

EDUCATION BULLETIN

SUMMER 2020

Welcome to our Summer education bulletin.

In this issue, we highlight the recent school related case of ***School Facility Management Ltd and others v Governing Body of Christ the King College*** which provides some much needed clarity on the capacity of a maintained school to enter contracts.

Also, with schools reopening, we offer a reminder on some of the issues to be taken into consideration, including decision making by academy trusts and the requirement of your school's data protection impact assessment. In readiness for the new school year we highlight key changes in the 2020 Academies Financial Handbook whilst our continuing look at governance and exempt charity status focuses on sixth form colleges.

Our summer employment update webinar series, which takes the place of Wrigleys annual conference, includes a refresh on equality in the workplace. More regular Covid-19 updates and what that means for staff are posted to the [news](#) page on our website and linked through [Twitter](#) and [LinkedIn](#).

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:

- **Wrigleys Charities & Social Economy Webinar Series: Mergers and collaborative working**
15 July 2020
[For more information or to book](#) ▶
- **Wrigleys Charities & Social Economy Webinar Series: Restructuring your organisation from the inside out**
22 July 2020
[For more information or to book](#) ▶
- **Wrigleys Employment Law Update Webinar Series: Equality in the workplace - transgender discrimination**
4 August 2020
[For more information or to book](#) ▶
- **Wrigleys Employment Law Update Webinar Series: Equality in the workplace - disability and reasonable adjustments**
1 September 2020
[For more information or to book](#) ▶
- **Wrigleys Employment Law Update Webinar Series: Equality in the workplace - atypical working, zero hours and ethical issues**
6 October 2020
[For more information or to book](#) ▶

Contents

1. Data Protection Impact Assessments – a quick guide for schools
2. A guide to decision-making by members and boards of academy trusts
3. Academies Financial Handbook 2020 – What it means for your trust
4. Exempt Charity Status – What this means for Sixth Form Colleges?
5. Out of sight, out of mind? Looking after the welfare of teachers working from home
6. The role of trade unions in schools reopening following lockdown
7. School’s construction contract void for lack of capacity
8. Governance reviews for academy trusts.
9. Overseas students identified as money laundering targets⁹.
10. Covid-19 – Are schools and academy trusts required to comply with DfE guidance on a phased wider opening?
11. FAQs - Covid-19 - Operational and Governance Issues for Schools and Academies



Wherever you see the BAILII logo simply click on it to view more detail about a case

Data Protection Impact Assessments – a quick guide for schools

This article explores the use of DPIAs in schools, when they must be used and tips on undertaking a meaningful assessment of data protection risks.

Data Protection Impact Assessments (“**DPIAs**”) are a crucial part of any school’s data protection toolbox. DPIAs help to identify risks to personal data at the outset of a project so that the protection of personal data is a key consideration throughout delivery. DPIAs also act as a good opportunity to pause and consider the measures currently in place within a school for data protection compliance and to develop these processes on an ongoing basis.

Obligation to undertake a DPIA

A DPIA **must** be undertaken where there is **likely to be a high risk to the rights and freedoms of a data subject** resulting from a processing activity. A processing activity is a broad term to describe something the school is planning to do involving personal data.

What constitutes a high risk to the data subject’s rights and freedoms will depend on the individual project, but [a group of European Data Protection Authorities](#) (including the Information Commissioner’s Office from the UK) have provided guidelines on what might constitute such a risk.

Factors to be taken into account include where there is a combining of datasets (e.g. as a result of an academy joining an existing academy trust) and where there will be processing of sensitive information of a personal nature (such as health information, or trade union membership details for staff). This will

be particularly relevant where a school will be gathering health information as part of its covid-19 response and school re-opening.

DPIAs are more likely to be required where personal data of children or other vulnerable beneficiaries is affected, as they may be less likely to be able to exercise their rights under data protection law.

Even where a DPIA is not strictly required, undertaking a DPIA is often a good process to undertake, as it demonstrates compliance with data protection obligations and helps to identify and minimise data protection risks in any project.

Undertaking a DPIA

The school's data protection officer should play a crucial role when a DPIA is undertaken (and they are legally required to provide advice on the DPIA), but all those involved in the project should contribute to the discussions surrounding the DPIA.

The preparation of the DPIA also acts as a good opportunity to thoroughly review and challenge the mechanics of the project to ensure that it produces a safe, secure, and effective outcome. External advice may also be required to ensure that the DPIA effectively addresses and mitigates the risks to data subjects' rights posed by the project.

The DPIA should be documented ([a template DPIA has been produced by the ICO](#)) and steps to mitigate the risks to personal data built in to the project plan, whether through the project's design or as part of the wider data protection compliance measures taken by the school. The DPIA should continue to be referred to on a regular basis to ensure that the risks continue to be appropriately managed as the project comes to fruition.

A guide to decision-making by members and boards of academy trusts

The following guide summarises the key requirements that members and boards of academy trusts must satisfy when making decisions.

Context

Understanding and following the correct decision-making procedure is key if an academy trust is to be governed effectively and avoid unnecessary scrutiny by others including the Education and Skills Funding Agency.

