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Relationships Education, RSE and Health Education

The Relationships Education, Relationships and Sex Education and Health Education (England) Regulations 2019 [hereafter Regulations] were drafted in exercise of the powers conferred upon the Secretary of State for Education by sections 34 and 35 of the *Children and Social Welfare Act 2017*. The salient parts of the statute as to what pupils must be taught as part of Relationships Education and Relationships and Sex Education [RSE] are found at Section 34(3) of the Act:

- (a) the pupils learn about—
 - (i) safety in forming and maintaining relationships,
 - (ii) the characteristics of healthy relationships, and
 - (iii) how relationships may affect physical and mental health and well-being, and
- (b) the education is appropriate having regard to the **age** and **religious background** of the pupils. [emphasis added]

In accordance with the Act, the Regulations were then approved by each House of Parliament. The final Regulations, in relation to what “*pupils learn about*”, were identical to those enumerated in Section 34 of the Act with the addition of one further element: “*The nature of marriage and civil partnership and their importance for family life and the bringing up of children.*”¹

Importantly, as also highlighted by the Department for Education’s Guidance [hereafter guidance], the teaching of Relationships Education and RSE must be done in an age appropriate and developmentally appropriate way. It must also have regard for the religious backgrounds of the pupils and their families.

Nick Gibb, Minister for School Standards, has further explained in Parliament on 25 June 2019, that primary schools are not required to teach LGBT elements.²

Under the new Regulations, all schools are legally required to have a separate written policy on how they will approach Relationships Education, RSE and Health Education which is to be published on a website and provided to anyone who asks for a copy free of charge.³ Notably, schools are also legally required to consult parents before making or revising their policies.⁴ The guidance further

¹ Education Act 2002, Section 80A(2)(a)(i). Interestingly, Section 80A(2)(a)(i) requiring maintained schools to teach about the nature of marriage and civil partnership is not replicated in the *Education (Independent Schools Standards) Regulations 2014*, which begs the question of whether the guidance on the issue is *ultra vires* as to this particular subject matter for independent schools.

² <https://hansard.parliament.uk/Commons/2019-06-25/debates/8F61FF43-BA5E-401D-A3AD-3B742236F757/ParentalInvolvementInTeachingEqualityAct>.

³ Education Act 2002, Section 80B(1)(a-b); Education (Independent Schools Standards) Regulations 2014, Section 2A(e) and (g).

⁴ Education Act 2002, Section 80B(3); Education (Independent School Standards) Regulations 2014, Section 2A(f).

recommends that as part of the consultation process, schools provide parents samples of the materials they intend to teach.⁵

Schools are obliged to have regard to the guidance⁶, and where they depart from those parts of the guidance which state that they should (or should not) do something, schools will need to have good reasons for doing so.⁷

The Regulations make Relationships Education compulsory for all pupils receiving primary education and make RSE compulsory for all pupils receiving secondary education. Schools means all schools, whether maintained, non-maintained, or independent schools, including academies and free schools, non-maintained special schools, maintained special schools and alternative provision, including pupil referral units. It does not apply to sixth form colleges, 16-19 academies or further education colleges. Additionally, Health Education is compulsory in all schools except independent schools where Personal, Social, Health and Economic Education (PSHE) continues to be compulsory.

The Regulations will come into force in September 2020.

The Role of Schools in Content Development

Individual schools are free to determine how to deliver the set content in the context of a broad and balanced curriculum.⁸ This approach has its benefits and drawbacks. The guidance, for example, states that schools with a religious character may teach their distinctive faith perspectives on relationships, and balanced debate may take place about issues that are seen as contentious.⁹ While this is a positive element, the guidance gives almost unfettered discretion to other schools to teach materials of a highly contentious nature in relation to intimate moral issues like sexuality.

While the regulations dictate that the governing body of a school, when creating its curriculum, must have regard to the age and religious background of the pupils,¹⁰ it is evident that no such regard has been paid to either the age or religious background of pupils in schools across the country. Nowhere has this been on public display more than at Parkfield Community School and Anderton Park Primary

⁵ Relationships Education, Relationships and Sex Education (RSE) and Health Education: Statutory guidance for governing bodies, proprietors, head teachers, principals, senior leadership teams, teachers (February 2019) [hereafter Guidance], para. 24. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/805781/Relationships_Education_RSE_and_Health_Education.pdf

⁶ Education Act 2002, Section 80A; Education (Independent Schools Standards) Regulations 2014, Section 2A(d).

