

EDUCATION BULLETIN

AUTUMN 2020

Welcome to our Autumn education bulletin.

Recent months have demanded significant flexibility from schools as part of the nation's covid-19 front line response. That demand has often been last minute and confused, but schools continue to rise to meet the challenge. Throughout, colleagues at Wrigleys have regularly posted updates to our [education news](#) and [covid-19 news](#) page providing guidance and clarity for school leaders on the rules and restrictions which have been introduced. In this bulletin we include commentary on the continuing safeguarding obligations, and the duty to provide remote learning, alongside school governance updates.

Wrigleys' employment webinar series, replacing our summer annual conference, was attended by many schools, and recordings of each session are now available on our [website](#). Wrigleys' [governance webinar series](#) has just begun, replacing our annual governance conference (now in its 29th year!).

Keep an eye out for Wrigleys education webinar series which will start in the new year.

We are always interested in feedback or suggestions for topics that may be of interest to you, so please get in touch.

Chris Billington,
Head of Education
e: chris.billington@wrigleys.co.uk
t: 0113 244 6100

First, a reminder of some of our forthcoming events:

- **5 November 2020, Webinar**

Wrigleys' 29th Annual Charity Governance Seminar

Not business as usual: operating your organisation in an uncertain, post Covid world

[Click here for more information or to book](#)

- **12 November 2020, Webinar**

Wrigleys' 29th Annual Charity Governance Seminar

Post-Covid – protecting your contracts

[Click here for more information or to book](#)

- **19 November 2020, Webinar**

Wrigleys' 29th Annual Charity Governance Seminar

Recruiting and retaining good trustees: harnessing opportunities and meeting the challenges presented by the pandemic

[Click here for more information or to book](#)

- **26 November 2020, Webinar**

Wrigleys' 29th Annual Charity Governance Seminar

Round-up, good news and things you might have missed

[Click here for more information or to book](#)

Recorded webinars:

- **Employment law update webinar series: Flexible working: Part I - building a balanced society**
16 June 2020, Webinar
[Click here for more information or to view webinar](#)
- **Employment law update webinar series: Flexible working: Part II - re-organisation and flexible working**
7 July 2020, Webinar
[Click here for more information or to view webinar](#)
- **Charities & social economy webinar series: Restructuring your organisation from the inside out**
22 July 2020, Webinar
[Click here for more information or to view webinar](#)
- **Employment law update webinar series: Equality in the workplace - transgender discrimination**
4 August 2020, Webinar
[Click here for more information or to view webinar](#)
- **Employment law update webinar series: - Equality in the workplace - disability and reasonable adjustments**
1 September 2020, Webinar
[Click here for more information or to view webinar](#)
- **Employment law update webinar series: Equality in the workplace - atypical working, zero hours and ethical issues**
6 October 2020, Webinar
[Click here for more information or to view webinar](#)
- **Wrigleys' 29th Annual Charity Governance Seminar: 'Serious incidents': what, why, and when to report**
15 October 2020, Webinar
[Click here for more information or to view webinar](#)
- **Wrigleys' 29th Annual Charity Governance Seminar: Is your cat causing a breach of the GDPR? Data protection in the age of remote working**
22 October 2020, Webinar
[Click here for more information or to view webinar](#)

Contents

1. What does the remote education direction mean for schools and trusts?
2. Safeguarding and remote learning in the time of Covid-19
3. Former academy trust CEO barred from school management
4. School staffing levels and the impact of Covid-19
5. Agile governance in schools and academy trusts
6. Teacher was unfairly dismissed after decision not to prosecute for criminal charges
7. Schools and academy trusts: are your contracts up-to-date?
8. What is the status and duty of members of an academy trust?
9. Board diversity and governance for schools and trusts

What does the remote education direction mean for schools and trusts?

The Secretary of State has directed that remote education shall be a legal requirement. So what does this mean for schools and trusts?

Background

The Secretary of State for Education, Gavin Williamson, has issued a [temporary continuity direction](#), in exercise of his powers under the Coronavirus Act 2020, requiring schools to provide remote education to pupils. The direction is accompanied by an [explanatory note](#) which schools must have regard to when complying with the direction.

What is the direction?

Schools must provide remote education where a pupil's travel to or attendance at school would be contrary to guidance published by the Department for Education (DfE) or Public Health England or prohibited by legislation. In other words, where a class, group of pupils or individual pupil need to self-isolate or there are local, regional/tiered or national restrictions requiring pupils to remain at home, schools are expected to provide those pupils with immediate access to remote education.

When from?

The direction has effect from 22 October 2020 until the end of the current school year, unless the requirement is ended sooner by a further direction.

Who is affected?

The direction applies to:

- *all state-funded schools in England. This covers maintained schools, academies, independent special schools, and other independent schools with pupils whose education is entirely state funded, for example through an assisted place or an education, health and care plan; and*
- *pupils of compulsory school age and younger children who are expected to be educated with them (most commonly in a reception class).*

Who is not affected?

The requirement will not apply to students in post-16 education, i.e. those attending further education colleges, sixth form colleges, sixth forms or 16-19 Academies.

