

PDA Conference 2013

Managing School Space

IS THE PLAYING PITCH LEVELLING OUT?
ADMISSIONS, BEHAVIOURS, EXCLUSIONS
IN A CHANGING ENVIRONMENT

The purpose of the presentation is to assist school principals and deputy principals to clarify and focus their roles in a combined policy and procedural context by highlighting some contextual, legislative and legal issues in regard to school management and examining recent developments in caselaw and policy development.

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Agenda for today:

- Introduction
- Context: Educational/Societal Landscape /Ethos/Image
- Legal Framework
- Review of important and recent cases
 - “Magisterial Role” of Principal/Deputy
 - Natural Justice/Fair Procedures
- Recent developments and proposed changes
- Questions and concluding remarks

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Some Context: The Landscape

- Growing “The High End Knowledge Based Economy”
- Decline from 5th to 17th Position in Early Literacy & Numeracy from 2000 to 2012;
- Growing Secularisation of Society;
- Ireland’s rejection of UN call to end religious discrimination in education;
- Forum on School Patronage;
- Educate Together Blueprint for 2nd Level Education;

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Context ctd.:

- 61% support state control of primary schools;
- Fee paying schools entering the free system;
- Questioning the state endowment of private schools;
- 2008 Audit of Enrolment Policies;
- 2011 Discussion Paper on Regulatory Framework for School Enrolment;
- Sept 2013 :Draft legislation and regulations on admissions;
- October 2013 Circular 45/2013: Anti-Bullying procedures

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Light touch regulation favours vested interests:

“A strong (subjective) personal/business interest in a particular state of affairs.... Usually ensuring or resulting in private/personal gain”

- Banks, Institutional abuse, Drink and tobacco industries, Some schools.
- Assumed/false consensus.... “By common consent”... “exclusive schools”... “dumbing down” the system

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Context:

What is the Overall Role/Function of Management?

- To Define
- To Lead, Supervise and Control
- To Defend
- To Develop/Grow

The **Space** within which the school operates in relative to the other stakeholders/providers.

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Audit of Enrolment Policies 2008

Western Cluster	Roll	SENs
Cluster E Vocational Ed. Mixed	51-100	55.84%
Cluster E Secondary Boys	251-300	15.04%
Cluster E Secondary Girls	301-350	5.26%
Cluster E Secondary Girls	351-400	2.53%
Cluster E Secondary Boys	401-450	2.44%
Southern Cluster Provincial Town		
Cluster A Community Mixed	151-200	27.08%
Cluster A Secondary Girls	401-450	14.12%
Cluster A Secondary Boys	651-700	5.64%
Cluster A Secondary Girls	651-700	4.71%

No Boarding or fee paying schools included.

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Audit Report

• Dept. of Education & Science Audit of Enrolment Policies issued April 2008:

“As you will see from the report, the audit does not find evidence of problematic enrolment practice..... However, it does identify pockets of inconsistent activity on a local school cluster basis which would indicate that some schools are assuming disproportionate shares of responsibility for enrolling children of all backgrounds and needs within their local community”

“There is also an issue on how parents might be equipped to deal with a refusal that is presented as “advice” to enrol in another school on the basis that the other school would better meet the needs of the child concerned.”

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An example of “advice”

I have further pointed out to the VTT that our Curriculum in the College is very academic base (sic) with little emphasis on practical subjects and even if we did not have problems with space in classes, this curriculum would not be in the best interest of your son's educational development.

Sincerely yours , Principal
Secretary to the Board of Management.

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Some of the Responses to the Audit

IVEA

The over-riding concern of the IVEA is to bring an end to the discriminatory enrolment policies, procedures and practices that have been endemic in Irish Education for decades.

The appointment of an appropriately resourced appellate body at a national level would be necessary to address this need.

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NEWB: “would welcome an exploration of the value and purpose of an Enrolment Commissioner. There is a clear need for ongoing monitoring and oversight of enrolment policies”.

Equality Authority: “The evidence of the Equality Authority suggests that where a school in a district adopts an inclusive approach... other schools in the area “opt out” of being inclusive.

