Education Challenges in Wales

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A. Introduction

1. Education is a devolved area, and an area where the Assembly and the Welsh Government has been particularly active. There is now a very real and distinct body of Welsh education law. In this paper, I set out an outline of the law in Wales in each of the following areas, and identify the main areas for challenges in these areas:-

    (1) Challenging school admission decisions

    (2) Ensuring that a child's special educational needs are met

    (3) Challenging school exclusion decisions

    (4) Challenging school reorganisations

B. School Admissions

2. School admissions is a perennially controversial topic. Good schools are popular, and often heavily over-subscribed. Fair access to educational opportunity is crucial for children, and the choice of school by a parent for a child is one of the most significant decisions that a parent can make.

3. There are two kinds of challenges that can be brought in respect of school admissions.

    (1) First, a "stand alone" challenge to the admission arrangements adopted by the admission authority for a school. Certain persons, including parents, may object to the admissions arrangements after they have been made by the admissions authority, and any objection is referred to the Welsh Ministers. The Welsh Ministers must consider whether it would be appropriate to changes to be made to any aspect of the admissions arrangements. If parents remain dissatisfied with the arrangements, they can challenge them by way of a claim for judicial review.

    (2) Secondly, a challenge to an admission decision in respect of an individual child. The parent (or the young person if it is admission to sixth form) has the right to appeal a decision to an Independent Appeal Panel ("IAP"). An IAP decision can also be challenged by way of judicial review.

4. In what is supposed to be an easily accessible area of law, with parents challenging admissions decision without legal advice, the legal regime is relatively complicated. It consists of:-

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(1) Part III of the School Standards and Framework Act 1998, which includes provisions about admissions arrangements, admissions forums, parental preference and admission appeals;

(2) Various statutory instruments, including the Education (Determination of Admission Arrangements) (Wales) Regulations 2006 and the Education (Admissions Appeals Arrangements) (Wales) Regulations 2005

(3) Two codes issued by the Welsh Government in July 2009 – the School Admissions Code and the School Admissions Appeal Code

(4) The Equality Act 2010 and non discrimination provisions

5. In short, each admission authority must determine admission arrangements for each maintained school for each academic year, following a consultation exercise. Local authorities are the admissions authorities for community and voluntary controlled schools. Governing bodies of foundation and voluntary aided schools are the admissions authorities for those schools. Admission arrangements must cover admission numbers for any age group to which children are normally admitted. All maintained schools in Wales that have enough places available must offer a place to ever child who has applied. Admission authorities must also have oversubscription criteria to determine the allocation of places in the event of oversubscription. Admission arrangements must be clear and easily understood, be objective and based on known facts, and be fair and equitable.

6. The Admissions Code gives guidance as to undesirable over subscription criteria. Undesirable over subscription criteria include (i) criteria selecting pupils on ability or aptitude, (ii) giving higher priority to children whose parents are more able or willing to support the school (financially or in any other way), (iii) giving higher priority to children according to the background or status of parents; (iv) taking account of past disruptive behaviour, additional learning needs; (v) giving priority on the basis that a sibling or other relative is a former pupil; (vi) giving priority to children based on religious faith save where the school has been designated as having a religious character; (vii) random allocation such as a lottery.

7. Lawful oversubscription criteria include priority for looked after children, siblings of pupils still at the school, children or families where there is a medical need, distance between home and school, catchment areas. Schools designated as having a religious character may give preference to members of a particular faith or denomination, so long as this does not conflict with equality legislation. Faith based criteria must also be objective and transparent, and must make clear how religious affiliation or commitment is to be demonstrated. Guidance may be given by church or religious authorities.

8. Admissions arrangements can be challenged before they are applied in each academic year. The procedure for determining admission arrangements in each academic year are found in section 89 of the 1998 Act. There are then rights of objection to the Welsh Ministers on behalf of various parties, including parents, under section 90 of the 1998 Act. The Welsh Ministers must consider whether it would be appropriate for changes to be made to any aspect of the admissions arrangements, to be determined on the merits. Parents can seek to judicially review the Welsh Ministers if they are not satisfied with the way in which their objections have been addressed, or with the final admissions arrangements. Challenges based on irrationality are difficult, as admission arrangements are usually questions of educational judgment. However, challenges have succeeded on the grounds of illegality (if the admissions arrangements are illegal) or a failure to have regard to relevant considerations. Challenges on procedural grounds have also been successful.

9. Local authorities have a duty to make arrangements enabling the parent of a child to express a preference as to the school at which he wishes education to be provided in the exercise of the authority's functions and to give reasons for his preference: see section 86(1) of the 1998 Act. The admissions authority for a maintained school is under a duty to comply with that parental preference unless either:-

    (1) compliance with the preference would prejudice the provision of efficient education or the efficient use of resources; or

    (2) the child has been permanently excluded from two or more schools for a period of less than two years since the last of those expulsions;

10. This duty does not apply in relation to sixth form education. That is governed by section 86A of the 1998 Act, and allows a child and a parent to express a preference for sixth form education.

11. In a normal year of entry, a child must not be refused admission on the grounds of prejudice to efficient education or efficient use of resources except where the number of applications for admission exceeds the admission number. Where it does, the admission authority must apply the oversubscription criteria in the admission arrangements.

12. Parents (and young people in respect of sixth form entry) have rights of appeal to an independent appeal panel ("the IAP") from admission decisions of local authorities and governing bodies not to admit their child to a particular school.