⁷ Guidance, p. 6.

⁸ Education Act 2002, Section 78(1) requires all maintained schools and academies to provide a broad and balanced curriculum which promotes the spiritual, moral, cultural, mental and physical development of the pupils and which prepares pupils for the opportunities, responsibilities and experiences of later life. Sections 2(2)(d) and 2(2)(i), Part I of the Schedule to the Education (Independent Schools Standards) requires independent schools, *other than* academies, to provide personal, social, health and economic education which reflects the school's aims and ethos and encourages respect for other people, paying particular regard to the protected characteristics set out in the Equality Act 2010. Like Section 78(1) of the Education Act 2002, it also must prepare pupils for opportunities, responsibilities and experiences later in life. Part 2 of the Schedule requires independent schools, *including* academies, to meet the standard relating to the Spiritual, Moral, Social and Cultural Development of pupils, including Section 5(a) and the active promotion of the British fundamental values of democracy, the rule of law, individual liberty, and mutual respect and tolerance of those with different faiths and beliefs.

⁹ Guidance, para. 21.

¹⁰ See: Education Act 2002, Section 80A (2)(b). This provision would also apply to independent schools laterally by reference to Section 2A(1)(d) of the Education (Independent Schools Standards) Regulations 2014.

School in Birmingham, where protests by hundreds of Muslim parents and co-belligerents have spread over the course of weeks because of the teaching of the No Outsiders Project.¹¹

Another well known activist school is Heavers Farm Primary School in Croydon, where young pupils are forced to participate in a Pride parade, colour LGBT symbols and are inundated with LGBT materials as part of their curriculum.¹² A photo on their website proudly displays a photo of a 6-year-old girl holding a placard which reads: “*I have a dream if bois cood go to the saim toilet as gerls.*”¹³ The school’s Parent Teacher Association even incorporates a rainbow flag into its official logo.¹⁴

It is not helpful that the Department for Education Guidance issued for teaching Relationships Education and RSE has suggested that LGBT elements be fully integrated into a school’s programme of study rather than delivered as a stand-alone unit.¹⁵ Not only would doing so make it impossible for parents to opt their children out of such teaching, as it would presumably permeate every area of the curriculum, it would further impose on parents with religious or philosophical objections to the subject matter an even greater challenge to their parental rights. Precisely stated, the persistent nature of any presentation of LGBT issues frustrates parental rights by creating a routine whereby a family’s faith beliefs will be undermined on a continuous basis through teaching, moral signalling and practices during large portions of their child’s day over a prolonged period of time and by someone the pupil would view as an authority figure.

More so, some of the materials already being utilised by school which have been deemed age appropriate by Ofsted seem to be anything but. Take for example, *My Princess Boy*¹⁶, which is read to children as young as 4 years of age, and which reads: “*His dad tells my Princess Boy how pretty he looks in a dress. His dad holds his hand and tells him to twirl! My Princess Boy smiles and hugs his dad.*” Not only is the sole purpose of the book to use manipulatively written text with warm and emotive images to influence the impressionable and innocent minds of young children to normalise a new morality, the proposition espoused by the book also supports a growing national safeguarding scandal. Since introducing the topic of gender identity into our schools, we have seen an increase in the number of children referred to Gender Identity Clinics rise from 97 referrals in 2009¹⁷ to 2519 referrals in 2017/18¹⁸. Under any matrix, such an astonishing increase is a matter of serious concern.

Another example of a children’s storybook that would likely be allowed under both the new guidelines and existing PSHE criteria would be Gayle Pittman’s *This Day in June*¹⁹, winner of the 2015 Stonewall Book Award for Best Children’s Book. The picture book, which takes place at a gay pride parade, shows various images such as a mother holding a placard saying, “*I love my gay sons,*” and

¹¹ See: e.g.: *Birmingham LGBT Teaching Row: How Did it Unfold?*, BBC News (22 May 2019), <https://www.bbc.co.uk/news/uk-england-48351401>.

¹² See e.g.: <https://www.conservativewoman.co.uk/crushed-the-primary-school-pupils-who-dared-to-question-lgbt-agenda/>.

¹³ See: <https://heaversfarm.com/2018/10/18/periodot-martin-luther-king-i-have-a-dream/>.

