

# **Public Administration and a Just Wales: Education**

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## **LIST OF ABBREVIATIONS**

A2P1	Article 2 of Protocol No. 1 to the ECHR
ALN	Additional learning needs
ALP	Additional learning provision
AJTC	Administrative Justice and Tribunals Council
CAJTW	Committee for Administrative Justice and Tribunals Wales
CCW	Children's Commissioner for Wales
CSA	Care Standards Act
DELCO	Designated Education Clinical Lead Officer
EA	Education Act
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EHE	Elective Home Education
EHC	Education, health and care
EIA	Education and Inspections Act
EOTAS	Education otherwise than at school
ESO	Education Supervision Order
EWM	Education (Wales) Measure
FGCW	Future Generations Commissioner for Wales
FOI	Freedom of information
GOWA	Government of Wales Act
HRA	Human Rights Act
IDP	Individual Development Plan
IEP	Individual Education Plan
LASPO	Legal Aid Sentencing and Punishment of Offenders
LT	Learner Travel
LTIW	Learning Travel Information (Wales)
LTWM	Learner Travel (Wales) Measure
NI	Northern Ireland
NIPSO	Northern Ireland Public Services Ombudsman
NGO	Non-governmental organisation

PSED	Public Sector Equality Duty
PSOW	Public Services Ombudsman for Wales
SAO	School Attendance Order
SEN	Special educational needs
SENTW	Special Educational Needs Tribunal for Wales
SEP	Special educational provision
SSFA	School Standards and Framework Act
SO	School Organisation
SSOWA	School Standards and Organisation (Wales) Act
SACRE	Standing Advisory Council on Religious Education
TCEA	Tribunals Courts and Enforcement Act
WBFOWA	Well-being of Future Generations (Wales) 2015 Act
WESP	Welsh Education Strategic Plan
WLC	Welsh Language Commissioner
WLGA	Welsh Local Government Association
WLWM	Welsh Language (Wales) Measure

# Public Administration and Justice in Wales: Education

## Part I – General issues

### 1 Public Administration and Justice in Wales: General Introduction

Justice in relationships between individuals and public bodies is usually referred to as administrative justice. It concerns ‘how government and public bodies treat people, the correctness of their decisions, the fairness of their procedures and the opportunities people have to question and challenge decisions made about them’.<sup>1</sup> The terminology ‘administrative justice’ became more common after a UK Administrative Justice and Tribunals Council (AJTC) was established under the Tribunals Courts and Enforcement Act (TCEA) 2007. That Act provided a definition of an ‘administrative justice system’ to aid the AJTC in its role of seeking to co-ordinate the system. According to the TCEA:

‘the administrative justice system’ means the overall system by which decisions of an administrative or executive nature are made in relation to particular persons, including—

- (a) the procedures for making such decisions,
- (b) the law under which such decisions are made, and
- (c) the systems for resolving disputes and airing grievances in relation to such decisions.

The first body with a formal role to oversee the administrative justice system in Wales was the Welsh Committee of the AJTC set up in 2008. The Committee was abolished along with the AJTC itself by the Westminster Government in 2013 but in its short life it had a significant impact in highlighting the particular administrative justice challenges faced in Wales, and in promoting reform.<sup>2</sup> It was succeeded in 2013 by the Committee for Administrative Justice and Tribunals Wales (CAJTW), set up by the Welsh Ministers to ensure that expert advice remained in place in Wales, and that the needs of users of the system in Wales continued to be paramount. CAJTW’s work facilitated the development of a community of stakeholders, including academic researchers, to continue providing evidence-based research and advice on the administrative justice system. CAJTW itself was disbanded in 2016, and no successor body has been established. However, the Commission on Justice in Wales [herein after ‘the Justice Commission’] recognised the importance of administrative justice, concluding that: ‘Administrative justice is the part of the justice system most likely to impact upon the lives of people in Wales’.<sup>3</sup> The Justice Commission also noted that: ‘Whatever the current state of divergence [between Welsh and English law], it seems safe to conclude that it is in the field of substantive administrative law that the scope for divergence has the most potential in the short term’.<sup>4</sup> Education is, of course, a key area of substantive administrative law devolved to Wales.

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<sup>1</sup> UK Administrative Justice Institute: <https://ukaji.org/what-is-administrative-justice/>

<sup>2</sup> AJTC Welsh Committee, *Review of Tribunals Operating in Wales* (2010).

<sup>3</sup> Commission on Justice in Wales, *Justice in Wales for the People of Wales* (October 2019) para 6.1.

<sup>4</sup> Justice Commission, para 6.15.

This ‘Education Report’ is one of three Reports into administrative law and justice in Wales. There is a general report, *Public Administration and a Just Wales*, which focuses on general Welsh public administrative law and its inter-action with Welsh policies on good administration, well-being, human rights and equality. That Report also examines the key institutions in the Welsh administrative justice system, how the system is designed and overseen, and suggests reforms. Another report examines administrative justice in the context of social housing and homelessness in Wales. The ‘Housing’ report and this ‘Education’ report serve as case-studies about how the various elements of administrative justice function in particular areas of devolved public administration. The conclusions from each of these area-specific reports have helped inform our broader recommendations about public law and administrative justice in Wales.

## 2 Education in Wales

### 2.1 Introduction

Education is a devolved area. The National Assembly for Wales (the ‘Assembly’) first gained primary legislative powers in some education areas in 2007,<sup>5</sup> and in almost all others in 2011.<sup>6</sup> The powers given to the Secretary of State in UK Acts of Parliament were generally transferred to the Welsh Ministers.<sup>7</sup> Even prior to the devolution of primary legislative powers, the Welsh approach to education had begun to differ from that in England, through the Welsh exercise of various executive and secondary legislative powers, as well as through the development of a different, more rights-focused context in which the law would be applied. Over the years, the body of primary legislation on education for Wales has developed and continues to develop, with the legislation on additional learning needs being a recent example of a flagship piece of Welsh legislation from an administrative justice point of view.

In terms of administrative justice, education is one of the most complex devolved areas (the same is true in relation to Scotland) with a plethora of different bodies involved, numerous sources of law which set out these bodies’ powers and responsibilities, and a range of different procedures for challenging or questioning decisions of the bodies which provide public services in education. Our project aims to consider the education sector as a case study in the operation of the administrative justice system as a whole in Wales.

In this Report we have focused on maintained primary and secondary schools (excluding for now nursery, further and higher education and the independent education sector – which could be important subjects for future research).

We have conducted desk-based research including examining relevant legislation,<sup>8</sup> guidance, codes of practice, the limited academic and practitioner commentary on Welsh education law that is

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<sup>5</sup> Government of Wales Act 2006, Part 3 and Schedule 5 (GOWA 2006).

<sup>6</sup> GOWA 2006, Part 4 and Schedule 7A. The only specific reservation in Schedule 7A is in relation to UK Research and Innovation and Research Councils, Section C11.

<sup>7</sup> GOWA 2006, Schedule 11, and earlier transfer of functions orders made under the GOWA 1998.

<sup>8</sup> All legislation referred to in this report is to the legislation ‘as amended’ by any later legislation. The report aims to state the law in force on 6 March 2020. Therefore, the report does not take account of the temporary changes to powers and duties provided for by legislation relating to Covid-19.



available, previous research reports and other education sector reports from representative organisations, charities and other bodies. This enabled us to develop an initial register of institutions within the education administrative justice sector, and to map the main routes available to individuals and groups to challenge public body decision-making, and some of the regulatory systems in place. In this exercise we also identified some areas of concern where redress appeared to be limited, and where relevant law, guidance or procedures were unclear. Our mapping, and specifically the areas of concern raised, formed the basis for a briefing paper and questions which we used as the main tool for discussion during two central workshops (one in North Wales and one in South Wales). The workshops brought together policy-makers, lawyers, judges, advice and advocacy providers, representative organisations (e.g., representing teachers or parents) mediators, representatives from the Public Services Ombudsman for Wales (PSOW), the Children's Commissioner for Wales, and the Future Generations Commissioner for Wales (among others). We also held focus groups; with a North Wales Region local authority Special Interest Group made up primarily of local authority lawyers and school effectiveness officers; and with groups from peer-support networks (primarily including parents and carers of children with Special Educational Needs and/or disabilities). We attended tribunal user group meetings, and we considered our developing findings against recent studies from England. Finally, we made a Freedom of Information Act 2000 (FOI) request for information and data about particular types of complaint and appeal mechanisms, and examined the Administrative Court in Wales education judicial review caseload.

Whilst we have sought positive *and* negative views on the operation of administrative justice in relation to education, with regards to parents who have used redress systems, it has understandably been the users with criticisms of the system who have been most willing to provide feedback to us. This was also true for some organisations that gave us feedback: they commented on how they tended not to hear about the things that went well. Our research identifies a range of possible problems within the education administrative justice sector, but a more extensive study would be needed to determine the empirical prevalence of these problems.

Significant changes are also imminent in relation to the administrative justice system covering additional learning needs, and our analysis here focuses on relevant new law and guidance 'on paper', as informed by the views of our research participants and those responding to Welsh Government consultations about the development of the new regime, and challenges that might be encountered during its implementation.

This report starts by setting out our general questions and identifying some common themes. It then proceeds to an overview of the bodies involved in the education administrative justice system and their general duties, before examining the more specific regimes established for particular subjects.

## 2.2 General questions

The initial, and most general, question that we posed to research participants sought to help us to understand the potential causes of disputes. Answers included:

- complexity of the law
- lack of understanding of the law

-resources

-lack of good quality advice and accurate information

-numerous redress systems and the need to make choices between them

### 2.2.1 Complexity

The complexity of the system was considered by many people to give rise to problems. We received feedback that the law is complex and hard to find. There are many statutes, regulations and guidance documents. Statutes must be looked at ‘as amended’. There is the complication of whether the law applies in Wales or in England. We consider this issue further in the context of consolidation and codification later in this section.

### 2.2.2 Understanding of the law

A view we heard a number of times was that sometimes those having to apply the law have a poor understanding of it. In particular, it was suggested that within some local authority departments there is confusion as to the distinction between what is required by the law and what is actually the authority’s own policy. The same issue is observed in our Housing report. This suggests that there might be a need for greater support and training for local authority staff. The offer of such training might also be valuable for local councillors who may be approached for assistance and advice but for whom there is no specific training on redress in the administrative justice system.

The knowledge of school governors was regarded as somewhat variable by a number of participants, including some who have served as school governors. This is considered further in the section on governing bodies.

**Recommendation 1: More dedicated and specific training on administrative justice issues and routes to redress should be made available for local authority staff. Such training should use clear practical examples in order to help decision-making staff understand the differences between mandatory legal requirements, discretionary powers and ‘due regard’ duties. In addition, it should be clear what is the local authority’s own policy as to how the law is implemented and what is legally required.**

### 2.2.3 The availability of advice and support

Given the complexity of the law, and difficulties for some in finding it, limited access to information and advice is a problem. This is particularly acute outside the major urban areas of south Wales. Sometimes professionals are finding that people have received advice that is plainly wrong. Some solicitor practices are providing pro bono advice but this is a heavy responsibility on small practices. Third sector bodies such as SNAP Cymru and Tros Gynnal Plant are regarded as playing a valuable role, but their ability to do so is limited by availability of resources.

It is clear that there is a vast amount of information available but not all parents know how to find it and it is not always clear how it all connects together. Knowing what to look for is an issue: we heard from schools, NGOs and solicitors that it takes time to identify the particular problem of the parent or learner that they can deal with, as many parents are not sufficiently knowledgeable about the law to frame their question in a way that the system can respond to. We had feedback that the kind of mapping we are engaged with could be useful in helping parents and learners to identify their specific concerns and desired outcomes more clearly.

Advocacy is regarded as having the potential to make a big difference. The all-Wales approach to statutory advocacy is regarded positively but it is the non-statutory side (for children who do not have a social worker) that might fall down. Once again, the view shared by many is that the earlier advocacy support can be offered, the greater the chance of avoiding problems arising or escalating.

Throughout the project we heard from families that it was essential that advice was available from bodies independent from local authorities and schools. This is discussed further in the section on Special Educational Needs (SEN) / Additional Learning Needs (ALN) where there are specific duties, but it is relevant in relation to all areas of possible disputes. Parents in focus groups were concerned that in some areas local authorities appeared to be cutting back on their funding for external bodies and were taking more advice roles in-house.

#### 2.2.4 Resources

Sometimes a shortage of resources can lead to problems. This was felt to be the case when schools struggle to provide for SEN or disability. On the other hand, it was also felt that sometimes issues regarding resources are more to do with a lack of understanding of what the law requires: access is being ‘gate-kept’ through the use of policies and thresholds. We heard that some issues concerning discrimination are down to the fact that funding is scarce but sometimes down to ignorance about what the law requires. Problems with capacity and resources in the education sector were seen as combining with problems concerning access to advice, understanding of law and policy to create a ‘perfect storm.’ There was the view that ‘problems are not always down to funding, but funding is often in the mix.’

In general, there appeared to be a feeling that scarce resources frame the context in which everything else has to be made to work. Where disputes concern the provision of resources, it is easier to see how the effects of austerity can escalate problems. However, some disputes about the adherence to procedures are less directly associated with the scarcity of resources.

#### 2.2.5 Navigating redress pathways

The complexity of the overall court and tribunal system was remarked upon by the Justice Commission:

“The processes of the court and tribunal system are not easy to understand without advice. Many courts and tribunals have come about in part as a matter of history and in part out of a desire to provide simpler and cheaper means of dispute resolution...The system has never been rationalised, it is unduly complex...”<sup>9</sup>

More specifically, it noted that the ‘current system for challenging public bodies in Wales is complex.’<sup>10</sup> Nowhere is this more true than in relation to the various systems for challenging decisions regarding education. Historical piecemeal development of education law has led to the evolution of a range of different specific redress systems, each dealing with different individual

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<sup>9</sup> Commission on Justice in Wales, *Justice in Wales for the People of Wales*, 2019, para 5.56. (herein after Justice Commission Report).

<sup>10</sup> Justice Commission Report, para 6.16.

problems, such as admissions, exclusions, curriculum, school organisation and SEN / ALN. Even when the substantive law has been consolidated, as with the Education Act 1996, there has not been a consolidation of the redress systems. Other education areas rely on the complaints systems within local authorities and the general powers of intervention of both local authorities and the Welsh Ministers. On top of these are some general redress systems not specific to education such as judicial review and complaints to the PSOW. There are other bodies whose role is to monitor different aspects of education or children's rights or well-being principles (eg Estyn, the school inspectorate, the Children's Commissioner, the Future Generations Commissioner) and sometimes to provide assistance in relation to individual complaints (eg the Children's Commissioner). The lack of understanding of the role of these bodies is evident from the fact that individual complaints are sometimes made to those who have no individual complaint handling role.<sup>11</sup>

Different redress routes lead to different outcomes, for example a binding decision in a judicial review case or a recommendation (usually followed) from the PSOW. Some routes will be more formal (eg judicial review) than others (eg tribunal or PSOW). Some may be more local (eg sittings of a relevant tribunal). Some may be easier to access without specialist knowledge (eg PSOW). Some may be speedier than others, and some more expensive than others. Awareness of, and ability to assess, this range of differences would be necessary to make an informed choice as to which to pursue.

The initial route to redress for a particular issue may be straightforward, if, for example, there is no choice. But pursuing further redress may present difficult choices for a parent or learner to assess: for example, whether dissatisfaction with a local authority regarding SEN / ALN should go to the PSOW or the Special Educational Needs Tribunal Wales (herein after the Education Tribunal)<sup>12</sup> will depend very much on the reason for the challenge and the outcome being sought. Making the wrong choice could lead to missing a time limit for a tribunal or judicial review action. As discussed in our main report, *Public Administration and a Just Wales*, this is why any improvements in liaison and signposting between different bodies, such as the Education Tribunal and the PSOW, are to be welcomed.

In addition to the possible confusion as to which route to take, it can be time consuming and exhausting where different routes must be taken, for example when dealing the education aspects of SEN while also complaining to an NHS body about the health aspects. We heard from parents who were dealing with a large number of different key workers in relation to the

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<sup>11</sup> See for example: 'Estyn often receives complaints from parents. However, Estyn does not have the powers to investigate individual complaints.' From Estyn website - <https://www.estyn.gov.wales/faq/do-schools-have-log-parents-complaints> (last accessed 9 Feb 2020). The Future Generations Commissioner has noted that, despite her lack of individual case-work function, 40% of the letters she received during 2019 asked that she 'intervene in some way or another in individual decisions' and that elected representatives (AMs and Councillors) also ask her to get involved in individual cases. See Future generations Commission response to questions from the Assembly Equality, Local Government and Communities Committee (6 December 2019): <http://senedd.assembly.wales/documents/s96601/ELGC5-35-19%20Paper%209.pdf>

<sup>12</sup> The Special Educational Needs Tribunal for Wales (SENTW) will be renamed the 'Education Tribunal' once the Additional Learning Needs and Education Tribunal (Wales) Act 2018 enters into force. For simplicity, we have used the 'Education Tribunal' throughout this report to cover both the existing SENTW and the new Education Tribunal.

education, social services and health aspects of the issues in relation to an individual child with special educational needs.

There are also questions about the costs and efficiency of running such a range of, sometimes unconnected, systems. Disputes can involve a number of different individuals or bodies: in the context of SEN in England, Doyle and O'Brien refer to the 'polycentricity of disputes and the tension between individual rights and collective public interest [that] are at play.'<sup>13</sup>

The Justice Commission considered that it was necessary to 'unify courts and tribunals, both for civil justice and administrative justice',<sup>14</sup> and in the short term it recommended 'better co-ordination in relation to administrative justice so that the public have a clear understanding on where to go to have their disputes resolved.'<sup>15</sup> While there is valuable information on different individual websites, such as those of the Education Tribunal and the PSOW, we consider that it is essential that the public can access information on the different redress systems in one place and gain a sense of how they relate to each other. Participants in our research workshops considered that the online tool we were developing as part of this project would help families and others to identify possible routes of redress in relation to education disputes.

**Recommendation 2: We recommend that Welsh Government considers whether the Law Wales site might indicate in one place the different redress systems of relevance to education disputes and explain briefly how they relate to each other.**

#### 2.2.6 What worked and what did not work

It is clear that transparency and fairness are valued by parents. Good communication between home and school is viewed generally as helping to avoid disputes and preventing existing disputes from escalating. However, local authority staff observed that the need to follow certain procedures can sometimes be perceived by parents as being 'distant' or 'clinical'.

We heard that head teachers can feel very exposed in relation to decisions regarding discipline within the school, and there is sometimes aggression towards them. It is easy for people to get emotional, especially when social media is used to make public criticisms. This provides an unhelpful context for trying to resolve disputes. External bodies observed that 'there *are* some ill-informed parents and young people and there *is* some very challenging behaviour in schools.' They observed that some schools are very good at engaging parents, making real efforts to support vulnerable parents. Some parents also noted that the emotional element makes it hard for them to pursue complaints: we heard from some grandparents who felt that they had been able to help as they had a little more emotional distance from the problems.

From the perspective of governors we heard: 'If there is effective parental engagement, issues get resolved early. Being open is important including having all school policies readily available. Sometimes just saying sorry if appropriate at the outset is what is needed.'

Sometimes it is not the substance of the outcome that gives rise to problems, but the way in which it is handled. It might be that there is a delay, or that the 'messaging was not quite right.'

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<sup>13</sup> M Doyle and N O'Brien, *Reimagining Administrative Justice – Human Rights in Small Places* (Palgrave Macmillan, 2020) 113.

<sup>14</sup> Justice Commission Report, para 5.56

<sup>15</sup> Justice Commission Report, para 6.60. For further discussion, see *Public Administration and a Just Wales*.

This is evident from the work of the PSOW, where, on occasion, the handling of the complaint is found to have been flawed even where the outcome is a perfectly proper result.

There was agreement that early intervention can pay dividends. It was suggested that more focus could go into avoiding problems. For example, if there were an offer of advocacy to children who had had a fixed term exclusion, work could be done on re-engagement and avoiding further problems within schools and later in life: it was argued in one of our workshops that money spent on advocacy to sort out low level issues in schools would be much more valuable and cost effective than having to spend money later on young people in the criminal justice system.

**Recommendation 3: We recommend that Welsh Government assesses the value of conducting an audit of the availability of advocacy services in education for all children and young people, including those who are not currently entitled by statute to advocacy services, including whether advocacy is provided early enough to prevent problems arising or escalating.**

While we heard examples from parents of genuine support received in relation to SEN / ALN, especially from some SENCOs, teachers and health professionals, many parents, including some who had gone on to succeed at the tribunal, told us that they did not feel that they had been listened to by schools and by local authorities. Parents who had gone to the Education Tribunal described their very positive impressions about the way the tribunal had operated, especially in relation to clarity on the law and, in particular, the way in which the tribunal created an atmosphere conducive to hearing from the child or young person. However, they considered that there were significant financial obstacles to going to tribunal which put this out of the reach of many parents.

### 2.2.7 Specific areas

Specific areas are dealt with later in this report. It is worth noting, however, that two specific areas featured more than others in the general feedback sessions. One was not surprising given the timing of our research. The ALN Bill had been passed in the Assembly, the draft ALN Code was published at the end of December 2018 and there was accordingly a good deal of interest in how the new arrangements would work. The other area which arose as a particular focus was that of exclusions where there appeared to be genuine concern among some organisations, lawyers and lay individuals about the fairness and transparency of the system.

### 2.2.8 The legislative framework and consolidation

A comment made to us consistently throughout this project related to the complexity of the legal framework for education. While some comments related to the substance of particular provisions, the most general comment was that there is a plethora of legal instruments – Acts, regulations and guidance, as well as case law – and this can prove confusing, especially for lay people. An interesting point in the context of education is who is a ‘lay person’, given the huge role played by volunteer governors. Given this, it is particularly important that the law is accessible for all. Someone who had served as a governor said that

‘people have only a fragmentary understanding of the system. The law and policies are hard to find. For example, Welsh Government puts guidance on the Learning Wales Website but not everything *is* there. You really need to know what you are looking for.

There is nowhere with *all* regulations etc in one place. The teachers will get advice from their unions; the governors will get advice from the LA, previously would have gone to Governors Wales. If the school is in dispute with the LA, then it will get independent advice.’

Perhaps the most telling remark is the fact that ‘you really need to know what you are looking for.’ Currently, Law Wales provides a long list of ‘key legislation’ and some topic headings. But it is not obvious from the title of any Act, given that so many are called Education Act, what its focus is, and thus far Law Wales does not yet have all subject matter covered in the list of topics.

The Education Act 1996 was an ‘Act to consolidate the Education Act 1944 and certain other enactments relating to education, with amendments to give effect to the recommendations of the Law Commission. The version as enacted is available on the legislation.gov website.<sup>16</sup> It was a well drafted piece of legislation, much loved by some of our research participants, which brought together provision on: the statutory education system, including the general principles, powers and duties of the key bodies, funding, governance and organisation of schools; special educational needs; the curriculum; admissions and attendance; independent schools; ancillary functions including transport; punishment and restraint of pupils. It represented a very clear starting point for finding the law on education, although regulations, guidance and case law would also have to be consulted. However, instead of this remaining the ‘go to’ place on education by amending it when needed, the process of moving topics to other Acts began just two years later with the School Standards and Framework Act 1998. The Education Act 1996 remains in force, but an examination of its current list of sections in force reveals how much has been moved to other legislation. When we discussed consolidation and codification in our participant workshops, the need for discipline in amending rather than replacing the consolidated legislation was underlined.

It is easy to see why lay people in particular could be confused about where to find the rules that relate to the issue they want to deal with. For example, to look at discipline within schools, it is necessary to consult the Education Act 2002 on the head teacher’s power to exclude a pupil. However, the processes for making and challenging the exclusion are found in the Education (Pupil Exclusions and Appeals) (Maintained Schools) Wales Regulations 2003, as amended by regulations of 2004 and 2010. Further detail is provided in the Guidance on Exclusion from schools and pupil referral units of 2015. However, for the more general responsibilities of governing bodies for ensuring that there are school policies regarding good behaviour and discipline, one must look to the Education and Inspections Act 2006 which also sets out the requirements for head teachers regarding the school behaviour policy, and the conditions which apply to the imposition of disciplinary penalties other than exclusion. The prohibition on corporal punishment remains in the Education Act 1996, although this section is referred to in section 91(10) of the Education and Inspections Act 2006 in order to clarify that the provisions in the 2006 Act on using reasonable force in certain circumstances do not permit corporal punishment.

From the original Part V of the Education Act 1996 on the curriculum, a few provisions remain regarding religious education (ss 375, 390-392, 394-399), sex education (including a parent’s right to withdraw their child) (ss 403-405), provisions on avoiding political bias or indoctrination (ss

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<sup>16</sup> <http://www.legislation.gov.uk/ukpga/1996/56/contents> (last accessed 9 Feb 2020).

406-407), and the system for complaints about the curriculum (s 409). Other provisions on religious education (including the provisions on the withdrawal of learners from religious education and collective worship) are found in the School Standards and Framework Act 1998 (ss 69-71). In section 409 of the Education Act 1996 on complaints on the curriculum, it is necessary to cross-refer to the School Standards and Organisation (Wales) Act 2013 to find the Welsh Ministers' powers of intervention if a dispute is not resolved. Otherwise, the key legislation on the curriculum at present is in Part 7 of the Education Act 2002 which sets out the national curriculum for Wales. It is presumed that the proposed changes to the curriculum will provide the opportunity to consolidate the law as regards the curriculum and this will be very welcome. It is important that the provisions regarding dispute avoidance and resolution are dealt with as well as the substantive changes to the curriculum.

If individual areas of education are consolidated when the opportunity arises due to policy changes being legislated for, eventually these individual consolidations will form a 'code' of the primary legislation. Rather than combining them all into one Principal Act, it may be more accessible if each individual area has its own Act with the relevant Schedule following immediately after. However, all the Acts can be presented online as different parts of the overall Education Code. This could be done on the Law Wales site.

This does not however deal with having other details in regulations which must be found separately. One solution to this might be to include this level of detail in Schedules to the Act, and to allow for those schedules to be amended by regulation by the Welsh ministers. It would ensure that there is one document rather than two or more that have to be consulted.

At present, the most accessible instruments, in terms of readability and intelligibility for a lay reader in particular, are the Codes or Guidance documents provided by the Welsh Government. They are also useful in bringing together reference to the various pieces of primary and secondary legislation. However, even where these include mandatory requirements, they are not updated on the legislation.gov or commercial websites where one may find the amended versions of the legislation. Where there is a change to the legislation on the area they deal with, they will be updated to reflect this. But sometimes there are cross-references to other areas: for example, the Guidance on exclusions recommends that children with SEN statements should be excluded only in the most exceptional circumstances. Once the ALN Act 2018 enters into force, that piece of guidance will be out of date. This specific example is not in itself of huge significance but serves to illustrate how guidance can gradually become outdated. Given the importance of Codes and Guidance to the lay reader in particular, it is essential that they are taken into account in the process of clarifying, consolidating and codifying Welsh law and we recommend that the eventual structure should provide clear sign-posting to accessible Codes and Guidance, and ensure that these resources, and the electronic links to them, are kept up to date.

All our participants felt positive towards consolidation or codification of the law, although it was not clear exactly what form they saw it taking. The predominant view was that it would help if all the relevant law, primary and secondary, and guidance could be found in the one place. Some participants questioned whether a codification would include case law as well as legislation and possibly guidance. As noted already, there was also concern about the sustainability of consolidating the law given the experience with the Education Act 1996. There were also questions



about how the links and cross-overs with other areas of law such as health and social care would be dealt with.

**Recommendation 4:** We recommend that Welsh Government should regard education law as a priority for consolidation. Such consolidation could take place steadily topic by topic, with the intention of producing a series of Acts, with descriptive titles, which codify the law on specific topics and which, together, would form the Education Code for Wales. The codification process will need to grapple with the place of case law and what currently exist as Codes or Guidance within a codified system, and how to ensure that these are made visible and accessible to the general public.

**Recommendation 5:** We recommend that when legislation is proposed regarding the changes in the school curriculum, the opportunity is taken to bring together in one place all the provisions currently in different pieces of legislation on the curriculum regarding its content, delivery and systems for resolving disputes.

## Part II – Bodies, systems and general duties

### 3 General overview of bodies and systems

This table seeks to provide an overview of the different bodies involved in relation to dealing with education disputes.

**Table One: Decision-making & Redress Bodies and Remit**

<b>Decision Making or Redress Body</b>	<b>Remit</b>
<b>Welsh Ministers</b>	General duties to promote education of people within Wales, and powers over bodies receiving public funds that provide education. Powers of intervention where there are concerns about performance, management, governance of schools. Powers to resolve disputes between school governing bodies and local authorities and to resolve disputes between local authorities. Possible role in school re-organisation proposals. Duty to have ‘due regard’ to the UNCRC rights of children in all their policy and decision-making (as well as being subject to equality and human rights legislation).
<b>Local authorities</b>	General duties to secure that efficient primary and secondary education is available to meet the needs of the population of their area, specific duties to ensure the provision of sufficient schools capable of providing appropriate education including in relation to SEN/ALN. Powers and duties regarding school re-organisation (including closures).

<b>Decision Making or Redress Body</b>	<b>Remit</b>
	Powers of intervention where there are concerns regarding performance, management, or governance of schools (including concerns that complaints are not being properly handled). Admissions authority for community and voluntary controlled schools. Constitution of appeal panels in relation to admission and exclusion decisions. Review, when requested, of governing body decisions in relation to assessment of ALN and IDPs.
<b>School governing bodies</b>	Governing bodies provide strategic leadership and accountability within schools. Have general responsibility for the school's conduct and must set aims and objectives for school, and policies and targets for achieving them. Role in dealing with general complaints. Discipline committees deal with challenges to school exclusions.
<b>Head teachers</b>	Head teachers are responsible for the internal organisation, management, and control of the school, for advising on and implementing the governing body's strategic framework, and for performing any functions delegated to them by the governing body. Role in dealing with general complaints. Specific duties and powers under legislation including the power to exclude a pupil.
<b>Independent Appeal Panels – exclusions and admissions</b>	Constituted by the local authority. Hear appeals against admission decisions by admission authorities. Hear appeals against governing body discipline committee decisions on permanent exclusions.
<b>Public Services Ombudsman for Wales</b>	Handling complaints against local authorities and independent appeal panels on admission and exclusion decisions. Power to conduct own initiative investigations into broader systemic matters of maladministration or service failure.
<b>The Tribunal (SENTW/Education Tribunal for Wales)</b>	Current: appeals against local authority refusal to assess SEN or to issue or revise statement or regarding the content of a statement. ALN: appeals against local authority decisions regarding assessment and provision for ALN. Claims of disability discrimination in education (except in relation to permanent exclusions and admission decisions which go to independent appeal panels) May review its own decision if request made to Welsh Ministers.

<b>Decision Making or Redress Body</b>	<b>Remit</b>
<b>Upper Tribunal</b>	Appeals against decisions of SENTW / Education Tribunal on points of law
<b>County court</b>	Discrimination in education except in relation to disability discrimination claims that go to the tribunal and claims of discrimination regarding admissions and permanent exclusions which go to independent appeal panels.
<b>Administrative Court in Wales</b>	Judicial review of decisions of public bodies including Welsh Ministers, local authorities and school governing bodies.
<b>Higher Appellate level</b>	All judicial bodies are ultimately subject on appeal (with permission) to the jurisdiction of the England and Wales Court of Appeal and UK Supreme Court
<b>Children's Commissioner for Wales</b>	Jurisdiction in relation to public bodies including local authorities and school governing bodies to review arrangements for complaints, whistle-blowing and advocacy; conduct examination of serious individual cases in limited circumstances; provide assistance to children / parents; signposting to other sources of advice and assistance. General highlighting and championing of children's rights in education.
<b>Future Generations Commissioner for Wales</b>	General role in promoting good administrative through promotion of sustainable development principles, encouraging best practice, and promoting holistic decision making through the 'five ways of working.'