13. The Code of Practice on School Admissions Appeals applies to such appeals. The Code contains a number of mandatory requirements which must be complied with, and contains guidance that should be followed unless there is a good reason not to.

14. The first stage of any appeal is for the IAP to consider whether the admissions criteria were properly and impartially applied to the pupil concerned. If the proper application of the admissions criteria would have led to the child's admission, then the appeal must be allowed.

15. If the appeal is not allowed, the next stage is to consider whether prejudice would be caused if the child were admitted to the school. If there is no prejudice, then where there is a single appeal, the appeal must be allowed. For multiple appeals, the panel must assess whether admitting all of the children would cause prejudice. If not, then all the appeals must be allowed. If some could be admitted before prejudice would be caused, the panel must decide how many could be admitted and allow appeals up to that number.

16. There are two different kinds of prejudice that may be suffered:-

    (1) infant class size prejudice – statutory limits on class sizes provides that infant classes (reception, Year 1 and Year 2) may not contain more than 30 pupils. Prejudice may be caused as a result of the measures that would be needed to comply with the duty to limit the size of infant classes – e.g the need to employ another teacher, build a temporary classroom etc.

    (2) ordinary prejudice – the impact on the school of admitting additional pupils in terms of organisation and size of classes, availability of teaching staff, and effect on pupils already at the school.

17. In an infants class size appeal, the scope of an IAP to uphold an appeal is limited. An IAP can allow an appeal only if the decision was not one which a reasonable admission authority would make in the circumstances of the case. If the appeal is not an infant class appeal, and "ordinary" prejudice has been established, the panel must conduct a balancing exercise and balance the degree of prejudice and the consequences for the particular child if the appeal were not allowed.

18. The IAP has a limited role in relation to the legality of admission arrangements. They can only look at whether the admission arrangements failed to comply with a mandatory requirement of the 1998 Act or the Admissions Code: see *R (Buckinghamshire County Council) v School Admissions Independent Appeal Panel for Buckinghamshire* [2009] EWHC 1679 (Admin). This makes it even more important that parents are aware of their ability to challenge admission arrangements at the earlier stages set out above.

19. The IAP's decision is binding on the local authority and the governing body, subject to a claim for judicial review. Judicial review challenges can be brought on traditional judicial review grounds, such as irrationality, failure to have regard to relevant considerations (such as mandatory requirements in the Code), failure to give reasons, procedural unfairness etc.

20. In September 2012, the Welsh Government consulted on a revised School Admissions Code and School Admissions Appeal Code. The consultation closed in January 2012 and new Admissions Codes are expected imminently.

C. Special Educational Needs

21. Children with special educational needs are amongst the most vulnerable children in our schools. There are duties imposed on local authorities to ensure that provision is put in place to meet a child's special educational needs The courts are frequently concerned with disputes relating to SEN. There are two principal areas of litigation: (1) statutory appeals to the Special Educational Needs Tribunal for Wales ("the SENTW") against various decisions taken by local authorities; and (2) judicial review challenges to decisions of local authorities that are not covered by appeal rights.

22. The legal regime consists of:-

    (1) Part 4 of the Education Act 1996 ("the 1996 Act")
    (2) The Education (Special Educational Needs)(Wales) Regulations 2002;
    (3) The Special Educational Needs Tribunal for Wales Regulations 2002; and
    (4) The Special Educational Needs Code of Practice for Wales (2002)

23. A child has special educational needs if he has a learning difficulty which calls for special educational provision to be made for him. A child has a learning difficult if he has a significantly greater difficulty in learning than the majority of children of his age, or he has a disability which prevents or hinders him from making use of educational facilities of a kind generally provided for children of his age in schools: section 312(2) of the 1996 Act. "Special educational provision" is defined as educational provision which is additional to, or otherwise different from, the educational provision made for children of his age in schools maintained by the local authority.

24. In summary, a local authority is under a duty to identify children in their area who have SEN where it is necessary for the local authority to determine the special educational provision required for any learning difficulty identified.

(1) If the local authority considers that a child has, or probably has SEN, and that it is necessary for it to determine the child's special educational provision, the local authority must assess the child's needs: section 323. A statutory assessment is a detailed process, set out in Schedule 26 to the 1996 Act and the regulations requiring a number of experts to provide evidence about a child's needs. Provisions in the Code of Practice that suggest that an assessment will only be necessary if there is "convincing evidence" that a child's needs have not been remedied sufficiently by steps taken by a school, is probably incorrect. An assessment is required if the local authority considers that a child "probably" has SEN: see *NM v London Borough of Lambeth* [2011] UKUT 499 (AAC), [2012] ELR 224.

(2) If following an assessment, it is necessary for the local authority to determine the special educational provision which any learning difficulty he may have calls for, the authority shall make and maintain a "statement" of the child's special educational needs: see section 324 of the 1996 Act. The test is one of "necessity". If special educational provision can reasonably be provided within the resources normally available to mainstream schools, it will not normally be necessary to require a statement. This is a question of fact and will vary from school to school and from local authority to local authority. Money provided to a school by a delegated budget can be taken into account: *NC and DH v Hertfordshire* [2012] UKUT 85 (AAC).

