SQUARE PEG
Because one size doesn't fit all in education

Not Fine in School

Working on behalf of children with school attendance difficulties & their families

Update on School Attendance Legal Action

March 2020

SUMMARY

Although no direct legal action is going to be taken against the government at this time, we are looking at other options for taking the legal action forward.
We are really pleased that the action taken to date has now resulted in written confirmation from the DfE that local authorities/schools should not be doing any of the following:

- **Insisting on medical evidence before marking an absence as authorised due to illness. This should only be the case where the veracity of an illness is in dispute.**
- **If a school insists on medical evidence because it doubts the veracity of an illness, the DfE states that the guidance requires this to be applied flexibly and if a doctor's note is not possible, other evidence should be accepted.**
- **Local authorities should be providing suitable education to children who cannot attend school. Importantly this does not only apply to children who's absences have been authorised because of illness.**

Parents can therefore feel free to use the information and quotes we have used in the following update, when writing to local authorities and schools about attendance policies in the future.

Since our last update, the legal team has progressed this matter by sending a letter before action to the Department of Education on behalf of two families who have been directly affected. The purpose of the letter before action was to set out potential grounds of challenge for a judicial review claim, giving the government a chance to address these issues and to confirm what action they would take.

In the letter before action it was made clear that there are very many children who are currently being affected by unlawful practices relating to absences from school, including parents being prosecuted, and children being left without education at all. The letter argued that the current legal framework was not fit for purpose and resulted in many instances where children with SEN were being left without support.

The Department for Education has now responded to the letter before action (see attached letter dated January 15th 2020), but they have maintained that they do not think they are obliged to make any changes to the current legal framework.

In their view, **the existing legal framework should not result in children being treated unfairly because of their illnesses or disability**. Their position is that if there are any unlawful practices, that these are down to **individual local authorities** and not down to the overall legal framework. Some of the key points they made included:

- **They say that the current legal framework provides for sufficient "flexibility" to avoid issues such as prosecution for non-attendance, even where absences have not been authorised.**

- **They reiterate that the Department for Education's Guidance on school attendance encourages a flexible approach: "Only where the authenticity of an illness is in doubt are schools advised that they can (not must) request parents to provide medical evidence, and schools are advised "not to request medical evidence unnecessarily".**

The DfE also states:

"The Attendance Guidance provides that **what constitutes medical evidence is also to be addressed flexibly**, noting that:

> "medical evidence can take the form of prescriptions, appointment cards, etc, rather than doctors' notes"….we would not expect schools to request medical evidence unless there is a clear case to do so.

Where a reason has not been provided, schools are advised to use Code N* as a holding code. This can be used flexibility, in an individual case, for a reasonable amount of time to establish the reason for absence."

*Note: Code N is an 'unauthorised' code so we do not see this as a truly suitable solution

- **The DfE make it clear that local authorities should be providing a "safety net" of suitable education for any child of compulsory school age who, by reason of illness, exclusion from school, or otherwise, may not for any period receive education**. The phrase "or otherwise" can be applied flexibly and can apply to children not just in situations where they cannot attend because of illness.

- **The DfE say that there are statutory exceptions which ensure that a parent should not be penalised or prosecuted where a pupil is prevented from attending school by sickness, or where the local authority has failed to fulfil any duty it has to help them get to school.**

- The DfE does not accept that the current legal framework could result in discrimination against children with SEND because it says there are sufficient safeguards in the system to prevent parents being unfairly prosecuted for non-attendance, and to ensure children receive suitable education if they are not able to attend school.

- Importantly the DfE states that "**there is no requirement for a formal diagnosis or formal medical evidence to authorise an illness absence**. Pupils in the position of the Proposed Claimants could be marked as "N" while evidence was being obtained. For example, evidence of ongoing referrals, to address the issue of lengthy waiting lists for medical consultations, could have been provided". One of the proposed Claimants was in a situation where "many

professionals (including a paediatrician) had confirmed his anxiety around attending school". The DfE says "it is not clear why this evidence would not have been sufficient".