¹⁴ See: <https://heaversfarmparentteacherassociation.wordpress.com/>.

¹⁵ Guidance, para. 37.

¹⁶ Cheryl Kildavos, *My Princess Boy*, New York: Simon & Schuster Children’s Publishing Division, 2009.

¹⁷ See: <https://tavistockandportman.nhs.uk/documents/408/gids-service-statistics.pdf>.

¹⁸ <https://tavistockandportman.nhs.uk/about-us/news/stories/gids-referrals-increase-201718/>

¹⁹ Gayle Pittman, *This Day in June*, Washington, D.C.: Magination Press, 2014.

half naked parade goers. The accompanying text reads: “*Voices Chanting. Doggies Panting. Clad in Leather. Perfect Weather. Dancers Jumping. Music pumping. Loving Kisses. So Delicious.*”

A third example would be Michael Willhoite’s *Daddy’s Roomate*²⁰, which if deemed age appropriate by a school’s governing body, could be used to teach young pupils about alternative family models. The storybook uses illustrations of a middle-aged man who has left his wife for a much younger man. The pictures depict the same-sex couple shaving together without their shirts on; and in another scene, intimately putting suntan lotion on each other at the beach in front of the middle-ages man’s young son.

It is worth recalling that it was only in November 2003 that Section 28 of the Local Government Act 1988, was repealed. That Section read that a Local Authority “*shall not intentionally promote homosexuality or publish material with the intention of promoting homosexuality*” or “*promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship*”.

The proliferation of LGBT material in schools and the pervasive way it is being presented to pupils, only 16 years on from Section 28’s repeal, suggests that the government is acting on emotional and cultural populism rather than good policy or any kind of genuine forethought.

Danger of *Ultra Vires* Obligations

As set out above, the new Regulations establish four legal obligations schools that must follow in teaching Relationships Education, RSE and Health Education. All four obligations are premised on the principle that the material presented to pupils is both age appropriate and takes into consideration the religious background of the pupils. The four obligations are that pupils must learn about the nature of marriage, civil partnership and the importance of family life to bringing up children; safety in forming and maintaining relationships; the characteristics of a healthy relationship; and how relationships may affect physical and mental health and wellbeing.

The Regulations amend the Education Act 2002, requiring the Secretary of State for Education to give guidance about the provision of Relationships Education, RSE and Health Education.²¹ The guidance, by way of introduction, notes that the document contains information on what schools should do and what they must do when teaching these subjects.²² The distinction between what a school should do and what it must do seems subtle, but in fact that distinction is quite sizable. What schools must do, in relation to both the guidance and the Regulations, must relate to the four statutory obligations listed at the outset of this section. What a school should do relates to anything

20 Michael Willhoite, *Daddy’s Roomate*, Boston, Alyson Wonderland, 1990.

21 Education Act 2002, Section 80A(1). Referencing Section Section 80(1)(c-e) which creates a statutory obligation to teach Relationships Education in primary school (Section 80(1)(c)), RSE at secondary school (Section 80(1)(d)) and Health Education for all registered pupils (Section 80(1)(e)). Independent schools must also have regard to the guidance pursuant to Education (Independent School Standards) Regulations 2014, Section 2A(d) with the caveat that Health Education is not made compulsory under the new Regulations. Nonetheless, Personal, Social, Health and Economic Education (PSHE) does remain compulsory for independent schools.

22 *Supra*, fn. 6.

else in the guidance that goes beyond what is mandated in the aforementioned four statutory obligations.

In legal terms, anything in the guidance which does not specifically relate to those four obligations is *ultra vires*; meaning it goes beyond the powers conferred upon the Department for Education and is therefore not strictly binding. Examples would include teaching about abortion, stereotypes, sexuality and gender identity. Several of these matters pre-date the guidance and are found in the Sex and Relationship Education Guidance of July 2000.²³ Interestingly, and perhaps not surprisingly, these matters are also *ultra vires* to the statutes they apply to and therefore are not strictly binding either.²⁴

As such, in relation to any part of the guidance which is not a legal requirement (i.e. not part of the four statutory obligations), schools must have due regard to following the guidance, but may also depart from the guidance if it has weighty reasons for doing so.