(3) If a statement is to be made, there are detailed procedures set out in section 324 of, and Schedule 27 to, the 1996 Act which provide how a statement is to be made and maintained. Part 2 of a statement must set out a child's special educational needs. Part 3 sets out the provision to be made in order to meet those needs. The statement must "specify" the provision. Special educational provision should normally be quantified in terms of hours, although will not be required if flexibility is in the best interests of the child. Greater specificity is likely to be needed if the child is educated in a mainstream school rather than a special school: *E v Newham LBC; R (IPSEA Ltd) v Secretary of State for Education and Schools* [2003] ELR 286, 393. Part 4 of the statement must specify the type of school, or name of a school or other institution, which the local authority considers is suitable to meet the child's needs.

(4) Children without a statement must be educated in mainstream schools. Children with statements must be educated in mainstream schools, subject to two exceptions. There is no duty to educate in mainstream if it is incompatible with the wishes of the parent or the provision of efficient education for other children: see section 316 of the 1996 Act.

(5) Parents have the right to express a preference for particular schools under paragraph 3 of Schedule 27 to the 1996 Act (preference for a maintained school) and section 9

of the 1996 Act (all schools). However, there is no duty to accede to the parent's preferred choice of maintained school if that would prejudice the efficient use of resources. There is no duty to acceded to the parent's choice of independent school if that would involve unreasonable public expenditure. Local authorities and the SENTW on appeals will have to calculate the costs of the local authority's preferred school and compare that to the cost of the parent's choice of school. The costs include all public expenditure – so not limited to costs to the education budget.

(6) The cost involved is the marginal cost of educating the child at a particular school - i.e. the additional burden that the placement will put on the LA's annual budget. The existing costs of providing a school and staffing do not come into account, as those costs would be incurred in any event: see *Oxfordshire County Council v GB* [2002] ELR 8. This includes sums spent on support out of the school's delegated budget: see *Coventry City Council v SENDIST* [2008] ELR 1. Examples of calculating marginal costs include (i) 5 hours per week of specialist teaching for the deaf (because the teacher was employed by the school and would be paid the same regardless of whether or not the child attended, so no marginal cost); (ii) the cost of transporting the child to school where a taxi was already being used to transport two children to the school and to add the child in question would cost the LEA no more – again, no marginal cost; (iii) genuine "on-costs" such as the AWPU (the capitation fee paid to the maintained school by the LEA for each pupil placed there and the costs of an additional learning assistant. This position was recently confirmed by the Court of Appeal in *EH v Kent City Council* [2011] ELR 433.

25. There is a statutory right of appeal to the SENTW against the following decisions:-

(1) A refusal to carry out an assessment
(2) A refusal to make a statement
(3) The contents of a statement - Parts 2, 3 and 4 of a statement that has been made
(4) A refusal to amend a statement following an annual review
(5) A decision to cease to maintain a statement

26. The SENTW stands in the shoes of the local authority on any appeal, and can substitute its decision for that of the local authority. An appeal lies from a decision of the SENTW on a point of law to the Upper Tribunal.

27. It is a general principle of judicial review that it is a remedy of last resort – so the courts will not grant permission if there is an adequate alternative remedy, such as an appeal to the SENTW. However, judicial review still plays a part in holding local authorities to account. The local authority is under a statutory duty to ensure that the child receives the special educational provision set out in his statement. That duty can be enforced by way of a claim for

judicial review, and the court can issue a mandatory order requiring the local authority to make the provision in question. Further, if there has been a failure on the part of a local authority to comply with an order of the SENTW, the only appropriate action is by way of judicial review. The court also has the power to order interim relief pending an appeal to the SENTW, although this power is exercised rarely.

28. The Welsh Government is currently considering fundamental reforms to the special educational needs regime in Wales. On 26 June 2012, the Welsh Government published a consultation on proposals for reform of the legislative framework for special educational needs in Wales. The consultation paper is found here: http://wales.gov.uk/docs/dcells/consultation/120710senconsultationen.pdf.

29. The consultation closed on 19 October 2012. On 26 September 2012, the Minister gave a statement to the Assembly, announcing that "feedback from stakeholders" had suggested that it would be beneficial to delay the legislative reform, so as to work through the implications of the proposals in more detail. He gave a commitment to legislating "during this Assembly". A response to the consultation was promised shortly after the consultation closed, and the Minister undertook to bring forward legislative proposals during this Assembly term. The legislative programme for 2012-13 still includes an Education (Wales) Bill, which is to include reform of the statutory framework for children and young people with special educational needs (as well as the registration of children of compulsory school age who are home educated). So we should see a Bill soon, but to date, nothing has been published.

30. Proposals for reform were first made in 2007, and pilot projects have been running across Wales since that date. The most recent consultation proposes to replace the statutory framework for the assessment and planning of provision for children and young people with SEN with a simpler, more person centered, and integrated system for children and young people with additional needs.

31. To date, the main highlights of the proposals are as follows:-

    (1) to give a statutory footing to the concept of "additional needs" which will replace "special educational needs". A person would be deemed to have an additional need if they have a greater difficulty than the majority of persons of the same age, which can encompass significant problems due to their physical or sensory needs, communication needs, ability to learn or social and emotional development. A child will have additional needs if they need support that is additional to or different from that provided as part of universal service provision or a normal school curriculum. There will be a range of need – those with additional needs, those with significant additional needs, and those with severe and/or complex needs. Children and young people will be deemed to have severe and/or complex needs if they require intensive and/or specialist interventions in relation to their

health needs, their disabilities or their social and emotional needs, and require more than one service to provide for their needs.

