

(Consultation on revisions - March 2019)

Protocol to Assist Schools and Academies to Manage Attendance

1 Context

- 1.1 This protocol outlines the work that Leicestershire County Council (LCC) will undertake to meet its statutory duties in relation to the enforcement of regular school attendance. It also identifies the roles and responsibilities of schools, academies and alternative providers.
- 1.2 Leicestershire County Council is committed to improving and sustaining attendance in all educational settings as it recognises the links between attendance, attainment, safeguarding and future life opportunities. The key to outstanding attendance is undoubtedly high quality teaching and learning experiences for our children and young people. This is best achieved through educational settings adopting earlier intervention strategies as part of a whole-school approach to attendance, supported by consistent statutory action from LCC.
- 1.3 This protocol reflects the greater autonomy given to schools and the Department for Education focus on empowering schools to intervene early to address attendance issues.
- 1.4 The Council believes a partnership approach, where respective roles and responsibilities are adhered to, will provide high quality educational opportunities for all our children and young people.

2 Statutory Duties of Leicestershire County Council

- 2.1 The Local Authority is a relevant enforcer for the purposes of the Education Act 1996. Enforcement can be affected through a number of formalised routes including Penalty Notices and prosecution of parents/carers for irregular attendance and School Attendance Orders.
- 2.2 LCC employs a core group of personnel to ensure these statutory duties are met and quality assured.
- 2.3 The areas of legislation that LCC has responsibility for include:
 - **School Attendance Order - Section 437 Education Act 1996.** If it appears to LCC that a child of compulsory school age in the area is not receiving suitable education, either by regular attendance at school or otherwise, a notice will be served in writing to the parent(s) requiring them to satisfy the Local Authority (LA) within a period specified in the notice that the child is receiving such education.
 - **Prosecution under Section 444(1) and 444(1A) Education Act 1996.** If a child of compulsory school age who is a registered pupil at a school is failing to attend regularly at the school, parent(s) are guilty of an offence.

- **Penalty Notices (inserted into the Education Act 1996 by section 23 Anti-Social Behaviour Act 2003; and Section 105 of the Education and Inspections Act 2006).**

Empowers designated LA officers, head teachers (deputy and assistant headteachers authorised by them) and the police to issue Penalty Notices in cases of unauthorised absence from school, and for parental failure to ensure that their child is not present in a public place during school hours without reasonable justification during the first five days of exclusion. LCC has written a Code of Conduct which specifies how Penalty Notices will be issued.

- **Education Supervision Orders (ESO) Section 36 (The Children Act 1989).**

Before instituting proceedings for an offence of irregular attendance or failure to comply with a school attendance order, the LA must consider whether it would be appropriate to apply for an ESO instead of, or as well as, prosecuting the child's parents.

3 Statutory Duties of Schools and Academies

- 3.1 Schools' responsibilities relating to attendance are detailed in the Education (Pupil Registration) (England) Regulations 2006 and The Education (Pupil Registration) (England) (Amendment) Regulations 2010.

These responsibilities include:

- advising LCC of any pupil who fails to attend regularly or has had 10 or more days of continuous unauthorised absence;
- taking a register twice each day (at the start of the morning session and once during the afternoon);
- marking pupils for each session indicating, with the appropriate code, whether each was present, absent, engaged in an approved educational activity off-site or unable to attend due to exceptional circumstances (unavoidable school closure, lack of school/LA transport and not within walking distance or widespread travel disruption due to local/national emergency); and
- complying with statutory registration & deletion procedures.

- 3.2 Where there are concerns about pupil absence, schools should seek to intervene early and maintain a chronology and record of all contacts regarding pupil absence with the pupil, parent and other agencies. This is of great importance, as schools will be required to produce this as evidence if legal intervention is subsequently used.

- 3.3 For the purposes of school attendance, the term 'parent' means all natural parents, whether they are married or not and includes any person who, although not a natural parent, has parental responsibility (as defined in the Children Act 1989) and any person who, although not a natural parent, has care of a child or young person.

