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EDUCATION BULLETIN

SPRING 2018

Welcome to Wrigley's Spring term roundup of news and articles relevant to schools and academies.

Education is rarely out of the media spotlight and the last terms has been no different. In this issue we continue our review of academy governance, comment on the Carillion effect and provide guidance on gender issues.

However top of the bill for all of us is the new data protection regime and we flag those extra hurdles schools and academies will need to jump to meet the GDPR requirements.

Also, may I remind you of our forthcoming events:

- **Employment Breakfast Briefing: Recent Developments in Whistle-Blowing Protection**
  Breakfast Seminar, Leeds, 7th August 2018
  For more information or to book
- **Employment Law Update for Charities 2018**
  A full day conference, Leeds, 26th June 2018
  For more information or to book
- **Northern Education Conference**
  A full day conference, Leeds, 27th November 2018
  For more information or to book

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

Contents

1. GDPR: Public authority status - what does this mean for academy trusts
2. Segregation of girls and boys in a mixed-sex school is discriminatory
3. Show me the money: income generation by academy trusts
4. Modern slavery statements and the academy trust
5. Single sex-school, boarding and transgender pupils
6. Is your board up to the challenge?
7. Could a TUPE transfer occur before a schools transfers into a MAT?
8. Carillion and Schools

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

GDPR: Public authority status - what does this mean for academy trusts

What do schools need to look out for and do differently to other organisations?

No matter what type of organisation you are there are some key steps you should be taking to prepare for the General Data Protection Regulations (GDPR) including data mapping, analysis of the lawful basis for processing data and implementation of changes to policies and procedures. In this article we highlight particular issues arising for academy trusts.

Public Authority status

Those familiar with academies will know, academy trusts are already designated as public authorities for the purposes of Freedom of Information Act queries. There is no separate definition of a "public authority" in the GDPR and whilst the government has power to redefine particular organisations and remove public authority status for the purposes of GDPR it has expressed no intention to do so for academies.

What does this definition mean for academy trusts?

Appointment of a data protection officer (DPO)

All academy trusts **must** appoint a DPO whose tasks include;

- advising the academy trust with regard to its data protection obligations;
- monitoring the academy trust's compliance with GDPR; and
- first point of contact for ICO and data subjects.

The DPO should report at Board level but should operate independently and will have statutory protection against dismissed or being penalised for performing the role. The DPO maybe an employee providing there is no conflict with their existing professional duties or the position may be contracted out.

"Legitimate interest" basis for processing data will not apply

Generic advice on GDPR states that all organisations processing personal data must do so within one of the six prescribed legal bases; these are:

1. *consent;*
2. *performance of a contract with the data subject;*
3. *to comply with a legal obligation;*
4. *to protect the vital interests of the data subject;*
5. *legitimate interest pursued by the controller or a third party, except where such interests are overridden by the interests, rights or freedoms of the data subject; or*
6. *performance of a task carried out in the public interest or in exercise of official authority.*

Academy trusts, will have additional hurdles to overcome if seeking to rely on (1) consent and in any event can not rely on (5), *legitimate interests.*

Consent as a basis for processing data may not be appropriate

Academy trusts will not necessarily be able to rely upon the legal basis of consent to justify processing personal data either. In draft guidance published earlier this year the Information Commissioner's Office (ICO) confirmed it considers public authorities' use of consent to be unfair where there is an imbalance of power. It says:

Consent will not usually be appropriate if there is a clear imbalance of power between you and the individual. This is because those who depend on your services, or fear adverse consequences, might feel they have no choice but to agree – so consent is not considered freely given. This will be a particular issue for public authorities and employers.

In the context of an academy trust this will be most relevant when processing the personal data of employees, parents and pupils.

The draft ICO Guidance also states consent will not be a fair basis for processing where you would still process the personal data on a different lawful basis even if consent were refused or withdrawn. In such circumstances the ICO considers seeking consent from the data subject to be misleading and inherently unfair, presenting the individual with a false choice and only the illusion of control. Therefore it may not be lawful to rely on consent as a type of "catch-all" where there is some other more relevant basis for processing.

What legal basis for processing data can academy trusts use?

