are acquainted with educational conditions in the area of the LEA, or are parents of registered pupils at a school. Similarly, individuals who are disqualified from sitting on admission appeal panels are disqualified from sitting on exclusion appeal panels. The LEA is under an obligation to pay certain financial loss allowances to members of these appeal panels, must advertise for lay members and must provide the necessary indemnity (Sch. 18, paras 3–5).

The only difference concerns jurisdiction. Admission appeal panels arranged by the LEA deal only with appeals relating to community and controlled schools; in the case of exclusion appeal panels arranged by the LEA, the appeal panels consider appeals against decisions not to reinstate a pupil at all maintained schools, including foundation and voluntary aided schools.

The procedure for making an appeal and conducting an appeal is set out in paragraphs 6 to 15 of Schedule 18 to the 1998 Act.

Exclusion appeals have become a source of much litigation recently and, with the introduction of the Human Rights Act, it is possible that greater scrutiny will be placed on the actions of appeal panels. Although attempts to require exclusion appeal panels to follow criminal court procedures (see for example *R v Headteacher and Independent Appeal Committee of Dunraven School ex p B (a child)* [2000] ELR 156, QBD and CA) have failed, there is no doubt that exclusion appeal panel members will need to be more rigorous in considering appeals and ensure that fairness and natural justice prevail at all times.

The guidance contained in Circular 10/99 clearly recognises that this is the case and indeed at times may go too far in advising appeal panels to adopt almost court-like procedures (such as the preservation and viewing of evidence – paragraph 46, for example). The reaction of some headteachers to the bureaucracy inherent in the Circular and the apparent difficulties this has caused in excluding pupils has led the

Secretary of State to promise an early revision of the guidance (see DfEE letter of 21 January 2000).

As noted above, the courts do not consider that exclusion appeal panels should act in the same fashion as criminal courts. Nonetheless, the decisions of the courts and the Ombudsman over the last few years, together with the latest guidance in DfEE Circular 10/99 *Social Inclusion: Pupil Support* (see, in particular, Chapter Six and Annex D of the Circular) indicate a need for appeal panels to act in accordance with the principles of natural justice, to recognise the importance of their decisions on the child excluded and on other pupils and staff at the school and to establish the facts of the matter.

Cases in which the courts have examined exclusions and, more particularly, exclusion appeals include the following:

- *R v Board of Governors of Stoke Newington School and Others ex p M* [1994] ELR 131. (a) There had been a breach of natural justice when a person who was in a position to give evidence about the excluded pupil's conduct sat on the appeal; and (b) appeal panels perform a quasi-judicial function (not an administrative one – important when considering the effect of Article 6 of the European Convention on Human Rights).
- *R v Neale and Another ex p S* [1995] ELR 198. A parent's attitude or behaviour towards staff and governors could be relevant to a decision to turn a fixed-term exclusion into a permanent one. Education was a three-way partnership between the pupil, the school and the parent(s).
- *R v Governors of St Gregory's RC Aided High School and Appeals Committee ex p M* [1995] ELR 290. (a) It was not necessary for the appeals panel to hear evidence directly from the primary witnesses, provided the excluded pupil knew the nature of the allegation against him, and so the headteacher was allowed to recite the evidence he had obtained from other witnesses, and (b) the excluded pupil should be allowed to give his account of events.
- *R v Newham LBC and Another ex p X* [1995] ELR 303. (a) Rules of fairness must apply to the appeal panel procedures, and (b) it was not unlawful for a headteacher, in appropriate circumstances, to use disciplinary action in relation to the behaviour of pupils towards each other off school premises.
- *R v Camden LBC and the Governors of the Hampstead School ex p H* [1996] ELR 360. (a) It was not necessary on every occasion for searching inquiries to be carried out, involving the calling of bodies of oral evidence, but once it was decided what factual

issues needed to be resolved, the consideration of those issues by the appeals panel needed to be reasonably thorough, and (b) consideration had to be given to the effect a direction to reinstate might have on the victim of the excluded pupil.

- *R v Solihull MBC ex p W* [1997] ELR 489. (a) The obligation on the appeals panel was to ask the right question and to take reasonable steps to acquaint itself with the relevant information to enable it to answer that question correctly, and (b) in appropriate cases, the appeals panel should take account of social difficulties and the previous behaviour of the excluded child.
- *R v Board of Governors and Appeal Committee of Bryn Elan High School ex p Whippe* [1999] ELR 380. (a) The behaviour of a parent towards a headteacher could be a relevant factor in a decision to exclude but only so far as it may have affected the future behaviour of the pupil, and (b) guidance contained in DfEE circulars should be taken into account, but the mere fact that the guidance was not specifically referred to would not be a problem if it was clear from the appeal panel's decision that a particular factor was taken into account.
- *R v Headteacher and Independent Appeal Committee of Dunraven School ex p B (a child)* [2000] ELR 156. Although appeal panels were not criminal courts, the principles of natural justice required that they should ensure that pupils, through their parents, should know the allegations against them. It would also be a breach of natural justice for the appeals panel to have access to material which had not been shown to the pupil.

D. LEAs and the Courts

Introduction

There is no doubt that LEAs and schools have never before been subject to such close scrutiny by the courts, and the perception that more and more time is being spent defending actions or decisions which would not have previously been challenged extends throughout much of the education profession.

Decisions of the courts clearly do play a significant part in both guiding LEAs as to what they can and cannot do and in holding LEAs to account where they either infringe some public law right or else commit a wrong in private law which leads to a claim for compensation from an aggrieved parent or pupil.

Although the amount of litigation has probably never been matched, it would be untrue to say, however, that litigation against teachers, governing bodies and LEAs is a recent phenomenon. From around 1910 onwards, LEAs have been sued with increasing regularity and the courts were required to consider such matters as injuries caused by defects in playgrounds (*Ching v Surrey County Council* [1910] 1 KB 736) and 14-year-olds attending a teacher's fire (*Myth v Martin and Kingston upon Hull Corporation* [1911] 2 KB 775).

The courts have therefore been involved, almost since the inception of LEAs, in assessing claims for compensation. It would be wrong, however, to suggest that courts were involved only in claims for damages. Albeit rarely, LEAs have found themselves before the criminal courts and with the relatively recent evolution of judicial review, LEAs are now more likely to be challenged in the High Court for following incorrect procedures or acting outside their powers, or, from October 2000, for failing to comply with the Human Rights Act 1998.

In recognition of these three types of cases, the interrelationship between the courts and LEAs will be dealt with under three headings:

- ◆ Criminal liability
- ◆ Civil liability – enforcement of “public law rights”
- ◆ Civil liability – enforcement of “private law rights”.

Criminal liability

Fortunately, the occasions where LEAs, and more particularly chief education officers, find themselves in front of criminal courts are rare. Nonetheless, more frequently than is perhaps thought, local authorities are brought before the courts on criminal charges. Prosecutions under the Environmental Protection Act 1990 for statutory nuisances are not uncommon and LEAs have been found guilty following incidents such as the leaking of fuel oil from school storage facilities. In Liverpool, some of the LEA's pupils even went so far as to prompt the prosecution of the LEA over the state of disrepair of their school.

The responsibilities as between LEAs and governing bodies under the health and safety legislation have been discussed above, but it is not inconceivable that charges could be laid against either the LEA or a governing body if an accident were to occur which infringed the criminal provisions of the Health and Safety at Work etc. Act 1974 or the regulations made under it.

The responsibility of incorporated bodies, such as local authorities, and their senior officers and members for both direct and vicarious criminal acts is notoriously complex and outside the scope of this book. Although chief education officers should not panic, it is however possible that in certain cases they could be held responsible for more serious offences, particularly in the event of a fatal accident. The charge of corporate manslaughter, although fortunately rarely arising, can be levelled against local authorities and their senior officers and it is the area of outdoor activities in particular where it may be used were an accident to occur. The operators of the activities centre responsible for the children involved in the Lyme Bay canoeing tragedy were tried and found guilty; it is not inconceivable that, were an accident to occur in an LEA-maintained centre, similar charges might be brought. The Activity Centres (Young Persons' Safety) Act 1995 will, however, hopefully attempt to ensure that similar accidents do not arise.

Civil liability

The distinction between public law and private law rights has been the subject of considerable judicial thought and academic debate which could take up a textbook in itself. For our purposes, we will adopt a simplistic distinction. Public law actions are those where an individual seeks to enforce statutory rights or challenge statutory powers. Private law actions are those where an individual seeks to secure compensation for a breach of a statutory or common law duty which the LEA owes directly and personally to that individual. An even more simplistic distinction might be between those cases where a person seeks to obtain a court order either requiring an LEA to do something or cease doing something (public) and those cases where a person seeks damages or compensation for injury he or she has suffered at the LEA's hands (private).

Civil liability – enforcement of public law rights

Throughout this book, we have been identifying and considering the various statutory duties and powers which Parliament has given to LEAs. Where LEAs either fail to perform a statutory duty or exercise a statutory power in breach of normal administrative law principles, the only option open to an aggrieved parent or pupil, apart from the statutory complaints procedures outlined above, is to seek judicial review of the LEA's action or inaction.

Judicial review

Judicial review is the means by which the High Court exercises a supervisory jurisdiction over the activities of public bodies. It needs to be remembered that judicial review is not an appeal mechanism or an

opportunity for the court to examine the merits of a decision. Those are matters for statutory appeal.

As the courts cannot intervene in the merits of a particular case, it is important to recognise the circumstances when a court can interfere. Often reference is made to principles of “*Wednesbury* unreasonableness” or irrationality. What this means is that the courts can intervene only where an LEA has acted outside its powers or, in Latin terms, *ultra vires*. This does not, however, mean that an LEA acts unlawfully only when it fails to comply with a particular duty; the principles have been interpreted to ensure that when exercising discretionary powers the court has an equal supervisory jurisdiction.

The summary of the principle was first set out by Lord Greene in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, when he said “the exercise of... a discretion must be a real exercise of the discretion. If, in the statute confirming the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters.”

Lord Greene felt that the word “unreasonable” had often been used to cover a wide range of unlawful administrative acts as a general description of things that must not be done. “For instance a person entrusted with a discretion must... direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider... Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority... Warrington LJ in *Short v Poole Corporation* [1926] Ch. 66 gave the example of the red-haired teacher, dismissed because she had red hair... It is so unreasonable that it might almost be described as being done in bad faith and, in fact, all these run into one another...”

Lord Greene summarised the position as follows:

“The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible

to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them."

The principles were again considered in the *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374. Lord Diplock identified 3 principles: "illegality", "irrationality" and "procedural impropriety".

- "Illegality" means that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it.
- "Irrationality" was, in Lord Diplock's view, the equivalent of "*Wednesbury* unreasonableness" and applies to a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it.
- Finally, "procedural impropriety" covers a failure to observe procedural rules that are expressly laid down in the statutory framework and which regulate the decision under challenge and also a failure to observe the basic rules of natural justice or to act with procedural fairness.

With the introduction of the Human Rights Act 1998 in October 2000, however, it may be necessary to extend these general principles to include as another ground of challenge that an authority has acted in a way which is incompatible with one or more of the European Convention on Human Rights rights ("Convention Rights").