What is 'remote education'?

The direction defines 'remote education' as education provided to a pupil who does not attend school. The explanatory note expects the quality of education to remain as set out in the [guidance for full opening](#) published in July 2020 (updated on 1 October), which expects remote education to:

- be high quality, safe and aligned as closely as possible with in-school provision
- be meaningful, ambitious, well-planned and clear
- avoid an over-reliance on long-term projects or internet research activities
- consider the age, stage, development or SEN of the pupil
- make reasonable adjustments for pupils with SEN, as necessary
- provide printed resources where pupils do not have online access and
- provide interaction, assessment and feedback

It is also essential to keep children safe online and therefore follow the statutory [guidance keeping children safe in education](#). My colleague, Alacoque Marvin has recently posted on [Safeguarding and Remote Learning in the time of Covid-19](#), available on our website.

Schools and trusts have already done an amazing job in providing remote education to pupils who are self-isolating, by expanding provision online and supporting those without adequate broadband or IT equipment. They need the government to play its part and deliver on its commitment to provide laptops to those who need them. However, schools will be well aware of the need to tailor remote provision to the educational abilities and needs of pupils who are not able to attend, including non-electronic alternatives such as workbooks and textbooks.

What if I don't comply?

Schools and trusts will do whatever they can to comply with the direction. However, in the event that they don't or can't comply, the government can apply to court for an injunction to require them to do so. That said, the explanatory note considers this a last resort.

Summary

The remote education direction, which takes effect on 22 October 2020, changes very little. It makes the provision of remote education, already expected in the guidance for full opening published in July 2020, a legal requirement. This is enforceable by an injunction, as a last resort, with the DfE saying it will help schools with their remote education plans and provision. Schools and trusts need the DfE to step up to the plate which includes delivering on the promised laptops for those whom most need them.

Safeguarding and remote learning in the time of Covid-19

As a remote education offering is soon to become a legal requirement, a reminder that safeguarding duties persist.

The Covid-19 crisis poses a number of novel safeguarding issues for schools, particularly around the safety of remote education and the wellbeing of children. However, while many usual ways of working may have been disrupted by the pandemic, it is important to remember that the basic safeguarding duties of schools and their staff have not changed.

New legal requirements for remote education

The expectations around remote education have moved pretty quickly in the last week or so. On 25 September, the DfE published its *expectation* that schools will have the capacity to offer “immediate remote education” where pupils need to self-isolate or local restrictions require pupils to remain at home and to have a “strong contingency plan in place” by the end of September. On 1 October, the DfE updated its [remote education guidance](#) to state that this expectation will become a legal requirement for state-funded, school-age children in schools in England from 22 October 2020.

Safeguarding considerations for remote education

Schools have been working incredibly hard to put in place contingency plans to enable the delivery of education remotely where it is required. Some of these plans include technological innovation such as live streaming of lessons (whether from home or school), enabling a pupil to interact with their teacher and school-based class through video-conferencing, and creating banks of video lessons and online resources.

Schools should be aware of different risks posed by these new approaches and by the fact that children will necessarily be physically isolated from their usual support networks, in some cases, for significant periods of time. Key considerations include:

School policy

- Considering safety and privacy as standard when making choices about online platforms, school devices and software;
- Ensuring that child protection and safeguarding policies refer to measures to protect children who are receiving remote education;

Supporting staff

- Highlighting that the usual code of conduct and safeguarding routines apply when using remote teaching tools;
- Creating, implementing and reviewing clear protocols for staff who are teaching remotely including:
 - o communicating within school hours as far as possible;
 - o communicating through channels approved by the senior leadership team;
 - o using school email accounts only;
 - o using school devices over personal devices wherever possible; and
 - o advising staff not to share personal information.
 - o Ensuring staff understand the need for privacy and data protection protocols when pupils or teachers are visible in their own homes (including in relation to other members of their household);

Supporting pupils

- Being alert to the increased risk of wellbeing concerns for children who may be experiencing trauma, isolation or difficult domestic situations because of the pandemic;
- Appreciating the heightened impact of online bullying on a child who is isolated from friends and staff

- support;
- Planning regular wellbeing contact / pastoral support for isolating pupils;
- Ensuring that downtime and recreation is included in the remote teaching timetable;
- Directly teaching pupils about online safety when accessing internet resources, video-conferencing and live streaming, particularly when in an isolated private setting;
- Creating, implementing and reviewing alternative routes for safeguarding disclosures and concerns, taking into account a pupil's home circumstances;

For parents

- Engaging parents with online safety concerns and in ensuring that home devices, networks and software are safe;
- Engaging parents with wellbeing strategies for their isolating children.

DfE safeguarding guidance

The DfE's [guidance on safeguarding and remote education during Coronavirus](#) was published before the whole-scale return to school in September but remains largely relevant and helpful and includes some useful links to resources.