- 3.4 Registration is a key aspect of excellent practice. Registers are legal documents and school leaders should ensure systems for recording attendance and absence is accurate at all times. Schools should maintain an up to date knowledge of pupil registration regulations by accessing information from the Department for Education (DfE) website. The DfE provides guidance on the use of National Attendance Codes which are used when completing the school census.

- 3.5 Developing and maintaining a whole school approach to attendance is identified as a key principle of excellent practice. Outstanding schools:

- demonstrate a strong attendance ethos
- have a clear policy on absence
- use effective, non-bureaucratic systems
- use data to improve school and pupil performance
- promote the importance of legal requirements to all staff, pupils parents/carers
- intervene early when individual pupil absence gives cause for concern
- have support systems in place for vulnerable pupils
- reward and celebrate good and improved attendance
- make best use of additional support for those with greatest need.

3.6 Where a Headteacher/Externally employed Attendance Agency wishes to refer a matter to LCC for legal proceedings to be considered under s444 (1) or (1A) Education Act 1996, they should complete the referral for a Penalty Notice/Prosecution form on the LA website.

4 Protocol for Penalty Notices

- 4.1 Penalty Notices can act as an early intervention tool in cases of overt truancy, parentally-condoned absences and holidays in term-time. Schools have had the responsibility of requesting the issuing of Penalty Notices by LCC since September 2012. Schools should be mindful that Penalty Notices have to meet the evidential requirements of Section 444(1) Education Act 1996. The Education (Penalty Notice) (England) Regulations 2007 apply the same test as applied under Section 444(1) of the Education Act 1996. Accordingly, in both cases it is necessary to be able to demonstrate that the parent has failed to secure the regular attendance of a child at school
- 4.2 The thresholds laid out in the Code of Conduct for issuing a Penalty Notice must be adhered to. There is an expectation, where possible, that a warning letter will precede a Penalty Notice. Upon receipt of a referral, LCC will issue a warning letter (known as a Notice of Intention to Issue a Penalty Notice/Prosecution) on behalf of the school. A Penalty Notice will generally only be issued if the pupil has at least **10 days of absences or twenty half days recorded against their name within the previous 12 week period**. It is important to note that the warning letter that LCC will issue will only be valid for a period of six months, from the date of issue.
- 4.3 If a Headteacher wishes a warning letter and subsequent Penalty Notice to be issued (where appropriate), they should complete the Penalty Notice Referral Form attached to this Code of Conduct and return it, along with the required supporting evidence, to LCC.
- 4.4 When using Penalty Notices, accurate registration and record keeping by the school is critical.
- 4.5 All monies received by virtue of a Penalty Notice will be paid to Leicestershire County Council.
- 4.6 The Education (Penalty Notice) (England) Regulations 2007 state Penalty Notices can only be withdrawn on very limited grounds and these are detailed in the Code of Conduct. If a penalty remains unpaid after 28 days, LCC will commence proceedings to prosecute the parent(s).
- 4.7 The prosecution under section 444(1) of the Education Act 1996 is for the irregular attendance of the pupil and not the non-payment of the Penalty Notice. Schools should therefore ensure accurate information is available for the period concerned as they will be responsible for writing the evidence to be presented as part of any court proceedings (a Section 9 statement of witness). The Head teacher (or representative) may also be called to give evidence. (See section 5 of this protocol for further information).