In advice provided for school leaders and governors by the Department for Education, 'due regard' in relation to equality has been defined as follows: "*The duty to have 'due regard' to equality considerations means that whenever significant decisions are being made or policies developed, thought must be given to the equality implications.*"²⁵ A commensurate standard would attach to the Relationships Education, RSE and Health Education Guidance as to how these subject matters should be approached by schools.

In case law, a requirement to have regard to a specified list of factors means that the authority subject to the requirement must consider each factor separately. However, it does not prevent the authority from going on to consider other factors, even if those other factors combine to outweigh the factors specifically listed.²⁶ In relation to the protected characteristics, other objective factors that must be taken into consideration are safeguarding, the protection of the health and morals of the pupils, the protection of the rights of other students and staff, and parental rights, all of which are also statutory requirements set out in Articles 8 and 9 and Protocol 1, Article 2 of the European Convention on Human Rights, as read into the Human Rights Act 1998 by Section 1(1)(a-b).

A fundamental concern is that key aspects of Relationships Education, RSE and Health Education are in the scope of Ofsted inspection.²⁷ This may be so through the inspector's consideration of pupils' spiritual, moral, social and cultural development.²⁸ Potential issues exist, for example, where an Ofsted inspector without religious literacy, and without understanding the difference within the

²³ See:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/283599/sex_and_relationship_education_guidance.pdf

²⁴ Education Act 1996, Sections 403-405.

²⁵ Department of Education, *The Equality Act 2010 and schools: Departmental Advice for school staff, governing bodies and local authorities*, May 2014.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/315587/Equality_Act_Advice_Final.pdf

²⁶ *Dunnachie v Kingston upon Hull City Council* [2004] UKHL 36.

²⁷ Guidance, para. 126.

²⁸ *Id.*

guidance between what is required and what is *ultra vires*, downgrades a faith school based on non-statutory elements. Currently, no feasible system of checks and balances allows a school to challenge the substantive decisions of Ofsted, apart from judicially reviewing the inspection report. This option however is time consuming and may expose a school to legal costs.²⁹

Nonetheless, faith schools do have some assurances that the material they teach and the manner in which they teach it does not have to offend their Christian ethos. First, having 'due regard' to the Guidance, as mentioned above, does not necessarily create a legal obligation. It merely requires a school to factor into its consideration what it should do (where the Guidance is *ultra vires*) and what the school must do (where the statutes speak to what must be taught).

The Department for Education has also been clear in both this guidance, and in its guidance for teaching equality, that it is not the intention of government to undermine the faith ethos of any school. For example, the guidance on teaching Relationships Education, RSE and Health Education state:

21. All schools may teach about faith perspectives. In particular, schools with a religious character may teach the distinctive faith perspective on relationships, and balanced debate may take place about issues that are seen as contentious.

At paragraph 70 of the guidance, the Department for Education also suggests that schools can promote abstinence as part of Sex Education. For a faith school, this means that abstinence can be promoted both as a social and spiritual good, coupling sexual activity with marriage.

The Department for Education has taken a similar position on how a faith school can fulfil its equality duty while remaining faithful to its ethos:

3.30 Schools with a religious character, like all schools, have a responsibility for the welfare of the children in their care and to adhere to curriculum guidance. It is not the intention of the Equality Act to undermine their position as long as they continue to uphold their responsibilities in these areas. If their beliefs are explained in an appropriate way in an educational context that takes into account existing guidance on the delivery of Sex and Relationships Education (SRE) and Religious Education (RE), then schools should not be acting unlawfully.³⁰

Given the level of discretion offered to individual schools in developing their own content and policies regarding how to teach these subject matters, faith schools should feel confident in their ability to remain true to their fundamental faith tenets.

²⁹ A school can raise a complaint about an Ofsted inspection to the Independent Complaints Adjudication Service for Ofsted (ICASO), however ICASO looks only at whether procedure was properly followed rather than the substance of the inspection reports. Importantly, ICASO cannot change the outcome of an inspection but will only make suggestions to Ofsted.

³⁰ The Equality Act 2010 and Schools [DfE Guidance](May 2014), <https://www.gov.uk/government/publications/equality-act-2010-advice-for-schools>.

Right of Withdrawal

The Regulations for Relationships Education (primary) and Relationships and Sex Education (secondary) make compulsory Relationships Education in both primary and secondary school, and provide an opt-out for Sex Education in secondary schools, which may be overridden by a headteacher in undefined 'exceptional' circumstances.

