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Füssel, Hans-Peter [Hrsg.]; Roeder, Peter M. [Hrsg.]: Recht - Erziehung - Staat. Zur Genese einer Problemkonstellation und zur Programmatik ihrer zukünftigen Entwicklung. Weinheim : Beltz 2003, S. 70-85. - (Zeitschrift für Pädagogik, Beiheft; 47)

Zeitschrift für Pädagogik · 47. Beiheft

Recht – Erziehung – Staat

Zur Genese einer Problemkonstellation
und zur Programmatik ihrer zukünftigen Entwicklung

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Beltz Verlag · Weinheim, Basel, Berlin

Herstellung: Klaus Kaltenberg
Satz: Druckhaus »Thomas Müntzer«, Bad Langensalza
Druck: Druckhaus »Thomas Müntzer«, Bad Langensalza
Printed in Germany
ISSN 0514-2717

Bestell-Nr. 41148

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Paul Meredith

Statutory Regulation of the Secular Curriculum in England and Consequences for Legal Liability

1. Introduction

The extent and scope of state regulation of the secular curriculum[1] and of the quality of educational provision in schools in England has grown virtually beyond recognition in the past 15 years. Within that period, England has moved from being one of the least legally regulated systems to one of the most highly regulated in Europe, a transformation which has been by no means without political, educational and legal controversy. The introduction of a highly regulated curricular framework during this period does not stand alone, but rather is to be seen as one very important element within a wider range of related educational reforms initiated by the radical reforming Conservative government in office from 1979 until 1997 under the Premiership first of Margaret Thatcher and subsequently of John Major. Many of these reforms have since 1997 been endorsed and consolidated by the present Labour government under Tony Blair.

This article will first address the question as to why the government decided to develop a highly detailed and prescriptive regulatory framework for the curriculum in England, placing this reform in the context of other related educational reforms during the same period. The second part of the article will examine some key elements of the regulatory framework itself and will discuss in particular the manner in which it is formulated and promulgated by the central government. The focus of this part of the article will include discussion of the nature and scope of the powers vested in the Secretary of State for Education in this context. The final part of the article will consider the potential for legal challenge by aggrieved parties – parents or children – in respect of the substantive content, quality or delivery of the curriculum in schools. It will consider the limited litigation that has arisen so far in England relating to the substance of educational provision, and whether the establishment of a detailed regulatory framework for the curriculum increases the likelihood of litigation in this context.

2. Background to introduction of a regulatory framework for the curriculum

The founding statute of the current school education system in England – the Education Act 1944 – contained only the most skeletal provisions relating to the secular curriculum. The policy of the 1944 Act strongly favoured discretion at the level of the local

1 This article will focus on regulation of the secular curriculum. Religious education and worship will only be mentioned incidentally.

education authority (LEA) and an almost total absence of centralised prescription. Control over the secular curriculum was essentially based upon a partnership between the LEA, the school's governing body and the headteacher (Education Act 1944, Sect.23), subject to a very broad overall responsibility vested in the Secretary of State to „promote the education of the people" (Education Act 1944, Sect.1). This largely permissive approach may have been in part attributable to an inherent fear at that time of centralised control, direction or even indoctrination, but was also informed by a genuine belief that LEAs and the teaching profession had and ought to have an important contribution to make to curricular content, and that diversity of provision was inherently desirable. For twenty years or more there existed a broad consensus that this allocation of responsibility for the curriculum was appropriate. During the later 1960s and the 1970s, however, a complex range of pressures for fundamental reappraisal of curricular control started to emerge, culminating in the establishment of a complex statutory framework for the curriculum – including a national curriculum – under the Education Reform Act 1988. The core reason for these pressures was a widespread perception that educational standards were in decline, in part perhaps by virtue of the move during the later 1950s, 1960s and 1970s towards comprehensive reorganisation of secondary schools – the abolition of academically selective entry. Widespread disquiet about educational standards, as well as some specific and widely publicised instances of failure of educational provision in particular LEAs (Inner London Education Authority 1976), led to the instigation by the then Prime Minister, James Callaghan, of a „great debate" on education in a famous speech in Oxford in 1976, followed by a series of regional conferences on education, and the publication in 1977 by the government of a Green Paper entitled *Education in Schools: A Consultative Document*[2]. The embryonic elements of the national curriculum concept are clearly discernible in this Green Paper. Following the general election in 1979, the incoming Conservative government seized on the secular curriculum in schools as a major political and social issue, and in the course of the following decade transformed legal regulation in this context almost beyond recognition – from the negligible provisions of the 1944 Act to a highly prescriptive regulatory structure which few could previously have envisaged (Meredith 1992). The government in its 1985 White Paper, *Better Schools*[3] set out a programme for the establishment of a broad consensus over the aims of the secular curriculum. This was followed by a further paper in July 1987, *The National Curriculum 5-16: a Consultation Document* which was the immediate prelude to the introduction of the legislative framework of the basic and national curriculum in the Education Reform Act 1988 (Meredith 1989; Flude/Hammer 1988; Bash/Coulby 1898). The 1988 Act was not the first major educational measure introduced by the Thatcher government[4], but it was by a considerable margin the most wide-ranging and penetrative. The basic and national curriculum was the centre-piece of the 1988 Act, although the same Act also introduced

