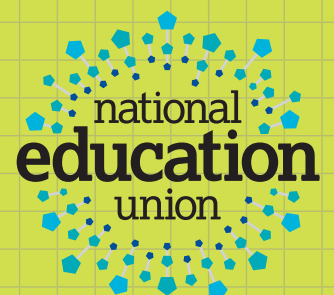


Lecture notes 2018-19

Education,
the Law
and You



**Join FREE as
a trainee or for
just £1 if you
are newly
qualified***



**Join the National
Education Union:
more than 450,000
teachers and education
professionals standing
up for education.**

Join us today

www.neu.org.uk/join

0345 811 8111

*terms and conditions at www.neu.org.uk/terms

Lecture notes

Education, the Law and You

Notes

Teachers work within a legal framework involving rights and duties. The *Revised professional standards for education practitioners* have applied to teachers in Wales since September 2011; the *Teachers' Standards* have applied to teachers in England since September 2012. Teachers are required to maintain up-to-date knowledge and understanding of and to act within the statutory frameworks which set out their professional duties and responsibilities.

These *lecture notes* provide information on the legal framework for teachers beginning their careers.

Your first point of contact for advice and support from the union is your workplace representative. If there is no representative in your workplace, for advice and assistance call 0345 811 8111.

The Department for Education (DfE) and the Welsh Government are responsible for education and children's services in England and Wales. Where Department for Education and Skills (DfES) or Department for Children, Schools and Families (DCSF) statutory and non-statutory guidance is referred to in these *lecture notes*, it continues to reflect the current legal and policy position.

Contents

	Page
Teachers' duty of care to pupils	4
Teachers' duty of care and out-of-school activities	5
Health and safety at work	6
Physical contact with pupils	7
Teachers' power to use reasonable force to restrain	7
The role of the education service in protecting children from abuse	9
Teachers' power to discipline	10
Detention of pupils on disciplinary grounds	11
Searching pupils	11
Protection from discrimination – pupils	12
Special educational needs (SEN) code of practice	14
Protection from discrimination – teachers	15
Criminal records and suitability to work with children	17
Childcare disqualification	17
Legal and professional advice from the union	17

Teachers' duty of care to pupils

1. Teachers are required to do all that is reasonable to protect the health, safety and welfare of pupils. Their legal responsibilities derive from three sources and this section considers each of the three:
 - the common law duty of care
 - the statutory duty of care
 - the duty arising from the contract of employment.

The common law duty of care

2. Teachers have a duty of care to pupils which derives from the 'common law'. The 'common law' is law developed through decisions of the Court as opposed to law which has been determined by Parliament and set down in statute.
3. It has been recognised that a teacher's duty of care to individual pupils is influenced by, for example, the subject or activity being taught, the age of the children, the available resources and the size of the class.
4. Further, the standard of care expected of each teacher is the skill and care of a reasonable teacher.
5. If it can be shown that a teacher acted in accordance with the views of a reputable body of opinion within the profession, the duty of care will have been satisfied, even though others may disagree.
6. A breach of the duty of care by a teacher could amount to common law negligence.
7. A teacher's employer could be liable to pay damages in compensation to a pupil who is injured as a result of negligence.
8. Whether teachers are found negligent in the event of accidents will be influenced by whether the incident that occurred could reasonably have been foreseen. If a teacher takes all reasonable steps to ensure the safety of their pupils, it is unlikely that the teacher will be held to be negligent in the event of an unforeseen accident.
9. Negligence could also arise if there is a serious failure to prevent harm to a child arising from, for example, pupil bullying. If negligence arises in these circumstances, it is more likely to be a collective failing rather than the responsibility of one individual.
10. A teacher's duty of care will depend upon what is reasonable and what can be expected of a competent professional acting within the constraints of the circumstances.
11. Provided teachers apply their professional judgement, training and experience to situations in a reasonable manner, seeking to promote the best interests of the pupils in their care, their obligations will have been met.

The statutory duty of care

12. Teachers are also responsible under the Children Act which places statutory duties upon those who care for children.
13. Section 11 of the Children Act 2004 requires teachers to have regard to the need to safeguard and promote the welfare of children when carrying out their work.
14. When issues arise concerning safeguarding or promoting the welfare of children, teachers should take into account the ascertainable needs and wishes of the children as individuals, considered in the light of their ages, understanding and any risk of harm.

The contractual duty

15. The duty of care also arises from the contract of employment, the terms of which will depend on the type of school in which the teacher works and the teacher's role.

16. The *School Teachers' Pay and Conditions Document (STPCD)* defines expressly the contractual duties in England and Wales upon all teachers employed in maintained schools (including academies and free schools). It also applies to teachers in independent schools where the *STPCD* (as amended) has been incorporated into their contracts. Relevant provisions from the list of contractual duties include promoting the safety and well-being of pupils and maintaining good order and discipline among pupils.
17. In Wales, where education is devolved, teachers pay and conditions of service had remained a reserved matter for Westminster. However, following the enactment of the Wales Act 2017, responsibility for the pay and conditions of teachers in Wales is to be devolved to the Welsh Government. Contractual duties in Wales will form part of future discussions with the Welsh Government.