The legal and existential implications involved are serious and far reaching. When government³¹ becomes the principal arbiter of which morals, values, and sexually oriented content our children will be exposed to, it becomes the sole authority of social direction, eliminating the vital role pluralism plays in a democratic society. The question of why a parent would not want their child exposed to this material is not about child neglect or abuse. Rather it is a matter of conscience, belief, preference, and ideology. If government asserts a right to determine which beliefs a parent can or cannot instil in his or her own children, it infringes on a fundamental liberty, upon which the social order is established.

Legal Status of Parental Rights and Opt-Outs

Numerous domestic and international obligations that are binding on the United Kingdom confirm parents are and ought to be the primary and principal educators of their children. By that fact alone, parents have the greatest rights and the greatest responsibility in the education of their children. Schools, both primary and secondary, should assist them in this task; but they must seek the cooperation of parents and should not in any case artificially displace the rights of children and the rights of parents by imposing on the children an education contrary to the one they receive from their parents.

Domestic law, international treaty obligations and case law protecting parental rights in education are both voluminous and clear. The right of parents to guide the education of their children is fundamental and protected. This is particularly true of educational content which has a moral character; schools have a positive obligation not to undermine the manner in which parents seek to bring up their children.

Section 9 of the Education Act 1996, which corresponds to Protocol 1, Article 2 of the European Convention on Human Rights (as transposed into domestic law by the Human Rights Act 1998), states that maintained schools must have regard to the principle that pupils are to be educated in accordance with the wishes of their parents.³² Similarly, Protocol 1, Article 2 creates a statutory obligation on schools to also respect the manner in which parents seek to raise their children in accordance with their own religious or philosophical convictions. It reads: "*In the exercise of any*

³¹ Government, as used in the current content, includes Parliament, the Department for Education and Ofsted.

³² Section 9 reads: "*In exercising or performing all their respective powers and duties under the Education Acts, the Secretary of State and local authorities shall have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure.*"

*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.”*³³

Treaty obligations are equally clear. While these obligations are not formally binding, they nonetheless evidence a significant corpus of complementary international law thereby amplifying the importance of the aforementioned provisions in the Human Rights Act 1998 and Education Act 1996. Article 26(3) of the Universal Declaration of Human Rights states that “[p]arents have a prior right to choose the kind of education that shall be given to their children”.³⁴ The United Nations Convention on the Rights of the Child, in Article 5, clearly states that among the most important rights of the child, besides the right to life, are precisely the right to parental love and the right to education.³⁵ The Convention also explicitly notes, in Article 18, that the rights of parents are not juxtaposed to the rights of children. Moreover, the parents, being the ones who love their children most, are those most called upon to decide on the education of their children.³⁶

Equally pertinent is Article 18(4) of the International Covenant on Civil and Political Rights (ICCPR) which states that “[t]he States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”³⁷

Furthermore, the Convention against Discrimination in Education holds in Article 5(1)(b) that it is essential that States:

*“respect the liberty of parents and, where applicable, of legal guardians, firstly to choose for their children institutions other than those maintained by the public authorities but conforming to such minimum educational standards as may be laid down or approved by the competent authorities and, secondly, to ensure in a manner consistent with the procedures followed in the State for the application of its legislation, the religious and moral education of the children in conformity with their own convictions....”*³⁸

Case-Law on Parental Rights and Opt-Outs

The European Court of Human Rights [“the Court”] defines ‘convictions’ as being something different from ‘opinions’ and ‘ideas’, denoting views that attain a certain level of cogency, seriousness, cohesion and importance.³⁹ The term ‘philosophical convictions’ has been interpreted as including pedagogical beliefs; those being the parents’ beliefs as to the best way of educating

³³ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5.

³⁴ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

³⁵ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

³⁶ *Id.*

³⁷ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

³⁸ UN Educational, Scientific and Cultural Organisation (UNESCO), *Convention Against Discrimination in Education*, 14 December 1960.

³⁹ *Valsamis and Efstratiou v. Greece*, 1996-VI Eur. Ct. H.R. Rep. Judgments & Dec. 2312 and 2347 (1996), § 25.

their children.⁴⁰ Undoubtedly, therefore, parents must be at the centre of the decision-making process when it comes to teaching content which deeply affects the value system of their child. The school systems should therefore work on harmonising institutional education with parental upbringing, rather than creating a system whereby they can exclude parents from critical decisions about the education their child is receiving.