Framework

An academy trust is a company limited by guarantee with exempt charity status, constituted with articles of association ("articles"). The articles will generally follow the Department for Education (DfE) model articles and this guide reflects the requirements of the latest version updated on 22nd December 2017.

Decision-making by the members and board of trustees (the "board") of an academy trust is governed by the articles and otherwise by the Companies Act 2006 ("Act"). Those decisions are often referred to as resolutions and so this terminology is used below.

Member resolutions

Where are resolutions passed?

The members ordinarily pass resolutions at members' meetings, either:

- an annual general meeting ("AGM"), if the articles include provision for those to be held (the first AGM should take place within 18 months of incorporation and thereafter not less than 15 months should pass between each AGM); and
- other general meetings convened at any time by the trustees under the articles or at the direction of the members under the Act.

Can the members pass resolutions without a meeting?

Yes. The members may agree a resolution in writing where this has been sent to every member and the resolution is approved by the requisite number of members as though the resolution was passed at general meeting (which includes an AGM). There are strict rules about timelines which must be followed for a members' written resolution to be valid. The resolution may be circulated by email then signed, dated and returned by email or in hard copy. The members do not all have to sign the same piece of paper. In circumstances where a face-to-face meeting is impractical, such as where social distancing restrictions apply, the ability for the members to make decisions in this way is invaluable.

Can the members meet by telephone or video conference?

There is no authority under the DfE model articles for the members to meet remotely, There is a requirement for a member to be present in person or by proxy (i.e. someone authorised to vote on behalf of the member).

However, the articles can be amended to permit remote meetings, and in any event if all the members agree to meet remotely then that agreement will take precedence over the wording of the articles.

What is the procedure for calling a meeting?

Under the DfE model articles, a general meeting (including an AGM) can be called on not less than 14 clear days' notice (or on shorter notice if 90% of the members agree) sent to the members, trustees and to the auditors. The notice must specify if the meeting is an AGM or general meeting, the time and place of the meeting, the general nature of the business to be dealt with, any intention to propose a special resolution or resolution requiring special notice and the terms of that resolution.

How are resolutions passed?

Resolutions are passed by the members exercising one vote each and ordinarily on a show of hands, although a poll (where each member votes in writing in a secret ballot) may be demanded by the chair, at least two members or at least 10% of the members.

Resolutions are passed as ordinary or special resolutions. Ordinary resolutions, requiring majority approval, suffice for most decisions while special resolutions, requiring approval by 75% of the members, are required to change the articles or name of the academy trust or appoint/remove additional members.

Resolutions are validly passed where the meeting is quorate (which ordinarily requires a minimum of two members) and where proper notice of the meeting has been given, as set out above. In each case, a declaration by the chair of the meeting that a resolution has been carried and an entry to that effect in the minutes of the meeting is conclusive evidence that the resolution has been passed.

Particular voting restrictions apply in the case of academy trusts, whereby the votes of members who are Local Authority Associated Persons cannot in aggregate exceed 19.9% of the total votes cast.

What is the procedure once a resolution is passed?

Minutes must be kept of each member meeting and be signed by the chair of the meeting. The minutes must then be kept at the academy trust's registered office, or a place notified to Companies House, for at least ten years from the date of the meeting.

All special resolutions must be filed with Companies House within 15 days.

If a resolution is passed appointing a new trustee, the relevant form must also be filed at Companies House within 14 days.

Board resolutions

Where are resolutions passed?

Resolutions are ordinarily passed at a meeting of the trustees.

Can the trustees pass resolutions without a meeting?

Yes. A resolution in writing is passed where it is signed by all of the trustees. The resolution may be circulated by email then signed, dated and returned by email or in hard copy. Again, the ability of trustees to make decisions in this way is invaluable where face-to-face meetings are impractical for example because of social distancing restrictions.

What is the procedure for calling a meeting?

Meetings of the trustees are convened by the clerk or company secretary who must comply with a direction given by the trustees, by any three trustees or by the chair (or, in their absence, the vice-chair) to convene a meeting. Each trustee must be given at least seven clear days' notice of the meeting together with a copy of the agenda although the chair (or, in their absence, the vice-chair) may determine that the notice and agenda may be given within such shorter period where there are matters demanding urgent attention.

Can the trustees meet by telephone or video conference?

Yes. The trustees may hold meetings by telephone or video conference provided details of the conferencing facilities have been circulated at least 48 hours in advance and all trustees have access to the appropriate equipment.

How are resolutions passed?

Resolutions are passed by a majority vote of the trustees where each trustee has one vote, although the chair has a further casting vote where there is an equal division of votes.

Again, particular voting restrictions apply, whereby the votes of trustees who are Local Authority Associated Persons cannot in aggregate exceed 19.9% of the total votes cast

What is the procedure for passing resolutions at meetings?

A quorum must exist in order for resolutions to be validly passed. A quorum exists where any three trustees or, where greater, any one third (rounded up to a whole number) of the trustees are present and entitled to vote.