- **The DfE also make it clear that it is not necessary for children to be marked as absent due to illness in order to receive adequate education outside of school**.

  "A local authority will have obligations under s.19 of the Education Act 1996 to make arrangements for the provision of suitable education not only where a child can't attend by reason of illness but also for those who can't attend for other reasons".

In light of the response from the Department for Education, the families involved in the case have consulted further with the solicitors and barristers, and for now it has been decided not to pursue further action against the government. That does not mean that no further action will be taken to get things changed for the better, however at present the legal team thinks there may be better ways to obtain the changes that are needed.

There are a number of other legal options that the families involved are now looking at with the legal team, in order to challenge unlawful practice, place pressure on local authorities, and to create precedents that will protect children with SEND. At this stage and to avoid prejudicing the families' cases, we will not list all of these legal routes online, however as soon as the strategy has been settled and legal proceedings have been taken further, we will try to keep you all updated.

CAN YOU HELP US?

We realise that many parents will feel frustrated that they have already tried to argue these points in their negotiations with their school or local authority, but relevant legislation is still not being followed. We would like to hear about any instances where this is the case. We would also like to see school and local authority policy documents or other written evidence that does not reflect legislation and/or the DfE expectations.

Please contact Fran using the email: hello@teamsquarepeg.org

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15 January 2020

Dear

Re: XX v Secretary of State for Education – Pre-Action Introduction

1. We write further to your letter dated 10 December 2019. We act on behalf of the Secretary of State for Education (the "**Secretary of State**").

2. The proposed claim, as set out in your Letter of Claim, has no prospect of success. The statutory framework, and guidance issued by, the Secretary of State does not create an unaccepted risk of unlawfulness in the form of breaches of Article 14 ECHR or otherwise. Further, while it is accepted that the PSED is a continuing duty, the Secretary of State has not acted in breach of his obligations. Rather, by continuing to monitor the equality issues engaged in education and school attendance, including in respect of special educational needs, the Secretary of State has fulfilled his obligations under the PSED.

The Proposed Claimants

3. You have explained that the Proposed Claimants are:

. **The Proposed Defendant**

4. The Proposed Defendant is the Secretary of State for Education (the "**Secretary of State**").

Gilad Segal - Head of Division
Nic Newling - Deputy Director, Team Leader MOJ, Public Law

The matter under challenge

5. You frame the challenge as being to the Secretary of State's policy of marking children absent where they are absent due to illness, where there is reasonable doubt about the veracity of the illness which can only be resolved with expert evidence. Specifically you say the system of absence marking:

> "fails to provide for a procedure where there is reasonable doubt about the veracity of an illness which, due to the nature of the illness, can only be resolved with expert evidence in circumstances where a referral has been made to an appropriate specialist, but the specialist has not yet provided the advice sought (typically due to long waiting lists within the relevant service)."

6. With respect, the way in which the challenge is framed is problematic. The Proposed Claimants have not made good their claim that they are accurately categorised as cases which could only be resolved with expert evidence. Rather, the current system provides for sufficient flexibility to avoid the negative consequences you describe (primarily the risk of a prosecution for non-attendance and/or the lack of alternative education) even without expert evidence.

Marking and Monitoring School Attendance

7. The system for marking and monitoring school attendance is a flexible and child-centred one. As explained in our letter of 29 October 2019 to Square Peg:

> "The [Education (Pupil Registration) (England) Regulations 2006] are clear that where a pupil is unable to attend school by reason of sickness, their absence must be treated as authorised. ….

8. This flexible approach is made clear in the Department's guidance on school attendance (the "**Attendance Guidance**"), which explains that schools should use Code I for illness "*unless they have genuine cause for concern about the veracity of an illness*". Only where the authenticity of an illness is in doubt are schools advised that they can (not must) request parents to provide medical evidence, and schools are advised "*not to request medical evidence unnecessarily*". The Attendance Guidance provides that what constitutes medical evidence is also to be addressed flexibly, noting that "*[m]edical evidence can take the form of prescriptions, appointment cards, etc. rather than doctors' notes*." As explained previously, we would not expect schools to request medical evidence unless there is a clear case to do so. Where a reason has not been provided, schools are advised to use Code N as a holding code. This can be used flexibly, in an individual case, for a reasonable amount of time to establish the reason for absence.