Schools should of course be aware that the new version of Keeping [Children Safe in Education](#) (KCSiE) applies from 1 September 2020. Annex C of KCSiE makes specific reference to [\(now withdrawn\) guidance on safeguarding in the context of Covid-19](#) and [guidance on safeguarding and remote education](#). Other key additions to KCSiE this year include the need for staff to be alert to children's mental health problems as a possible indicator that a child has suffered or is at risk of suffering abuse, neglect or exploitation, and the need for schools to follow up on safeguarding concerns in relation to supply staff.

No one size fits all for remote education

Of course, "remote education" does not exclusively mean online provision or learning through electronic devices. Schools will be well aware of the need to tailor remote provision to the educational abilities and needs of pupils who are not able to attend. Factoring in a particular pupil's ability to access electronic devices and the internet at home will of course be a crucial part of ensuring that remote education is suited to pupil circumstances. Reliable "old school" approaches such as workbooks and textbooks will be part of the solution and should not be overlooked.

Students with disabilities will continue to require additional and differentiated approaches while learning from home. Schools should consider the reasonable adjustments which they should make to any standard remote education provision to help students overcome barriers posed by their disability when working remotely. Students with particular clinical vulnerabilities because of a medical condition are likely to spend longer learning remotely and could be disproportionately disadvantaged by one size fits all policies.

In summary

The legal requirement that all schools provide remote education from 22nd October will certainly be a prompt to ensure that school policies, procedures and technology for remote teaching and learning are in place and fit-for-purpose. When working on remote education contingency plans and provision, it is important that schools continue to prioritise the safeguarding and welfare of pupils and students while they learn from home.

Former academy trust CEO barred from school management

As a former academy trust CEO is barred from school management, we look at the lessons that can be learned.

Background

The Secretary of State has published a [prohibition notice](#) barring Nardeep Sharma, former CEO of The Thrive Partnership Academy Trust, from taking part in the management of an independent school (including an academy or free school), which also disqualifies him from being a governor of a maintained school. Nardeep Sharma has three months to appeal.

The prohibition notice follows an [investigation report](#) by the Education and Skills Funding Agency (ESFA) which identified ‘failings and weaknesses in financial management and governance’ including

- **poor procurement practices**, with one contract awarded to the most expensive of three suppliers with a personal connection to the Trust, in breach of the Academies Financial Handbook (AFH) 2017, advice from external auditors and Trust policy,
- **irregular expenditure** on hampers (some with wine) requested by the CEO as gifts for an employee, previous trustee and former chairs, in breach of the Trust’s code of conduct,
- **lack of governance oversight**, with the CEO and Executive Principal making proposals to the finance and audit committee, including to override the external auditor, in breach of the committee’s function of objective and independent assurance under AFH 2017,
- **recruitment**, which involved a change to the staffing structure, without board approval and in breach of Trust policy and standard practice
- **severance payments** to staff with capability or absence issues without formal approval or legal advice and in breach of special severance payment provisions of AFH 2017 and
- **lack of transparency** in reporting the Trust’s governance arrangements on its website and on Get Information About Schools (GIAS) and inconsistency with Companies House.

So what lessons can be learned by current academy trusts and their CEOs?

It’s not a one off

The prohibition notice is the third such notice published by the Secretary of State in relation to former academy trust leaders, with all three published this month. This marks a greater focus by the Secretary of State and the ESFA on holding academy trust leaders to account.

It’s personal

The prohibition notice is a stark reminder that CEOs, as accounting officers, are personally responsible to Parliament and ESFA’s accounting officer, under AFH 2020, for their trust’s financial resources. They are also personally responsible for assuring their board that there is compliance with their funding agreement and the handbook. This includes notifying the board in writing if the board is considering acting in breach of their articles or in breach of (or they fail to comply with) their funding agreement or the handbook. This personal responsibility for assuring the board of compliance must not be delegated and so presents a major challenge for CEOs with many other competing demands on their time.

It’s collective

That said, AFH 2020 is clear that the appointment of an accounting officer does not remove the trustees’ responsibility for the proper conduct and financial operation of the trust. This highlights the vital importance of collective decision making and teamwork, alongside an effective scheme of delegation and clear reporting and communication, to ensure the board can function effectively. The [Charity Governance Code](#) identifies key outcomes and recommendations in these areas which trust boards will find invaluable.

It's all about you

The prohibition notice and investigation report highlight the dangers of blind spots and the importance therefore of knowing your strengths and weaknesses and having the support in place to help you do your job well, whether as CEO or as a board. Coaching and training as a CEO can be invaluable which is why [Forum Strategy](#) and their [#BeingTheCEO Programme](#) provide much needed support and insight. Similarly, governance reviews for boards provide deep insight into their relationships and effectiveness, which is where the [governance review service](#) provided by Wrigleys Solicitors and [Satis Education](#) can help.

It's about values

Unity of vision, purpose and strategic direction is fundamental to the future success of any trust, particularly so as we navigate the covid pandemic. This builds trust and confidence among those who work in and support the trust and among the public at large. Values are central which is why the breach of the Seven Principles of Public Life – selflessness, integrity, objectivity, accountability, openness, honesty and leadership - were cited in the prohibition notice. The prohibition notice specifically cites breach of these principles, particularly the failure to act with integrity and honesty. The Secretary of State and the ESFA will therefore take action where these principles are not followed to the detriment of the trust.