However, special quorum requirements apply on a vote to remove a trustee or the chair where two thirds of the trustees are required. Also a resolution to remove the chair or vice-chair from office does

not have effect unless: it is confirmed by a resolution passed at a second meeting held not less than fourteen days after the first meeting; and the chair or vice-chair's removal is specified as an item of business on the agenda for each of those meetings.

Whether a trustee is entitled to vote or counts toward the quorum turns on the question of whether that trustee may have a conflict of interest.

What is the procedure once a resolution is passed?

The trustees must ensure that minutes are taken of all proceedings and that the academy trust keeps a written record, for at least ten years from the date of the resolution.

Closing remarks

The articles lay down a clear procedure for decision-making by the members and board of trustees of an academy trust which, if followed, will avoid unnecessary scrutiny by others including the Education and Skills Funding Agency ("ESFA") and so avoid time-consuming correspondence, investigations and checks with/by the ESFA which will needlessly divert the energy and attention of the academy trust.

The decision-making procedure also allows the members and board of trustees of an academy trust to make decisions without meeting in person which, in the case of social distancing, is invaluable.

Academies Financial Handbook 2020 – What it means for your trust

The new Academies Financial Handbook has been published which will be effective from 1st September 2020. We look here at what it means for your trust.

The focus of the new handbook is on:

- expectations in using public funds as a contractual obligation in your funding agreement
- efficient financial management and accountability in helping trusts deal with the additional risks created by Covid-19
- internal scrutiny, ensuring procedures are fit-for-purpose and followed
- the school resource management and self-assessment tool
- members being informed and ensuring effective governance by the board
- board responsibility to maintain the trust as a going concern
- the requirement to have a clerk to the board to provide independent and expert advice and
- the key role of the Chief Financial Officer and the value of a relevant financial qualification.

The key changes included in the new handbook are as follows.

Going concern

Boards must take ownership of their trust's financial sustainability and satisfy themselves their trust remains a going concern, ensuring financial plans are prepared and monitored and taking a longer term view consistent with their three-year budget forecasts. The finance committee can support them in this role.

Pupil number estimates

Pupil number estimates should be reviewed by the board each term, as minimum good practice. As now, the handbook already confirms that the board should challenge these estimates as they underpin the

revenue projections of the trust.

Reserves policy

Boards must also explain their trust's policy for holding reserves in its annual report.

Fixed asset register

Trusts are required to maintain a fixed asset register, which they should be doing as good practice. The handbook already requires trusts to manage and oversee assets.

Purchase of alcohol

Trust funds must not be used to purchase alcohol for consumption, except where it is to be used in religious services. This removes any element of discretion and has implications for Christmas parties and other events where the purchase of alcohol in moderation would otherwise seem appropriate to express particular thanks to trust staff.

School resource management self-assessment tool

All trusts must now complete the school resource management self-assessment tool and submit this to the ESFA each year. This is a major change from the more laissez-faire approach of recent years where trusts have been encouraged to make use of school resource managers and only required to do so where there have been serious concerns.

Publication of executive pay

Trusts must publish on their website the number of employees whose benefits (including salary, taxable benefits and termination payments but not the trust's own pension costs) exceeded £100k, in £10k bandings. The information must be published in a separate readily accessible form as an extract from the financial statements for the previous year ended 31 August, which are already required to be published on the trust's website.

The salary and other benefits of employees who are trustees will be disclosed in £5k bandings in the trust's financial statements.

Accounting officers and CFOs

The accounting officer (being the chief executive or equivalent) and chief financial officer (CFO) should be employed by the trust. As now, the handbook defines 'should' as 'minimum good practice which trusts should apply unless they can demonstrate that an alternative approach better suits their circumstances'. On the face of it, it is therefore not a strict requirement. However, trusts must obtain prior ESFA approval if they are proposing, in exceptional circumstances, to appoint someone who will not be an employee. So, in effect, it is a strict requirement unless the ESFA agrees otherwise. This is in response to some senior executive leaders who have performed their services through a separate company. Clearly, the ESFA is concerned that this practice inhibits transparency in the use of public funds.

The handbook also encourages larger trusts (for example with over 3000 pupils) to consider accountancy qualifications available from professional bodies and take this into account when filling CFO vacancies. As now, the handbook requires CFOs and finance staff to be 'appropriately qualified and/or experienced' and obliges trusts to assess if the CFO and others in key financial posts should have a business or accountancy qualification and hold membership of a relevant professional body. The focus on CFOs of larger trusts is intended to address the added scale and complexity of these trusts and the growing sophistication of the sector.

According to the handbook, CFOs should also maintain continuing professional development and undertake relevant ongoing training. This is recommended as minimum good practice and not a strict requirement though any trust worth its salt will already be investing in the training and continuing professional development of its CFO to ensure it remains financially viable and able to provide a quality education for its students.

Members, employees and volunteers

Members must not be employees or occupy unpaid staff roles, with effect from 1 March 2021. The current handbook prohibits employees from being members unless permitted by the trust's articles. This is not allowed by the DfE model articles though recent editions of the articles allow trusts to change their articles without DfE consent, enabling trusts to take the opposite approach, though this is not best practice.