(2) to replace SEN statements with a new integrated Individual Development Plan for children and young people, which will cover all areas of need. The IDP will be produced following one integrated assessment covering education, health and social care, and will be based on a "person centred planning" approach

(3) for those with significant additional needs, local authorities will determine provision at a Support Panel. Those with severe and/or complex needs will have their needs considered at Multi-agency Support Panels, which will assess and agree the package of services that will be provided from education, social and health services. The outcome of the agreed package will be recorded in the IDP.

(4) to set out how IDPs will cover those aged 0-25. The Early Support Model will support those below school age, and the extension of the IDP to those aged 19- 25 should improve transition arrangements into further or higher education, work based learning and/or adult services.

(a) Those with severe and/or complex needs will have an IDP with "entitlement protection", described as the same legal protection as an SEN statement. For those between 18-25, only those where specialist further education placements are being considered will have this protection.

(b) Children between 2-18 with significant needs will have an IDP with entitlement protection, with a package of support agreed by the Support Panel

(c) Children between 2-18 and young people with additional needs will havean IDP covered by the Code of Practice;

(d) Children between 2-18 and young people in receipt of universal services will have an IDP as a matter of good practice in relation to short-term educational interventions.

(e) 19-25 year olds who do not have severe and complex needs will have an IDP as a matter of good practice to aid their transition.

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(5) to set out the duties imposed on all relevant bodies, such as local authorities and the NHS. The new regime will move away from education services being perceived as the lead, to one of full-partnership and a multi-agency approach between education, health and social services.

(6) to set out the resolution process for any disputes. It is proposed that there will be a continued right of appeal to Tribunal for those with significant and severe and/or complex needs, but with the requirement to go through some kind of mediation/ dispute resolution process in the first instance. There will be a maximum of four weeks proposed to resolve disagreements. The Welsh Government states that it intends to "explore the possibility" of broadening the remit of the SENTW to include health and social care, subject to appropriate safeguards for issues of clinical judgment of need, and to extend to cover packages from 0-25 years of age. Those with less significant AN, and who do not have an IDP with entitlement protection, will have to find redress through the relevant complaints procedure. There is also a proposal that if an authority concedes or loses an appeal, authorities will be required to hold an internal review.

(7) to impose a duty on the Welsh Ministers to issue a code of practice in relation to the new statutory framework for Additional Needs;

(8) to require all relevant bodies to collaborate in respect of AN provision.

(9) A final proposal is to make local authorities responsible for assessing the need for, securing and funding specialist further education provision, including residential accommodation for learners with learning difficulties and/or disabilities. These duties are currently imposed on the Welsh Government itself. The proposal is to transfer funding through the Revenue Support Grant to meet this new duty.

32. A number of similar proposals have been made in the Children and Families Bill currently going through Parliament in England. As is the case there, the devil will often be in the detail, and we will need to wait to see a draft Bill before we can evaluate how the proposals may work in practice. Key issues have arisen as to how integrated assessments will work, the nature and extent of any duty imposed on health bodies to provide

D. School Exclusions

33. The impact of exclusions upon the emotional well-being of children and young people is significant, and the social and political consequences of school exclusions are well known. Recent research has indicated that certain vulnerable groups are at higher risk of exclusion. Boys are four times more likely to be excluded than girls; pupils with special needs are nine times more likely to be permanently excluded; and pupils on free school meals are four times

more likely to be excluded. Research has also indicated that illegal exclusions from schools are on the rise. Wales' Children's Commissioner has expressed his frustration at progress in tackling the problem.

34. The legal regime governing exclusions in Wales has not changed recently, unlike the position in England. It consists of:-

    (1) Section 52 of the Education Act 2002;
    (2) The Equality Act 2010;
    (3) The Education (Pupil Exclusions and Appeals) (Maintained Schools) (Wales) Regulations 2003 ("the Regulations");
    (4) The Education (Pupil Exclusions and Appeals) (Pupil Referral Units) (Wales) Regulations 2003;
    (5) The Government of Maintained Schools (Wales) Regulations 2005; and
    (6) The Education (Reintegration Interview) Wales Regulations 2010.

35. New statutory guidance was published by the Welsh Government in September 2012: *Exclusion from schools and pupil referral units* ("the Guidance"). Regulation 8 of the Regulations provides that the head teacher, governing body, appeal panel and local authority must each have regard to the Guidance. The Guidance itself states that:

    "*There is a strong expectation that the guidance will be followed unless there is good reason to depart from it. The guidance is not exhaustive and judgements will need to take account of the circumstances of individual cases."*

36. Key points to note about the exclusions regime are as follows.

    (1) First, schools must have behaviour policies, designed to promote good behaviour and discipline.

    (2) Secondly, the statutory definition of the term "exclude" means exclude on disciplinary grounds. Pupils cannot be excluded on a "precautionary" basis without any findings as to their guilt of the matters alleged: see *JR 17's Application for Judicial Review* [2010] HRLR 27.

    (3) "Informal" or unofficial exclusions are unlawful regardless of whether they are done with the agreement of parents or carers – so sending a pupil home for disciplinary reasons without following the formal exclusions process or being sent home for other reasons is unlawful.

(4) The power to exclude can be exercised for one or more fixed periods (which may not exceed 45 days in any one school year) or permanently. It can only be exercised by the headteacher (or an acting headteacher in their absence).