The 1998 Act will require all primary and subordinate legislation to be read and given effect in a way which is compatible with the Convention Rights listed in the Schedule to the Act, so far as it is possible to do so (s. 3(1) Human Rights Act 1998). More importantly for LEAs, the Act renders it unlawful for public authorities to act in a way which is incompatible with one or more of the Convention Rights (s. 6(1)).

What the actual effect of the 1998 Act will be in the education field has been the subject of much debate and dispute. Although warnings have

been given that the Act could change the culture of decision making in local authorities, warnings of significant litigation and liability should perhaps be regarded with the same scepticism as the “Millennium bug”. The principal Convention Rights which will affect education are likely to be:

- Article 6 – The right to a fair trial, which provides that everyone, in the determination of his civil rights and obligations, is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment should be given in public, but the press may be excluded in certain specified circumstances.
- Article 8 – The right to respect for private and family life, which includes the right to respect for a person’s home and correspondence.
- Article 9 – Freedom of thought, conscience and religion, which can be limited only in a way prescribed by law and necessary for reasons of public safety, public health or morals, public order or the rights or freedom of others.
- Article 10 – Freedom of expression, by which everyone is entitled to the rights of freedom of expression and to receive and impart ideas without interference.
- Article 14 – Prohibition on discrimination. This is not a stand-alone Convention Right but provides that the enjoyment of other Convention Rights should be secured without discrimination on the grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
- First Protocol, Article 2 – No one shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the state shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Although the last Convention Right appears to be most relevant to LEAs as it specifically talks of the right to education, it may not be the most influential right or indeed the one most likely to be cited in any challenge. This is because the right is subject to a derogation secured by the United Kingdom Government which provides that the right only applies “only in so far as it is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public

expenditure”, i.e. the same qualification which applies to the obligation to educate children in accordance with their parents’ wishes in s. 9 of the Education Act 1996.

The right enshrined in Article 6 may also be of relevance to LEAs, particularly with regard to admission and exclusion appeals. To fall within the Article, however, the aggrieved citizen must show that there has been a determination of his “civil rights or obligations”. At first sight it would appear natural to assume that the admission or exclusion of a child would be a matter involving that child’s civil rights. The European Court of Human Rights, however, took a different view in *Simpson v United Kingdom* (1989) 64 D & R 188. This case concerned a dyslexic child who complained at an LEA’s decision not to place him in a special school. The child had appealed to an old-style local appeal panel, in the days before the Special Educational Needs Tribunal, which had dismissed his appeal. The Commission held that the right not to be denied education was not a civil right within Article 6, and thus the requirement for a fair and impartial hearing, etc. was not a requirement under the Convention. Given the similarity between old-style special educational needs review panels under the Education Act 1981 and the current admission and exclusion appeal panels under the School Standards and Framework Act 1998, it would seem that, on the basis of the *Simpson* case, Article 6 would not apply.

However, the decision in *Simpson* is quite old in terms of the development of education law and the rights of parents and pupils under UK law and it may well be that the English courts will not follow the decision. In *R v Governors of Stoke Newington School and Others ex p M* [1994] 131 the court, by treating appeal panels as quasi-judicial bodies, perhaps gave warning that providing a place at school should be considered as more than a mere administrative function.

If the courts do ignore *Simpson*, the other condition of Article 6, that there shall be a “determination”, should apply to admission and exclusion appeal panels as their decisions are final, with no appeal mechanism built in. This contrasts with, for example, the SEN Tribunal where a statutory right of appeal is available. This is important as previous Convention case law suggests that certain tribunals need not follow the Article precisely provided that at some stage there is the opportunity for the civil rights or obligations to be determined by a truly independent and impartial arbitrator, which, in the case of the SEN Tribunal, will be the High Court. No such appeal mechanism is available in the case of appeal panels so it seems likely that Article 6 will apply, a potential problem especially when one of the parties, the

LEA, appoints the panel. Another ground, which commentators believe may be used to show that appeal panels are Convention-compliant, is the fact that decisions of appeal panels can be challenged by judicial review. The problem with this view is that a court in a judicial review cannot look at the merits of the case. It can only consider the procedure. It is still to be determined if that supervisory role is enough to satisfy the requirements of Article 6.

Any action, or failure to act, on the part of an LEA which infringes a person's Convention Rights can lead to challenge by way of judicial review or, if proceedings are being brought by the LEA against the aggrieved individual, can be raised by way of collateral challenge to those proceedings. In principle, the Human Rights Act 1998 will allow individuals aggrieved by breach of their Convention Rights to seek damages but damages recoverable under the Act are significantly limited. In comparison to damages recoverable under private law actions, the amounts which may be awarded will be significantly less and consequently any damages claim for breach of Convention Rights is likely to be made in types of proceedings other than judicial review.

Although some elements of the European Convention have started to creep into UK law (see, for example, the decision of the House of Lords in *Barrett v Enfield LBC* [1999] 3 WLR 79), with one exception, the majority of the jurisprudence on the Convention Rights is found in decisions of the European Commission and Court of Human Rights. But, in the education field, even this is of little help as there have been comparatively few decisions involving education, under either Article 2 of the First Protocol or the other Articles. Those cases which have been decided, include:

- *Simpson v UK* – see above.
- *The Belgian Linguistics Case* (1979-80) 1 EHRR 252. Article 2 to the First Protocol guarantees a right of access to educational institutions and teaching which exists in a state. It does not require the state to establish at state expense, or to subsidise, education of a particular type or at any particular level. In other words, where a parent has a particular philosophical view about the way their child should be taught, the Convention does not require the establishment at public expense of tuition or schooling to ensure that those views are met.
- *Sulak v Turkey* [17 January 1996]. The Convention does not prevent a state introducing rules to allow the suspension or expulsion of pupils.

- *Costello-Roberts v UK* [1994] ELR 1. Corporal punishment in independent schools did not infringe the Convention and did not amount to degrading or inhumane treatment.
- *Vogt v Germany* [1996] ELR 232 Consideration of the legality of dismissing a teacher because of her political activities.
- *X v United Kingdom* (application 7782/77, unreported). There is no positive obligation on the state to subsidise any particular form of education in order to respect the religious and philosophical beliefs of parents. It is sufficient for the state to evidence respect for the religious and philosophical beliefs of parents within the existing and developing system of education.
- *Valamis v Greece* [1998] ELR 430. Parents who were Jehovah's Witnesses requested that their daughter be excused from school RE lessons and any event which was contrary to their religious beliefs including national celebrations. The pupil refused to take part in a school parade on a national day and was punished with a one-day suspension. The parents claimed a violation of Article 2 of the First Protocol. The court held that there was no breach of Article 2 of the First Protocol on its own but there was a breach of the Convention as there was no mechanism in Greek law to enable the parents to seek redress for what they perceived to be a breach of Article 2 of the First Protocol.
- *R v Department of Education and Employment ex p Begbie* [1999] ELR 471. A case before the English courts in which it was held that Article 2 of the First Protocol did not guarantee a right to an assisted place.

Given the lack of guidance in these cases, the true effects of the Human Rights Act will therefore have to await the litigation which is likely to follow the Act's introduction on 2 October 2000.

The judicial review process

Only those with "sufficient interest", often referred to as those persons having *locus standi* in a matter, can make an application to the court. Within the educational field, it is usually quite clear whether a parent or a parent taking action on behalf of their child has sufficient interest in a decision of an LEA.

The Court may, in certain circumstances, decline to allow a judicial review to go ahead if alternative statutory remedies are available. This immediately produces an issue in the educational field where the

Secretary of State retains default powers to deal with complaints about the performance of an LEA. Generally, the courts will take the view that only in exceptional circumstances will a judicial review be allowed if a suitable, effective alternative remedy is available. For example, in *R v Newham LBC ex parte R* [1995] ELR 156, it was held that the appeal mechanism to the Secretary of State was more appropriate and effective than judicial review. Similar principles were applied in *R v Special Educational Needs Tribunal ex parte F* [1996] ELR 213, where it was held that there must be exceptional circumstances for a judicial review of the SEN Tribunal to be allowed, if there was an alternative, statutory right of appeal. Some judges, however, are stricter in the application of these principles than others and there have been cases, particularly where concern has been expressed at the delay inherent in a complaint to the Secretary of State, where judicial review has been allowed to go ahead in spite of the alternative statutory remedies. Other examples of the court's ignoring alternative remedies have arisen where the court has decided that matters of law arise which the court and only the court can interpret or decide (see, for example, *R v Barnet LBC ex part B* [1994] ELR 357).

Judicial reviews should be brought promptly after the decision being challenged but in any event within three months from the date of the decision or failure. The period can be extended but exceptional grounds need to be shown. If the court believes that there has been undue delay, it may refuse to allow permission for a judicial review to go ahead or may refuse relief if it considers that to do so would be likely to cause substantial hardship to or substantially prejudice the rights of any person or would be detrimental to good administration (s. 31(6) Supreme Court Act 1981).

Judicial review consists of a two-stage process. The first is an application for permission. At this point, it is necessary for the claimant to show that they have an arguable case and for the court to be convinced that they have sufficient interest and are not vexatious. The application for permission is usually heard *ex parte* and the public body whose action is under challenge is not notified of the application. If permission is granted, the second stage, a full hearing, follows, at which both the applicant and the challenged authority present their cases.

A number of discretionary remedies are available to the court, including (and the terminology has survived the attempts by Lord Woolf to modernise legal language) the following:

- certiorari – an order that the decision under challenge be quashed, often followed by an order that the matter should be remitted back

for the body to reach a conclusion in accordance with the court's findings

- mandamus – an order requiring the performance of a specified act or duty. This is normally only granted where the authority is under an absolute duty to do something or else the facts make it clear that the authority concerned has failed to perform its duty at all
- prohibition – an order which prevents the authority concerned acting or continuing to act unlawfully
- declaration – which is as it says simply a declaration by the court of the law and/or the rights of the parties concerned
- injunction – an order restraining a particular act or acts
- damages – an order very rarely made in judicial review proceedings. It can be awarded only if the court is satisfied that if a claim had been brought in a private law action the applicant would have been entitled to damages. In practice, because of the short time limits, it is rarely possible to provide evidence to support a claim for damages; therefore, applicants normally pursue compensation by way of private law remedies.

Judicial reviews brought against LEAs have been numerous and although most have concerned children with special educational needs, virtually all areas of LEA responsibility have, at one time or another, been considered. Most of the important decisions affecting the functions of LEAs have been considered under the relevant sections in this book. The following, less well-known judgments, provide a brief illustration of the types of cases which the courts have considered in judicial review proceedings.

- *R v Hampshire County Council ex parte Martin* (1982) Times, 20 November – the court reviewed the decision of the LEA concerning the ordinary residence of a minor who had applied for an educational award. (The LEA had misinterpreted the rules of ordinary residence.)
- *R v Secretary of State for Wales and Clwyd County Council ex parte Russell* 28 June 1983, unreported – whether objectors to a statutory proposal to modify a school were entitled to see the response to their objections. (They were not.)
- *R v Hertfordshire County Council ex parte Cheung* (1986) Times, 4 April – challenge to an LEA's interpretation of the ordinary residence of an applicant for a mandatory award. (The challenge was successful.)