Teachers' duty of care and out-of-school activities

18. Understanding the duty of care can be particularly significant when a teacher is engaged in leading or assisting with activities off the school site, such as educational visits, school outings or field trips.
19. The legal liability of an individual teacher, head teacher or principal for an injury which is sustained by a pupil on a school journey or excursion depends on whether the injury is a direct result of some negligence or breach of the duty of care on the part of their teacher, head teacher or principal. There is no legal liability for any injury sustained by pupils unless there is proven negligence.
20. The standard of care required of teachers is that which, from an objective point of view, can reasonably be expected from teachers generally applying skill and awareness of children's problems, needs and susceptibilities. The law expects that a teacher will do that which a parent with care and concern for the safety and welfare of his or her own child would do, bearing in mind that being responsible for up to twenty pupils is very different from looking after a family. The legal duty of care expected of an individual teacher is that which a caring teaching profession would expect of itself.
21. In practice, this means that teachers must provide supervision of the pupils throughout school journeys or visits according to professional standards and common sense. Reasonable steps must be taken to avoid exposing pupils to dangers which are foreseeable and beyond those with which the particular pupils can reasonably be expected to cope. This does not imply constant 24-hour direct supervision. The need for direct supervision has to be judged by reference to the risks involved in the activity being undertaken. It may not always be sufficient to give instructions to pupils. The possibility that there may be challenging behaviour has to be taken into account, together with the risk the pupils may encounter if they disobey instructions. Equally, teachers may take account of the ages and levels of personal responsibility of their pupils.
22. Teachers have responsibility for pupils in their care but qualified instructors giving guidance to pupils will be responsible for their relevant area of expertise. If teachers are concerned about the ability of any of their pupils to undertake any particular activity safely, those pupils should, if necessary, be withdrawn from the activity.
23. Teachers should not participate in journeys or visits which they believe are not being adequately prepared and organised. Any concerns should be raised with the head teacher or principal.
24. Where journeys are organised within schools, responsibility for establishing that proper preparation has been made and that proper supervision will be provided is ultimately with the head teacher or principal. Head teachers and principals may delegate this function to the educational visits coordinator. Head teachers and principals should prohibit journeys and visits if they are not satisfied with the arrangements made.

Notes

25. Satisfying the duty of care absolves teachers from legal liability. Sometimes accidents occur as a result of the fault of persons with no organising or supervising responsibility for the journey. Some events are accidents, not reasonably foreseeable and not the result of anyone's negligence. Liability goes with fault. In the case of a pure accident, no one bears liability. No-fault insurance covers this eventuality.
26. Employers have 'vicarious liability' for the negligence of their employees at work. This means broadly that the employer takes responsibility if employees do not properly fulfil their health and safety obligations at work. Accidents involving pupils where negligence is alleged on the part of teachers may give rise to legal claims. If the teachers were at the time working in the course of their employment, such legal claims will most likely be made against employers. The employer might be the local authority or multi academy trust or, in the case of a foundation school, voluntary aided school, sixth form college, independent school, stand-alone academy or trust school, the governing body.
27. The DfE has withdrawn its guidance on school trips *Health and Safety of Pupils on Educational Visits (HASPEV)*, replacing it with a summary of the law relating to health and safety both in schools generally and on school visits specifically. In the view of the union, the DfE document issued in February 2014, *Health and Safety: Department for Education Advice on Legal Duties and Powers for Local Authorities, Head Teachers, Staff and Governing Bodies* does not provide anything like the level of detailed good practice guidance found in HASPEV. The DfE has published separate *Advice on Driving School Minibuses*. The Health and Safety Executive (HSE) guidance, *School trips and outdoor activities – tackling the health and safety myths* is available at www.hse.gov.uk/services/education/school-trips.pdf. Further to this guidance, the HSE has published five case studies to illustrate examples of proportionate responses to planning and delivering school trips. These case studies can be found at www.hse.gov.uk/services/education/case-studies.htm
28. In Wales, the Welsh Government refers to the authoritative information and guidance contained on the website of the Outdoor Education Advisers' Panel (OEAP) national guidance, which can be found at www.oeap.info. This website is external to the Welsh Government and its resources are available in English only. The union also advises schools in England to take advice from this comprehensive guidance.
29. In summary, teachers organising or accompanying visits should do so in accordance with the guidance from schools and government guidance and guidance from the OEAP.
30. The OEAP guidance gives advice on staffing ratios. The ratio of pupils to staff should be determined by risk assessment, according to, for example, the nature of the trip and activities planned, the age, ability and special needs of the pupils, the experience and competence of the staff and the location and environment in which the activity is to take place.
31. It is strongly advisable, however, that a minimum of two teachers should be present on any one visit, regardless of the number of adult supervisors present, in order that one teacher has charge of the group while another deals with any emergency situation.

Health and safety at work

32. The main responsibility under the Health and Safety at Work etc Act (HSWA) 1974 rests with employers, who have to take reasonable care for the health and safety of their employees and others on their premises. Employers are required to organise, control, monitor and review how health and safety measures are managed. They must assess risks, record their assessments of risks and inform employees of safety procedures. All schools, academies, free schools and colleges should have written health and safety policies in place, of which all employees, including teachers, should be informed. Furthermore, Section 2 of the HSWA requires employers to consult with safety representatives on health and safety matters.

