

# **EDUCATION AND INSPECTIONS ACT 2006**

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## **INTRODUCTION**

1. The Education and Inspections Act 2006 received Royal Assent on 8 November 2006. It is a large and somewhat unwieldy piece of legislation that touches on several different areas, ranging from the general duties of local education authorities to the replacement of OFSTED by the new Office for Standards in Education, Children's Services and Skills.
2. This paper deals with three of the areas touched on by the 2006 Act:
  - (1) changes to the general education functions of local authorities;
  - (2) trust schools; and
  - (3) travel to and from school.

## **GENERAL EDUCATION FUNCTIONS OF LOCAL AUTHORITIES**

3. Sections 1 to 6 of the 2006 Act largely involve an expansion of local education authorities' pre-existing general functions in relation to education within their area (see, for example, the pre-existing ss 13 to 15B of the Education Act 1996).
4. A new s 13A is substituted into the Education Act 1996 by s 1 of the 2006 Act, imposing a duty on local education authorities to ensure that their functions relating to the provision of education are, so far as they are capable of being so exercised, exercised not just with a view to promoting high standards (as was already required

by the pre-existing s 13A), but also with a view to ensuring fair access to educational opportunity and promoting the fulfilment of every child's educational potential ("child" having an extended meaning for these purposes: Education Act 1996, s 13A(3)).

5. A new s 14(3A) is added to s 14 of the Education Act 1996 by s 2 of the 2006 Act, requiring local education authorities to exercise their functions in relation to the provision of schools under that section with a view to securing diversity in the provision of schools and increasing opportunities for parental choice.
6. It is likely that these new duties will form part of what have been described as local education authorities' "target duties" under the Education Act 1996 (see *R v Inner London Education Authority, ex parte Monin Ali* [1990] 2 Admin LR 822; *R (O) v London Borough of Hackney* [2006] EWHC 3405 (Admin)). Accordingly, it may prove difficult to compel compliance with them in specific cases.
7. A duty to consider parental representations in relation to the performance of functions under s 14 of the Education Act 1996 (i.e. functions relating to the provision of primary and secondary schools) is incorporated into that Act by way of the insertion of a new s 14A by s 3 of the 2006 Act. Where a local education authority receives any representation from the parent of a child who is of or under compulsory school age, it must consider the representation and what action (if any) to take in response and, within a reasonable time, it must provide the parent with a statement setting out what action it proposes to take and why (or its reasons for taking no action, if that is the case). It does not matter, apparently, whether the representation is made orally or in

writing. Provision is made for exceptions in the case of vexatious or repeat representations. The new s 14A(4) requires local education authorities to have regard to guidance given by the Secretary of State and the DfES has put out draft guidance for consultation.

8. A new s 436A is inserted into the Education Act 1996 by s 4 of the 2006 Act. This relates to school attendance and requires local education authorities to make arrangements to establish the identities of children in their areas who are of compulsory school age but are not on a school roll and are not receiving suitable education otherwise than at school. Essentially, this is a means of ensuring that local authorities identify those children in respect of whom they should be exercising their functions in relation to school attendance (for example, making school attendance orders, prosecuting parents or, presumably, providing “education otherwise” pursuant to s 19 of the Education Act 1996).
  
9. Section 5 requires local education authorities to appoint “school improvement partners” for every school that they maintain. School improvement partners are to provide advice to the head teacher and governing body with a view to improving standards at the school. A school improvement partner must be accredited for that purpose (s 5(2)). As is common throughout the Act, s 5 is mainly an enabling provision, with further details to be filled in by regulations. To date, the only regulations that have been made provide for persons already engaged or employed by a local education authority before 8 February 2007 for the purposes of providing advice to the governing body and head teacher of a school with a view to improving standards at the school automatically to become school improvement partners

(Education (School Improvement Partner) (England) Regulations 2007 (SI 2007 No 25)).

10. Finally, s 6 of the 2006 Act inserts new ss 507A and 507B into the chapter of the Education Act 1996 that deals with ancillary functions of local education authorities. There are two aspects to the duties imposed by these two new sections. First, local education authorities have a new duty to secure that primary and secondary education facilities have adequate facilities for recreation and social and physical training of children under 13 years old (Education Act 1996, s 507A(1)). This includes wide powers to establish, maintain and manage camps, holiday classes, playing fields, play centres, playgrounds, gymnasiums and swimming pools.
  