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JMB/AMCSS:

“It is neither practical nor desirable to force boards of management into making decisions which result in the loss of parental choice and diminishes the autonomy of schools”

“The suggestion of developing the concept of a formal statutory “Enrolment Commissioner” would mean an over-regulation of school enrolments and would constitute an unacceptable interference in the functions and responsibilities of boards of management”

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CORI/ Assoc. of Trustees of Catholic Schools:

“schools are already required to inform parents of their right to appeal”... “We endorse the idea of peer mentoring”... CORI/ATCS do not agree that a formal statutory Enrolment Commissioner be appointed or that the Minister be given the power to appoint a person to assume the exercise of enrolment function. If Section 29 is operating effectively there should be no need for such a role”... “Also the provision of certain practical subjects cannot be offered in many Voluntary Secondary Schools due to the fact that the DES does not provide funding”

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ACCS Response:

Community and Comprehensive schools have been providing quality inclusive, comprehensive education to majority and minority communities, irrespective of creed, origin, or socio-economic background, for almost half a century. The seeming lack of equity in the enrolment policies of some schools in other sectors has had a direct, negative impact on our schools, and on equality.

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Impact on Schools?

- Pressure on Management from Staff
- Incentivises “cherry picking”
- Reduces social mixing and increases “social apartheid”
- Negative impact on school’s self-image and self-esteem
- Enhances “league table” culture and biased recognition of achievement
- Perpetuates unfounded societal perceptions of difference rather than similarity about school type and people.
- Provides a safety valve for some schools at the expense of other schools.

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The Legal Framework

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Constitution Art 42 + Natural Justice

Equality Legislation

Education & Training Boards Act 2013

Education (Welfare) Act 2000

Education Acts 1998-2012

EPSEN Act 2004

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Education

Article 42

1. The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.
2. Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.
3. **1° The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.**
4. The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative.....

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Equal Status Act 2000 section 3

The 9 grounds on which discrimination is unlawful:

Gender	Marital Status
Family Status	Sexual Orientation
Religion	Age
Disability	Race
Traveller	

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Equal Status Act 2000 section 7:

(2) An educational establishment shall not discriminate in relation to—

- (a) the admission or the terms or conditions of admission of a person as a student to the establishment,
- (b) the access of a student to any course, facility or benefit provided by the establishment,
- (c) any other term or condition of participation in the establishment by a student, or
- (d) the expulsion of a student from the establishment or any other sanction against the student.

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Equal Status Act 2000 section 7:

(3) An educational establishment does not discriminate under *subsection (2)* by reason only that—

(a) where the establishment is not a third-level institution and admits students of one gender only, it refuses to admit as a student a person who is not of that gender...

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Equal Status Act 2000 section 7:

(c) where the establishment is a school providing primary or post-primary education to students and the objective of the school is to provide education in an environment which promotes certain religious values, it admits persons of a particular religious denomination in preference to others or it refuses to admit as a student a person who is not of that denomination and, in the case of a refusal, it is proved that the refusal is essential to maintain the ethos of the school,

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Indirect Discrimination - happens where there is less favourable treatment by impact or effect. It occurs where people are, for example, refused a service not explicitly on account of a discriminatory reason but because of a provision, practice or requirement which they find hard to satisfy. If the provision, practice or requirement puts people who belong to one of the grounds covered by the Acts at a particular disadvantage, then the service provider will have indirectly discriminated, unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

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Education Act 1998, section 9(m):

A recognised school shall provide education to students which is appropriate to their abilities and needs and, without prejudice to the generality of the foregoing, it shall use its available resources to—
(m) subject to this Act and in particular [section 15](#) (2) (d), establish and maintain an admissions policy which provides for **maximum accessibility** to the school.

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Education Act 1998 section 15(2)

(d) publish, in such manner as the board with the agreement of the patron considers appropriate, the policy of the school concerning admission to and participation in the school, including the policy of the school relating to the expulsion and suspension of students and admission to and participation by students with disabilities or who have other special educational needs, and ensure that as regards that policy **principles of equality and the right of parents to send their children to a school of the parents' choice are respected** and such directions as may be made from time to time by the Minister, having regard to the characteristic spirit of the school and the constitutional rights of all persons concerned, are complied with,

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Education Act 1998:

29.—(1) Where a board or a person acting on behalf of the board—(a) permanently excludes a student from a school, or
or
(b) suspends a student from attendance at a school for a period to be prescribed for the purpose of this paragraph, or
(c) refuses to enrol a student in a school,
the parent of the student, or in the case of a student who has reached the age of 18 years, the student, may appeal that decision to the Secretary General of the Department of Education and Science and that appeal shall be heard by a committee appointed under subsection (2).