### 3.1 Bodies concerned with the provision and administration of education

#### 3.1.1 Welsh Government, the National Assembly for Wales and local authorities

The main bodies with responsibility for the provision and administration of primary and secondary education in Wales are the Welsh Ministers, local authorities, school governing bodies and head teachers. The Assembly also plays a key role in making legislation and scrutiny of law and policy. Welsh Ministers have general duties to promote the education of the people within Wales, and to exercise powers in respect of bodies that receive public funding in order to provide education and specifically to run schools. Welsh local authorities have a broad range of duties, some phrased in general terms such as to secure the provision of efficient primary and secondary education to meet the needs of the population of their area, and to exercise their education and training functions with a view to promoting high standards and the fulfilment of children's learning potential. On the other hand, local authorities are also subject to more specific duties around providing for schools sufficient in number and character, and ensuring that these schools are properly resourced.

In order to fulfil these duties, local authorities have a range of powers to establish and maintain schools, and to secure provision of full-time and part-time education for persons over compulsory school age. Both the Welsh Ministers and the local authorities have powers of intervention to deal with problems within schools, and the Welsh Ministers also have powers of intervention where there are failings of the local authority.

### 3.1.2 Governing bodies and head teachers

All maintained schools must have a governing body<sup>17</sup> and a head teacher.<sup>18</sup> Head teachers are responsible for the internal organisation, management and control of the school, for advising on and implementing the governing body's strategic framework,<sup>19</sup> and for performing any functions delegated to them by the governing body.<sup>20</sup> In general terms, governing bodies are required to provide the strategic leadership and accountability within schools and have general responsibility for the school's conduct: they must set aims and objectives for the school and policies and targets for achieving them. They must also offer both support and constructive criticism to the head teacher.<sup>21</sup> Although governing bodies are being discussed here under the heading of the provision and administration of education, they are also involved in the redress system in relation to general school complaints and exclusions. Both head teachers and governing bodies have many specific duties which are set out in the legislation and guidance and are dealt with in later sections of this report.

The Education (Wales) Measure 2011 requires local authorities to ensure that every governor is provided, free of charge, with the information it considers appropriate to discharge the governor's duties.<sup>22</sup> Regardless of more specific duties in any regulations, that Measure requires a local authority to secure for every governor that training which the local authority considers necessary for the discharge of their functions.<sup>23</sup> However, in addition, the Welsh Ministers may require local authorities to secure the provision, free of charge, of 'prescribed training' to 'prescribed governors' of maintained schools.<sup>24</sup> Such prescribed training is set out in Regulations.<sup>25</sup> At least some of this training is delivered through regional consortia.<sup>26</sup>

A 2013 report for Welsh Government questioned whether all governors were familiar with all the sources of information available to them, whether from their local authorities or other bodies

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<sup>17</sup> Education Act 2002, s 19 (herein after EA 2002); Government of Maintained Schools (Wales) 2005, SI 2005/2914.

<sup>18</sup> EA 2002, ss 35(3) and 36(3).

<sup>19</sup> SI 2000/3027, reg 6.

<sup>20</sup> SI 2000/3027, reg 8.

<sup>21</sup> EA 2002, s 21; School Government (Terms of Reference) Wales Regulations 2000, SI 2000/3027, reg 5.

<sup>22</sup> Education (Wales) Measure 2011, s 22(1) (EWM 2011).

<sup>23</sup> EWM 2011, s 22(5) & (6).

<sup>24</sup> EWM 2011, s 22(3).

<sup>25</sup> Government of Maintained Schools (Training Requirements for Governors (Wales) 2013, SI 2013/2124; Government of Maintained Schools (Clerk to a governing body) (Wales) Regulations 2013, SI 2013/2127; Welsh Government, *Guidance on mandatory training for governors and clerks*, Guidance document no. 117/2013, September 2013; Welsh Government, *Training for chairs of governors in Wales Guidance for local authorities and governing bodies of maintained schools*, Guidance document no: 112/2013, August 2013.

<sup>26</sup> See for example, Education Achievement Service for South East Wales, *Mandatory Governor Training and Strategic Development Programme – Annual Programme 2017-2018*.

Given the huge role played by governors, who are volunteers, it is important that the level of support available, and the take up of that support and training, are monitored. As noted earlier, we received feedback in our workshops and discussion sessions that governors' knowledge and understanding of relevant law and policy varied. This prompts the question of whether additional topics, especially in relation to complaint handling, should be added to the mandatory training for all or some governors. This is an issue which needs to be considered in order to ensure a balance between the burdens taken on by governors and the acquisition of necessary skills. Some of our participants were definite that there should be additional mandatory training, others were concerned at the demands being placed on volunteers and the danger that it might make it harder to recruit people to serve. However, we also heard doubts that even the existing mandatory training was being delivered in the same way right across Wales: there was a perception that the support that governors receive is varied. One person who had previously served as a governor stated that 'the Welsh Government guidance is pretty clear but it is down to governors being acquainted with it.' There was a feeling among research participants that some areas of law were less well understood than others, disability discrimination law being an example of an area where understanding was less certain.

**We recommend that local authorities should consider:**

- ### Recommendation 7:

i. whether it would be valuable to gather information from local authorities on the level of take-up of training for governors that is offered by local authorities;

<sup>30</sup> Governors Cymru Services <http://www.governors.cymru/> (last accessed 6 March 2020).

- ii. **whether it would be valuable to consult with local authorities, school governors and other interested parties as to whether additional topics should be included within the training that is mandatory for governors; and**
- iii. **whether to exercise its powers regarding the scope of mandatory training for governors.**

### 3.1.3 Estyn and the Welsh Audit Office

In terms of monitoring schools' and local authorities' delivery of education, the key body is Estyn, the inspectorate for education and training in Wales. Established under the Education Act 1992, Estyn is an important part of the regulatory framework, especially in its inspection of the work of individual schools and local authority education departments, and its examination of thematic areas. However, it has no role in relation to individual education disputes. The Wales Audit Office is responsible for ensuring that public money is spent wisely and that public bodies are working towards improving outcomes. This remit has led it to report on areas such as the working of regional education consortia, and the building and refurbishment of schools. Some reports have been worked on jointly with Estyn.<sup>31</sup> Again, it has no role in dealing with individual complaints.

### 3.1.4 Regional education consortia

In addition to these bodies, it is worth mentioning the four regional education consortia through which local authorities have been required to work in relation to improving school standards.<sup>32</sup> These are generally invisible in the statutory framework, with duties and powers being given to the Welsh Ministers or the local authorities. However, we heard that from the perspective of governors and head teachers, they are a big presence in the work of the school. From an administrative justice perspective, it was clear from some discussions with local authority staff that the collaboration between authorities can be useful in relation to setting up appeal panels for exclusions.

## 3.2 Bodies concerned with provision of redress or advice

A number of bodies with specific education dispute settlement roles will be discussed later in this report. One is the Special Educational Needs Tribunal Wales (SENTW) which will be renamed the Education Tribunal when the Additional Learning Needs and Education Tribunal (Wales) Act 2018 (ALN Act 2018) enters into force. We have referred to it as the Education Tribunal or just 'the Tribunal' in this report. There are also independent appeal panels which hear appeals concerning admissions and permanent exclusions.

In addition to these bodies with education roles, a number of other bodies figure in the more general administrative justice landscape and will be discussed here. These include the Administrative Court, the PSOW, the Children's Commissioner for Wales, the Future Generations Commissioner for Wales and, for Welsh language issues in education, the Welsh Language Commissioner.

### 3.2.1 The Public Services Ombudsman for Wales (PSOW)

The PSOW has jurisdiction to examine complaints of alleged maladministration and service failures within most public bodies in Wales: this includes local authorities, and the independent

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<sup>31</sup> Welsh Audit Office, *Covering Teachers' Absences* (2013).

<sup>32</sup> For general background information, see Estyn, *Improving schools through regional education consortia*, June 2015; Welsh Government, *National model for regional working: revitalising people management in schools*, Guidance document 170/2015, April 2015.

appeal panels constituted by them for admissions and exclusions) but not school governing bodies (except when they are dealing with pupil admissions to maintained schools.).<sup>33</sup> The legislation expressly excludes from the PSOW's jurisdiction any matters relating to the giving of instruction or conduct, curriculum, internal organisation, management or discipline.<sup>34</sup>

As with ombuds legislation from other legal jurisdictions there is no specific statutory definition of maladministration or service failure. However, the PSOW publishes *Principles of Good Administration* including, getting decisions 'right first time', being customer focused, openness and accountability, fairness and proportionality, putting things right and seeking continuous improvement. Failure in one or more of these areas could constitute maladministration and/or an example of service failure.

The PSOW cannot investigate a matter where the person aggrieved has had, or could have had, a right of appeal to a tribunal, a remedy by way of proceedings in a court of law, or a right of appeal to a particular Welsh Minister. However, this exclusion does not apply where the PSOW is satisfied that in the circumstances it is not reasonable to expect the person aggrieved to resort, or to have resorted, to the right or remedy otherwise available.<sup>35</sup>

Following an investigation, the PSOW will issue a report making recommendations to the relevant authority. Such recommendations could include that the authority apologises to the complainant, and/or ceases identified poor practices, or improves its procedures for the future. The PSOW may also recommend that the authority pays compensation to the complainant. PSOW recommendations are not legally binding, but more often than not they are complied with. Some cases will not require a full investigation and many are closed with an early voluntary resolution. In one such voluntary settlement in a SEN education case, the Council agreed that additional hours of support would be provided for the learner to make up for education missed.<sup>36</sup>

The PSOW Act 2019 gives the PSOW new powers, in particular, to accept oral complaints, undertake own initiative investigations, and undertake a role in relation to complaints handling standards and procedures. The new Complaints Standards Authority (CSA) role provides that the PSOW must publish a statement of principles concerning complaints handling for listed authorities and that the authorities must have complaints-handling procedures which comply with the principles.

The own-initiative powers and complaints standards authority role further enhance the PSOW's function as an institution for promoting and, to an extent, regulating good administration and decision-making. Even before receiving these new powers, the PSOW had issued a thematic report on complaint handling.<sup>37</sup> He noted that some issues go to him only because the initial complaint was handled badly. A number of cases categorised as school transport cases illustrate this point, where the complaints related not to the substance of the issue but to the authority's handling of

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<sup>33</sup> Public Services Ombudsman (Wales) Act 2019, Schedule 3, Listed Authorities – Education and training. (herein after PSOW Act 2019).

<sup>34</sup> PSOW Act 2019, Schedule 2, Part 3, para 6.

<sup>35</sup> PSOW Act 2019, s 13.

<sup>36</sup> PSOW, *The Ombudsman's Casebook*, case no. 201503572, September 2016.

<sup>37</sup> *Ending Groundhog Day – Lessons in Poor Complaint Handling*, 2018.

the original complaint<sup>38</sup> or its failure to respond to the PSOW's inquiries.<sup>39</sup> Sometimes, it is the authority's assessment process rather than the outcome that is at fault: in one case there was a lack of written documentation of an assessment, insufficient reasons given for the decision, and the authority had failed to follow its own appeal process. That part of the complaint was upheld but the PSOW pointed out that, in substance, there was no eligibility for free transport in the case. There are occasional cases where the PSOW has not upheld the complaint but has noted that the Council's reasoning for its decision has not been clear.<sup>40</sup> The PSOW has also expressed concern in the 2018 report that he saw the same issues recurring which meant that lessons had not been learnt. Urging a culture change in Wales for public bodies to learn from complaints, he contrasted private companies who regarded complaints as 'free consultancy'.<sup>41</sup> If further training on complaints handling were to be provided for governors, the PSOW's reports might be drawn upon as good practice.

However, the annual reports of the PSOW from the establishment of the office show that complaints concerning education have been a consistently small percentage of the overall number of complaints received, usually about 3% or 4% of the total. The PSOW's casebook provides summaries of all the cases, including a small number on education, dealt with following a full investigation. The case book also provides a selection of summaries of complaints closed after early resolution or voluntary settlement. Again, a small number of education cases feature here. The main topics complained about have been SEN, transport and school admissions.<sup>42</sup> From the cases which are reported, although the complaints are brought by individuals, the wider value of the system can be seen in the recommendations to authorities to review their general arrangements for dealing with the issue under investigation. Recommendations have been made in admissions cases for improved training for panel members and clerks,<sup>43</sup> and for reviews to take place of the admissions policies.<sup>44</sup> In one case resolved by voluntary agreement, the Council agreed not only to hold a fresh appeal panel hearing for the individual who had taken the complaint but also to investigate whether any other school appellants similarly affected would wish to take up the same offer of a fresh appeal panel hearing.<sup>45</sup> The benefit therefore went beyond the individual case.

Some school transport cases illustrate how the PSOW can provide a more complete and rounded response to a complainant than would be achieved by way of judicial review. For example, where the Council had decided to re-evaluate a safe walking route, the PSOW considered that the Council's action was not unreasonable. However, it shared the complainant's concern that sufficient detail had not been provided about the transport arrangements and sought to redress this by asking the Council to explain the arrangements in more detail, apologise to the parent and provide a small payment in recognition of the time and trouble taken in pursuing the complaint.<sup>46</sup>

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<sup>38</sup> For example, PSOW, *The Ombudsman's Casebook*, case no. 201602129, August 2016; case no. 201600907, June 2016.

<sup>39</sup> Case no. 201707182, March 2018.

<sup>40</sup> Case no. 201606912, November 2017.

<sup>41</sup> *Ending Groundhog Day – Lessons in Poor Complaint Handling*, 2018, p5.

<sup>42</sup> PSOW, *Annual report and Accounts 2018/19* notes 23 cases closed concerning school appeal panels in 2018/19 and 13 in 2017/18.

<sup>43</sup> PSOW, *The Ombudsman's Casebook*, Case nos 201501765 and 201502884, March 2016.

<sup>44</sup> Case no. 201502409, April 2016.

<sup>45</sup> Case no. 201802558, August 2018.

<sup>46</sup> Case no. 201604023, November 2016.



While some complaints lead to a remedy for the individual complainant only,<sup>47</sup> in other cases, the redress benefits both the individual and others in a similar position. For example, where transport had been refused for a learner with ALN, the Council agreed to hold a further ALN panel which recommended the provision of transport, but it also agreed to review its home to school transport policy in light of that panel's recommendation.<sup>48</sup> In one case where the information given to the complainant by the Council had caused confusion on how it calculated home to school distance when no non-hazardous routes were available, the authority agreed to consider amending its policy to clarify this issue.<sup>49</sup>

It may be asked whether matters would be improved if the PSOW had jurisdiction to deal with complaints about schools. In comparison, all publicly-funded schools (more than 1100) were brought within the jurisdiction of the Northern Ireland Public Services Ombudsman (NIPSO) under the Public Services Ombudsman (Northern Ireland) Act 2016 and the remit entered into force in April 2017.<sup>50</sup> The relevant schools are obliged to inform those who have completed the internal school complaints process that they can make a complaint to the NIPSO. Clearly, an extension to the PSOW's jurisdiction in this way would have resource implications. The NIPSO's annual report for 2017-18 observed a 37% increase in the number of complaints received in that year which was 'in large part' explained by the new schools jurisdiction coming into effect at the beginning of the reporting year. However, education cases represented only 15% of the overall complaints received by the office.<sup>51</sup> Nonetheless, the NIPSO noted 'school related complaints were more than double the number anticipated.'<sup>52</sup> Of the total 103 education complaints, 71 concerned school boards of governors. However, the following year this had dropped to 53 (in contrast with 17 against education authorities) of the total 90 education complaints. It will be worth monitoring the trends in NI and considering whether, with the publication of the NIPSO's decisions in these cases, there is greater scope for general lesson learning than when the complaints process is wholly internal to schools.

**Recommendation 8: That Welsh Government and the office of PSOW monitor the experience in NI regarding schools coming within jurisdiction, including any information regarding the additional resources required, and to consider whether a similar development would be worthwhile in Wales.**

### 3.2.2 The Welsh Commissioners

One of the distinguishing features of the administrative justice landscape in Wales is the establishment of a number of Commissioners with varying powers and remits, three of which are relevant in the sphere of education, although the extent to which they can be of direct assistance to individuals varies considerably: the Children's Commissioner for Wales, the Welsh Language Commissioner, and the Future Generations Commissioner.

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<sup>47</sup> For example, case no. 201900330, June 2019.

<sup>48</sup> Case no. 2016606454, June 2017.

<sup>49</sup> Case no. 201900836, May 2019.

<sup>50</sup> For a short time, the Local Government Ombudsman in England had a remit including schools – from April 2010 until July 2012.

<sup>51</sup> NIPSO, *Ombudsman's Report 2017/18*.

<sup>52</sup> *Ombudsman's Report 2017/18*, 5.

### 3.2.2.1 The Children's Commissioner for Wales

Of the different Welsh Commissioners, the one most relevant to education is the Children's Commissioner for Wales (CCW), established under the Care Standards Act 2000 as an independent human rights institution. The principal and overarching aim of the CCW when exercising her functions is to safeguard and promote the rights and welfare of children,<sup>53</sup> and in doing so she must have regard to the United Nations Convention on the Rights of the Child (UNCRC). With jurisdiction in relation to a range of specified public bodies, including local authorities and the governing bodies of maintained schools,<sup>54</sup> the CCW's powers and jurisdiction are laid down in the Care Standards Act 2000, as amended by the Children's Commissioner for Wales Act 2001.

The CCW has the power to review the effect on children of the exercise, or proposed exercise, of functions by the bodies within remit, including the Welsh Ministers, local authorities and school governing bodies.<sup>55</sup> There is also the power, to review and monitor the effectiveness of the relevant bodies' arrangements for whistleblowing, dealing with complaints and representations, and advocacy, for safeguarding and promoting the rights and welfare of children. In conducting such a review, the CCW may require the provision of information.<sup>56</sup> This power includes assessing the effect on the relevant children of a failure to make these arrangements.<sup>57</sup> The CCW used this power to examine the arrangements of local education authorities on complaints, whistleblowing and advocacy.<sup>58</sup> The report found that there were very few complaints from children and young people and recommended that local authorities should make their complaints procedures more accessible. It also found little awareness of authorities' whistleblowing policies among education officers, and that at that time no education authority in Wales was directly commissioning advocacy services for children in relation to education issues. The assumption underlying all three areas gave the report its title, *Children don't complain*.

The most far-reaching power is the power to 'examine' the case of a particular child or children, as long as there is a point of principle of more general application or relevance to the rights of children than in the particular case.<sup>59</sup> When conducting such an examination, the CCW has powers equivalent to those of the High Court to require the provision of information, and attendance and examination of witnesses. The CCW may not review or examine a matter that is currently under judgement or has been decided by a court of law or tribunal. The one occasion on which this exceptional power has been used was in relation to education: the *Clywb* inquiry<sup>60</sup> investigated allegations of serious sexual abuse by a teacher of pupils in a secondary school. It made numerous recommendations, not only in relation to safeguarding but also regarding the need for processes

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<sup>53</sup> Care Standards Act 2000, s.72A (CSA) (inserted by the Children's Commissioner for Wales Act 2001).

<sup>54</sup> CSA 2000, Schedules 2A and 2B.

<sup>55</sup> CSA 2000, s 72B and Schedule 2A.

<sup>56</sup> Children's Commissioner for Wales 2001, SI 2001/ 2787, Reg3.

<sup>57</sup> CSA 2000, s 73.

<sup>58</sup> Children's Commissioner for Wales, *Children don't complain - The Children's Commissioner for Wales' Review of the operation of complaints and representations and whistleblowing procedures, and arrangements for the provision of children's advocacy services in local education authorities in Wales*, (2005).

<sup>59</sup> CSA 2000, s 75 and Children's Commissioner for Wales Regulations 2001, SI 2001/ 2787.

<sup>60</sup> Children's Commissioner for Wales, *Clywb - Report of the Examination of the Children's Commissioner for Wales into allegations of child sexual abuse in a school setting* (2004).

for pupils to be able to raise concerns or complaints and be listened to. The resources – time and money – needed for such an inquiry mean that this power will be used only in exceptional cases.

Finally, legislation allows the CCW to provide information and advice and she may also provide assistance to make a complaint or representation about the specified bodies. That assistance may be financial or by way of providing representation.<sup>61</sup> Assistance in relation to legal proceedings may be given only where there is a point of general relevance going beyond the individual case.<sup>62</sup>

In terms of the individual requests for assistance received by the CCW's office, the top two areas since the office was established have been education and social services, with education having the highest number of requests in the most recent years (in 2018/19, of the total 671 requests, 408 were on education and 370 on social services; in 2017/18, of the total 554 requests, 342 related to education and 251 to social services; in 2016/17, of the total 528 requests 284 related to education and 267 to social services.)<sup>63</sup> While the CCW plays a very significant role in the provision of advice and assistance to children and their parents, and signposting them to other appropriate sources of help, she does not have a role in determining individual complaints in the way that PSOW has. Nor can the CCW, in the exercise of any of her powers, require any body within her remit to provide redress: publicity is the only way in which she can influence behaviour. The Justice Commission considered that this 'name and shame' function has the 'potential to influence the culture of public bodies and how those bodies exercise their functions.'<sup>64</sup>

On the basis of information gained in dealing with such requests for assistance, and in other research, the CCW's reports have, over the years, highlighted problems affecting groups of children such as, safe walking routes to school, the condition of school toilets, the need to ensure that home-educated children are not invisible to the authorities, and unofficial school exclusions. CCW responses to consultations on Welsh Government proposals for policy and legislation have ensured that the focus on securing children's rights is consistently raised, as for example most recently regarding the inclusion in the ALN Act of the duty to have regard to the UNCRC. The CCW has also played a role in promoting a rights-based approach for children in education.<sup>65</sup>

The area of school transport illustrates the different ways in which the CCW may contribute to avoiding and resolving disputes. Following a complaint from a parent, the CCW made representations to Welsh Government to address the failure of the existing guidance to require local authorities to take into consideration the welfare of the child when assessing the distance of route from home to school. The revision of the guidance by Welsh Government demonstrates the benefit of a proactive and rights-based champion as a means of 'getting things right'.<sup>66</sup> The CCW continues to make representations: in October 2019 she expressed concern about appropriate travel arrangements for all learners up to the age of 25 who will be covered by the ALN Act 2018.<sup>67</sup> And in January 2020 she reiterated her concern about the position of post-16

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<sup>61</sup> CSA 2000, s 76.

<sup>62</sup> SI 2001/2787, reg 10.

<sup>63</sup> Statistics from Children's Commissioner's Annual Reports:  
<https://www.childcomwales.org.uk/categories/annual-reports/>

<sup>64</sup> Justice Commission, para 6.57.

<sup>65</sup> Children's Commissioner for Wales, *The Right Way – A Children's Rights Approach for Education in Wales* (2017); *The Right Way – Education Survey* (2018).

<sup>66</sup> Children's Commissioner for Wales, *Our Progress 2008-2015*.

<sup>67</sup> Children's Commissioner for Wales, *Annual Report 2018-19*, p66.

learners under the 2008 Measure on learner travel.<sup>68</sup> Unlike the PSOW, the CCW cannot make recommendations in individual cases. However, the office assists individuals with complaints by interceding on their behalf or providing help with writing letters on matters of concern. Issues which have arisen include the safety of walking routes, provision of escorts on buses and cuts to transport services. This leads to resolution of disputes without engaging a formal process.<sup>69</sup>

### 3.2.2.2 Welsh language commissioner

Two key principles guide and underpin the work of the Welsh Language Commissioner (WLC) established under the Welsh Language (Wales) Measure 2011 (WLWM): that Welsh should not be treated less favourably than English in Wales, and that people in Wales should be able to live their lives through Welsh should they choose to do so.<sup>70</sup> One of the WLC's roles is to lay down new Welsh Language Standards that will eventually replace Welsh Language Schemes which public bodies were obliged by the Welsh Language Act 1993 to produce and adhere to in relation to their provision of services to the public.<sup>71</sup> Local authorities and school governing bodies are listed in the WLWM 2011 as public bodies which may be required to comply with specified language Standards.<sup>72</sup> However, the duty to comply is engaged only when the WLC issues the body with a compliance notice.<sup>73</sup> Thus far, such notices have been issued to local authorities and community councils but not yet to school governing bodies.<sup>74</sup>

The WLC may 'do anything' appropriate to promote and facilitate the use of Welsh. This includes giving advice or assistance (including financial assistance) to any person,<sup>75</sup> including legal assistance to a party in proceedings relevant to the functions of the WLC.<sup>76</sup> The WLC may also institute or intervene in relevant legal proceedings.<sup>77</sup> Whilst the WLC is primarily a regulator, individuals can complain to the WLC if a public body fails to comply with the language standards applicable to it<sup>78</sup> or if a person has interfered with an individual's freedom to communicate in Welsh with another individual.<sup>79</sup> The former power of investigation in the education sphere was exercised recently in relation a Welsh-medium primary school closure decision by a local authority, where an individual alleged that the required consultation had not treated Welsh equally with English, that the impact assessment on Welsh-medium teaching had failed to comply with the authority's language standards and that there had been a failure to conduct appropriate impact assessments on the opportunities to use Welsh in the school community.<sup>80</sup> While the WLC found a failure to

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<sup>68</sup> <https://www.childcomwales.org.uk/wp-content/uploads/2020/02/Quarterly-Updates-January-2020.pdf> p7

<sup>69</sup> For example, the Children's Commissioner's Annual Report for 2015-16 noted 28 concerns or complaints about school travel arrangements concerning 9 local authorities.

<sup>70</sup> Welsh Language (Wales) Measure 2011, s 3(3). (WLWM)

<sup>71</sup> Welsh Language Act 1993, s 5.

<sup>72</sup> WLWM, s 33 and Schedule 6.

<sup>73</sup> WLWM, s 45.

<sup>74</sup> A list is provided on the Commissioner's website:

<http://www.comisiynyddygymraeg.cymru/English/Organisations/Pages/SearchStandards.aspx> (last accessed 6 March 2020).

<sup>75</sup> WLWM, s 4.

<sup>76</sup> WLWM, s 9.

<sup>77</sup> WLWM, s 8.

<sup>78</sup> WLWM, ss 71 and 93.

<sup>79</sup> WLWM, ss 111 and 114.

<sup>80</sup> CSG470, City and County of Swansea, 16 January 2020, Closure of Ysgol Gynradd Gymraeg Felindre.

<http://www.comisiynyddygymraeg.cymru/English/Organisations/Enforcing%20Standards/Pages/Action.aspx?aci d=235> (last accessed 6 March 2020).

comply with a number of the language standards (although there had not been a failure in relation to the impact of the decision on Welsh-medium education), he observed that it was not open to him to require the Council to remake its decision. The steps that he set out for the authority would be ‘relevant only to future decision’ relating to the effects of policy decisions on the Welsh language and how consultations on those decisions should be conducted.

Other requirements for local authorities to follow in relation to relation to Welsh-medium provision in education exist in specific legislation, for example regarding school transport and school organisation.

### 3.2.2.3 The Future Generations Commissioner and the Well-being of Future Generations (Wales) Act 2015

The Well-being of Future Generations (Wales) 2015 Act (WBFGWA) requires public bodies to carry out sustainable development, to be achieved by setting and publishing ‘well-being objectives’ which show how the body will maximise its contribution to achieving seven ‘well-being goals’: this means working towards a Wales that is prosperous, resilient, healthier, culturally vibrant with the Welsh language thriving, more equal, with cohesive communities, and globally responsible.<sup>81</sup> The WBFGWA also sets out ‘five ways of working’ for public bodies: in order to comply with the ‘sustainable development principle’ they must balance long-term and short-term needs, take an integrated approach which considers the impact of action on the different well-being goals and other public bodies’ objectives, work to prevent problems occurring or worsening, involve those with an interest in the well-being goals, and collaborate with any persons that can help secure the well-being goals.<sup>82</sup> Since the Welsh Ministers and local authorities are public bodies under the WBFGWA,<sup>83</sup> the duties set out will apply in relation to the development and implementation of education law and policy. Although school governing bodies are not ‘public bodies’ for the purposes of the WBFGWA, education legislation requires them to have regard to any ‘local well-being plan’ published under the Act.<sup>84</sup>

The WBFGWA Act establishes the Future Generations Commissioner for Wales (FGCW) whose general duty is to promote the sustainable development principle, acting as a guardian of the ability of future generations to meet their needs, and encouraging public bodies to take greater account of the long-term impact of the things that they do. This can involve providing assistance to public bodies, promoting awareness, encouraging best practice and undertaking research in relation to sustainable development and well-being.<sup>85</sup> Both the Auditor General for Wales<sup>86</sup> and the FGCW<sup>87</sup> have roles in relation to considering the progress being made by public bodies, including those relevant to education, in setting and pursuing well-being objectives. This includes the FGCW’s power to undertake reviews of public bodies,<sup>88</sup> following which public bodies must take all

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<sup>81</sup> WBFGWA, s 4.

<sup>82</sup> WBFGWA, s 5.

<sup>83</sup> WBFGWA, s 6.

<sup>84</sup> EA 2002, s 21(6) and (9).

<sup>85</sup> WBFGWA, s.19.

<sup>86</sup> WBFGWA, s 15.

<sup>87</sup> WBFGWA, s 18.

<sup>88</sup> WBFGWA, s 20.

reasonable steps to comply with recommendations set out by the FGCW following a review, unless they consider that there is ‘good reason’ not to do so.<sup>89</sup>

The FGCW is a strategic office and one that has no role in relation to providing assistance to individuals or to investigating specific individual complaints, in education or any other field. However, the general role of the FGCW may be relevant for the planning of law and policy in relation to education by the Welsh Ministers and local authorities. Recently, for example, the FGCW contributed to discussion about whether the ‘skills needed in the future’ are served by the education and qualifications system.<sup>90</sup> The WBFGWA has also been called in aid, albeit unsuccessfully, in an attempt to halt a proposed school closure on the basis of the potential impact on the community of the closure.<sup>91</sup> The application for judicial review failed, the judge holding that judicial review was not the appropriate means of enforcing the duties in the Act, but that, in any case, the authority had complied with the relevant duties. The WBFGWA and the FGCW’s role are considered in detail in our main report *Public Administration and a Just Wales*.

### 3.2.3 Working together

The legislation establishing the PSOW and the Commissioners requires them to work together. There is also a Memorandum of Understanding between the PSOW and the Welsh Commissioners, and between the Welsh Commissioners themselves as there are circumstances where their jurisdictions overlap, and where (even in the absence of overlap) joint working and/or information exchange could be beneficial to the overall process of dispute resolution, learning from disputes and promoting good administration. For example, the CCW and the FGCW jointly developed a resource, including a report and self-assessment toolkit, for public bodies to consider children’s rights in relation to the well-being goals and the five ways of working under the Future Generations Act.<sup>92</sup>

## 3.3 Judicial review and the Administrative Court

Part III of this report will highlight specific areas of education law. Sometimes a full regime for redress is provided; in other cases, there is provision for an initial complaint but no further appeal or complaint after that. In the latter circumstances, the individual may be able to seek judicial review in the Administrative Court. Judicial review is effectively a ‘gap filling’ procedure where the individual has no specific right to redress, or where they have exhausted all other avenues yet still consider there to have been a legal flaw in a relevant decision. As it is a gap filling exercise, we could not list all the possible decisions of Welsh Ministers, governing bodies and/or local authorities against which judicial review may be sought.

Judicial review claims against Welsh public authorities should be issued in the Administrative Court in Cardiff and can be determined across a range of court locations in Wales. Judicial review is a two-stage process with applicants first being required to pass a permission stage test, namely that they have sufficient interest in the matter to which the application relates, and that their case is ‘arguable’. There is a three-month time limit from when the applicant became aware, or could

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<sup>89</sup> WBFGWA, s 22.

