

## INFORMAL EXCLUSIONS

Nick Armstrong & Clive Yeadon

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The new guidance on exclusions, *Improving Behaviour and Attendance: Guidance on Exclusion from Schools and Pupil Referral Units*, was first published in March 2004 but was updated and republished in October. It reflects a number of subtle but significant changes in the conduct of exclusions, including to the burden of proof on appeal (see SI 2004/402 and paragraph 120 of the guidance). Equally important, however, is a shift in the emphasis on informal exclusions and their interrelationship with special educational needs (SEN).

Paragraph 5 of the guidance underlines that informal exclusions, by which it means anything falling short of a formal exclusion, are “illegal regardless of whether they are done with the agreement of parents or carers.” Paragraphs 148 and 149 deal with the presumption in favour of full-time education, adopting the guidance in an old Circular *Management of the School Day* (DfES 7/90) on numbers of hours and carrying them across to excluded pupils. Paragraphs 153 to 155 provide that children with SEN may occasionally be unable, on account of their needs, to access full-time education. In those circumstances, however, their statement “should be amended to set out the milestones in a staged return to full-time hours.”

The guidance was published during the course of an application for permission for judicial review *R(S) v Headteacher & Governing Body of Almondbury School & Kirklees MBC* [2004] EWCA Civ 1041. It was relied on as supporting the claimant’s submission that an arrangement whereby S was not permitted to attend school over lunchtime and (previously) some afternoons, during each school week, was unlawful. In two robust decisions, however, the courts found the submission unarguable, holding that the arrangement fell within the scope of proper headteacher management discretion and did not offend against either the law or the guidance.

We think the decisions are wrong, broadening management discretion beyond that which either Parliament or the DfES intended. In this article we set out the factual and legal background to the case, together with its possible implications, in more detail.

### FACTS

S came from a difficult background. As a result of domestic violence he and his mother had had to move from their home into a women’s refuge. He already had a statement of SEN at that stage. S first began to receive home tuition at the refuge but was then transferred to a Pupil Referral Unit. By July 2002, however, discussions about integrating him back into school had begun, and after his mother managed to secure a local authority tenancy in August of that year, his statement was amended to enable him to start at Almondbury, now his local mainstream school.

The statement was reasonably brief, diagnosing behavioural difficulties, providing for the National Curriculum and naming Almondbury without qualification. In agreement with S’s mother, however, when he started at school in October 2002, his attendance was restricted to five mornings per week. This arrangement was not, however, recorded in the statement.

The intention, or at least S’s mother’s expectation, was that S’s attendance would gradually be increased until he was back at school full-time. In November 2002 it was

agreed that Tuesday afternoons would be restored, although that was not in fact done until June 2003. When the new school year started in September 2003 S was permitted to attend Monday and Wednesday afternoons as well, but he remained out of school on Thursday and Friday afternoons, and also every lunchtime. The statement remained unamended, no alternative provision was made and although there were some short fixed term exclusions, there was nothing providing for what was now a long-standing part-time arrangement.

S's mother was increasingly concerned and in late 2003, she consulted solicitors. An application for judicial review was issued in February 2004 and in March, Thursday afternoons were restored. The application came before Sullivan J in April and was dismissed. Less than a week later, however, Friday afternoons were also restored. This meant that by the time the application came before the Court of Appeal in July, the only outstanding issue was S's non-attendance at lunchtimes.

## **THE CHALLENGE**

The arrangement was challenged on the basis that absent very unusual circumstances (such as a contagious disease) not said to apply here, part-time attendance could only be lawful by way of an exclusion, or by reference to a child's SEN. If the former, however, it would generate an exclusion appeal under the Education Act 2002 and associated regulations. If the latter, it would require an amendment to the child's statement, which would also generate a right of appeal, this time to the Special Educational Needs and Disability Tribunal (SENDIST).

The core proposition on behalf of S, therefore, was that Parliamentary and DfES intention was that generally, a child cannot be deprived of full-time education without generating a right of appeal of one form or another. This is because full-time education is important, and cannot be withheld without having some kind of informed and independently reviewed conversation about why that might be necessary.

The argument was developed by reference to Circular 7/90, above, the Education (School Day and School Year) (England) Regulations 1999 (SI 1999/3181), which provide for 380 school sessions per year delivered as two sessions per day, the exclusion guidance past and present, the Education (Pupil Registration) Regulations 1995 (SI 1995/2089) as summarised by Stanley Burnton J in *Ali* [2003] EWHC 1533 at [87], and the decision of the House of Lords in *L* [2003] UKHL 9. *L* is not an uncontroversial decision (see in particular Lord Hoffmann's dissent) on the extent of headteacher management discretion as to how to reinstate an excluded child (it is the case arising out teaching unions refusing to teach a reinstated pupil and the head having to make special arrangements). Even in *L*, however, the child was receiving full-time education.