Academy trusts (and other public authorities) will need to identify the most appropriate lawful basis for processing data from the start. This will depend on what you hold and why.

Consider processing data about staff, pupils and parents as a key, but no means only, concern. *Consent* is not sufficient if it can not be shown that such consent was freely given (as referenced in the ICO guidance noted above). In any event consent may be withdrawn at any time.

Legitimate interest is not available to a public authority.

In the case of employee data, processing may be necessary for the *performance of a contract to which the data subject is a party* (being the employment contract). Alternatively, some processing *may be necessary for compliance with a legal obligation* to which the academy trust, as data controller, is subject such as collecting PAYE payments.

Of the two remaining bases,

1. *protecting the vital interests of the data subject or another person is only likely to apply in "life and death" situations; and*
2. The ICO suggests public authorities should rely on the sixth basis where *processing is necessary for the performance of a task carried out in the public interest or in exercise of official authority vested in the controller.* This basis has been further defined in the Data Protection Bill to cover processing of data where it is *necessary for the exercise of a function….. conferred on a person by an enactment.*

At first glance it seems difficult to see what lawful basis an academy trust may have for processing pupil and parent data. Consider data relating to a pupil's academic progress for example. What is the lawful basis for an academy trust to send home reports?

It is important to bear in mind that, for secondary students they (and not the parent, guardian or other responsible adult) are the data subject and can therefore exercise data subject rights and withdraw consent.

There is a clear *legal obligation* to report to parents annually, under the Education (Independent School Standards) (England) Regulations 2010. The situation is not so clear cut when contemplating more frequent, e.g. termly reports.

Academy trusts could argue the processing of data to produce regular school reports is necessary to exercise the function of an academy as conferred by the Academies Act 2010 and thereby follow the ICO's advice and use the legal basis of *necessary for … or in exercise of official authority* as set out at (2) above. Why is regular reporting necessary?

Regular information to parents regarding a pupil's progress may be viewed as necessary to support the home/school contract and to further the pupil's education by engaging those with parental responsibility in the process.

Given the ink is not yet dry on the draft legislation or the ICO's guidance on consent, the situation may change and we may gain more clarity. In the meantime analysis of the issues surrounding production of school reports highlights the importance of identifying the purpose for which data is held and seeking to identify the legal basis for processing. At the same time academy trusts should review existing home/school contracts and privacy notices to consider whether they describe the purpose and lawful basis upon which data is processed in light of the legal bases available to them.

Chris Billington, Head of Education at Wrigleys notes that "Academy trusts must move beyond any assumption that they are entitled to process personal data as and when they wish. Compliance with the new data processing rules does require an extensive data mapping exercise so that the academy trust can identify what data it holds and why. The academy trust will then need to ensure that they are covered by one of the legitimate bases under GDPR. However, there is no need to go it alone. All academy trusts, maintained schools and local authorities are going through this process; some are further along than others. This is an opportunity for academy trusts to engage with others and help develop best practice".

You will find a link to our more general advice to charities which sets out steps to prepare for implementation of GDPR *here* and a link to our *podcasts*.

Wrigleys is offering "in-school" bespoke half day or full day training courses on the implementation of GDPR for schools.

Segregation of girls and boys in a mixed-sex school is discriminatory

Court of Appeal holds that girls and boys in an Islamic state school are discriminated against by being segregated throughout the school day.

We reported in December last year on the High Court decision that the segregation of boys and girls in an Islamic school was not sex discrimination. The Court of Appeal has now overturned that decision, ruling such segregation to be unlawful.

Segregation by sex in schools and the Equality Act 2010

Treating a person of one sex less favourably than a person of the other sex is direct discrimination. Additionally, a school must not discriminate against or victimise pupils in terms of admission or treatment (including the provision of education, benefits, facilities and services) on the ground of their sex (or any other protected characteristic).

There are exceptions, for example:

- single-sex schools are permitted to admit one sex only (single-sex schools include those which exceptionally admit pupils of the opposite sex and such schools are permitted to make separate provision for different sexes, including by confining pupils of the same sex to particular courses or classes);
- mixed-sex schools are permitted to provide boarding facilities to one sex only or separate boarding houses for each sex;
- segregation by sex is allowed in "gender-affected" activities such as sport or competitive games in which the physical capabilities of an average female or male might put them at a disadvantage when compared to the other sex (taking into account the age and stage of development of the children in question);
- sex segregation is also permitted in situations where it is necessary to preserve privacy and decency (for example in changing rooms and toilets).