<sup>90</sup> C Jones, *Fit for the Future – Education in Wales, a White Paper for Discussion* (2019) (produced in collaboration with the FGCW).

<sup>91</sup> *R (B) v Neath Port Talbot Council* (30 January 2019) CO147470/3018.

<sup>92</sup> *The Right Way – A Future Fit for Children* <https://www.childcomwales.org.uk/resources/childrens-rights-approach/future-fit-children/> (last accessed 6 March 2020).

reasonably be expected to have been aware, of the decision challenged (though this can be extended if the interests of justice require).

Since the Administrative Court started operating in Wales (in April 2009) to the end of April 2018 there have been approximately 43 education judicial review claims against Welsh public bodies issued in the Administrative Court in Cardiff. This makes education one of the highest subject areas of judicial review (with the most common area of litigation being town and county planning, and second to this immigration and asylum and prisons/probation cases). Cases have been issued against Welsh Ministers, school governing bodies and local authorities, including in both rural and urban local authority areas across North, Mid and South Wales. However, owing to the lack of specialist legal provision in North and Mid-Wales, its use is very South Wales centric. Some issues have included; school closure and reorganisation decisions, provision of learner transport, Welsh Minister's policy about funding placements for young people with learning difficulties, the Welsh Minister's duty to consult under its School Organisation Code, school organisation and transport in the context of equality and non-discrimination. Often judicial review claims are issued in order to secure urgent, but interim relief, such as an injunction (say to prevent an imminent school closure). The actual number of issued claims may only represent the tip of the iceberg in terms of issues that might be suitable for judicial review which are either raised with advisers but resolved through other means such as negotiation, or possible issues which never make it to the attention of advisers.

In some instances, the courts may consider that an alternative remedy should have been pursued. For example, in *R v Essex CC ex p Bullimore*, the claimant sought judicial review of the council's decision to refuse free transport to school where the parents argued that the route used to measure the distance was unsafe.<sup>93</sup> They alleged that the decision was *Wednesbury* unreasonable and that relevant evidence had not been put before the education committee. The Court refused the application. Noting that it had merit, it held that the claimant had not availed himself of the statutory remedy to complain to the Secretary of State under the Education Act 1996, ss 496 and 497. The issues argued could be more properly investigated and evaluated by the Secretary of State than the court. The provisions referred to in that case no longer apply in relation to Welsh local authorities: the equivalent would be the Welsh Ministers' powers of intervention under sections 21-23 of the School Standards and Organisation (Wales) Act 2013.

It is notable that across the Administrative Court in Wales over 33% of litigants are not legally represented (they are so-called 'litigants in person'), however in the field of education judicial review in Wales only 16% of applicants were litigants in person. Anecdotally at least, and from participation in our workshops, we note that there are a number of law firms in South Wales with significant specialist experience in education law claims, including judicial review, and that it might not be especially difficult (certainly for people in the South) to access privately funded legal advice. However, access to state funded (legally aided) advice is a more complex matter. To seek SEN related legally aided advice the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO) brought in a mandatory requirement to access services only through a specific telephone gateway service. This has subsequently been criticized as acting as an unnecessary barrier to those entitled to services, particularly those who are vulnerable and may find communicating over the

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<sup>93</sup> *R v Essex CC ex p Bullimore* [1997] ELR 327 (digest available on Westlaw).



telephone difficult. Following a post-implementation review of LASPO the mandatory gateway service is being phased out, and a new approach to Civil Legal Advice is being developed which includes a phone line and access to face-to-face advice where appropriate. However, the provision of advice is still contracted out only to a small number of specialist providers. Legal aid funded advice obtained via the Civil Legal Advice route can include advice and ultimately representation in judicial review claims (if both a means and merits test are met). However, at least under the previous mandatory gateway approach very few potential judicial reviews made it to specialist gateway firms, and some of the considerations as to why this was the case are likely to continue even as the new approach is phased in. These are that it may require significant knowledge of education law to even spot an issue that might be the subject of a judicial review claim, and that many parents, carers, young people, and even solicitors and other professionals are not aware that legal aid remains available for education issues, there has been no real advertising or public awareness raising about legal aid in education issues.<sup>94</sup> There has also been, and remains, some confusion around the circumstances in which an individual could still be granted legal aid under the general ‘public law’ category which seems to have extended to cover judicial review claims in a range of education-related issues including those relating say to children’s rights, despite there being a specific route to funding for education law advice (previously under the mandatory gateway and now under the Civil Legal Advice service). It seems that the issue is still dealt with on a case-by-case basis, but a crucial factor in many cases will be the means testing of parental income as part of the process of determining eligibility for legal aid funded advice and representation.

The general picture is that judicial review can provide an effective route to redress for individual children, young people and families, and that this may lead to the resolution of broader issues for others. Frequently, it is the threat of judicial review, the letter before claim, that leads to the resolution of the issue. However, there are limits to its usefulness as a remedy in education. In terms of the subject matter, as is noted later, some duties in education law are expressed in very broad terms and would not be amenable to judicial review, short of a total default in duty by the relevant authority. Judicial review is always a review of the ‘legality’ rather than the ‘merits’ of a decision, and in areas of social and economic policy, and especially where resources are implicated, there is likely to be even greater judicial deference to the political decision-makers. In practical terms, access to the procedure is highly dependent on both awareness of legal rights and financial resources. As such, as barrister Tom Hickman QC puts it, judicial review is simply not available for most people.<sup>95</sup>

## 4 General duties of relevance to education: human rights and equality

Part III of this report will consider the powers and duties of bodies under education legislation. However, before embarking on the detail of education law, we should note the duties under human rights and equality legislation which bind the relevant bodies in education. The key human rights obligations, in addition to those provided for in specific education legislation, are those contained in the Human Rights Act 1998 and the UN Convention on the Rights of the Child under the Rights of Children and Young Persons (Wales) Measure 2011.

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<sup>94</sup> <https://www.lag.org.uk/article/202534/the-education-problems-still-covered-by-legal-aid>

<sup>95</sup> T. Hickman, ‘Public Law’s Disgrace’, U.K. Const. L. Blog (9th Feb 2017) (available at <https://ukconstitutionallaw.org/>)).



From the early days of the First Assembly, the Welsh approach to children and young people has been markedly different to that of England, with an emphasis in Wales on their rights, as opposed to their welfare alone, being a defining feature, and the UN Convention on the Rights of the Child being a major influence. This has fed into some education legislation as well as having been at least partly responsible for the creation of institutions such as the Children's Commissioner for Wales. On the other hand, it is not always clear whether the human rights and equality agenda is specifically and consistently feeding into the education administrative justice system, especially as it operates in practice.

## 4.1 The European Convention on Human Rights and the Human Rights Act 1998

The Human Rights Act 1998 (HRA) identifies most of the rights of the European Convention on Human Rights (ECHR) and makes them, as 'Convention rights',<sup>96</sup> directly enforceable in the UK courts. It is unlawful for public authorities to act in a way which is incompatible with the Convention rights (unless an Act of Parliament requires them to act incompatibly).<sup>97</sup> The National Assembly, Welsh Ministers, Education tribunal, local authorities, governing bodies and head teachers are public authorities for the purpose of the Act.<sup>98</sup> Victims of an alleged breach of the Convention rights may take action against a public authority and, if there has been an unlawful act, the UK courts may provide a remedy.<sup>99</sup> Given that the HRA is interpreted and applied by courts of England and Wales, and by the UK Supreme Court, this is not an area where there is a divergence between Wales and England in relation to education law.

### 4.1.1 Access to education and the ECHR

While rights to family life and privacy, religion and belief, and expression under Articles 8, 9 and 10 are relevant in many education contexts, the only ECHR right that deals specifically with education is Article 2 of Protocol No 1 (A2P1) which, in its first sentence, guarantees, albeit in a negative formulation, the learner's right to education (No-one shall be denied the right to education) and, in its second sentence, provides the right for parents to have their religious and other beliefs or convictions respected by the State in its provision of education for their children. As a substantive right to education, the first sentence of A2P1 to the ECHR is, as Lord Bingham stated, 'a weak one, and deliberately so.'<sup>100</sup> According to the European Court of Human Rights (ECtHR) it does not require states 'to establish at their own expense, or to subsidise, education of any particular type or at any particular level'<sup>101</sup> and the ECtHR will allow states a significant margin of appreciation in how they organise education. As Lord Phillips put it in a case concerning the failure, due to lack of local authority resources, to provide 'any significant education' to a pupil with severe SEN over a period of 18 months, in breach of the Education Act 1996, 'the value of the right conferred by A2P1 depends upon the system of education that is in place in the particular State concerned.'<sup>102</sup> In that case, Lord Phillips found that the right of

<sup>96</sup> HRA 1998, s 1 and Schedule 1.

<sup>97</sup> HRA 1998, s 6(1) and (2).

<sup>98</sup> HRA 1998, s 6(3). For head teachers, see *Ali v Headteacher and Governors of Lord Grey School* [2004] EWCA Civ 382 and [2006] UKHL 14.

<sup>99</sup> HRA 1998, ss 7 and 8.

<sup>100</sup> *Ali v Headteacher and Governors of Lord Grey School* [2006] UKHL 14, para 24.

<sup>101</sup> *Belgian Linguistics Case (No. 2)*, 1968, ECHR Application no. 1474/62, HUDOC. (All ECHR cases may be found on the HUDOC database using the application number: <https://hudoc.echr.coe.int>)

<sup>102</sup> *A v Essex County Council* [2010] UKSC 33, para 79.

a child with SEN was the right of fair access to whatever special facilities that were available. Where facilities were limited and immediate access could not be provided, the delay did not constitute a denial of the pupil's right to education.<sup>103</sup> Clearly aware of the problems that this case highlighted for parents of children with severe disabilities, Lord Phillips noted that major reform was on the agenda and might well be desirable. However, for the time being, 'so far as A2P1 is concerned, it takes the system as it finds it.'<sup>104</sup> It is this characteristic of the provision that has led Harris to observe that at present, 'the ECHR standard adds little if anything to the guarantees under domestic law.'<sup>105</sup> However, in a review of UK cases, Harris is encouraged by the 2017 case of *R (E) v London Borough of Islington*<sup>106</sup> which found a violation of A2P1: unlike the *A* case, this was one where there was no need for especially resource-intensive facilities and instead engaged the authority's basic duty to ensure the provision of efficient education. In light of this and a number of other cases, he considers that there may be some 'signs of an increased judicial willingness to raise the bar for the state in ensuring that provision meets children's needs to the extent necessary to prevent a denial of the right to education.'<sup>107</sup>

A pupil's exclusion from school for disciplinary purposes will not in principle constitute a violation of A2P1,<sup>108</sup> although depending on the facts it may do so.<sup>109</sup> The fact that an exclusion may be a breach of domestic law has not in itself led to such an exclusion being found to violate the ECHR provision, by the UK courts<sup>110</sup> or by the ECtHR.<sup>111</sup> However, the ECtHR has been influenced by whether an exclusion is temporary and has indicated that there could be a violation if there were permanent exclusion and an inability to secure full-time education at another school.<sup>112</sup>

While A2P1 has inherent limitations in its focus on access to whatever system is already in place in a state, it may be a more powerful tool when linked with Article 14. The combined effect of the two provisions is that states must not discriminate unlawfully against any group in the way that they choose to make existing or new provision available. For Article 14 to be applicable, it must be linked with another Convention right: in this context that means that, although it is not necessary to show a breach of A2P1, it must be shown that it is 'engaged' or applicable to the case in hand. Any difference in treatment between different groups in their enjoyment of the right to access education will be in violation of Article 14 unless it pursues a legitimate aim and is proportionate to that aim. While it would not be a breach of A2P1 not to provide a particular type of education, if a particular type of education is provided for one group, then the exclusion of another group would have to be justified. Accordingly, the exclusion from student loans of

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<sup>103</sup> Ibid, para 86.

<sup>104</sup> Ibid, para 92.

<sup>105</sup> N Harris, *Education, Law and Diversity*, 2<sup>nd</sup> ed. (Hart, 2020), 47.

<sup>106</sup> [2017] EWHC 1440 (Admin).

<sup>107</sup> Ibid, p 62.

<sup>108</sup> *Dogru v France*, 2008, ECHR Application no. 27058/05, HUDOC.

<sup>109</sup> *Timishev v Russia*, 2005, ECHR Application no. 55762/00, HUDOC.

<sup>110</sup> *Ali v Headteacher and Governors of Lord Grey school* [2006] UKHL 14 (although the Court of Appeal had found a violation); *In the matter of an application by 'JR 17' for judicial review* [2010] UKSC 27.

<sup>111</sup> *Ali v UK*, 2011, ECHR Application no. 40385/06, HUDOC.

<sup>112</sup> Ibid, para 60.

certain individuals with limited or discretionary leave to remain in the UK was found to be a violation of A2P1, read with Article 14.<sup>113</sup>

#### 4.1.2 Parents' right to respect for conscience and belief

The second sentence of A2P1 has been described by the ECtHR as 'safeguarding the possibility of pluralism in education', operating as a check against possible indoctrination.<sup>114</sup> The provision requires that, when states are exercising their functions in relation to education, they 'shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.' This will be relevant in relation to the changes to be introduced in Welsh schools where parents' right to withdraw their children from sex and relationships education, and from religious education, will be ended.<sup>115</sup>

A2P1 applies to the whole school curriculum, not just in relation to religious subjects.<sup>116</sup> It has implications for the organisation, ethos and content of education and has led to some division and finely balanced decisions in the ECtHR. However, the UK entered a reservation, accepting the obligations of this second sentence 'only in so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure.'<sup>117</sup> This is reflected in national legislation which states that central and local government must exercise their education functions with '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.'<sup>118</sup> The conditions concerning efficient instruction and costs place a considerable limit on the force that this guarantee to parents can have. As interpreted by the ECtHR, it is also clear that there are limits on the extent to which parents' convictions must be respected. States are not prevented from 'imparting... information or knowledge of a directly or indirectly religious or philosophical kind.'<sup>119</sup> For example, Denmark was entitled to make sex education compulsory in its schools as long as the information or knowledge was 'conveyed in an objective, critical and pluralistic manner.'<sup>120</sup> What is forbidden is for the state 'to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions.'<sup>121</sup> A refusal to exempt primary school Muslim pupils from mixed swimming lessons did not fall foul of A2P1 either.<sup>122</sup> However, in relation to religious education, it can be more challenging for states: not only must the information and knowledge be conveyed in an objective and critical manner (and not as a matter of 'faith formation'), there must also be an appropriate balance between the attention and coverage given to majority beliefs and those of minority groups. These criteria were not found to be satisfied in the *Folgero* case, and a partial right of exemption was insufficient

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<sup>113</sup> *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57.

<sup>114</sup> *Kjeldsen v Denmark*, 1976, ECHR Application no. 5095/71, HUDOC.

<sup>115</sup> Welsh Government, *Curriculum for Wales Guidance*, January 2020. <https://hwb.gov.wales/curriculum-for-wales> See p12 regarding mandatory elements.

<sup>116</sup> *Kjeldsen*, para 51

<sup>117</sup> The reservation is carried into national law under the HRA.

<sup>118</sup> Education Act 1996, s 9.

<sup>119</sup> *Kjeldsen*, para 53.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*

<sup>122</sup> *Osmanoğlu and Kocabaş v Switzerland*, 2017, ECHR Application no 28086/12, HUDOC.

to rectify the situation, although the very narrow 9 to 8 vote majority in the ECtHR is an indication of how difficult it may be to draw the appropriate line.<sup>123</sup>

### 4.1.3 Rights to a fair hearing

In addition to the substantive rights of the ECHR, it may be asked whether the right to a fair hearing may be relevant in relation to a number of areas in education, such as proceedings concerning admissions or exclusions. Article 6 of the ECHR guarantees the right to a fair and impartial hearing, but only when ‘civil rights and obligations’ or ‘criminal charges’ are being determined. These terms have been interpreted in a ‘Convention-autonomous’ way by the ECtHR. In its early case law, the then European Commission had held that Article 6 was inapplicable to proceedings concerning education on the basis that the right not to be denied education fell within the domain of public law<sup>124</sup> but the ECtHR has since moved away from that approach, recognising the right of access to higher education as a ‘civil right’ for the purposes of Article 6(1) in *Araç v Turkey*.<sup>125</sup> However, the courts in the UK have found that, since there is no right to education in any particular school, there is no civil right engaged for the purposes of Article 6 in relation to exclusions. Unpersuaded by the ECtHR’s approach in *Araç*, the Court of Appeal of England and Wales held in 2010 that Article 6 was not engaged in the case of a permanent exclusion from school: it found that there was no civil right to continue to be educated at a particular school, and that, even if the conduct which led to the exclusion could constitute a criminal offence, the exclusion proceedings did not involve the determination of a criminal charge.<sup>126</sup>

The issue was subsequently raised by the UK Parliament’s Joint Committee on Human Rights in its report on the Bill which became the Education Act 2011. This legislation replaced independent appeal panels for dealing with permanent exclusions in England with review panels with more limited powers. This change was not made in Wales and so the particular concerns discussed by the Committee are not relevant to Wales. However, the point that is relevant to Wales is that the Committee concluded from the ECHR case of *Oršuš v Croatia*, decided a month after the *Tom Hood School* case, that Article 6 was applicable to exclusion cases on the basis of the ECtHR having stated ‘where a State confers rights which can be enforced by means of a judicial remedy, these can, in principle, be regarded as civil rights within the meaning of Article 6 § 1’.<sup>127</sup> However, the UK Government maintained its position that Article 6 is not applicable, and it is not clear that the courts in the UK will be swayed by the conclusion in the *Oršuš* case. For now, therefore, arguments based on Article 6 ECHR in relation to fairness of admission or exclusion proceedings seem likely to fail.

## 4.2 The UNCRC

From the earliest years of the National Assembly, the UN Convention on the Rights of the Child has been a significant influence for Assembly and then Welsh Government policy. Indeed, it was in the early years of the Assembly when both its powers and institutional structure were at their weakest that there was the highest prioritisation of children’s rights on the political agenda. The Assembly resolved in plenary to use the UNCRC as the benchmark for all policy developed by it

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<sup>123</sup> Eg, *Folgero v Norway*, 2007, ECHR Application no. 15472/02, HUDOC.

<sup>124</sup> *Simpson v. the United Kingdom*, ECHR no. 14688/89, Commission decision of 4 December 1989, Decisions and Reports 64, p. 188).

<sup>125</sup> 2008, ECHR Application no. 9907/02, HUDOC.

<sup>126</sup> *R (on the application of LG) v Independent Panel for Tom Hood School* [2010] EWCA 142.

<sup>127</sup> *Oršuš v Croatia*, 2010, ECHR Application 15766/03, HUDOC, para 105.

Article 28 of the UNCRC recognises ‘the right of the child to education’ at different levels, and Article 29 provides direction on the appropriate aims of education in order to ensure the maximum development of the child’s potential, preparation for participation in society, and the inculcation of respect for family, culture, national values and other civilizations and the environment. While the new curriculum to replace that of 1988 aligns with many of the aims expressed in Article 29, it is unclear as to the extent to which this has been directly influenced by the UNCRC. The Children’s Commissioner expressed disappointment in January 2020 that the Bill on the curriculum was not to include an obligation to have regard to the UNCRC.<sup>131</sup> In contrast, the ALN Act 2018 includes the duty for certain bodies to have regard to the UNCRC, and in addition the Convention on the Rights of Persons with Disabilities. While many issues such as exclusions, performance and the curriculum are often referred to in the context of the right to education, a key driving force behind the different policies is the commitment to equality. Whether this driver is a consequence of the expressed commitment to the UNCRC, or the commitment to the UNCRC is itself a consequence of a desire to further a more equal Wales is difficult to answer. And, while there is an expressed commitment to the UNCRC, this has not always translated into successful delivery in practice, especially where resources are required. ‘Policy rich but implementation poor’ was a description of Wales used by an Assembly committee in 2011: it remains a challenge in today’s Wales.<sup>132</sup>

<sup>128</sup> National Assembly for Wales, *Official Record*, 14 January 2004.

[illegible]

131 Children's Commissioner for Wales, Quarterly Update, January 2020, 11-12. Available at:

132 *Legacy Report of the Children and Young People Committee*, March 2011, para 179. Available at:

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unsurprising since it was perhaps more easily accommodated, than changes to substantive education law would have been, within the limited depth and breadth of the Assembly's powers until 2011. For example, school councils became compulsory in Welsh schools in 2005,<sup>133</sup> a move which Estyn regarded at the time as having 'enabled the participation agenda to make progress and gain support quickly in schools'.<sup>134</sup> Also in pursuance of greater participation, the right to complain about an exclusion and appeal against a permanent exclusion was given to children over 10 and young people in 2003:<sup>135</sup> in contrast, it remains the case in England that the 'relevant person' who may complain or seek review of an exclusion is the parent unless the learner is 18 or over.<sup>136</sup> The Education (Wales) Measure 2009 provided for an extension of appeal rights to the Education Tribunal for children and young people.<sup>137</sup> In contrast, the position in England restricts the right of appeal to parents and young persons over compulsory school age.<sup>138</sup> Of course, the provision for participation rights in legislation does not guarantee that they will be enjoyed in practice: the evaluation of the pilot scheme extending tribunal appeal rights to children and young people found only one case which had been taken by a child.<sup>139</sup> Academic comparative research on Wales and NI concluded in a similar vein.<sup>140</sup> On the other hand, the President of the Education Tribunal stated in her 2014-15 Annual Report that although there had been only one appeal received from a child at that point, the 'very nature of the legislation around children's rights to appeal has improved the culture of listening to and hearing the voices of our children and young people.'<sup>141</sup> As noted earlier, our feedback from parents was that the Education Tribunal was very receptive to listening to the children and young people whose cases were being examined. However, as we also noted earlier, owing to financial and knowledge constraints, many will not be aware of, or able to access, the Education Tribunal or judicial review. It may be that the human rights agenda has improved the experience of those who can and do access these redress systems, but the barriers to accessing these systems in the first place clearly remain.

**Recommendation 9: That Welsh Government considers whether the appeal rights provided for in education legislation in Wales are being used in practice, and, if not, considers how practical barriers to their use may be addressed.**

### 4.3 Equality

In addition to the duties under the education legislation, there must be compliance with the Equality Act 2010 which sets out protections for individuals as well as provisions aimed at improving equality by requiring public bodies to be proactive. Central to the act are the designated 'protected characteristics': (sex, race, religion or belief, disability, sexual orientation,

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<sup>133</sup> School Councils (Wales) Regulations 2005, SI 2005/3200. They are not compulsory in England but most schools there have one: Whitby and Wisby, *Real Decision Making? School Councils in Action* (Institute of Education, 2007).

<sup>134</sup> Estyn, *Young people's participation in decision making 2005-2006*, para 34.

<sup>135</sup> The Education (Pupil Exclusions and Appeals) (Maintained Schools) (Wales) 2003, SI 2003/ 3227, reg 2 regarding the definition of 'the relevant person'.

<sup>136</sup> School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012, SI 2012/1033, reg 2.

<sup>137</sup> By amending the Education Act 1996. These provisions are now part of the ALN Act 2018.

<sup>138</sup> Children and Families Act 2014, s51.

<sup>139</sup> D Holtom, S Lloyd-Jones and J Watkins, *Evaluation of a Pilot of Young People's Rights to Appeal and Claim to the Special Educational Needs Tribunal for Wales* (Welsh Government, 2014).

<sup>140</sup> O. Drummond, 'When the Law is Not Enough: Guaranteeing a Child's Right to Participate at SEN Tribunals' (2016) 17 (3) *Education Law Journal* 149; <https://ukaji.org/2016/11/30/child-participation-at-special-educational-needs-tribunals/>

<sup>141</sup> SENTW, Annual Report 2014-15 (October 2017), p 3.



age, gender-reassignment, marriage and civil partnership, and pregnancy and maternity), although not all of these characteristics are protected in every circumstance.

The general public sector equality duty (PSED) in section 149 of the Act places a general duty on public bodies including local authorities and schools to take active steps to eliminate discrimination and promote equality.<sup>142</sup> Regulations set out ‘Wales specific equality duties’ that public bodies in Wales must comply with in order to show that they are complying with the general duty.<sup>143</sup> These specific duties include engaging with people with protected characteristics in setting objectives, and carrying out impact assessments.<sup>144</sup>

The type of advance consideration required by the PSED would be relevant, for example, when a school is determining a uniform policy, or a local authority is changing its school transport policy. While making an equality impact assessment before a decision will usually be regarded as ‘convincing evidence’ that a body has had regard to its PSED requirements, the question was left open in the *Diocese of Menevia* school transport case as to whether the PSED had been complied with when the local authority did have regard to the PSED issues but had ‘fallen into legal error’ in doing so.<sup>145</sup> Other equality breaches had been found in that case.

The provisions on individual protection indicate types of regulated conduct (direct discrimination, indirect discrimination, discrimination arising from disability, harassment and victimisation) and the extent to which those forms of conduct are prohibited in relation to specific protected characteristics. Chapter 1 of Part 6 of the Act deals with the application of equality duties in relation to education in schools, imposing duties on the ‘responsible body’ which for maintained schools in Wales will be the local authority or the governing body,<sup>146</sup> depending on the function at issue: for example, if admissions were at issue the responsible body will be the admissions authority.

Not every protected characteristic is protected in every circumstance, and not every type of regulated conduct is prohibited in every context. For example, in relation to schools, the characteristics of marriage and civil partnership, and age are not protected at all<sup>147</sup> and none of the provisions in the chapter apply in relation ‘anything done in connection with the content of the curriculum.’<sup>148</sup> An example of a more specific limitation is that, in relation to the admission and treatment of pupils, the prohibition of harassment does not apply in relation to the characteristics of gender reassignment, religion or belief or sexual orientation.<sup>149</sup> The general prohibition on sex discrimination does not apply in relation to single-sex schools<sup>150</sup> although the local authority would still be under the duty in the Education Act 1996 to provide sufficient school places for boys and girls. The duty on local authorities not to discriminate does not apply in relation to religion or belief regarding the duty to provide primary and secondary schools.<sup>151</sup>

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<sup>142</sup> The general PSED does not apply in relation to age in education.

<sup>143</sup> Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011, SI 2011/1064.

<sup>144</sup> SI 2011/1064, regs 4,5 and 8.

<sup>145</sup> *R (on the application of Diocese of Menevia) v City and County of Swansea*, [2015] EWHC 1436 (Admin), Wyn Williams J, paras 98-100.

<sup>146</sup> s 85(9).

<sup>147</sup> s 85.

<sup>148</sup> s 89(2).

<sup>149</sup> s 85(10).

<sup>150</sup> Schedule 11, para 1.

<sup>151</sup> Schedule 3, para 6.

This ensures that the local authority is not bound to provide schools for pupils of different faiths, or no faith, in every catchment area.<sup>152</sup>

The case of *R (on the application of Diocese of Menevia) v City and County of Swansea* illustrates the need for authorities to be alive to the possibility of creating indirect discrimination.<sup>153</sup> In that case an authority had previously exercised its discretion to provide free travel to learners attending Welsh-medium and faith schools even where an English-medium or non-faith school was nearer. Forced to make a substantial reduction in its expenditure, it amended its policy to remove the entitlement to free travel from learners attending faith schools but continuing to make it available for learners attending Welsh-medium schools. The change in policy was found to be indirect discrimination on grounds of race since the change in policy affected substantially more black and minority ethnic children (who attended faith schools) than white children (who were the major group attending Welsh-medium schools). Although there was a legitimate aim, namely the saving of costs taken in conjunction with the duty to promote access to Welsh-medium education, the policy change chosen was not a proportionate response: by failing to appraise possible alternatives, the Council had failed to show that the chosen approach was no more than reasonably necessary to achieve the aim.<sup>154</sup> However, the claim that there had been discrimination under Article 14 ECHR in association with A2P1 failed, the Court adopting the same position as in earlier case law<sup>155</sup> in holding that the provision was not engaged in relation to transport to school.

#### 4.3.1 Enforcement

Part 9 of the Equality Act 2010 deals with enforcement. Proceedings must be brought in accordance with the Act but this does not prevent an action for judicial review,<sup>156</sup> nor any jurisdiction for a court or tribunal expressly provided for elsewhere in the Act.<sup>157</sup> For all forms of discrimination in schools, except disability discrimination, the remedy will lie in the county court except where there are specific appeal arrangements in legislation.<sup>158</sup> Such specific arrangements exist in relation to any kind of discrimination regarding decisions on admissions or permanent exclusions where the claim must go to the independent appeal panel.<sup>159</sup> Where disability discrimination by a ‘responsible body’ (school or local authority) is alleged, the claim will be made to the Education Tribunal for all cases other than for admissions appeals and appeals against permanent exclusions, which, as noted, must go to the independent appeal panels.<sup>160</sup>

Under section 119, the county court has the power to grant any remedy which could be granted by the High Court in proceedings in tort or on a claim for judicial review. In contrast, the Tribunal may make such order as it thinks fit but it cannot award financial compensation. Alternatively, a solicitor has advised that where disability discrimination lies in a failure to make

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<sup>152</sup> Explanatory notes to the Equality Act 2010. Available at <https://www.legislation.gov.uk/ukpga/2010/15/notes/contents> (last accessed March 2020).

<sup>153</sup> [2015] EWHC 1436 (Admin).

<sup>154</sup> *Ibid*, para 80.

<sup>155</sup> *Leeds City Council* [2005] EWHC 2495.

<sup>156</sup> s 113 (1) and (3).

<sup>157</sup> s 113 (4).

<sup>158</sup> Equality Act 2010, s 114(1)(c) and (3).

<sup>159</sup> s 116 and Schedule 17, paras 13 and 14.

<sup>160</sup> s 116 and Schedule 17, para 3A(1) and (2).



the provision set out in a statement, a quicker form of redress may be to threaten judicial review to enforce the provision in the statement.<sup>161</sup>

In relation to disability discrimination in schools, provisions on dispute avoidance and resolution mirror those which apply in relation to SEN / ALN.<sup>162</sup> Given that there was consultation on these provisions in relation to the ALN Bill and, more recently, the ALN Code, discussion on them will be left until the section on ALN to avoid duplication.

The duties on schools and local authorities regarding discrimination count as ‘education functions’: this means that Welsh Ministers may intervene under the School Standards and Organisation (Wales) Act 2013 if the head teacher or governing body has failed, or is likely to fail, to comply with their duties or has acted or is proposing to act unreasonably.<sup>163</sup>

We heard concerns from parents and professionals in our focus groups that equality legislation in schools appeared to be poorly understood, especially in comparison with the level of understanding of the duties under SEN legislation. Without further research it is difficult to say why this might be. It was suggested to us that greater awareness-raising and training might have taken place in relation to the devolved area of education rather than in the generally reserved area of equality. On the other hand, it may be that the cross-cutting law on discrimination in the Equality Act 2010 presents greater complexity and challenges to those applying it in specific situations than the single-area SEN/ ALN law. Whatever the reason, it was worrying to hear from some parents that general references to the Equality Act were being made incorrectly to justify *failures* to make reasonable adjustments for disabled children, on the basis that the teachers or schools feared that such adjustments would amount to discrimination against children who were not disabled.

**Recommendation 10: That consideration must be given to how to raise the level of understanding in schools regarding discrimination, in particular disability discrimination.**

## 5 General duties and powers of the Welsh Ministers

Since devolution, the Welsh Ministers have taken over the general duties of the Secretary of State to ‘promote the education of the people’ within Wales<sup>164</sup> and to exercise powers in respect of ‘those bodies in receipt of public funds’ with responsibility for securing the provision of education, or which run schools, for promoting primary, secondary and further education in Wales. It has been suggested that short of ‘total default’ in these general duties, ‘it seems extremely improbable’ that they could be enforced through the courts.<sup>165</sup>

As discussed below, the more specific duty to provide sufficient schools falls on local authorities, and therefore in the context of school re-organisation or closure decisions these are primarily the responsibility of local authorities, although some proposals do require Welsh Ministers’ approval.<sup>166</sup> There are also instances where the Welsh Ministers may direct a local authority to use

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<sup>161</sup> <https://www.lag.org.uk/article/202534/the-education-problems-still-covered-by-legal-aid>

<sup>162</sup> Equality Act 2010, Schedule 17, Part 2.

