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School of Law  
and Social Justice

Coronavirus Research by the European Children's Rights Unit

*Damned if you  
do; Damned if  
you don't:*

*School  
Attendance  
and Covid-19*

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Coronavirus (COVID-19) #LivUniCOVID  
Research and response

Briefing Paper #11

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## **Introduction**

One of the most significant effects of Covid-19 has been on children's education. After two extended periods of national lockdown and several ongoing localised lockdowns it is natural to assume that any move to facilitate children's return to school should be welcomed, essential even. Indeed, current Government policy is that school attendance is mandatory. But an eagerness to minimise any further disruption to children's learning has triggered what many believe – including many parents – to be a reckless move that exposes children and their families to a heightened and disproportionate risk of Covid-19 infection.

Following a judicial review threat from the [Good Law Project](#), the Department for Education have revised their [guidance to schools](#). It now notes that rather than imposing a blanket obligation on parents to send their children back to school, schools must consider each request for leave on its own merits and cannot decide on a blanket basis to refuse to authorise absences.

This briefing explains precisely what the legal requirements are, for parents, schools, and local authorities, when making such decisions concerning children.

### **1. Do parents have to send their children to school?: What the Law Says**

In general, parents/primary carers are required to ensure that their children attend school. If they do not and the absence is recorded as 'unauthorised' by the school, parents can be issued a fixed penalty notice of £60 per parent by the Local Authority, rising to £120 per parent if not paid within 21 days. There is no right of appeal. Parents can also be prosecuted under the [Education Act 1996, s.444\(1\)](#) or under [s.444\(1A\)](#) for failing to cause their child to attend school regularly. The penalty, following successful prosecution for the aggravated offence of *knowing* that their child is not attending school and failing to cause them to attend, is a fine of up to £2500 and/or 3 months in prison. There are defences to this if the parent can prove they had 'reasonable justification' for their child's absence ([s.444\(1B\)](#)) or if the child was prevented from attending by 'any unavoidable cause' ([s.444\(2A\)](#)).

The [Education \(Pupil Registration\) \(England\) Regulations 2006](#) require that an absence shall be treated as authorised if the child is unable to attend 'by reason of sickness [or unavoidable cause](#)'. The Regulations do not define 'unavoidable cause' but specialist legal advice obtained by [The Good Law Project from Fiona Scolding Q.C. and Yaaser Vanderman](#) has noted that it is "well within [schools']

discretion” to decide that an absence is authorised where a child or their family member is clinically vulnerable to Covid-19.

Under the 2006 Regulations schools may also grant a leave of absence. Unless there are ‘exceptional circumstances’ this leave of absence may not be for more than ten school days in any school year. Again, ‘exceptional circumstances’ are not defined in the Regulations and could reasonably include a global pandemic. There is, therefore, some discretion offered to schools to authorise absences. The different ways in which this discretion is exercised have meant that some schools are authorising absences where children or their household members are clinically vulnerable to Covid-19 and some are not.

## 2. Determining whether school attendance is in children’s best interests

Any time a public authority – like a school - exercises discretion they must do so in accordance with the law. This includes exercising this discretion in a way that is compatible with the Human Rights Act 1998, the Equality Act 2010 and, where the decision involves children, it must also be compatible with the UK’s international obligations to protect children’s rights, as enshrined in the [1989 UN Convention on the Rights of the Child](#) (UNCRC). A particularly relevant obligation imposed by the UNCRC is contained in Article 3(1) which states that:

*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*

Article 3(2) of the UNCRC further states that:

*States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, **taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.***

This imposes a specific yet often neglected obligation to take all appropriate measures to ensure children’s well-being, with **the rights and duties of their carers in mind.**

Applied to children’s schooling in the context of Covid, this provision imposes an obligation on school authorities to consider how decisions around children’s

attendance impact on the rights and vulnerabilities not just of children themselves, but of those who care for them, including their parents.