9. Both schools and local authorities have obligations to monitor children of compulsory school age who fail to attend school, or to attend school regularly. [r. 12 of the Education (Pupil Registration) (England) Regulations 2006/1751] There are a variety of steps schools and local authorities can take to enable children to return to full-time schooling. These include: using educational welfare teams to work with families to determine how best to re-engage children in education; part-time or phased returns to school; reintegration meetings; promoting good mental wellbeing and a supportive environment, including by way of making reasonable adjustments for those experiencing problems; following the graduated approach set out in the Department's statutory guidance on special educational needs and disability code of practice: 0 to 25 years (the "**SEND Code of Practice**")[1] for those with health issues which require additional support; making a request for an Education, Health and Care needs assessment where appropriate; and arranging alternative provision.

10. Although Parliament places responsibility for ensuring a child's full-time education on their parent, there is also a "safety net" provided by the local authority. A local authority must make arrangements for the suitable education of any child of compulsory school age who,

[1] https://www.gov.uk/government/publications/send-code-of-practice-0-to-25, Chapter 6.

by reason of illness, exclusion from school, or otherwise, may not for any period receive education without such arrangements. Education Act 1996, s.19(1). Thus, the local authority can have a duty to provide alternative arrangements in situations not only where children are unable to attend by reason of illness or exclusion. This is because the phrase "*or otherwise*" "*is plainly intended to encompass other causes of non-attendance at school or non-receipt of education*". R (DS) v Wolverhampton City Council [2017] EWHC 1660 (per Garnham J) (at para.36).

11. You highlight the fact that parents can be penalised for their child's absence. However, there are a number of safeguards which apply in this situation before a local authority may issue a penalty notice or prosecute. Statutory exceptions provide that a parent cannot be penalised where a pupil is prevented from attending school by sickness or where the local authority has failed to fulfil any duty it has to help them get to school.

Article 14 Discrimination Claim

12. In order to establish that different treatment amounts to a violation of Article 14, it is necessary to establish four elements. First, the circumstances must fall within the ambit of a Convention right. Secondly, the difference in treatment must have been on the ground of one of the characteristics listed in Article 14 or "other status". Thirdly, the claimant and the person who has been treated differently must be in analogous situations. Fourthly, objective justification for the different treatment will be lacking. R (Stott) v Secretary of State for Justice [2018] UKSC 59 (per Lady Black) (at para.8).

13. It is accepted that your claim falls within the ambit of A2P1, given the risk you outline of a failure to provide suitable education while the problem is resolved. However, the claim does not fall within the ambit of Article 8. You base your claim, in this respect, on the risk to the Proposed Claimants' parents of a fixed penalty notice and/or criminal proceedings. However, there are sufficient safeguards with respect to these proceedings to ensure that Article 8 is not engaged. Further, it is not accepted that the family life as a whole is engaged by the prospect of these proceedings.

14. Your claimed status lacks clarity. As defined, it is far more temporal and variable than the other types of status recognised in the Article 14 jurisprudence. The status you describe reflects not a personal characteristic or trait, but rather the efficiencies of a separate professional service provider (the awaited advice) and the child's parents (as to whether or not reasonable steps have been taken to obtain the evidence). Indeed, it appears that you are advancing a characteristic which is not personal but rather defined by the differential treatment of which you complain.

15. Finally, it is not even clear that your clients fall within this classification of status, as it is not accepted that their claims could only be resolved by the provision of expert evidence. Rather, the flexibility in the statutory framework allows for a variety of approaches in this situation, such as accepting the claim based on the parental evidence or by way of medical evidence other than an expert report, such as evidence of a referral or appointment card.

16. The difficulties in defining the relevant group or class flow over into the required analysis of differential treatment in analogous situations. The differential treatment you complain of is not between those who require, but do not have, expert evidence, but those whose illness is not accepted as genuine and those for whom it is. This in turn reflects any number of factors, only one of which is the nature of the illness in question.