5 Protocol for Court

- 5.1 Prosecution of parent(s) under s444 of the Education Act 1996 will be considered on a case by case basis.
- 5.2 When schools/externally employed attendance agencies make a request for LCC to start legal proceedings due to irregular attendance, the form, Legal Proceedings Referral should be completed. Referrers need to ensure they:
- provide a copy of their letter, notifying parents that the matter is now being passed to the Local Authority for legal action to be considered;
 - describe whether the proposed prosecution should, in the opinion of the referrer, be a strict liability offence (s444(1)) or an aggravated offence (s444(1A));
 - provide an up-to-date attendance certificate relating to the period of complaint, including periods of unauthorised absence;
 - agree, should a prosecution take place, to complete a Statement of Witness (CJ Act 1967 Section 9, MC Act 1980, s 5A(3)(a) and 5B Magistrates Court Rules 1981 Rule 70). This section 9 statement will need to be provided within set timeframes. Failure to provide a statement could result in the local authority withdrawing the case from the legal process.
 - As appropriate, describe any known issues regarding the child's / parent's circumstances including any health, welfare or other relevant considerations which may be relevant to the public interest considerations likely to be applied by the LA Officers when making prosecution decisions. It is not being suggested that the Education Establishments conduct specific enquiries as a precursor to referral but simply share information already known to the school which if available is likely to enhance the Council's decision making.
- 5.3 Upon investigation of individual cases by the Court Team, where it appears that a parent is failing in his/her duty to ensure the regular school attendance of a child, prosecution may be considered as a beneficial intervention to facilitate regular attendance.
- 5.4 It is recognised however that a prosecution is a serious step to take and each case must be considered on its own merits. The Council may consider alternatives to prosecution where it is considered that compliance may be secured by other means.
- 5.5 When making its decision on whether to prosecute, the Council will consider both an evidential test and a public interest test.

Evidential Test

- 5.6 In each case the Council will consider whether there is a realistic prospect of conviction. This will involve considerations of whether evidence (*e.g. copies of the registers, statements, letters reports*) is admissible, reliable and credible. If a case does not pass the evidential stage it must not proceed, no matter what level of non-attendance is involved.
- 5.7 The Council officers will consider any information presented by the parent in order to ascertain whether any of the statutory evidences are likely to be available.

5.8 The Council will generally make enquiries by inviting the parent to complete a questionnaire to better understand the reasons for the child's non-attendance as well as the family's circumstances. Each questionnaire will contain a suitable caution that it may be used in evidence.

Public Interest Test

5.9 Prior to undertaking any enforcement action, each individual case will be assessed to ensure that it is in the public interest to proceed. A prosecution will not usually take place if the prosecutor is satisfied that the public interest factors tending against prosecution outweigh those tending in favour of a prosecution.

5.10 Subject to receiving relevant information, the Council will consider whether there are any factors which tend to lower the culpability of the parents concerned or otherwise suggest that it may be disproportionate or unreasonable to proceed with a criminal case.

5.11 It should be understood that the presence of any public interest mentioned below (or a combination of them) is not determinative of whether a criminal prosecution should proceed be permitted to proceed. However, the following is a non-exclusive list of factors which if present and known to the LA Officer may be considered by the relevant officer considering the public interest test.

Sample factors which tend to suggest that a prosecution might not be in the public interest		
1.	Very high levels of attendance;	It is settled law that attendance, otherwise than in accordance with the schools rules, is not "regular attendance". However, it is acknowledged that if the overall percentage of attendance is particularly high (e.g. over 96% over a given school term) then it may not be in the public interest to pursue a prosecution.
2.	Temporary health issues with the concerned Parent	If a parent is temporarily ill and this was the cause of the child's absence it may suggest that repetition of the non-attendance is less likely. A low likelihood of a repetition is likely to suggest that the public interest is not served by a prosecution
3.	Relevant health or psychological issues with the child	It is recognised that psychological factors the child may inhibit the child from attending school regularly:- <ul style="list-style-type: none"> • Stress and anxiety; • Socialisation problems; • Bullying whilst at school. If these factors are present it may suggest that other interventions rather than a criminal prosecution of the parent have a better prospect of assisting in achieving regular attendance.
4.	Temporary family	Relationship breakdown;