11. Secondly, local education authorities have a new duty, insofar as is reasonably practicable, to secure for young persons in their areas sufficient access to educational and recreational leisure-time activities which are for the improvement of their well-being, and sufficient facilities for such activities. These are known as “positive leisure-time activities”. In this context, “young persons” are persons who are 13 or over but under 20 (save where they have learning difficulties) (Education Act 1996, s 507B(2)). Guidance on the performance of these functions has not yet been published, but draft guidance has been put out to consultation by the DfES. According to the draft guidance, the intention is that local authorities should not be the “default provider” of positive leisure-time activities, but should be proactive in identifying appropriate providers. Further definition of what a local education authority may do in this regard is provided in s 507B(5) to (7) and the draft guidance gives examples of “educational leisure-time activities” as homework or special interest clubs; out-of-

school-hours coaching in artistic, sporting or other physical activities; learning opportunities available through facilities such as field centres and outdoor activity centres that provide residential, weekend and holiday-time learning opportunities; and volunteering activity. Examples of “recreational leisure-time activities” include sports and informal physical activities, as well as cultural activities including music, performing and visual arts. The draft guidance sets out national standards for positive activities.

12. Local education authorities have a power to charge for anything provided by them under s 507B. It remains to be seen how the power to charge will be squared with the duty to secure access to positive leisure-time activities (cost is identified as a barrier to participation in leisure-time activities in paragraph 2 of the draft guidance). Interestingly, the new s 507B appears to contemplate that there will be a presumption in favour of a local education authority contracting out its functions under this section (s 507B(7)) and this is a presumption that appears to be continued into the draft guidance.

### **TRUST SCHOOLS**

13. One of the centrepieces of the White Paper *Higher Standards, Better Schools for All* published in October 2005 was the proposal to establish “trust schools”. In the foreword, the Prime Minister stated that one of the Government’s main aims was “the creation of a system of independent non-fee paying state schools” and, perhaps unsurprisingly, these proposals sparked a significant amount of controversy.

14. In the event, the expression “trust school” is not to be found in the 2006 Act, although the term is still being used by the DfES (see, for example, the DfES’s *Short Guide to the Education and Inspections Act 2006*). Instead, there is the somewhat less snappy terminology of “the acquisition of a foundation by a school” and of “changes in the instrument of government of a school to allow for the majority of the governing body to be foundation governors”.
  
15. The implementation of the provisions of the 2006 Act relating to trust schools is still only at an early stage, with the majority of the relevant sections only coming into force on 1 April 2007 or 25 May 2007. As many of the provisions are not much more than enabling provisions, with the detail to be fleshed out by regulations and guidance, any consideration of their effect is slightly hampered by the fact that the relevant regulations have not yet been introduced and, where guidance has been issued, it has only been issued in draft form for consultation.
  
16. The starting point for a consideration of the means of acquiring trust status is s 18 of the 2006 Act. It provides for regulations to specify the types of alterations to maintained schools that may be implemented pursuant to proposals published under s 19 of the Act. As yet, no regulations have been made under this section, but s 18(2) makes it clear that the acquisition by a foundation school (or a foundation special school) of a foundation will in due course be one of the prescribed alterations, as will any change in the instrument of government of a school to allow for the majority of the governing body to be foundation governors (where that was not previously allowed under the instrument of government). These are the key ingredients of trust

school status. In this context, a “foundation” is a foundation established otherwise than under the School Standards and Framework Act 1998.

17. The type of body that may act as a trust in respect of a trust school is partly defined by a new s 23A inserted into the Schools Standard and Framework Act 1998 by s 33 of the 2006 Act. Again, this will be further fleshed out by regulations. A foundation must be a body corporate, a charity, and have as its purpose (or one of its purposes) the advancement of the education of pupils at the relevant school. There are limitations on the involvement of local authorities in foundations. There is a duty on both trusts, when carrying out their functions in relation to schools, and governing bodies to promote “community cohesion” (School Standards and Framework Act 1998, s 23A(6) and Education Act 2002, s 21(5)(b) (the latter paragraph is inserted by s 38 of the 2006 Act)). “Community cohesion” is undefined in the legislation.
18. The provision for the majority of the governing body to be made up of foundation governors is underpinned a new set of school governance regulations. Prior to 25 May 2007, no more than a quarter of the governors of a foundation school can be foundation governors (see the School Governance (Constitution) (England) Regulations 2003 (SI 2003 No 348)). However, as from 25 May 2007, the new School Governance (Constitution) (England) Regulations 2007 (SI 2007 No 957) will provide for trust schools (called “qualifying foundation schools” in the new regulations) to have a majority of foundation governors.
19. Local education authorities have no power to propose the acquisition of trust status (s 19(2)). Such a proposal must come from the governing body of the school itself

(subject, in certain circumstances, to the consent of the trustees of the school or the foundation: s 20).