- *R v Liverpool City Council ex parte Professional Association of Teachers* (1984) 83 LGR 648 – a review of a decision of the LEA to remove the PAT from the LEA’s recognised negotiating bodies. (The decision of the LEA was invalid and an injunction was granted.)
- *R v Liverpool City Council ex parte Ferguson* (1985) Times, 20 November – challenge to the decision of the LEA to issue notices of dismissal to all teachers and headteachers. (As the dismissals followed a decision to set an illegal rate, they were not for educational purposes and were in breach of the LEA’s statutory duties.)
- *R v Hampshire Education Authority ex parte J* 28 November 1985, unreported – challenge to the LEA’s decision that dyslexia did not constitute a “learning difficulty”. (It did.)
- *R v Kirklees MBC ex parte Molloy* (1987) Independent, 28 July – challenge to a decision to close a school with the court examining what was meant by a duty to consider a report from an education committee and what such a report needed to contain. (It needed to be reasonably self-explanatory.)
- *R v Croydon LBC ex parte Leney* (1986) 85 LGR 466 – meaning of “persons of experience in education” in the context of appointing education committee members.
- *R v Lancashire County Council ex parte M* [1989] 2 FLR 279 – whether an LEA was under a duty to provide speech therapy. (It was.)
- *R v Greenwich LBC ex parte Governors of the John Ball Primary School* [1990] Fam Law 469 – legality of an admissions policy which discriminated against out-of-LEA-area pupils. (It was not lawful.)
- *R v Brent LBC ex parte Assegai* (1987) Times, 18 June – whether a governor had been removed from office fairly in accordance with correct procedures. (He had not.)
- *Brunyate v ILEA* [1989] 2 All ER 417 – whether governors had been removed unlawfully by an LEA. (They had not.)
- *R v Camden LBC ex parte S* (1990) Times, 7 November – whether an appeal hearing could adjourn and resume with different members. (It could not.)

- *R v Bradford MBC ex parte Sikander Ali* (1993) Times, 21 October – whether an LEA could take account of traditional links between primary and secondary schools especially if it discriminated against ethnic minorities. (It could.)
- *R v Northamptonshire County Council ex parte K* (1993) Times, 27 July – challenge to school closure on grounds it might cause potential sex discrimination. (The decisions of the LEA and Secretary of State were not unreasonable or unlawful.)
- *R v Lancashire County Council ex parte West* 27 July 1994, unreported – whether allotting places at schools by lottery was lawful. (Surprisingly, the Judge agreed that it was.)
- *R v East Sussex County Council ex parte Tandy* [1998] ELR 251 – legality of blanket reduction in hours of home tuition provided. (The arbitrary reduction as part of a cost cutting exercise was unlawful.)

Civil liability – enforcement of private law rights

Introduction

Having considered the public law aspects of the LEA's functions and the remedies available, it is now necessary to turn to the private law liabilities of LEAs.

Local authorities, and LEAs in particular, enjoy no special status in law and may be held liable in the courts for damages if they infringe the private law rights of individuals or other organisations.

LEAs will owe obligations under their contracts and like any other organisation or person will be directly liable for certain wrongful actions, as well as assuming vicarious liability for their employees' wrongs. This section will therefore examine these issues, although, given the emphasis on claims for compensation in recent years, particular attention will be paid to the tortious liability of LEAs.

Contracts

An LEA, as part of a local authority, has a general power to enter into contracts for the discharge of any of its functions (s. 111 Local Government Act 1972). In a number of Acts, specific power to contract is given (for example, the power to contract with careers service providers for a limited period (s. 10A Employment and Training Act 1973)). Under the Local Authorities (Goods and Services) Act 1970, a local authority can enter into agreements with a number of prescribed

public bodies for the authority to supply goods, materials, services, transport and equipment and to carry out maintenance work. Included within the prescribed bodies are, for example, Education Action Forums (by virtue of para 2 of Schedule 30 to the School Standards and Framework Act 1998) and institutions within the further and higher education sectors (by virtue of para 71 of Schedule 8 to the Further and Higher Education Act 1992).

The decision of the Court of Appeal in *R v Yorkshire Purchasing Organisation ex p British Educational Suppliers Ltd* [1998] ELR 195 confirmed that LEAs either individually or through trading consortia could enter into contracts with, what were then, schools with delegated budgets under local management. As the Court recognised, to decide otherwise would have meant that LEAs could enter into contracts with grant-maintained and independent schools (which were prescribed public bodies) but not the LEA's "own" schools. It is submitted that this decision will be of equal effect with regard to all maintained schools following the introduction of the School Standards and Framework Act 1998.

Another issue, which affected local authority contracts in the 1990s, was the problem of some contracts being subsequently held by the courts to have been outside the local authority's powers. This particularly applied to a series of cases where local authorities had entered, on the financial markets, into contracts which had gone very wrong, leaving the authorities facing huge debts. To avoid paying these debts, a number of authorities successfully argued that the original contracts had been outside their powers and unlawful. If the contracts were unlawful, they were void *ab initio* and therefore the other party to the contract could not recover the sums due to them.

Not unnaturally, this prompted considerable concern about the contractual reliability of local authorities. To meet these concerns, the Local Government (Contracts) Act 1997 was introduced. The Act makes clear that local authorities have power to enter into contracts with others for the provision or making available of assets, services or both (s. 1(1)). The Act also allows local authorities to enter into certain finance contracts, but to protect the other party from the local authority subsequently reneging on the contract, a contract certification procedure is introduced (s. 2). Once certified, the contract has effect as if the local authority had power to enter into it and had exercised that power properly (s. 2(1)). Thus, in principle, provided a contractor has a certificate from the local authority, there should be no question of the authority arguing at a later stage that the contract was unlawful and therefore void.

The contractual provisions set out above are of specific application to local authorities including LEAs. Within this work, however, we could not hope to deal with the general principles of contract law and, therefore, on issues of the contractual liability of LEAs, reference should be made to the general works on the subject.

Torts

A tort is a civil wrong, the redress for which is usually in the form of legal action for damages or an order of the court, such as an injunction. Although the most common types of action are for breach of statutory duty and/or negligence, this area of the law embraces such matters as trespass to persons, goods and land, nuisance, defamation and misfeasance in public office.

Before turning our attention to actions for negligence and/or breach of statutory duty, we will first briefly consider the other types of tort and the potential for their commission by LEAs.

It is first necessary, however, to examine the difference between the direct liability of LEAs and their vicarious liability for the acts of their staff, a distinction which has been at times confusing, not least for the courts.

i) Direct and vicarious liability

In *X v Bedfordshire County Council*; *M (A Minor) v Newham LBC*; *E (A Minor) v Dorset County Council*; *Christmas v Hampshire County Council*; *Keating v Bromley LBC* [1995] 2 AC 633; [1995] ELR 404 (frequently cited or referred to as *X (Minors) v Bedfordshire County Council* or simply *X*), the House of Lords drew a distinction between the direct liability of a local authority and the liability which can be incurred vicariously for the acts of its employees in the context of claims for breach of statutory duties and/or negligence. Lord Browne-Wilkinson identified a number of areas where a local authority might owe direct duties of care to a claimant, either because the tort was committed through the action of the authority corporately (for example, as a result of a committee decision) or through the act of an officer which constituted a breach of a direct duty, an authority being able to act only through its servants in the majority of cases. These were, in his Lordship's view, to be distinguished from the separate, additional, usually professional duties, which an individual officer owed personally to a claimant and where the authority would not necessarily be directly liable, but where it would be vicariously liable. Indeed, in the education cases under consideration in *X*, the Lords held that vicarious liability, as opposed to direct liability, might arise in respect of the professional duties owed by educational psychologists and headteachers to pupils in their care.

In view of this “definitive” analysis of the differences, it is perhaps no wonder that people are confused. The distinction is, however, not so important in respect of the first categories of torts discussed below. It is when we consider negligence and breaches of statutory duties that it takes on an added significance and we will therefore return to the issue when we look at those torts.

ii) Trespass to persons

Trespass to persons covers a range of torts including assault, battery and false imprisonment. These are not usually committed directly by an LEA, but an LEA may find itself vicariously liable for its staff’s actions which constitute these torts.

Battery is the intentional and direct application of force to another person; assault is an act which causes another person to apprehend the infliction of battery upon him by that other person.

In the world of LEAs, these torts are of particular significance in the school setting where a number of claims have been made against teachers who have come into physical contact with their pupils for one reason or another. Corporal punishment, now outlawed, would clearly constitute battery, but what is often overlooked is that a mere touching can amount to the tort, a particular problem for staff in schools, especially where physical restraint may be required. To alleviate certain fears amongst school staff, s. 550A of the Education Act 1996 was introduced by the Education Act 1997. This section provides reassurance by making clear that any teacher who works at the school and any other person who, with the authority of the headteacher, has lawful control or charge of pupils at the school, may use reasonable force to prevent a pupil committing an offence, causing personal injury to himself or others or damage to property, or engaging in behaviour prejudicial to the maintenance of good order and discipline at the school or among any of its pupils. This power applies both to actions on the school premises and off site where the member of staff has lawful control or charge of the pupil. Guidance on the use of restraint by school staff can be found in DfEE Circular 10/98 *The Use of Force to Control or Restrain Pupils*.

LEAs are unlikely, if at all, to incur direct liability for assault or battery, but they may do so through the acts of their staff. However, there is always a fine line between civil assault and battery and a criminal act and if the teacher is guilty of deliberate criminal misconduct, the act will be outside the scope of the employee’s employment and the LEA will not be vicariously liable. For example, in *Trotman v North Yorkshire County Council* [1998] ELR 625, an LEA was held not to be vicariously liable for a sexual assault by a deputy headteacher on a

handicapped teenager in his charge whilst on an approved school trip abroad. Similarly, in *Lister v Hesley Hall Limited* (1999) *The Times*, 13 October, the employer (in that case, the proprietor of an independent school) was held not to be liable for sexual and physical assaults carried out on pupils by a teacher.

False imprisonment is another tort which would appear to be of little relevance to LEAs. However, claims have arisen in respect of the detention of pupils. In general terms, false imprisonment is the infliction of bodily restraint which is not expressly or impliedly authorised by law. In 1980, an attempt was made to claim false imprisonment in respect of a class detention, but in an unreported decision, the judge in the Blackpool County Court would have none of it and dismissed the claim on the grounds that the school had lawful authority to impose the punishment.