17. Even if it were accepted that there were children in an analogous situation, and that your clients had a relevant status, the Secretary of State's approach is justified.

18. Initially, the correct test for justification under Article 14 is "*manifestly without reasonable foundation*" (or "**MWRF**"). The question, when deciding which test to apply, is not simply whether or not welfare benefits are involved. Rather, welfare benefits are a paradigm (but not the only) case of the type of social and economic policy decisions with which a court will be slow to interfere. Here, the questions of education, school attendance and the provision

of alternative education are also questions of social and economic policy, with significant fiscal implications. Therefore, the MWRF test should be applied.

19. With respect to the Proposed Claimants, it is not accepted that the current system gave rise to an unacceptable risk of unlawful treatment:

    19.1. As explained above at paragraph 8, the tone of the Attendance Guidance is that, generally, illness attendances should be authorised. Illness should be authorised "*unless they [i.e. the School] have genuine cause for concern about the veracity of an illness*" and schools are "*advised not to request medical evidence unnecessarily*."

    19.2. There is no requirement for a formal diagnosis or formal medical evidence to authorise an illness absence. Alternatively, pupils in the position of the Proposed Claimants could be marked as "N" while evidence was being obtained. Evidence of illness which was not technically expert evidence could have been provided. For example, evidence of ongoing referrals, to address the issue of lengthy waiting lists for medical consultations, could have been provided In XX's case, the GP letter did not formally comment on her ability to attend school, and nonetheless this evidence was accepted. With respect to YY, you have said that "*many professionals (including a paediatrician) had confirmed his anxiety around attending School.*" It is not clear why this evidence would not have been sufficient.

    19.3. There are a number of outreach options schools can use to continue to provide education to those who are not able to attend school regularly. Schools can send work home. Alternatively, they can engage local specialist services, or reach out to the local authority for this type of support.

    19.4. If a parent feels that a school has discriminated against their child in the way it has recorded the pupil's absence, and the child is disabled under the Equality Act 2010, the parent can make a discrimination claim to the First-tier Tribunal.

    19.5. Further systems for supporting pupils may be appropriate depending on the individual circumstances of each child. For example, if the child's needs are leading to a learning difficulty or a disability which calls for special educational provision to be made for him or her, we expect schools to put in place SEN Support through the graduated approach described in the SEND Code of Practice. A further example is the s100 duty in the Children and Families Act 2014 about meeting the needs of those with medical needs, for which there is associated guidance,[2] and the possible application of individual health care plans.

20. Therefore, while it is difficult to comment on the situations of the individual claimants given the limited information made available, it appears that the current statutory framework provides a number of safeguards to ensure that children receive the support they need to attend school, or be supported where they are too ill to do so.

21. You argue that it is necessary for children to be marked as absent due to illness to receive adequate education outside of school. However, there are alternative options available to parents in this situation to secure alternative educational arrangements for their children that are not linked to how a child's absence is categorised. As explained above, a local authority will have obligations under s.19 of the Education Act 1996 to make arrangements for the provision of suitable education not only where a child can't attend by reason of illness but also for those who can't attend for other reasons.

22. You also argue that the prospect of a penalty notice, or criminal proceedings, is discriminatory. We consider that there are sufficient safeguards built into those processes. It is a defence to these proceedings if the local authority has failed to fulfil any duty it has to help them get to school or the parent proves the pupil was prevented from attending by reason of sickness or any unavoidable cause. This is an issue on which a parent could

[2] https://www.gov.uk/government/publications/supporting-pupils-at-school-with-medical-conditions--3

provide evidence which a prosecuting authority, and ultimately tribunal, would have to take into account.

23. An administrative scheme is only open to a systemic challenge if there is something inherent in the scheme that gives rise to an unacceptable risk of procedural unfairness, rather than just a number of decisions that represent localised, or individual, failures. You have failed to set out any aspect of the scheme which gives rise to an unacceptable risk of procedural unfairness, let alone one which passes the requisite high threshold. R (Woolcock) v Communities Secretary [2018] 4 WLR 49 (Hickinbottom LJ) (at para.68).