It's about compliance

Crucially, the Secretary of State and the ESFA will intervene where there is a breach of the Academies Financial Handbook including where internal procedures are non-compliant, contradictory or simply not followed and where information on the website, GIAS and/or Companies House is incomplete or in clear contradiction. The prohibition notice therefore serves as a stark warning to CEOs and boards of the consequences of non-compliance which can be easily avoided, particularly so when updating information available to the public.

In summary

The prohibition notice and investigation report detail circumstances and events which can make uncomfortable reading for trust leaders, whether as CEOs or trustees. They speak of the consequences of failing to act with integrity and honesty and in breach of the Academies Financial Handbook and what they must do to comply. However, they highlight the positive things that CEOs and boards can do to ensure their future success, including by setting their vision, purpose and strategic direction and working together effectively in a common cause.

School staffing levels and the impact of Covid-19

What are the legal considerations for school leaders?

It is clear that school staffing levels are being impacted by Covid-19 self-isolation and staff taking leave to care for their own isolating family members and relations. The current difficulties in obtaining a Covid-19 test and the need to prioritise symptomatic people and health workers are only likely to exacerbate staff absences in coming weeks.

Staff – pupil ratios

There are some cases in which staffing levels are dictated by law. At Early Years Foundation Stage (EYFS) statutory minimum adult to pupil ratios are in place dependent on the age of the children in question and the qualification level of members of staff.

Changes to EYFS requirements during the pandemic

As part of its measures during Covid-19 pandemic, the Government has temporarily [changed some of the requirements of the EYFS statutory framework](#) to help schools and nurseries to handle fluctuation in demand and staffing levels. These changes to staffing level requirements will end on 25 September 2020. However, there will be a transitional period of up to two months following that date.

New regulations also come into force on 26 September 2020 which will continue to disapply and modify some EYFS requirements for providers where it is not reasonably practicable for them to comply because of *local* Covid-19 restrictions imposed under the Public Health (Control of Disease) Act 1984 or under the Coronavirus Act 2020. However, unlike the current modifications, these regulations will not apply to all EYFS providers. Also, there is a distinction, and potential delay, between government guidance and formal local restrictions triggering the statutory modifications.

The usual rule for maintained nursery schools and nursery classes in maintained schools caring for children aged 3 and over is that there *must* be at least one member of staff for every 13 children and one member of staff must be a qualified teacher (level 6). Where they apply, the Covid-19 modifications relax this rule so that providers should *use reasonable endeavours* to ensure that at least one member of staff is a qualified teacher. If that is not possible, providers should do what they can to follow the usual ratio of one member of staff to every 8 children where a qualified teacher is not working with the children. In this case, at least one member of staff must hold a level 3 qualification and providers should *use reasonable endeavours* to ensure that at least half the remaining staff hold a level 2 qualification.

Staffing ratios for infant classes

Broadly speaking, infant classes at maintained schools and academies are subject to a statutory requirement to have one qualified teacher to 30 pupils. There has been no change to this requirement during the Covid-19 pandemic.

Staffing levels for Year 3 and above

Aside from the above, there are no particular staffing ratios which apply in law. Teaching unions recommend specific class sizes for different ages and activities, but these are policy aims rather than being legal requirements on the school. Schools will of course have to consider what staffing levels are necessary to comply with their health and safety duties, for which please see the further section below.

Must a qualified teacher be in place?

There are statutory rules concerning the qualification and experience of those who carry out “specified work” in schools, which includes the planning and delivery of lessons. In general, staff who carry out such specified work are required to have qualified teacher status. However, there are a number of exceptions to this, including where the member of staff is equivalent to a higher-level teaching assistant, is carrying out specified work, and is supervised and directed by a qualified teacher. It may therefore be possible for a qualified teacher who is isolating at home, but otherwise fit and able to work, to supervise and direct a higher-level teaching assistant remotely where it is not feasible for another qualified teacher to supervise and direct the teaching assistant. Supervising pupils who are carrying out work set by a qualified teacher during absence is not “specified work”. Cover supervisors may therefore undertake such supervision in the short-term, but a qualified teacher should be put in place to cover longer periods of absence.

Health and safety duties

Alongside the above, schools have a duty to ensure, so far as is reasonably practicable, the health, safety and welfare of their staff and pupils. This will include having systems in place to deal with lower than usual levels of teaching staff in the school and taking into consideration safe staff workloads and levels of supervision of children.

Schools should carry out, consult on and implement risk assessments which include consideration of any risks associated with low staffing levels in the current circumstances. Such assessments will need to take into account relevant school activities, facilities and Covid-19 protocols as well as any particular risks associated with the pupils and staff concerned. Risk assessments are likely to need more regular review and revision than is usually the case because of the fast-changing nature of the pandemic and its impact on the number of staff and pupils who are able to attend school.