Forty-two years ago, the European Court of Human Rights, in its decision in the *Kjeldsen* case, affirmed that parents have the prior right under Protocol 1, Article 2 of the Convention to opt their children out of classes which could be viewed as having elements which indoctrinate or proselytise.⁴¹ The Court has defined indoctrination as being any teaching that fails to be objective, critical or pluralistic.⁴² While these opt-outs were denied to the applicants in the *Kjeldsen* case, the guarantee nonetheless became a seminal part of the Strasbourg Court's case-law.

Later, in the *Folgerø* case of 2007, the Grand Chamber upheld the right of opt-outs for parents who wished not to have their children attend religious education classes.⁴³ The progeny of *Folgerø* has continued to promote the freedom of parents to remove their children from classes they feel undermine their parental rights.⁴⁴ From *Kjeldsen* to *Folgerø*, the Court has continued to hold that the right to opt-outs holds equally to all subjects, and not just religious education. While opt-outs should always be made available for themes as controversial as sexual education, the State also has a duty to provide options for parents in how they want their children to be educated in relation to any moral issue.

The Court has made this clear:

*Article 2 of Protocol No. 1 does not permit a distinction to be drawn between religious instruction and other subjects. It enjoins the State to respect parents' convictions, be they religious or philosophical, throughout the entire State education programme. That duty is broad in its extent as it applies not only to the content of education and the manner of its provision but also to the performance of all the "functions" assumed by the State. The verb "respect" means more than "acknowledge" or "take into account". In addition to a primarily negative undertaking, it implies some positive obligation on the part of the State.*⁴⁵

The distinction between teaching and education is important, particularly regarding Relationships Education and RSE policy. The Court differentiates between education and teaching thus: "*The education of children is the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young, whereas teaching or instruction refers in particular to*

⁴⁰ ECHR, *Campbell and Cosans v. the United Kingdom*, A 48 (1982) 17; (1982) 4 EHRR 293.

⁴¹ *Kjeldsen, Busk Madsen and Pedersen v Denmark*, Judgment, Merits, App No 5095/71 (A/23), [1976] ECHR 6, IHRL 15 (ECHR 1976), 7th December 1976, European Court of Human Rights [ECtHR].

⁴² *Id.*, § 53. This test has since been utilised by the Court as the gold standard for determining whether opt-outs should be wholly or partially granted to parents in cases where a contested ideology becomes part of a school's teaching.

⁴³ ECHR, *Folgerø and Others V. Norway* [GC], application no. 15472/02, judgment of 29 June 2007.

⁴⁴ See e.g.: ECHR, *Affaire Mansur Yalçın et Autres c. Turquie*, application no. 21163/11, judgment of 16 February 2015).

⁴⁵ *Folgerø and Others V. Norway*, *op.cit.*, at § 84(c). [Emphasis added]

the transmission of knowledge and to intellectual development."⁴⁶ In neither case is indoctrination allowed. But importantly, simply because an issue falls outside of the spectrum of the mandated teaching curriculum, if it remains part of the larger educational goal of upbringing the children to hold a certain worldview, then parental input and consent remains a positive obligation to which schools are held.

The European Court of Human Rights has also repeatedly held that *"it is in the discharge of a natural duty towards their children- parents being primarily responsible for the "education and teaching" of their children- that parents may require the State to respect their religious and philosophical convictions. Their right thus corresponds to a responsibility closely linked to the enjoyment and the exercise of the right to education.*"⁴⁷ It has further held that *"a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position."*⁴⁸ Parliament, together with the Department for Education, being the organiser of educational teaching content, must therefore not abuse its dominant position to force onto parents and their children views and positions which parents find harmful to the development of their children. This holds true to Local Authorities and individual schools as well.

Again as the Court has laid out: *"the second sentence of Article 2 (P1-2) implies on the other hand that the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that must not be exceeded."*⁴⁹

Protecting the Spiritual and Moral Integrity of our Children

Beyond the issue of opt-outs, several related aspects of the new regulations are deeply concerning, with the common denominator being a parent's right to protect their child from a form of education which they feel may cause them moral harm or hamper their spiritual and moral development. The Department for Education has averred that individual schools will be able to determine exactly which materials they will use to teach Relationships Education and RSE, so long as they meet the minimum standard set by statutory regulation. They have also left it to individual headteachers to determine whether and under what circumstances a request for opt-out may be granted from Sex Education.