33. The duty on employers includes taking reasonable care for both the physical and mental health of their employees. This means that employers should assess the risks to teachers of stress, excessive workload, pupil behaviour and the conduct of other staff.
34. All employees have a duty under the HSWA to take reasonable care for the health and safety of themselves and others who may be affected by their acts or omissions at work. Thus, teachers have a duty to take reasonable care of both their own and their pupils' health and safety at school (Section 7 of the HSWA).
35. Teachers should comply with any school, academy, free school, college or local authority guidance on health and safety issues and make sure they are familiar with any such guidance (Section 7 of the HSWA). They should act with reasonable care at all times and apply good sense to everything they do, including not taking any unnecessary risk or doing anything that is potentially dangerous. It is unlawful (Section 8 of the HSWA) to interfere with, or misuse, either intentionally or recklessly, anything which has been provided for the purposes of health and safety. Examples of this include propping open fire doors and blocking fire exits.
36. All employers have a duty to report any hazards, accidents which lead to 'specified injuries' or seven days absence and potentially dangerous incidents, including asbestos exposure incidents, at work to the HSE. Teachers should make themselves familiar with any recording system in the school, academy, free school or college, such as the accident report book. Full details on the requirements of reporting incidents at schools are available at www.hse.gov.uk/pubns/edis1.pdf
37. It can be important, for example, to report what might seem to be insignificant matters requiring cleaning up or minor repair. Seemingly minor matters can cause serious accidents, for example, wet patches or rubbish on the floor could cause slips, trips or falls. The union's health and safety briefing on slips, trips and falls is available at www.teachers.org.uk/help-and-advice/health-and-safety/s/slips-trips-and-falls

Physical contact with pupils

38. In July 2013 the DfE issued revised non-statutory guidance to all schools: *Use of reasonable force – Advice for head teachers, staff and governing bodies*. It has since been updated. The advice, which applies to academies, free schools, independent schools and all types of maintained schools states: "It is not illegal to touch a pupil. There are occasions when physical contact, other than reasonable force, with a pupil is proper and necessary.

Examples of where touching a pupil might be proper or necessary include:

- holding the hand of the child at the front/back of the line when going to assembly or when walking together around the school
- when comforting a distressed pupil
- when a pupil is being congratulated or praised
- to demonstrate how to use a musical instrument
- to demonstrate exercises or techniques during PE lessons or sports coaching
- to give first aid."

Teachers' power to use reasonable force to restrain

39. In England, the following guidance can be found on the Government website www.gov.uk/dfe
- *Use of reasonable force – Advice for head teachers, staff and governing bodies* DfE 2013
 - *Behaviour and discipline in schools – A guide for head teachers and school staff* DfE 2016

Notes

In Wales, the following guidance may be found on the Welsh Government website www.wales.gov.uk

- *Safe and effective intervention – use of reasonable force and searching for weapons* (March 2013)
- Welsh Government Guidance Circular 23/2006 *Teaching Drama: Guidance on Safeguarding Children and Child Protection for Managers and Drama Practitioners*.

When it is reasonable to use force

40. Teachers in both England and Wales have a statutory power to use reasonable force to restrain pupils in a number of circumstances as set out in Section 93 of the Education and Inspections Act 2006. Teachers are generally permitted the use of reasonable force to prevent pupils from hurting themselves or others, from damaging property, or from causing disorder. The DfE guidance on the *Use of Reasonable Force* provides that teachers can use reasonable force:
 - to remove disruptive children from the classroom where they have refused to follow an instruction to do so
 - to prevent a pupil behaving in a way that disrupts a school event or a school trip or visit
 - to prevent a pupil leaving the classroom where allowing the pupil to leave would risk their safety or lead to behaviour that disrupts the behaviour of others
 - to prevent a pupil from attacking a member of staff or another pupil, or to stop a fight in the playground
 - to restrain a pupil at risk of harming themselves through physical outbursts.
41. The statutory provisions can apply when a teacher or other authorised person is:
 - on the premises of the school or academy
 - elsewhere at a time when, as a member of school or academy staff, he or she has lawful control or charge of the pupil concerned, for example, on an out-of-school activity.
42. It should be noted that the use of any degree of force is unlawful if the particular circumstances do not warrant it. The degree of force should be in proportion to the circumstances and the seriousness of the behaviour or consequences it is intended to prevent. The level and duration of the force used should be the minimum necessary to achieve the desired result, such as to restore safety.
43. It is always unlawful to use force as a form of punishment or discipline.
44. It is impossible to describe definitively when it is reasonable to use force and how much may be used, beyond stating that this will depend on the circumstances of the case. Relevant considerations as to whether it might be reasonable to use force and the degree of force to be used could include, for example, the age and strength of the child. In some circumstances it will, of course, be inadvisable for a teacher to intervene without help, such as where a number of pupils are involved; where the pupil is older and physically mature; and where the teacher might be at risk of injury.
45. It is relevant that failure to respond in circumstances which merit it can be as serious as overreacting. In many circumstances, it is not a safer option for a teacher to do nothing or to take very limited action, when to take action could restore safety. This action may involve swiftly alerting a third party. So far as a teacher's duty of care is concerned, an omission can be significant if there is a subsequent claim for negligence. This will depend on the circumstances of the case. Teachers would not be expected to intervene to restore safety at the expense of their own personal safety.