As with any emergency protocol, it will ultimately be for school leaders to make a judgment call about whether the school can continue to operate certain activities given the numbers of staff available. Governors and trustees must approve the policies and risk assessments which govern such decision making and must be kept informed of developments in case these need updating. Ultimately, governors and trustees must approve the arrangements that will apply, for example where the decision is taken to cease face-to-face teaching for a large number of pupils and to move to remote teaching. These may be the difficult decisions which school leaders face to avoid the full closure of the school, which the Government and many of those working in education are keen not to see.

Agile governance in schools and academy trusts

As covid restrictions flux and local lockdowns increase, agile governance is ever more important. What does this mean for schools and academy trusts?

Background

During the Covid-19 pandemic, schools and academy trusts have been nothing short of remarkable. They have provided for the vulnerable and the children of key workers, made education online the norm, not the exception, and ensured the safe return of students, while taking care of their staff. Governors and trustees have played a key role, moving their meetings and decision-making online. However, as covid restrictions flux and local lockdowns increase, they need to become ever more agile to adapt to changing circumstances. So what are the key things they should bear in mind?

In person or online?

Simply because boards have moved their meetings online, doesn't mean all meetings should be in person once restrictions allow. Instead, boards should be encouraged to recognise the alternate benefits of meeting in person or online and adopt a blended approach.

In many cases, it will be appropriate for boards to meet online where this will suffice for the purposes of the agenda. This will make it easier for governors and trustees, many with busy lives, to attend and help recruit governors and trustees who would otherwise find it hard to volunteer.

If there is a need for in-depth discussion of difficult or complex issues, boards will benefit from meeting face-to-face, perhaps so that body language can be taken into account, provided social distancing restrictions allow.

Where restrictions or shielding limit the number of people who can meet in person but some face-to-face discussion is

necessary, some governors or trustees can always attend in person while others join by phone or video conference.

Code of conduct

Boards should be encouraged to revisit or devise a code of conduct for their governors or trustees, reflecting on what has worked well and what has not, to record those behaviours that are expected whether in person or online.

Quorum

Whether a board meets online and/or in person, they must ensure the meeting is quorate which, for a maintained school, requires one half of the governors and, for an academy trust, ordinarily requires three or a third of the trustees, in each case rounded up to a whole number. Where a technical issue disconnects someone from attending online, temporarily or permanently, the meeting may cease to be quorate and so unable to conduct any business until they re-join, in which case it may be necessary to re-schedule the meeting.

Short notice

A board may of course meet on such shorter notice as the chair directs where the chair determines that there are matters demanding urgent consideration.

Committees

However, a board may wish to reconfigure its committee structure to include committees with delegated responsibility for those areas that are most affected by the pandemic. These committees, being smaller than the board, will be better able to meet on short notice, as required.

Terms of reference

Where a board reconfigures its committee structure, it will need to update the terms of reference for its committees so that their role, the procedure for calling meetings and the process by which they report to the board are clear.

Academy trusts will also need to comply with the Academies Financial Handbook by updating the structure and remit of their committees on their website and recording any change in the chair of a committee (including a local governing body) on their website and on [Get information about schools](#).

Scheme of delegation

Boards should of course review their scheme of delegation to ensure the allocation of responsibilities remains fit-for-purpose and keep this under review. Where an academy trust

updates its scheme of delegation, this must be added to the website to comply with the Academies Financial Handbook.

Co-opting

Boards may also exercise their power to co-opt additional governors or trustees to bolster their skills and expertise in dealing with the challenges presented by the pandemic.

Training and support

They can further reinforce their effectiveness by reviewing their training and continuing professional development, online or in person as appropriate, and ensuring regular contact between their governors or trustees and the chair to safeguard their own wellbeing.

Governance reviews

Governance reviews, ordinarily conducted every two or three years, should also be considered. It may be that a board will benefit from a review sooner than later to assess their continued effectiveness and reflect on the meeting and decision making processes thrust upon them as a consequence of lockdown . If this is the case, the [governance review service](#) provided by [Wrigleys Solicitors](#) and [Satis Education](#) offers the

advice and support needed.

Vision and strategy

Ultimately, a board may need to take a step back and review its vision and strategy to reassess its core purpose and how it will deliver this in practice.

Summary

The covid pandemic has presented major strategic and operational challenges, which schools and academy trusts have responded to admirably. The challenge now is for boards to become ever more agile while following best practice and complying with legal and regulatory requirements and, in so doing, ensure their future success.

Teacher was unfairly dismissed after decision not to prosecute for criminal charges

Unfair to dismiss for reputational damage when this was not put to the teacher as a formal allegation.

On the principles of natural justice, an employee facing disciplinary action should be able to understand the precise allegations against them so that they can meaningfully put their case in their own defence. The [Acas Code of Practice on Disciplinary and Grievance Procedures](#) (which employers must take into account) also requires that the employee has sufficient information about the alleged misconduct to prepare to answer the case against them. It is therefore vital that all allegations are set out in the letter inviting the employee to the disciplinary hearing.