2 Cmnd. 6869 (1977).

3 Cmnd. 9469 (1985).

4 See in particular the Education Act 1980 and the Education (No. 2) Act 1986.

a range of other highly significant reforms including the creation of grant-maintained schools and reform in the context of parental choice and the management of schools. The government proclaimed the introduction of the basic and national curriculum as an endorsement of the consensus that had built up over the preceding 10 years or more over the curriculum, and as a fundamental underpinning of educational standards. The assertion of centralised control over curricular content was seen as the surest means of securing high educational standards across the whole range of LEAs facing many differing challenges and problems. While this was the fundamental rationale for the basic and national curriculum as portrayed by the government, there is little doubt that the government placed a high priority upon centralisation of power over the educational system as a whole. In part this may have been attributable to a profound distrust on the part of members of the government of LEAs and, to an extent, elements within the teaching profession, whom the government saw in some cases as espousing radical and left-wing educational theories which they felt had contributed to the decline in educational standards in the 1970s. But there was also strong feeling within the government that LEAs lacked the resources and the will to tackle the shortcomings in educational standards in many areas, and that a very strong element of control and direction from the centre was required. Centralisation of control in the hands of the government department responsible for education (currently known as the Department for Education and Skills (DfES)) has been a major feature of educational reform ever since; indeed, LEAs have seen many of their functions significantly eroded in the past 15 years – not only in respect of the curriculum – through an amalgam of centralisation of power in the hands of the Secretary of State and devolution of power through managerial restructuring to the governing bodies of individual schools (Meredith 1998). The establishment of the basic and national curriculum is, however, arguably the most obvious manifestation of that wider process of centralisation.

While concern over educational standards – and its distrust for LEAs and elements within the teaching profession – may have been the government's primary motivation for introduction of a centrally regulated curriculum, it should also be understood as being inextricably connected with other key components within the government's radical educational reform agenda in the 1980s. Above all, the government was seeking to instil into the school education system notions of individualism, parental choice, and accountability on the part of the providers of education to their consumers – seen in particular as parents, although accountability to the wider business and social community was also viewed as important. Taken together, these reforms may be regarded as introducing into the school system a significant element of market forces, giving parents as consumers some degree of power to choose between competing providers of educational services (Harris 1993). The underlying rationale for the incorporation of an ethos of competition and accountability was that this was the most certain way to secure improvement in educational standards. Whether it has done so is a matter of considerable doubt, particularly in respect of schools located in socially and economically deprived inner city areas faced with steadily declining pupil numbers. This, however, goes beyond the terms of reference of the present article. The crucial point for the pur-

poses of this article is the direct link between the introduction of a centrally regulated national curriculum and these other reforms: a central element within the national curriculum would be the arrangements for assessing pupils at set key stages, and this would facilitate the development and promulgation of comparative information about pupil performance at each school. This in turn was facilitated by the imposition of important duties on LEAs and schools under Sect.16 of the Education (Schools) Act 1992 in respect of the publication of results, which have come to be widely disseminated in both the national and local newspapers in the form of comparative „league tables" of school performance, with wide implications for parental choice, competition and accountability. Many have viewed this development as highly damaging to the education system, not least by virtue of the relatively crude form in which comparative information about school performance has been disseminated, with little or no contextual background about the socio-economic context within which particular schools operate. What is clear, though, is that the national curriculum with its integral assessment mechanisms has greatly facilitated the development of such a system for making comparisons between schools on the basis of „measurable outputs", and that this was central to the government's thinking when the framework of the national curriculum was being debated in the late 1980s. In the next section we will go on to consider the key elements of that framework as it has evolved over the years since its first establishment in the Education Reform Act 1988.