Useful *guidance for schools* on compliance with the Equality Act is available from the Equality and Human Rights Commission website.

Case details

The Interim Executive Board of Al-Hijrah School v HM Chief Inspector of Education concerns an appeal against a draft Ofsted report which stated that the segregation of boys and girls at the school for all lessons, breaks and activities was discriminatory on the ground of sex.

Ofsted argued that both girls and boys at the school were treated less favourably as their social development and confidence in interacting with the opposite sex was limited by the segregation. It also argued that segregated girls suffered a particular detriment given that women are a less powerful group in society and the segregation perpetuates

female social inferiority. It did not argue that the girls received a lesser education than the boys.
The High Court decided that direct discrimination had not taken place because boys were treated in the same way as girls. That is, both sexes were denied the opportunity to mix with the opposite sex so it could not be said that one sex was less favourably treated than the other.

Decision

The Court of Appeal disagreed, holding that the High Court had been wrong to focus on the effects of the segregation on boys and girls as two groups. Rather, the focus of a direct discrimination claim should be on the effect on individual boys or girls. The court held that an individual girl at the school is less favourably treated because she is not able to mix with boys, compared to a boy at the school who is able to mix with boys. And vice versa: an individual boy at the school is less favourably treated because he is not able to mix with girls, compared to a girl at the school who is able to mix with girls.

Two of the three judges upheld the High Court's decision that the segregation did not disadvantage girls more than boys. Lady Justice Gloster gave a dissenting judgment, stating that girls at the school were particularly disadvantaged by the arrangement because women are a less powerful group in society than men and the denial of an opportunity to mix with boys would disadvantage them more in the longer term. She argued that the segregation also perpetuated what she saw as social stereotypes about men's and women's place in society in "some Muslim communities" and did nothing to support girls at the school to grow up to play whatever part they choose in their society.

Impact on schools and academy trusts

This judgment will have significant consequences for co-educational schools which segregate boys and girls. The judgment notes that previous Ofsted judgments have not pointed out that segregation is discriminatory and there has been no Government guidance to indicate this. Ofsted made clear in the proceedings that it would apply a consistent approach to other schools which are "similarly organised".

The court recommends that Ofsted and the Secretary of State for Education recognise that "given the history of the matter, their failure (despite their expertise and responsibility for these matters) to identify the problem and the fact that they have de facto sanctioned and accepted a state of affairs which is unlawful, the schools affected should be given time to put their house in order".

A number of schools separate boys and girls for teaching in some subjects. For example, the *BBC reported* last week that a school in Southampton is teaching boys and girls in separate classes for GCSE English in a bid to improve the performance of boys in the subject. **Chris Billington**, who leads Wrigleys Education Team notes that "although this case is specific to the complete segregation of boys and girls in a mixed-sex school, schools and academy trusts may wish to take legal advice about the ways in which they make separate provision for boys and girls to ensure that they are not inadvertently contravening the Equality Act. This includes consideration of current gender identity issues."

Given the impact of this judgment, particularly on faith schools which segregate in this way, it is possible that the decision will be appealed. There are thought to be around 25 mixed-sex schools in England which segregate the sexes completely.

Show me the money: income generation by academy trusts

Many academy trusts decide, or have little alternative but to seek ways, to raise additional funds, to supplement the money they receive from the Government. In this article, we set out a number of points to consider when looking at income generation.

Where could more money come from?