A recent case in the EAT in Scotland has highlighted the importance of this simple principle even in very difficult cases.

Case: [K v L](#)

A school teacher was charged by the police with possession of indecent images of children but the Procurator Fiscal (the Scottish equivalent of the Crown Prosecution Service) decided not to prosecute.

After learning of the charge and subsequent decision not to prosecute, the employer began a disciplinary process. The invitation to the disciplinary hearing described the complaint against the teacher as being 'due to you being involved in a police investigation into illegal material of indecent child images on a computer found within your home and the relevance of this to your employment as a teacher.'

The teacher denied responsibility for downloading the images that were found. The teacher lived with their son and explained that their son and many of their son's friends had access to this computer.

The school ultimately decided to dismiss the teacher and gave several grounds for doing so, including:

- The teacher had been charged by the police with an offence of indecent child images being found on a computer in their home;
- Although the decision had been not to prosecute, the prosecutors advised that there was an obligation on them to keep cases under review and they reserved the right to prosecute the case against the teacher at a future date;
- The teacher admitted to the disciplinary panel that a computer located in their household contained indecent images of children;
- The employer was unable to exclude the possibility that the teacher was responsible for the indecent images being downloaded;
- There was a risk to the employer local authority's reputation if it continued to employ the teacher and a

- future prosecution or similar action were to occur; and
- There had been an irretrievable breakdown of trust and confidence between the teacher and the employer.

The teacher brought a claim for unfair dismissal which was dismissed by an employment tribunal. The teacher appealed to the EAT.

The appeal

The EAT agreed with the teacher that the dismissal was unfair.

Unclear allegations

The EAT commented that it was against natural justice to state a ground of dismissal in the dismissal letter that had not been clearly set out in the invitation to the disciplinary meeting. Although reputational issues had been raised by the school's investigation report and had been touched on briefly during the disciplinary hearing, they were not put formally to the employee and the employee had not commented on them at the hearing. The EAT made clear that any allegations must be clearly expressed so that an employee can adequately prepare themselves to answer the case. The EAT disagreed with the tribunal's view that it was sufficient grounds for dismissal to rely on an issue identified in an investigatory report that was not addressed in the disciplinary allegations.

Finding guilt on the balance of probabilities

The EAT also agreed with the teacher that the dismissal on conduct grounds was unfair as it was not based on a finding of misconduct on the balance of probabilities. The decision maker had dismissed the teacher partly on the basis that, although there was not enough evidence to prove who had downloaded the images, the possibility that the teacher had done so could not be excluded. The EAT made clear that this was the wrong standard of proof. In disciplinary procedures, as in civil proceedings, allegations will be proven if they are more likely than not to be true. In other words, there is more than a 50% chance that the alleged conduct occurred. Here, the school had wrongly decided to dismiss because there remained a possibility (however small) that the teacher had downloaded the images.

Relying on reputational damage

The EAT drew comparison between this case and that of *Leach v Office of Communications [2012]*. In *Leach* the employer had been warned by the police that the employee had engaged in paedophile activity in Cambodia. The employer fairly dismissed the employee because of the risk to its reputation in continuing to employ him. However, in *Leach* the employer had access to information from the police which indicated it was more likely than not that the conduct had taken place and the employee had attempted to conceal the matter from his employer. There was also significant interest from the national press about the case.

In contrast, in this case, the school had not found evidence to establish that the conduct was more likely than not to have occurred and had no evidence to suggest reputational damage was likely. When dropping a prosecution, the Procurator Fiscal commonly reserves the right to prosecute should further information come to light. This was no indication that such a future prosecution would happen and damage the employer's reputation.

Wrigleys' comment

Disciplinary cases involving criminal allegations can be extremely difficult for employers to deal with. Please see further information on handling such cases particularly in a school context in our previous article: "Dealing with school employees who are being investigated by the police" (link [here](#)). We have also looked at the interaction between internal and external investigations in a recent case report: "When disciplinary and criminal proceedings interact" (link [here](#)).

The employer in this case might have been able fairly to dismiss on the basis of reputational damage to the organisation if it had properly put this point to the employee and considered the likelihood of reputational damage based on the facts of the case. This would depend however on whether there was found to be a real risk of the matter becoming public knowledge and actual harm to the employer's reputation as a consequence.

Schools and academy trusts: are your contracts up-to-date?

Following lockdown and the phased and full opening of schools, we look at the importance of ensuring your contracts are up-to-date.

Background

Following the initial closure of schools for all pupils except those of key workers and vulnerable children, schools and academy trusts will have varied their contracts with suppliers to reflect the change in circumstances. In doing so, they will have had regard to the Government's [Procurement Policy Note - Supplier relief due to COVID-19](#) and so gone to great lengths to help ensure their suppliers survive the pandemic. This will have included agreeing to pay invoices sooner, making interim or advance payments, granting suppliers relief from performance penalties and termination and agreeing a reduced specification.

With the phased wider opening of schools towards the end of the summer term, schools and academy trusts will have again varied their contracts with suppliers, especially to ensure the more regular and deep cleaning of premises so that staff and students continue to be safe.