The position, though, became confused where parents refused to allow their children to take detentions. Could schools detain children against their parents' wishes? To avoid some of these problems, the Education Act 1997 tried to clarify the position by inserting a new section into the Education Act 1996 (s. 550B). This provides that where a pupil is required on disciplinary grounds to spend a period of time in detention at school after the end of the school day, his detention shall not be rendered unlawful by virtue of the absence of his parent's consent provided certain conditions are met (s. 550B(1)). These conditions are that the headteacher must have made generally known within the school and to all parents that detentions will be used; that the detention must be imposed by the headteacher or a teacher specifically authorised to do so; the detention must be reasonable in all the circumstances and the pupil's parent must have been given at least 24 hours notice in writing of the detention (s. 550B(2)). If these conditions are met, the headteacher, and vicariously the LEA, should have a defence to a claim for false imprisonment.

iii) Trespass to land

Trespass to land is the unjustified interference with the possession of land. This rarely affects LEAs, certainly not deliberately. On occasion, an LEA may accidentally trespass on the land of another, for example where there may be confusion over the boundary of a school. Usually, though, the trespass is committed against the LEA.

iv) Trespass to goods and conversion

Trespass to goods takes the form of a wrongful physical interference with a person's goods. Conversion is similar, but involves a dealing with the goods of a person so as to deny his rights in them, for example the wrongful taking of goods. Again, these are torts with which LEAs

will rarely be sued, but they may arise, vicariously, in the school environment when a teacher confiscates an item from a pupil. The usual defence, though, is that if the confiscation is justified, either because the possession of the item is against school rules or is detrimental to discipline in the school, the interference or taking of the item will not be wrongful and hence not unlawful.

Having taken possession, though, the goods will be considered as having been bailed into the care of the teacher. If the goods are then negligently lost or damaged, the teacher, and vicariously, the LEA will be liable.

v) Nuisance and *Rylands v Fletcher* liability

To many neighbours, schools are always a nuisance. However, the general noise and inconvenience caused does not normally constitute a nuisance in law. For there to be a nuisance in private law, there must be an unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with, it (*Read v Lyons & Co Ltd* [1945] KB 216). A school, provided that it has been established in accordance with the correct statutory procedure, should not therefore simply by being there constitute a nuisance as, even if it does interfere with a neighbour's enjoyment of their land, it will not be an unlawful interference. If however, an unlawful activity is committed on the school site which does so interfere, liability may arise.

A tort associated with nuisance is strict liability under the rule in the case of *Rylands v Fletcher* (1865) 3 H & C 774. This applies where a person for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes. That person must keep it at his peril and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. The case itself concerned the collection of water in a reservoir, which burst and flooded a neighbour's mines, but it has been subsequently applied to the escape of fire, oil, gas and in one, possibly unreliable case, the discharge of a "noxious person" (*Attorney General v Scott* [1933] Ch 89). A number of statutes provide a defence to a claim, for example, where water companies are required to construct reservoirs, but no such defences are likely to assist LEAs. Thus, for example if an oil tank on a school site were to leak and cause damage to adjoining property, the LEA may well be liable under this rule.

vi) Defamation

Defamation comprises the publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right-thinking members of society generally or tends to make them shun or avoid him. Libel is the written or broadcast form of the tort, slander the spoken form.

Although LEAs, as public bodies, cannot sue for defamation (*Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534), they can be sued either as an organisation if they publish defamatory material or, vicariously, if one of their employees in the course of his employment does so.

Certain defences are available, however, and these include justification (i.e. what was said was true), fair comment on a matter of public interest or that the statement was privileged. In the case of LEAs, the privilege most frequently relied on is the qualified privilege which arises where a statement is made in council or committee meetings or is made in circumstances where the maker of the statement is under a legal, moral or social duty to communicate the information in the statement to the recipient. If the statement is made maliciously, the privilege will not apply; otherwise the defence should stand to protect the maker and, if an employee of an LEA, the LEA from liability. Thus, for example, if a teacher were to pass on their concerns about a child to the social services department, they would enjoy the second type of qualified privilege. If, however, that statement were made maliciously, because the teacher did not like the child's parent, then the privilege would disappear.

vii) Misfeasance in public office

This tort is committed by a local authority and/or by individual officers where they perform an *ultra vires* act maliciously. The person acting needs to know that he or his authority had no power to act in the way against which complaint is made and that he either intended to injure or probably knew that so acting would injure the complainant. In recognition of the seriousness of the tort, the Court of Appeal (*Three Rivers DC v Governor and Company of the Bank of England (No. 3)* [1998] All ER 558) held that deliberate and dishonest abuse of power is necessary in every case in which misfeasance is alleged.

Where the tort is alleged against a decision of a council or committee, as opposed to the act of an individual, it is necessary to show that a majority of the members voting in favour of the decision did so with the object of damaging the claimant's interests (*Jones v Swansea CC* [1990] 1 WLR 1453).

To the authors' knowledge, a claim of misfeasance in public office has only been pursued against an LEA officer in one case (*Jarvis v Hampshire County Council* [2000] ELR 36; [2000] EdCR 1) where it was alleged that an LEA officer had committed the tort when arranging for a child with special educational needs to be placed in a special school. The Court of Appeal struck out the allegation as misconceived on the grounds that the placement was made, firstly, not by the officer

against whom the allegations were made, but by a multi-disciplinary panel and, secondly, because it was an abuse of the process of the court to make allegations of dishonesty which were inconsistent with all the known facts.

viii) Breach of statutory duty and/or negligence

The effect of this area of law on public authorities has troubled the courts over the last few years and a relatively high number of cases have been considered by the Court of Appeal and House of Lords. The liability of the police (*Hill v Chief Constable of West Yorkshire* [1989] AC 53), ambulance services (*Kent v Griffiths* 3 February 2000, unreported), fire services (*Capital and Counties v Hampshire County Council* [1997] 2 All ER 865, (1997) 95 LGR 831), highway authorities (*Stovin v Wise (Norfolk County Council (Third Party))* [1996] AC 923) and social services (*X v Bedfordshire County Council* [1995] ELR 404) have all been subject to judicial scrutiny, but, unfortunately, not necessarily with consistent or unambiguous conclusions.

The same can be said of those cases which have addressed the alleged failings of schools and LEAs. Add to this a number of cases which have been decided as “strike out” applications, i.e. without the courts having the benefit of seeing any evidence, and the whole question of the liability of public authorities for breach of statutory duty and/or common law negligence becomes incredibly difficult to fathom.

X v Bedfordshire County Council [1995] ELR 404 is the starting point for an understanding of this whole area of law, even if its effects have been limited by subsequent decisions, such as *Phelps v Hillingdon LBC* [1998] ELR 587.

a) Breach of statutory duty

On the issue of breach of statutory duty, *X* is the leading authority. As reference to this decision recurs throughout this section, it is worth examining the facts, such as there were, involved in this decision.

X was five cases in one, two involving claims against social service authorities and three against LEAs. The social services cases concerned allegations in *Bedfordshire* that social workers had failed to take action to protect children at risk of abuse and in *M v Newham LBC*, perhaps showing how social workers can never win, that children were taken into care when they should not have been. The three education cases, *Christmas v Hampshire County Council*, *E v Dorset County Council* and *Keating v Bromley LBC*, involved claims respectively against a headteacher and advisory teacher for failing to spot and address a child’s dyslexia, an educational psychologist on similar grounds and an LEA for placing a child in a special school and not mainstream education.

In all five cases, the claims were based either on breaches of statutory duties by the various authorities and/or negligence on the part of the authorities and/or their staff.

So far as breach of statutory duties was concerned, Lord Browne-Wilkinson, in the leading judgment, made clear that the circumstances in which such claims could be successfully pursued would be rare. "The basic proposition", he said (at p. 415), "is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action." Thus if an LEA were to breach any of the various duties we have discussed in this book, although it might lead to challenge by way of judicial review, it would not normally lead to a claim for damages. "However," Lord Browne-Wilkinson continued, "a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty... [I]t is significant that [we] were not referred to any case where it had been held that statutory provisions establishing a scheme of social welfare for the benefit of the public at large had been held to give rise to a private right of action for damages for breach of statutory duty. Although regulatory or welfare legislation affecting a particular area of activity does in fact provide protection to those individuals particularly affected by that activity, the legislation is not to be treated as having been passed for the benefit of those individuals but for the benefit of society in general... The cases where a private right of action for breach of statutory duty have [*sic*] been held to arise are all cases in which the statutory duty has been very limited and specific as opposed to general administrative functions imposed on public bodies and involving the exercise of administrative discretions."

On this basis, in the education cases, the House of Lords struck out a claim that the LEA in the *Bromley* case had been in breach of the relevant education legislation. The Lords held that a claim that an LEA had failed to provide sufficient school places, contrary to what is now s. 14 of the 1996 Act, could not give rise to a private law claim for damages. Lord Browne-Wilkinson also held that, although the legislation relating to children with special educational needs protected individual children (at p. 454), Parliament did not intend to give those children a right of action for damages if the duties in the legislation were not met.

As a consequence of the Lords decision, it is therefore unlikely that many claims will succeed against LEAs for breach of their statutory duties. This position was confirmed in *Holtom v Barnet LBC* [1999] ELR 255, where it was held that an alleged breach of the duties in

respect of children with special educational needs in the 1996 Act could not give rise to a private right of action for damages.

The occasions when an LEA will be sued for a direct breach of its statutory duties are therefore likely to be rare. To stand a chance of succeeding, a claimant must be able to show that Parliament has imposed the statutory duty for the benefit of a limited class of the public and intended that breach of that duty should lead to a claimant having a private right of action for damages. Given the circumstances considered in *X* and *Holtom*, it is suggested that few claims (if any) for breach of statutory duty will be successful against an LEA. Claims for negligence are, however, a different matter.

b) Common law negligence

In simple terms, negligence is the breach of a duty to take care which results in damage. For the tort to arise, the damage must result from a duty which the law will impose, there must have been a breach of that duty and damage or injury must result from that breach.

So far as establishing a duty of care is concerned, the law will not impose duties on all occasions. The circumstances where duties may arise were outlined by Lord Atkin in the landmark case of *Donoghue v Stevenson* [1932] AC 562. "You must", he said, "take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts and omissions which are called in question."

Even if a duty of care can be established, a claimant then needs to show that there has been a breach of that duty. This is where the concept of "the reasonable man" comes in and, in most cases, the test is whether there has been "an omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs [in more modern language, in all the circumstances], would do, or doing something which a prudent and reasonable man would not do" (*Blyth v Birmingham Waterworks Co* (1856) 11 Ex 781).

This principle is slightly modified where the actions of professionals (for example, doctors, psychologists, solicitors and headteachers) are called into question. In these cases, the so-called *Bolam* test applies. Thus the standards to be applied in these circumstances are not those of the ordinary man, but the standards of reasonably competent fellow professionals at the time (*Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582).

Assuming that a duty is owed and that there has been a breach of the duty, damage of a type recognised by law has to be thereby caused. This therefore requires a claimant to show that the act or omission which constitutes a breach of duty caused the injury for which the claimant is seeking compensation and was not so remote that it could not have been a contributory factor.