The 'best interests' obligation contained in Article 3 UNCRC should be read in conjunction with the relevant domestic legal framework relating children's welfare. When it comes to assessing whether it is in children's best interests to attend school in the face of Covid-related risks, the [Children Act 1989](#) is particularly relevant. This requires that **every decision involving a child must treat that individual child's welfare as *the paramount consideration*** (s.1(1)). This means that where schools or local authorities are exercising discretionary powers such as authorising absences, a blanket policy requiring all children to return to school should be accompanied by provision and a process for considering **a child's full and individual circumstances**. This might include factors relating to a particular child's mental and physical health, whether any specific educational needs can be more effectively accommodated in school or at home, whether they are at a key transitional stage in their education, whether there is someone to care for and educate them at home, and whether their social and cultural needs favour school attendance. Other verified evidence, including what we know about the effects of Covid-19, should also be taken into account.

### 3. What Covid-related evidence tells us about the safety of insisting on school attendance

Under normal circumstances it would be uncontroversial that a child's welfare would usually require them to attend school. However, there is currently a novel coronavirus that has hospitalised over 500,000 people and killed over 160,000 people since [March 2020](#). The [Office for National Statistics](#) estimates that 1.1 million people in the UK are living with long covid, including 1 in 7 of those children who have caught the virus so far according to the [British Medical Journal](#). This includes symptoms that limit people's day-to-day activities. Despite previous UK government assertions to the contrary, the [medical evidence](#) demonstrates that children are often the first person to bring Covid-19 into the home from school.

With appropriate mitigation measures in place, including mandatory masks, distancing, isolation of known contacts, and good ventilation provided by open windows and HEPA filtration systems, some [school districts](#) in the US have managed to prevent Covid-19 outbreaks in schools and Independent SAGE have [recommended](#) similar measures here. However, the UK government has chosen not to take these measures and cases amongst school children have increased dramatically since schools returned in September, with 1 in 33 of all primary school children currently infected according to the ONS statistics for 15 October 2021. Children are being subjected to '[inevitable](#)' (according to the Chief Medical Officer) infection with a novel coronavirus with potentially serious and long-term impacts on their own and their families' health. It is unsurprising in this context that some parents have concluded that they do not want their children to attend school.

But even if these risks are acknowledged, there are also clear risks to children's educational attainment, social development, and mental health if they miss



school, particularly for extended periods. For some children there will also be potential safeguarding concerns. Given the complexities of determining whether school attendance is in a child's best interests, it is essential that decision-makers follow a robust and well-evidenced process. This is supported by guidance from the UN Committee on the Rights of the Child, the expert body responsible for monitoring implementation of the UNCRC. It has asserted, for instance, that:

*Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases.*

(para 6(c) [General Comment No.14 of the UN Committee on the Rights of the Child](#)).

Thus, while good attendance figures are important for schools and there is considerable pressure coming from central government to ensure attendance remains high, a legally-compliant welfare assessment must be procedurally and substantively rigorous. In other words, schools and local authorities should follow a transparent, rigorous procedure when determining whether or not to authorise the absence of an individual children, taking into account all the available evidence. The following section illustrates what such a process might look like in the context of Covid-19.

#### **4. How should schools and local authorities approach decisions to authorise or refuse to authorise a child's non-attendance?**

There are three questions, in particular, that should usefully guide decisions to authorise/refuse to authorise an absence. Each of these factors ensure that the child's welfare is placed front and centre of that decision, and recognise that children do not exist in isolation from or independent of their caring relationships:

##### **i. Is the child or a member of their household at higher risk of negative outcomes from catching Covid-19?**

Those with certain medical conditions are considered by the NHS to be at higher risk from Covid-19 (those deemed 'clinically vulnerable' or 'clinically extremely vulnerable'). Other [risk factors](#) include age, sex, deprivation, and ethnicity. Requiring children or those with household members at higher risk to attend school in circumstances of acknowledged near certainty that they will catch Covid-19 is to potentially violate their and their families [right](#) to life and/or right to private and family life.

The impact on a child's welfare and life-chances of losing a parent or a parent suffering serious long-term illness is staggering and must be considered as part of a welfare assessment. Even where there are no heightened risk factors for a family, the possibility of serious illness (including long Covid) and death still exists for children, their parents, and their grandparents, albeit at a lower risk level, and should still be factored into the welfare assessment.