Academy trusts may find additional funds from a variety of sources, including:

- Donations or voluntary contributions from parents, ex pupils and others (e.g. by maintaining an active network of alumni). Done correctly this also opens up the possibility of claiming Gift Aid on the donation.
- Grant funding, for example from Sport England to pay for or contribute towards the cost of new sports or other facilities.
- Providing consultancy services to other schools, e.g. school improvement and school support. Some schools which have been through significant restructuring or capital projects can offer project management and other advice and assistance.
- Holding fundraising events, such as parents' quiz nights, summer fetes etc, perhaps with a raffle or lottery running alongside.
- Undertake trading, for example:
    - Selling school items, such as branded merchandise, photographs and uniform. This includes receiving commission from a preferred supplier who you introduce to parents;
    - Letting out facilities, for example to community groups, nurseries, breakfast clubs, afterschool clubs and sports clubs. Some schools may have conferencing facilities, fitness suites or leisure centres; or

- Trading with the general public, such as catering alongside facilities which are hired out the general public.

What activities can an academy trust legally do to raise money?

As a charitable company, the starting point is that an academy trust must comply with its objects, as set out in its articles of association. The model objects for an academy trust are, generally speaking, to advance education. This means that, in the first instance, everything which an academy trust does must be to advance education.

Some academy trusts have an additional charitable object, the provision of recreational and leisure facilities for the benefit of the local community, in the interests of social welfare. This gives those academy trusts more flexibility in the activities they can do to raise funds: they can undertake activities which further education, and also activities which are about providing facilities for the wider community.

Attracting grants and donations for spending on school facilities clearly falls within the model academy trust objects, even if it does not have recreational and leisure option. The real difficulties arise when an academy trust starts to do trading activities i.e. offering goods or services in return for a fee.

Trading by academy trusts

Where trading has an educational purpose, or is ancillary to an educational purpose (such as charging pupils for school meals), it is classed as 'primary purpose trading'. Such activities can be carried out by an academy trust, as it furthers the charitable objects.

However, if the academy trust does activities that are not in furtherance of its objects, such as selling branded school merchandise (mugs, pens etc), this is termed 'non-primary purpose trading'. Profits arising from non-primary purpose trading is chargeable to corporation tax, unless it falls under a certain threshold known as 'the small scale exemption'.

The small scale exemption means that an academy trust can do a small amount of non-primary purpose(i.e. non-charitable) trading, provided that the income generated falls under a certain amount, which for academy trusts is generally £50,000 pa.

An academy trust with the object of providing recreational and leisure facilities has more flexibility in the trading activities it can do. It would be permitted to rent out areas of school sites to community groups as primary purpose, without this being caught by the prohibition on taxable trading.

In contrast, an academy trust without this recreational object, which hires out areas to community groups, would not be furthering its object to advance education. It would therefore potentially be doing non-primary purpose trading.

It is important to note that the amount of trading undertaken takes into account all of the schools within an academy trust. It is not done on a school by school basis.

If an academy trust is undertaking a significant amount of non-primary purpose trading, and the income exceeds £50,000, it would need to set up a trading subsidiary if it wished to continue to undertake this activity.

It is therefore important that academy trusts regularly review the trading activity that is being carried out in its schools, to ensure it is staying within the rules.

Chris Billington, Head of Wrigleys Education team, comments: "*many schools were familiar with an extended school programme where school engaged in wide range of activities. From the start of the academies programme this freedom has been strictly paired back and academies have had to become familiar with charity regulation*".

Income generation: other points to be aware of

Fundraising Regulator

As exempt charities, academy trusts should be aware of the Fundraising Regulator. This is a new body, established in January 2016, to regulate fundraising activities by charities.

It has a Code of Fundraising Practice, which charities are encouraged to comply with when undertaking fundraising activities. The Code includes sections on fundraising involving children, which will be of particular relevance to academy trusts (*link here*).

The Regulator also operates the Fundraising Preference Service, which permits members of the public to opt out of fundraising communications from particular charities.

Data protection

Schools should also be aware of data protection issues, particularly if they are contacting ex-pupils or parents to raise funds.

The website of the Information Commissioner's Office has a special section devoted to charities (*link here*), which covers the rules relating to data protection and fundraising.

You could also listen to our podcasts on the upcoming changes to data protection legislation, available *here*, or have a look at *our earlier article* on how the changes will impact on schools and academy trusts.

Academy Funding Agreement

The DfE template prohibits academies spending GAG on anything other than education of its pupils. Accordingly academies cannot use GAG as start up funding for other activities, whether or not is it an educational or charitable purpose and even if the aim is to create a greater financial return for the benefit of pupils.