⁴⁶ *Campbell and Cosans v. the United Kingdom*, *op. cit.*, at § 33.

⁴⁷ *Kjeldsen, Busk Madsen and Pedersen v Denmark*, *op. cit.*, § 52.

⁴⁸ *Chassagnou and Others v. France*, 29 EHRR 615, 28331/95, § 112.

⁴⁹ *Kjeldsen, Busk Madsen and Pedersen v Denmark*, *op. cit.*, § 53.

Increasingly, we are seeing more and more schools actively and aggressively promoting alternative sexual lifestyles and exposing children to materials which many parents find both age inappropriate and offensive. The European Court has acknowledged this, holding that *“abuses can occur as to the manner in which the provisions in force are applied by a given school or teacher and the competent authorities have a duty to take the utmost care to see to it that parents’ religious and philosophical convictions are not disregarded at this level by carelessness, lack of judgment or misplaced proselytism.”*⁵⁰

However good the intentions of a school administration to achieve their goal of inclusivity or sexual awareness, these same schools have done great violence to the statutory rights of parents who hold differing convictions. Importantly, a school may not, on the grounds that it does provide opt-outs, fail in its obligation to teach children in a manner which is objective and critical.⁵¹

Interrelatedly, creating a scenario where headteachers may veto an opt-out request under ‘exceptional’ circumstances, where Parliament has failed to define the meaning of ‘exceptional’, can easily lead to an abuse of the headteacher’s dominant position. It leaves parents at the ideological whim of any given headteacher.

The Human Rights Act 1998 requires that any limitation of a fundamental freedom, including parental rights, be prescribed by law. One element of this is ensuring that such restrictions are clearly defined, foreseeable, accessible and precise.⁵² The Court has been very clear that an undefined, and therefore unfettered discretion to limit fundamental rights is incompatible with the Convention. In the Court’s words, a *“law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise.”*⁵³

Conclusion

Much has been made about the new statutory regulations and statutory guidance, and how it has the potential to undermine parental rights and enforce a government mandated new morality. Certainly, there is a risk that abuses of parental rights and the potential for indoctrination might occur under the new Regulations. The fact is, even under the current regime, we are already seeing such abuses around the country. The definition of what is age appropriate and the degree with which a school must have regard to the religious background of its pupils is fairly relative. As we have seen with Parkfield Primary and Anderton Park Primary in Birmingham, both Ofsted and the Department for Education have very different perspectives on these questions than do many parents.

It is also disconcerting that independent schools, including faith schools, are being burdened with new obligations that take away from their independence and ethos. A significant reason

⁵⁰ *Id.*, § 54.

⁵¹ *Folgerø and Others V. Norway*, *op. cit.*, at § 84(h).

⁵² *Sunday Times*, 30 Eur. Ct. H.R. (ser. A) at § 31.

⁵³ *Metropolitan Church of Bessarabia v. Moldova*, 2001-XII Eur. Ct. H.R. 81, 111 at § 109.

independent schools exist is so that parents have an option on which school they wish their children to attend and which values they would like them taught. It would seem that some of the material being mandated, particularly that which is *ultra vires* in the guidance, takes away from parental freedoms and the principle of school independence.

Finally, it is equally worrying that the right of parents to opt their children out of Sex Education has been watered down and is now in a state of legal uncertainty, leaving the decision not to the parents but to the whims of individual headteachers.

However, there are positive elements as well that both parents and school Governors should take comfort in. Faith schools remain in control of what is being taught and how it is being taught. Parents also have the opportunity to shape the school policies their children will later be subject to. Finally, the worse elements of the guidance are *ultra vires* and can be disregarded if a school can establish that it has weighty reasons for doing so.

What is clear is that we are living in unprecedented times. The gap between what parents want for their children and how schools wish to educate children has grown to an unprecedented level. Parental objections to LGBT or gender ideology in schools have been the subject of national debate and media coverage. If parents wish to continue to enjoy their parental rights, they will need to be clear and open about their concerns and what they feel is inappropriate for their children to be exposed to. Ultimately it will be this dialectic between what LGBT campaign organisations wish to implement in schools, currently with the eager complicity of government, and the extent to which parents challenge those decisions which will determine how new regulations will actually affect parents. Time will tell.