(5) The governing body must decide whether or not to reinstate a pupil where he/she has been excluded permanently or for certain fixed term exclusions.

(6) Where a pupil has been permanently excluded and the governing body decides not to reinstate them, there is a statutory right to challenge the refusal to reinstate. This is by way of an appeal to an independent appeal panel. The IAP must decide whether the The IAP may uphold the exclusion, direct that the pupil is to be reinstated or decide that because of exceptional circumstances, it is not practical to give a direction requiring reinstatement, but such a direction would otherwise have been appropriate.

(7) The IAP's decision binds the parties, subject to a judicial review challenge. An IAP's decision can be challenged on the usual public law grounds – e.g. that it is irrational, that it acted in a procedurally unfair manner, failed to have regard to relevant considerations, took into account irrelevant considerations, or otherwise acted unlawfully. Human rights challenges are unlikely to be successful, as the Courts have held that (i) a decision to exclude a child does not determine his civil rights and obligations under Article 6; (ii) does not interfere with Article 8 rights; and (iii) does not breach Article 2 of the First Protocol (right to education) as that article does not create any right to be educated in any particular institution.

37. The Guidance provides that a decision to exclude a learner should be taken only in response to serious breaches of the school's behaviour policy and if allowing the learner to remain in school would seriously harm the education or welfare of the learner or others in the school. A decision to exclude a learner permanently is a serious one. It will usually be the final step in a process for dealing with disciplinary offences following a wide range of other strategies, which have been tried without success. The Guidance states that there will, however, be exceptional circumstances where in the head teacher's judgement it is appropriate permanently to exclude a learner for a first or one-off offence. These might include:

    (1) serious actual or threatened violence against another learner or a member of staff;

    (2) sexual abuse or assault;

    (3) supplying an illegal drug; or

    (4) use or threatened use of an offensive weapon.

38. The Guidance explains that learners' behaviour outside school on school business, e.g. on school trips, away school sports fixtures or work experience placements is subject to the

school's behaviour policy. Bad behaviour in these circumstances should be dealt with as if it had taken place in school. For behaviour outside school, but not on school business, a head teacher may exclude a learner if there is a clear link between that behaviour and maintaining good behaviour and discipline among the learner body as a whole. This will be a matter of judgement for the head teacher. Learners' behaviour in the immediate vicinity of the school or on a journey to or from school can, for example, be grounds for exclusion. The Guidance lists examples of possible objectives for the school to bear in mind when setting its policy on behaviour outside school.

39. Additional safeguards apply to the exclusion of pupils with special educational needs. The Guidance states that, other than in the most exceptional circumstances, schools should avoid permanently excluding learners with statements of SEN. They should also make every effort to avoid excluding learners who are being supported at School Action or School Action Plus under the Special Educational Needs Code of Practice, including those at School Action Plus who are being assessed for a statement. In particular:

    (1) Schools should try every practicable means to maintain the learner in school, including seeking LA and other professional advice and support at School Action Plus, or, where appropriate, asking the LA to consider carrying out a statutory assessment. For a learner with a statement, where this process has been exhausted, the school should liaise with their LA about initiating a formal review of the learner's statement; and

    (2) Where a learner is permanently excluded, the head teacher should use the period between their initial decision and the meeting of the discipline committee to work with the LA to see whether more support can be made available or whether the statement can be changed to name a new school. If either of these options is possible, the head teacher should normally withdraw the exclusion.

40. Exclusion should not be used for minor incidents, poor academic performance, lateness or truancy, pregnancy, breaches of school uniform policy or punishing pupils for the behaviour of their parents.

41. In Wales, unlike the position from September 2012 in England, the IAP is not limited to reviewing the decision of the governing body. They must first decide, on the balance of probabilities, whether the pupil did that which he is accused of doing. They must then consider whether to uphold the exclusion or not, which includes a consideration of the proportionality of the sanction, the fairness of the exclusion in relation to the treatment of others who were involved in the incident, the school's behaviour policy, equality opportunities

policy, SEN policy, anti-bullying policies and whether the headteacher and governing body complied with the law and had regard to the guidance on exclusion.

42. The IAP must also consider any claim for discrimination arising out of a permanent exclusion – including disability discrimination and race discrimination.

E. School Reorganisations

43. School reorganisation, and in particular the closure of existing schools and establishment of new ones, is in many cases a controversial and emotive subject. As such, it generates significant litigation, through claims for judicial review. Local authorities have very broad discretion to ensure that sufficient primary and secondary education is available to meet the needs of the population of their area, and must exercise their education functions with a view to promoting high standards, ensuring fair access to educational opportunity and promoting the fulfilment of every child of his educational potential.

44. School re-orgnaisations in Wales are (at the present date) principally governed by Part II of the 1998 Act, and various key sets of regulations, including the Education (School Organisation Proposals)(Wales) Regulations 1999. There are detailed statutory requirements on consultation, publication, consideration, approval and implementation of new school proposals and proposals to cease maintaining a school. Prescribed alterations also require formal proposals – including things such as an enlargemenet of a school and the transfer of a school to a new site. Many proposals have to be approved by the Welsh Ministers, and at present in Wales, there is much greater involvement of the Welsh Government in school decisions than in England.