In addition, any activity which places at risk the academy trust's charitable status, such as non-charitable trading, may be a breach of the funding agreement.

Lotteries

If you are running a lottery or raffle, please be aware that there is specific legislation which governs this kind of activity. You can find out more on the Gambling Commission's website (*link here*).

Further information

This is a complex area of law and this article only touches on some of the general issues. It does not constitute legal advice, and anyone interested in the topics raised is welcome to contact a member of our academies team to discuss their particular situation.

The following guidance may also be of interest:

- *Joint guidance from the Charity Commission and HMRC on charities and trading*
- *Charity Commission guidance CC35* (Trustees, trading and tax)
- *HMRC guidance on charities, trading and tax*
- *Fundraising Regulator* and the *Code of Fundraising Practice*
- *Information Commissioner's Office: information for charities (data protection)*
- *Gambling Commission (raffles and lotteries)*

Modern slavery statements and the academy trust

It is reported that 40 million people are in slavery worldwide, and according to National Crime Agency estimates, that includes tens of thousands of people in England.

A number of larger academy trusts have now published a Modern Slavery Statement. Some are required to do so under the Modern Slavery Act. Others have taken the decision to publish a statement even though they are not compelled to do so.

What is modern slavery?

The offence of modern slavery includes subjecting someone to slavery or servitude, forced or compulsory labour, including child labour, and human trafficking. It often entails breaches of human rights law, employment law and health and safety regulations, harsh and inhumane treatment, and exploitatively low pay and long hours.

Does your academy trust have to publish a statement?

Every incorporated organisation or partnership carrying on a business in the UK with a total annual turnover of £36 million or more is required to produce a slavery and human trafficking statement for each financial year.

Chris Billington, Head of Education at Wrigleys notes that "academy trusts are caught by the modern slavery legislation if they have sufficient turnover. Their educational activities and charitable status do not exclude them from compliance; GAG funding and other sources of income count toward the turnover level. A multi academy trust must aggregate income across all their schools".

Smaller academy trusts may decide voluntarily to produce a statement and to take action to prevent modern slavery in

their supply chains. As more and more organisations publish statements, develop policies and commit to the principles behind the Act, academy trusts may also find that they are required to produce a statement or policy as a condition of a contract or funding arrangement.

Refreshed Government guidance

This month has seen the publication of updated *Government Guidance on Transparency in Supply Chains* which sets out best practice for organisations which have to comply with the Act. The guidance stresses the importance of transparency so that the public are aware of the steps which organisations are taking or not taking to prevent modern slavery and human trafficking taking place in their supply chains.

The guidance makes clear that a statement can set out proposed future actions as well as any action already taken but emphasises that there is an expectation that actions should be built on year by year and that progress towards stated goals should be regularly reviewed.

What to include in a statement

The statement will either set out steps the academy trust has taken to ensure that there is no slavery in its supply chain or state that the trust has taken no such steps. It should be in plain English and there must be a prominent link to the statement from the trust's home webpage. The statement must be approved by the board and signed by a director or equivalent.

Statements may include, for example, information on the structure of the academy trust, relevant policies, due diligence or risk assessment processes and details of staff training. It can cross refer to trust policies such as those for risk management, safeguarding, whistleblowing and procurement.

Taking action

Academy Trusts should consider the impact of their decisions about suppliers and products on the people who work in their supply chains. Careful thought should be given to policies and procedures for sourcing goods and services, for example, stationery, uniforms, cleaning, maintenance and catering services. Procurement decisions should include consideration of full and fair labour costs and the labour standards applied to those who produce goods and services used by the trust. Due diligence should be carried out to reduce the risk that modern slavery is entailed in supply chains, including those supplying the trust's contractors.

The impact of payment practices should also be considered. For example, the pressure placed on those working in supply chains when orders are placed at short notice, or when late payment is commonplace.

The guidance highlights the need for training for relevant staff to ensure they are alert to the issues of modern slavery and human trafficking and able to take action should concerns ever arise.