The claimant must also show that physical damage resulted and, except in a very few cases, that economic loss was not the only consequence of the act or omission. This latter point causes some difficulties but is important in the context of the educational cases discussed below. An example was provided in *Murphy v Brentwood DC* [1991] AC 398, where it was alleged that the local authority had negligently approved defective building plans, causing a reduction in the value of the claimant's house. It was held that a duty of care could be owed in respect of personal injury or damage to property arising from a defect (i.e. physical damage), but no such duty was owed to those who acquired the house and suffered economic loss because of the effect of the defects on its value. Only if the local authority had accepted some additional responsibility, akin to that of an independent surveyor retained by a purchaser, would the local authority have been liable for any such economic loss. As it was, all it had done was carry out its statutory functions and no more and that could not give rise to any liability for the diminution in value.

Those, then, are the general principles applying in "simple" cases of negligence. Needless to say, negligence, so far as it affects local authorities, and LEAs in particular, is not so simple. This is principally because a number of other factors come into play to recognise the discretionary nature of much decision-making and public policy issues concerning the imposition of liability on public bodies.

These factors contributed to the general analysis by Lord Browne-Wilkinson in *X* of the circumstances where liability for common law negligence might arise in respect of local authority functions. His Lordship (at p. 418) identified three categories of situation where a common law duty of care (i.e. the first requirement of negligence) might arise:

- 1) where a statutory duty gives rise to a common law duty of care owed to a claimant by a local authority to do or refrain from doing a particular act;
- 2) where, in the course of carrying out a statutory duty, a local authority has brought about such a relationship between itself and the claimant as to give rise to a duty of care at common law; or

- 3) where, whether or not the authority is itself under a duty of care to the claimant, its officers or employees in the course of performing the statutory functions of the authority were under a common law duty of care for a breach of which the authority would be vicariously liable.

Whether duties will actually arise in these circumstances will depend on a number of other factors.

- a) Under categories (1) and (2) above, it is possible that common law duties of care may arise in the performance of statutory functions, but a distinction has to be made between, first, cases in which it is alleged that the authority owes a duty of care in the manner in which it exercises a statutory discretion (for example, a decision whether or not to exercise the discretion to close a school) and, secondly, cases in which a duty of care may arise from the manner in which the statutory duty has been implemented in practice (for example, the running of a school pursuant to statutory duties). In the first case, no common law duty of care should arise, but in the second case it will.
- b) A local authority cannot be held liable for doing what Parliament authorised in legislation. To establish liability for negligence in the exercise of a discretion, it is necessary to show that the decision was outside the ambit of the discretion altogether; if it was not, a local authority cannot itself be directly in breach of any duty of care.
- c) A common law duty of care in relation to the taking of decisions involving policy matters cannot exist, for Parliament will have conferred the discretion on the authority not the courts. Nothing which falls within the ambit of the statutory discretion can be actionable. If the matter complained of falls outside the statutory discretion, it may give rise to liability. If, however, factors relevant to the exercise of the discretion include matters of policy, the court cannot adjudicate on such policy matters and therefore cannot reach the conclusion that the decision was outside the ambit of the statutory discretion.
- d) If, however, the allegations concern negligence, not in the taking of a discretionary decision to do some act but in the practical manner in which that act has been performed, the question of whether or not a common law duty of care arises is determined by the general principles.
- e) In circumstances where no direct duty of care arises, local authorities may be vicariously liable for the acts or omissions of their officers and employees. However, where there is no allegation of a

separate “professional” duty of care being owed by an individual employee, the negligent acts of that employee are only capable of constituting a breach of a duty of care (if any) owed directly by the authority to the claimant. This follows from the fact that the authority can act only through its staff.

Although Lord Browne-Wilkinson’s judgment was intended to be a definitive statement of the duties of care that may be imposed on public authorities, it is fair to say that it has caused some confusion and a number of other cases have had to be considered by the higher courts in order to flesh out the basic principles, not all either successfully or consistently. For example, it is hard to see why a firefighter who decides not to attend a fire is immune from liability for his inaction, but a firefighter who risks his life trying to deal with a fire, but gets it wrong, can be held liable (*Capital & Counties v Hampshire County Council* [1997] 2 All ER 865, (1997) 95 LGR 831) or why an ambulanceman can be held liable for both not attending and for making a mistake whilst tending a patient (*Kent v Griffiths* 3 February 2000, unreported).

Further discussion on this topic, though, is a matter for academics and works on the general liabilities of local authorities. It is, though, important to look at the, albeit confused, general principles in order to help understand specific issues, but what really matters in context of this work is the effect this all has on the liability of LEAs.

Negligence cases involving LEAs can best be split into two categories: (1) cases involving physical injury and (2) cases where the allegation is of educational malpractice leading to an inadequate education or attainment (sometimes referred to as “educational well-being” or educational malpractice cases).

1) Physical injury

The first category is relatively straightforward. Such cases have been brought successfully against LEAs for years; they all arise from operational actions, so there is no need to worry about the ambit of statutory discretions and there is usually clearly ascertainable injury. If a chemistry teacher poisons a whole classroom by combining the wrong chemicals, reference to Lord Browne-Wilkinson’s carefully reasoned judgment is somewhat redundant.

In these cases, the duty can best be expressed as a duty to take reasonable care for the health and safety of pupils (and, for that matter, other employees and visitors). In certain circumstances, the duty may extend to require the taking of positive steps to protect a pupil from physical harm (see *Hippolyte v Bromley LBC* [1995] PIQR 309).

The standard of care to which all staff must aspire in cases of physical harm (as opposed to educational malpractice cases where the standard is different) is that of a careful and/or reasonable parent (*Williams v Eady* (1893) 10 TLR 41; *Rich v London County Council* [1953] 2 All ER 376 and *Martin v Middlesbrough Corporation* (1965) 63 LGR 385). The standard should, though, take account of the fact that a teacher will, unlike the reasonable parent, usually be responsible for a whole class or a large playground (*Beaumont v Surrey County Council* (1968) 66 LGR 580 and *Lyes v Middlesex County Council* (1962) 61 LGR 443). The courts have also been disinclined to “wrap children in cotton wool” or require schools to be turned into secure fortresses (*Nwabudike v Southwark LBC* [1997] ELR 35).

Much press interest has recently been raised by claims for injury caused by bullying with one case involving Richmond LBC being settled by insurers (“Bullying case may bring new claims”, *TES*, 22/11/1996). As it is part of a teacher’s duty to take reasonable steps to protect pupils from injury (see *Beaumont v Surrey County Council* (1968) 66 LGR 580), there is no reason why bullying claims will not succeed if, for example, supervision has been negligent. However, although schools are required to have anti-bullying policies, these claims should not fall into any special category, but will be considered in line with the general principles.

Despite attempts to claim the contrary, duties of care may extend beyond the school gate and beyond the school day. Obviously, duties of care arise during break and lunchtimes in respect of the adequacy of supervision for ensuring safety, and similar duties will be owed when ensuring the safe arrival and departure of children. In *Barnes v Hampshire County Council* [1969] 3 All ER 746, it was held that a school, which had released a class of five-year-olds five minutes before the end of the school day, was negligent.

If a school or LEA arranges school transport, it will be under a duty to take reasonable care of the children during the journey, including entering and exiting from vehicles. Organised school trips will also involve similar duties, but, given the potentially dangerous nature of some activities, greater supervision may be required as the potential for injury may be greater (as shown by, for example, the Lands End and Lyme Bay tragedies).

A number of the cases involving injury to pupils have been discussed in the Chapter 5 (on schools and school buildings and injuries to staff; for example, *Purvis v Buckinghamshire County Council* [1999] ELR 231 and *Moore v Kirklees MBC* 30 April 1999, unreported). The

following, however, provide examples where the duties of care owed by teachers to protect pupils from harm, and vicariously by LEAs or governing bodies as appropriate, have been considered by the courts. Some are possibly unreliable and may be considered creatures of their time, reflecting as they do different attitudes to the protection of pupils than exist today.

- *Smith v Martin and Kingston-upon-Hull Corporation* [1911] 2 KB 775. A teacher ordered a pupil to attend an open fire in the staff common room. The pupil's clothes caught fire and she was injured. The teacher was liable but so was the LEA as the order to attend the fire was given in the course of the teacher's employment.
- *Chilvers v London County Council* (1916) 80 JP 246. A pupil was allowed by a teacher to bring his toy soldiers to school. Another pupil fell on a soldier, with the result that her eye was pierced. The court found that there was no negligence and this was an accident which might happen in any nursery where children play with toys. The age of the case may suggest it is unreliable, but the sentiments expressed contain, it is suggested, a degree of common sense which is as applicable now as then.
- *Jones v London County Council* (1932) 96 JP 371. A student participating in an organised game of "riders and horses" was injured. The game involved one boy riding on the back of another trying to cause another mounted fellow pupil to fall. At the time, the court held that it was a common game and no negligence was involved. It is doubted that a court would reach the same conclusion today.
- *Gibbs v Barking Corporation* [1936] 3 All ER 115. A teacher failed to assist a pupil vaulting over a gym horse. The pupil was injured. The teacher was found not to have taken reasonable care and the LEA was therefore held liable.
- *Rawsthorne v Ottley* [1937] 3 All ER 902. Pupils were left alone to play in a playground at a time when a lorry was delivering. The court held that the headteacher had not been negligent in failing to supervise or in allowing the lorry on to the site – again, a potentially dubious decision to rely on today.
- *Ricketts v Erith Borough Council* [1943] 2 All ER 629. A child in a playground fired a toy arrow which injured the plaintiff child. A teacher did check the playground from time to time, but the supervision was not continuous. The court held that continuous supervision was not required and that in the circumstances the level of supervision was adequate.

- *Wright v Cheshire County Council* [1952] 2 All ER 789 (another gym case). A pupil was assigned to catch a pupil using the vaulting horse, but that pupil wandered off whilst the other pupil was in mid-flight. The plaintiff fell and was injured. The teacher was supervising other pupils at the time. It was found that this was a generally approved practice and that the teacher had not been negligent in allowing a child to be a “catcher”.
- *Rich v London County Council* [1953] 2 All ER 376 (another allegation of failing to supervise pupils in the playground). The court held that the level of supervision was adequate and a constant monitoring in the circumstances was not required.
- *Lewis v Carmarthenshire County Council* [1955] AC 549. The House of Lords affirmed a decision of the Court of Appeal that a teacher had not been negligent after a pupil escaped from a classroom whilst the teacher was attending to an injured child. However, after the child had escaped, he was able to pass out of the school and on to a busy road, causing a lorry to crash, killing the driver. The LEA was held liable to the driver’s widow as it had not taken reasonable precautions to prevent the pupil escaping into the road.
- *Clark v Monmouthshire County Council* (1954) 52 LGR 246. Again, the court held that there was no obligation to ensure constant supervision in the playground. All that was required was reasonable supervision.
- *Crouch v Essex County Council* (1966) 64 LGR 240. During a chemistry lesson, two pupils squirted some liquid into the eyes of another pupil, not knowing that it was double-strength caustic soda. The court held that in the circumstances (the pupils were 15) it was reasonable to allow the pupils to use caustic soda without direct supervision provided they had been given adequate warning and instruction. The standards of discipline imposed by the teacher were found to have been sufficient from the point of view of safety and he could not be held liable for the irresponsible acts of pupils in the circumstances.
- *Beaumont v Surrey County Council* (1968) 66 LGR 580. A teacher put a three-metre length of elastic in a wastepaper bin. It was removed by some pupils and used in horseplay which resulted in a pupil being hit in the eye. It was held that it was a headteacher’s duty, bearing in mind the known propensities of children, to take all reasonable and proper steps to prevent any of the pupils suffering injury from inanimate objects and the actions of other pupils. The placing of the elastic in the bin was unreasonable as it

was foreseeable it would be taken and used by the pupils. Further, there were inadequate levels of supervision, which meant the horseplay had not been spotted and stopped before the accident occurred. The LEA was therefore liable.