3. The statutory framework of the curriculum

The establishment of a highly prescriptive and regulated secular curriculum for maintained schools in England (and Wales) formed the centre-piece of the government's wide-ranging Education Reform Act in 1988, arguably the most radical reform of the education system since the Education Act 1944. The 1988 Act made provision for both religious education and worship (which lie outside the national curriculum) and for the establishment for the first time of a national curriculum for all registered pupils of compulsory school age in maintained primary and secondary schools.

The Act itself did not lay down the contents of programmes of study and assessment arrangements, but established a structural framework for the curriculum, specifying which subjects were required to be taught at various key stages, and empowered the Secretary of State to issue Orders and supporting Documents which themselves would contain the detailed prescription as to what must be taught and how pupils would be assessed. In the event, the process of devising a wide-ranging and comprehensive curriculum within all the specified subject areas and promulgating the relevant Orders and curricular Documents inevitably took several years to complete, not least because there was wide disagreement between educationalists, members of the statutory advisory body set up under the Act to advise the Secretary of State (then known as the National Curriculum Council) and members of government (Graham/Tytler 1992). Furthermore, there was wide opposition, especially to the arrangements for the testing of pu-

pils, from members of the teaching profession. Many teachers argued that their professional autonomy had been seriously compromised by the highly prescriptive contents of the programmes of study, as originally drafted, and many were deeply opposed to the elaborate nature of the assessment and testing arrangements, the latter leading to industrial action by teachers and to litigation over the obligations of teachers in respect of testing pupils[5]. Indeed, during the early years of establishing the detail of the national curriculum, opposition from many quarters was strong, and the government came under increasing pressure to modify the content of the programmes of study, notably by making them less burdensome and less prescriptive, and to make the testing arrangements less complex and elaborate. The government commissioned a major inquiry into the operation of the national curriculum, chaired by Sir Ron (now Lord) Dearing: the Dearing Report, published in 1994, *The National Curriculum and its Assessment – Final Report,* put forward extensive recommendations for reducing the level of detailed prescription within the curriculum, crucially important both for the pupils and from the point of view of the professional standing and expertise of the teachers. As a result of the Dearing recommendations, the national curriculum as originally drafted was significantly modified through amending Orders and supporting curriculum Documents. Indeed, it has been subject to a process of continuous amendment and evolution ever since. Furthermore, important statutory changes have been introduced, particularly in respect of the provision of sex education (Education Act 1993, Sect.241); and, most recently the national curriculum has been extended to cover what is known as the foundation stage of education, for pupils aged between 3 and 5 years under the Education Act 2002. The statutory framework for the school curriculum was consolidated along with other aspects of existing statute law on school education in the Education Act 1996, but most of the provisions relating to the national curriculum have been re-enacted in the Education Act 2002 which now provides the current legislative framework for most aspects of the secular curriculum.

Under the Education Act 2002, the curriculum for every maintained school in England[6] is required to comprise a „basic" curriculum with three key components:

a) religious education for all registered pupils, irrespective of age, subject to a parental right of withdrawal;
b) the „national curriculum for England", applicable to all registered pupils aged between three and 16 years; and
c) in the case of secondary schools, sex education for all registered pupils, irrespective of age, subject to a parental right of withdrawal (Education Act 2002, Sect.80(1)).

Additionally, a number of very general aspirational requirements are imposed in respect of the curriculum. It is required to be „balanced and broadly based" and to promote

5 Wandsworth London Borough Council v. National Association of School Masters, Union of Women Teachers [1994] Education Law Reports 170.

6 Parallel provision is made for Wales in the Education Act 2002, Sect. 91-118.

„the spiritual, moral, cultural, mental and physical development of pupils and of society" (Education Act 2002, Sect.78(1)).