As schools open fully with the start of the new academic year, contracts will also have been varied to reflect the new normal with some services returning to pre-Covid levels and others, such as cleaning, adapting to a return to school with social distancing and some continued online teaching. Some schools and academy trusts may also be agreeing a revised specification should they be included in a local lockdown.

Getting it right

With all the changes to school life during Covid-19, it will have been a challenge for schools and academy trusts to keep and maintain an accurate written record of the contract variations they have agreed with their suppliers. In some cases, a trusted relationship may have contributed to a verbal agreement to vary a contract. However, while a verbal agreement to vary may be binding, depending on the terms of the contract, a clear written record of the agreed contract variation is essential if later disputes are to be avoided. A written record of an agreed variation should therefore be produced and maintained even if time has lapsed since the variation was first agreed.

Care must also be taken to follow the procedure in the contract for making a variation. For example, some contracts may require a formal notice of change to be served on and agreed by the supplier while others may say that a written record of the variation, signed by representatives of the parties, will suffice. Alternatively, a deed of variation signed by the parties will be conclusive and binding as to the terms of the variation. Again, ensuring the correct procedure has been followed will avoid future disputes regarding the terms of the contract variation. Where a variation has been agreed in writing but not as prescribed by the contract, the parties should follow the correct procedure to confirm the variation though the courts will look to their intentions when deciding the terms of the variation. However, this is not ideal and should be avoided.

It is also recommended that schools and academy trusts keep a written risk assessment of each variation and a written record of the reasons for agreeing this with the supplier.

Summary

Keeping and maintaining a clear written record of variations to contracts with suppliers and recording those variations using the correct procedure is key to effective contract and risk management and therefore core to good governance. It will therefore safeguard your future success and avoid the watchful eye of the Education and Skills Funding Agency.

What is the status and duty of members of an academy trust?

A court case has confirmed that members of charitable companies are fiduciaries and owe duties as such. We look at what this means for academy trusts.

What is an academy trust?

An academy trust is a company limited by guarantee which means it is a company incorporated and registered at Companies House whose members undertake or guarantee, in the articles of association, to contribute up to £10 towards payment of the debts, liabilities, costs, charges and expenses of the academy trust on its winding up.

An academy trust is also an exempt charity which means it is a charity, and so must comply with charity law, but is exempt from the requirement to be registered with the Charity Commission. As an exempt charity it is regulated in large part by the Secretary of State for Education as principal regulator under a Memorandum of Understanding between the Department for Education (DfE) and the Charity Commission.

As a company limited by guarantee and exempt charity, an academy trust is therefore a charitable company.

Who are the members?

The members of an academy trust are company law members, which means they have certain rights in relation to the academy trust as a company limited by guarantee. For example, they have the power to amend the articles of association subject to the prior approval of the Charity Commission where the change relates to the objects, the application of property on a winding up and/or the payment of benefits to members or trustees/directors or persons connected with them. Under the current DfE model articles of association, the members also appoint the majority or all of the trustees.

What was the court case about?

The court case concerned the Children's Investment Fund Foundation (CIFF), founded by Sir Christopher Hohn and Ms Jamie Cooper, which became difficult to manage when their marriage broke down. To resolve the difficulties, Sir Christopher and Ms Cooper agreed that, in return for a grant of \$360m to be paid by CIFF to Big Win Philanthropy (founded by Ms Cooper), Ms Cooper would resign as a member and trustee of CIFF. CIFF's members had to approve the grant. However, as Sir Christopher and Ms Cooper each had a conflict of interest, they had to absent themselves from the vote. It therefore fell to the one remaining member, Dr Marko Lehtimäki, to vote on the proposal. The Supreme Court ordered Dr Marko to vote for the resolution approving the grant.

Why is the court case relevant for academy trusts?

The Supreme Court concluded that members of charitable companies are fiduciaries.

What does this mean for academy trusts?

The Supreme Court referred to an earlier case which defined a fiduciary as someone who has undertaken

to act for or on behalf of another and so owes a duty of single-minded loyalty to them. By agreeing to be a member of an academy trust, a member agrees to act on behalf of the academy trust in accordance with its articles of association and so owes a duty of single-minded loyalty to the academy trust.

The Supreme Court expanded on the duty of single-minded loyalty by saying a fiduciary must not put themselves in a position where there is a conflict between their interest and that of the charitable company and must act in the interests of the charitable company to the exclusion of their interests or those of a third party. Members must therefore absent themselves from and not participate in discussions and decisions of the members where their interests or those of a third party conflict with those of the academy trust. This has added resonance for members who have been nominated or appointed by or on behalf of a Church Diocese or a foundation or sponsor. They must therefore act in the interests of the academy trust and not the organisation who nominated or appointed them.

The Supreme Court further expanded on the duty of single-minded loyalty by saying a fiduciary must not profit from their position. This is regulated by the current DfE model articles of association which provide that a member may only be paid for goods and services provided to, or rent and interest received from, the academy trust where the payment is reasonable and proper, the trustees are satisfied it is in the interests of the academy trust and the decision is recorded in the minutes. The issue is also regulated by the Academies Financial Handbook where the provisions dealing with related party transactions prohibits contract payments to members above a de minimis level where the payment includes an element of profit.