- *Barnes v Hampshire County Council* [1969] 3 All ER 746. A class were dismissed five minutes before the normal going home time. The plaintiff's parent was therefore not by the school gate as usual to meet her. The girl therefore ran into a road and was knocked down. The LEA was held liable: releasing the children early was negligent.
- *Ward v Hertfordshire County Council* [1970] 1 All ER 535. A child who arrived early at school, ran into a wall and injured his head. The LEA was held not to be liable as the wall was not inherently dangerous. As the accident occurred in the normal course of play, it was irrelevant that there was no supervision and it was anyway impossible to supervise children so that they never fell down and injured themselves.
- *Moore v Hampshire County Council* (1981) 80 LGR 481. A disabled child, who was forbidden from doing PE, persuaded a new teacher that she could take part and tried to do a handstand. She fell and broke her ankle. The teacher was supervising other children at the time. The court held that the teacher had not met the standard of care required as the girl's special condition required a greater level of supervision and that she should not have allowed her to take part in the first place without checking.
- *Affutu-Nartoy v Clarke* (1984) Times, 9 February. A teacher took part in a game of rugby with 15-year-old pupils and tackled the plaintiff causing injury. The teacher was held liable.
- *Nwabudike v Southwark LBC* [1997] ELR 35 (a case brought by another child who had escaped from school and was subsequently injured). It was held that, although the standard of care was high, a school which had taken all proper and reasonable steps to ensure such safety was not in breach of its duty of care. On the evidence, it was found that there had been only one similar accident in six years, demonstrating that all proper and reasonable steps had been taken.

Jenny v North Lincolnshire Council 20 December 1999, unreported, was an appeal from the decision of Gray J that personal injuries sustained by the claimant pupil, aged nearly 9, were caused by defendant LEA's negligence in failing to provide proper security to keep the pupil within a primary school during school hours. The pupil

had left the school during a break without permission and without anyone noticing him. He was hit by a car approximately 1,000 metres from the school, on a major road, and was seriously injured. The driver of the car was not at fault. The pupil, who suffered from global development delay, had a reading age of 7 and an emotional age assessed at 4½. The school accepted that the pupil could not safely be out of school on his own. There were five gates accessible from the playground to the world outside. The judge concluded that the school, being in charge of children at risk if unaccompanied in the trafficked world, was in breach of its duty to establish a system for ensuring, so far as was practicable, that all five gates were kept closed and fastened during school hours and especially during breaks; that the school's system was somewhat haphazard and insufficiently stringent for a playground with so many exits; and that the breach caused the accident. The LEA appealed (i) against the extent of the duty and whether there had been a breach, and (ii) whether that breach caused the pupil's escape.

In dismissing the appeal, the Court of Appeal held that, as accepted by the LEA, *Lewis v Carmarthenshire* placed the initial evidential burden on them. The LEA could not say how the pupil left the safety of the school unobserved. Lord Justice Henry stated that the school knew that escape was not difficult and could happen unobserved. With five exits to roads dangerous to vulnerable pupils such as the claimant, to whom the school owed a special duty, any system should address the separate exits and their individual weaknesses. The judge was right to conclude that the school had not taken the necessary precautions.

Secondly, applying *Henderson v Henry E Jenkins and Sons and Another* (1970) AC 282 HL, since the school's explanation did not throw any light on how the pupil got out, the school had failed to show that the accident was not due to negligence on its part. As, therefore, the evidential burden did not shift back to the pupil, he did not need to prove causation. The claimant could rely on the inference that the accident was caused by the defendant's negligence.

"Jenny" should be contrasted with "Nwabudike" above.

2) *Educational malpractice or educational well-being cases*

The second category of cases, educational malpractice or educational well-being cases, are a much more recent phenomenon and, although the first one or two cases were seen as groundbreaking successes for campaigners for pupils' rights, the courts have now started to limit the opportunity for such claims to be brought.

The catalyst for the development of these claims was the decision of the House of Lords in respect of the education cases in *X*. As has been seen, claims for physical injury had a long history, but, before *X*, no claim for a failure to educate or a failure to remedy an educational need had been brought in the courts.

In the *X* cases, it was alleged that LEAs, through their educational psychologists (*E v Dorset County Council*) or headteachers and advisory teachers (*Christmas v Hampshire County Council*) or education officers (*Keating v Bromley*) owed duties to detect the special educational needs of pupils, provide appropriate remedial tuition or support and ameliorate those needs. No actual physical injury was alleged. Instead, it was claimed that the children had suffered an educational detriment so that their future career prospects were affected. In addition, in the *Dorset* claim, the recovery of the costs of educating the pupil in a private school was attempted.

It must be remembered, however, that the appeals before the House of Lords were against applications to the lower courts to “strike out” claims. These were presented on the basis that, as a matter of law, none of the claims should succeed. As a consequence, no evidence had been given as to either the arrangements for educating pupils with special educational needs in the respective LEAs or on the specific details of what had happened to these particular pupils. The decision of the Lords therefore needs to be read in light of the fact that because there was no evidence, they had to make certain assumptions about the work of the education professionals involved. In particular, Lord Browne-Wilkinson probably did misunderstand the role of the educational psychology service, an error which he subsequently corrected in *Barrett v Enfield LBC* [1999] 3 WLR 79.

Nonetheless, the Lords held the following.

- a) A headteacher, being responsible for a school, is under a duty of care to exercise the reasonable skills of a headteacher in relation to a pupil’s educational needs. If it comes to the attention of a headteacher or teacher that a pupil is underperforming, he owes a duty to take such steps as a reasonable teacher would consider appropriate to try to deal with such underperformance. If a headteacher gives advice to parents, he should exercise the skills and care of a reasonable headteacher in giving such advice. “To hold that, in such circumstances, the headteacher could properly ignore the matter and make no attempt to deal with it would fly in the face, not only of society’s expectations of what a school will provide, but also of the fine traditions of the teaching profession itself” (per Lord Browne-Wilkinson at p. 451).

- b) An advisory teacher brought in to advise on the educational needs of a specific pupil, if he knows his advice will be communicated to the pupil's parents, owes a duty to the pupil to exercise the skill and care of a reasonable advisory teacher.
- c) Where educational psychologists carry out an assessment of an individual pupil as part of the statutory process, even though their advice is directed to the LEA, they could owe a duty of care to use reasonable professional skill and care in the assessment and determination of the pupil's educational needs. This view was, however, based on Lord Browne-Wilkinson's mistaken belief that an educational psychology service was offering a service to the public, in the same way as medical psychologists in the NHS, and, in view of the decisions of the Court of Appeal in *Phelps and Jarvis*, is now unreliable.
- d) Actions for common law negligence should not, however, be brought where the imposition of a common law duty of care might cause a conflict with the LEA's statutory responsibilities.
- e) Damages might, in principle, be recoverable for educational detriment, but that was a matter for the trial judge when in possession of all the facts.
- f) LEAs would be vicariously liable for the breaches of duty committed by their teaching, advisory and educational psychology staff.

Although the Lords' decision seemed to quash any notion of damages being recovered from LEAs for breach of statutory duty and emphasised that any claim would be difficult to pursue successfully, the decision was seen as a green light for a number of claims against LEAs for the negligence of their staff.

This view was diminished, albeit briefly, by the decision of Kennedy J in *Christmas v Hampshire County Council* [1998] ELR 1, the first of the education cases considered in *X* to come to trial. Having heard the evidence, the judge concluded that neither the headteacher nor the advisory teacher had been negligent and therefore dismissed the claim.

Next day, however, Garland J gave judgment at first instance in *Phelps v Hillingdon LBC* [1998] ELR 38 and found the LEA to be liable for what he considered were the negligent acts of the LEA's educational psychologist. The judge found that the educational psychologist owed a duty of care to a pupil and should have known that her findings in respect of the pupil would have been acted upon by the pupil's parents. There had been, in the judge's view, a failure to diagnose the claimant's

dyslexia and a failure by the educational psychologist to review her opinion after she was aware that the claimant had failed to make progress. This amounted to negligence. Further, in failing to mitigate the adverse consequences of dyslexia, a congenital defect, the claimant had been injured, for which she should be compensated with damages. The LEA was therefore held liable for the educational psychologist's negligence and was ordered to pay £46,000 damages.

That decision is now, however, of little significance as the judge's findings were overturned by the Court of Appeal (see [1998] ELR 587; for a more detailed discussion of the case and its consequences, see Simon Whitbourn: "Whither X? Education negligence claims in the light of the Court of Appeal's decision in *Phelps v London Borough of Hillingdon*", *Education, Public Law and the Individual* (1999), 4, 1, 2).

The Court of Appeal, first, rejected the notion that the claimant could have been injured by the educational psychologist's acts. Stuart-Smith LJ said that it was wrong to categorise dyslexia, or the failure to ameliorate or mitigate its effects, as an injury. Instead, in reality what the claimant was seeking to compensate was an economic loss and that, in law, the economic consequences of a failure to mitigate or ameliorate could only be recoverable if the educational psychologist had assumed responsibility to protect the claimant from the loss she had suffered. Although a private educational psychologist who had assumed responsibility to assess a child under a contract could be liable, an educational psychologist exercising or carrying out the LEA's statutory functions could not be sued to the same effect for negligence.

Secondly, and perhaps more importantly, the Court of Appeal held that the educational psychologist and, vicariously, the LEA owed no duty of care to the claimant. A number of reasons were given for this including the lack of assumption of responsibility beyond the statutory framework; the fact that, otherwise, the claimant could have circumvented the principle set out in *X* that an LEA owed no direct duty of care to a pupil for whom it was responsible under the Education Acts; the fact that the decision taken in respect of the child was made by a multi-disciplinary team of which the educational psychologist was just one member; the cost to LEAs of vexatious claims; the involvement of parents in the special educational needs process; the alternative remedies available; and the concern that if claims of this nature were allowed, it would encourage "defensive education".

The court were also reluctant to impose duties of care because of the difficulty in showing that whatever the educational psychologist might have done or not done actually contributed to the loss which the

claimant claimed to have suffered. In *Phelps*, the court felt that the claimant had to demonstrate that the teaching provided would have been different and more effective if the educational psychologist had identified the dyslexia and that significant improvement would have resulted. On the facts, the claimant was unable to show that if that had happened it would have made any meaningful difference. When other factors such as non-attendance and other physical, neurological, emotional, cultural and environmental factors were included in the equation, the court felt it would be nigh on impossible to establish a link between an educational psychologist's negligence and the claimed loss.