The national curriculum is divided up into a „foundation" stage for pupils aged between three and five years[7], and four „key" stages for pupils within the age ranges respectively of six to seven years; eight to 11 years; 12 to 14 years; and 15 to 16 years (Education Act 2002, Sect.82). The Act goes on to lay down certain general requirements as to the knowledge, skills and understanding which pupils are expected to acquire during the foundation stage and the „areas of learning" to be covered during that stage (Education Act 2002, Sect.83). The Act then specifies the core and other foundation subjects to be studied at each of the four key stages, in respect of which attainment targets, programmes of study and assessment arrangements are required to be issued (Education Act 2002, Sect.84-86). The Secretary of State is obliged to establish and to keep under review these various component elements of the national curriculum, and the detailed contents of each element of the curriculum are generally promulgated in published Documents which are given formal legal force through Orders issued by the Secretary of State as Statutory Instruments (Education Act 2002, Sect.87, 241). The process of determining the contents of these crucial curricular Orders and Documents is highly centralised, although the Secretary of State is obliged under section 96, before making any new provisions or revising existing provisions, to refer any proposal to the Qualifications and Curriculum Authority (Q.C.A.), the government's principal curricular advisory agency and the successor to the National Curriculum Council. The Q.C.A. reports back to the Secretary of State on any such proposals, having referred the matter for consultation to LEA associations, bodies representing school governors and school teachers, and „any other person with whom consultation appears to the Authority to be desirable (Education Act 2002, Sect.96(3)). The Q.C.A. report, and any draft Order or associated Document, are subsequently published (Education Act 2002, Sect.96(5) and (6)), and a further period for the submission of representations is provided before the relevant Orders may be made by the Secretary of State (Education Act 2002, Sect.96(7) and (8)). The Secretary of State also has powers to direct that provisions of the national curriculum shall be disapplied or modified in a range of circumstances (Education Act 2002, Sect.90-95), in some cases in order to facilitate development work and experiments in particular schools (Education Act 2002, Sect.90), or in relation to children with special educational needs (Education Act 2002, Sect.92). The Secretary of State, furthermore, assumed extensive powers under the 2002 Act to suspend statutory requirements under education legislation generally by Order in order to encourage and facilitate educational innovation (Education Act 2002, Sect.1-5).

In the formulation and implementation of the national curriculum, certain general statutory obligations are placed upon the Secretary of State, LEAs, school governing bodies and headteachers. The obligation of the Secretary of State at the highest level is to exercise his or her powers in such a way as to establish and to revise the component

7 This stage was introduced for the first time in the Education Act 2002: see Sect. 81.

parts of the curriculum in accordance with the structure laid down by the 2002 Act (Sect.87(1)) and „with a view to securing" that the curriculum satisfies the broad aspirations in Section 78, referred to above, in terms of the provision of a balanced and broadly based curriculum promoting pupils' spiritual, moral, cultural, mental and physical development (Education Act 2002, Sect.79(1)). LEAs, school governing bodies and headteachers for their part also are placed under a similar duty to carry out their functions „with a view to securing" these very broad aspirations (Education Act 2002, Sect.79(2) and (3)). Although these do constitute statutory duties, they are at a very high level of generality and, as will be discussed in the next section of the article, would be entirely unenforceable by legal action. Rather more precise and compelling as legal obligations are those under section 88: this section imposes an obligation on the LEA and on the governing body of each maintained school to exercise their functions „with a view to securing" that the national curriculum „is implemented"; and provides that the headteacher of each school „shall secure" that it „is implemented". Only the last of these statutory obligations is phrased in unqualified terms, but whether it would give rise to a remedy in the individual is a matter of doubt which will be explored in the next part of the article.

In respect of sex education – which is strictly not part of the national curriculum – there is a requirement that it be provided as part of the basic curriculum in secondary schools for all registered pupils (Education Act 2002, Sect.80(1)c), and it *may*, at the discretion of the governing body, be provided in primary schools. The LEA is required to have regard to *Guidance* issued on sex education by the Secretary of State under the Education Act 1996 (Sect.403(1 A); Department of Education and Employment 2000). Furthermore, the governing body and headteacher are obliged to „take such steps as are reasonably practicable" to secure that any sex education is given

> *„in such a manner as to encourage … pupils to have due regard to moral considerations and the value of family life"* (Education Act 1996, Sect.403(1));

and the Secretary of State's *Guidance* is required to be designed to secure that pupils

> *„learn the nature of marriage and its importance for family life and the bringing up of children."* (Education Act 1996, Sect.403(1A)a; inserted by Learning Skills Act 2000, Sect.148(4)).

Finally, parents have an unqualified right to have their child (whatever his or her age) withdrawn from sex education classes- except so far as sex education is comprised in the national curriculum(Education Act 1996, Sect.405).