In terms of the precise nature of the fiduciary duty, the Supreme Court confirmed that members of a charitable company must act in the best interests of the charitable purposes or objects of the charity. Members must therefore act in the best interests of the objects of their academy trust which, according to the current DfE model articles of association, are to advance education for public benefit in the UK including by establishing, maintaining, carrying on, managing and developing Academies. An academy trust may also have other objects depending on their circumstances and wider activities.

Finally, the Supreme Court said the duties owed by a member of a charitable company need to be considered according to the particular circumstances that apply and the governing document of the charity. Members must therefore be familiar with the articles of association of their academy trust and act in accordance with those articles, with company and charity law and with other laws that apply in the particular circumstances.

In summary

The Supreme Court has confirmed that members of charitable companies owe a fiduciary duty to act with single-minded loyalty in the best interests of the objects of the charity and in accordance with their governing document and with company, charity and other law and to avoid any conflict of interest or profit from their position. This applies to members of academy trusts as charitable companies and is particularly welcome given the uncertainty of some academy trusts regarding the role and function of their members..

Board diversity and governance for schools and trusts

The Black Lives Matter movement has made diversity a focus for schools and trusts. We look at the Charity Governance Code and how this can help you.

Background

The death of George Floyd in America and the rise of the Black Lives Matter movement has brought diversity into sharp focus. School governing bodies and academy trust boards are looking at what this means for them. Having conquered the challenge of holding all their meetings by video conference

within weeks of lockdown, something which had seemed impossible, they are wanting to apply their new-found confidence to the challenge of board diversity.

Charity Governance Code in overview

The Charity Governance Code provides a practical tool to help boards develop high standards of leadership and governance and was developed by the charity sector for charities and not-for-profit organisations. This applies to maintained school governing bodies and academy trust boards, both included in the references to a board below. While not a legal or regulatory requirement, the Code is founded on trustees' basic legal and regulatory responsibilities and supports continuous improvement across the following 7 principles.

- Organisational purpose
- Leadership
- Integrity
- Decision making, risk and control
- Board effectiveness
- Diversity
- Openness and accountability

For each principle, the Code looks at

- the rationale (the reasons why it's important)
- the expected outcomes (what you would expect to see if the principle was adopted) and
- the recommended practice (what might be done to implement the principle).

The Code recognises that recommended practice will vary between organisations and sectors. Boards are therefore encouraged to apply the recommended practice or explain what they have done instead or why they have not applied it.

Charity Governance Code and diversity

The Code considers that diversity supports the effectiveness, leadership and decision making of boards (*the principle*) by drawing on trustees with different backgrounds and experience to help encourage debate and make better decisions (*the rationale*). As you would expect, the Code confirms that diversity includes the following protected characteristics under the Equality Act 2010:

- age
- disability
- gender reassignment
- marriage and civil partnership
- pregnancy and maternity
- race
- religion or belief
- sex
- sexual orientation

However, the Code extends diversity to also include difference of background, life experience, career path and thought and identifies a variety of perspectives, experiences and skills and compliance with equality and diversity as *key outcomes*.

The *recommended practice* identified in the Code includes periodic training for the board and removing, reducing or preventing obstacles by adjusting the time, location and frequency of meetings (so those with other commitments can attend), sharing board papers electronically (which should be commonplace following lockdown), communicating using audio and Braille, paying reasonable

expenses (which boards can do, for example to cover child-care and travel costs) and re-thinking the advertising of trustee vacancies. Boards make good use of [Inspiring Governance](#), [Academy Ambassadors](#), newsletters, social media and existing networks and contacts to advertise and fill vacancies and could engage with other schools and trusts in case they have governors and trustees who are coming to the end of their term and would fill a gap or senior leaders seeking personal development.

Recommended practice also includes: the chair taking regular feedback on how meetings can be made more accessible with constructive challenge and all voices equally heard; regular audits and reviews; plans to monitor and achieve its diversity objectives; and an annual report on what the board has achieved and its performance against those objectives.

In summary

The Charity Governance Code, while not a legal or statutory requirement, provides maintained school governing bodies and academy trust boards with a practical tool to evaluate and improve their effectiveness. In terms of diversity, this requires governing bodies and boards to reflect a wide range of backgrounds, experiences, skills and perspectives so that decisions are informed and considered and reflect the concerns of their students and communities. The recommended practice, while not exhaustive, provides clear actions for governing bodies and boards to take as they tackle the challenge of improving diversity.

Wrigleys have been working with a number of academies to review governance and company compliance. If you would like any further information, please contact Chris Billington or Elizabeth Wilson on 0113 244 6100

www.wrigleys.co.uk/education



Follow us on Twitter



The information in these articles are necessarily of a general nature. Specific advice should be sought for specific situations. If you have any queries or need any legal advice please feel free to contact Wrigleys Solicitors.