Recording and reporting incidents

Notes

46. Incidents of restraint should be logged in a record book provided for this purpose and monitored by a senior staff member. The record should be contemporaneous and detailed, as this will help in the event of any later investigation or complaint. Parents must be informed as soon as possible after every recorded incident, unless it appears that doing so would be likely to result in significant harm to the pupil.
47. Teachers should be familiar with the school, academy or college behaviour policy. Maintained schools are legally required to have such policies in place. There is no legal requirement to have a policy on the use of force, but DfE guidance recommends that, as a matter of good practice, schools, including academies, and colleges should set out in their behaviour policy the circumstances in which force might be used. This is likely, according to DfE guidance, to reduce the likelihood of complaints being made when force has been used properly.
48. Staff should always avoid touching or holding a pupil in a way that might be considered indecent.

The role of the education service in protecting children from abuse

49. A number of statutory provisions place responsibilities for child protection upon local authorities (LAs), schools, academies and colleges, although – in the context of further education (FE) colleges – child protection responsibilities also extend to vulnerable adults.
50. Under the Children Act 2004, LAs, schools, including academies and colleges have a duty to assist local authority social services departments acting on behalf of children in need or enquiring into allegations of child abuse. Education bodies have a statutory duty to carry out their functions with a view to safeguarding and promoting the welfare of children under the Education Act 2002 and accompanying regulations. This includes taking steps to protect children who are at risk of significant harm. Harm is defined as ill treatment or the impairment of a child's physical or mental health or of their physical, intellectual, emotional, social or behavioural development.
51. The duty applies to LAs, governing bodies of community, foundation, voluntary aided, voluntary controlled, special and maintained nursery schools and FE colleges, the proprietors of independent schools and academies. Besides these statutory duties, schools, including academies and colleges, have a pastoral responsibility towards their pupils.
52. The individual responsibilities of teachers depend upon their role in relation to child protection in their schools or colleges. The DfE has issued guidance to maintained and independent schools, including academies and colleges, called *Keeping children safe in education: for schools and colleges Working together to safeguard children*. It is available for download on the Government website www.gov.uk/dfe. *Working Together to Safeguard Children* is the companion piece to *Keeping Children Safe* and is also available on the Government website. It sets out how individuals and organisations should work together to safeguard and promote the welfare of children. Welsh Government guidance is contained in *Keeping learners safe* – January 2015. A copy of the relevant guidance should be available in every school or college or can be accessed on the Welsh Government website www.wales.gov.uk
53. Under the Children Act 2004, LAs have a duty to make arrangements to promote cooperation between agencies in order to improve children's well-being.

Teachers' responsibilities

- 54. Teachers should be familiar with the procedures in their school, academy or college for dealing with suspected child abuse. Concern or suspicions should be reported. In the case of female genital mutilation (FGM), each teacher has a legal duty to report any verbal disclosure by a victim that an act of FGM (however described) has been carried out on her. Further guidance is available at www.teachers.org.uk/help-and-advice/self-help/s/safeguarding
- 55. Each school, academy or college should have a designated member of staff responsible for child protection matters. The 'designated person' will usually be a teacher and he or she must undertake regular training on child protection and inter-agency work. All other staff, including supply teachers and fixed-term teachers, should receive appropriate training on child protection issues.

If child abuse is suspected

- 56. Child abuse is widely defined, but may include physical abuse; emotional abuse, which is the persistent emotional maltreatment of a child such as to cause severe and persistent adverse effects on the child's emotional development; sexual abuse, which involves forcing or enticing a child or young person to take part in sexual activities, including prostitution; and neglect, which is the persistent failure to meet a child's basic physical and/or psychological needs and is likely to result in the serious impairment of the child's health or development.
- 57. Teachers are not responsible for investigating suspected abuse but should know to whom to report any concerns. It is the responsibility of the designated teachers to discuss cases with, or refer cases to, the investigating agencies, which are social services departments and the police. All schools, academies and colleges should have procedures, of which all staff should be aware, for handling suspected cases of abuse of pupils or students. The school, academy or college child protection policy should also be made known to parents.

Allegations of abuse by teachers

- 58. Each school, academy and college should also have procedures for dealing with allegations of physical or sexual abuse which have been made against members of staff. There are national guidelines on such procedures which have been drawn up by the six teachers' organisations and the national employers' organisation. The Welsh Government guidance *Keeping learners safe*, provides detailed procedures on how allegations should be handled. The DfE equivalent guidance currently lacks detail. Schools, academies and colleges are not prohibited, however, from using previous DCSF guidance, ie *Safeguarding children and safer recruitment in education* where this is more helpful. Schools, academies and colleges may also refer to the *Joint NEOST/Teacher Union Guidance on Education Staff and Child Protection: Staff Facing an Allegation of Abuse*.
- 59. Each local authority should have model procedures which have been adopted by schools and colleges locally. The procedures apply equally to non-local authority maintained schools, former sixth form colleges and to the independent sector, including academies. School, academy and college procedures should be consistent with those of the Local Safeguarding Children Board (LSCB) and in the case of local authority maintained schools, with those of the local authority.