This has been a brief overview of the salient legislative provisions relating to the national curriculum and to the provision of sex education in maintained schools. The core question that now arises is how far these provisions may give rise to legal liability on the part of the public authorities – from the central department with responsibility for edu-

cation down to LEAs, school governing bodies and headteachers. This will be explored in the following section.

4. Legal liability for failure to meet curricular obligations

4.1 Liability in damages for breach of statutory duty

As we saw in the previous section, we now have a substantial regime of statutory regulation of curricular provision in England conferring a complex range of statutory powers and duties on public authorities. The question is whether breach of any of these statutory duties would give rise to any form of legal liability towards individuals – parents or children – enforceable in the courts. The prevailing view of the UK courts is clearly that no such liability will accrue in respect of *breach of statutory duty* in the context of educational provision in schools. This does not exclude the possibility of liability in negligence *at common law*, as will be discussed below. The exclusion of the possibility of liability for breach of statutory duty over education may come as no surprise, given that the right to education is generally categorised as a social, economic and cultural right of a positive nature whose realisation is dependent upon a wide range of political and economic considerations. This is borne out by the breadth of the statutory duties imposed under the legislative regime as seen above: while the Secretary of State and other public authorities – including headteachers – have an onerous statutory duty to ensure that the curricular requirements are implemented, judicial enforcement of those duties would be a remote prospect. This was clearly the position taken by the House of Lords in the seminal decision in this context, *X.* v. *Bedfordshire County Council* in 1995[8]. This litigation arose out of a number of actions grouped together and raised the question as to whether careless performance by a local authority of its *statutory* or *common law* duties in connection with the education or welfare of children could give rise to an action for damages. It was decided by the House of Lords that there was no liability in damages for breach by an LEA of its *statutory* duties in respect of the provision of education: in particular the very broad obligation of an LEA under section 14 of the Education Act 1996 to ensure the provision of sufficient schools for pupils living in its area was too broad in its nature and substance and was an obligation owed to too wide a category of people to give rise to an action in damages on the basis of a failure to make proper educational provision. The obligations of the LEA under the section were, furthermore, too heavily dependent upon a wide range of policy considerations for an action in damages to lie in respect of any alleged breach.

The exclusion of liability for breach of statutory duty in *X.* v. *Bedfordshire County Council* was endorsed by the House of Lords in the later very important case of *Phelps* v. *London Borough of Hillingdon*[9]. *Phelps* was an action brought by a dyslexic former pupil

8 [1995] 3 All England Law Reports 353.
9 [2000] 3 Weekly Law Reports 776.

against the LEA with responsibility for her education, claiming damages for its having failed to identify her as suffering from dyslexia, and failing to take appropriate remedial action (Harris 1999; Meredith 2001). While liability for negligence at common law on the part of the educational psychologist employed by the LEA was recognised in this case, the House of Lords explicitly stated that no liability arose on the part of the LEA for breach of any of its *statutory duties* under the applicable education legislation. In this case the applicable legislation was primarily that relating to provision for children with special educational needs – Part IV of the Education Act 1996 – which incorporated a range of procedural mechanisms for parents of such children to challenge the decisions by LEAs in respect of their children, particularly by way of exercising a right of appeal to the Special Educational Needs Tribunal. Lord Slynn commented in the House of Lords as follows:

> *„… Although the duties (owed by the LEA) were intended to benefit a particular group, mainly children with special educational needs, the Act is essentially providing a general structure for all local education authorities in respect of all children who fall within its provision. The general nature of the duties imposed on local authorities in the context of a national system of education and the remedies available by way of appeal and judicial review indicate that Parliament did not intend to create a statutory remedy by way of damages. Much of the Act is concerned with conferring discretionary powers or administrative duties in an area of social welfare where normally damages have not been awarded when there has been a failure to perform a statutory duty.*"[10]

These comments, made in the context of statutory duties on the part of LEAs in respect of children with special educational needs, would apply with equal if not grater force in respect of statutory duties owed to children generally by virtue of LEAs' obligations under the national curriculum. It is not thought that breach of statutory duty giving rise to liability in damages to parents or children would arise. The obligations arising from the legislation are of too general a nature and are owed to too broad a category of people to give rise to liability. This is not, however, to argue that liability for curricular failings may not arise at common law, the issue that will be explored in the following section.