Taking no action

There is no compulsion for academy trusts to take any action save for publishing the annual statement if turnover exceeds the required level. However, there will clearly be reputational risks arising from the content of the statement and in failing to publish a statement. Any academy trust which is required but fails to publish the required statement may face an injunction to compel them to publish and will be in contempt of court if they do not do so.

Single sex-school, boarding and transgender pupils

Could your school be contravening the Equality Act 2010 by not admitting a transgender pupil?

There have been a number of stories in the press recently concerning moves towards gender neutrality in the education field. These have included gender neutral uniform policies and terms of address. In August, it was *reported* that exam boards are considering creating a transgender category for students who do not identify as either male or female.

It is perhaps inevitable that gender-related issues will come to the fore in schools given that school-age children are beginning to work out their social identity. Issues are often highlighted in the school context because of the traditional separation and management of pupils along gender lines.

In the context of single-sex and boarding schools, such issues can be intensified, particularly when a pupil's very place in the school might be called into question because of gender identity or reassignment.

Gender reassignment protection

Under the Equality Act, schools must not discriminate against or victimise pupils in terms of admission to the school or in the provision of education, benefits, facilities and services on the ground of any protected characteristic. The protected characteristics include sex and gender reassignment.

A person has the protected characteristic of gender reassignment if that person is "*proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex"* (Equality Act 2010).

The Equality and Human Rights Commission describes gender reassignment as a "*personal process, that is, moving away from one's birth sex to the preferred gender, rather than a medical process*". There is no need for the person to be under medical supervision or undergoing any particular medical or other treatment before they are protected. The decision to reassign gender need not be irrevocable and protection will continue even if the person stops or reverses the transitioning process.

On this basis, a person who is legally one sex and seeks to identify with the other sex, will fall under the protection of gender re-assignment, provided there is a declared intent to be so identified. Interestingly, the Equality Act does not include protection for those seeking to identify as gender neutral.

Children who make a decision to transition from one gender to another or to live as a different gender to their birth sex are protected by the legislation. This is the case even if the child later decides not to transition.

Chris Billington, who leads Wrigleys' Education Team, comments: "*Although the Equality Act is a fairly recent piece of legislation, it does not truly reflect the current complexities of thinking on gender identity and gender fluidity. The protected characteristic of "sex" relates simply to whether someone is "a man or a woman" (and this includes boys and girls). At present the law does not recognise a 'neutral' sex or gender. It is possible that the legal definitions of sex (male or female) and gender reassignment will be challenged in the future on the basis that they represent only a limited binary choice and do not provide a "neither" option, for example, for intersex people (who have male and female biological traits) or those who identify as gender neutral.*"

There is some uncertainty about how the protected characteristics of "sex" and "gender reassignment" interact and whether a single sex / boarding school can lawfully make decisions about admitting a transgender pupil on the basis of their legal sex. It is still the case that people in the UK cannot be legally recognised as a different sex to that assigned at birth unless they have a Gender Recognition Certificate (GRC). Those under 18 cannot apply for a GRC.

Exceptions under the Equality Act

As case law suggests (see our report on a recent mixed-sex school segregation case here), it can be discriminatory to segregate girls and boys for educational provision in school under the Equality Act.

Single-sex schools

There are exceptions under the Equality Act which allow single-sex schools to operate. Single-sex schools can discriminate on the ground of sex by admitting one sex only. The term "single-sex" includes schools which exceptionally admit pupils of the other sex or which admit a comparatively small number of pupils of the other sex and confine those pupils to particular classes or courses.

In practical terms, then, a girls' school will not lose its single-sex status by admitting a pupil who was born male but identifies as a girl. The question of whether such a pupil would be discriminated against if she was refused admission is not a simple one. (I use the term 'she' here as properly denoting the gender with which this individual pupil identifies.)

A school might argue that she is not being refused admission on the ground of gender reassignment (which would be discriminatory) but on the ground of sex (relying on the exception for single-sex schools); any other child who is legally male, the school might say, would be refused admission on the same basis. The pupil, on the other hand, would be likely to argue that she, as a transgender girl, was treated less favourably than a non-transgender girl who applied for admission. It is difficult to predict the outcome of such a case in the current climate. If a girls' school exceptionally admits some boys, it is more likely that the non-admission of a transgender girl who is legally male would be found to be discriminatory.