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The Education(Welfare) Act 2000, section 19:

19.—(1) The board of management of a recognised school shall not refuse to admit as a student in such school a child, in respect of whom an application to be so admitted has been made, except where such refusal is in accordance with the policy of the recognised school concerned published under section 15(2)(d) of the Act of 1998.

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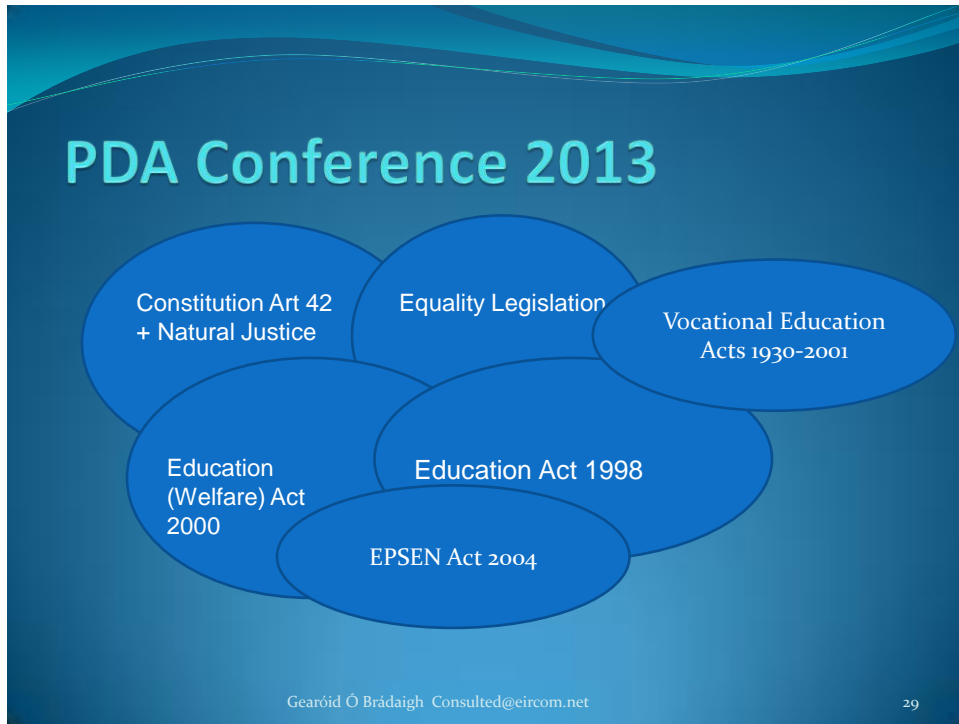
Education for Persons with Special Educational Needs Act enacted 19 July 2004

“special educational needs” means, in relation to a person, a restriction in the capacity of the person to participate in and benefit from education on account of an enduring physical, sensory, mental health or learning disability, or any other condition which results in a person learning differently from a person without that condition and cognate words shall be construed accordingly

Section 2 The right to be educated in an inclusive environment

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Some important Cases:

1. Westmeath VEC -V- Dept. of Education and Science. High Court. (2007-2009)
2. Board of Management of St. Molaga's National School -V- Dept. of Education and Science. Delivered February 2009 (High Court) and Supreme Court (December 2010)
3. O'Donovan -v- Board and Management of De La Salle College Wicklow & Ors Delivered 3rd April 2009.
4. Stokes V CBS Clonmel ongoing
5. City of Waterford VEC -V- DOES Refer to copy

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Mr. Justice Daniel O’Keeffe

in Westmeath VEC V Dept. of Education & Science

49. The Appeals Committee recited as a reason for its decision that “The enrolment policy of Mullingar Community College, with regard to transfers from post primary schools may be at variance with the rights of parents to enrol their child in the school of their choice”.