20. Section 19 requires the publication by the governing body of a school of proposals to acquire trust status, which is to be undertaken in accordance with regulations made under s 21. No such regulations have been made to date, but s 21 indicates that the scheme of publication is likely to involve an element of consultation and a right to object.
21. Where a governing body has published proposals to acquire trust status, then it will be for the governing body alone to determine how to proceed with those proposals (s 22(4) and (5)), although again this will be the subject of regulations. It would appear that the only brake on governing bodies in this respect will be the envisaged right of a local education authority to refer the proposals to the Schools Adjudicator (see ss 21(2)(g), 22(5)(a) and (b), 23(1)), although it is likely that this right will only be exercisable in certain circumstances.
22. Pursuant to s 24, the implementation of a proposal to acquire trust status is to be governed by regulations. However, steps that may be taken to implement a proposal are likely to include the revision or replacement of a school's instrument of government; the reconstitution of its governing body; the transfer of property, rights and liabilities; and the transfer of staff (s 24(3)).
23. One of the aspirations of the 2005 White Paper was "to create a school system shaped by parents". Presumably in pursuit of this aim, the governing body of a trust school

must establish a “parent council” (new s 23A inserted into the Education Act 2002 by s 34). The purpose of a parent council is to advise the governing body on matters relating to the conduct of the school (and in particular the power to provide community facilities under s 27 of the Education Act 2002) (Education Act 2002, s 23A(3)). Although further provision for parent councils are to be made by regulations (which have not yet been made), the Act appears to envisage that parent councils may not be made up entirely of parents of pupils at the school (see Education Act 2002, s 23A(5)). Interestingly, the Act itself does not place any obligation on governing bodies to take into account any views expressed by a parent council and the practical efficacy of these provisions will no doubt be a matter of some debate.

24. There is provision for dispensing with trust status (although the DfES’s *Short Guide to the Education and Inspections Act 2006* emphasises that “a relationship with a trust is designed to be lasting”). Section 25 provides for the governing body of a foundation school to publish proposals either for the removal of the foundation, or for the alteration of the instrument of government in such a way that foundation governors will cease to constitute the majority of the governors, or both. In the light of the fact that the majority of governors will be foundation governors, s 25(5) envisages that the relevant regulations will enable this to be done at the insistence of a prescribed proportion of the governors of the school.

### **TRAVEL TO SCHOOL**

25. Part 6 of the 2006 Act inserts a raft of provisions dealing with school travel into the Education Act 1996. Interestingly, the 2006 Act refers to “travel” rather than “transport” (the term used in the Education Act 1996), presumably to reflect the

emphasis on sustainability and physical well-being in the new sections. These new provisions came into force on 1 April 2007.

26. The new s 508A in the Education Act 1996 (inserted by s 77 of the 2006 Act) requires local education authorities to prepare “a sustainable modes of travel strategy” to meet the school travel needs of their areas for each academic year and to promote the use of sustainable modes of travel to meet the school travel needs of their areas. “School travel needs” in this context means the needs of children and of young persons of sixth form age (s 508A(4) of the Education Act 1996). “Sustainable modes of travel” are modes of travel which a local education authority considers may improve either the physical well-being of those who use them, or the environmental well-being of whole or part of their area, or both (Education Act 1996, s 508A(3)).
  
27. A complicated new provision imposing upon local education authorities a duty to make travel arrangements for “eligible children” is inserted into the Education Act 1996 as a new s 508B by s 77 of the 2006 Act. It seems that this duty is to replace the old duty imposed by the pre-existing s 509(1) of the Education Act 1996, which now applies only in relation to Wales. In order to discover what is meant by an “eligible child”, it is necessary to turn to the new Schedule 35B to the Education Act 1996, inserted by Schedule 8 of the 2006 Act. The general structure of these definition provisions (which run to 15 paragraphs) is to identify certain categories of child and then stipulate certain criteria that must be met before they are “eligible children”. The general categories are: children with special educational needs, disabilities or mobility problems; children who cannot reasonably be expected to walk to school because of the nature of the routes; children who live outside the statutory walking distance and

in respect of whom no suitable alternative arrangements have been made; and children entitled to free school meals.