As above, the handbook confirms the importance of members being kept informed of trust business so they can be assured the board is exercising effective governance. Whilst not a strict requirement, it is nonetheless good governance particularly since the members appoint and remove the trustees under the DfE model articles.

Register of interests

Boards must keep their register of interests up-to-date. The current handbook says boards should keep the register up-to-date as minimum good practice.

Appointment of a clerk

Trusts must appoint a clerk to the board, being someone other than a trustee, principal or the chief executive, to ensure the board complies with legal and regulatory requirements, advise on procedural matters and provide administrative and organisational support. The current handbook says trusts should appoint a clerk as minimum good practice.

Whistleblowing policy

Board must publish their whistleblowing procedure on the trust's website.

Risk register

As now, the handbook requires that trusts maintain a risk register. However, the new handbook confirms that overall responsibility for risk management, including ultimate oversight of the risk register, must be retained by the board, drawing on the advice of the audit and risk committee and other committees as required. The handbook also requires the board to review the risk register at least annually.

Audit and risk committee

Trusts must have an audit committee, as before, though this is called the audit and risk committee. The handbook extends the committee's role, beyond directing the programme of internal scrutiny and reporting to the board on the adequacy of the internal control framework, to ensuring risks are addressed appropriately through internal scrutiny. The handbook also stipulates that the committee must:

- review the external auditor's plan
- the annual report and accounts
- the auditor's findings (and actions taken by the trust's managers in response) and
- assess the effectiveness and resources of the external auditor and report to the board and the members on the reappointment, dismissal or retendering of the external auditor and their remuneration.

Internal scrutiny

Internal scrutiny must also extend to financial and non-financial controls, in recognition that a range of factors, collectively or in isolation, can lead to serious difficulties and ultimately the downfall and re-brokering of a trust. However, internal audit may not be conducted by a trust's external auditor, something which many trusts and their external auditors already practice. Meanwhile, trusts may use other individuals or organisations to support internal scrutiny where specialist non-financial knowledge is required.

In summary

The Academies Financial Handbook 2020 includes a number of changes which trusts must comply with or follow depending on whether they are a strict requirement or recommended as minimum good practice. The majority of these changes should not come as a surprise as they continue the direction of travel taken by the ESFA and codify behaviours that many trusts are already observing as best practice. Trusts can also learn from the wider charities sector, for example by using the Charity Governance Code to assess and improve their governance through the lens of their exempt charity status.

Exempt Charity Status – What this means for Sixth Form Colleges?

Sixth form colleges are governed by corporations or academy trusts, as exempt charities. We explore what this means and complying with their duties.

As exempt charities, corporations and academy trusts cannot register with the Charity Commission but remain subject to and must comply with charity law. They have the Secretary of State for Education as their principal regulator. A memorandum of understanding is in place between the Charity Commission and the Secretary of State to assist with regulation.

The Charity Commission does retain certain significant powers in relation to exempt charities, including in relation to certain regulated changes to the articles of association of academy trusts (it's constitution) involving the objects, application of property on dissolution and payments or other benefits to members, trustees or connected persons.

The Charity Commission also has power to direct an exempt charity to produce documents or to suspend or remove a governor or trustee, but will only exercise such powers with Department for Education ("DfE") consent or at their request in accordance with the agreed memorandum of understanding.

As principal regulator, the Secretary of State also has a role. The Charity Commission's guidance *Exempt Charities (CC23)* says a principal regulator: must promote compliance with charity law; checks charity law compliance; can ask the Charity Commission to use its regulatory powers (such as undertaking a statutory inquiry); works with the Charity Commission to make sure that an exempt charity is accountable to the public; and receives reports on matters of material significance from auditors.

However, there is some question whether the DfE or Education and Skills Funding Agency ("ESFA"), both of which act under delegated powers from the Secretary of State, have the requisite charity law expertise to discharge the functions as principal regulator or even at times to recognise or acknowledge that such a duty exists on the Secretary of State.

Where a corporation is seen to be failing the FE Commissioner and/or ESFA will undertake a diagnostic assessment, independent business review or structure and prospects appraisal, reconstitute or dissolve the governing body or direct a structural solution. In the case of an academy trust, the DfE is likely to step in and compel the re-brokering of the trust rather than consent to any use by the Charity

Commission of its powers.

Why then should corporations and academy trusts be concerned or take any note of their exempt charity status?

The manner in which the Secretary of State, ESFA and/or FE Commissioner seek to exercise their powers does not diminish the need for corporations and academy trusts, as exempt charities, to comply with charity law.

Also, many of the problems that may lead to the failure of a corporation or academy trust can be avoided by a clear focus on effective governance and leadership, which is in itself consistent with exempt charity status and charity law duties.

As charity trustees, governors of corporations and trustees of academy trusts are subject to various duties: to comply with their governing document (being the instrument and articles of government for a corporation and the articles of association for an academy trust); act in the best interests of the corporation or academy trust; manage conflicts; avoid private benefits; and act with reasonable care and skill.

As governors and trustees, they also need to ensure clarity of vision, ethos and strategic direction; oversee financial performance and make sure money is well spent; and hold the principal or chief executive officer and senior executive to account for educational performance.