<sup>163</sup> Equality Act 2010, s 87 (3)(a).

<sup>164</sup> Education Act 1996, s10 (EA 1996).

<sup>165</sup> Rabinowicz et al, *Education: Law and Practice* (Sweet & Maxwell, 1996), p4.

<sup>166</sup> School Standards and Organisation (Wales) Act 2013 Act, s50 (SSOWA).

its power to establish or alter a school or to ‘rationalise’ school places.<sup>167</sup> The School Organisation Code (SO Code) describes the powers of the Welsh Ministers to issue a direction or subsequently publish its own proposals as being ‘powers of last resort’ to be used when the local authority has failed to ensure the provision of sufficient schools, reasonable access to a school for each child, or cost-effective funding and provision of necessary resources.<sup>168</sup>

In terms of the general systems for ensuring the proper running of schools and provision of appropriate standards, an individual would first raise any concern they have with the school itself (following the procedures outlined below). However, the Education Act 1996 (EA 1996) makes general provision for the Welsh Ministers to determine disputes within Wales between a local authority and a school governing body concerning their exercise of powers or performance of duties under the EA 1996,<sup>169</sup> and to determine disputes between two or more Welsh local authorities as to which of them is responsible for the education of any pupil.<sup>170</sup>

Under the School Standards and Organisation (Wales) Act 2013 (SSOWA), the Welsh Ministers are also given powers of intervention in relation to concerns regarding the exercise of functions by local authorities. Under the SSOWA, the Welsh Ministers may also give guidance to governing bodies, head teachers and local authorities on how functions should be exercised with a view to improving the standard of education being provided.

Where there are concerns about a school and the local authority has not used its intervention powers, or has done so in a way that the Welsh Ministers consider inadequate, the Welsh Ministers may give a warning notice to the school that they intend to intervene, and subsequently may do so.<sup>171</sup>

## 6 General powers and duties of local authorities

Some of the duties on local authorities in Wales are comparable in generality to those of the Welsh Ministers, for example there is a general duty on local authorities, ‘so far as their powers enable them to do so’ to ‘contribute towards the spiritual, moral, mental and physical development of the community by securing that efficient primary and secondary education are available to meet the needs of the population of their area’<sup>172</sup> and the duty to ensure that ‘so far as they are capable of being so exercised’ that the local authority’s education and training functions are exercised with a view to promoting high standards and the fulfilment of learning potential...’<sup>173</sup>

More specific is a local authority’s duty under section 14(1) of the Education Act 1996 to secure the provision of ‘sufficient schools’ for primary and secondary education in their area. This duty is not discharged unless the schools in the area are ‘sufficient in number, character and equipment to provide for all pupils the opportunity of ‘appropriate education’.<sup>174</sup> This duty may also be achieved by the provision of ‘regional schools’.<sup>175</sup> The local authority is to have particular

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<sup>167</sup> SSOWA, s 57(1) and (2).

<sup>168</sup> School Organisation Code, p55 (SO Code).

<sup>169</sup> EA 1996, s 495(1) and (2).

<sup>170</sup> EA 1996, s 495(3).

<sup>171</sup> SSOWA, ss 10 and 11.

<sup>172</sup> EA 1996, s 13.

<sup>173</sup> EA 1996, s 13A(3).

<sup>174</sup> EA 1996, s 14(2).

<sup>175</sup> EA 1996, s 14 (4A).

regard to the need for securing that additional learning provision is made for pupils with additional learning needs.<sup>176</sup> However, although the section 14 duties are more specific than the earlier ones, and have been litigated, it is clear that authorities have some latitude in terms of the types of the schools made available, and in terms of what they must do to comply with the duty.<sup>177</sup> There are also specific duties in relation to planning for, and delivering, Welsh medium education.<sup>178</sup>

In order to carry out their duties under the 1996 Act, local authorities are given the power to establish and to maintain primary and secondary schools and to assist any such schools which are not maintained by them.<sup>179</sup> Local authorities in Wales also have the powers to secure provision of full- or part-time education suitable for persons over compulsory school age.<sup>180</sup> In exercising this power, the local authority must in particular have regard to persons with learning difficulties / additional learning needs.<sup>181</sup>

Each local authority is also obliged to arrange for the provision of ‘suitable education’ at school or otherwise for children of compulsory school age who, due to illness or exclusion from school or other reason, may not receive suitable education for any period unless arrangements are made for them.<sup>182</sup> Schools established and maintained by local authorities for this purpose are to be known as pupil referral units.<sup>183</sup> There is a power (but not a duty) to make the same arrangements in relation to young persons (i.e. those above compulsory school age).

In the context of specific complaints about various issues within particular schools, a person’s first recourse should be to the school itself. However, Welsh Government Guidance also places duties on local authorities with respect to complaint-handling. The School Complaints Guidance states that a local authority should satisfy itself that all the schools it maintains have adequate complaints procedures that are publicised<sup>184</sup> and that the local authority may choose to give advice and further guidance to governing bodies<sup>185</sup> but the statutory responsibility rests with the governing body.<sup>186</sup> There is further inter-play with Welsh Ministers/Government here as where a complaint about a school is addressed to Welsh Government, if, having advised that the complaint should be sent to the school, Welsh Government considers that the governing body is failing to deal with the complaint, it will bring the complaint to the attention of the local authority to provide support or take action.

The SSOWA gives local authorities powers of intervention in maintained schools when there are concerns about the level of pupil performance, safety or the management or governance of a

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<sup>176</sup> EA 1996, s 14(6b).

<sup>177</sup> *R v ILEA, ex parte Ali* [1990] COD 317, [1990] 2 Admin LR 822.

<sup>178</sup> SSOWA, Part 4; Welsh in Education Strategic Plans (Wales) Regulations 2019, SI 2019/1489. See further in section 8.1 below on school organisation.

<sup>179</sup> EA 1996, s 16, and powers under School Standards and Organisation (Wales) Act 2013.

<sup>180</sup> EA 1996, ss 15A(1) and 15B.

<sup>181</sup> EA 1996, s 15A(3) There are also duties in relation to persons in detention, and in relation to the provision of facilities for recreation and social and physical training.

<sup>182</sup> EA 1996, s 19.

<sup>183</sup> EA 1996, s19(2).

<sup>184</sup> Complaints procedures for school governing bodies in Wales, Welsh Government Guidance, Circular 011/2012, para 5.1 (School Complaints Guidance).

<sup>185</sup> School Complaints Guidance, para 5.2.

<sup>186</sup> School Complaints Guidance, para 5.3.

school<sup>187</sup> or if the governing body or head teacher has failed to comply with a duty under the Education Acts.<sup>188</sup> If the local authority considers that there are grounds for intervening, it may give a warning notice to the governing body of the school specifying the grounds for concern.<sup>189</sup> It may then intervene if the governing body has failed to comply with the notice to the local authority's satisfaction.<sup>190</sup> Where grounds for intervention exist, the local authority has the general power to issue directions to the governing body or head teacher or 'take any other steps.'<sup>191</sup> A specific example of where a local authority may use its powers of intervention (discussed above) is noted in the School Complaints Guidance as where there is evidence that 'a complaint has not been considered properly at Stage C and therefore that standards of governance are not good enough'.<sup>192</sup>

## Part III- specific areas

### 7 Complaints within schools

If a person is dissatisfied with school-based education, the starting point for pursuing a complaint will be within the school itself. Welsh Government has issued guidance<sup>193</sup> to which school governing bodies are required to have regard in relation to establishing and publicising arrangements for dealing with complaints.<sup>194</sup> A 'complaint' for the purposes of the School Complaints Guidance is 'an expression of dissatisfaction in relation to the school, a governor or a member of its staff that requires a response from the school'.<sup>195</sup>

It should be noted, however, that where legislation provides for a specific system for redress, that, rather than the general complaints systems should be used. The School Complaints Guidance states that this is the case for school admissions and exclusion, SEN, school organisation proposals, religious worship and the delivery of the curriculum.<sup>196</sup>

The School Complaints Guidance sets out the general principles (including fairness, impartiality, timeliness) that should govern the handling of the complaint, the recording of information and holding of meetings.<sup>197</sup> The Guidance also makes clear that complaints by pupils should be treated as seriously as those made by adults<sup>198</sup> and that, in line with the UNCRC, pupils need to be aware of their right to complain if they are dissatisfied or unhappy.<sup>199</sup> Where complaints are brought by pupils under 16, the Guidance recommends that the school bring the matter to the attention of the pupil's parent, 'having discussed this course of action with the pupil beforehand and preferably

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<sup>187</sup> SSOWA, Part 2.

<sup>188</sup> The grounds for intervention and the relevant powers are set out in SSOWA, s 2, ground 5.

<sup>189</sup> SSOWA, s 3.

<sup>190</sup> SSOWA, s 4.

<sup>191</sup> SSOWA, s 9.

<sup>192</sup> School Complaints Guidance, para 3.26.

<sup>193</sup> Under EA 1996, s10 and EA Act 2002, s29(2).

<sup>194</sup> Complaints procedures for school governing bodies in Wales, 2012. Guidance circular 011/2012 (School Complaints Guidance).

<sup>195</sup> School Complaints Guidance, para 2.4.

<sup>196</sup> School Complaints Guidance, para 2.5.

<sup>197</sup> School Complaints Guidance, chapter 2.

<sup>198</sup> School Complaints Guidance, para 3.30.

<sup>199</sup> School Complaints Guidance, para 3.31.

having sought the pupil's consent'.<sup>200</sup> The Guidance refers young people to 'MEIC', the national advocacy and advice helpline for children and young people. Special arrangements are recommended for where a complaint is made against the entire governing body, in which case the local authority should be informed.<sup>201</sup> Schools with a religious character may agree to the diocesan authority investigating a complaint or arranging for a third party to do so.<sup>202</sup>

The School Complaints Guidance recommends that there should be a three-stage process whereby complaints are:

- A. Initially taken to a member of the school staff other than the head teacher,
- B. If unresolved, they are taken to the head teacher, and
- C. Finally, if still unresolved, they go to the Governing Body. The Guidance recommends that governing bodies establish a committee to handle complaints.

The Guidance advises against establishing an appeal from the Stage C decision.<sup>203</sup>

A specific example of where a local authority may use its powers of intervention (discussed above) is noted in Welsh Government Guidance as where there is evidence that 'a complaint has not been considered properly at Stage C and therefore that standards of governance are not good enough'.

## 7.1 Discussion

When issuing its School Complaints Guidance in 2012, Welsh Government stated that there was evidence of a high level of dissatisfaction among parents/carers with complaints handling.<sup>204</sup> It noted that Governors Wales<sup>205</sup> received many inquiries annually about complaints handling, and concluded from this, from correspondence received by Welsh Government and from 'anecdotal evidence from local authorities' that governing bodies found handling complaints difficult.<sup>206</sup> Welsh Government also considered that there was evidence that not all governing bodies had a complaints procedure or publicised it, and that some failed to comply with their own procedures or had inadequate procedures.<sup>207</sup>

It is difficult to assess the extent to which the School Complaints Guidance of 2012 and other Welsh Government initiatives have improved complaints handling in schools. Indeed, measuring satisfaction or dissatisfaction without examining individual complaints and their outcomes is difficult: satisfaction could be linked to a favourable outcome even where the complaint handling is not in itself particularly good, and vice versa there may be dissatisfaction even where a complaint has been handled entirely properly if the outcome is not the desired one. We heard from some local authority staff that the fact that governors and authorities are working objectively through technical processes can make parents feel that they are being treated in a detached 'clinical' manner

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<sup>200</sup> School Complaints Guidance, para 3.33.

<sup>201</sup> School Complaints Guidance, para 4.22.

<sup>202</sup> School Complaints Guidance, para 5.8.

<sup>203</sup> School Complaints Guidance, chapter 3.

<sup>204</sup> School Complaints Guidance, para 1.5.

<sup>205</sup> This body is no longer in existence. See note 29 and accompanying text above.

<sup>206</sup> School Complaints Guidance, para 1.6.

<sup>207</sup> School Complaints Guidance, para 1.7.

about something that is immensely important to them. The staff considered that there was more to do to raise awareness not just of the procedures to be followed, but also that the purpose for having different stages is to allow information to be gathered fairly, and not to be obstructive.

A freedom of information request to Welsh Government at the end of 2019 asked for figures to back up the statement in the School Complaints Guidance that it should be rare for Stage C (complaints to the governing body) to be reached in internal school complaints process. The response indicated that this information is not held by Welsh Government.<sup>208</sup>

Feedback we received in focus groups and workshops for this project from a range of people was to the effect that there is still a significant level of variation between different governing bodies and indeed different governors within the same body: some are viewed as skilled and knowledgeable and some less so. The process seems not to be understood by at least some parents and we heard of school effectiveness officers being drawn into explaining the process and feeling caught between the parents and the governing body at times. The fact that Estyn notes on its website that it ‘often’ receives individual complaints about schools from parents also indicates this lack of awareness.<sup>209</sup> And yet, this information is published by schools in their guidance for parents.

We heard that parents often found it hard to see the governors as unbiased and independent adjudicators. We discuss this further in our section on exclusions and also refer to other research on the matter that has followed a more thorough and systematic method to examine the topic than was possible in this project.<sup>210</sup> We heard of one instance in which it was felt that someone independent should be appointed to investigate an issue and the matter was resolved by governors from other schools committing the equivalent of 3 days of work to the issue. This perhaps underlines how dependent school governance is on the goodwill of volunteers.

As noted earlier in this report, the suggestion that focused training on complaint handling should be compulsory for governors was met with concerns that the more mandatory training there is, the more it would possibly put people off becoming governors. This is a heavy role for a volunteer work force and this fear is entirely understandable. We heard that governors may very rarely have to deal with a complaint, but when they do it can be complex, serious and challenging for them. However, this seemed to be an area where consortia could help by pooling local authority resources in order to provide assistance and evaluate complaints procedures. We refer to our earlier recommendations (Recommendations 6 and 7) that the scope of mandatory training for governors requires consideration.

Our research findings raise the question of whether there is a need to further investigate and review how these complaints systems are operating since the School Complaints Guidance was issued in 2012.

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<sup>208</sup> FOI request ATISN 13616. Available at <https://gov.wales/sites/default/files/publications/2019-12/ATISN%2013616.pdf>

<sup>209</sup> <https://www.estyn.gov.wales/faq/do-schools-have-log-parents%E2%80%99-complaints> (last accessed 21 Jan 2020)

<sup>210</sup> See section 10.2.3.1 of this report.

As discussed earlier,<sup>211</sup> it may be worth considering whether to bring schools within the jurisdiction of the PSOW as has been done in Northern Ireland. 2017. This would have resource implications for the office of the PSOW but would introduce an independent element into the process of dealing with school complaints.

## 8 Establishing, re-organising and closing schools

The rules on establishing, altering and closing schools are set out in Part 3 of the Schools Standards and Organisation (Wales) Act 2013 (SSOWA). Further detail is set out in the School Organisation Code (SO Code)<sup>212</sup> which the SSOWA requires the Welsh Ministers to issue.<sup>213</sup> The SO Code may include requirements and guidance for the Welsh Ministers, local authorities, governing bodies of maintained schools and the promoters of proposals to establish voluntary schools, collectively referred to in the SO Code as ‘the relevant bodies’. More generally, local authorities, in dealing with re-organisation issues, must take all reasonable steps to meet their well-being objectives, and must act in a manner that takes into account the five ways of working as required by the Well-being of Future Generations (Wales) Act 2015.

Welsh Ministers, local authorities, governing bodies of maintained schools and the promoters of proposals to establish voluntary schools must act in accordance with any requirements set out in the SO Code, and must have regard to any relevant guidelines in it.<sup>214</sup>

In terms of administrative justice, a significant change was reducing the involvement of the Welsh Ministers in the decision-making process. Previously, all proposals to which there were objections had to be determined by the Welsh Ministers. Under the SSOWA more is to be decided at the local level. While this makes the process a quicker one, it may be perceived by those seeking to challenge a proposal, especially one to close a local school, as lessening their redress rights, restricting them to judicial review of the decision or a complaint to the PSOW, if the process has not been handled properly. It is clear that concerned individuals have attempted to harness a range of legislation to try to prevent school closures: as noted earlier, there was an unsuccessful judicial review claim based on the Well-being of Future Generations (Wales) Act 2015.<sup>215</sup> In a different case, a complaint made to the Welsh Language Commissioner was upheld, but this could not halt closure of the school and the recommendations made would be relevant only in relation to future decision making.<sup>216</sup>

The SSOWA and the SO Code set out the types of decisions that can be made and the process for making and challenging those decisions.

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<sup>211</sup> See section 3.2.1 on the PSOW and Recommendation 8.

<sup>212</sup> Welsh Government, School Organisation Code, 2<sup>nd</sup> edition - Statutory Code document no 011/2018, November 2018 (SO Code). This second edition of the Code replaced the 2013 Code (document no. 006/2013).

<sup>213</sup> SSOWA, s 38.

<sup>214</sup> SSOWA, s 38(4). S 39 sets out the requirements for the making and approval of the Code.

<sup>215</sup> *R (B) v Neath Port Talbot Council* (30 January 2019) CO147470/3018, and see section 3.2.2.3 on the Future Generations Commissioner.

<sup>216</sup> CSG470, City and County of Swansea, 16 January 2020, Closure of Ysgol Gynradd Gymraeg Felindre. <http://www.comisiynyddygymraeg.cymru/English/Organisations/Enforcing%20Standards/Pages/Action.aspx?aci d=235> (last accessed 6 March 2020). See also section 3.2.2.2 on the Welsh Language Commissioner.

## 8.1 Permissible changes and factors to be taken into account

Part 3, chapter 2 of the SSOWA sets out the changes which made be made: the establishment of new community or community special schools, (on a local authority's proposal) or a voluntary school (on the proposal of 'any person')<sup>217</sup> certain alterations to existing schools (eg decreasing a school's age range, changing the language medium, or changing sixth form provision),<sup>218</sup> changing the category of schools,<sup>219</sup> and the closure of schools.<sup>220</sup>

Factors which must be taken into account by all the relevant bodies in the case of all proposals are:

- Quality and standards in education – the relevant bodies 'should place the interests of learners above all others'<sup>221</sup>
- Need for places and the impact on accessibility of schools<sup>222</sup>
- Resourcing of education and other financial implications<sup>223</sup>
- Other general factors including the impact of the proposals on the educational attainment of children from economically deprived backgrounds; any equality issues; whether schools involved are subject to any trust or charitable interests that might be affected.

In addition to these general factors to be considered, other matters must be considered in relation to the specific types of proposal including, for example, whether demand exists for places and for particular types of school, and whether the proposals will improve access for disabled pupils.<sup>224</sup>

If the proposal is to close a school, the proposer must have regard to whether alternative provision will provide sufficient capacity and accommodation of at least equivalent quality for existing and projected numbers, taking account of the nature of the demand, for example in relation to language or religious character. In relation to school closures, local authorities should also consider the nature of journeys to alternative provision and the resulting journey times for pupils including SEN pupils.<sup>225</sup>

The SO Code emphasises that any case for closure should be robust and in the best interests of educational provision in the area.<sup>226</sup> However, it also requires that the impact of closure on the community is assessed through the production of a Community Impact Assessment and lists a number of factors to which special attention should be given including whether establishing multi-site schools might be a means of retaining buildings, whether there are alternatives to closure such as clustering, collaboration or federation.

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<sup>217</sup> SSOWA, s 40(1).

<sup>218</sup> SSOWA, s 40 and Schedule 2.

<sup>219</sup> SSOWA, ss 40(2) and 45-47.

<sup>220</sup> SSOWA, s 43.

<sup>221</sup> SO Code, para 1.3.

<sup>222</sup> SO Code, para 1.4.

<sup>223</sup> SO Code, para 1.5.

<sup>224</sup> SO Code, para 1.4.

<sup>225</sup> SO Code, para 1.4.

<sup>226</sup> SO Code, para 1.7.



The SO Code introduced a ‘procedural presumption’ against the closure of rural schools.<sup>227</sup> This means that there are more detailed procedures and requirements for formulating, consulting on and reaching a decision on whether to close a ‘rural school’. A ‘rural school’ is identified by using Office for National Statistics rural and urban classification.<sup>228</sup> For a proposal to close a rural school, the proposer must identify the reasons for proposing closure: rather than stating just that the school is not viable, the proposer must set out specific reasons very clearly, for example problems delivering the curriculum or concerns about the school building. All reasonable alternatives must be identified and explored, and their merits and viability assessed. There must also be consideration not just of the education perspective but of the community impact across the range of local authority responsibilities. This could include, for example linking the school with wider asset management and community regeneration strategies. As with all closure proposals, there must be a Community Impact Assessment. Before proceeding to consultation, the person who will determine whether the proposal should proceed to consultation must be presented with a paper detailing the general factors listed in the code, and the proposer must be satisfied that closure is the most appropriate response to addressing the challenges faced by the school.

As will be seen below, the law treats ‘small schools’<sup>229</sup> as a special category in terms of the processes that apply in relation to their closure. However local authorities and governing bodies making such proposals must still take account of the factors set out in the Code regarding closure.<sup>230</sup> If the small school is also a ‘rural school’, although the Act does not require consultation on its closure, those proposing its closure must still take satisfy the requirements listed in the Code’s section on the ‘presumption against the closure of rural school.’

Part 4 of the SSOWA sets out specific duties in relation to planning for, and delivering, Welsh medium education. The Act puts the making of Welsh Education Strategic Plans (WESPs) on a statutory basis: these plans, prepared by local authorities, must be approved by the Welsh Ministers and then publicised and implemented by the local authorities.<sup>231</sup> The Welsh Ministers may make regulations and guidance for local authorities about the making of WESPs.<sup>232</sup> The WESPs must include targets for the expected increase in children in specified school years taught through the medium of Welsh for the plan’s duration, and details of how those targets will be achieved; targets for increasing the amount of Welsh-medium provision in bilingual schools, and how they will be achieved; how the authority will co-operate with other authorities, and how it will promote access to Welsh-medium teaching in relation to learner transport.<sup>233</sup>

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<sup>227</sup> SO Code, para 1.8.

<sup>228</sup> A list is provided in Annex F of the SO Code.

<sup>229</sup> A ‘small school’ is defined as a school with fewer than 10 registered pupils on the third Tuesday in January immediately preceding the date on which the proposals are made (SSOWA, s 56(1)). The Welsh Ministers may, by order, amend this definition by changing the date on which the number of pupils is taken (s 56(2)).

<sup>230</sup> SO Code, para 1.7.

<sup>231</sup> SSOWA, ss 84 and 85.

<sup>232</sup> SSOWA, s 87; Welsh in Education Strategic Plans (Wales) Regulations 2019, SI 2019/1489.

<sup>233</sup> SSOWA, Part 4, and Welsh in Education Strategic Plans (Wales) Regulations 2019, SI 2019/1489, reg 3 and Schedule. Estyn, *Local authority Welsh in Education Strategic Plans*, September 2016.

## 8.2 The process for making changes

Any proposals for school establishment, closure or re-organisation must be published in accordance with the SO Code,<sup>234</sup> and, before that publication takes place, the proposer must consult on its proposals in accordance with the SO Code.<sup>235</sup> However, the requirement to consult does not apply to proposals to discontinue a school which is defined as a ‘small school’ under section 56 of the SSOWA.<sup>236</sup> Within 7 days of their publication, the proposer must send copies of the published proposals to the Welsh Ministers and, if it is not the proposer, the relevant local authority.<sup>237</sup> The proposer must publish a report on the consultation that it has carried out in accordance with the SO Code.<sup>238</sup> There is a 28-day ‘objection period’ from the date of the proposals’ publication in which written objections may be sent to the proposer<sup>239</sup> by any person.<sup>240</sup>

### 8.2.1 Who decides

Who is responsible for determining the outcome depends on the nature and source of the proposal, and whether there have been objections.

#### 8.2.1.1 Approval by the Welsh Ministers

As noted earlier, the SSOWA cuts down the number of situations where the Welsh Ministers’ approval is required. Proposals require approval by the Welsh Ministers if they affect sixth form education or if the local authority (or in the case of a school with a religious character, the relevant religious body) is not the author of the proposal and has objected within the objection period.<sup>241</sup> In this case, within 35 days of the end of the objection period, the proposer must send to the Welsh Ministers: the published proposals; the report on the consultation carried out; any objections made during the objection period that were not withdrawn; and the summary of, and response to, those objections.<sup>242</sup> The Welsh Ministers may reject the proposals, or approve them with or without modification. However, in order to approve with modifications, the Welsh Ministers must obtain the proposer’s consent to the modifications and (except where the proposer is the governing body or local authority), it must consult the governing body, if any, and the relevant local authority.<sup>243</sup> However, no approval is required under this section for proposals to discontinue a ‘small school’.<sup>244</sup>

#### 8.2.1.2 Approval by the local authority of proposals of others under section 51 SSOWA

Approval by the local authority is required under section 51 of the SSOWA for proposals which do not require approval by the Welsh Ministers, have been made by a proposer other than the

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<sup>234</sup> SSOWA, s 48(1).

<sup>235</sup> SSOWA, s 48(2).

<sup>236</sup> SSOWA, s 48(3).

<sup>237</sup> SSOWA, s 48(4) the relevant local authority is the one that maintains, or will maintain, the school.

<sup>238</sup> SSOWA, s 48(5).

<sup>239</sup> SSOWA, s 49(2).

<sup>240</sup> SSOWA, s 49(1).

<sup>241</sup> SSOWA, s 50.

<sup>242</sup> SSOWA, s 50(3) and (4).

<sup>243</sup> SSOWA, s 50(5).

<sup>244</sup> SSOWA, s 50(9), and s56 for definition of ‘small school’.

local authority and an objection has been made.<sup>245</sup> In this case, within 35 days of the end of the objection period, the proposer must send to the local authority: the published proposals; the report on the consultation carried out; any objections made during the objection period that were not withdrawn; and the summary of, and response to, those objections.<sup>246</sup> Within 16 weeks from the end of the objection period,<sup>247</sup> the local authority must decide whether it will reject the proposals, approve them without modifications or, after consulting the governing body (unless it is the proposer), approve them with specified modifications consented to by the Welsh Ministers and the proposer.<sup>248</sup> The only modifications which a local authority may make are to the dates for implementing the proposal or the admission numbers in the proposal.<sup>249</sup> No approval is needed under this section for proposals to close a ‘small school’ within the meaning of section 56 of the SSOWA

Within 28 days of the local authority approving or rejecting such proposals, the following may refer the proposals to the Welsh Ministers: another local authority (including one in England) which is likely to be affected by the proposals; the appropriate religious body for a school with a religious character to which the proposals relate or any other school with a religious character that is likely to be affected; the governing body of a foundation or voluntary school to which the proposals relate; a trust holding property for the purpose of the school to which the proposals relate; an FE institution likely to be affected by the proposals.<sup>250</sup> It is for the Welsh Ministers to decide whether the body in question is likely to be affected by the proposals.<sup>251</sup> A decision to close a ‘small school’ may not be referred to the Welsh Ministers.<sup>252</sup>

When a referral has been made, the Welsh Ministers must consider the proposals afresh and must make the decision in the same way as for decisions requiring their approval,<sup>253</sup> and, for the purposes of implementation, the decisions will be treated as the decisions of the Welsh Ministers.<sup>254</sup>

### 8.2.1.3 Determination by the proposer (including the local authority)

Finally, where it is not provided under sections 50 and 51 that the approval of the Welsh Ministers or the local authority is required, the proposer must determine whether the proposals should be implemented.<sup>255</sup> If the proposer does not make this determination within 16 weeks of the end of the objection period, the proposals are regarded as having been withdrawn.<sup>256</sup> Seven days before the date on which it makes the determination to implement its proposals, the

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<sup>245</sup> SSOWA, s 51(1).

<sup>246</sup> SSOWA, s 51(2) and (3).

<sup>247</sup> SSOWA, s 51(8).

<sup>248</sup> SSOWA, s 51(4).

<sup>249</sup> SSOWA, s 51(5).

<sup>250</sup> SSOWA, s 54(2).

<sup>251</sup> SSOWA, s 54(3).

<sup>252</sup> SSOWA, s 54(5).

<sup>253</sup> SSOWA, s 54(4).

<sup>254</sup> SSOWA, s 54(7) and (8).

<sup>255</sup> SSOWA, s 53(1).

<sup>256</sup> SSOWA, s 53(2).

proposer must notify the Welsh Ministers, the local authority and the governing body of the relevant schools of its determination.<sup>257</sup>

If the proposer is the local authority and it decides to implement proposals to which there were objections, the proposals may be referred to the Welsh Ministers for decision by the following bodies: another local authority (including one in England) which is likely to be affected by the proposals; the appropriate religious body for a school with a religious character to which the proposals relate or any other school with a religious character that is likely to be affected; the governing body of a foundation or voluntary school to which the proposals relate; a trust holding property for the purpose of the school to which the proposals relate; an FE institution likely to be affected by the proposals.<sup>258</sup> The Welsh Ministers will treat the proposals as if they were proposals requiring their approval, and the decision made with be treated, for the purposes of implementation, as a decision of the Welsh Ministers.<sup>259</sup>

### 8.2.2 Sixth form education

As noted earlier, proposals regarding the establishment or closure of sixth form education require approval of the Welsh Ministers. Section 71 of the SSOWA also permits the Welsh Ministers to make proposals for: the establishment by a local authority of new community or community special schools to provide sixth form education only;<sup>260</sup> the addition of a sixth form to an existing school;<sup>261</sup> the closure of a sixth form at an existing school;<sup>262</sup> or the closure of sixth form school.<sup>263</sup> The Welsh Ministers must follow the provisions of the SO Code in relation to consulting on, and publishing, the proposals.<sup>264</sup> Any person may object to the proposals and any objections must be made in writing to the Welsh Ministers within the 28-day objection period. At the end of the objection period, the Welsh Ministers must, having regard to any objections,<sup>265</sup> determine whether to adopt the proposals, with or without modifications, or to withdraw the proposals.<sup>266</sup> If there are to be modifications, the Ministers must consult ‘such persons as they consider appropriate.’<sup>267</sup>

Where the Welsh Ministers have adopted their own proposals on sixth form restructuring, they must be implemented in the form in which they were adopted, except that, at the request of a specified body,<sup>268</sup> they may be modified by the Welsh Ministers after consulting the specified bodies.<sup>269</sup> They may also change the form in which the proposals are implemented if they decide, after consulting the specified bodies, that the implementation of the proposals would be

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<sup>257</sup> SSOWA, s 53(3).

<sup>258</sup> SSOWA, s 54(1) and (2).

<sup>259</sup> SSOWA, s 54(7) and (8).

<sup>260</sup> SSOWA, s 71(1)(a).

<sup>261</sup> SSOWA, s 71(1)(b) and Schedule 2, para 6(1).

<sup>262</sup> SSOWA, s 71(1)(b) and Schedule 2, para 6(2).

<sup>263</sup> SSOWA, s 71(1)(c).

<sup>264</sup> SSOWA, s 72(1) and (2).

<sup>265</sup> SSOWA, s 73(2).

<sup>266</sup> SSOWA, s 73(1).

<sup>267</sup> SSOWA, s 73(3).

<sup>268</sup> These bodies are: the governing body of the school to which the proposals relate; the temporary governing body of a proposed new school; the local authority that maintains or is proposed to maintain the school in question; where the proposals relate to a community special school, every local authority which maintains a SEN statement / ALN IDP for a pupil at the school (s 74(5)).