Section 15(2)(d) does not give an absolute right to a parent to enrol their child in the school of their choice. Such a right of parents to send their children to a school of their choice must be respected in the published enrolment policy of the school having due regard to the matters set out in section 15(2)(d).

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St Molaga’s School Supreme Court 23/11/2010

The words in s.29 are very clear. The term "appeal" is not obscure. It has a plain meaning in relation to procedures. The concept of an appeal is a full hearing on the merits with the jurisdiction to make a determination on the issues raised. An appeal goes beyond a review of a decision-making process.

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Supreme Court ctd:

Consequently, the appeals process enables the appeals committee to have a full hearing on the matter and if so determined to replace its judgment on the matter for that of the Board and to make such recommendations as it considers appropriate. Such a decision is anticipated as a possible outcome of an appeal by the section itself, in the provisions enabling a Secretary General to require a board to remedy a situation in accordance with the recommendation of an appeal committee.

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O'Donovan -v- Board and Management of De La Salle College Wicklow & Ors

56. In light of the foregoing, it seems clear to me that the determinations of the Board of Management and the appeals committee were not reached in violation of the ordinary requirements of reasonableness or in manifest error of law. However, there was nonetheless a plain and unambiguous violation of the requirement under sections 21(4) and 24(1) of the 2000 Act to engage with the educational welfare officer. The role of the educational welfare officer is a vital one. It is to ensure that there is no untoward break in the continuous education of a child where disciplinary procedures such as expulsion or a long period of suspension are in **contemplation...**

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O'Donovan ctd.....

In this case, the applicant was studying for his Leaving Certificate. The change of school alone was likely to have a serious effect on his performance at this crucial time. The absence from school for an extended period at Christmas of his Leaving Certificate year was most undesirable and in my view exactly what the statutory framework seeks to avoid. I am of the opinion that the expulsion process was tainted by this error on the part of the school.

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Indirect Discrimination

Stokes V Board of Management High School Clonmel
Equality Tribunal delivered December 2010

Circuit Court Appeal delivered July 2011

High Court Appeal delivered orally January 2012

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Equality Tribunal

I find that the complainant has not proved that the priority given to siblings of current or former pupils puts members of the Traveller community at a particular disadvantage compared with non-Travellers.

I find that the complainant has proved that the priority given to the sons of former pupils puts members of the Traveller community at a particular disadvantage compared with non-Travellers and that the High School has not proved that this criterion is objectively justified by a legitimate aim and is appropriate and necessary.

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Stokes V Clonmel High School Circuit and High Court

The issue can be broken into two parts:

- (i) having regard to the provisions of the Equal Status Legislation, is the "parental rule" discriminatory against Travellers? And
- (ii) if so, can it be objectively justified by reference to a legitimate aim, the means to the achieving of which could be deemed both appropriate and necessary?

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Stokes ctd...

I find that the overall aim of the Board in introducing the “parental rule” is entirely in keeping with this goal and the “characteristic spirit of the school”, a concept to which it must have regard in accordance with section 15(2) (b) and (d) of the Education Act 1998. The Appellant has thus objectively justified to the satisfaction of this Court that the aim of the Board in this regard was wholly legitimate.

Stokes ctd...

The current policy (a form of lottery) falls somewhere between these extremes. This in itself does not mean that the policy is appropriate, **but it is one which is reviewed annually** and I am satisfied that, having regard to all the many relevant considerations of which the Board must take account, it strikes the correct balance and is, therefore, appropriate. (Emphasis added)

In relation to the necessity test... links between the school and the community in Clonmel. ..The resultant bond has been strong. There is an active past pupils' union... former students have been active in providing mentoring, bursaries for sports and financial assistance for the sons of impoverished parents... task of bridging the shortfall in funds provided by the Department and the outgoings of the school would most probably be considerably less were such strong bond not in place. I find -- and not without hesitation -- that the inclusion of the "parental rule" was a necessary step in creating an admissions policy which is proportionate and balanced.