Governors and trustees can be assisted in ensuring compliance with charity law and their duties by adopting the Charity Governance Code which has been generated by charity sector bodies as a practical tool to: ensure compliance with the basic duties of charity trustees and with legislation and regulation; and develop exemplary leadership and governance and the attitudes and culture to ensure future success. For each principle – (1) organisational purpose (2) leadership (3) integrity (4) decision making, risk and control (5) board effectiveness (6) diversity and (7) openness and accountability – the Code confirms why it's important, the key outcomes that should be observed and the recommended practice. There are also other codes such as the UK Corporate Governance Code and the Code of Good Governance for English Colleges. Corporations must adopt one of the three codes as a condition of their funding while academy trusts are free to choose. For a comparison of the three codes, please see the Sixth Form Colleges Association (SFCA) Occasional Paper *The Governance Codes: How Do They Compare?* which can be obtained from the SFCA or by email to graham.shaw@wrigleys.co.uk.

In summary

For corporations and academy trusts, a clear focus on exempt charity status, assisted by a suitable governance code, is the bedrock of effective governance and leadership which can ensure their success for the benefit of their students and communities.

Out of sight, out of mind? Looking after the welfare of teachers working from home

Teachers are finding it understandably difficult to adapt to remote working.

Before I retrained as a solicitor, I was a teacher for many years so I know how structured and compartmentalised normal working life for teachers can be. I also remember how much I valued the camaraderie of the staff room and those morale-saving chats with colleagues after a difficult day. My friends who are still in the profession admit they have at times felt a bit lost in the new world of socially distanced education.

As employers, academy trusts have a duty to protect the health and safety of all staff. The focus in recent weeks has been on the more obvious health and safety aspects of school re-opening in order to minimise the risks of Covid-19. While many staff will be returning to school in the coming months, a significant number are likely to continue home-working into the next academic year and trusts should not overlook the welfare of these staff, some of whom will have long term health conditions and disabilities.

The health and safety duties of academy trust employers

Academy trusts have a statutory duty to protect the health, safety and welfare at work of their employees as far as is reasonably practicable. This includes duties to assess the risks impacting on staff in their work, to create a safe system of work, to ensure that system is properly implemented, and to have a regular programme of review.

Working from home

Teaching staff who continue to work from home may be working in inappropriate settings, using furniture and equipment which was not designed for prolonged periods of work, and they are likely to be less physically active than they would be during a normal teaching day. All of these will have impact on the physical health of staff.

Easier to overlook can be the impact on mental health of sustained home-working. Some staff are likely to have difficulty separating work and home life, leading to increased risks of stress. Isolation and the lack support networks can mean that the normal strains of teaching life are amplified. There are also the difficulties of juggling child-care with timetabled remote sessions, worries about vulnerable students they can't contact, anxieties about this year's exam-grading system, and fears about returning to work before it is safe to do so.

Clearly, trusts have much less control over the teacher's home environment than over the school environment, and so the measures which are reasonably practicable to protect staff at home will be different. However, there are important steps which can be taken:

- Ask staff to complete their own home-working risk assessments to flag any risks;
- Set up formal systems to make regular contact with staff working from home – video calls are much more likely to help managers to spot signs of stress than phone calls or emails;
- Encourage informal contact outside the line management structure and prioritise team-working;
- Don't forget about the wellbeing of your line managers and leaders – facilitate peer support;
- Consider the use of specific stress risk-assessments where appropriate;
- Consider reasonable adjustments which might be needed for those with a long term mental or physical health condition;
- Consider putting in place a home-working policy.

Risks of claims

Academy trusts should speak to their insurers to check the extent of cover for particular claims and notify their insurers if there is a risk of a claim being brought.

Claims can be brought where staff allege they have suffered personal injury due to their employer's breach of its duty of care. Employers should also be aware of the risk of whistleblowing claims where staff have raised concerns about a legal breach. Staff or trade unions could make a report to the Health and Safety Executive.

Staff may allege that their employer failed to put proper safeguards in place for home-working and that this amounts to a breach of trust and confidence, leading to resignation and a constructive dismissal claim.

Discrimination claims may be brought if a staff member believes that they have been less favourably treated because of their protected characteristic. In the current circumstances, claims might include those from disabled employees or women with child-care responsibilities who allege that they are disadvantaged by policies which apply to all staff. Further information on the discrimination risks for employers during the Covid-19 crisis can be found in [my previous article](#), including risks relating to BAME and pregnant staff.

Consultation and communication

Trusts have a duty to consult staff and their representatives on health and safety issues. My colleague Chris Billington discusses the importance of schools working together with trade unions in the current crisis in his [recent article](#).

Reaching out to staff, unions and professional advisers can significantly lower the risks of home-working and lead to healthier and happier staff who are more able to provide the best for their students. This is ultimately what drives trust leaders, not least in these testing times.

The role of trade unions in schools reopening following lockdown

The history of the trade union movement evidences the impact unions have had on protecting the health, safety and welfare of staff.

Whilst Covid-19 has created an unprecedented situation for public health and the economy, schools in particular have been required, almost overnight, to find practical work around solutions to ensure continuing education provision for our nation's children.