With regard to SEN, S relied on the rules as to specificity in statements (paragraph 8:34 of the Code of Practice, *L v Clarke & Somerset CC* [1998] ELR 129 and *E v LB Newham* [2003] EWCA Civ 9) to establish the point that any part-time arrangement would be so significant as to have to be recorded. He also relied on section 312 of the Education Act 1996 which defines special educational provision by reference to that "which is additional to, or otherwise different from, the educational provision made generally for children of his age in schools". This would seem to mean non-full-time education. Finally, he made

general submissions about the desirability of generating a right of appeal in cases of this kind, observing that absent a High Court declaration of unlawfulness which would force an amendment to the statement, no right of appeal to the SENDisT could lie. There was no appealable decision.

## **THE JUDGMENTS**

Sullivan J found on the facts that there had been no exclusion. He thought the headteacher had clearly intended to justify the arrangement by reference to S's SEN. With regard to the argument that in order to be lawful that meant there had to be an amendment to the statement, he dismissed it in unequivocal terms. This, he found, was a school "doing its very best to ensure that S [was] integrated, at a pace he [could] manage, into mainstream schooling." He said there was no evidence to the contrary other than S's mother's views, and it was "impossible to contend that a headteacher does not have a discretion under the 1996 Act to permit such a pupil to attend school for four and [a] half days, or four days, or however many days a week they can cope with."

Sedley LJ in the Court of Appeal was a little more sympathetic, but he also dismissed the argument. By then, as already noted, the court was only concerned with lunchtimes and Sedley LJ felt that this was too small to engage the court's attention. At [7] onwards:

"I can see that there is a potential issue of legal principle – the problem posed by Mr Armstrong of a child potentially trapped either in an informal exclusion, because he is not getting the full-time education that the statement presupposes, or having a statement which does not accurately set out the needs which the school is purporting to give effect to.

But what has happened here is that the issue has shrunk to a measure – lunchtime attendance – which is, in my judgment, simply too little for the courts to resolve by the use of judicial review. It lies, as it must do, within the management functions of the school in seeking to give effect to a plan for the boy's reintegration into mainstream schooling without the disruption either of other children's schooling or of his own.

The courts are not a chessboard on which legal gambits can be played for some ulterior gain. They are there to decide the rights and obligations of individuals and institutions, and it seems to me that there is, as things stand, nothing justiciable left that stands between the parties in the present situation. So while I can accept that a question of principle of the kind adumbrated by Mr Armstrong may lurk in the sort of situation which at least initially was present here, the case has gone far past the stage where the court could usefully intervene, assuming that a case in law were made out."

## **IMPLICATIONS**

*S* is only a permission decision, and as Sedley LJ makes clear, confined to its facts. Nevertheless, and particularly bearing in mind its tone, it is also the higher courts giving a powerful indication of how big a margin of appreciation they are prepared to afford headteachers. We think that in this respect it goes too far.

This is not because the headteacher in *S* was necessarily wrong. It is because the courts, in the exercise of their public law discretion, cannot be satisfied to the proper threshold that she was right. Judgements on exclusions and SEN are complex. As the guidance makes clear, there is an increasing number of creative alternatives, and an increasing array of initiatives that ought to be tried first. This is all the more so in SEN cases, where reasonable minds can, and usually do, disagree over both diagnosis and provision. Parliament has created the SENDisT and exclusion appeal panels to resolve these disagreements, and the point of the application in *S* was to generate a SENDisT appeal. A court on judicial review cannot know what evidence will be called before the SENDisT, and can have no idea what view will be taken of a head's judgement once it has been tested by way of cross-examination. In very many cases, and contrary to the view expressed by Sullivan J, a mother's view will be preferred to that of a school.

With regard to the significance of lunchtimes, clearly, losing those is often less important than losing classroom time. All the exclusion guidance, however, past and present, has stressed that they are sufficiently important to trigger the exclusion jurisdiction. The October guidance says the same: paragraphs 30 and 31 provide that a lunchtime exclusion is to be treated as equivalent to a half-day exclusion, and a lunchtime exclusion for an indefinite period is unlawful. In *S* itself the arrangement had subsisted for nearly two years with no immediate prospect of it coming to an end.

If it is sufficiently important to trigger the exclusion jurisdiction, we think it must be sufficiently important to sound in SEN terms as well. Preventing a child from attending school over lunch deprives him of the most important opportunity for socialising and learning about socialising. It also, of course, and as *S*'s mother believed happened to *S*, spotlights that a child is different, which has its own impact on self-esteem and behaviour, and on peer group reaction. This is quite apart from the impact on parents who have to arrange to have the child picked up and dropped off.

In our view, this is enough to make it justiciable. We continue to think, therefore, that the Education Acts 1996 and 2002, together with the related guidance, require such arrangements to be justified in exclusion or in SEN terms. Plainly, however, at least two courts do not agree.

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