Boarding schools

There is also an exception under the Equality Act which allows mixed-sex schools to admit boarders of one sex only. Again, this exception still applies where only a few pupils of the other sex are allowed to board.

There are general exceptions which allow the provision of separate facilities for girls and boys in school for reasons of privacy and decency. Of particular relevance to boarding schools is the exception relating to residential accommodation. This means it may not be discriminatory for a boarding school to refuse to admit a pupil to a single-sex boarding house and its facilities because of the pupil's sex or gender reassignment.

When refusing to admit a pupil to the accommodation or its facilities because of sex or gender reassignment, a boarding school must consider whether it would be reasonable to alter or extend the facilities in order to accommodate the pupil. It should also consider the comparative frequency of demand for the facilities by pupils of different sexes. Furthermore, the school must consider whether the refusal to admit a transgender pupil to boarding accommodation can be justified as a proportionate means of achieving a legitimate aim. For example, if the school could afford the necessary alterations and it could be shown that a number of transgender pupils would benefit from the new facilities, a court may find that a decision not to admit because of the alterations required was discriminatory.

How do schools actually deal with these issues?

In practice, some schools have been at the forefront of progressive policies for working with transgender pupils. A number of single-sex schools and boarding schools have made special arrangements for transgender pupils, particularly where the

child is already a pupil of the school and has made a decision to transition away from the gender catered for by the school.

For example, St Paul's School, an independent girls' school in London, now has a "gender identity protocol" for pupils over 16 years of age who wish to be recognised as boys or as gender neutral. However, St Paul's School's charter on this subject states that it is still "only able to educate students who are legally and physically female". (See press report *here*.)

Frensham School in Surrey, a mixed-sex independent school which only offers boarding places to boys *hit the headlines* recently as it has agreed to allow a transgender pupil (transitioning from a girl to a boy) to board in a single room within the boys' boarding house.

Despite these reported cases, charities working with transgender people, such as *Mermaids UK*, have expressed concern that schools are refusing the admission of transgender pupils on the grounds of biological sex.

This article reflects the law as at November 2017.

Is your board up to the challenge?

This article discusses the importance of a strong governing board, to act as a check and a balance on executive decision making. While aimed at academy trusts, the same principles apply to all schools, and indeed other organisations too.

Research released last year suggests that headteachers with the most successful records of turning round failing schools are challenged by between 30% and 60% of their governing body on key decisions.

This reinforces the importance of a robust board, which has the knowledge and confidence to ask the right questions of headteachers and other senior employees.

As a reminder, the governing board is responsible for establishing the vision, mission and values of the school, and setting the strategy and structure to implement that vision. The executive staff team are responsible for the day-to-day operation of the school or schools, under the direction and supervision of the board.
The board should have a clear idea of its role, and what has been delegated to staff members. These terms of delegation should be set out in writing and the board should ask for regular updates to ensure they are monitoring and reviewing performance.

This doesn't mean that the board should undermine staff members – they must be allowed to get on with their day jobs – but it does mean the board should take a 'helicopter view' of the organisation to ensure staff are fulfilling the strategy of the organisation which they have set.

If executive staff are regularly having to come to the board for decisions then there is something wrong with the strategic vision setting or delegation of authority and its implementation at an operational level.

Asking headteachers and other senior employees to provide reports to the board can be a useful way of monitoring performance. Where possible, written reports should be circulated in advance of any discussions, to allow board members to read them thoroughly. That does mean that board members should come to a meeting briefed and prepared. It can be a good idea to invite staff members to a meeting (or part of a meeting), to give the board chance to ask questions and to challenge any assumptions made in the reports. This is essential to verify key information and test its integrity.

This underlines the need to recruit the right people to the board. Board members need to have the right skills to understand the various aspects of how a school is run, so that they have the confidence and ability to ask the right questions. Such skills might include finance, human resources, legal and of course education.

Chris Billington, Head of Education at Wrigleys Solicitors notes that "*challenging staff members in a constructive, useful way not only helps create a stronger organisation, it means individual board members are fulfilling their legal duties as directors and charity trustees."*

Could a TUPE transfer occur before a school transfers into a MAT?