4.2 Liability in damages for common law negligence

The cases of *X.* v. *Bedfordshire* and *Phelps* v. *London Borough of Hillingdon* themselves clearly indicate that liability in negligence at common law may arise through curricular shortcomings. This possibility was clearly envisaged by Lord Browne-Wilkinson in a crucial passage of his opinion in *X.* v. *Bedfordshire:*

10 [2000] 3 Weekly Law Reports 776 at p. 789.

> *„In my judgment a school which accepts a pupil assumes responsibility not only for his physical well-being but also for his educational needs. The education of the pupil is the very purpose for which the child goes to the school. The head teacher, being responsible for the school, himself comes under a duty of care to exercise the reasonable skills of a headmaster in relation to such educational needs. If it comes to the attention of the headmaster that a pupil is under-performing, he does owe a duty to take such steps as a reasonable teacher would consider appropriate to try to deal with such underperformance. To hold that, in such circumstances, the head teacher could properly ignore the matter and make no attempt to deal with it would fly in the face, not only of society's expectations of what a school will provide, but also of the fine traditions of the teaching profession itself. If such a head teacher gives advice to the parents, then in my judgment, he must exercise the skills and care of a reasonable teacher in giving such advice.*"[11]

Liability for negligence at common law was likewise recognised by the House of Lords in *Phelps:* the educational psychologist who had failed to diagnose dyslexia was held to have been in breach of her duty of care not only to her employers – the LEA – but also to the pupil. Furthermore, the existence of such a duty of care extended well beyond the role of educational psychologists in assessing a pupil's special educational needs to other professional people working within the education service. As stated by Lord Nicholls in his opinion in *Phelps:*

> *„In the same way as an educational psychologist owes a duty of care in respect of matters falling within the scope of his educational expertise, by parity of reasoning so must a teacher owe a duty of care to a child with learning difficulties in respect of matters which fall within his sphere of competence. A teacher must exercise due skill and care to respond appropriately to the manifest problems of such a child, including informing the head teacher or others about the child's problems and carrying out any instructions he is given. If he does not do so, he will be in breach of the duty he owes to the child, as well as being in breach of the duties he owes his employer, and his employer will be vicariously liable accordingly.*
> *… It cannot be that a teacher owes a duty of care only to children with special educational needs. The law would be in an extraordinary state if, in carrying out their teaching responsibilities, teachers owed duties to some of their pupils but not others. So the question which arises … is whether teachers owe duties of care to all their pupils in respect of the way they discharge their teaching responsibilities. This question has far-reaching implications. Different legal systems have given different answers to this question. I can see no escape from the conclusion that teachers do, indeed, owe such duties.*"[12]

11 [1995] 3 All England Law Reports 353 at p. 395.
12 [2000] 3 Weekly Law Reports 776 at p. 804.

The recognition of liability in negligence at common law on the part of LEAs, governing bodies and teachers (including vicarious liability on the part of LEAs and governing bodies as employers of teachers) is of the very first importance as a matter of principle. It should not, however, be inferred from the decision in *Phelps* that such actions will occur frequently. It will remain extremely difficult to establish a breach of duty of care in the educational context, and litigants will face considerable problems in establishing the necessary causal link between any such breach on the one hand and consequential loss to the child on the other. The quantification of damages will also be highly problematic. It can be said with fair certainty that the *Phelps* case has not opened the door to actions based simply on what pupils or parents may regard as teaching of poor quality. The nature of the breach of the duty of care would have to be more specific and more substantial than this. As was stressed by Lord Nicholls in his opinion in *Phelps:*

> *„This is not to open the door to claims based on poor quality of teaching. It is one thing for the law to provide a remedy in damages when there is manifest incompetence or negligence comprising specific, identifiable mistakes. It would be an altogether different matter to countenance claims of a more general nature, to the effect that the child did not receive an adequate education at the school, or that a particular teacher failed to teach properly. Proof of under-performance by a child is not by itself evidence of negligent teaching. There are many, many reasons for under-performance. A child's ability to learn from what he is taught is much affected by a host of factors which are personal to him and over which a school has no control. Emotional stress and the home environment are two examples. Even within a school, there are many reasons other than professional negligence. Some teachers are better at communicating and stimulating interest than others, but that is a far cry from negligence. Classroom teaching involves a personal relationship between teacher and pupil. One child may respond positively to the personality of a particular teacher, another may not. … Suffice to say, the existence of a duty of care owed by teachers to their pupils should not be regarded as furnishing a basis on which generalised 'educational malpractice' claims can be mounted.*"[13]