24. The Letter Before Claim fails to make an arguable case of systemic unlawfulness. Rather, you have provided anecdotal evidence of two cases. We accept that both XX and YY, and their families, have been through a distressing time. However, this is insufficient evidence of a systemic unlawfulness. Beyond this anecdotal evidence, the Letter Before Claim contains assertions unsupported by evidence, such as the number of children who are affected by school attendance difficulties, the reasons why they have those difficulties, and the ways in which school leaders and local authorities address these issues.

PSED

25. The Secretary of State has acted consistently with his duties under the PSED.

26. What the PSED requires of public authorities is highly fact-sensitive and varies from case to case. R (Bailey) v London Borough of Brent Council [2011] EWCA Civ 1586 (per Pill LJ) (at para.83). The focus of the court, when considering whether a public authority has had due regard under the PSED, is substance rather than form. R (Baker) v Secretary of State for Local Government and Communities [2008] EWCA Civ 141 (at paras.35-7).

27. As your clients' case under the PSED is currently understood, it argues the 27 August 2019 letter from "Square Peg" and "Not Fine in School" brought these concerns to the attention of the Secretary of State and triggered a duty of inquiry.

28. The nature of the exercise required under the PSED will depend on the function being exercised. Dylan Powell v Dacorum Borough Council [2019] EWCA Civ 23 (per McCombe LJ) [44]. The analysis must be proportionate to the function being exercised. Branwood v Rochdale Metropolitan Borough Council [2013] EWHC 1024 (Admin) (per Haddon-Cave J [66-][67]). There are two features of your case which mean that the duty is not as you characterise it. First, the act in question is not a decision but merely a response to correspondence. Second, the very nature of the group in question means that consideration of the issue will result in consideration of equality issues.

29. The duty to inquire which can flow from the PSED is a pragmatic one. This was explained in a recent (August 2018) decision by His Honour Judge Cotter QC, sitting as a Deputy High Court Judge:

> "there is, by implication, a duty of inquiry upon any decision maker who must take reasonable steps to inquire into the issues, so that the impact, or the likely impact, of the decision upon those of the listed equality needs who are potentially affected by the decision, can be understood. On appropriate facts, this may require no more than an understanding of the practical impact on the people with protected characteristics who are affected by the decision…" R (KE & ors) v Bristol City Council [2018] EWHC 2103 Admin (at para.52)

30. The Secretary of State has fulfilled his obligations under the PSED:

30.1. The Department for Education engages in targeted monitoring. The Department collects data relating to the absence of each pupil in state-funded primary, secondary and special schools via the school census. Data is also collected relating to absence in pupil referral units, alternative provision free schools and alternative provision. This is published three times per year relating to each school term, including for every full

year, in National Statistics releases.[3] The data supports the Department in monitoring the impact of attendance policy. The published data includes breakdowns by pupil characteristics (such as SEN, ethnicity and gender) and reasons for absence. As well as considering overall absence rates, another key metric used by the Department is "persistent absence", defined by pupils missing 10 per cent or more of their time at school.

30.2. The Department also engages with stakeholders to inform the absence policy. It commissions research, liaises with local authorities, schools and representative bodies, considers published academic research, and receives and responds to correspondence from schools, local authorities and parents to understand issues of concern.

30.3. Finally, the Department considers that it has adopted a flexible policy around attendance which supports children with special educational needs, and disabilities.

ADR proposals

31. The Secretary of State is of the view that the nature of the claim renders it unsuitable for ADR. However, if ADR is proposed, it will be considered.

Address for Reply and Service of Court Documents

All further correspondence is to be sent to Priya Samplay, Government Legal Department, 102 Petty France, Westminster, London SW1H 9AJ (priya.samplay@governmentlegal.gov.uk) using the reference above.

Yours sincerely

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[3] https://www.gov.uk/government/statistics/pupil-absence-in-schools-in-england-autumn-term-2018