Teachers' power to discipline

- 60. Teachers have an express power to enforce school discipline which derives from their professional status as teachers. The union sought this change to eradicate the notion that teachers rely on delegated parental authority. The Education and Inspections Act 2006 sets out teachers' statutory powers of discipline and restraint. The DfE's *Behaviour and discipline in schools* guidance provides further advice.

61. The power to discipline includes imposing a penalty when a pupil's standard of behaviour falls below that which it is reasonable to expect, as well as the legal right to confiscate inappropriate items from pupils such as mobile phones or music players and to discipline pupils who behave badly on the way to and from school, for instance when travelling on buses and trains.
62. All the powers should be exercised in accordance with the school, academy or college's behaviour policy.

Detention of pupils on disciplinary grounds

63. By virtue of Section 92 of the Education and Inspections Act 2006, there is a legal right for teachers to detain pupils after the end of a school, academy or college session or on most weekends, without parental consent. Certain conditions apply in order for the detention to be lawful. These are that:
- the head teacher/principal must have made it generally known within the school, academy or college and brought it to the attention of parents that detention might be imposed, for example, through the school, academy or college's behaviour and discipline policy
 - the detention must be imposed by a paid member of staff either generally or specifically authorised to do so
 - the detention "must be reasonable in all the circumstances", that is, it must be a proportionate punishment. Any special circumstances relevant to the particular pupil must be taken into account, such as the pupil's age, special needs, religious requirements or any disability he or she may have and whether suitable alternative travel arrangements can be made by the parents where school to home transport arrangements are made
 - for pupils at schools in Wales, at least 24 hours' advance notice is given to the parents by post, 'pupil post', or fax (except for detentions between break times or between school sessions)
 - the pupil is under the age of 18.
64. Teachers are advised to ensure they follow carefully the disciplinary policies of their schools, academies and colleges. In England, information on behaviour, attendance, discipline and exclusions can be found in the DfE publication, *Exclusion from maintained schools, academies and pupil referral units in England: a guide for those with legal responsibilities in relation to exclusion* – January 2015. In Wales, guidance on exclusion is called *Exclusion from Schools and Pupil Referral Units* – April 2015 and is available from wales.gov.uk

Searching pupils

65. In England, sections 550ZA and 550ZB of the Education Act 1996 empower a head teacher or principal to search a pupil or a pupil's possessions if the head or principal has reasonable grounds for suspecting that the pupil has a 'prohibited item'. Examples of 'prohibited items' are knives, an offensive weapon, alcohol, controlled drugs, stolen property, an article that may be used to commit an offence or to cause injury or damage or any other item which the school rules identify as an item for which a search may be made.
66. In Wales, section 550AA of the Education Act 1996 empowers a head teacher to search a pupil or a pupil's possessions if the head teacher has reasonable grounds for suspecting that the pupil has a knife or an offensive weapon.
67. A head teacher may delegate this power to staff who agree to accept it but teachers may not be directed to search pupils. All staff who are willing and authorised to search pupils must first receive appropriate and adequate training. Teachers who have accepted the power to search pupils may decide not to exercise that power based on the teacher's own professional judgement of the circumstances. All other teachers who do not have any delegated responsibility to search are entitled to refuse any request to search pupils.

Notes

68. The provision applies when the head teacher, teacher or other authorised person is on the school premises or where he or she has lawful control of the pupil outside the school premises while on an out-of-school activity or visit.
69. The Education Act 1996 requires the member of staff searching the pupil to be of the same sex as the pupil and the search may only be carried out in the presence of another member of staff who is also of the same sex as the pupil. An exception applies to the same sex provision/presence of another member of staff where the teacher reasonably believes that it is not practicable to do so because there is a risk that serious harm will be caused to others, if the search is not carried out as a matter of urgency and in the time available. The member of staff searching the pupil must not require the pupil to remove any clothing except outer clothing, such as a shoe, coat or hat.
70. If, in the course of a search, the person carrying out the search finds an offensive weapon or article, he or she may seize and retain the item, which must be handed over to the police as soon as possible.
71. The DfE guidance for school leaders, staff and governing bodies called *Screening, Searching and Confiscation – Advice for Schools* explains the powers schools have to screen and search pupils and to confiscate items they find. It applies to: maintained schools, community schools, foundation schools, voluntary schools, community special schools, foundation special schools, academies, free schools, pupil referral units and non-maintained special schools. The guidance can be found on the Government website at **www.gov.uk/government/publications/searching-screening-and-confiscation**. *Advice for Principals and Staff of Further Education Colleges, Sixth Form Colleges and 16-19 Academies* can be found at **www.dera.ioe.ac.uk/16124/**