45. Two recent Welsh cases provide good examples of the kinds of challenges that can be brought to school reorganisation decisions. The first is that of *R (Philippa Jane Roberts) v Welsh Ministers and Cardiff City Council* [2011] EWHC 3416, which concerned a challenge to the decision of the Welsh Ministers to approve a proposal from Cardiff City Council to re-organise primary school provision in the Whitchurch area. The second is that of *R (Brynmawr Foundation School Governors) v Welsh Ministers and Blaenau Gwent County Borough Council* [2011] EWHC 519 (Admin).

(1) R (Roberts) v Welsh Ministers

46. In this case, Cardiff had published proposals that two English medium schools – Eglwys Wen and Eglyws Newydd – were to be closed, and replaced by a single school located at a site shared by Eglwys Wen and a Welsh-medium primary school, Ysgol Melin Gruffydd. It was also proposed that Ysgol Melin Gruffydd should be relocated to the site occupied by Eglyws

Newydd and its capacity expanded substantially. The proposals generated very significant opposition in the locality, and so required the approval of the Welsh Ministers. By letter dated 28 January 2011, the responsible Minister gave his approval to the proposal.

47. The challenge was essentially a challenge to Cardiff's policy of "local schools for local children" – i.e. a policy of ensuring that there are enough places for children in the catchment area but closing surplus places.

48. Section 9 of the Education Act 1996 ("the 1996 Act") imposes a duty upon the Welsh Ministers and local authorities 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. Section 13 imposes upon a local authority an obligation to contribute towards the spiritual, moral, mental and physical development of the community by securing that efficient primary education is available to meet the needs of the population of their area. Section 14 of the 1996 Act provides that a local authority shall secure that sufficient schools for providing primary (and other) education are available for their area.

49. Section 86(1) of the School Standards and Framework Act 1998 ("the 1998 Act") obliges a local authority to make arrangements for enabling the parent of a child to express a preference as to the school at which he wishes the child's education to be provided. Section 86(2) makes it mandatory for a local authority to comply with that parental preference but the duty does not apply if the preference would prejudice the provision of efficient education or the efficient use of resources.

50. The Administrative Court (Wyn Williams J) held that a local authority is not precluded from adopting a policy which seeks to match school places with the likely demand from children within the catchment area of the school. The Judge held that the effect of the above statutory provisions was that all local authorities have a duty to comply with parental preference unless compliance with the preference would prejudice the provision of efficient education or efficient use of resources within their administrative area. However, this did not preclude the adoption of a policy which sought to match school places with the likely demand from children within the catchment area of the school. Nor did the provisions make it unlawful for a local authority to have a policy which encourages children to attend the school in whose catchment area they reside. The Judge held that a local authority has an unqualified obligation to secure efficient primary education to meet the needs of the population of its area (under section 13 of the 1996 Act) and it was open to them to conclude that an appropriate means of securing such efficient education for the whole of its area was to seek to achieve a reasonable match between the number of places at a particular school and the demands for such places from the catchment area of the school.

51. The Judge did not accept that, because a possible effect of the proposal might be that pupils who would attend the existing schools (should those schools continue to exist) but who resided out of their catchment areas would be forced to attend a school other than the new school which was intended to replace them, the policy was thereby in conflict with section 9 of the 1996 Act or section 86 of the 1998 Act. The aim of the policy was the provision of efficient education in the whole of the administrative area and parental choice in any given case and, more particularly, the fact that choice in an individual case might be denied was not a reason for concluding that the policy was unlawful. See at §127.

52. Also of wider significance within Wales is Wyn Williams J's consideration of the Welsh Government's Circular 21/2009, "School Organisation Proposals". Section 1 of the Circular is entitled "Key Principles, Policies and Issues", and its primary object is to provide guidance to local authorities in relation to the process of formulating proposals prior to publication. Section 2 of the Circular is headed "Consideration of Proposals by the Welsh Ministers". Section 2 of the Circular contains guidance relating to "popular and effective" schools. The Judge left open the question whether a local authority is obliged to have regard to the guidance contained in Section 2 of the Circular when formulating proposals (§18-20).

53. The issue before the Judge was whether the Minister should have treated Eglyws Newydd as a "popular" school. The term "popular school" is not defined in the Circular. The Judge held, applying *R (Raissi) v Secretary of State for the Home Department* [2008] QB 836 that it fell to the court to determine the meaning of guidance contained in the Circular (rather than the court being limited to assessing whether the Minister's interpretation of the guidance was a rational one). The phrase "popular school" must be a meaning which can sensibly apply in relation to all schools within Wales. A "popular" school is a school that is very well attended. The Judge held that, in the context of the Circular, a reasonable and literate person would regard a school as popular only if the school's surplus places were 10% or less over a period of time (§§45-46). This has to be measured over a period of time, in years if possible. If a school can demonstrate that its surplus places have been 10% or less over some years, it ought properly to be regarded as a "popular" school. The Judge was careful to state that a low percentage of surplus places is not the *only* way in which a school can be described as "popular" – he thought that a combination of circumstances and/or factors might exist in relation to a school which would justify that conclusion. However, he did not go on to explain what those factors might be (§50).

54. The Welsh Ministers had not adopted this test. They had put forward two reasons for concluding that Eglyws Newydd was not a popular school – first, that only 42% of children from its catchment area attended the school, and secondly, that the school had a significant number of surplus places (81). The Judge held that this conclusion was irrational. The

Minister had relied on the number of surplus places at a particular moment in time when he knew or ought to have known that the number was very unlikely to be properly representative (as he took the figures at the time when proposals had been published which threatened the existence of the school). He should have taken the figures over a number of years, and not just a single year in question (see §§55-58). The rationality challenge to the method of calculating the percentage of children from the catchment area who attended the school was dismissed (§§59-65).