4.3 Judicial review

While liability in negligence may be a remote possibility in the curricular context, the issue remains as to whether the legality of the actions, decisions or failings of public authorities in carrying out their statutory responsibilities in formulating and implementing the school curriculum may be subject to judicial review. Education as a whole has, indeed, become a fertile ground for judicial review, especially in such areas as parental choice of school, the exclusion of pupils from school, and provision for children with special educational needs (Harris 1998; Meredith 1995). The particular context of the school curriculum is, however, more problematic from the point of view of founding

13 Ibid., at p. 804-5.

claims for judicial review as it is an area almost wholly devoid of procedural rights vested in the individual parent or child. In this respect it sharply contrasts with these other areas of educational provision which are fraught with procedural technicalities and mechanisms and thus areas in which LEAs and school governing bodies may well find themselves being challenged as to the legality of their actions. In the context of the curriculum, as we have seen in part 3 above, the statutory phraseology is broad in the extreme, and virtually no express procedural or substantive rights are vested in individuals. It is true that children may be said to have a right to education as correlative to the duties imposed upon LEAs to provide sufficient schools (Education Act 1996, Sect.13) and those imposed upon the Secretary of State, LEAs, governors and headteachers to implement the basic and national curriculum, but judicial enforcement of this right through judicial review is highly improbable. Enforcement of curricular obligations in practice is achieved through the governmental processes of school inspection, principally under the School Inspections Act 1996, and the many and complex statutory powers of control and intervention in the running of schools at the disposal of the Secretary of State and LEAs under the School Standards and Framework Act 1998 (Sect.14-19) and the Education Act 2002 (Sect.54-59) Furthermore, parents have a right under the Education Act 1996 (Sect.409) to make a formal complaint in respect of curricular matters to statutory curricular complaints bodies established at LEA level. Empirical research has, however, found that there is a strikingly low incidence of recourse to such bodies, and the nature of any remedies that might be available by virtue of such a complaint is unclear (Harris 1992).

These considerations therefore leave judicial review in the context of the curriculum as unlikely. The possibility does exist, however, that this may change in time by virtue of the incorporation of the European Convention on Human Rights into UK law under the Human Rights Act 1998. Article 2 of the First Protocol to the Convention provides that:

> *„No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.“*

Article 2 of the first Protocol has, however, not proved to be a fertile source of individual challenge over curricular matters, and it is thought unlikely that it would found challenges in the UK courts over curricular provision in anything other than exceptional cases. Clearly, in a culturally diverse society arguments may be put forward that the national curriculum is insufficiently diverse and pluralistic in its coverage of cultural difference (Poulter 1998, p.57-59). Such arguments could perhaps be of particular relevance in the context of the programmes of study in history, art and music and language. Curricular Orders have, on the other hand, approved a wide range of foreign languages for study within the national curriculum, including Arabic, Bengali, Chinese, Gujerati, Hindi, Japanese, Punjabi, Turkish and Urdu. Such arguments as to insufficient

diversity are entirely to be expected but very unlikely to succeed, not least because when the UK acceded to Article 2 of the First Protocol, it did so subject to a very important reservation, namely that the Article was accepted only so far as it was compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure. The second element of the reservation relating to public expenditure would be very likely to defeat any claims that the UK was in breach of its Convention obligations by virtue of insufficient diversity and pluralism within the curriculum, given the cost implications of the provision of a more broadly based curriculum. This is likely to be the case even though the legislation does not permit parents of pupils attending maintained schools to withdraw their children from any aspects of the national curriculum (in contrast with religious education and worship and sex education where an absolute right of parental withdrawal is provided). This view is reinforced by the fact that it is open to parents to educate their children at a wide range of private schools catering not only for adherents to minority religions but also for a wide range of cultural or pedagogical preferences. It is also open to parents to educate their children in the home: while parents are under a statutory obligation (Education Act 1996, Sect.7) to ensure that their children of compulsory school age receive efficient full-time education suitable to their age, ability and aptitude and to any special educational needs they may have, this may be either by regular attendance at school *or otherwise*. The possibility of withdrawing children from the maintained sector would significantly undermine any successful legal challenge by parents to the substantive content of the national curriculum on the basis that it failed adequately to respect their religious or philosophical convictions.