<sup>269</sup> SSOWA, s 74(3).

‘unreasonably difficult’, or would be inappropriate given changed circumstances.<sup>270</sup> The rules on who is to implement the proposals are set out in sections 75 and 76 of the SSOWA.

## 9 Admissions

### 9.1 Introduction

The law on admission to maintained schools and on the process for resolving admission disputes is dealt with in the School Standards and Framework Act 1998 (herein after SSFA), Regulations,<sup>271</sup> and statutory Codes on the making of admission arrangements and decisions (Admissions Code)<sup>272</sup> and on appeals against individual admission decisions (Appeals Code).<sup>273</sup> These Codes include mandatory provisions which must be followed, and guidance which the admission authorities ‘should’ follow unless they can justify doing otherwise. A failure to comply with the Admissions Code may result in a statutory objection or complaint being made to the Welsh Ministers<sup>274</sup> and the Welsh Ministers may use their general powers of intervention in response.

Section 88 of the SSFA sets out who the admissions authorities are: in the case of community or voluntary controlled schools, it is the local authority unless, with the governing body’s consent, it has delegated that responsibility to the governing body. Where the local authority is the admissions authority for community and voluntary controlled schools, the governing body must comply with the local authority’s decisions. In the case of voluntary aided or foundation schools, the admissions authority is the governing body of the school.

### 9.2 Admission arrangements

Local authorities are required to make arrangements to allow parents to exercise their statutory right to express a preference for a school and give reasons for that preference.<sup>275</sup> However, children are not automatically guaranteed a place at the preferred school. Legislation requires that Government ministers and local authorities should 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’<sup>276</sup> and this limitation is repeated in the SSFA<sup>277</sup> and would be applicable in cases of a school being oversubscribed. Other specific provisions about the applicability and operation of arrangements for parental expression of a preference are set out in detail in the legislation.<sup>278</sup>

Section 89 of the SSFA sets out the procedures to be followed by admission authorities in making admission arrangements, including consultation of certain bodies, and gives the Welsh Ministers powers to make regulations regarding the making of admission arrangements, including how to determine the numbers to be admitted. The setting of the admissions numbers for each relevant age group in a school is a crucial aspect of the admissions process as this provides the benchmark

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<sup>270</sup> SSOWA, s 74(4).

<sup>271</sup> Education (Objections to Admission Arrangements) (Wales) Regulations 2006, SI 2006/176; Education (Admission Appeals Arrangements) (Wales) Regulations 2005, SI 2005/1398.

<sup>272</sup> Welsh Government, School Admissions Code, Document no 005/2013, July 2013 (Admissions Code).

<sup>273</sup> Welsh Government, School Admission Appeals Code, Document no 007/2013, December 2013 (Appeals Code).

<sup>274</sup> Admissions Code, para 1.5.

<sup>275</sup> SSFA s 86(1).

<sup>276</sup> EA 1996, s9. This reflects UK obligations (subject to a specified reservation) under A2P1 to the ECHR, the right to education.

<sup>277</sup> SSFA, s 86(3)(a).

<sup>278</sup> SSFA, ss 86-87.

for deciding whether the school is oversubscribed with applications or not. In order to deal with those situations where a school is oversubscribed, each admissions authority must indicate to parents in advance the criteria, which must be fair, clear and unambiguous, which will be used to allocate places where it is oversubscribed.

The Admissions Code sets out examples of ‘oversubscription criteria’ which must not be adopted by admissions authorities, for example selection on the basis of ability or aptitude. It is expressly prohibited to exclude applicants from a particular social or religious group or to indicate that only applicants from such a social or religious group will be considered. Only where a school has been officially designated as having a religious character is it permissible to give priority to children based on religious faith. For those schools the prohibition on discrimination on grounds of religion or belief does not apply.

In terms of what constitute fair criteria for dealing with oversubscription, the Admissions Code notes that vulnerable children who are in public care are to be given the highest priority. Other criteria which may be considered relate to the position of siblings of pupils currently at the school and situations where there is a medical need in the family. Distance from the school may be considered relevant but if it is to be a criterion it must be carefully and objectively explained how it is to be measured.

The Admissions Code requires that the oversubscription criteria of faith schools must be objective, transparent and capable of being understood by applicant parents. If preference is to be given to members of a particular faith, then it is a requirement that the arrangements make clear how that affiliation is to be demonstrated – whether by statement of the parents, reference from a church representative or other means.

### 9.2.1 Disputes about admission arrangements

Local authorities are required to establish an admissions forum for their area whose role is to advise the admissions authorities on matters relating to the determination of admissions matters and other prescribed matters.<sup>279</sup> The Admissions Code states that admissions forums must monitor compliance with the Code.<sup>280</sup> Ideally this should prevent disputes from arising concerning the lawfulness or fairness of the arrangements adopted.

In addition to this general monitoring system at a local authority level, section 90 of the SSFA allows a parent and other relevant bodies to refer objections about the admissions arrangements made by an admissions authority to the Welsh Ministers.<sup>281</sup> In deciding whether to uphold an objection to admissions arrangements, the Welsh Ministers may consider whether it would be appropriate for changes to be made to the admissions arrangements, whether or not required in the specific case of the objection. The Welsh Ministers must publish a report giving their decision on the objection and any decision they have made on whether changes should be made to the admissions arrangements along with their reasons for the decisions. They may specify modifications to be made to the arrangements and the decisions are binding on the admission authority and other relevant bodies.

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<sup>279</sup> SSFA 1998, s 85A.

<sup>280</sup> Admissions Code, para 1.11.

<sup>281</sup> SSFA 1998, s 90 and (Objections to Admission Arrangements) (Wales) Regulations 2006, SI 2006/176.

### 9.3 Individual admission decisions

Where an individual admission decision has been made, the SSFA provides that an appeal may be made by the parent of a child, or, in the case of a sixth form pupil, the parent, the young person, or the parent and young person acting jointly.<sup>282</sup> There may also be appeals by a governing body against the decision of a local authority to admit a child who has previously been permanently excluded from two or more schools.

The local authority (where it is the admissions authority, and in relation to admissions decisions by governing bodies in community or voluntary controlled schools) and the governing body of foundation and voluntary aided schools must make arrangements for the holding of appeals which are in accordance with the School Admissions Appeals Code issued by the Welsh Government (Appeals Code).<sup>283</sup> An appeal made under these arrangements must be to an appeal panel set up in accordance with the statute and regulations.<sup>284</sup> The decision of an appeal panel on an appeal is binding on the admissions authority that made the decision under appeal, and on the governing body of a community or voluntary controlled school at which the appeals panel determines that a place should be offered to the child in question.<sup>285</sup> Regulations<sup>286</sup> set out the detailed arrangements for appeals including the requirements regarding the composition and procedure of the panels. Admissions authorities are required to advertise for lay members every three years.

The panel must consist of three or five members appointed by the local authority or governing body, as appropriate, from persons eligible to be lay members, persons with experience in education or familiar with educational conditions in the area, or persons who are parents of registered pupils in the school. <sup>287</sup> The panel must include at least one lay member and at least one from the other two categories. The local authority/governing body must appoint one member to act as chair. Those persons who are disqualified from membership of an appeal panel (on the basis of their lack of independence or failure to have attended required training) are set out in the regulations. The Appeals Code requires that the chair and members of the panels undertake training before becoming panel members and should continue to update their skills and knowledge during their membership.

Details about the arrangements for making an appeal must be given alongside the decision on admission. An appeal must be heard in private although one member of the local authority/governing body may attend as an observer, or any person may attend for the purposes of training or appraisal of the performance of the clerks or appeal panel members, if the panel so directs. If the members of the panel disagree, the appeal will be decided by a simple majority of the votes cast, and in the case of a tied vote, the chair will have a second or casting vote.

The matters to be considered by the appeals panel are set out in the Regulations.<sup>288</sup> In an appeal against a refusal to admit, the panel must consider any preference expressed by the appellant and the admission arrangements made by the admission authority. The panel may consider whether

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<sup>282</sup> Except in relation to a child who has been permanently excluded from 2 or more schools where the right of appeal is suspended for two years after the second or subsequent exclusion – SSFA, ss 87(2) and 95(1)).

<sup>283</sup> Statutory Code document no: 007/2013, December 2013. (Appeals Code).

<sup>284</sup> SSFA, s94(5).

<sup>285</sup> SSFA, s94(6).

<sup>286</sup> Education (Admission Appeals Arrangements) (Wales) Regulations 2005, SI 2005/1398.

<sup>287</sup> SI 2005/1398, reg 3 and Schedule 1.

<sup>288</sup> SI 2005/1398, reg 6.

those arrangements comply with any mandatory requirements of the Admissions Code and the SSFA. An appeals panel may determine that a place should be offered to a child if satisfied that the child would have been offered a place if the school admissions requirements had complied with the requirements of the Admissions Code and/or the SSFA, or if they decide that the school's admission arrangement had not been properly implemented, or if the decision was not one which a reasonable admission authority would have made in the circumstances of the case.

In considering an appeal by a governing body against a decision to require a child to be admitted, the panel must consider the local authority's reasons for the decision, and any reasons advanced by the governing body as to why the child's admission would be inappropriate.

There is no further appeal from the panel's decision. The Welsh Ministers have no role in considering complaints about the decisions of appeals panels or about the way they conduct their business. The options for a parent or young person dissatisfied about the decision received would be either to complain to the PSOW or to seek judicial review of the decision.

### 9.3.1 Discussion

The system for dealing with appeals against individual admission appeal decisions has been considered by a number of bodies concerned with administrative justice, including the Administrative Justice and Tribunals Council (AJTC), the Committee for Administrative Justice and Tribunals Wales (CAJTW) and the Commission on Justice in Wales (Justice Commission).

While local authorities collect data on school admission appeals, Welsh Government does not collect statistics on the number or outcomes of appeals in Wales. Such statistics are collected in England.<sup>289</sup> In its 2016 Legacy Report,<sup>290</sup> CAJTW noted an estimate that there were approximately 600 school admission appeals in Wales each year. CAJTW was told that the data were routinely collected but could not be relied upon as accurate and therefore were not helpful to policy makers or the Assembly.<sup>291</sup> Indeed, referring to a Welsh Government feasibility study in relation to exclusion and appeal panels (to which 9 of 22 local authorities had failed to provide information), CAJTW noted that Welsh Government had less information on admission appeals than on exclusion panels.<sup>292</sup> There is therefore no overview of the admissions appeals system on a Wales-wide basis. It is also unclear whether the analysis of such data by local authorities involves consideration of the administrative justice aspects of appeals rather than the understandable focus on monitoring the provision of education.

Some oversight was provided in the past when the former Welsh Committee of the AJTC, and then CAJTW as its successor body in Wales, occasionally observed admission (and exclusion) appeal hearings to monitor compliance with Welsh Government guidance. Neither body exists now. In its Legacy Report, CAJTW recommended that Welsh Government and the Children's Commissioner should consider whether the Commissioner's office should take on that role for the future. The Welsh Government's response was that while there may be benefits to having national arrangements for observation, the role did not come within the Children's

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<sup>289</sup> <https://www.gov.uk/government/collections/statistics-admission-appeals> (last accessed 18 March 2020).

<sup>290</sup> *Administrative Justice: A Cornerstone of Social Justice in Wales*, 2016 (herein after CAJTW 2016).

<sup>291</sup> CAJTW 2016, para 49.

<sup>292</sup> CAJTW 2016, para 60.



Commissioner's remit. Interestingly, the Welsh Government's Appeal Code of 2013 did not rule out the continued independent oversight of the administrative justice system: it stated that the observation role was 'an important part of the AJTC's work which enabled it to take an overview of appeals...The role of its successor body, should there be one, will be determined in due course.'<sup>293</sup> However, the role has not been given to any other body, so that oversight has been lost. The more recently established Administrative Justice Council (hosted by the NGO Justice and funded by the UK Ministry of Justice and charitable sources) has no direct role in this type of oversight.

There are also concerns about whether the administration of the system by local authorities is conducive to a perception of independence from the decision maker, and to consistency and equality across Wales as a whole. CAJTW expressed concern that without 'systematic monitoring of local performance there is a considerable risk that the performance of Panels will not be consistent.'<sup>294</sup> Training is provided at local authority level, something that CAJTW considered would be better done at the national level: 'the Welsh Government, in consultation with the Children's Commissioner, should take responsibility for the provision of training for appeal panel chairs, members and clerks on a national basis and maintain a list of approved and suitably trained panel chairs for use by local authorities.'<sup>295</sup> The Welsh Government's response was that the panels already had their own training programmes but that it would bring the recommendation to the attention of the Children's Commissioner.

More radically, CAJTW suggested that, along with exclusion appeals, admission appeals should be brought within the jurisdiction of the Education Tribunal which would provide a 'professional and independent cadre of panel chairs' and would also have the value of annual reports on these appeals becoming available. Welsh Government responded that it had concluded that the tribunal was 'not the appropriate vehicle' for these appeals. It is not clear whether this was down to resources or the subject matter of the appeals, CAJTW itself had observed that the potential resource implications for the tribunal would be significant with around 600 admission appeals every year.<sup>296</sup> The timing of admissions appeals is likely to have been, and remains, an issue. For example, whilst exclusion appeal panels might need to be convened intermittently throughout the year, there may well be a significant concentration of admissions appeals around the time that decisions are made on the admission of children to primary education, and then on moving up to secondary school. This might be difficult in terms of managing the resources of the tribunal, though the Welsh Government did not expressly address these concerns or provide consideration of an alternative means of redress. We would argue that the case for such a transfer for exclusion appeals to the tribunal seems to be more compelling than for admission appeals, but agree with CAJTW's recommendations for training in both types of appeal panel to take place at a national level.

However, a less radical change would be to move the administrative functions for the admission appeals panels into the Welsh Tribunals Unit. CAJTW reported that Welsh Government had

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<sup>293</sup> Appeals Code, para 1.12.

<sup>294</sup> CAJTW 2016, para 52.

<sup>295</sup> CAJTW 2016, Recommendation 21.

<sup>296</sup> CAJTW 2016, para 49.

conducted a feasibility study of transferring the administrative responsibilities for the school panels into the Welsh Tribunals Unit. This would have the advantage of enhancing the perception of independence of the appeal panels in the eyes of parents and learners. However, no change has been made.

An alternative to bringing the admission appeals within the Tribunal's jurisdiction that was considered, but not preferred, by CAJTW was preserving the local panels but having them operate under the oversight of a national tribunal President.<sup>297</sup> This issue of oversight was raised again by the Justice Commission in its 2019 report where it expressed the concern that these appeal panels 'operate without any kind of judicial scrutiny save in those very rare cases in which an exclusion leads to an application for judicial review.' Its conclusion was that 'a thorough appraisal of local authority appeal panels and oversight by the President of Welsh Tribunals of their decision making processes is required.'<sup>298</sup> The Justice Commission also recommended that:

'All public bodies, ombudsmen and other tribunals which have been established under Welsh law or by the Welsh Government, which make judicial or quasi-judicial decisions, and are not currently subject to the supervision of the President of Welsh tribunals, should be brought under the supervision of the President'.<sup>299</sup>

It is likely that the admissions and exclusion appeal panels can both be considered as 'quasi judicial' bodies as they make binding decisions about people's legal rights and entitlements. However, supervision by the President of Welsh Tribunals may run counter to CAJTW's previous concluded view, and also appears to extend the President's own role beyond that anticipated in the Wales Act 2017 which established the office. These matters are discussed in more detail in our main report *Public Administration and a Just Wales*.

## **Recommendation 10**

- i. That Welsh Government, and any board or other body examining civil and administrative justice established in response to recommendations of the Justice Commission, considers how the issue of admission appeals can be considered from a *justice* perspective as well as from an education perspective.**
- ii. That the President of the Welsh Tribunals supervisory function over appeal panels as quasi judicial bodies should include a review of the training for appeal panel members and the procedures, if any, for collecting data about the number of panels convened and their outcomes, as a means of identifying any trends in decision-making and to improve administrative practices in the future.**
- iii. That the administrative functions for constituting admission appeals panels are moved to the Welsh Tribunals Unit to enhance the perception of their independence from local authorities.**

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<sup>297</sup> CAJTW 2016, para 53.

<sup>298</sup> Justice Commission, para 6.47.

<sup>299</sup> Justice Commission, para 6.50.

## 10 Discipline – general and exclusions

### 10.1 General

Under the Education and Inspections Act 2006 (EIA), governing bodies are responsible for ensuring that schools have policies ‘designed to promote good behaviour and discipline’ on the part of the pupils.<sup>300</sup> In particular, having consulted parents, the head teacher, pupils and relevant persons working at the school (including volunteers), and having regard to any guidance issued by the Welsh Ministers, the governing body must make and keep under review a written statement of the general principles to which the head teacher must have regard when deciding measures to promote good behaviour and discipline.<sup>301</sup> The EIA sets out the conditions which apply to the imposition of all disciplinary penalties, other than exclusion, in order to ensure that the imposition of the penalty is lawful. It also deals with the circumstances in which a school might use reasonable force, for example, to prevent a pupil from causing harm to him/herself or to another pupil, or when it would be lawful to confiscate the possessions of a pupil.<sup>302</sup> Any disputes regarding these actions will be governed by the normal school complaints process.<sup>303</sup>

### 10.2 Exclusions

The power of a head teacher to exclude a pupil is provided for in section 52 of the Education Act 2002. Further details are set out in regulations<sup>304</sup> and statutory guidance issued by Welsh Government to which the head teacher, governing body, and any subsequent appeal panel must ‘have regard’.<sup>305</sup> These instruments provide a specific regime on when the power to exclude may be used and the processes to be followed for making the decision and for appealing against it. In brief, the power to exclude a learner is exercised by the head teacher and there is the right to make representations to the governing body. In the case of permanent exclusions, a further appeal lies to an independent appeal panel. The Education Tribunal has jurisdiction in relation to disability discrimination and fixed-term, but not permanent, exclusions.

A pupil may be excluded by the head teacher for a fixed period (of up to 45 days in a single school year) or permanently. A decision to exclude should be taken only in response to serious breaches of the school’s behaviour policy and where allowing the learner to remain in school would seriously harm the education or welfare of the learner or others in the school.<sup>306</sup> To be lawful, an exclusion must be made formally: it is unlawful for what is in effect an exclusion to be treated as a ‘voluntary withdrawal’ by parents or for an ‘informal’ exclusion to take place. Estyn has recently expressed concern that schools might be ‘off-rolling’ students in order to improve their performance data.<sup>307</sup> Any such unlawful practice not only deprives the learner of education but also of their rights within the administrative justice system.

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<sup>300</sup> EIA, s 88.

<sup>301</sup> EIA, s 88(2).

<sup>302</sup> In February 2020, the Equality and Human Rights Commission announced an inquiry into how schools in England and Wales are monitoring their use of restraint. <https://www.equalityhumanrights.com/en/inquiries-and-investigations/inquiry-how-schools-are-monitoring-use-restraint> (last accessed 20 March 2020).

<sup>303</sup> EIA, ss 91-93.

<sup>304</sup> Education (Pupil Exclusions and Appeals) (Maintained Schools) (Wales) Regulations 2003 (SI 2003/3227) (Exclusions Regulations).

<sup>305</sup> Welsh Government, Exclusion from schools and pupil-referral units, Guidance Document no: 171/2015, April 2015 (Exclusions Guidance). This replaced 2012 guidance.

<sup>306</sup> Exclusions Guidance, para 1.1.1.

<sup>307</sup> Estyn, *Pupil Registration Practices* (October 2019, p4

Before taking the decision to exclude a learner, the head teacher should ensure that there has been an appropriate investigation, consider all the evidence to support the allegations against the learner, take account of the school's behaviour and equal opportunities policies and the Equality Act 2010, allow the learner to give their version of events, check whether the incident may have been provoked by bullying or harassment, and, if necessary, consult others but not anyone, such as a member of the governing body's discipline committee, who may later have a role in reviewing the head teacher's decision.<sup>308</sup> The standard of proof that must be applied if the head teacher (and subsequently the governing body or any appeal panel) has to establish any facts is the balance of probabilities.<sup>309</sup>

The Exclusions Regulations and Exclusions Guidance set out the time limits for providing information to the 'relevant person' and the information that must be provided. Who the 'relevant person' is depends on the age of the learner: where the learner is aged 10 or under on the day before the start of the relevant school year, it will be learner's parent or carer; where the learner of compulsory school age was aged 11 or over on the day before the start of the relevant school year, it is both the learner and the learner's parent or carer; for a learner above compulsory school age, it will be the learner himself or herself.<sup>310</sup> (This is in contrast to the position in England where the right is that of parents unless the pupil is 18 or over.<sup>311</sup>)

The 'relevant person' must be informed of the exclusion and its length or the fact that it is a permanent exclusion, the reasons for it, the right of the relevant person and the learner to make representations to the governing body and how to do this.<sup>312</sup>

Governing bodies must establish a discipline committee (referred to in the Exclusion Regulations as the pupil discipline and exclusions committee), one of whose functions is to review the use of exclusion within the school. The committee must be made up of either 3 or 5 governors drawn from the governing body, not including the head teacher or any associated pupil governor. It must appoint (and may remove) a clerk (who may not be the head teacher or an associate pupil governor) who is responsible for convening meetings of the committee, attending the meetings and ensuring that minutes are drawn up as well as for performing any other functions given by the governing body.<sup>313</sup>

The local authority is not required to send a representative to all discipline committee meetings, but the Exclusions Guidance recommends that, if possible, they do so for permanent exclusions and longer fixed term exclusions. The value of this is that the authority could explain how other schools in the area have dealt with similar issues and would be able to advise on alternative education arrangements for the learner if the exclusion is confirmed. However, the committee should make its decision in private, advised, if necessary, by the clerk.<sup>314</sup>

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<sup>308</sup> Exclusions Guidance, para 1.3.

<sup>309</sup> Exclusions Regulations, reg 8A.

<sup>310</sup> Exclusions Regulations, reg 2.

<sup>311</sup> School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012, SI 2012 / 1033, reg2(1).

<sup>312</sup> Exclusions Regulations, reg 4.

<sup>313</sup> Government of Maintained Schools (Wales) Regulations 2005.

<sup>314</sup> Exclusions Guidance, paras 3.3.1 and 3.3.2.

The Exclusions Guidance emphasises that the discipline committee's role is only to review the exclusion imposed: it cannot increase the severity of an exclusion.<sup>315</sup>

The Exclusions Guidance states that 'the Welsh Government would expect the LA to organise a training session for members on exclusions issues and for members to make every effort to attend.' There is, however, no legislative provision making such training mandatory.<sup>316</sup>

### 10.2.1 The process

The Exclusions Regulations and Exclusions Guidance set out the time limits and process to be followed when a pupil is excluded. These vary according to the type and / or length of the exclusion.

The discipline committee must review the following types of exclusion and consider whether the learner should be reinstated:

- A permanent exclusion;
- A fixed-term exclusion which takes the pupil's total days of exclusion in the one term to 16 or more;
- Any exclusion which would result in the learner losing the opportunity to take a public examination;
- An exclusion which will take the pupil's total days of exclusion to between 6 and 15 days *and* the 'relevant person' wishes to make representations.<sup>317</sup>

In each case it must consider the circumstances in which the pupil was excluded; consider any representations made to the governing body by the 'relevant person', the excluded pupil if they are not the relevant person, the head teacher and the local authority; convene a meeting and allow the 'relevant person', the excluded pupil if they are not the relevant person, the head teacher and an officer nominated by the local authority to attend that meeting and make representations; and consider any oral representations made at the meeting. There is no requirement to convene a meeting where the exclusion totals between 6 and 15 days and the relevant person has not wished to make representations.<sup>318</sup>

In relation to exclusions totalling 5 days or fewer in any one term where no examination opportunity is lost, the panel Chair must consider any representations that are made and *may* convene a meeting. For this length of exclusion, it may not direct reinstatement but may put a record of the panel's considerations on the learner's education record.<sup>319</sup>

The Governing body discipline committee must decide whether the learner should be reinstated, and, if so, when reinstatement should happen,<sup>320</sup> and whether it would not be practical for the head teacher to comply with a direction requiring the pupil's reinstatement.<sup>321</sup> According to the

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<sup>315</sup> Exclusions Guidance, para 3.2.7.

<sup>316</sup> Exclusions Guidance, para 3.1.2.

<sup>317</sup> Exclusions Regulations, reg 6(1).

<sup>318</sup> Exclusions Regulations, reg 6(2).

<sup>319</sup> Exclusions Regulations, reg 6(7) and Exclusions Guidance, para 3.2.1(a).

<sup>320</sup> Exclusions Regulations, reg 6(3).

<sup>321</sup> Exclusions Regulations, reg 6(4).

Exclusions Guidance, ‘practical, in this sense, refers to the individual circumstances and needs of a learner, rather than issues such as financing of support for the learner within the school.’<sup>322</sup> Examples given in the guidance of where reinstatement would not be practical include where the learner has already returned to school following the expiry of a fixed term exclusion, or because the parent / learner makes it clear that they do not want reinstatement.<sup>323</sup> Where the discipline committee considers that the learner should be reinstated but that this is not practical, the outcome of the committee’s review should be added to the learner’s educational record for future reference.<sup>324</sup> The head teacher must comply with a direction to reinstate a learner.<sup>325</sup>

If the governing body decides that the pupil should not be reinstated, it must ‘without delay’ inform the relevant person, the head teacher and the local authority of their decision.<sup>326</sup>

If the exclusion was for a fixed term, apart from the theoretical possibility of judicial review,<sup>327</sup> this is the end of the redress system for the learner unless there is a possible claim to the Education Tribunal that there has been disability discrimination. This is discussed later in this section.

The Welsh Ministers may consider complaints about the discipline committee’s operation of the exclusion procedure, but they may not overturn the exclusion order (or consider complaints about the decision of an independent appeal panel).<sup>328</sup>

If the committee decides not to direct reinstatement of a permanently excluded learner, there is a right of appeal for the ‘relevant person’ to an independent appeal panel.<sup>329</sup>

### 10.2.2 Independent appeal panel

The local authority must constitute the independent appeal panel and appoint a clerk.<sup>330</sup> The panel will have three or five members appointed by the local authority.<sup>331</sup> The members must include a lay person as chair,<sup>332</sup> an education practitioner (or 2 if it is a 5 member panel) and a school governor (or 2 if it is a 5 member panel).<sup>333</sup> For these purposes, a ‘lay person’ is ‘someone without personal experience in the management of a school or the provision of education, other than in a voluntary capacity or as a school governor’.<sup>334</sup> Persons with a connection to the school or to the pupil in question are disqualified from serving on the appeal panel, as is anyone employed by the

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<sup>322</sup> Exclusions Guidance, para 3.3.5.

<sup>323</sup> Exclusions Guidance, para 3.3.7.

<sup>324</sup> Exclusions Guidance, para 3.3.7.

<sup>325</sup> Exclusions Regulations, reg 6(5).

<sup>326</sup> Exclusions Regulations, reg 6(6)(a).

<sup>327</sup> JUSTICE, *Challenging School Exclusions*, 2019. This report on exclusions in England, found that judicial review of exclusions rarely happened – it could find only one reported case. Para 2.9.

<sup>328</sup> Exclusions Guidance, para 4.13.2.

<sup>329</sup> Exclusions Regulations, reg 7.

<sup>330</sup> Exclusions Regulations, reg 7 and Schedule; Exclusions Guidance, para 4.4 on the composition of the appeal panel.

<sup>331</sup> Exclusions Regulations, Schedule para 2(2).

<sup>332</sup> Exclusions Regulations, Schedule, para 2(10).

<sup>333</sup> Exclusions Regulations, Schedule para 2(3).

<sup>334</sup> Exclusions Regulations, Schedule, para 2(4).

local authority other than as a teacher.<sup>335</sup> Local authorities should ensure that all panel members and clerks receive suitable training.<sup>336</sup>

The appeal panel must allow the relevant person and the excluded pupil (of any age) to make written representations, to appear and make oral representations and to be represented at the hearing or accompanied by a friend.<sup>337</sup> Where learners of compulsory school age are not accompanied by their parents, the local authority should endeavour to obtain the services of an advocate for the learner, especially when the learner may be considered to lack sufficient maturity or capacity to represent themselves effectively.<sup>338</sup> The head teacher, governing body and the local authority must also be allowed to make written representations, be represented and to appeal and make oral representations.<sup>339</sup>

The Clerk provides an independent source of advice on procedure for all parties and should not have served as Clerk to the discipline committee hearing. If the Clerk has not received legal training, and no member of the panel is legally qualified, the LA 'should consider whether the panel might benefit from an independent source of legal advice, especially where the appellant and/or the school is legally represented.'<sup>340</sup> It is not therefore a matter of course that the clerk will be legally trained, and the language in this section of the Exclusions Guidance seems very weak given the importance of the Clerk's role.

The hearing is not just a review of the discipline committee's decision but a full rehearing of the facts of the case. This is in contrast to the position in England where the Independent Review Panel is restricted to a review only.<sup>341</sup> The appeal panel in Wales should decide whether, on the balance of probabilities, the pupil did what they were alleged to have done.<sup>342</sup> It should consider the basis for the head teacher's decision and the procedures followed by the head teacher and the discipline committee, whether they complied with the law and had regard to the Exclusions Guidance in deciding to make the exclusion and not to reinstate the pupil. The Exclusions Guidance indicates that while the law states that the panel must not decide to reinstate a learner solely on the basis of technical defects in procedure prior to the appeal,<sup>343</sup> procedural issues would be relevant if there were evidence that the process was so flawed that important factors were not considered.<sup>344</sup>

It is for the appeal panel to decide how to conduct its proceedings, which should be reasonably informal so that the parties can present their case effectively.<sup>345</sup> The Clerk should explain the order in which the parties will be entitled to state their case and that there will be an opportunity for

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<sup>335</sup> Exclusions Regulations, Schedule, para 2(7).

<sup>336</sup> Exclusions Guidance, para 4.4.7.

<sup>337</sup> Exclusions Regulations, reg 10(1).

<sup>338</sup> Exclusions Guidance, para 4.6.4.

<sup>339</sup> Exclusions Regulations, reg 10(2).

<sup>340</sup> Exclusions Guidance, para 4.5.

<sup>341</sup> For a review of the system operating in England, see JUSTICE, *Challenging School Exclusions*, 2019.

<sup>342</sup> Exclusions Regulations, reg 8A.

<sup>343</sup> Exclusions Regulations, reg 7(3).

<sup>344</sup> Exclusions Guidance, para 4.9.2.

<sup>345</sup> Exclusions Guidance, para 4.7.

questioning by other parties.<sup>346</sup> It is then for the chair to lead the panel in establishing the relevant facts.

Having considered the range of issues recommended by the Exclusions Guidance, the panel may uphold the exclusion, direct the pupil's reinstatement (either immediately or by a specified date), or decide that this is an exceptional case where reinstatement is not a practical way forward but would otherwise have been the appropriate direction.<sup>347</sup> The Exclusions Guidance gives the example of it not being practical to direct reinstatement because the parent or learner has made it clear they do not want it, or the learner has become too old to return to school.<sup>348</sup> In addition, it observes that there may be exceptional cases where the panel considers that the permanent exclusion should not have taken place but that reinstatement in the excluding school 'is not a practical way forward in the best interests of all concerned.' This might be the case if there has been 'an irretrievable breakdown' in relations between the learner and the teachers or between the parents and the school or between the learner and other learners involved in the exclusion or appeal process.<sup>349</sup>

The appeal panel's decision is binding on the relevant parties.<sup>350</sup> There is no further redress route from the appeal panel's decision other than by way of judicial review or a complaint to the PSOW that the process was not handled properly.

If an appeal panel is regularly directing a school to reinstate permanently excluded learners, the panel should draw this to the attention of the local authority so that it can discuss the underlying issues with the head teacher.<sup>351</sup> This is an example of broader learning for the future from an administrative justice dispute resolution procedure.