55. Despite this finding that the Minister's conclusion was irrational, the Judge decided not to quash the decision because he was satisfied that had the Minister applied the correct test there was no material that would have permitted the conclusion that Eglyws Newydd was a popular school. There would be no useful purpose in remitting the matter to the Minister for re-consideration (see at §§67-70, 149-162).

56. The Claimant then alleged that the Minister did not consider whether the proposals offered at least equivalent quality and diversity of education at a total lower cost than would be available in the status quo was maintained. This ground of claim relied on the principle set out in *Secretary of State for Education v Science v Tameside Metropolitan Borough Council* [1977] AC 1014 that a decision maker must ascertain a proper factual basis for his conclusion. The first aspect of this ground was dismissed: the Minister had clearly had regard to the quality and diversity of education under the new proposals.

57. The second aspect succeeded. The Judge held that Circular 21/2009 required a reasonably detailed analysis of the capital costs of implementing the proposals compared with maintaining the status quo and the likely increase or decrease of revenue expenditure thereafter. No such analysis had been undertaken prior to the decision under challenge. It had not been undertaken by Cardiff, and the Minister had made insufficient inquiry about the financial implications of the proposals prior to making his decision (§§93-97).

58. However, again, the Judge's finding that the Minister failed to comply with his *Tameside* duty did not lead to the decision being quashed because the issue in relation to costs simply did not arise if Eglyws Newydd was not a popular school (see at §§148, 158).

59. The final ground of claim was that the policy of "local schools for local children" was discriminatory as between English medium learners and Welsh medium learners. It was said that the Council's plans were to create Welsh-medium capacity in excess of local catchment demand while frustrating parental choice in relation to English medium schools by limiting the planning of school places to in-catchment demand. This ground of claim was roundly rejected by the Judge, who found that the Claimant had not identified any legal basis for such a claim. The published proposals sought to provide a suitable number of places to meet local

catchment demand for both English medium and Welsh medium schools based upon projections of demand for education in both mediums.

(2) R (Brynmawr Foundation School Governors) v Welsh Ministers

60. The second judgment is that of *R (Brynmawr Foundation School Governors) v Welsh Ministers and Blaenau Gwent County Borough Council* [2011] EWHC 519 (Admin). The functions of the Welsh Ministers included consulting upon, and making proposals for, a "prescribed alteration" to a foundation school under section 113A of the Learning and Skills Act 2000. Proposals to provide or to cease to provide sixth form education in a school are "prescribed alterations". The claimant was a foundation school, and the local authority proposed to close all school sixth forms in its area, and replace them with a single institution.

61. Guidance published by the Welsh Government had indicated the Welsh Ministers' intentions to delegate their powers to the local authority, deriving from the Learning and Skills Act 2000, to alter the provision of post-16 education. The local authority submitted its proposals on sixth form education to the government. An informal consultation document was published listing three proposals for consideration. A report was produced on the informal consultation procedure which stated that the government would have to delegate its powers before the local authority could remove the sixth form at Brynmawr. The local authority wrote to the Welsh Ministers, asking them if they recommended delegating its powers under s.113A of the 2000 Act to it in respect of the reorganisation of sixth forms by virtue of s.83 of GOWA. It also requested an assurance that the options put forward would be legally possible before the delegation was agreed. It was not until after formal consultation commenced that that assurance was given. Publication of the consultation document occurred prior to the assurance.

62. The claimant school governors applied for judicial review of a decision of the Welsh Ministers to enter into an arrangement with the local authority under section 83 of GOWA, under which the local authority would exercise the Welsh Minister's functions in respect of consulting upon, and making proposals, about the provision of sixth form education at the school. They also challenged the local authority's consultation process as vitiated by bias, predetermination, non-compliance with relevant guidance as to the time a consultation should take place, and rationality.

63. On the first point, the Court held that the Welsh Ministers had been entitled under section 83 of GOWA to delegate their powers to consult and make proposals about the provision of sixth form education under the Learning and Skills Act 2000 to a local authority. Beatson J held that GOWA was a statute that attracted "constitutional" status, and the court had to take that into account when applying the rules of statutory construction to determine the scope of

powers conferred on the Welsh Ministers or the Assembly. Section s.83 allowed the Welsh Ministers to make arrangements for any relevant authority to exercise its functions, but s.83(3) excluded certain functions. However, the combined effect of various provisions in GOWA meant that since the exclusion in s.83(3) did not apply the functions conferred on the Welsh Ministers by s.113A of the 2000 Act were functions about which they could make arrangements with any local authority. Had Parliament intended to further limit s.83 by excluding the functions of s.113A of the 2000 Act, it would have done so.

64. The transfer of functions concerning foundation schools was in the same statute as the power to enter into arrangements with such bodies. Parliament had intended the Welsh Ministers to be able to enter into arrangements regarding their functions with other relevant authorities, including local authorities. It could not be said that the Welsh Ministers were frustrating the policy and objects of the relevant provisions of the 1998 and 2000 Acts, particularly because of the clear indication in the language in s.33 of the 1998 Act that they did not occupy the entire field (§§74-77, 85-87).