	difficulties:-	Domestic abuse, Substance / alcohol abuse; Financial pressures; It is recognised that in temporary situations of exceptional hardship may suggest the Council may wish to consider a broader range of options rather than criminal prosecutions.
5.	The age of the child	If a child is almost 18 years of age, there may be limited benefit in prosecuting
6.	Issues related to destabilisation of the family unit	It is recognised that certain parents in certain professions may face substantial prejudice as a result of receiving a criminal offence (<i>particularly a recordable criminal offence</i>).
Sample factors which tend to suggest that a prosecution may be the public interest		
1	Very poor levels of attendance	If the level of attendance is particularly poor then a criminal prosecution may be entirely necessary and proportionate.
2	Parental knowledge of a child's truancy	Although the question of a parent's knowledge is strictly only a component of the aggravated offence under Section 444(1)(a), if the Claimant, it would aggravate any offending if the parent knew of the non-attendance and failed to take any steps to curtail the truancy.
3	A lack of engagement by the parent with relevant educational authorities	The Local Authority aims to work in partnership with those they seek to regulate. A lack of engagement by the parent may suggest that a more formal means of enforcement is necessary.
4	Previous convictions for the same offence;	Previous convictions may suggest that the parent has a clear understanding of their legal duties but has continued to permit truancy.

If LCC determines it is not appropriate or in the public interest to proceed with a prosecution, it will write to the school setting out the reasons why.

6. Referrers must forward their requests for legal proceedings to the Pupil Services Court Team, Room 100b, Pen Lloyd Building, County Hall, Glenfield, Leicestershire LE3 8RF. Referrers may email their Legal Proceedings Request (along with relevant supporting documentation) to the Court Team at pupilservicescourteam@leics.gov.uk and request a read receipt. This will act as a request to issue a Notice of Intention to prosecute/issue a Penalty Notice.
7. The information must be laid by Leicestershire County Council with the court within 6 months of any offence having taken place.

1. Rationale

- 1.1. Regular and punctual attendance of pupils at school is both a legal requirement and essential in order for pupils to maximise the opportunities available to them, unless parents elect formally to educate their children at home. A Penalty Notice is a useful sanction at an early stage before attendance problems become entrenched and where prosecution may seem inappropriate.

2. Legal Basis for the issue of Penalty Notices

- 2.1. In February 2004, the Anti-Social Behaviour Act 2003, section 23, sub-section 1 added sections 444A and 444B after section 444 of the Education Act 1996. These sections enable Penalty Notices to be used as an alternative to prosecution and provide parents with the opportunity to discharge liability for conviction of an offence under section 444 by paying a financial penalty to the Local Authority.
- 2.2. Section 105 of the Education and Inspections Act 2006 enables Penalty Notices to be issued to parents in relation to an excluded pupil of compulsory school age, should they fail to ensure their child is not present in a public place during school hours in the first five days of each and every fixed period or permanent exclusion without reasonable justification.
- 2.3. Persons authorised to issue Penalty Notices must have regard to The Education (Penalty Notices) (England) Regulations 2007, the guidance issued by the Secretary of State, and the following legislation:

Human Rights Act 1998
Equality Act 2010
Data Protection Act 1998

3. Procedures for issuing Penalty Notices

- 3.1. The issue of Penalty Notices will be undertaken by staff authorised by Leicestershire County Council (LCC).
- 3.2. A Penalty Notice request proforma has been attached to this Code of Conduct.
- 3.3. If a Headteacher wishes a Penalty Notice to be issued they should complete Penalty Notice Request, and attach copies of relevant documentation issued to parents, and return them to LCC.

- 3.4 LCC will always issue Penalty Notices by first class post (with proof of posting) as there may be health and safety implications involved in the operation of direct delivery.
- 3.5 Parents will normally receive a warning letter from the LA before a Penalty Notice is issued. The warning letter will indicate the period of time over which improvement is expected (typically a further 15 school days).
- 3.6 A Penalty Notice will usually only be issued to each parent if the pupil has ten days of absences (or 20 half days) recorded against their name within the previous 12 week period.
- 3.7 An exception to 3.5 and 3.6 are holidays in term-time where no permission has been requested by parents or where permission has not been granted by the Headteacher of the school. In such cases a Penalty Notice may be issued for less than 10 unauthorised absences.

NB. As of 1st September 2013, LCC will issue Penalty Notices where parents choose to take a family holiday during term time and where the Headteacher deems the holiday to fall outside of their definition of 'exceptional circumstances.' A specific request form, Guidance notes on the process to be followed in relation to this updated legal support (Annex 4) and a sample letter for use by Headteachers when informing parents that leave of absence will not be granted for a family holiday during term time (Annex 5) are all provided herewith.