### 10.2.3 Discussion

Even more so than with admission appeals, there has been much discussion concerning the appropriateness of the system for challenging exclusions.

In our workshops and focus groups, there was a significant body of opinion that there were problems concerning the transparency of the system. This gave rise to concerns about the fairness of the process. On the other hand, we heard from some local authority lawyers that they felt that the exclusions system worked well.

In general terms, the feedback we received during this project showed a definite consensus that where there was a good general level of communication between home and school, it was easier to avoid problems escalating. The value of advocacy and independent support being offered by bodies such as SNAP Cymru and Tros Gynnal Plant as early as possible was underlined by a range of people.<sup>352</sup> However, the key is to offer support in order to avoid the exclusion arising, rather than just as assistance with an appeal against it. This would mean seeking independent

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<sup>346</sup> Exclusions Guidance, para 4.7.2.

<sup>347</sup> Exclusions Regulations, reg 7(5).

<sup>348</sup> Exclusions Guidance, para 4.10.3.

<sup>349</sup> Exclusions Guidance, para 4.10.4.

<sup>350</sup> Exclusions Regulations, reg 7(4).

<sup>351</sup> Exclusions Guidance, section 4.12.7.

<sup>352</sup> See also Edinburgh Report, para 4.62, which referred to these bodies and their work.



support if it appeared that there was a risk of a pattern of persistent misconduct arising, rather than only at the point of considering an exclusion.

### 10.2.3.1 Governing body hearings

One concern of research participants regarding governing body hearings related to their actual and perceived independence from the head teacher whose decision they are considering. In our participant sessions for this project, a range of individuals also expressed concern about the perceived or actual variations in knowledge and skills among governing body members involved with exclusions and whether there was consistency across different areas in Wales.

In 2011, Welsh Government commissioned a research team from Edinburgh University to examine the process of exclusion from school in Wales and provision for children being educated outside school. The report it produced in 2013, referred to here as the ‘Edinburgh report,’<sup>353</sup> included consideration of the processes for challenging exclusion. The researchers received feedback from some local authority staff who felt that discipline committee members ‘were not always independent and neutral’, ‘school [pupil discipline] committees do tend to support the head’ and ‘basically [the committees] are cheer leaders for the head’.<sup>354</sup> That report is now 7 years old and whether this would now be the same in Wales could usefully be investigated. However, similar findings were made in a recent study on exclusions in England by JUSTICE: it considered that the school governing board panels lacked independence, resulting in a ‘rubber-stamping’ of the head teacher’s decision.<sup>355</sup> It found only a tiny percentage of governing body determinations which overturned the head teacher’s decision: while that might indicate good decision making by head teachers, they then observed that when governing body decisions on permanent exclusion were reviewed by independent review panels, even on the limited grounds permitted, only 60% were upheld. Without further research, we do not know whether the same picture exists in Wales.

Some of the general points made in the JUSTICE study in England would be relevant in a Welsh context too: for example the study noted the potentially conflicting elements in the relationship between the head and governor, with governors often having a close working relationship with the head in order to provide the challenge and support that is key to their role. They stated:

‘Yet this relationship makes it difficult for governors to be objective when reviewing a head teacher’s decision to exclude; and even more so to overturn it. Both governors and head teachers we spoke to recognised that this was an issue. One governor told us how the head teacher did not speak to them for six months following a decision to overturn an exclusion. We also heard anecdotal evidence of a training for governors in which the governors were told that its purpose was to help them support the head teacher in decisions to exclude.’<sup>356</sup>

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<sup>353</sup> G McCluskey et al, *Evaluation of education provision for children and young people outside the school system* (Edinburgh Report).

<sup>354</sup> Edinburgh Report, para 4.35.

<sup>355</sup> JUSTICE, *Challenging School Exclusions*, 2019, paras 4.2-4.3. (JUSTICE 2019).

<sup>356</sup> JUSTICE 2019, para 4.15.

Whether there is a lack of independence in practice, it is hard to avoid the perception that a parent might have of the school reviewing its own decisions. As the President of SENTW commented to an Assembly Committee on governing body hearings: ‘...they could be definitely looked at as if they’re unfair. I’m sure they’re not, but from an outside perspective, they certainly look as if they’re not because they’re basically part of the body that’s excluded the child in the first place.’<sup>357</sup>

Another issue is consistency as between schools. The Edinburgh Report found variation in rates of exclusion across Wales which it considered suggested inconsistency in the application of Welsh Government’s Exclusions Guidance.<sup>358</sup> The Edinburgh Report referred to the previous 2008 Guidance, and it is possible that the clarity of the subsequent 2015 guidance may have improved things by now: again, it would be useful to investigate. The Edinburgh researchers did observe that local authority staff considered schools to have an increasing understanding and awareness of their legal duties regarding exclusion although there was some concern that this did not always extend to issues concerning equality and disability discrimination.<sup>359</sup>

CAJTW and the Justice Commission made recommendations regarding exclusion appeal panels only. The solutions they propose therefore deal only with permanent exclusions. For many learners with a fixed term exclusion, where the issue of disability discrimination does not apply, the only redress currently available is to the governing body discipline committee, and thereafter to judicial review. The latter is not a practical reality in most cases, from the point of view of time and cost, and recent research in England on school exclusions found only one such case.<sup>360</sup> We are not aware of any such cases in Wales, and certainly there have been none resulting in a final published judgment.

Schools are not within the PSOW’s remit, so a complaint about the procedure followed is not possible in these cases. Some consideration of the system for reviewing fixed term exclusions is needed. This could be by seeking to improve the current system, replacing it or adding some further appeal or complaint.

Given the nature of a fixed term exclusion, even discipline committee hearings may take place after the exclusion has ended. So, a more complex route of appeal may be of little practical benefit for all but the lengthiest exclusions. Instead, it might be more effective to put the emphasis on greater training for governors and ensuring consistency between authorities by greater collaboration between different authorities. We heard from some authorities in Wales that there was co-operation between them. While there is understandable caution about requiring more mandatory training for discipline committee members, this seems all the more necessary if there is no scrutiny of their decisions.

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<sup>357</sup> President Rhiannon Walker, SENTW, Oral evidence to the Assembly’s Children, Young People and Education Committee on the ALN Bill, 2 March 2018, para 505.

<sup>358</sup> Edinburgh Report, paras 4.14 and 6.11.

<sup>359</sup> Edinburgh Report, para 4.36.

<sup>360</sup> JUSTICE 2019, paras 2.9 - 2.10.

The President of the Education Tribunal appeared to contemplate a role for the Tribunal in relation to these cases:

One of my main bones of contention is the school exclusion appeals, which are basically dealt with, as you will know, by the actual school governors. ... I firmly believe that the tribunal is well placed to take on that sort of work as well in the future.<sup>361</sup>

An alternative might be to extend the remit of the PSOW, if not to all issues concerning schools, then at least to examining complaints about the procedures of the discipline committees. While the PSOW would not be able to direct reinstatement, it might be appropriate for a discipline committee to be asked to revisit its decision with a view to changing it or if necessary to placing a record of any changed view on the learner's record. Given that the PSOW can frequently achieve an early resolution or voluntary settlement without a full investigation, this might be a pragmatic way forward.

This would be less radical and expensive, than the proposal made by JUSTICE for exclusions in England, namely that a new role of Independent Reviewer to take on the role of the governing body committees on individual complaints while the governing bodies play a more strategic role in monitoring the rate of exclusions and ensuring general accountability.

#### 10.2.3.2 Appeal panel hearings

In relation to both discipline committees and appeal panels, the Edinburgh Report found 'issues about equity of outcomes for children and young people.'<sup>362</sup> Of those it interviewed, most found the appeal panels 'largely fair.'<sup>363</sup> However, some parents did not feel it was worth pursuing a claim.

In contrast to admission appeals, the number of appeals to panels on exclusions is small. CAJTW observed that there had been 24 in 2011-2012<sup>364</sup> and the Edinburgh Report stated that the number was very small.<sup>365</sup> Since Welsh Government does not collect statistics on the number and outcome of exclusion appeal panel hearings, we attempted to gain some information by way of a Freedom of Information Act (FOI) request to all local authorities in Wales. Of the 12 local authorities who responded to our FOI asking how many school exclusion appeal panels they had convened over the past 12 months, 3 declined to disclose the information due to the low numbers involved and the risk of students being identified. The other 9 had, between them, convened a total of 18 panels: one authority had convened no panels, 4 had convened one each, one had convened 3, one had convened 4, and one had convened 7 in the 12 month period. This is a small response on which to base any conclusions, but it does appear that there is limited use of the appeals system. It is not clear whether this indicates that the bulk of permanent exclusions are regarded by parents and learners as fair and lawful, or whether it is a sign of a lack of awareness of the system or an unwillingness for some reason to engage with it.

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<sup>361</sup> Oral evidence to the Assembly Children, Young People and Education Committee regarding the ALN Bill, 2 March 2017, Para 505.

<sup>362</sup> Edinburgh Report, para 4.15.

<sup>363</sup> Edinburgh Report, para 6.10.

<sup>364</sup> CAJTW 2016, para 50.

<sup>365</sup> Edinburgh Report, paras 4.37 and 6.8.

The low numbers of appeals to independent panels has also raised questions of consistency and efficiency at that level too. The Edinburgh Report was concerned that panel members may, as a consequence, lack experience and this may have an impact on the fairness of outcomes.<sup>366</sup> This was also commented upon by CAJTW in its Legacy Report in 2016: ‘a system with such a low volume of exclusion appeals is unlikely to be performing optimally when it is administered by 22 different local authorities who each will rarely experience a case.’<sup>367</sup> For example, it considered that it would be difficult for local authorities to appoint chairs with previous experience in panel work given the low number of cases. We heard from some local authorities that exclusion appeal panels were managed and arranged by the regional consortium, and this may be an answer to some of the concerns raised here. It would be valuable to consider the extent to which this is the position.

CAJTW also considered that it would be more effective for authorities to have access to training on exclusion (and admissions) appeals that was planned and developed centrally.<sup>368</sup> However, the recommendation to have training for panel chairs, members and clerks on a national basis was rejected by Welsh Government which simply pointed out that individual appeal panels already have their own training programmes. There was no specific response to the recommendation that Welsh Government maintain a list of approved and suitable trained panel chairs for use by local authorities.<sup>369</sup> Again, it may be that these concerns are being alleviated by action at the regional consortium level: again, it would be valuable to investigate further.

The Edinburgh Report recommended that in ‘the interests of equity and consistency, a National Appeal Panel should be established.’<sup>370</sup> In 2016, in its Legacy Report, CAJTW recommended that the work of exclusion (and admission) appeal panels should become part of the jurisdiction of the Education Tribunal. This would ‘ensure a professional and independent cadre of panel chairs’ and, in addition, the Annual Reports produced by the Tribunal would make available an account of the national picture concerning school exclusion appeals. Such an overview at the national level is not currently available as statistics are not collected by Welsh Government regarding appeal panels. We heard from some local authority lawyers that they considered that the system worked well, with independent panels being well structured and lay chairs having sufficient knowledge and experience. They felt that some degree of oversight of exclusion panels would be appropriate but not to the extent of transferring the process to the Tribunal. Their concern was that moving to the Tribunal would lead to a more formal process and would lose the direct local expertise. Their view was that parents’ concerns about the panels’ independence could be managed by a good introduction from the panel chair and the proper performance of the clerk’s role, with no discussions with the school before the panel. It was clear that there was some co-operation between groups of local authorities so that people with expertise and experience worked across authorities on the panels. There are clearly different perceptions about

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<sup>366</sup> Edinburgh Report, para 6.10.

<sup>367</sup> CAJTW 2016, para 51.

<sup>368</sup> CAJTW 2016, para 51.

<sup>369</sup> CAJTW 2016, recommendation 21 and Welsh Government response, July 2016, p3 (available at: <https://gov.wales/sites/default/files/publications/2018-11/welsh-government-response-to-cajtw-report.pdf>).

<sup>370</sup> Edinburgh Report, p 127.

the appeal panels: our feedback from parents who had been to the Tribunal did not indicate that they found the Tribunal overly formal, and we heard concerns that the ‘local expertise’ which local authorities considered valuable was perceived by some parents as a lack of independence from the schools.

Given the lower number of exclusion appeals,<sup>371</sup> this would be a more manageable addition to the Tribunal’s workload than putting admission appeals within its jurisdiction. It might also be argued that what is at stake for a permanently excluded pupil is even greater than in relation to an admissions appeal, so the argument for this coming within the remit of the Tribunal is all the stronger. In addition, as CAJTW observed, given a high proportion of school exclusion cases concern learners with SEN, this would strengthen the argument for such appeals to come within the jurisdiction of the Tribunal. Again, as with admissions, Welsh Government rejected this, having concluded that the Tribunal was not the appropriate vehicle for these appeals. There was no reference to any distinction between exclusion and admission appeals or any indication of why the Tribunal was not the appropriate body.<sup>372</sup> This is in stark contrast to the view expressed by the current President of the Tribunal to the Assembly Committee examining the ALN Bill: she considered the Tribunal was well placed to take on this remit.<sup>373</sup>

As noted in relation to admissions, a less radical change would be to move the administrative functions for exclusion appeal panels into the Welsh Tribunal Unit. CAJTW reported that Welsh Government had conducted a feasibility study on this.<sup>374</sup> This would have the advantage of enhancing the perception of independence of the appeal panels in the eyes of parents. However, no change has been made on this point.

The annual publication by Welsh Government of statistics provides overall numbers of fixed-term and permanent exclusions, the main reasons for the exclusion taking place, whether the excluded learners had SEN or were receiving free school meals. This makes it possible to detect trends and to identify the much higher rate of exclusion for learners with SEN than those without. However, statistics on the appeals process are not available. As CAJTW commented in its legacy report in 2016: ‘Data on the local authority based system concerning school admissions and exclusions appeals are simply not available on a Wales-wide basis as they are held in local authorities and are not collated nationally.’<sup>375</sup> This is indicative of a system where there is scrutiny of exclusions in a substantive sense, monitoring trends to identify disadvantage, discrimination and areas where improvements can be made to reducing the number of children excluded. The focus is from an equal access to education perspective, not, unsurprisingly given who is doing it, from an administrative justice perspective regarding the quality of justice dispensed. Both perspectives are valuable and necessary.

As with admissions, even CAJTW’s more modest proposal to have some system of oversight over the operation of exclusion appeals, with the involvement of the office of the Children’s

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<sup>371</sup> CAJTW 2016, para 50.

<sup>372</sup> CAJTW 2016, recommendation 24 and Welsh Government response.

<sup>373</sup> President Rhiannon Walker, SENTW, Oral evidence to the Assembly’s Children, Young People and Education Committee on the ALN Bill, 2 March 2018, para 505.

<sup>374</sup> CAJTW 2016, para 49.

<sup>375</sup> CAJTW 2016, p27.

Commissioner, was rejected.<sup>376</sup> This would have replaced the role of the Welsh Committee of the AJTC, and then of CAJTW itself, which had from time to time observed exclusion (and admission) appeal hearings in order to monitor their compliance with Welsh Government Guidance. While Welsh Government had described this as ‘an important part’ of the AJTC’s work, and not ruled out giving the role to another body, it responded to CAJTW that the role did not fall within the remit of the Children’s Commissioner. There could of course be an amendment to that remit if it were considered appropriate in principle. In any case, more than 3 years on, the role has not been given to any body and that element of oversight has been lost. It remains to be seen how Welsh Government will respond to the concerns of the Justice Commission that these panels operate without any kind of judicial scrutiny, unless there is a rare case where an exclusion leads to an application for judicial review. As noted above, the Justice Commission called for ‘a thorough appraisal’ of these panels and ‘oversight’ of their decision making processes by the President of Welsh Tribunals.<sup>377</sup>

### 10.2.3.3 Claims to the Education Tribunal regarding disability discrimination

Claims against fixed term (but not permanent) exclusions on grounds of disability may be brought to the Education Tribunal.<sup>378</sup> A very small number of such claims have gone to the Tribunal. In an early Annual Report, the President noted that disability claims as a whole continued to represent a small fraction of the Tribunal’s work and that in ‘the few claims that do proceed a common feature is an apparent uncertainty by responsible bodies about the duties that rest with them.’<sup>379</sup> The small number of exclusion claims continues to be a feature: in the past four years for which there are statistics there have been 4 claims in 2016/17, 7 in 2015/16, 2 in 2014/15, and 1 in 2013/14. It is unclear why the numbers are so low. The Tribunal cannot order financial compensation but could make orders to provide tuition for lost learning, to amend school or local authority policies, for training of school staff and governors or for providing trips or other activities missed by the excluded learner.

In its 2008/09 Annual report, the AJTC had considered that the right to bring disability grounds challenges to the Education Tribunal should be extended to children who had been permanently excluded.<sup>380</sup> If accepted, this would have meant that there would be two different systems of redress for permanently excluded children. Of course, at present this *is* the case with fixed term exclusions. Given the high percentage of permanently excluded learners who also have SEN, we consider that it is worth revisiting this proposal.

#### **Recommendation 11:**

- (i) That there is a review of the governing body level of exclusion challenges. Such a review would consider: the independence, actual and perceived, of school discipline committees from the head teacher whose decision they are considering; the training available to, required for, and taken up by, members**

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<sup>376</sup> CAJTW 2016, recommendation 22 and Welsh Government response (available at:

<https://gov.wales/sites/default/files/publications/2018-11/welsh-government-response-to-cajtw-report.pdf>).

<sup>377</sup> Justice Commission, para 6.47.

<sup>378</sup> Equality Act 2010, s 116.

<sup>379</sup> SENTW, Annual report 2005/06, p2.

<sup>380</sup> Para 8.

of school discipline committees; whether there is an alternative to these decision being made by governing bodies; or whether the decisions of discipline committees could be reviewed by an external body such as the PSOW or the Education Tribunal, whether in all cases or in cases of more lengthy fixed term exclusions.

- (ii) That Welsh Government consider making training on exclusions issues mandatory for any governors who wish to serve on the governing body's pupil discipline and exclusions committee.
- (iii) That Welsh Government considers whether the Clerk to the independent panel should be legally trained, or, if not, where the Clerk to the independent panel is not legally trained, that the local authority be required to ensure that an independent source of legal advice is provided.
- (iv) That Welsh Government, and any board or other body examining civil and administrative justice in response to recommendations of the Justice Commission, considers how the exclusions process is perceived and dealt with as a *justice* issue as well as an education issue.
- (v) That whichever body or bodies have involvement in the review of exclusion appeal panels recommended by the Justice Commission (which may include but not be limited to Welsh Government and the President of Welsh Tribunals), should consider the following matters: if the independent appeal panels remain, whether it would be more consistent and efficient for training of panel members to be conducted on a national basis; whether appeals against permanent exclusions should be brought within the jurisdiction of the Education Tribunal; whether there are other alternatives to the current system.
- (vi) That if the current system of exclusion appeals to independent panels remains in place, it is considered whether, by way of exception, permanently excluded learners with SEN / ALN should be given the right to appeal to the Education Tribunal.

## 11 Transport

The basis for the law on home to school transport is the Learner Travel (Wales) Measure 2008 (LTWM) under which Welsh Government has issued the Learner Travel Statutory Provision and Operational Guidance in 2014 (the LT Code), the All-Wales Travel Behaviour Code in 2009 (Behaviour Code) setting out the required standards of behaviour required of learners, and the

Learner Travel Information (Wales) Regulations 2009<sup>381</sup> (LTIW Regulations) regarding the information which must be published by local authorities.

### 11.1 Mandatory requirements

The Welsh Ministers and the local authorities are required to promote access to Welsh-medium education when exercising their functions under the Measure.<sup>382</sup> However, it has been held that this duty does not of itself require an authority to provide free transport to Welsh-medium schools where they are not the nearest suitable school to the learner's home.<sup>383</sup>

The Measure places duties on local authorities to assess the travel needs of learners in their area,<sup>384</sup> and to make suitable free home to school transport arrangements for those compulsory school age learners whose home is further than a specified distance from the nearest suitable school.<sup>385</sup> Although for admissions purposes, parents may express a preference for a particular school, for example on the basis of it being a Welsh-medium or faith school, if the preferred school is not the one determined as the nearest by the authority, there will be no entitlement to free transport, even if the other criteria for entitlement are satisfied.

The authority must also make suitable free travel<sup>386</sup> arrangements for compulsory school age learners who would not qualify on the basis of the distance of their home from the nearest suitable school, but who, due to their particular circumstances, would need travel arrangements in order to attend each day.<sup>387</sup> A failure by the local authority to make arrangements under these sections would provide a defence for a parent accused of failing to ensure the child's attendance at school.<sup>388</sup> This section, along with the duties towards disabled students under the Equality Act 2010, provides the basis for ensuring that appropriate provision is made for learners with a disability or learning difficulty. The Measure deals only with transport from home to school, so if transport during the day, for example for school trips, is involved, the duties under the Equality Act to make reasonable adjustments (for which no charge may be made) to ensure access to all the school activities will be more relevant.<sup>389</sup>

### 11.2 Discretionary powers

For learners who are not entitled to have travel arrangements made for them, the local authority has the discretion to make travel arrangements, although it may decide to charge for them.<sup>390</sup> In exercising those powers, the authority may not favour one type of education institution over

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<sup>381</sup> SI 2009/569.

<sup>382</sup> LTWM, s10.

<sup>383</sup> *R (on the application of Diocese of Meneria) v City and County of Swansea*, [2015] EWHC 1436 (Admin).

<sup>384</sup> LTWM, s2.

<sup>385</sup> LTWM, s3

<sup>386</sup> 'Travel' is defined in s 1(2) of the LTWM as

- (a) the provision of transport;
- (b) the provision of one or more persons to escort a child when travelling;
- (c) the payment of the whole or any part of a person's reasonable travelling expenses;
- (d) the payment of allowances in respect of the use of particular modes of travel.' 'Travel' includes transport but might also include the provision of an escort or payment for travel expenses.

<sup>387</sup> LTWM, s 4.

<sup>388</sup> LTWM, s 20 amending s 444 of the Education Act 1996.

<sup>389</sup> Equality Act 2010, s29(7).

<sup>390</sup> LTWM, s6. There is also provision for regulations to make provision about arrangements for learners who are over, and under, compulsory school age:- ss 7 and 8.



another.<sup>391</sup> Discretionary transport provision might be made, for example, where, due to parental or learner preference, learners are attending faith or Welsh-medium schools which are not the nearest suitable school. Where discretionary provision is made, the authority must ensure that it treats all learners in the same circumstances equally and does not discriminate unlawfully between learners.<sup>392</sup> Some grounds of discrimination challenge are not possible due to exceptions in the Equality Act: in relation to religious or belief related discrimination, the duties not to discriminate do not apply to a local authority in relation to anything done in connection with transport to or from a school.<sup>393</sup> This is discussed in greater detail in the section on Equality earlier in this report.

The other key discretionary power given to authorities by the LTWM is to withdraw travel arrangements made under sections 3 or 4 of the LTWM from learners who have failed to comply with the Behaviour Code.<sup>394</sup> The LTWM sets out the conditions that must be followed by the authority before travel arrangements are withdrawn: the learner and parent must be given the opportunity to make representations and the local authority must consider these; the learner's head teacher must be consulted; the decision itself must be reasonable; notice must be given in advance of the withdrawal; the period of withdrawal must not exceed 10 consecutive school days or more than 30 days in the relevant school year. The reasonableness of the withdrawal must be judged by reference to the proportionality of the period of withdrawal in the circumstances of the case, the learner's age, any special needs or disability, whether the chance to sit a public examination will be lost, and whether other suitable arrangements can be made by the learner's parent.

### 11.3 Dispute resolution

The 2014 guidance states that where a dispute arises between parents and the local authority regarding the exercise of their functions under the Measure, the existing local authority dispute resolution mechanisms should be used: a complaint should be referred to the authority's Transport Department and thereafter, if unresolved, to the local authority's Complaints Officer or Monitoring Officer. After that, if complaints are still not resolved, complainants should apply to the PSOW if the complaint is eligible.<sup>395</sup> The information which the local authority must publish under the LTIW Regulations includes information on how to make enquiries about travel arrangements, on any complaints procedure and appeals procedure available in respect of decisions regarding travel arrangements.<sup>396</sup>

The LTWM gives powers to the Welsh Ministers to make regulations providing for an appeal against the withdrawal of travel provision for breaches of the travel behaviour code.<sup>397</sup> However, at the time of writing (March 2020) no regulations have been made under this section. Accordingly, the same dispute resolution process will apply as for other decisions under the LTWM.

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<sup>391</sup> LTWM, s 9.

<sup>392</sup> See *Diocese of Menevia* case, note 383.

<sup>393</sup> Equality Act 2010, Schedule 3, para 11(e).

<sup>394</sup> LTWM, s 14.

<sup>395</sup> The LT Code, para 5.5.

<sup>396</sup> Reg 4 and Schedule 1 to the Regulations.

<sup>397</sup> LTWM, s14(14) and (15).

As noted earlier, issues concerning transport have engaged a range of general administrative redress systems including judicial review,<sup>398</sup> the PSOW,<sup>399</sup> and the Children's Commissioner.<sup>400</sup> Transport to school is a good indication of how different parts of the administrative justice landscape contribute to a single area and sometimes overlap. As noted in the earlier section on judicial review, it has been the case that in some applications for judicial review of travel decisions, the courts have considered that other more appropriate remedies should have been utilised.<sup>401</sup>

## 12 The Curriculum

### 12.1 Law and possible disputes

Part 7 of the Education Act 2002, sets out the curriculum to be followed in maintained schools in Wales. Duties regarding religious education and collective worship, and associated rights to withdrawal, are currently dealt with in the School Standards and Framework Act 1998.<sup>402</sup> Other provisions on religious education and worship, including the roles of standing advisory councils on religious education (SACREs),<sup>403</sup> on sex education and parents' right to withdraw their children from those classes, and provisions on political bias and balance,<sup>404</sup> remain in the Education Act 1996. As we observed in the introductory section, this is an area of education law crying out for codification,<sup>405</sup> and the opportunity to do so presents itself with the content of the curriculum currently being revised, with a view to a new curriculum being rolled out in Wales from 2022. Significantly, as regards possible disputes, the new curriculum will, as noted earlier,<sup>406</sup> remove parents' right to withdraw their children from relationship and sex education, and from religious education. The Equality Act 2010 does not apply to the content of the curriculum,<sup>407</sup> although if the method of delivery amounted to harassment of, or excluded, a learner, then an equalities issue could arise, perhaps requiring a change to the manner in which a topic was delivered or reasonable adjustments to avoid the problem. General duties in relation to religious or belief-related discrimination do not apply in relation to acts of worship or other religious observance or the curriculum of the school.<sup>408</sup>

Disputes will, in general terms, concern whether the local authority or the school governing body has acted reasonably in relation to exercising its functions in relation to the curriculum. Some may focus in particular on the protection for parents' rights to have their religious or other beliefs protected in relation to their children's education. This could be in relation to accusations of political bias, cultural sensitivities about certain work or activities, or concerns regarding the content of, or wish to withdraw a learner from classes on sex education or religious education or

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<sup>398</sup> See section 3.3 on the Administrative Court

<sup>399</sup> See section 3.2.1 on the PSOW

<sup>400</sup> See section 3.2.2.1 on the Children's Commissioner

<sup>401</sup> *R v Essex CC ex p Bullimore* [1997] ELR 327 (digest on Westlaw). See section 4.3 above.

<sup>402</sup> SSFA, ss 69, 70, 71.

<sup>403</sup> EA 1996, Part V, Chapter III.

<sup>404</sup> EA 1996, Part V, Chapter IV.

<sup>405</sup> See section 2.2.8 on codification.

<sup>406</sup> See section 4.1.2 above on human rights and conscience.

<sup>407</sup> Equality Act 2010, s 89(2).

<sup>408</sup> Equality Act 2010, Schedule 3, para 11.

from collective worship, or.<sup>409</sup> The human rights aspects of respect for parents' beliefs have been examined in an earlier section.<sup>410</sup> It might be safely predicted that, certainly in the early years of the new arrangements, the removal of the parental right to withdraw their children from religious education and sex and relationships education will give rise to additional disputes.

## 12.2 Dispute resolution processes

Complaints relating to the school curriculum are not dealt with under the general school complaints process. Instead, they are dealt with under section 409 of the Education Act 1996 (EA), a provision which now applies to Wales only. This provision applies to any complaint that the local authority or the governing body has acted unreasonably in relation to the exercise of a power or discharge of a duty under the statutory provisions concerning the curriculum or religious worship. Local authorities, after consulting with governing bodies of foundation and voluntary aided schools, must make arrangements for the consideration and disposal of these complaints. The Welsh Ministers must not, in exercise of their powers of intervention under Chapters 1 or 2 of Part 2 of the School Standards and Organisation (Wales) Act 2013 (SSOWA), deal with any complaint to which section 409(2) applies unless a complaint on this matter has been made and disposed of in accordance with the arrangements made by the local authority under s409(1).

Guidance<sup>411</sup> on the predecessor of section 409, section 23 of the Education Reform Act 1988 (ERA), which originally introduced the obligation to set up a process for dealing with curriculum complaints, indicated that the first stage should involve an informal discussion with the teacher or head teacher. This would be followed by a formal complaint to the governing body, and, if not resolved at that stage, a formal complaint to the local authority. The final stage would be to take the complaint to the Secretary of State under sections 496 or 497 of the EA 1996, a role now undertaken by the Welsh Minister under the SSOWA. That decision could if appropriate be challenged by way of judicial review.

Writing in 1993 on the predecessor provision in the ERA, Harris observed that the formal stages of the procedures were under-utilised and 'completely untested in some parts of the country'.<sup>412</sup> In light of the low level of awareness of the existence of these procedures, he recommended that local authorities should monitor schools' compliance with the obligation to publish information on them.<sup>413</sup> He also recommended that the relevant Regulations should be amended to add information on these procedures to the information authorities are already required to publish on schools. Later commentary by others on curriculum complaints have made similar observations. Writing when the obligation applied in England, Ruff stated: 'This complaints procedure is potentially wide-ranging but there is little evidence on the extent to which it is used. Perhaps, virtually all complaints are resolved informally, or perhaps this procedure is not widely known about or used.'<sup>414</sup>

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<sup>409</sup> For example, see N Harris, *Education, Law and Diversity*, 1st edition (Hart 2007), p390.

<sup>410</sup> See section 4.1.2 above.

<sup>411</sup> Department for Education Circular 1/89 and equivalent Welsh Office Circular 26/89, discussed in N Harris, Local Complaints Procedures under the Education Reform Act 1988, [1993] *Journal of Social Welfare and Family Law* 19.

<sup>412</sup> N Harris, *ibid*.

<sup>413</sup> *Ibid*

<sup>414</sup> A Ruff, *Education Law* (Butterworths, 2002), 483.

It is still the case that, although the requirement is for the local authorities to make the arrangements, the obligation is placed on each school's governing body to publish information on how complaints are to be made under the arrangements made under s409.<sup>415</sup> It therefore remains difficult to gain an overview of the current arrangements in place. For his 2005 report on complaints arrangements in local education authorities,<sup>416</sup> the Children's Commissioner for Wales asked local authorities whether they had a separate complaints procedure for 'complaints which should be dealt with under the statutory curriculum procedure' under s409. The Commissioner found it surprising, given the statutory duty, that only 16 authorities had such a procedure, 4 authorities reported that they had no such procedure and 2 were unable to answer the question.