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- **Some issues for consideration:**
- Check that all statutory rights are dealt with, principally the right to appeal a refusal and how to do that.
- Specify an enrolment period each year and review the policy each year in October/ November for issuing in December/January
- Specify some of the circumstances (non-exhaustive list) where the Board may refuse and application to enrol

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- Include a reference to Code of Behaviour and the need to sign it (Education Welfare Act s.23(4))
- Avoid phrases like “*Acknowledges the right of parents to send their child to the school of their choice*” with no qualification of any kind.. Perhaps use the word “respects”
- Requiring an applicant to attend an enrolment day when no date is given and no enrolment period is listed
- Giving preference to siblings could present ground for indirect discrimination on the basis of Family Status.
- “*Criteria for admission may include the following*” ... not specific enough, spell out what they are or what applicants have to provide

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- Transfers
- References to an “Entrance Test” should be clarified.
- There cannot be a probationary period.
- Avoid associating disability with special educational needs and the possibility of a threat to staff or student safety. Be positive about accepting students with SENs and disabilities but state clearly that certain students may present with levels that a mainstream school cannot cope with.
- Preference for children of staff ????
- Brothers/sisters/past pupils ????

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Magisterial Role of Principal/Deputy

Smullen v Duffy (1980) ILRM46, per Finlay P.:

Power to control the internal organisation, management and discipline of the school, should exercise supervision over the teaching and non-teaching staff and should have power for any reason which he or she judges adequate to dismiss subject to the approval of the Board or to suspend pupils subject to any right of appeal”

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Education Act 1998 section 23 as amended by the Act of 2012 (Section 6):

- (2) In addition to the functions of a Principal provided for in section 22 , the Principal shall—
- (a) be responsible for the day-to-day management of the school, including guidance and direction of the teachers and other staff of the school, and be accountable to the board for that management,
 - (b) provide leadership to the teachers and other staff and the students of the school,

Fair Procedure Due Process Natural/Constitutional Justice

- Fair Procedure and the Requirement of a Fair Hearing.....Audi Alterem Partem (Hear the other side)
- The Rule Against Bias..... Nemo Iudex In Causa Sua (No man/woman should be a judge in his/her own case) and that **each decision maker** is impartial in the adjudicative process

Areas of Application

- Day to day discipline/behaviour issues
- Disciplinary Committee Matters
- Section 29 matters: exclusion/suspension/expulsion (refer to Guidance Notes from DOES in your pack)
- Complaints by parents against staff
- Allegations of Bullying/Harassment/Sexual Harassment
- Suspension & Dismissal of Teachers/Principals Circulars 59&60 of 2009

Things I should always do

- Clarify the issue and my role
- Clarify the extent of my jurisdiction
- Clarify the procedure to be used
- Check proposed action against the principles as outlined.... Put yourself in the position of the other party(ies)... but practise detachment
- Seek advice if unsure, mending one's hand is always difficult and usually too late
- **Make detailed preparation for every meeting/hearing/report/letter**
- **Be aware of and manage the stress**

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Avoid “spur of the moment” decisions.

What seems like the longest way around is very often the quickest way there.

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Team Management

- Crucial importance of uniform senior team approach to these issues.
- No room for “good cop bad cop”
- Inconsistency devalues the currency of the procedure, devalues the esteem and respect for management.
- It leads to decisions being overturned on review

Dublin Dún Laoghaire ETB

Future changes ???

1. Draft General Scheme of an Education (Admissions to Schools) Bill 2013
2. Draft Regulations on Policy Content
3. Draft Regulations on Admissions Process
4. Circular 45/2013 Anti-Bullying Procedures

- General requirement to accept all applicants, including those with SEN
- No waiting lists or booking deposits or “first come first served” arrangements
- Power to Minister to take over admission function
- Priority to siblings and 25% allocated to “parents rule”
- Waiting lists may continue for at least 5 years
- Single sex exemption and “religious ethos” exemptions will apply
- Detailed admission policies and procedures
- Abolition of section 29 Appeal for refusal to enrol

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Anti-Bullying Procedures

September 2013: Circular 045/2013

and

Anti-Bullying Procedures for Primary and Post-Primary Schools (previous version 1993).

Bullying is always wrong and never acceptable and is not a normal part of growing up.

This is not a problem schools can solve alone

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Context:

What is the Overall Role/Function of Management?

- To Define
- To Lead, Supervise and Control
- To Defend
- To Develop/Grow

The **Space** within which the school operates relative to all the other stakeholders/providers.

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Questions?

Concluding Remarks

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