Protection from discrimination – pupils

72. The Equality Act 2010 prohibits discrimination against pupils and prospective pupils on grounds of disability, pregnancy, race, religion or belief, sex, sexual orientation and gender reassignment (or trans) status. These are referred to as 'protected characteristics'.
73. It is unlawful to directly or indirectly discriminate against a pupil on grounds of a 'protected characteristic'.
74. Schools and colleges should not discriminate:
- on the terms on which admission is offered (although certain exceptions apply to schools with a religious ethos and single sex schools)
 - in refusing to accept an application
 - in the way pupils are afforded access to benefits, facilities or services
 - by refusing to afford pupils access to benefits, facilities or services
 - by excluding pupils or subjecting them to any other detriment.
75. Direct discrimination is where a person is treated less favourably because of their protected characteristic. Direct discrimination takes many forms. In the treatment of pupils and students, for example, it may vary from offensive remarks to subtle differences in assessment, expectation, provision and treatment. It may be unconscious or even well-intentioned but still unlawful. For example, a principal excludes a pupil who has recently been diagnosed as autistic from the school play on the presumption that the pupil will not be able to cope. This is likely to be unlawful direct disability discrimination.
76. Indirect discrimination is more complex. This is where a provision, criterion or practice, although applied equally to everyone, puts a greater proportion of pupils with a particular protected characteristic at a disadvantage, and places a pupil at a particular disadvantage and cannot be justified objectively. In an educational context, 'justified objectively' means justifiable on educational or other grounds. It is a question of fact in each case. An example of indirect race discrimination, based on a case heard by the House of Lords, was a requirement to wear a cap as part of

a school uniform. Although applied equally to all pupils, it had the effect of excluding Sikh boys from the school and was not justifiable on educational grounds.

- 77. Pupils are protected from discriminatory harassment on grounds of their protected characteristics. For example a pupil from an Irish Traveller background is offended by a staff member's derogatory comments about gypsies and travellers. This is likely to be racial harassment.
- 78. They are also protected from victimisation, ie from detrimental treatment on grounds that they have, for example, made a complaint of discrimination.

Disability

- 79. A disability is a physical or mental impairment which has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities.
 - 'substantial' means neither minor nor trivial.
 - 'long term' means that the effect of the impairment has lasted or is likely to last for at least 12 months; or is likely to last for the rest of the life of the person affected; or has not lasted 12 months, but is likely to recur.
 - 'normal day to day activities' may include walking, climbing stairs, washing or any activity (both mental and physical) which most people engage in regularly if not daily.
- 80. Treating a pupil unfavourably because of something connected with their disability is a form of discrimination known as 'discrimination arising from disability'. Unlike the term 'less favourable treatment', 'unfavourable treatment' does not require a comparison to be made between pupil's treatment and the treatment of a pupil who is not disabled. It is enough to be put at a disadvantage for something arising in consequence of the pupil's disability.
- 81. A school or college must take reasonable steps to prevent a policy or practice or physical feature of a school or college from placing a pupil at a substantial disadvantage. A failure to do so would amount to a failure to make reasonable adjustments. What is 'reasonable' will depend on the circumstances in each case.

Race

- 82. Race discrimination includes treatment on grounds of race, colour, nationality or ethnic or national origins. Schools and colleges should have effective policies, procedures and staff training schemes in place to ensure that pupils are not treated less favourably on grounds of their ethnic origins. For example, a school is likely to be liable for direct race discrimination for imposing heavier disciplinary sanctions on black children than white children for the same behaviour in similar circumstances.

Religion or belief

- 83. Religion or belief includes religion, religious belief, philosophical belief or lack of religion or belief. Designated religious schools are permitted to apply admissions criteria which give preference to members of their own religion. Schools with a religious character need not incorporate aspects of other faiths into the curriculum. These exceptions do not extend to pupil discipline or pupil exclusions. Excluding from a Catholic school a pupil who has turned away from the Catholic faith and declared himself an atheist would be unlawful direct religion or belief discrimination.

Sex

- 84. Discrimination on grounds of sex is generally unlawful in schools and colleges. Single-sex schools are permissible but the local authority must ensure that there is equality of educational provision for boys and girls respectively. Schools and colleges should ensure that robust behaviour and social media policies are followed so that they can tackle, for example, peer-to-peer sexual harassment of students.

Sexual orientation

85. Sexual orientation discrimination law offers protection to all pupils and students whether they are, or are perceived to be gay, lesbian, bisexual or straight. All schools and colleges are prohibited from admitting or refusing to admit or excluding pupils on grounds of sexual orientation. Similarly, a school is likely to be liable for direct sexual orientation discrimination if a pupil reports homophobic or biphobic bullying but no action is taken on the grounds that they should have kept quiet about their sexual orientation.

Gender reassignment

86. Gender reassignment is the medical and social process whereby a person changes their birth sex to match their chosen gender identity. The term includes any part of the process. A pupil or student who is choosing to fulfil their life in the gender opposite to their birth gender, may identify themselves as 'trans'. Discrimination against a pupil in connection with the provision of education on grounds of past, present or proposed gender reassignment is generally unlawful under the Equality Act. For example, causing distress to a 16-year-old pupil who has adopted a male name by Deed Poll – by refusing to use male pronouns in respect of the pupil – is likely to amount to direct discrimination because of gender reassignment.