Our own recent search of local authority websites<sup>417</sup> suggested a rather mixed picture as to what is understood regarding the requirement in section 409, with some authorities' online material pointing to the standard school complaints system, others signposting to another website for which the link no longer works, one referring to a document available in schools and libraries, some not mentioning them, and one with information in line with the stages noted above by Harris.<sup>418</sup> From the information which is available on local authority websites, it is clear that at least some authorities have designated their local standing advisory committee on religious education (SACRE) to deal with complaints concerning religious education and collective worship.<sup>419</sup>

An FOI request to all Welsh local authorities asking about their section 409 arrangements received 11 responses, of which 4 referred us to the individual complaints processes within schools, 1 said that the authority did not deal with complaints of this kind and referred us to schools, 4 said that complaints about the curriculum would be dealt with under the council's corporate complaints process and 2 indicated that they have specific arrangements made in accordance with section 409 of the Education Act. Of the latter, one authority had details on its website, and the other indicated that its arrangements were available in schools, education offices and public libraries. Of the authorities that recorded the number of complaints received under the section 409 arrangements separately from general corporate complaints, one authority responded that there had been 26 curriculum-related complaints, and the others had received none.

As noted earlier, one of the proposals for the new curriculum is to remove the right of parental withdrawal of children from relationships and sex education and from religious education. It would not be unreasonable to speculate that the number of curriculum complaints is unlikely to decrease following the introduction of the new system. However, the discussion on reform does not appear to have considered any changes to the system for complaint avoidance or resolution.

We consider that thought needs to be given to how curriculum disputes should be dealt with. At present, it appears that the intention of section 409 to have a system for curriculum complaints is not operating consistently across Wales.

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<sup>415</sup> School Information (Wales) Regulations 2011, reg7 and Schedule 3, para 11. SI 2011/1994.

<sup>416</sup> Children's Commissioner for Wales, *Children don't complain...* (2005).

<sup>417</sup> November 2019.

<sup>418</sup> See, for example, Blaenau Gwent, Complaints about Aspects of the Curriculum in Schools - <https://www.blaenau-gwent.gov.uk/en/resident/schools-learning/school-complaints/> (last accessed 18 January 2020).

<sup>419</sup> We identified 4 local authority websites which refer to a role for the SACRE but others may do so in practice.

## **Recommendation 12:**

- (i) That Welsh Government consider whether the system for dealing with curriculum disputes is fit for purpose, and, if it is not, that provision on this is included in the legislation being brought forward on the content of the curriculum.**
- (ii) That, if section 409 is to remain, local authorities, as well as schools, should be required to publish information about the arrangements made on their websites.**
- (iii) In order to provide some consistency, it would also be valuable for Welsh Government to issue guidance on the essential elements that the local authorities' arrangements should include, no guidance having been issued on this topic since well before devolution.**

## **13 Elective home education**

In terms of its relevance to the administrative justice system, elective home education, or home schooling, is an area, unlike others, where it is the parent who makes the initial decision rather than requesting another body to do so. The parent takes the decision to home-educate, and the local authority must then react to that decision if it considers that the child is not receiving a suitable education, ultimately, if necessary by prosecuting the parents for failure to comply with a School Attendance order if the education provided is not appropriate.<sup>420</sup> Accordingly, what begins outside the administrative justice system as a parental decision, enters the administrative justice system and may finally end up in the criminal justice system.

The law has never required that children of compulsory school age receive their education only at school. Under the Education Act 1996,<sup>421</sup> parents must ensure that their child receives 'efficient full-time education' which is suitable to the child's age, ability, aptitude and to any SEN/ALN he or she may have. This education may be provided 'either by regular attendance at school or otherwise.' As long as parents provide 'suitable education', the 'otherwise' in the legislation means that they may opt to educate their children at home. This is referred to as Elective Home Education or EHE, and is not to be confused with instances where the local authority has a duty to provide education outside the school setting for whatever reason.<sup>422</sup> Welsh Government has provided non-statutory guidance for local authorities on this topic (EHE Guidance).<sup>423</sup> In 2018 it announced a package of measures to support parents who make the choice to home educate, including help with exam registration and access to learning materials.<sup>424</sup>

Some parents make this choice from the very beginning of the child's education while others may opt for EHE later on by deciding to withdraw a child who is attending school. The reasons parents opt for home-education are diverse and for some parents the decision to home-educate may in itself represent a failure in the school system to provide for their child. Welsh Government

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<sup>420</sup> EA 1996, s 443.

<sup>421</sup> s 7.

<sup>422</sup> EA 1996, s 19.

<sup>423</sup> Elective Home Education, Guidance document no: 202/2016, January 2017.

<sup>424</sup> Statement to the Assembly. *Assembly Record*, 30 January 2018.

recommends that local authorities should analyse the reasons that parents opt for home education so that they can address any concerns which have arisen. If the decision to home-educate arises as a result of the school effectively, but unofficially, excluding the child from school, this raises questions regarding the system for taking and challenging decisions to exclude, and in general there are connections between home schooling and exclusions that raise concerns regarding administrative justice redress processes. In our focus groups we heard from some parents of learners with SEN who had felt forced to remove their children from school without appreciating the implications of their decision.

The EHE Guidance emphasises the value of dealing with any problems within a school that might lead to parents opting to home educate. It points to the local authority parent partnership services which can be used to help prevent a situation escalating and to ensure that parents can make informed decisions. It suggests that the school and the local authority might want to consider a mediation process involving specialist officers and advocacy services. The EHE Guidance gives the example of a multi-disciplinary ‘Fair Access Panel’ in Cardiff whose role is to identify issues that might lead to parents electing to home educate and which can develop an intervention package in order to resolve issues including SEN, attendance, health and behaviour.<sup>425</sup> Such initiatives are to be applauded.

There is no general requirement for parents to register with, or seek approval from, the local authority to home-educate their children. It is only in the specific case of a child with a statement of SEN who attends a special school, that the parents must obtain the local authority’s permission, or failing that a direction from the Welsh Ministers, before removing the child from the school.<sup>426</sup>

For children who are attending school (including children with a statement of SEN who are attending a mainstream school), the parent must inform the head teacher asking them to remove the child’s name from the register. The school should then remove the child’s name from the register<sup>427</sup> and must then notify the local authority of the removal within 10 school days.<sup>428</sup> The local authority is required to write to the parents to acknowledge receipt of the notification and must consider (by meeting the parents or otherwise making enquiries of other agencies) whether there is any cause for concern over the child’s withdrawal from the school. If there are concerns, support is to be made available to the family. If the authority is concerned that the parents are failing to provide suitable education, the authority may take action to require the learner to attend school. This action is dealt with in the section of this report on attendance issues.<sup>429</sup>

For children who have never attended school, there is no process to be undergone. Local authorities are under a duty to make arrangements ‘so far as it is possible to do so’ to identify children who are not registered at school and are not receiving suitable education.<sup>430</sup> However, this is difficult for authorities as parents are not obliged to register that they are home educating. This has given rise to discussion around whether children of attending school can effectively become ‘invisible’, and that one way to address such concern would be through a compulsory system of

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<sup>425</sup> EHE Guidance, p10.

<sup>426</sup> Education (Pupil Registration) (Wales) Regulations 2010, reg8(2).

<sup>427</sup> Regulation 8(1)(d) Education (Pupil Registration) (Wales) Regulations 2010, SI 2010/1954.

<sup>428</sup> SI 2010/1954, reg 12(3).

<sup>429</sup> See section 14 on school attendance.

<sup>430</sup> EA 1996, s 436A.

registration.<sup>431</sup> Welsh Government launched a consultation in 2019 on whether it should use its powers under the Children Act 2004 to issue statutory guidance and regulations on home education. Its proposed regulation would require local health boards to disclose non-medical information to the local authority to assist them in identifying children in their locality, and independent schools would also be required to inform the authority of learners registered with them.<sup>432</sup> This information along with EOTAS registers and school rolls would be cross-matched in order to produce a list of children not known to the local authority. This would enable the local authority to compile a ‘reasonably complete’ database of children not on any education register and then to inquire into the provision and suitability of their education. 73% of the responses to the consultation did not agree that there should be this type of information sharing to identify children not known to the local authority.<sup>433</sup> There was a similar negative response (72%) to the draft statutory guidance for local authorities to assess the suitability of the education received by home educated children. Welsh Government has since launched a consultation on regulations to require such a database to be established. The consultation will end on 22 April 2020.<sup>434</sup>

## 14 School attendance

Local authorities have a duty to make arrangements to identify children within their area who not receiving a suitable education, whether at school or otherwise.<sup>435</sup> Accordingly, what is discussed here relates to children being educated at school and at home. As noted in the previous section of this report, there can sometimes be difficulties for the local authority to be aware of some children being educated at home, and the Welsh Government is currently considering proposals to assist the authorities to be aware of all children in their area.

The area of school attendance is where the administration of the education system potentially connects with the criminal justice system given that this will be the ultimate course of action by an authority against a parent whose child is not being educated at home or at school.

Where the local authority considers that a child of compulsory school age is not receiving suitable education, they must serve notice in writing on the parent, requiring him or her to satisfy them that the child is receiving such education.<sup>436</sup> Before serving such a notice, the local authority should ‘make every effort to engage the parent and help them to get their child to school’, including explaining and helping with admission or admission appeal arrangements and making the parent aware of the location of schools in the area.<sup>437</sup> The parent must respond to the satisfaction of the local authority<sup>438</sup> within the period set out in the notice, which shall not be less than 15 days from the service of the notice.<sup>439</sup> If the parent fails to satisfy the local authority that the child is receiving

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<sup>431</sup> See for example, D Forrester, N Maxwell, T Slater, J Doughty, *An evidence based review of the risks to children and young people who are educated at home – Final Report* (Commissioned by the National Independent Safeguarding Board, October 2017); Children’s Commissioner for Wales, <https://www.childcomwales.org.uk/our-work/policy-positions/home-education/> (Last accessed 13 Feb. 2019)

<sup>432</sup> See statement to the Assembly 30 January 2018 by Education Secretary, note 426; Welsh Government, Consultation, Home Education – Statutory Guidance for Local Authorities and a Handbook for Home Educators, July 2019.

<sup>433</sup> Welsh Government Consultation – analysis of responses, December 2019.

<sup>434</sup> Welsh Government Consultation on Draft Regulations, January 2020. Available at: <https://gov.wales/sites/default/files/consultations/2020-01/consultation-document.pdf>

<sup>435</sup> EA 1996, s4 36A.

<sup>436</sup> EA 1996, s 437(1).

<sup>437</sup> Welsh Government, All Wales Attendance Framework, 2011, para 77.

<sup>438</sup> EA 1996, s 437(1).

<sup>439</sup> EA 1996, s 437(2).

suitable education, and the local authority's opinion is that 'it is expedient' for the child to attend school, the local authority 'shall serve' a school attendance order (SAO) on the parent requiring him or her to register the child at the school named in the order.<sup>440</sup> Before serving an SAO,<sup>441</sup> the authority must write to the parent referring to the notice already served and indicating its intention to serve an SAO and specifying the school it intends to name in the order as well as other schools that it regards as suitable alternatives.<sup>442</sup> If, within the 15-day notice period, the parents nominate one of the schools specified in the notice, the local authority must name it in the SAO.<sup>443</sup> The parents must also be informed of their right to nominate schools to be named in the SAO.<sup>444</sup>

Once an SAO is made it will remain in force for as long as the child is of compulsory school age unless it is revoked by the local authority or a direction is made by the Welsh Minister.<sup>445</sup> The school named may be amended by the local authority,<sup>446</sup> including at the request of the parent.<sup>447</sup> Parents may apply to the local authority to have the SAO revoked on the ground that arrangements have been made for the child to receive suitable education otherwise than at school. In that case, the local authority must revoke the SAO unless it considers that no satisfactory arrangements have been made. If the parent wishes to complain about the local authority's refusal to revoke the SAO, the parent may refer the question to the Welsh Minister.<sup>448</sup> The Welsh Minister must give 'such direction determining the question as he thinks fit'.<sup>449</sup> The provision on revocation at the request of a parent does not apply in relation to a child for whom a statement of SEN/Individual Development Plan (IDP) names a school. In any other case the Minister's determination may require the local authority to make amendments to the statement/IDP as are considered expedient in consequence of the determination.<sup>450</sup>

Failure to comply with an SAO is an offence.<sup>451</sup> However, before instituting proceedings for an offence, the local authority must consider whether it would be appropriate to apply for an education supervision order (ESO) in respect of the child.<sup>452</sup> If proceedings are taken for failure to comply with an SAO, the only defence is that the parents are in fact ensuring that a suitable education is being received by the child.

It is also an offence for a parent to fail to secure the regular attendance at school of their child if their child is registered at the school, punishable by a fine.<sup>453</sup> However, more seriously, a parent who knows their child is failing to attend school regularly and fails to cause the child to do so is guilty of an offence which may be punished by imprisonment of up to three months, unless the parent can prove that there was a reasonable justification for the failure to cause the child to attend.<sup>454</sup> These offences are not applicable if the attendance is prevented by illness or other unavoidable cause or if authorised or in relation to days of religious observation for the faith of

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<sup>440</sup> EA 1996, s 437(3).

<sup>441</sup> A useful flow chart is provided in the All Wales Attendance Framework – chart with para 78.

<sup>442</sup> EA 1996, s 438(2).

<sup>443</sup> EA 1996, s 438(2) and (3).

<sup>444</sup> EA 1996, s 438(4)-(6).

<sup>445</sup> EA 1996, s 437(4).

<sup>446</sup> EA 1996, ss 440-441a.

<sup>447</sup> EA 1996, s 440.

<sup>448</sup> EA 1996, s 442(2).

<sup>449</sup> EA 1996, s 442(4).

<sup>450</sup> EA 1996, s 442(5)/(6).

<sup>451</sup> EA 1996, s 443.

<sup>452</sup> EA 1996 s 444. Children Act 1989, s36(9).

<sup>453</sup> EA 1996, s 444(1).

<sup>454</sup> EA 1996, s 444(1A).



the child's parent.<sup>455</sup> Nor will an offence have been committed if the parent can prove that the local authority failed to discharge its duties in relation to making transport arrangements for the child under the Learner Travel (Wales) Measure 2008.

Failure to attend school can result from a range of reasons including unresolved problems concerning bullying at school, anxiety, special needs, disability for which reasonable adjustments may not have been made. Accordingly, this area may highlight problems in the dispute avoidance and resolution system elsewhere in the education landscape. The interaction between potential criminal penalties and the administrative justice system in education is also exemplified in England where two parent-led organisations have crowd-funded to bring a judicial review action against the Department for Education regarding its school attendance policy and registration codes.<sup>456</sup>

## 15 Special Educational Needs (SEN) and Additional Learning Needs (ALN)

### 15.1 Introduction

The current Special Educational Needs (SEN) arrangements for schools in are found in Part IV of the Education Act 1996 (EA), previously applicable to both England and Wales but now applicable only to Wales. This is supplemented by subordinate legislation and by the SEN Code of Practice to which the relevant parties must pay regard when exercising their powers.<sup>457</sup>

These arrangements remain in force but are to be replaced by the Additional Learning Needs and Education Tribunal (Wales) Act 2018 (herein after ALN Act).<sup>458</sup> While the ALN Act has yet to enter into force, a 'transformation' period is already underway, developing workforce skills to cope with the changes, raising awareness of best practice and providing implementation and transition support. It was originally intended that the finalised ALN Code would be issued by the end of 2019 along with all subordinate legislation, and the ALN system rolled out in a phased introduction process from September 2020 onwards, with the SEN/LDD system coming to an end in the summer of 2023. However, in order to take on board the extensive feedback received on the draft ALN Code, the timescale has been revised: the ALN Code and regulations will be laid for Assembly approval in 2020, statutory roles created by the Act will start in January 2021, and the new ALN system will start on a phased basis in September 2021.<sup>459</sup> This section makes reference to the draft ALN Code as published in December 2018, although it is likely that at least some parts will change.

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<sup>455</sup> EA 1996, s 444(2A).

<sup>456</sup> [https://www.crowdjustice.com/case/schoolattendancedifficulties/?utm\\_source=backer\\_social&utm\\_campaign=schoolattendancedifficulties&utm\\_reference=a13ef97f61ca2a5ed23ccf77f11448c&utm\\_medium=clipboard\\_copy&utm\\_content=post\\_pledge\\_page](https://www.crowdjustice.com/case/schoolattendancedifficulties/?utm_source=backer_social&utm_campaign=schoolattendancedifficulties&utm_reference=a13ef97f61ca2a5ed23ccf77f11448c&utm_medium=clipboard_copy&utm_content=post_pledge_page) (last accessed 20 March 2020).

<sup>457</sup> Key subordinate legislation as amended: The Education (SEN) (Wales) Regulations 2002, SI 2002/152; The Special Educational Needs (Provision of Information by LEAs) (Wales) Regulations 2002, SI 2002/157; The SEN Tribunal Regulations 2001, SI 2001/600; The Special Educational Needs Tribunal (Time Limits) (Wales) Regulations 2001, SI 2001/3982. Special Educational Needs Code of Practice for Wales made under Education Act 1996, s 313.

<sup>458</sup> Commencement date to be appointed under s100(3) ALN Act.

<sup>459</sup> Statement by the Minister for Education, 17 September 2019.

## 15.2 Overview of the SEN and ALN systems

Although the terminology of SEN and special educational provision (SEP) will be replaced under the ALN Act by additional learning needs (ALN) and additional learning provision (ALP), the definitions remain the same in substance for SEN and ALN. A learner has SEN/ALN if s/he ‘has a learning difficulty or disability which calls for additional learning provision’.<sup>460</sup> It is the arrangements for making provision and for challenging decisions that will change.

### 15.2.1 SEN

Under the EA 1996, duties fall on schools and the local authority. Schools have the general duty to ‘use their best endeavours’ to secure the necessary SEP for any pupil with SEN.<sup>461</sup> As to how it will comply with this, the school must ‘have regard to’ the SEN Code of Practice for Wales.<sup>462</sup> The Act draws a distinction between children with SEN for whom provision could be made within the normal school resources (although how to determine whether this is the case is not specified), and those children with more severe or complex needs for whom provision could not be made within normal school resources and for whom the local authority would provide in accordance with a statutory ‘statement’. Accordingly, the statutory system applies to the minority of learners with SEN while the SEN Code sets out how schools should deal with what is in practice the majority of pupils.<sup>463</sup> The SEN Code sets out a graduated response to meeting the needs of those learners who do not fall within the statutory protection scheme: intervention known as ‘School Action’ should be recorded within an Individual Education Plan (IEP), and should be reviewed at least twice a year. If the child is not making progress under School Action, the next response is School Action Plus which will involve help from external agencies.

If the pupil is not making adequate progress under School Action Plus, it is then necessary for the school, in consultation with the parents and any external agencies already involved, to consider whether to initiate a request to the local authority for a statutory assessment.<sup>464</sup> There may also be a referral to the local authority from a parent<sup>465</sup> or another agency such as health or social services.<sup>466</sup> The key issue for the local authority in deciding whether to make a statutory assessment is whether there is convincing evidence that, despite the school having taken ‘relevant and purposeful’ action, the difficulties experienced by the child have not been remedied and may require the local authority to determine the learner’s SEP.<sup>467</sup>

The statutory assessment will not necessarily lead to the making of a statement. Once the local authority has conducted the assessment, it is obliged to determine whether a ‘statement’ of SEN needs to be made and maintained.<sup>468</sup> This decision will be governed by the local authority considering whether the SEP required to meet the child’s SEN cannot reasonably be provided from the resources normally available to mainstream schools. The significance of a statement is

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<sup>460</sup> EA 1996, s 312(1); ALN Act 2018, s2(1).

<sup>461</sup> Education Act 1996, s 317.

<sup>462</sup> Education Act 1996, s 313.

<sup>463</sup> According to the explanatory memo accompanying the ALN Bill in December 2016, children with a statement represented 2.2% of all pupils, whereas the percentage of pupils at maintained schools in Wales with some form of SEN was 22%.

<sup>464</sup> Education Act 1996, s 329A.

<sup>465</sup> For assessment, s 329; for reassessment, s 328.

<sup>466</sup> SEN Code, para 7.15.

<sup>467</sup> SEN Code, para 7.34.

<sup>468</sup> EA, ss 323 and 324(1).

that it creates an enforceable duty on the local authority to secure the provision that is set out in it.<sup>469</sup>

### 15.2.2 ALN

In contrast, the ALN Act removes the division of learners with ALN into two categories, and establishes a single statutory regime that applies to all ALN learners. An Individual Development Plan (IDP) must be provided for any learner who has ALN. Schools and local authorities have obligations in relation to assessing ALN and making provision. School decisions may be submitted to the LA for ‘reconsideration’ and LA decisions may be appealed to the Education Tribunal.

This report deals only with schools. However, it may be observed that one of the changes introduced by the ALN Act is to provide a single system for all children and young people from birth up to the age of 25.)

The Welsh Government’s White Paper of 2014 considered that a number of problems arose from what it regarded as ‘the unclear divide between those requiring statements of SEN and those who do not’. It regarded as unfair the statutory protection only of provision required to address more complex needs, with less complex needs being left outside. It intended that, in removing that ‘artificial and contentious divide’, the new legislation will ‘eliminate one of the principal causes of adversarial tension.’<sup>470</sup> However, while one source of disputes under the EA 1996 has been removed, it may be argued that another potential source of disputes will exist under the ALN Act in terms of when provision should be made by the local authority instead of by the governing body. Our project heard concerns that the ‘reconsideration’ remedy about what a school should provide will challenge the relationship between local authorities and schools. In light of this, and questions about the extent to which administrative review works successfully in other areas, it was suggested that it will be important that there are transparent statistics on the working of reconsideration.

If it is brought to the governing body’s attention that a learner may have ALN, it must make a decision as to whether this is so unless an IDP (or EHC from England) is already being maintained, or the governing body has previously decided this and there has not been a change in circumstances, or the decision relates to a young person who does not consent to the decision being made.<sup>471</sup> If the governing body decides that a child or young person has ALN, or if the governing body is directed by the local authority or Welsh Ministers to do so,<sup>472</sup> it must prepare and maintain an IDP for them unless one of a number of circumstances apply. One such circumstance is that the governing body considers that the learner’s ALN are more complex or severe and call for ALP that is not reasonable for the governing body to provide, or which cannot be determined by the governing body.<sup>473</sup> The local authority will be responsible in cases of: ALN calling for ALP that it would not be reasonable for the governing body to secure; ALN the extent or nature of which the

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<sup>469</sup> EA 1996, s 324(5)(a)(i) indicates that unless the child’s parents have made suitable arrangements, the LA ‘shall arrange that the special educational provision specified in the statement is made for the child...’

<sup>470</sup> Explanatory memo to the ALN Bill, para 3.114.

<sup>471</sup> ALN Act s 10.

<sup>472</sup> ALN Act, s 14.

<sup>473</sup> ALN Act, s 12(2).

governing body cannot adequately determine, or ALN for which the governing body cannot adequately determine ALP.<sup>474</sup>

The ALN draft Code provides detail on the content of the IDP in addition to standard forms that must be used in its preparation or revision.<sup>475</sup> The importance of early identification is emphasised in the draft Code, and draft Regulations also set out deadlines to ensure early identification and intervention.

## 15.3 Avoiding disputes and early resolution of disputes

### 15.3.1 General

One of the stated aims of the ALN legislation is to place greater emphasis on the avoidance of disputes, and, if necessary, ensure their early resolution by informal means rather than through the formal appeals process. The desired change was to be achieved partly by a greater focus on collaboration with families and a strong rights-based approach, and partly by specific provisions on dispute avoidance and settlement. In putting forward the ALN Bill, Welsh Government stated that trust between parents and local authorities or schools was often undermined and this led to disputes. It considered that the arrangements in place for disagreement resolution were ‘insufficiently robust’ for avoiding or quickly resolving disputes.

In Welsh Government’s view, providing ‘a simpler’ process for producing IDPs, ‘should avoid the adversarial nature of the existing, overly bureaucratic approach.’<sup>476</sup> It was noted that given that parents can complain about a school IDP to the local authority, this might lead to local authorities having additional disagreements to deal with. However, this risk was estimated to be small as the IDPs will be developed using ‘person centred practice’ which has been found in trials to foster better trust and confidence between the parties.<sup>477</sup> The approach taken in the ALN Act was designed to be a less complex and more flexible system which would reduce the amount of time taken to make decisions.

Unlike the pre-devolution EA 1996,<sup>478</sup> the ALN Act as enacted<sup>479</sup> requires local authorities and NHS bodies (but not schools) exercising functions under the Act to ‘have due regard’ to both the UN Convention on the Rights of the Child and the UN Convention on the Rights of Persons with Disabilities.<sup>480</sup> However, this does not require ‘a specific consideration of the Convention on each occasion that a function is exercised.’<sup>481</sup> While the SEN Code referred to the value of working in partnership with parents and pupils,<sup>482</sup> the ALN Act itself requires regard to be had to the

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<sup>474</sup> ALN Act, s 12(2).

<sup>475</sup> ALN Draft Code, 2019, chapter 3.

<sup>476</sup> Explanatory memo to the ALN Bill, para 3.11.

<sup>477</sup> Explanatory memo to the ALN Bill, para 8.278 referring to Welsh Government commissioned research.

<sup>478</sup> However, chapter 3 of the SEN Code referred to Article 12 of the UNCRC in relation to pupil participation.

<sup>479</sup> The ‘due regard’ duty was not in the original version of the Bill but there were strong representations from the Children’s Commissioner and other bodies to have the ‘due regard’ duty added.

<sup>480</sup> ALN Act, ss 7(1) and 8(1).

<sup>481</sup> ALN Act, ss 7(3) and 8(3).

<sup>482</sup> SEN Code, chapters 2 and 3.

importance of children, parents and young people participating as fully as possible in the ALN process and having their views taken account of.<sup>483</sup>

### 15.3.2 Information, support and, disagreement avoidance and resolution services

One of the elements highlighted by Welsh Government when introducing the ALN Bill, was the need for ‘a fair and transparent system for providing information and advice.’<sup>484</sup> The EA 1996 required local authorities to arrange for parents of children with SEN to be ‘provided with advice and information about matters relating to those needs.’<sup>485</sup> The provision in the ALN Act is more extensive in that, in addition to information and advice about ALN, there must also be information about the system for providing for those needs. It is also on the face of the Act that this information and advice must be provided in an ‘impartial manner’.<sup>486</sup> However, neither Act requires that the information and advice is provided by a body independent of the authority.

The SEN Code states that the local authority must arrange for ‘parent partnership services’ from which parents can obtain information and advice: this can be done entirely by the authority itself or by buying in the services of an external provider or a mixture of the two. If it is provided in-house, the SEN Code encourages the local authority to ensure that the service is run at ‘arm’s length to ensure parental confidence.’<sup>487</sup> The most recent annual reports from SNAP Cymru (an all-Wales charity providing independent and specialist education advice to families and professionals) indicate that 19 authorities are using its services for parent partnership services (although the levels of funding vary).<sup>488</sup> Another authority is using the local citizens’ advice bureau<sup>489</sup> and two authorities organise the parent partnership services ‘in house’.<sup>490</sup> The SEN Code expresses the aim that the parent partnership services will function as the main means of preventing difficulties developing into disagreements. It sets out the minimum standards that an effective parent partnership is expected to meet<sup>491</sup> and the overall responsibilities of the local authorities.<sup>492</sup> While the SEN Code notes that the primary role of parent partnership services is to provide help where children have been identified with special needs, it acknowledges that there may be disputes between the school and the family as to whether the child has special needs, and schools are encouraged to handle such cases with sensitivity and flexibility.<sup>493</sup>

The draft ALN Code notes the ALN Act’s requirement that local authorities must have regard to the principle that information and advice must be provided in an impartial manner and it gives examples of how this might be done by within the authority itself or by an external provider. The

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<sup>483</sup> ALN Act, s 6.

<sup>484</sup> Explanatory memo to the ALN Bill, para 3.2.

<sup>485</sup> EA 1996 s332AA, and SEN Code, para 2.16-The original version in the EA was 332A which was inserted by s2 of SENDA 2001 and it referred only to information for parents, head teachers and others considered appropriate. S 332AA was inserted by the Education (Wales) Measure 2009 and expressly refers to children receiving information.

<sup>486</sup> ALN Act, s 9.

<sup>487</sup> SEN Code, para 2.17.

<sup>488</sup> SNAP Cymru Annual Report 2018-19, para 3.4; Annual Report 2019-20, p6 ‘Appeals Casework’

<sup>489</sup> Flintshire: <https://flintshirecab.org.uk/about-us/projects/parent-partnership-service/> (last accessed March 2020).

<sup>490</sup> Pembrokeshire and Swansea: <https://www.pembrokeshire.gov.uk/parent-partnership-service/pps-contact-us;> <https://www.swansea.gov.uk/sen> (last accessed March 2020).

<sup>491</sup> SEN Code, para 2.21.

<sup>492</sup> SEN Code, para 2.18.

<sup>493</sup> SEN Code, para 2.19.

feedback we received in our research project is that the availability of accurate advice as early as possible is crucial for avoiding disputes or ensuring that any that do arise are swiftly resolved. Our feedback also indicated that families trust advice and support coming from an external body more than that coming from the authority itself which is perceived as lacking independence. Given that the stated purpose of the provision of information is to enable families to exercise their rights ‘including to challenge decisions’, one response to the consultation on the draft ALN Code stated: ‘We can find no precedent where a member of the LA has acted against another member / department of a local authority.’<sup>494</sup>

The ALN Act requires each authority to ‘take reasonable steps’ for making the arrangements for information and advice as well as its arrangements for avoidance and resolution of disagreements, and its arrangements for independent advocacy services, known to children, young people, parents, schools and anyone else considered relevant.

### 15.3.3 Advocacy

Both the EA 1996 and the ALN Act require every local authority to make arrangements for the provision of ‘independent advocacy services’ and to refer any child or their case friend who requests advocacy to a service provider.<sup>495</sup> This is applicable to any child appealing, intending or considering whether to appeal to the Tribunal or taking part in ‘disagreement resolution services’ in the Acts. The Children’s Commissioner has expressed some regret that advocacy is presented in the draft ALN Code purely as a means of resolving disagreements, rather than as an opportunity for a child or young person’s voice to be amplified in all the discussion and decision making.<sup>496</sup> This chimes with feedback that we had generally in our research project where, in relation to SEN and other areas, participants emphasised the importance of early advocacy to enable the voices of children, young people and their parents to be heard before issues turn into disagreements. The provision of an advocate at a stage before disagreement resolution services are engaged or an appeal is being considered might avoid disputes arising in the first place and in any case will ensure that the child’s or young person’s rights under Article 12 UNCRC are respected. Responses to the ALN Bill that advocacy should be provided for parents who were not case friends were unsuccessful.<sup>497</sup>

The draft ALN Code notes that current practice in Wales is to achieve independence by commissioning advocacy services from an external provider, and recommends that the services providing advocacy *should* be funded and managed in a way that ensures independence from the commissioning organisation.<sup>498</sup> We consider that the statutory power in the Act for the ALN Code to impose requirements on a local authority in relation to the provision of independent advocacy services (section 4(5)(a)) should be used to require, rather than recommend, that services are funded and managed to ensure independence.

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<sup>494</sup> SNAP response to consultation on draft ALN Code, para 6.6.

<sup>495</sup> ALN Act, s 69.

<sup>496</sup> Children’s Commissioner’s response to consultation on the draft ALN Code.

<sup>497</sup> Children, Young People and Education Committee, Report on the ALN Bill, recommendation 26.

<sup>498</sup> Draft ALN Code, para 25.68.



