

Education, Law and Practice

Fourth Edition

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INTRODUCTION

Since the publication of the first edition of this book in 1999, the reform of education law and practice has been unremitting. Education has been at the centre of political campaigning, and there has been a tendency for incoming governments to change the structure of the educational system. Examples can be found in the abolition of assisted places in 1997, the creation of the infant class size rule and the restriction of grammar schools in 1998, and the Academies Act in 2010. One of the first acts of the Conservative Government led by Theresa May, has been to launch a consultation on the re-introduction of selective state schools. There are serious questions to be asked about the treatment of education as a political tool.

Following the vote on 23 June 2016 to leave the European Union it is difficult to predict what changes may be made to the education system in England and Wales in the coming years. We may be about to see a political revolution, or perhaps mere cosmetic changes which leave the status quo intact. The authors encourage all who have involvement in education at all levels, and in the delivery of services intended to foster the development and welfare of young people, to understand what the law can deliver in order to achieve greater encouragement of equality and access to justice and the facilities that are made available for the development and well-being of young people.

Since the previous edition of this book there has been a large amount of secondary legislation, much of which amends primary legislation. This piecemeal approach to updating the legislation makes it extremely difficult to establish what is in force at any given time. This method of amending legislation may explain the substantial increase in guidance from the Department for Education (DfE) which has been issued in the recent years. The law of education is extremely complex and reaches beyond academic teaching into the functioning of modern society.

Unfortunately, access to qualified education lawyers who are able to navigate through the statutory minefield has been undermined by successive governments. The Legal Aid, Sentencing and Punishment of Offenders Act 2012, which abolished legal aid for many areas of law, specifically preserved legal aid for education cases for children and people up to the age of 25 with learning difficulties. However, the operation of the publicly funded legal aid system was modified by procurement and contracting decisions that removed 95% of the expert providers available to give advice. This was brought about by cutting rates of pay and making costs assessment rules which

defeat most meritorious claims. At the time of writing, there are only two education law providers with legal aid contracts in the whole of England of Wales. They have to concentrate on giving advice in the absence of adequate resourcing for representation; they are usually unable to bring test cases which could result in an improvement to the education system for the numerous people who approach them daily.

This book is primarily designed to enable general practitioners to become aware of education law and its application and relevance to other fields of law. In previous editions of this work we expressed our concern at the educational challenges facing children in care or within the youth justice system.

In the Introduction to the second edition we wrote:

‘We are particularly concerned about the plight of children in care; particularly those with special educational needs or disabilities. Currently, many of the rights afforded to such children are exercised by the parent. However, for children in care, particularly those who have no active parent other than the local authority, effective scrutiny of provision will, in practice, be non-existent since it will be dependent on the vigilance and independence of the social worker charged with the responsibility for the child; something which even the most dedicated social worker would find extremely difficult, particularly when he/she is employed by the very same body that is making the educational decision.’

In the third edition we commented:

‘The Children Act 2004 provisions requiring cooperative working between education and social services and other authorities came into force in September 2005. Sadly, these remain largely disregarded in practice. It is important for schools and education officers to recognise that the Act is supposed to safeguard the welfare of all children, as was made clear in the Education Act 2002, s 175. The outlook is grim, with recent events revealing a significant drop in the number of quality applicants for social work posts. Sadly, the most deserving cases are not even in the educational system. A significant proportion of young offenders are people with learning difficulties and/or those whom the education system has failed or excluded. Unfortunately, they and their parents are the least likely to recognise and exploit the remaining educational opportunities.’

Initiatives such as the establishment of the Independent Inquiry into Child Sex Abuse in 2014 might be seen as part of a wider move towards a political solution, however we believe the answer lies in more positive social work with parents to change negative attitudes of education. If the Home Office and the Ministry of Justice are determined to make legislative and procedural changes to safeguard the interests of children they could refer to the decades of evidence

which has been presented to the legal aid authorities and in inquiries during the last 30 years. It is unfortunate that cases have not reached the courts because of the legal aid funding rules and the loss of independent scrutiny by the Law Society which ran legal aid until 1989.

The book, although aimed at lawyers and advisers, looks at law and practice from the viewpoint of pupils and students rather than the providers. We have tried to arrange the book in the same order as a parent may encounter problems where a legal point could arise. Most parents, and many lawyers, might not recognise immediately the precise legal issue in this complex field. We look at what to do when things go wrong and consider available remedies. It is essential to consider carefully the practical effect of any intended course of action where the welfare and development of a child or young person is involved. It can take years to make good the damage done by a traumatic educational experience or a failure to meet special educational needs.

We hope that this book will be a practical guide, making education law accessible to a range of legal advisers, social workers, children's guardians, and those within educational establishments and Local Authorities. We believe this book will have served its purpose if it assists in the recognition of education law problems and their social consequences. This is, however, a highly technical field and specialist advice and assistance will often be required in obtaining expert evidence and making representations.

The law is stated at 31 October 2016.

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