We consider the potential TUPE risks for a Multi Academy Trust which takes day to day control of a school before the transfer date.

It is becoming common practice for a Multi Academy Trust (MAT) to assume some control of a school prior to its conversion or transfer to the MAT. A principal and/or other senior leaders employed by the MAT may take on leadership of the school under a secondment agreement, consultancy arrangement or school to school support contract. MAT policies may be adopted by the school well in advance of the transfer date. While the school is still officially under control of the local authority or its own trust, significant financial, strategic and operational decisions could be made by employees and trustees of the MAT.

A recent Employment Appeal Tribunal case highlights the possible TUPE risk where one organisation takes on responsibility for running another prior to any official transfer.

Case details

In *Guvera v Butler and others*, the EAT held that a TUPE transfer had taken place following a share sale (to which TUPE would not ordinarily apply) because the acquiring company had assumed day to day control of the business in a way that

went beyond the mere exercise of ordinary supervision or information gathering by a parent company.

Blinkbox was a music streaming service which was acquired by Tesco in 2012. In January 2015, Guvera UK bought the shares in Blinkbox from Tesco. A share sale constitutes a change of ownership but does not usually effect a change of employer. In May 2015, an employee of Guvera took day to day control of Blinkbox, making key business decisions including deciding which creditors to pay and implementing redundancies.

An employment tribunal found that Blinkbox staff had transferred under TUPE to Guvera on the date where Guvera had effectively taken over conduct of Blinkbox's day to day activities. Guvera was therefore held liable for claims made by employees who were subsequently dismissed.

The EAT agreed, dismissing Guvera's argument that it had not taken responsibility for paying Blinkbox employees and so could not be their employer. The EAT made clear that the key test is whether there has been a change in the legal or natural person who is responsible for carrying on the business and who by virtue of that fact incurs the obligations of an employer.

Considerations for MATs

Chris Billington, Head of Education at Wrigleys notes that "*Where a MAT takes control of a school prior to transfer, it is likely that a TUPE transfer is envisaged in the fairly near future. However, MATs must consider whether their pre-transfer involvement in another school is so significant as to be effectively "stepping into the shoes of the employer."*

If MAT staff are making financial, budgeting, employment and other day to day business decisions for the school, the Guvera case raises a distinct possibility that a tribunal would find employment of staff at the school had transferred to the MAT from the date on which such control was assumed. In that case, the MAT would take on the obligations and liabilities of the employer before the formalities of the transfer process had taken place, raising the potential for the MAT being liable for employment-related claims it was not expecting.

Carillion and schools

There has been a lot in the news recently about the appointment of a liquidator for Carillion and what this could mean for existing contracts with schools. There are generally two types of Carillion contracts that schools are involved with:

- Contracts to build or maintain new schools or buildings; and
- Contracts for school services, such as cleaning or catering.

These contracts are sometimes a result of a PFI scheme, but that is not always the case.

At the moment, the government's advice is "business as usual" although it does accept that at least some building contracts may need to be re-procured due to Carillion's difficulties. If schools with Carillion contracts are concerned about timescales slipping or build programs simply stopping, they should be looking at the detail in the contract to see what it says about insolvency. Often, the contract can be terminated due to a party's insolvency and this may be something that schools want to consider doing although they should talk to other parties involved with the contract – often this would be the local authority.

If schools have service contracts with Carillion, then there is a pressing need to talk to the Carillion staff who work at the school to get a feel for their concerns and plans. At the moment, Carillion staff are being reassured that they will be paid but, if that promise proves hollow, or if their staff take matters into their own hands and change job, schools could find themselves without their regular service staff. Schools should make emergency plans for such a situation.

One rather drastic option would be for schools to terminate their contracts with Carillion if the contractual insolvency provisions allow for that. They would then be free to use another contractor or even employ the existing Carillion staff direct. Before terminating any Carillion contracts, schools should review the terms carefully to see what rights they have to terminate and consider whether any termination might trigger a penalty. We can help with this review if required.

If you would like any further information, please contact
Chris Billington on 0113 244 6100

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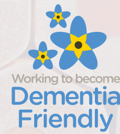

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