The public sector equality duty

87. Since April 2011 all local authorities, schools, academies, free schools and colleges in the state sector and also independent schools in the exercise of their education functions, must have due regard to the need to eliminate discrimination, to advance equality of opportunity and to foster good relations.
88. Public authorities are required to demonstrate that they meet the general duty, for example, by publishing objectives and reports that they promote good relations between pupils from different racial groups.
89. Schools and colleges have important roles to play in promoting equality of opportunity. Teachers are likely to be more aware of the consequences of stereotyping than anyone else. Teachers should follow carefully a school or college's equality policy and encourage this to be applied consistently and reviewed if it does not address situations which arise commonly. In particular, schools, colleges and teachers should have regard to policies and practices relating to:
- admissions
 - the day-to-day organisation of school, academy or college life
 - the broader social context and local community in which education takes place
 - the relationship between pupils and staff inside and outside the classroom
 - assessments
 - raising attainment levels
 - delivering the curriculum
 - behaviour and discipline, including exclusions
 - guidance and support.

Special educational needs (SEN) code of practice

England

90. The *code of practice* provides statutory guidance on duties, policies and procedures relating to Part 3 of the Children and Families Act 2014 and associated regulations. It applies to England only.
91. Schools must fulfil their statutory duties towards children and young people with SEN or disabled children and young people in light of the guidance set out in the *code*.
92. Schools/colleges are not expected to have fully moved to the new system until 1 April 2018.

93. The *code of practice* (2014) covers the 0–25 age range and includes guidance relating to disabled children and young people as well as those with SEN. There is also new guidance for education and training settings on taking a graduated (assess, plan, do, review) approach to identifying and supporting pupils and students with SEN.
94. Class or subject teachers are responsible for carrying out the assessment, planning and support for SEN pupils in their class but should be supported by the special educational needs coordinator (SENCO) in doing this.
95. Some children with more complex SEN will have an education, health and care (EHC) plan. Other children with SEN will have additional support at school level but may not have an EHC plan.
96. Each school should have a SENCO whose role it is to coordinate provision for all children with SEN within the school. They must be a qualified teacher with qualified teacher status (QTS). The SENCO provides professional guidance to colleagues and will work closely with staff, parents and other agencies.
97. The *code* stresses the importance of working with and taking into account the views of parents/carers and pupils. The importance of early identification and assessment of SEN is emphasised and the conditions for the inclusion of pupils with SEN into mainstream schools are described.

Wales

98. There is a separate SEN *code of practice* for Wales which was introduced in 2002 and updated in 2004. The *code* focusses on removing barriers to participation and learning with the key principle being that children who have SEN should have their needs met.
99. The *code* provides practical advice to schools, early years settings and local authorities about carrying out their statutory duties to identify, assess and make provision for children with special educational needs. The Additional Learning Needs and Education Tribunal (Wales) Bill is currently in the consultation stage and will review major elements of the *code*.
100. School and Early Years Action and Action Plus remain in Wales. Statements of SEN also remain. Pupils with more complex SEN may have a Statement which has been agreed by the local authority and which sets out the SEN provision to meet the child or young person's particular educational needs following the assessment process.
101. The SENCOs must have QTS in Wales. There are also recommendations in the *code*, about the time that they will require to carry out the role in schools and early years settings.
102. Class or subject teachers should seek the support of the SENCO if, in consultation with parents, they consider that a child may need further support to secure greater progression. Teachers and the SENCO will work together to produce an individual education plan (IEP) which focusses on three or four key targets.
103. The *code* stresses the importance of taking into account the wishes of the child and working in partnership with parents/carers.

Protection from discrimination – teachers

104. All teachers have specific protection from discrimination or harassment at work on grounds of age, disability, marital or civil partnership status, maternity or pregnancy, race, religion or belief, sex, sexual orientation, and gender reassignment (or trans) status under the Equality Act 2010 and other legislation. These are known as 'protected characteristics'. It is unlawful for managers, governors and colleagues to discriminate against teachers. It is also unlawful for employment agencies to discriminate against agency or supply teachers working on day to day or longer term contracts.

Notes

105. Employers must not discriminate against teachers in recruitment including advertisements, short-listing and interview procedures; terms and conditions of employment; access to training; opportunities for promotion; transfers; dismissals; and after the employment has ended, for example, in the provision of references.
106. Treating a teacher less favourably than another teacher or colleague in similar circumstances on grounds of a protected characteristic would be direct discrimination. For example, appointing a man rather than a woman with superior qualifications and more experience to the post of principal of a secondary school on the assumption that a woman would not have the gravitas to lead the school would be direct discrimination.
107. Applying to all staff a workplace policy or practice, that a teacher and other teachers with the same protected characteristic cannot comply with because of that characteristic, would be indirect discrimination if it places the teacher at a disadvantage, unless the employer cannot justify the impact of the policy or practice. For example, the disproportionate use of capability procedures against black or minority ethnic teachers could be indirect race discrimination. Workplace procedures must be applied to teachers objectively and consistently – processes and outcomes must be free from discrimination.
108. Subjecting a teacher to unwanted conduct on grounds of a protected characteristic which violates the teacher's dignity, or creates an intimidating, hostile, degrading, humiliating or offensive environment for them would be harassment. Intimidating or degrading behaviour, such as name-calling, offensive homophobic or biphobic 'jokes' by parents, pupils or colleagues or graffiti, or requests to teachers to hide their sexual orientation from pupils, could amount to harassment. The harassment itself does not have to make explicit reference to sexual orientation but if the reason behind the harassment is sexual orientation, then it may be unlawful.
109. Treating a teacher unfavourably because of something connected with their disability is a form of discrimination known as 'discrimination arising from disability'. Unlike the term 'less favourable treatment', 'unfavourable treatment' does not require a comparison to be made between the treatment of the disabled teacher and the treatment of someone who is not disabled. It is enough for the teacher to be put at a disadvantage for something arising in consequence of their disability. For example, if a teacher is dismissed on grounds of incapability because they have been absent from work for six months with a disability related illness, it will not be enough for the employer to say that an employee who is not disabled, but who has been absent for six months would also be dismissed.
110. A school or college must take reasonable steps to prevent a policy or practice or physical feature of a school or college from placing a teacher at a substantial disadvantage. A failure to do so would amount to a failure to make reasonable adjustments. What is 'reasonable' will depend on the circumstances in each case.
111. Schools, colleges and local authorities have a statutory duty to be proactive in eliminating discrimination and advancing equality of opportunity for staff. They must assess the impact of their policies and procedures on the people affected by them and take steps to remove any barriers that come to light where it is proportionate to do so.
112. Procedures should allow teachers to record every incident of discrimination, harassment or bullying and employers should take reasonable steps to prevent any further such conduct.
113. In addition to protection from discrimination on grounds of equality characteristics, employment legislation protects trade union members from less favourable treatment on the grounds of their trade union membership or activity. Part-time, fixed term and agency teachers also have specific protection on the grounds of their employment status.