##### **ii. How well can the child learn at home?**

Some children struggled to learn at home during previous school closures/absences, while some thrived academically with supportive parents and schools. Some parents will be more willing and able to support their child's learning at home than others. This may be impacted by factors such as the child's age, personality, and previous educational attainment, the educational resources available at home, and the parents' work and other commitments. Where a child is well supported and able to make good academic progress at home, this would be a factor in favour of authorising the absence. Where a child is not well supported or would otherwise struggle educationally, this would be a factor against authorising the absence. In either case, this would need to be balanced against the level of potential risk to health.

Where the risk to health is more serious, the level of educational detriment to the child (if any) would need to be higher to justify refusing to authorise the absence. Where the educational risk to the child is lower (or virtually non-existent in cases where children are well supported and making good progress at home), the level of risk to health would not need to be as significant to weigh the balance in favour of authorising the absence.

### iii. Are there any social, mental health or safeguarding concerns?

Where there are safeguarding concerns for a child, this is likely to tip the balance in favour of attendance, unless the health risk is very high. In the absence of specific safeguarding issues, consideration would need to be given to how well the child can be supported to maintain their social life with their friends, whether in relatively Covid-safe environments such as outdoors or online, and what the impact on their mental health has been or would likely be.

An assessment of the child's best interests should take into account all of these relevant factors together, along with the current infection rate in the community and the level and effectiveness of mitigations in school.

If an absence is authorised, the school and parents should remain in contact and when any of the above considerations changes (whether a lower infection rate, increased mitigations, vaccinations for children, or if the child's education, mental health or general well-being starts to suffer) the best interests analysis will need to be re-visited.

## 5. Challenging a refusal to authorise a child's absence from school

While schools have legal obligations in relation to attendance and are permitted discretion in whether to authorise an absence, it will be unlawful in some circumstances for them to withhold authorisation. To reiterate, these circumstances include:

- 1) Where it is withheld as part of a general policy of refusing authorisation/leave of absence, rather than an individualised best interests analysis taking into account the child's specific circumstances. Either applying a general policy of refusing authorisation/leave of absence in any circumstance or limiting approval only to cases involving families currently or previously advised to shield is an unlawful fettering of discretion. Each case must be decided on its own merits, in accordance with General Comment No.14, Article 3(1) UNCRC, and the Children Act 1989 (s.1(3)).
- 2) In certain circumstances, schools are legally required to authorise absences because the Education (Pupil Registration) (England) Regulations 2006, governing absence recording, must be interpreted in light of the Human Rights Act 1998 and the Equality Act 2010 (see also the Good Law Project's [Guide](#)):
  - a. The Human Rights Act 1998, section 6, prohibits schools and local authorities from acting in a way that is incompatible with the rights contained within the European Convention on Human Rights, including the right to life (Article 2), the right to private and family life (Article 8) and the prohibition of discrimination in relation to the exercise of these rights (Article 14). Where these rights would be

endangered by the child's 'inevitable' infection with Covid, it would be unlawful to refuse to authorise the absence.

- b. The Equality Act 2010 prohibits discriminatory treatment of people with a 'protected characteristic', including disability, ethnicity, age and sex. Discriminatory treatment includes policies or practices that have a disproportionate impact on people with those characteristics, or subjects them to less favourable treatment, unless that treatment is a proportionate means of achieving a legitimate aim. Requiring a child who is, or has family members who are, at greater risk from Covid due to one of those protected characteristics to de-register or face prosecution for non-attendance constitutes 'less favourable' treatment in this context.

Where a school or local authority has acted unlawfully in either failing to treat the child's welfare as the paramount consideration, fettering their discretion to authorise absences, or failing to authorise an absence in circumstances that constitute a violation of the Human Rights Act or Equality Act, they can be subject to judicial review of that decision.

## Conclusion

By putting an assessment of each individual child's welfare at the heart of decisions about whether to authorise attendance, schools would both comply with their legal obligations and foster constructive discussions with parents and children. Many schools and parents have worked well, in the face of enormous fear, pressure and uncertainty to sustain some level of education during lockdown – there's no reason why this can't continue for those children whose welfare dictates they should continue to learn at home in the current circumstances. Forcing children back to school in the absence of a reasoned, individualised, and transparent welfare assessment is reckless, counterproductive, and against the law.

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