The Court of Appeal's view, especially on the nature of the "loss" suffered, was followed in *Anderton v Clwyd County Council* [1999] ELR 1. The same court as in *Phelps* found that even if dyslexia was regarded as an impairment of a person's mental condition, it could not be caused by an educational psychologist or LEA. Dyslexia is a congenital and constitutional condition and failure to diagnose it cannot exacerbate the condition. Consequently, the failure to mitigate or ameliorate the consequences of dyslexia could not amount to a personal injury.

In *Gower v Bromley LBC* [1999] ELR 356, the Court of Appeal distinguished the decision in *Phelps*. In this case, allegations of negligence were made against teachers at a maintained special school who were accused of being professionally incompetent and failing to provide a pupil with the computer teaching or aids necessary to enable him to communicate adequately in order to learn or socialise with his fellow pupils. On this occasion, the Court of Appeal declined to strike out the claim and set out the following propositions applicable to claims against teaching staff in schools.

- a) A headteacher and teachers have a duty to take such care of pupils in their charge as a careful parent would have in like circumstances, including a duty to take positive steps to protect their well-being.
- b) A headteacher and teachers have a duty to exercise the reasonable skills of their calling in teaching and otherwise responding to the educational needs of their pupils. Those responsible for teachers in breach of that duty may be vicariously liable for it.
- c) The justiciability of such a claim for vicarious responsibility is the same whether or not a headteacher and teachers are operating under a statutory scheme, such as that for children with special educational needs, and whether or not the school is in the public or private sector.

- d) The duty is to exercise the skill and care of a reasonable headteacher and/or teachers, i.e. whether the teaching and other provision for a pupil's educational needs accord with that which might have been acceptable at the time by reasonable members of the teaching profession.
- e) It is plainly reasonably foreseeable by a headteacher and his staff that if they do not properly teach or otherwise provide for a pupil's educational need, he may suffer educationally and possibly psychologically.
- f) In normal circumstances of the headteacher and teacher/pupil relationship, there should be little difficulty in establishing proximity where, as in *Gower*, it is alleged that the teaching staff held themselves out as specialists in the teaching of pupils with special educational needs.

The principles set out in *Phelps* were, however, preferred by the Court of Appeal in the latest educational malpractice case to be considered (*Jarvis v Hampshire County Council* [2000] ELR 36; [2000] EdCR 1), albeit that that case involved educational psychologists and education officers as opposed to teachers. This was another application to strike out a claim. In addition to alleging misfeasance in public office (discussed above), compensation had been sought in respect of the LEA's alleged failure to provide the claimant with the education it should have done. He accordingly claimed the cost of remedial tuition and the loss of prospective future earnings. Relying on *Phelps*, the LEA applied for the claim to be struck out as disclosing no cause of action.

In summary, the claim was that, during the course of assessment and statementing under the Education Acts, an LEA educational psychologist had negligently offered advice to the LEA as to the appropriate placement for the claimant and that the LEA's officers had been negligent in arranging the claimant's placement at a school which it was alleged was inappropriate to meet his needs.

Perhaps surprisingly, in view of the cases which have cast doubt on the propriety of courts using their striking out powers (see, for example, *Barrett v Enfield BC* [1999] 3 WLR 79), the Court of Appeal found that none of the allegations of negligence made against the educational psychologist and LEA officers were capable of giving rise to a duty of care. Nor could any of them be liable to the claimant so as to give rise to any vicarious liability on the part of the LEA.

In reaching this conclusion, Morritt LJ tried to summarise the principles applying to educational malpractice claims as they currently stand (at p. 22 of the transcript).

- a) An LEA does not owe a direct common law duty of care in the exercise of its powers and discretions relating to children with special educational needs specifically conferred on it by the Education Act 1996.
- b) An LEA does not owe a direct duty of care in respect of the performance of any educational psychological service set up to advise it as to the performance of its educational functions unless, with the requisite statutory authority, it also provides psychological services to the public in a medical adviser/patient relationship.
- c) Where the exercise of professional skills by an individual agent or employee of the LEA within the scope of his authority or employment is such as to give rise to a duty of care at common law, the LEA will be vicariously liable if the existence of such a duty does not fetter or conflict with the proper exercise by the LEA of its statutory powers and discretions.
- d) The acts or omissions of such an agent or employee in advising the LEA how to exercise its statutory powers and discretions are not, without more, sufficient to constitute the assumption of responsibility in those cases where such an assumption is necessary to give rise to the alleged duty of care.
- e) A claim for the recovery of compensation for a failure to diagnose or ameliorate the consequences of dyslexia (or other congenital constitutional conditions) is a claim for economic loss for which an assumption of responsibility is required if the relevant duty of care is to arise.

Although the Court of Appeal's decisions in *Jarvis*, *Phelps*, *Anderton* and *Gower* are currently subject to appeal before the House of Lords, that summary is a helpful indication of the current state of the law of educational malpractice. It does, however, leave open some inconsistencies, which may enable claims to be brought in the future. First, it suggests that the failure to ameliorate certain non-congenital or constitutional conditions could amount to an injury. Second, the idea that LEA educational psychologists assume no responsibility to the children they assess is a way of avoiding what might have been significant litigation against educational psychologists, but it may not accord with what educational psychologists assume is their

responsibility towards the child. Third, although *Phelps* and *Jarvis* have given the message that LEA educational psychologists will, in effect, be protected from negligence claims, the position of headteachers, teachers, advisory teachers and inspectors is unclear. *X* and *Gower* give the clearest possible indication that they would be in breach of their legal duties if they failed to exercise the reasonable skills of their fellow professionals in relation to a pupil's educational needs. Neither *Phelps* nor *Jarvis* has really altered that general statement and the duty was assumed to arise in *Christmas*, albeit on the facts there had been no breach of that duty. There is therefore still the potential for claims to be made against teaching staff and, vicariously, their LEAs for failing to detect a pupil's special educational needs and/or to provide adequate remedial assistance. They may be safe from action when operating within the statutory special educational needs framework, although *Gower* questions that proposition, but in their general classroom teaching, there is still uncertainty when they may be sued and that uncertainty, it is submitted, is not conducive to effective education.

ANNEX

The following essay, by Kenneth Poole, solicitor, and until recently a contributing editor of *The Law of Education* (9th edn, Butterworths), originally appeared as an article in the February 2000 issue of the *Bulletin* of the Education Law Association. It is reprinted here by kind agreement of the author. The journal's editor took his cue from s. 57(5) of the Education Act 1944 and, communicating with himself, was pleased to grant himself permission to reprint.

Guidance Missives

by Kenneth Poole

*"Everyman I will go with thee, and be thy guide,
In thy most need to go by thy side."*

Older readers will remember this rune, which appears on a title page in every volume of Dent's Everyman Library. Perhaps it has also come to the Secretary of State's mind as he casts LEAs in the role of Everyman. For the promise of his guidance on diverse topics is widely diffused among the provisions of the School Standards and Framework Act 1998 (the 1998 Act).

A hierarchy of status may be ascribed to guidance. At the peak are Codes of Practice. Statutory provisions oblige the Secretary of State to make them and they take effect only on the approval of, or in the absence of a negative resolution by, Parliament. Then there is so-called "statutory guidance", given by the Secretary of State at his discretion also in pursuance of particular statutory powers and published under s. 571 of the 1996 Act. Statutory guidance is an unfortunate term so far as it gives rise to the misconception that the guidance is itself of statutory effect.

Statutory guidance creates, by implication, a third category, "non-statutory guidance", such as Circulars in their annual sequence,

circular letters and miscellaneous publications difficult to classify. Examples (if any are needed) are to be found among the documents appended to the *Effective Relationships Code of Practice*, mentioned below. The different forms are distinguished as a matter of practical convenience, though it by no means always apparent why one rather than another has been selected. All the texts are “non-statutory” in the sense that they do not derive from a specific power to give guidance: but they must necessarily have been published as a more or less direct incident of the Secretary of State’s statutory functions. Mr Blunkett, were he other than a member of the Government, could issue indisputably non-statutory guidance (as indeed could anyone who has mastered the art of desk-top publishing); but it is submitted that he cannot do so while he is Secretary of State. So “non-statutory” guidance is best regarded as a convenient but potentially misleading fiction. It is also misleading if it is understood as a synonym for “non-legal” guidance (for example that given in Circular 2/98 on reducing the bureaucratic burden on teachers) because much non-statutory guidance is about the interpretation and use of statutory powers. Indeed Codes of Practice and Circulars may contain statutory guidance (and sometimes it is unclear whether guidance is statutory or otherwise). It follows that the tidy three-tier model has rough edges. No doubt alternative methods of classification can be found – a rewarding exercise for the Department’s consultants.

The statutory Code of Practice is a recent innovation in education law. That on *Special Educational Needs* derives in the first place from the repealed 1993 Act. The 1998 Act introduced Codes on *School Admission Arrangements*, on *Admission Appeals* and for *Securing Effective Relationships between LEAs and Maintained Schools*. (The “other” 1998 Act, the Teaching and Higher Education Act, authorises the General Teaching Council, under regulation, to issue a Code for registered teachers.)

Statutory guidance has a longer pedigree (though not reaching back to the 1944 Act). The 1980 Act required LEAs to have regard to any guidance given by the Secretary of State about consultation on proposed establishment, alteration, etc. of schools. The 1998 Act, similarly, required LEAs, in preparing financial delegation schemes, to take guidance into account.¹ Current legislation repeats those requirements. Under the 1996 Act, as amended, LEAs are to “have regard to any guidance given from time to time by the Secretary of State” about exceptional provision of education in pupil referral units or elsewhere; also about the disciplinary responsibilities of governing bodies and headteachers.

¹ The writer has found no authority which distinguishes “have regard to” from “take into account”.

But it is the 1998 Act that has brought statutory guidance into bloom. There are some two dozen separate powers granted to the Secretary of State to give guidance to LEAs, or additionally or alternatively to others such as governing bodies and school organisation committees. At a high level of generality is guidance on school exclusions² (which, with the *Admissions* Code of Practice, supersedes the non-statutory code issued by the former Associations of County Councils and of Metropolitan Authorities). In a descent to what might be perceived as pettiness, the Secretary of State has taken power to guide LEAs on how to present “fairly” factual information about the outcome of a grammar school ballot. If the Local Government Association is as jealous of the independence of local authorities as were the local authority associations of yesteryear it will resist the giving of that guidance.

Non-statutory guidance has long been a feature of educational administration. The DfEE and its predecessors have failed to find time to carry out a thoroughgoing cull of material, some of which goes back to the early days of the 1944 Act. Its extent is beyond measurement.