There are a multitude of stories highlighting the good work of schools, and of staff rising to the challenges of this health emergency, and this continues to have the support of the trade unions.

However, throughout unions have also been concerned to do everything they can to uphold the rights of staff, guarantee their financial position and safeguard health, safety and welfare (including mental health). This includes the work of unions in avoiding redundancy, protecting pay including sick pay for those self-isolating, and supporting employees not only in relation to disciplinary (and capability) procedures and grievances but also supporting those affected by fatalities as a result of the virus. Unions have also been instrumental in providing staff and schools with information, advice and guidance, helping to avoid the effects of misinformation, and challenging the government on its response to the virus.

Reopening is only one part of the recent challenges faced by schools. Reopening comes at a time when there are still so many unknowns about the virus, including the continuing risk (not just due to personal health conditions but also, as evidence grows, the racial and socio-economic disparities) and lack of a vaccine (with little clarity as to when one may become available).

Schools are well aware of their legal duties, including that staff have the right to withdraw from and refuse to return to a workplace that is unsafe. As part of their reopening assessments schools know that they need, and want, to be careful to avoid making assumptions that could expose them to discrimination claims, such as whether a member of staff is ready or able to return, or making arrangements which unjustifiably and detrimentally affect some groups, such as those with caring responsibilities or who may be more susceptible to the virus or its effects.

Some guidance appears to suggest that once a school has signed off on its risk assessment then there is nothing to stop it reopening. We can all tick a box. However schools exist in the real world and that involves multiple and often complex relationships.

One of a school's key relationships is with its staff and that will include any trade union representing staff. Relationships are built upon mutual respect. That is not created automatically; it needs to be worked on. But like any relationship it can be weakened, perhaps destroyed, through a simple lack of thought.

A key ingredient in building and maintaining that relationship is good communication, including timely forethought. This is not a last minute scramble to meet minimum statutory requirements around consultation. However, this does not mean that a school and union must agree on everything. Mutual respect allows for professional disagreement but it is important to remember that notwithstanding the statutory duty of schools to ensure the health, safety and welfare of staff the history of the trade union movement evidences the impact unions have had in this area.

If there is a concern about the quality of your relationship then that demands time and attention to find a way to make improvements. That includes supporting and investing in the development of your staff representatives so that they can better fulfil their role, just as you will support and develop other teaching and non-teaching staff in their roles.

No school is alone in seeking a solution to respond to the present crisis and no school should seek to respond alone.

School's construction contract void for lack of capacity

We look at a recent case which has provided helpful clarity in relation to a school's capacity to enter contracts.

Case: School Facility Management Ltd and others v Governing Body of Christ the King College

What happened?

Christ the King College (the College), a maintained voluntary aided school sought to add a new sixth form block. It agreed a 15-year lease of a modular building with BOShire (BOS), a construction company which regularly operated and had expertise in the public sector. The contract involved payment of an initial premium followed by an annual rent. As part of the contract negotiation both the College and the local authority gave written confirmation that the College had power to enter into the lease.

Four years in, the College could no longer meet its financial commitments under the contract. The College claimed the contract was void as it was a finance lease, in essence borrowing for which Secretary of State consent was required, but which had not been obtained. In turn, BOS sued for breach of contract, misrepresentation and unjust enrichment (more below).

What were the key points raised?

- Was this a finance lease (under which the College was borrowing) or an operational lease?
- Did the College act ultra vires by entering the lease, acting outside its powers?
- Was the College in breach of statutory measures which are there to prevent overspending?
- Could BOS claim for misrepresentation and unjust enrichment if the College had improperly agreed the contract given the College's written confirmation that it has the requisite power and authority?

What did the Court find?

The Court held that the contract was a finance lease. Distinguishing it from an operational lease, a lease is likely to be a finance lease if:

- it has the same outcome as if the asset (here, a building) had instead been purchased and financed through a loan

- the lease term is for a significant part of the life of the asset in question even though ownership of the asset does not transfer
- the payments made at the beginning of the contract represent a significant portion of the asset value.

Given the nature of the lease, Secretary of State consent to the contract was required pursuant to the Education Act 2002. This was not obtained, and the College therefore did not have capacity to enter the contract, meaning it was void for all purposes.

However, the Court held that the College had acted unreasonably, as well as recklessly, in not ensuring it had the financial ability to meet its commitments under the contract. The College had ignored alternative, perhaps better value, quotes from contractors in preferring BOS.

BOS claimed that it had relied on the College's confirmation that it had the requisite power and authority. The Court made it clear that it was not for the College to assume an "advisory duty" on this specific question; it was for BOS to rely on its own views and to take its own advice; BOS were in essence the experts. The Court also dismissed BOS' claim for significant losses of £6.7m because they could not prove this loss. BOS did however enjoy a partially successful claim for unjust enrichment against the College, recognising that the College had received considerable value through its use of the building; the Court did require the College to make some payments to BOS.

What can schools, academies and colleges take from this case?

For maintained schools, borrowing by entering a finance lease will always require Secretary of State consent. Otherwise it is likely that arrangements will be declared as void.