65. As to the second ground, the local authority's decision to revert to an earlier proposal because the one proposed by the claimant, which it had endorsed, was deemed by the Welsh Ministers not to comply with policy, did not show predetermination. Although the local authority had indicated its preferred option, the consultation paper clearly raised and dealt with the claimant's proposal. It also made it clear that the consultees could propose alternatives, which it would, and did, consider. They had not been denied any meaningful opportunity to express their views on the claimant's proposal. The local authority could not be criticised for expressing a preference. It was required to candidly disclose its reason for what was proposed to enable meaningful responses to be given.

66. The judge also held that the local authority had been entitled to commence consultation when it did. It was arguably entitled by virtue of the broad power to promote economic and social well-being in s.2 of the Local Government Act 2000 to raise the issue of Brynmawr even if that could not at that stage be part of the formal statutory consultation period. The local authority's decision to launch consultations before responding to the assurance letter did not invalidate that which occurred thereafter. Regardless of the number of days of consultation that occurred during term time and the holidays, the claimant's lack of promptness in raising the point meant that it would not be appropriate to set aside the consultations and subsequent decisions.

67. Anyone with sufficient interest in the proposals can bring a claim for judicial review to challenge a school reorganisation decision. The need to act promptly in this area is particularly important, and claimants must act swiftly so as not to have their challenges excluded on the grounds of delay. There is still controversy as to whether any challenge

should be brought to each stage of the discontinuance process (i.e. early consultations, or decisions to publish a statutory notice) or whether a claimant can wait until the ultimate decision to close has been taken on the basis that the decision maker could correct any defects in the process at a later stage. The Court of Appeal in *R (Elphinstone) v Westminster City Council* [2008] EWCA Civ 1069 expressed the provisional view that any challenge should have been brought promptly after the decision to publish the statutory notice. It may be sensible to issue a protective claim at an early stage and then seek an agreement to stay proceedings so that no point can be taken on delay.

68. The Schools Standards and Organisation (Wales) Act ("the Act") was passed by the Assembly on 15 January 2013 and received its Royal Assent on 4 March 2013. The vast majority of provisions in the Act are not yet in force. Part 3 of the Act contains new provisions on school re-organisation. The major innovation here is to divest the Welsh Ministers of their current role of determining the majority of proposals and to allow local authorities and proposers themselves to determine proposals at a local level and more swiftly than the Welsh Ministers are able to. The stated objectives of the new provisions are as follows:[1]

    "
    - a greater number of locally determined proposals for reorganisation;
    - fewer proposals requiring third party determination as a result of objections;
    - where proposals do require third party determination, a process which is much swifter and for the most part conducted at the local level;
    - a consultation and determination process which is consistently applied;
    - a bringing together, in one place, of all substantive law on school organisation in Wales."

69. The Welsh Ministers have a power to issue a School Organisation Code, which may impose mandatory requirements as well as giving guidance in respect of functions under Part 3 of the Act (s 38). A *Draft School Organisation Code* was published in October 2012, and consultation on it ended on 16 January 2013.

70. The new Act contains provisions on proposals and proposers for the establishment, alteration and discontinuance of maintained schools. The first step that must be taken by a proposer is to consult on its proposal in accordance with the School Organisation Code (s 48(2)), save where the proposal is to close a "small school" with less than ten registered pupils, in which case there is no duty to consult (s 48(3)). Post-consultation, the proposer must publish a report on the consultation exercise (s 48(5)). Section 3 of the *Draft School Organisation Code* sets out in detail the requirements that must be complied with on a consultation exercise, including a detailed prescription of the information that must be included in a consultation document.

[1] *School Standards and Organisation (Wales) Bill, Explanatory Memorandum* (April 2012), para 3.59.

71. The next step is that the proposer must publish its proposals in accordance with the School Organisation Code (s 48(1)). Thereafter, there is a 28 day period within which objectors may send written objections to the proposer (s 49(1) and (2)). The proposer must publish a summary of all objections received and its response to them within a specified period (either seven or 28 days, depending on the proposal) (s 49(3)).

72. The identity of the body that is charged with determining proposals depends on the nature of those proposals. Accordingly:

    (1) the Welsh Ministers will determine a proposal where (ss 50(1), 52(2) and (5), and 54):
        (a) it affects sixth form education;[2]
        (b) the proposer is not the relevant local authority and the relevant local authority has objected to the proposal;
        (c) it is a proposal related to a proposal mentioned in subparagraphs (a) or (b) which has not been determined before the Welsh Ministers determine the related proposal; or
        (d) it has been properly referred to the Welsh Ministers pursuant to s 54 of the Act;

    (2) the relevant local authority will determine a proposal where (ss 51(1) and 52(4) and (6)):
        (a) it is not required to be determined by the Welsh Ministers under s 50, it has been made by a proposer other than the relevant local authority, and there has been an objection to the proposal; or
        (b) it is a proposal related to such a proposal which has not been determined before the local authority determine the related proposal;

    (3) in any other case, the proposer will determine the proposal (s 53(1)).

73. It is likely that the majority of challenges will in future be made against local authority decisions, rather than those of the Welsh Ministers. Challenges are likely to come in the same kinds of areas such as previously: challenges to consultation exercises, failure to have regard to relevant considerations, failure to comply with mandatory requirements of the new school organisation code, irrationality and the public sector equality duty.

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[2] As defined in s 50(2).

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