The authorities must make these services known to the relevant persons in their area.<sup>499</sup>

#### 15.3.4 Avoidance and resolution of disagreements

The EA 1996 currently requires local authorities to ‘make arrangements with a view to avoiding *or* resolving disagreements’ between authorities and schools on the one hand and children and their parents on the other.<sup>500</sup> A very similar provision is made in the ALN Act.<sup>501</sup> However, the provision in the ALN Act is for ‘arrangements with a view both to avoiding *and* to resolving disagreements’ between authorities / schools and parents and their children.<sup>502</sup> The explanatory memorandum accompanying the Bill placed a good deal of emphasis on this distinction, stating that authorities ‘are not currently required to focus on avoiding disputes.’<sup>503</sup> It is not clear if local authorities have interpreted the ‘avoiding or resolving’ language in such a stark way, and therefore whether the difference in outcome will be that great. However, the explanatory memorandum observes that Carmarthenshire, which introduced an ALN family support officer in order to avoid disputes, had seen a significant fall in the number of appeals to tribunal.<sup>504</sup> However, research had not been conducted which could conclusively determine a causal relationship.<sup>505</sup> Nonetheless, any success in achieving the avoidance or early resolution of disputes is to be welcomed: Welsh Government-commissioned research estimated that the cost to local authorities of defending a case appealed to the tribunal is £10,000 which was 2.42 times greater than the cost of providing services to support learners and their parents through the appeal process.<sup>506</sup> The figures presented in the explanatory memorandum were that local authorities are estimated to spend £12,140,700 per year on disagreements and appeals. Of this, £10,834,300 is incurred from dealing with disputes - £3,164,000 on providing disagreement resolution services, and £7,670,300 on responding to disputes. The remaining £1,306,400 relates to dealing with appeals - £223,400 on providing advocacy services and £1,083,300 on responding to appeals.<sup>507</sup>

The EA 1996 provision states that the arrangements ‘must provide for the appointment of independent functions of facilitating the avoidance or resolution of such disagreements.’<sup>508</sup> In a similar vein, section 68(3) of the ALN Act states that the relevant arrangements ‘must include provision for parties to a disagreement to access help in resolving it from persons who are independent of the parties.’ In referring to ‘the parties to a disagreement’ the sub-section suggests that the arrangements for disagreement *avoidance* do not require the involvement of a person who is independent of the parties. If this is the correct reading of the provision, the ambit of the ALN Act arrangements is narrower than in the existing law in which no such distinction is made between the avoidance and resolution of disagreements.

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<sup>499</sup> EA 1996, s 332BB; ALN Act 2018, s 69.

<sup>500</sup> EA 1996, s 332BA. Emphasis added.

<sup>501</sup> ALN Act, s 69.

<sup>502</sup> Emphasis added.

<sup>503</sup> Explanatory memorandum to the ALN Bill, paras 7.32, 7.36, 7.38, 8.320.

<sup>504</sup> Ibid, paras 7.41-7.42 and 8.330-8.337.

<sup>505</sup> Ibid para 8.338.

<sup>506</sup> Ibid para 8.79, referring to research of D Holtom et al in 2014.

<sup>507</sup> Explanatory memorandum, para 8.315.

<sup>508</sup> EA 1996, S332BA(3).

In any case, it is clear that neither the 1996 nor 2018 Act requires that *all* of these services, even just those for disagreement resolution, must be provided by a body external to the authority. The types of arrangements permissible are elaborated upon in both the existing SEN Code and the draft ALN Code.

The SEN Code envisages that a facilitator will bring all the parties together in a non-threatening environment to resolve the disagreement through discussion and negotiation.<sup>509</sup> It leaves it to the authorities to choose an approach that includes an independent element in their disagreement resolution arrangements. It offers a number of models that might be adopted to ensure that this is achieved, including: using a panel of trained facilitators, affiliated to a recognised dispute resolution body, whose services could be purchased as required; expanding existing disagreement resolution services that cover other areas of the authorities work to include SEN expertise; or using regional panels funded by a number of neighbouring authorities.<sup>510</sup> An example of the first is the service which can be provided by SNAP Cymru: SNAP itself describes this as independent of the local parent partnership.<sup>511</sup> Not all LAs fund SNAP's disagreement resolution service, and the level of funding differs between authorities.<sup>512</sup> When commissioned by local authorities or schools, the disagreement resolution service uses the skills of a pool of trained facilitators with specialist knowledge of additional learning needs, including SEN and disability. The aim is to arrive at a negotiated voluntary agreement which avoids the need for further action and with both parties considering that a better understanding has been achieved with all avenues having been considered. Where a full agreement is not reached, it may still be possible that particular aspects have been agreed upon and these can be reported to the Tribunal in any subsequent appeal.<sup>513</sup>

In 2018-19, SNAP Cymru participated actively in 302 cases involving SEN, EOTAS panels and casework discussion.<sup>514</sup> 5,263 cases were 'actioned' in 2018-19 of which 64% were dealt with by the help centre and 35% required a specialist case worker.<sup>515</sup> The 2018-19 Annual report concludes that information, advice, support including casework early intervention resulted in effective successful resolution.<sup>516</sup> There was the potential for an appeal raised in over 1000 matters; this number was reduced greatly by the telephone helpline team, resulting in 128 families (2.4% of the potential number) still considering an appeal to the Tribunal. Of those 128 families, 35 families were supported at the informal resolution stage with SNAP Cymru facilitating discussion with the family and local authority and these cases<sup>517</sup> were resolved without the need for an appeal to the Tribunal. <sup>518</sup> Specialist caseworkers facilitated 10 cases at Formal Disagreement Resolution stage which led to 3 cases being withdrawn by the family and 7 cases conceded by local authorities. 62 cases where support had been provided by SNAP Cymru at

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<sup>509</sup> SEN Code, para 2.27.

<sup>510</sup> SEN Code, para 2.29.

<sup>511</sup> Described on its website at <https://www.snapcymru.org/mediation/#>

<sup>512</sup> SNAP Annual report 2018-19, para 3.4; Annual Report 2019-20, p 6 'Appeals Casework'.

<sup>513</sup> <https://www.snapcymru.org/mediation/#faqs>

<sup>514</sup> SNAP Annual report 2018-19, para, 3.4.

<sup>515</sup> Ibid, para 3.6.

<sup>516</sup> Ibid, para 3.7.

<sup>517</sup> A case is defined as: when advice and support is provided in addition to information and signposting. SNAP 2018-19 Annual Report, para 3.9.

<sup>518</sup> Ibid para 3.7.



some stage lodged an appeal to the Tribunal, although at the time of the appeal some had appointed solicitors or otherwise ceased to be supported by SNAP Cymru.<sup>519</sup>

SNAP Cymru describes the process as involving access to a ‘trained and experienced facilitator who arranges and chairs formal disagreement resolution discussions and meetings.’ The facilitator gathers as much information about the disagreement as possible prior to arranging a formal disagreement resolution meeting. While impartial, the facilitator must redress any power imbalance between the authority and parents by explaining processes, ‘allowing the parents the first opportunity to speak and requesting clarification of issues in jargon free language.’ The role of the facilitator is to identify agreed areas and work with both parties to identify possible options for agreement. The facilitator will summarise the main issues of disagreement from the different parties’ points of view, make notes at the meeting and draft any agreement reached. They must record in writing the outcome of the disagreement resolution meeting. SNAP emphasises:

It is important that both parties contribute to the writing and the wording of the agreement in order to take ownership. The facilitator will write the voluntary agreement and explain its voluntary status. No one should feel pressurised into an agreement and should it be necessary further meetings can be arranged. A copy of the written document will be given to both parties to sign.<sup>520</sup>

This description from SNAP Cymru is useful as it provides an insight into the actual practice of disagreement resolution at present.

As regards the position under the ALN Act, the draft ALN Code appeared to envisage that the bulk of the arrangements for avoiding and resolving disagreements would be delivered, not by independent bodies, but by local authority staff. The early part of the relevant chapter in the draft ALN Code refers to the ‘staff’ delivering the arrangements.<sup>521</sup> It is only some way into the draft ALN Code chapter that it refers to provision for parties to the disagreement to access help from ‘persons who are independent of the parties.’<sup>522</sup> This section on the ‘independence of persons helping to resolve disagreements’ stands as a separate section and it is not clear how much of a ‘part’ of the local authority arrangements this independent provision would amount to. Additionally, it is unclear as to whether children/ young people / families would have to specifically request this or whether it would be offered.

The draft Code emphasises that the authority must ensure that staff delivering the arrangements are ‘impartial to the outcome of any potential disagreements.’<sup>523</sup> However, individuals acting impartially is not the same as persons who are ‘independent’ of the parties.

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<sup>519</sup> Ibid para 3.6.

<sup>520</sup> Described on its website at [www.snapcymru.org](http://www.snapcymru.org)

<sup>521</sup> Draft ALN Code, paras 25.11 and 25.12.

<sup>522</sup> Draft ALN Code, para 25.34.

<sup>523</sup> Draft Code para 25.12

The equivalent statutory provision in England is similar to section 68 of the ALN Act: section 56(1) of the Children and Families Act 2014 provides that local authorities ‘must make arrangements with a view to avoiding or resolving’ those types of disagreement set out in the section’ and, similarly to section 68(3) of the ALN Act, that these arrangements ‘must provide for the appointment of independent persons with the function of facilitating the avoidance or resolution’ of the relevant disagreements<sup>524</sup>. However, in contrast to the Welsh draft ALN Code, the SEN Code for England gives effect to the statutory duty by requiring that ‘[t]he service, while commissioned by it, must be independent of the local authority - no one who is directly employed by a local authority can provide disagreement resolution services.’<sup>525</sup>

Even where the local authority is not yet directly involved as a party, as for example if it were involved in arrangements seeking to resolve a dispute between children / young people / parents and a school regarding a decision on ALN or ALP, it must be borne in mind that the local authority may subsequently be requested to ‘reconsider’ the school’s decision. The reference to the right to request a reconsideration of a school’s decision in the middle of the section on ‘arrangements to resolve disputes’<sup>526</sup> highlights the fact that the local authority could be trying to support a family to resolve a dispute with a school in a situation where the local authority might subsequently have to reconsider the school’s decision. This highlights the risks of ‘inhouse’ delivery of these arrangements.

Considerable concern is evident on this part of the draft ALN Code in the consultation responses. The Welsh Government summary of responses notes that 34 of the 60 questions had a clear majority of positive answers. Of the other 26, ‘none had an absolute majority against the proposal but nevertheless included a significant number of negative or ‘not sure’ responses.’ One of the matters on which the uncertainty or negativity was greatest was in relation to arrangements for disagreement resolution and advocacy services. On the question about whether the requirements imposed in chapter 25 of the draft ALN Code on local authorities in respect of arrangements to avoid and resolve disagreement were appropriate, 41% answered yes, 39.5% said no and 19.5% were unsure.<sup>527</sup>

One concern was whether a local authority could be impartial in this matter since it had a vested interest in the outcome.<sup>528</sup> Many responses considered that financial pressures on the authority would make it impossible for it to act independently since the authorities would be in the ‘conflicted position’ of having to fund ALP. The Welsh Government summary noted that similar comments had also been made at regional consultation events. A number of responses urged that, as in the English SEN Code, it should be made clear that the services should be commissioned by the authority but not provided by it directly. Aside from the independence issue, there were also concerns expressed that past experience had shown some authorities to be confused as to what was the law and what were the local authority’s own policy and procedures.

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<sup>524</sup> Children and Families Act 2014, s 56(5)

<sup>525</sup> SEND code of practice: 0 to 25 years (England), para 11.6.

<sup>526</sup> Draft ALN code para 25.26

<sup>527</sup> Draft ALN Code consultation: Welsh Government summary and individual responses to the consultation. Available at: <https://gov.wales/draft-additional-learning-needs-code> (last accessed March 2020)

<sup>528</sup> Welsh Government summary of responses.

There was concern that authorities lacked the skilled staff needed to provide such arrangements themselves and that they would not be in a position to provide the intensive support in preparing for meetings that external bodies were currently providing.

There was also concern about whether there was a risk of inconsistent support if this is provided at local authority level rather than at a national level across Wales. This was also related to the funding of such services – some responses indicated that if a funding formula could not be agreed between Welsh Government and local authorities, then these services should be funded centrally.

Based on the feedback to our own project and that in the consultation responses, we consider that the powers in section 4(5)(a) of the ALN Act should be used to include a requirement in the ALN Code that these arrangements for disagreement avoidance and resolution are commissioned by the authorities and not provided directly by them.

If, however, some disagreement avoidance and resolution arrangements are to be provided from within local authorities, it is essential that the ALN Code provides more detailed guidance on how the authority can achieve an acceptable level of separation around those members of staff involved in the disagreement arrangements, so that confidence in those arrangement is not undermined.

Our other concern regarding chapter 25 of the draft ALN code is whether there is sufficient clarity in the guidance as to the kind of arrangements that should be made. There is much about the value of dispute avoidance and early resolution, and on the principles which underlie such arrangements. However, we found it challenging to form a clear and concrete picture of what local authorities will be required to provide. It is only at para. 25.31 that the requirement for a meeting is mentioned, and then para. 25.33 refers to the possibility of pre-meeting conversations, a series of meetings, and of different outcomes from the process, for example, ‘agreements reached’ or ‘agreement to disagree’. Some of the respondents to our research noted that it was useful to see the principles about the desired outcomes of the arrangements, but harder to be sure as to exactly what would satisfy the goals set out in the Code, and they indicated that they would welcome some practical examples for guidance (even if they are just ‘examples’ and not a prescribed process). While it is valuable that there is some flexibility as to the nature of the arrangements that might be made available, we have concerns about whether the guidance in chapter 25 is sufficient to ensure a level of consistency in provision across Wales.

Compared to the draft ALN Code, the existing SEN Code of Practice provides a little more guidance for local authorities as to the kind of arrangements that might be considered appropriate and valuable. Para. 2.29 of the current SEN Code sets out examples of possible models for local authority consideration: using a panel of trained facilitators, affiliated to a recognised body in the field of disagreement resolution and buying in services as required; expanding existing disagreement resolution services that operate over other areas of the authority’s work to include SEN; or using panels funded by a group of neighbouring local authorities. Para. 2.30 encourages local authorities to consider working with external bodies in making their arrangements.

Experience in England under the Children and Families Act 2014 has seen an increase in recourse to mediation (*engagement* in mediation sessions rather than the compulsory *contact* required by s55(3) of that Act in order to obtain a certificate in order to proceed to a Tribunal appeal). Independent research commissioned by the Department for Education (England)<sup>529</sup> found that, of the 3,000 parents / young people from 109 local authorities in the study, 42% chose to go to mediation. That research found that, of the group that chose not to use mediation, 36% went on to appeal compared to 22% of those who had chosen mediation. One of our expert participants considered that there was much in the rights-based approach in Wales that England could learn from but also stated that: ‘If there is something Wales might learn from England, it would be to consider the place for mediation in the system’.

In the context of mediation arrangements in England, Doyle observes that the confidentiality involved in mediation can make it difficult to access information about the process. She observes that although SEND-specific mediation practice standards have been developed, the steep increase in the number of mediations in England since the 2014 legislation has not been matched by a parallel increase in the scrutiny of the mediation process.<sup>530</sup> We submit that this is a point worth noting about all informal disagreement avoidance and resolution arrangements: not only is it necessary to ensure that there is enough scrutiny to ensure adherence to appropriate standards but there must also be some processes whereby authorities can reflect and learn from the disagreements that are referred to these arrangements. In the English context, Harris and Smith note the value of a regional approach to mediation not only for ensuring quality and consistency, but also in relation to learning opportunities and providing feedback on authority practice.<sup>531</sup>

Where the EA 1996 requires the authority to take such steps as they consider ‘appropriate’ to make the arrangements known to parents and children, the ALN Act is stronger in requiring that the authorities ‘must promote’ the use of the arrangements.<sup>532</sup>

In both cases, the use of these arrangements is not made a mandatory condition to making any appeal to the Tribunal. A number of responses to the draft ALN Code consultation considered that there should be some attempt to engage with informal disagreement resolution before an appeal could be lodged, but this is not a matter for the ALN Code since the provision is in the ALN Act itself.

## 15.4 The formal appeals system under the two Acts

Disputes under both the current and the future legislation focus on whether any learning needs of the learner have been identified and whether they have been properly provided for. Under the EA 1996 regime, no statutory remedies are provided in relation to disputes with a school regarding the identification of and provision for a learner’s SEN. A parent dissatisfied with progress at the school level has the option of requesting that the local authority assesses the learner’s needs. At that point,

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<sup>529</sup> Cullen et al, Review of arrangements for disagreement resolution (SEND) – Research Report, 2017. (available at: <https://www.gov.uk/government/publications/send-disagreement-resolution-arrangements-in-englandreview> (last accessed 21 March 2019)). On the potential value of mediation in SEND, see also M Doyle and N O’Brien, *Reimagining Administrative Justice – Human Rights in Small Places* (2020).

<sup>530</sup> M Doyle, *A Place at the Table* (UKAJI, 2019).

<sup>531</sup> N Harris and E Smith, Resolving Disputes about Special Educational Needs and Provision in England [2009] *Education Law Journal* 1, 10.

<sup>532</sup> ALN Act, s 68(4).

the dispute would become one with the local authority and move into the statutory arena which recognises and provides appeal rights to the Education Tribunal in relation to:

- a decision of the local authority not to carry out a statutory assessment. The Tribunal may dismiss the appeal or order the authority to arrange for an assessment to be made.<sup>533</sup>
- the local authority decision not to make a statement of SEN following assessment. The Tribunal may dismiss the appeal, order the local authority to make and maintain a statement or remit the case to the local authority for it to reconsider it in the light of the Tribunal's observations.<sup>534</sup>
- the contents of the statement (description of SEN or SEP, or school named or not named in part 4 of the statement). The Tribunal may dismiss the appeal, order the local authority to amend the statement regarding the SEN or SEP described, order the local authority to cease to maintain the statement, or in certain circumstances order the authority to specify the name of a school.<sup>535</sup>
- the refusal of the local authority to change the school named in the statement. The Tribunal may dismiss the appeal or order the local authority to substitute the name of the school specified by the parents.<sup>536</sup>
- the refusal of the local authority to carry out a re-assessment of SEN. The Tribunal may dismiss the appeal or order the local authority to arrange for an assessment.<sup>537</sup>
- the decision of the local authority to cease to maintain a statement. The Tribunal may dismiss the appeal or order the local authority to continue to maintain the statement, either in its existing form or with amendments as determined by the Tribunal.<sup>538</sup>

In making any of these decisions, the local authority must inform the parents and child in writing of their rights of appeal and relevant time limits, the availability of parent partnership and disagreement resolution services and the fact that the right of appeal is not affected by entering into any disagreement resolution procedure.

The Tribunal may review and vary its own decision if an application is made on grounds that there has been a material error.<sup>539</sup> There is also the right of appeal to the Upper Tribunal on a point of law subject to the Tribunal or the Upper Tribunal giving permission to appeal.<sup>540</sup>

Under the ALN Act, due to the single statutory scheme, the context will change. Significantly, all disputes concerning learners who may have ALN come within the statutory system. Disputes between the child / parents / young person and the school may arise in relation to:

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<sup>533</sup> EA 1996, ss 329 and 329A.

<sup>534</sup> EA 1996, s 325.

<sup>535</sup> EA 1996, s 326.

<sup>536</sup> EA 1996, Schedule 27, para 8.

<sup>537</sup> EA 1996, s 328.

<sup>538</sup> EA 1996, Schedule 27, para 11.

<sup>539</sup> Special Educational Needs Tribunal for Wales Regulations 2012, reg 56.

<sup>540</sup> EA 1996, s 336ZB.

- the decision of a governing body that the learner does not have ALN.<sup>541</sup> In this case there is no right of appeal directly to the Tribunal. However, the relevant person may request the local authority to ‘reconsider’ the decision, and the local authority must decide whether the learner has ALN.<sup>542</sup> In that case, the decision by the local authority will replace that of the governing body under section 11 of the ALN Act.
- the content of an IDP being maintained by a governing body under section 12 of the ALN Act. In this case, the relevant person may request the local authority to reconsider the plan with a view to it being revised.<sup>543</sup>

The right to request that a local authority reconsiders its initial decision adds a different approach to redress into the administrative justice system here, as under the previous arrangements there was no specific statutory right for a young person, child or parent to request a reconsideration of the school’s decision. Given that only a local authority’s decision may be appealed to the Tribunal, requesting this reconsideration is the first step on the way to a tribunal appeal. As observed earlier, as a new process, it will be important that the use and effectiveness of reconsideration is monitored.

If the dispute is not resolved by local authority reconsideration, the ALN Act provides for appeals to the Education Tribunal against the following local authority decisions:

- (a) a decision by ...a local authority under section 13, 18 or 26 as to whether a person has ALN;
- (b) in the case of a young person, a decision by a local authority under section 14(1)(c)(ii) as to whether it is necessary to prepare and maintain an IDP;
- (c) the description of a person's ALN in an IDP;
- (d) the ALP in an IDP or the fact that ALP is not in a plan (including whether the plan specifies that additional learning provision should be provided in Welsh);
- (e) the provision included in an IDP under section 14(6) or 19(4) or the fact that provision under those sections is not in the plan;
- (f) the school named in an IDP for the purpose of section 48;
- (g) if no school is named in an IDP for the purpose of section 48, that fact;
- (h) a decision under section 27 not to revise an IDP;

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<sup>541</sup> ALN Act, s 11.

<sup>542</sup> ALN Act, s 26. Chapter 17 of the draft ALN Code provides more detail.

<sup>543</sup> ALN Act, s 27.

- (i) a decision under section 28 not to take over responsibility for an IDP following a request to consider doing so;
- (j) a decision to cease to maintain an IDP under section 31(5) or 31(6);
- (k) a decision under section 32(2) that a governing body of a maintained school should cease to maintain a plan;
- (l) a refusal to decide a matter on the basis that section 11(3)(b), 13(2)(b), 18(2)(b) or 29(2)(a) applies (no material change in needs and no new information that materially affects the decision).<sup>544</sup>

On such appeals, the Tribunal may make the following decisions:

- (a) dismiss the appeal;
- (b) order that a person has, or does not have, ALN of a kind specified in the order;
- (c) order the local authority to prepare an IDP;
- (d) order local authority to revise an IDP as specified in the order;
- (e) order a governing body of a maintained school in Wales ... or local authority to continue to maintain an IDP (with or without revisions);
- (f) order a local authority to take over responsibility for maintaining an IDP;
- (g) order a ... local authority to review an IDP;
- (h) remit the case to the local authority responsible for the matter for it to reconsider whether, having regard to any observations made by the Tribunal, it is necessary for a different decision to be made or different action to be taken.<sup>545</sup>

If the Tribunal makes an order, the governing body or local authority must comply within the time stated and must report to the Tribunal on how it has complied.<sup>546</sup> The Tribunal may share details with the Welsh Ministers of any non-compliance.<sup>547</sup> Such non-compliance could also be the subject of a complaint against a local authority to the PSOW.

Regulations will provide a power for the Education Tribunal to revise and vary its own decision on grounds of a material error. There will continue to be a right of appeal on a point of law to

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<sup>544</sup> ALN Act, s 70(2).

<sup>545</sup> ALN Act, s 71.

<sup>546</sup> ALN Act, s 77.

<sup>547</sup> ALN Act, s 78.



the Upper Tribunal, subject to the Education Tribunal or the Upper Tribunal granting permission.<sup>548</sup>

### 15.5 The current system in practice

In terms of the statutory dispute settlement system of appeals to the Tribunal, the number of registered appeals has been reasonably stable from the first year of the Welsh Tribunal (2003-04: 139 appeals) to the most recent statistics available (2016-17: 144) although a number of years had registered appeal numbers falling below 100 (2007-08 – 94; 2008-09 – 92).

In most of the years for which statistics are available, the single most appealed issue has been the refusal of the local authority to assess. In the four most recent years for which statistics are available, the percentage of appeals against refusal to assess has been the single most appealed issue and the number has been rising, perhaps against the context of the moves to change away from the system of statements: 33% in 2013-14; 39% in 2014-15; 41% in 2015-16; 45% in 2016-17. However, when appeals about the different parts of the statement are put together, in 8 years they represent a majority of the overall appeals and a substantial percentage (never under 40%) of the overall in the other 7 years.<sup>549</sup>

The SENTW President noted the 34% increase in appeals for 2016-17, observing that the majority related to refusal to assess and refusal to statement. Her view, based on feedback from the SENTW user group meetings, was that parents were worried about the implications of the new Act for their children and might be keen to have statements in place rather than ‘testing the provisions under the new Act’.<sup>550</sup> She noted that there were concerns that number of appeals may increase due to the increased age range covered by the 2018 Act:

“With the new act, our jurisdiction will be extended to children and young people up to the age of 25 years. Our concern regarding this is that we could see a substantial increase in our numbers which will have an impact on our resources. When the age range was increased in the English Tribunal, they saw an increase in appeals of 20%, Scotland saw a similar increase. The expansion of the age range will also necessitate further training to ensure we have the required skills to deal with challenges that we may face in dealing with young people. We are already considering what further training is required and we will be putting the same in place over the next 12 months.”<sup>551</sup>

In terms of the outcomes of appeals lodged, a significant number are conceded each year. This means that the local authority notifies the Tribunal that it no longer opposes the appeal and has agreed to what the appellant requested in their appeal. Such cases amounted to 39% in 2016-17, 30% in 2015-16 and 29% in 2014-15. This raises a question as to why cases which have reached the point of being appealed are conceded at this point. Parents expressed the view that they were

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<sup>548</sup> ALN Act, s 81.

<sup>549</sup> Tribunal annual reports.

<sup>550</sup> SENTW Annual Report 2016-17, Foreword.

<sup>551</sup> SENTW, Annual Report 2016-17.



taken seriously by the local authority only when they involved a solicitor or indicated that they intended to appeal to the Tribunal. This perception may be unfounded but underlines the difficulty of the authority itself being involved in disagreement resolution arrangements. If true, it represents a cynical approach that penalises families without the resources to pursue an appeal. Separate from these are the cases which have been ‘withdrawn by consent’ which means that the parties have reached agreement and the parent agrees to withdraw their appeal on the basis of the agreed amendments. These represented 10% of outcomes in 2016-17, 12% in 2015-16 and none in 2014-15. In addition to this, a proportion of appeals are withdrawn by parents: 17% in 2016-17, 16% in 2015-16 and 36% in 2014-15. These may include some cases where an appeal was lodged in order to come within the required time limits but agreement was subsequently reached with the authority through informal means. The statistics do not provide reasons for withdrawal of appeals.

As regards those decided, more are upheld (in full or in part) than dismissed. Of the cases brought: in 2016-17, 13% were upheld in full or in part while 5% were dismissed; in 2015-16, 14% were upheld in full or in part and 7% were dismissed; and in 2014-15, 13% were upheld in full or in part and 4% were dismissed.

As observed in the section on the UNCRC, since the Education (Wales) Measure 2009, the child has had rights of appeal exercisable concurrently with the parent’s rights.<sup>552</sup> The 2009 Measure also added provision for case friends for children to make representations on the child’s behalf ‘with a view to avoiding or resolving disagreements’ with LAs regarding the exercise of SEN functions.<sup>553</sup> However, as noted earlier, to the extent to which information is available, cases brought by children and young people are very rare.<sup>554</sup>

## 15.6 Health disputes

A common theme during our research workshops was how education disputes often concern a cluster of related problems such as exclusions, SEN/ALN and discrimination often combining with other problems relating to health or social care. Just as we observed in our Housing Report, this adds to the complexity of the possible routes to redress and the obstacles in accessing a remedy. In England, the move to replace statements with EHCs (Education, Health and Care plan) is designed to provide a more holistic approach regarding education, health and social services. The approach taken in the ALN Act is to create a new duty to appoint a Designated Education Clinical Lead Officer (DELCO) to provide leadership within the health board and to liaise with local authorities.<sup>555</sup> In relation to disputes about health provision required for a child or young person with ALN, complaints about the health provision still need to be pursued through the NHS complaints system, *Putting Things Right*.<sup>556</sup> This could mean that an individual is required to follow two separate routes for redress. Some responses to the draft ALN Code considered that this could be confusing for families. The draft ALN Code notes that in such cases, which it anticipates will be infrequent, that a single point of contact to attempt resolution

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<sup>552</sup> This added s 332ZA to the EA 1996.

<sup>553</sup> The Measure added s 332ZC to the EA 1996.

<sup>554</sup> See Section 4.2 on the UNCRC.

<sup>555</sup> ALN Act, s 61; draft ALN Code, chapter 15.

<sup>556</sup> Draft ALN Code, para 25.41.

should be arranged by the local authority and health. The Children's Commissioner was concerned that this might be a situation where it transpires, after following the health complaints, that the dispute should have been one for the tribunal but was out of time. (There have in the past been difficulties in deciding the dividing line between health provision and educational provision, as for example in relation to speech and language therapy.<sup>557</sup>) She urged that if there was no statutory provision for allowing such an appeal to be lodged out of time, it would be an issue most appropriate for the exercise of the President's discretion to allow an out of time appeal.<sup>558</sup>

The Tribunal may require an NHS body to give evidence about its exercise of its functions and may make non-binding recommendations to an NHS body.<sup>559</sup> Where such a recommendation is made to an NHS body, that body must report to the Tribunal on the action taken or proposed to be taken or why the body has not taken and does not propose to take any action in relation to the recommendation.<sup>560</sup> If a recommendation is not acted upon, the Tribunal has the power to share this information with the Welsh Ministers.<sup>561</sup> It is important that responses from NHS bodies intending not to take action in relation to a recommendation of the Tribunal are monitored to assess whether there is a need for an alternative approach to the resolution of health disputes that arise in the context of ALN issues.

## **Recommendation 12:**

- (i) That local authorities gather and publish statistics on the level of use, and the outcomes, of the new reconsideration remedy.**
- (ii) That local authorities are required to gather information on the use and outcomes of the disagreement resolution services used, and to develop processes for reflecting and learning from the disagreements referred to these services.**
- (iii) That the statutory power in section 4(5)(a) of the ALN Act, for the ALN Code to impose requirements on a local authority in relation to the provision of independent advocacy services, should be used by Welsh Government to *require*, rather than *recommend*, that services are funded and managed to ensure independence.**
- (iv) That the statutory power in section 4(5)(a) of the ALN Act should be used to include a requirement in the ALN Code that the arrangements for disagreement avoidance and resolution are commissioned by the local authorities and not provided directly by them. That if this recommendation is not accepted, and some disagreement avoidance and resolution arrangements**

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<sup>557</sup> See for example, *R V Lancashire County Council ex parte M* [1989] 2 FLR 279 (CA); *Bromley London Borough v SENT* [1999] ELR 260.

<sup>558</sup> Response of the Children's Commissioner to the draft ALN Code consultation.

<sup>559</sup> ALN Act, s76.

<sup>560</sup> ALN Act, s 76(4).

<sup>561</sup> ALN Act, s 78.

are to be provided from within local authorities, it is essential that the ALN Code provides more detailed guidance on how local authorities can achieve an acceptable level of separation around those members of staff involved in the disagreement arrangements, so that confidence in those arrangements is not undermined.

- (v) That the guidance in chapter 25 of the draft ALN Code should be more detailed so that there is enough clarity regarding what is required in the dispute avoidance and resolution arrangements to ensure consistency in provision across Wales.
- (vi) That the value of mediation is given more explicit consideration in relation to informal dispute avoidance and resolution.
- (vii) That there is careful monitoring of NHS bodies' responses indicating that action will not be taken in relation to a non-binding recommendation of the Education Tribunal, and consideration as to whether any changes are required to how health disputes within the context of ALN issues are dealt with.

## Concluding reflections

This report demonstrates the range and complexity of routes to redress in relation to education disputes. It is unsurprising that at least some parents, learners, teachers, governors, and even some in local authorities may struggle to grapple with them. While there is good quality information available, it requires a basic knowledge of where to start and what to look for. What many people lack most is an overview of the redress system as a whole where they can locate the possible routes that they might follow, and the implications of choosing one over another.

It is also important that clear and accurate information and advice is available, as early as possible in relation to an issue that has arisen or may arise, and from a source that is independent from the parties to the dispute.

Those making decisions at all levels must have appropriate knowledge and understanding of the law and of general complaints handling best practice and must be supported in their decision making.

Finally, a key finding of this report is that it is essential that education disputes issues are appreciated within a *justice* perspective as well as a substantive education perspective.