For academies, there are perhaps clearer safeguards automatically put in place on conversion by way of the Department for Education model funding and commercial transfer agreements. The requirement to obtain Secretary of State consent when borrowing is further reinforced in the Academies Handbook.

Schools may want to look at both current and historic borrowing arrangements, such as photocopying and ICT system contracts, to check if they are pure finance leases and in turn, their validity.

Governance reviews for academy trusts.

Wrigleys Solicitors and Satis Education partner up to provide a comprehensive service for academy trusts.

Wrigleys Solicitors and Satis Education have joined forces to provide a governance review service for academy trusts which assesses and reports on the governance function and provides targeted recommendations and support where action is required.

Wrigleys has a nationally recognised team of dedicated lawyers who work with a range of academy trusts and have encountered and resolved many different governance issues. The firm is steeped in the sector and has a detailed understanding of the governance and compliance framework for academy trusts. Many of the staff are also experienced academy governors or trustees of academy trusts.

[Satis Education](#) has first-hand practical experience of governance in academy trusts, with a portfolio that spans visioning (including the development of growth plans and operating models), governance reviews, health checks and developing governance frameworks.

Why do a governance review?

Your academy trust is required to comply with the Academies Financial Handbook, which imposes strict

governance requirements. A failure to comply, even a minor infringement, can attract the attention of the Education and Skills Funding Agency. Repeated and more serious breaches can lead to a Financial Notice to Improve and ultimately re-brokerage of your academy trust. Regular governance reviews can help avoid formal intervention of this kind.

There is a wealth of best practice for you to draw on to support and improve how your trust is governed and ultimately ensure your success. A governance review will identify areas that can be improved and recommend best practice that best suits your particular circumstances.

Our governance review service offers you three levels of service.

Option 1 – Effective Governance: A review of your effectiveness including roles, relationships, meetings and decisions
Option 2 – Compliance: A review of your compliance with key regulatory requirements
Option 3 – Effective Governance and Compliance: A combined review of effectiveness (option 1) and compliance (option 2) to provide a comprehensive assessment of effectiveness and compliance across all key areas
Each review will conclude with a written report outlining the current position and providing recommendations for next steps
As a part of social distancing measures, all meetings may be conducted via phone or online video conferencing.

To arrange a governance review for your academy trust or for further details, please contact:

Graham Shaw on graham.shaw@wrigleys.co.uk, 0113 204 1138 or 07955 855 314

Helen Stevenson on helen@satiseducation.co.uk, 07931 384683 or 07729 024631

Overseas students identified as money laundering targets.

Why are criminals using international students and what can students' unions be doing to raise awareness and protect students?

Overseas students studying in the UK have been identified by the National Crime Agency as a key target for criminal gangs attempting to launder money, with Chinese students being particularly vulnerable.

The NCA reported in its 'National Strategic Assessment of Serious and Organised Crime' for 2019 that account freezing orders were placed on 95 UK bank accounts containing an estimated £3.6 million. The accounts were mainly held by overseas students studying at universities in the UK.

One bank, Santander, alerted the authorities in the UK about suspicious cash deposits of over £57m which were linked to 600 bank accounts opened by students.

Simon Lord, of the National Crime Agency, spoke at the Law Society's anti-money laundering and financial crime conference and said that the industry is worth 'hundred of millions, if not billions' and in particular is used as a way to transfer funds out of China.

There has been a rise in incidents due to restrictions introduced by China on overseas investments

and outbound transfers of funds. Chinese nationals are subject to an annual cap of 50,000 USD each year unless they are emigrating, and transactions of more than 10,000 USD must be finalised through the State Administration of Foreign Exchange. This means that large transfers cannot be made without government approval which is unlikely to be granted.

Although some Chinese nationals may wish to transfer funds to invest in property overseas, there will also be criminals who need to use alternative means to circumvent such limits. The NCA suspects that the money contained in the 95 UK bank accounts of overseas students was either the proceeds of crime or intended to be used for criminal purposes.

Although these are issues of Chinese law, it is crucial to be aware of the money laundering implications of such restrictions as there are several ways in which overseas students may be implicated in the money laundering.

The National Crime Agency identifies 'money mules' as those who allow their bank accounts to be used to move money. Overseas students are likely to be targeted because they already have a bank account open in the UK and could be used as a way to channel funds out of a country. Students may not be aware that their account is being used for illegal means or may be acting under duress.

The NCA notes the two key methods associated with the laundering of the money of the frozen bank accounts. Firstly, there may be small and frequent cash deposits, which are paid from different locations into the accounts to avoid scrutiny. Secondly, the cash deposited may be used to buy goods which are then exported to China, despite there being no connection between the party transferring the funds and the party making the purchase.

Criminals may seek to recruit students by asking them to receive money and make a further transfer, and offer a cut of the money as payment. Students may also be conned into handing their account details over unwittingly. Online scam job adverts claiming to pay high sums for minimal hours working from home are common signs of money laundering and are easy to target towards students.