114. Teachers, like other employees, can raise grievances and bring complaints to employment tribunals about unlawful discrimination, harassment, less favourable treatment or victimisation at work. The union provides advice and support to members who wish to raise individual or collective grievances.

Criminal records and suitability to work with children

115. When appointments are offered, teachers are asked to apply for an Enhanced Disclosure from the Disclosure and Barring Service (DBS). In addition to any convictions, disclosure includes information from local police records such as acquittals, allegations or other non-conviction information (referred to as soft information).
116. Teaching posts are exempted from the provisions of the Rehabilitation of Offenders Act 1974 under which 'spent' convictions do not need to be disclosed to employers. Teachers should therefore inform a prospective employer of any convictions when requested, unless the conviction has been removed from the disclosure certificate on the basis that it is old and minor. Further guidance may be found in the union document *Disclosure of police information to employers FAQs*, which is available at www.teachers.org.uk/help-and-advice/self-help/c/conduct
117. The DBS provides teachers with a copy of the information before it is sent to employers so that teachers can check that they have been correctly identified and that the information to be supplied is accurate. Technically teachers are responsible for the DBS fee but in practice most employers pay it. Agency teachers are less fortunate, in that few agencies agree to meet the DBS fee.

Childcare disqualification

118. The childcare disqualification arrangements are set out in the Children Act 2006 and the *Childcare (Disqualification) Regulations 2018*. They automatically disqualify a person from providing, or working in, childcare at the point they are convicted or cautioned for specified offences or where they meet other disqualification criteria set out in the regulations. These arrangements apply to staff in all schools who are employed in connection with early and later years' provision, as set out below:
- early years' provision includes education and any supervised activity for a child from birth until 1 September following their fifth birthday. It applies to all provision for children in that age range during and outside of school hours, including in school nursery and reception classes
 - later years' provision covers any supervised childcare activity for a child under eight that is provided outside of school hours, including breakfast clubs and after school care.
119. The Act and Regulations also apply to staff directly concerned in the management of such provision.
120. These arrangements are longstanding, with the current provisions coming into force in 2007. The DfE's current advice and guidance was revised in August 2018 and may be found at www.gov.uk. The union has produced guidance for members in the form of FAQs and these are available at www.teachers.org.uk/help-and-advice/self-help/s/safeguarding

Legal and professional advice from the union

Trainee teachers have rights as well as the legal responsibilities outlined above. Trainee teachers may want to know what duty schools and colleges have in providing support and training, or want some advice about their working environment during teaching placements. By joining the Union, trainee teachers have access to the union's unrivalled legal protection and professional support and will be able to seek advice and information about issues of concern. We are the only union with a qualified solicitor in all English regions and in Wales.

Members in difficulty or needing advice should contact their workplace representative or for advice and assistance call 0345 811 8111.

TRAINEE APPLICATION FREE MEMBERSHIP



www.neu.org.uk/join 0345 811 8111

Please complete in capital letters

Title	First name	Surname
Date of birth DD MM YYYY	Permanent home address	
Mobile	Postcode	
Home telephone	Email	

Training routes

School-led training

Programme

- School Direct (salaried)
- School Direct (non-salaried)
- SCITT
- Teach First
- GTP Wales

Other (please specify)

School

Postcode

Training provider

When does your course/programme finish?

University-led training

Qualification

- BA (QTS)
- BSc (QTS)
- PGCE
- PGCE (FE)
- BEd

Other (please specify)

University / college / SCITT

When does your course/programme finish?

Terms and conditions available at www.neu.org.uk/terms

Use of personal information

Your membership agreement with the Union means that we are authorised to process your data. The NEU uses this information to help develop and assist with a range of Union-based activities related to the running of the NEU.

Our full privacy notice can be viewed here www.neu.org.uk/use-personal-information.

Return your completed application form to:

FREEPOST RSCK-HCRC-HGYJ
National Education Union
Hamilton House, Mabledon Place
LONDON WC1H 9BD