The Department walks a skilful tightrope in commenting on the status of guidance. The SEN Code of Practice states that “all those to whom the Code applies have a statutory duty to have regard to it; they must not ignore it”. The LEAs and other bodies concerned “must consider what the Code says”. But the “Code is not prescriptive”.³ The *Effective Relationships* Code remarks that the duty to have regard to the Code “means for all normal purposes they [LEAs etc.] should observe its principles and guidance, departing from it only where there is good reason”. The Code notes that the 1998 Act does not create specific sanctions or rights of appeal linked to breaches of the Code, but it refers to the Secretary of State’s long-established general powers of intervention under the Education Acts and in particular to the sanction against unreasonable action which now appears in s. 496 of the 1996 Act. If the Secretary of State concludes in any case that an LEA or governing body have acted unreasonably in failing to have regard to the Code, he can give whatever directions he judges expedient to put the matter right. Under s. 497 “failure to have regard” would be a default – and so enable the Secretary of State to direct an LEA to perform their duty – but the direction would not of itself appear to promote correction of unreasonable action.

It would be disingenuous – perhaps unreasonable even – to expect the Secretary of State to draw attention to the limitation on his s. 496

² In Circular 10/99.

³ In Circular 9/94, para 14.

powers imposed by the *Wednesbury*⁴ concept of “unreasonableness” and the *Tameside*⁵ judgment which further restricts the exercise of those powers. But the two decisions, though familiar to ELAS members, will not be in the minds of all readers of the Codes.

The formula “have regard to” ordinarily appears as the requirement in relation to statutory guidance given by the Secretary of State as it does in relation to Codes of Practice. And as Woolf J (as he then was) indicated in *R v ILEA, ex parte Bradby*,⁶ there is probably an equal, if unstated, obligation upon LEAs and others to have regard to the advice of the Secretary of State in Circulars and other forms of non-statutory guidance. Judicial decisions indicate that a requirement to have regard to one specific consideration does not exclude the right, or perhaps duty, to have regard to others. Section 76 of the 1944 Act, which lives on in s. 9 of the 1996 Act, gave rise to the leading case *Watt v Kesteven County Council*⁷ (who now remembers the Parts of Lincolnshire?), which established that the duty of LEAs to have regard to the general principle that pupils are to be educated in accordance with their parents’ wishes left them free to have regard to other matters. Indeed the reference to a “general principle” points to the possible relevance of other considerations.

Where the Secretary of State gives statutory guidance, there is no such hint of other considerations or obligations; but it has been held (outside the context of education law) in *Ishak v Thowfeek*⁸ that a duty to have regard is not a duty to comply: matters to which regard is to be had are to be taken into account, considered and given due weight, but an ultimate discretion remains. And in the words of Woolf J in *Bradby*, “To suggest that merely because there is a departure from a circular or the adoption of a particular interpretation of a circular an LEA has acted in any way *ultra vires*, in my view is not sustainable. That is elevating the circulars to a status which they just do not have. They are no more than advice and guidance from the Minister as to a course which, in general, he suggests the education authority should follow.”

⁴ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. To be fair it should be added that there is a reference to *Wednesbury* in para 14 of Annex B to the *School Admissions Appeals*

⁵ *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014.

⁶ *R v Inner London Education Authority, ex parte Bradby* (unreported, but see Liell and Coleman *The Law of Education* Butterworths 9th edition 1984, at E[1]).

⁷ [1955] 1 QB 408. See also *Cumings v Birkenhead Corporation* [1972] Ch 12 and *Harvey v Strathclyde Regional Council* [1989] SLT 612, HL.

⁸ [1968] 1 WLR 1718. For discussion of the significance of “have regard to” see 545 HL Deb 485ff, 29 April 1993, and 548 HL Deb 1002ff, 26 July 1993.

So an LEA who fail to follow guidance need to be ready to show that they first had regard to it and departed from it knowingly and on defensible grounds; otherwise they are at risk under the s. 496 sanction. But that sanction is a clumsy weapon: where the Secretary of State wishes to impose an obligation more demanding than under the usual rubric Parliament has enacted accordingly. Thus HMIs or other inspectors are to act “in accordance with” the Secretary of State’s guidelines on inspection of vocational training;⁹ and if it appears to him that an LEA have not taken his guidance sufficiently into account in preparing their financial delegation scheme for maintained schools he may substitute his own scheme.¹⁰

The Secretary of State’s guidance is invariably the subject of prior consultation with the interested parties; it is plainly expressed and often presented in an attractive format; but sometimes patience is tried by a seemingly repetitive and “told for the bairns” style. The dissemination of guidance may be represented as a responsible government endeavour to raise standards by imposing best practice upon LEAs; alternatively it may be deplored as an interference in the exercise of proper discretions by elected bodies, stifling innovation from its surest source, practical experience (though it must be acknowledged that some guidance documents give examples of local achievements). Local government, the argument goes, will not attract and retain able members and officers if it becomes little more than the executive instrument of centrally determined policy. The clash of values is inescapable: a balance must be held. Such a glimpse of the obvious is worth revealing when the Secretary of State takes explicit power, in a single statute, to assert his advice in such a wide range of circumstances. Many of his powers to require regard to be had to his guidance have yet to be exercised, but the snowball has begun to roll.

⁹ Teaching and Higher Education Act 1998 s. 34.

¹⁰ School Standards and Framework Act 1998 Sch 14, para 1.

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Audit Commission

<http://www.audit-commission.gov.uk>

BECTA (British Educational Communications and Technology Agency)

<http://www.becta.org.uk>

BOPCAS (British Official Publications Current Awareness Service)

<http://www.bopcas.com>

EMIE (Education Management Information Exchange)

<http://www.nfer.ac.uk/emie>

Employers' Organisation for Local Government

<http://www.lg-employers.gov.uk>

FEDA (Further Education Development Agency)

<http://www.feda.ac.uk>

Government Centre for Special Educational Needs

<http://www.dfes.gov.uk/sen/>

DETR (Department for the Environment Transport and the Regions)

<http://www.detr.gov.uk>

DfEE (Department for Education and Employment)

<http://www.dfes.gov.uk/>

ELECT-ed (for local government elected members)

<http://www.dfes.gov.uk/elected>

Health Development Agency

<http://www.hda.org.uk/>

Health and Safety Executive

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QCA (Qualifications and Curriculum Authority)

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The Standards Site

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UK government information on education

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United Kingdom Parliament's World Wide Web Service

<http://www.parliament.uk/>

Improvement and Development Agency

<http://www.idea.gov.uk>

LARIE (Local Authorities Race Relations Information Exchange)

<http://www.lg-employers.gov.uk/equal-info.html>

LGA (Local Government Association)

<http://www.lga.gov.uk>

Local Government Ombudsman

<http://www.open.gov.uk/lgo/index.htm>

National Assembly for Wales

<http://www.wales.gov.uk>

NAEIA (National Association of Educational Inspectors, Advisers and Consultants)

<http://www.naeia.co.uk/>

NCER (National Consortium for Examination Results)

<http://www.ncer.org/>

NGC (National Governors' Council)

<http://www.ngc.org.uk/>

SEO (Society of Education Officers)

<http://www.seo.org.uk>

SEO Virtual Staff College

<http://www.virtualstaffcollege.co.uk/>

Tagish's Directory of UK Local Government on the Web

<http://www.tagish.co.uk/tagish/links/localgov.htm>

The Education Network

<http://ednet.org.uk>

The Stationery Office

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ACRONYMS AND ABBREVIATIONS

AC	Audit Commission
ACCAC	Awdurdod Cymwysterau, Cwricwlum ac Asesu Cymru Qualifications, Curriculum and Assessment Authority for Wales
ACPI	Audit Commission Performance Indicator
BSP	Behaviour Support Plan
BVPI	Best Value Performance Indicator
CEO	Chief Education Officer
CETW	National Council for Education and Training for Wales
CPD	Curriculum and Professional Development*
CTC	City Technology College
DES	Department of Education and Science
DETR	Department of the Environment, Transport and the Regions
DFE	Department for Education
DfEE	Department of Education and Employment
EAf	Education Action Forum
EAZ	Education Action Zone
ECJ	European Court of Justice
EDP	Education Development Plan
EiC	Excellence in Cities
ELAS	Education Law Association
ESP	Education Strategic Plan (Wales)
EYDCP	Early Years Development Childcare Plan
EYDP	Early Years Development Plan
EYDP	Early Years Development Partnership
FAS	Funding Agency for Schools
FE	Further Education
FEFC	Further Education Funding Council
FHE	Further and Higher Education
GEST	Grants for Education Support Training for Wales

* CPD more commonly used, but not in this publication, for Continuing Professional Development

GTC	General Teaching Council
HC	House of Commons
HE	Higher Education
HL	House of Lords
HMCI	Her Majesty's Chief Inspector
ICT	Information and Communication Technology
ISB	Individual Schools Budget
J	Justice (High Court)
LJ	Lord Justice
LMS	Local Management of Schools
LSB	Local School Budget
LSC	Learning and Skills Council
OFSTED	Office for Standards in Education
PA	Personal Adviser (Connexions Service)
PANDA	Performance and Assessment (Report)
PI	Performance Indicator
PRU	Pupil Referral Unit
QCA	Qualifications and Curriculum Authority
RE	Religious Education
RO	Revenue Outturn [forms issued by DETR]
RSG	Revenue Support Grant
RSPT	Recreation and social and physical training
SACRE	Standing Advisory Committee on Religious Education
SEN	Special Educational Needs
SENT	Special Educational Needs Tribunal
SI	Statutory Instrument
SOC	School Organisation Committee
SOP	School Organisation Plan
TEC	Training and Enterprise Council
TSC	Training Standards Council
TTA	Teacher Training Agency
TUPE	Transfer of Undertakings Protection of Employment
YOT	Youth Offending Team

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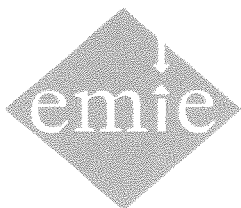
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What is the LEA for?

An Analysis of the Functions and Roles of the Local Education Authority

The perspective of this topical study is the law of education in England and Wales (including the development of divergences between statutory provisions within the jurisdiction).

The legalities are crucial: LEAs are creatures of statute, operating, along with the rest of local government, within the doctrine of *vires*. That is why the authors have started from the Education Acts and other statute law and also the statutory instruments from which so many of the requirements imposed upon LEAs depend. Case law is also examined in some detail.

The text is updated to 1 June 2000. It takes account of: two present Bills (Learning and Skills, Local Government); a promised Bill on special educational needs and disability rights in education; and implementation of the Human Rights Act 1998.

The book is for: LEA education and legal officers and other senior managers; councillors; students of education and local government; headteachers; governors; teachers; inspectors; national politicians and administrators – anyone, in short, interested in answers to the question "What is the LEA for?"

Principal areas covered in depth are: educational planning, the curriculum, the LEA's duties in respect of standards of schooling, what is meant by "maintaining" schools, special educational needs, inclusion, lifelong learning, and accountability and challenge. The analysis also covers the collection and dissemination of information, early years, admissions, structures, governance, the youth service, careers, juvenile employment and work experience – and miscellaneous but essential support services. Specially included is an essay on Ministerial "guidance" by Kenneth Poole, solicitor, lately an editor of Butterworths' *The Law of Education*.

The main writer is Simon Whitbourn, Principal Solicitor, Hampshire County Council, with Keith Mitchell, Director of Education, Durham County Council, and Robert Morris, editor of *The Law of Education Bulletin*.

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