Alternatively, students may be unwittingly breaking foreign and domestic laws by using non-regulated means of transferring money. 'Hawala' is an alternative banking system where money can be sent faster and with lower fees than by using regulated bank transfers. Messaging services such as WeChat, which can also be used to transfer money, are popular amongst Chinese students and their families due to the strict money transfer laws in China. However, using a hawala system to transfer funds from China to a student here is illegal in the UK due to tight foreign exchange regulation. The NCA also believes that the hawala system can easily be infiltrated by organised crime gangs.

There are now more than 100,000 Chinese students studying in the UK, creating a large pool of potential targets at universities all over the country. Although all students are at risk of becoming a victim of this type of money laundering, there is a risk to Chinese students in particular, due to the restrictive domestic laws on outgoing transfers.

The NCA can apply to have account freezing orders and forfeiture orders put on suspicious accounts through the magistrates court. Such restrictions may leave them unable to pay living expenses and tuition fees. For overseas students studying in the UK, who may not have an immediate support network, this could have a devastating effect on their day to day life and studies. Students' unions should be aware of this growing trend and look out for those students who may be particularly vulnerable to the risk of being used by organised crime networks.

Covid-19 – Are schools and academy trusts required to comply with DfE guidance on a phased wider opening?

We look here at whether schools and academy trusts must comply with DfE guidance on the phased wider opening of schools from 1 June 2020.

On 11 May 2020, the Department for Education (DfE) published [Actions for education and childcare settings to prepare for wider opening from 1 June 2020](#), [Coronavirus \(COVID-19\): implementing protective measures in education and childcare settings](#) and [Opening schools and educational settings to more pupils from 1 June: guidance for parents and carers](#), accompanied by a [press release](#). The guidance has received a mixed response with some asking whether a phased wider opening of schools from 1st June can sensibly proceed given concerns over the health and safety of staff and pupils. School and academy leaders and their governing bodies and boards are asking whether and to what extent they must comply with the guidance and who is responsible and liable for the decision. The legal position is as follows.

For an academy trust, the position is framed by its funding agreement with the Secretary of State where the academy trust and the Secretary of State agree that the academy trust will operate its academy or academies in accordance with the requirements set out in the funding agreement. In this regard, the DfE model funding agreement requires the trustees to ‘have regard to any guidance issued by or on behalf of the Secretary of State’. The trustees must therefore be able to show that they are aware of the guidance, have taken this into account when deciding whether to proceed with the wider opening of any academy and, if they decide to depart from the guidance, have good reasons for doing so. “Having regard” to guidance is not a requirement to blindly follow it.

The trustees must also comply with their duties under charity law and so, in this context, must act prudently, in good faith (with genuine honest intention or motives), with undivided loyalty and in the best interests of the academy trust and its pupils. Further, the trustees must comply with their company law duties as directors and so, in this context, must promote the success of the academy trust, avoid conflicts of interest and exercise independent judgement, reasonable care, skill and diligence. This could involve the board instructing a series of reports to help them decide whether to proceed with the phased wider opening of an academy. Obtaining robust health and safety advice will help the academy trust consider the guidance and protect the trustees in any decision they take which the academy trust is ultimately liable for.

For a maintained school, the position is framed by the Education Act 2002 which confirms that the conduct of the school is ordinarily under the direction of the governing body and that the governing body may do anything which appears to them to be necessary or expedient for the purposes of or in connection with the conduct of the school. Unless the school is subject to intervention by the Secretary of State or the local authority, the decision whether to proceed with the phased wider opening of the school therefore lies with the governing body. In making the decision, the governing body must be able to show they are aware of the guidance, have taken this into account when deciding whether to proceed and, if they decide to depart from the guidance, have good reasons for doing so. In accordance with the School Governance (Roles, Procedures and Allowances) (England) Regulations 2013, they must also act with integrity, objectivity and honesty and in the best interests of the school when making the decision. Further, the governing body of a voluntary or foundation school, as an exempt charity, must comply with charity law and so the governors must comply with their duties as charity trustees. The governing body of a maintained school may also want to instruct a series of reports to help decide whether to proceed. They will benefit from robust health and safety advice to inform and protect them in any decision they take, which the governing body is ultimately liable for.

In summary

Maintained schools and academy trusts naturally look to the Department for Education for guidance on key issues, not least in the midst of Covid-19. However, they needn't follow guidance simply because it has come from the Department for Education. Nor must they follow what their local authority has decided to do in response. Instead, they are required to exercise their own judgement and make decisions in the best interests of their school or academy/academies, which may sometimes depart (to a greater or lesser degree) from Department for Education guidance. The DfE may of course highlight non-compliance and threaten intervention in other areas to pressure the school or academy trust to comply.

FAQs - Covid-19 - Operational and Governance Issues for Schools and Academies

With schools closed, exams cancelled and new guidance issued on almost a daily basis schools are adapting quickly to deal with the current crisis.

We have drawn together some of the most recently asked questions from maintained schools and academies, together with answers that are current at the date of publication. For specific advice on any of these issues please contact the team using the contact details at the end of this article.

Further information on employment law issues during the Covid-19 crisis may be found [here](#) and [here](#) on our Covid-19 news pages.

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.