28. The criteria that must be met vary from category to category, but one of the common themes is that the child must be a registered pupil at a qualifying school (or, in some cases, be receiving education at a place other than a school pursuant to s 19(1) of the Education Act 1996) and no suitable arrangements have been made for the child to become a registered pupil at a qualifying school nearer to the child's home. Paragraph 15 of the new Schedule 35B defines a qualifying school, which includes an independent school where such a school is named in a child's statement of special educational needs. However, the duty imposed by the new s 508B only applies in the case of children to whom s 508B(2) applies, thereby effectively imposing further a criterion that must be met. That criterion is, in short, that there are no suitable travel arrangements already being provided free of charge by someone other than the local education authority.
  
29. Having identified a child to whom the duty in the new s 508B relates, the actual duty on the local education authority is to make such travel arrangements as it considers necessary in order to secure that home to school travel arrangements, for the purpose of facilitating the child's attendance at the relevant educational establishment, are made and provided free of charge (s 508B(1)). In this context, "travel arrangements" are travel arrangements of any description and include arrangements for the provision of transport and escorts. "Home to school travel arrangements" are arrangements relating to travel in both directions between the child's home and school (s 508B(3)).

30. Section 508B(6) and (7) makes some rather cryptic provision as to costs. On the face of them, they seem to suggest that no duty arises where the travel arrangements concerned would give rise to the need to incur expenditure in order for the child to take advantage of them, unless that expenditure is to be met by the person by whom the arrangements are made.
31. Section 444 of the Education Act 1996, which creates the offence of parents failing to secure regular attendance of their child at school, is amended to take account of the new duty under s 508B. In effect, the parent will have a defence to a charge under s 444 if he can prove that the local education authority had a duty to make travel arrangements under s 508B(1) but failed to discharge that duty (s 444(3B)). The extent to which the link drawn in the case law between s 444 and the old s 509 of the Education Act 1996 (which now applies only to Wales) will be replicated in a link between s 444 and the new s 508B remains to be seen, particularly as the pre-existing defence under s 444(4) now applies only if the child has his home in Wales (*cf. Surrey v Ministry of Education* [1953] 1 WLR 516 and *Devon County Council v George* [1989] 1 AC 573). This is likely to be one of the more interesting areas of debate (and therefore litigation) to arise out of the new travel provisions. In particular, there is likely to be a focus on the extent to which the wording of s 444(3B), which unlike the old s 444(4) is contingent upon the local education authority already having a duty to make travel arrangements, affects the ability of a local education authority to determine whether or not it is “necessary” to make travel arrangements and whether that is also affected by the fact that s 508B(2) imports an exercise of judgment that did not previously exist into a local education authority’s determination of what is “necessary” for the purposes of s 508B(1).

32. The new section 508C of the Education Act 1996 (also inserted by s 77 of the 2006 Act) confers a discretion on local education authorities to make “school travel arrangements” for children other than eligible children. The distinction between this power to make “school travel arrangements” and the duty to make “home to school travel arrangements” is that the former may be one-way only, whereas the latter has to be in both directions (*cf.* s 508C(3) and s 508B(3)).
33. Section 78 of the 2006 Act introduces the concept of “school travel schemes” by way of inserting a new s 508E and Schedule 35C into the Education Act 1996. School travel schemes are subject to the approval of the Secretary of State and it is apparently intended that only a handful of “Pathfinder” authorities will pilot them initially. By virtue of the new Schedule 35C, paragraph 1, local education authorities have a power to make a school travel scheme. Such a scheme must set out in general terms what arrangements the local education authority considers it appropriate to make in relation to travel to educational institutions (Schedule 35C, paragraph 2), it must require the making of travel arrangements for eligible children along the lines of those laid down by s 508B of the Education Act 1996 (Schedule 35C, paragraph 3), and it must set out the local education authority’s policy on charging (Schedule 35C, paragraph 5). Where a local education authority has made a school travel scheme, the requirements of that scheme effectively supplant the duties under s 508B and the powers under s 508C (s 508E(3)). This is reflected in an additional defence to a charge under s 444 where a local education authority has failed to make travel arrangements required by its school travel scheme (s 444(3B)(b)).

34. A new s 509AD (inserted into the Education Act 1996 by s 84 of the 2006 Act) requires a local education authority to have regard, when exercising its travel functions, to any wish of a parent for education to be provided at a particular institution where that wish is based on the parent's religion or belief. This is no more than a duty to take such wishes into account; it is not a duty to comply with them. As such, this provision is unlikely affect the outcome of cases such as *R (R) v Leeds City Council* [2006] ELR 25, decided in relation to the old s 509(4) (which now applies only to Wales). However, in cases involving potential "eligible children", paragraph 12 of the new Schedule 35B must be borne in mind.

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**3 May 2007**

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