- 3.8 The Isle of Wight Council v Platt case considered by the Supreme Court makes it clear that regular attendance shall mean attendance in accordance with the school rules. Therefore, any non-attendance which is not in accordance with the school rules will be deemed unauthorised and it would therefore be appropriate to issue a PN.
- 3.9 Each parent will receive no more than one separate Penalty Notice resulting from the unauthorised absence of an individual child in any one academic year. This is ensured by checking the database for previous actions.
- 3.9 An exception to 3.9 are Penalty Notices issued for holidays in term-time where no permission has been requested by parents or where permission has not been granted by the Headteacher of the school. More than one Penalty Notice can be issued in this case in any one academic year.
- 3.10 To ensure the powers associated with Penalty Notices are applied consistently and fairly, Headteachers and LCC must be confident the circumstances of each case:
- meet the criteria for the issue of a Penalty Notice specified in this Code of Conduct; and

- that all necessary information can be provided to LCC should a Penalty Notice be unpaid in order to pursue legal proceedings under Section 444(1) Education Act 1996.

3.11 A Penalty Notice would not be issued where other statutory intervention for irregular attendance is being pursued by the LCC or where a parent has received a previous conviction in respect of his/her child's absence from school within the previous two years.

3.12 Within this Code of Conduct, a parent is defined as in Section 576, Education Act 1996. This means all natural parents, whether married or not and includes any person who, although not a biological parent, has parental responsibility or has care of the child or young person.

3.13 The Headteacher or authorised person must provide to LCC a copy of the attendance register for the period covered by the Penalty Notice.

3.14 Other authorised LCC staff and the police, Headteachers, community support officers and accredited persons may also issue Penalty Notices subject to adherence to this Code of Conduct, for example as a result of truancy patrols and/or in relation to the whereabouts of excluded pupils in the first 5 days of exclusion.

4. Circumstances for Issuing a Penalty Notice

4.1 The Headteacher may consider requesting the issue of a Penalty Notice in relation to the parents of children of compulsory school age in the following circumstances:

- Early intervention to address unauthorised absence (where that unauthorised absence would meet the criteria for a prosecution under s444, 1996 Education Act)
- Unauthorised holidays in term time (see paragraph 3.7 and attached guidance documents)
- Unwarranted delayed return from an extended holiday (without school agreement); and
- Persistent late arrival after the register has closed.

4.2 Authorised personnel may also issue a Penalty Notice in relation to an excluded pupil under Section 103 of the Education and Inspections Act 2006. A parent must be clearly informed in writing that they should ensure their child is not present in a public place (which does not include school premises) during school hours in the first five days of each and every fixed period or permanent exclusion without reasonable justification. A record of the exact time and place at which the pupil was observed is required.

5. Payment and non-payment of a Penalty Notice (with effect from 1st September 2013)

- 5.1 Payment of a Penalty Notice within 21 calendar days of receipt of the notice is £60 and payment after this time but within 28 calendar days of receipt of the notice is £120. Payment in full discharges parent/carer liability for the period in question and they cannot be prosecuted under other enforcement powers for the period covered by the Penalty Notice.
- 5.2 Non-payment will trigger a prosecution for non-attendance under Section 444(1) of the Education Act 1996. LCC will undertake the prosecution using a period of complaint including the period highlighted within the Penalty Notice. The school/externally employed attendance agency will need to prepare a Section 9 statement of witness. The Headteacher (or representative) may also be called to give evidence.

6. Withdrawing a Penalty Notice

- 6.1. When considering legal proceedings for non-payment of a Penalty Notice, LCC may request it be withdrawn if it determines that the Penalty Notice:
- ought not to have been issued i.e. it was outside the terms of this Code of Conduct; or
 - has been issued to the wrong person; or
 - contains material errors.

7. Administration of the Penalty Notice Scheme

- 7.1 All financial penalties will be made payable to LCC and the resources will be used to cover the costs of administering legal proceedings resulting from non-payment of Penalty Notices.