It has been suggested, however, that the provision of sex education could conceivably give rise to a challenge based on the second sentence of Article 2. The statutory framework regulating the provision of sex education outlined in part 3 above, and the statutory *Guidance* issued by the Secretary of State to LEAs, school governors and teachers, is, however, generally bland in its tone and would be unlikely to prove a successful basis for challenge by virtue of lack of respect for philosophical convictions. With regard, for example, to the particular issue of ethnicity in the context of sex education, the Secretary of State's *Guidance* emphasises that:

> *„It is … important for (sex education) policies to be both culturally appropriate and inclusive of all children. Primary and secondary schools should consult parents and pupils both on what is included, and how it is delivered. For example, for some children it is not culturally appropriate to address particular issues in a mixed group. Consulting pupils and their families will help to establish what is appropriate and acceptable for them…"* (Department for Education and Employment 2000, Para.1.25)

Nonetheless, the overall tone of the *Guidance* could be said to be highly moralistic in approach, particularly in respect of its emphasis on the importance of marriage and family life. This may well accord with the views and preferences of the majority of parents, but whether it is sufficiently inclusive, objective, critical and *pluralistic* in a highly

diverse society is perhaps open to question. In the well-known case of *Kjeldsen, Busk, Madsen and Pedersen* v. *Denmark* in 1976[14] the European Court of Human Rights interpreted the obligation in the second sentence of Article 2 as requiring states to ensure that:

> *„… information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner.*"[15]

While some parents may object to the moralistic and arguably not particularly pluralistic tone of the statutory provisions on sex education, it is, however, thought to be highly improbable that these statutory provisions or the *Guidance* issued under them would fall foul of Article 2 by virtue of being insufficiently pluralistic in nature. The *Kjeldsen* case did not impose rigorous and restrictive conditions upon state authorities in the formulation and delivery of their sex education curriculum, but, on the contrary, left them very generous discretion which would be hard to challenge unless the state were seen to be acting in an overtly indoctrinatory manner.

5. Conclusions

The establishment of a highly regulated and prescriptive school curriculum has probably been the most prominent and significant development in the governance of education in England since the Education Act of 1944, the foundation stone of the current system. The introduction of the national curriculum was a deeply political reform – set amid a number of other crucial reforms effected by the Thatcher/Major government aimed at promoting parental choice, accountability and the incorporation market forces into the provision of education in schools. The national curriculum was also a deeply centralising measure which set the tone for much further centralised prescription, control, inspection and direct intervention in the running of schools and LEAs in the years that followed, much of which has been continued and consolidated by the present government. Many have welcomed the national curriculum as a crucial mechanism for raising standards and eradicating inequality of educational provision across the country. Coupled with subsequent reforms of the school inspection system, it has arguably done much to reverse what many saw as a serious decline in educational standards in the 1970s and early 1980s. Furthermore, much of the opposition to the national curriculum in its early years – particularly among the teaching profession which viewed its professional autonomy as being under threat – has been allayed by virtue of the considerable modifications introduced after the Dearing review in 1994. While there clearly does remain some opposition to the principle of a national curriculum, and there is debate over particular aspects of its contents and over the arrangements for assessing and

14 (1976) Series A, No. 23.
15 Ibid., para. 53.

testing pupils and the dissemination of the results of these tests, there is a general consensus today that the national curriculum has been broadly beneficial in its impact. What it has not done, however – and was never intended to do – is to confer on individual parents and children enhanced legal rights enforceable in the courts over the delivery of the curriculum in schools. As the cases of *X.* v. *Bedfordshire* and *Phelps* v. *London Borough of Hillingdon* have made clear, the courts do not recognise educational legislation designed by Parliament for the benefit of the population at large as conferring liability towards individuals for breach of statutory duty. The very broad and discretionary terms in which the statutory provisions relating to the basic and national curriculum are framed strongly underlines this. The courts have also been highly reluctant to develop the common law of negligence in the sphere of the substantive provision of education, although they have recognised the existence of a duty of care on the part of teachers and public authorities here as a matter of principle. In practice, the problems here faced by litigants – particularly in respect of causation – will make successful legal challenge quite exceptional. Finally, it is clear that, while judicial review in areas of education which are procedurally intensive – such as choice of school, exclusions and special educational needs – is a very real prospect, it is highly unlikely to arise in the context of the secular curriculum, a position which is unlikely to be significantly changed by the incorporation of the European Convention on Human Rights into UK law.

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