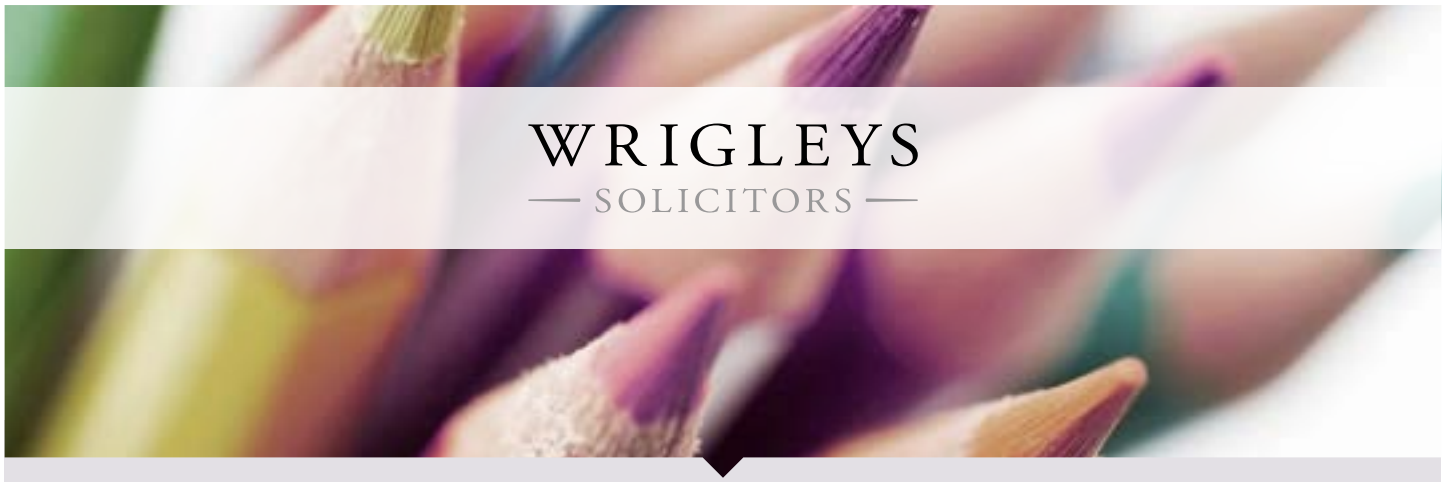

WRIGLEYS
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EDUCATION BULLETIN

SUMMER 2018

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

Our roundup this term includes updates on employment, governance, property matters, safeguarding and SEN. There remains a spotlight firmly fixed on how a school organises itself to support its education provision. This isn't about education as a business; it is about ensuring that robust frameworks, systems and processes are in place, are understood and are followed for the single purpose of ensuring that pupils can benefit from the best education available.

Also, may I remind you of our forthcoming events:

- Employment Breakfast Briefing: Recent development in Whistle-blowing Protection
  Breakfast Seminar, Leeds, 7th August 2018
  For more information or to book
- 27th Annual Charity Governance
  A full day conference, 18 October 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.

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Charities' legal spend - In support of your charity, what to be aware of

What do charities need to consider to demonstrate responsible management?

Charity spending on legal fees recently hit the headlines again, as part of Save the Children being questioned before the International Development Committee of the House of Commons about the recent allegations against it. Part of the session included questions on letters sent by the charity's lawyers to media organisations in response to the media's unfavourable reporting on the allegations.

It is not the first time that charities have come under scrutiny for their legal spending and proactive legal action. The former chair of the Charity Commission, William Shawcross, noted in one of his last interviews before leaving office that well funded charities may be using lawyers to head off unwanted attention.

Separately, the RSPCA has had to justify its spending on private prosecutions on alleged animal cruelty.

Charity, including academy, trustees have a duty to act in furtherance of their charitable objects and to manage charity resources prudently. There is significant scope for trustees to determine what may be in the best interests of their charity. As part of that trustees are actively encouraged to seek advice as and when they need it. Setting an annual budget for legal (and other professional) advice can help demonstrate responsible management

Charity Commission guidance states that "a decision to take or defend legal action must be made exclusively in the best interests of the charity, having considered whether or not another course of action is available". That includes consideration of the economic prospects and proportionality of any such action.

Adding an interesting twist is the decision of the Charity Tribunal in the Support for Heroes case (2017). Whilst the tribunal noted that the technical legal advice given was accurate, and did not comment specifically on the amount spent, it did suggest that the charity's lawyers should have alerted the charity to possible reputational risks inherent in the contemplated course of action which the trustees should also have in mind.

Chris Billington, Head of Education at Wrigleys comments: "It is not surprising that charities spending money to stave off media attention will itself attract media attention. Those charities, including academies, which are publically funded should also expect detailed scrutiny. Charities must, as a matter of good governance, be able to justify their spending decisions to all key stakeholders in an open and transparent way. Legal spend, as with any other expenditure, should further a charity's objects but that does include protecting and promoting the work of the charity."

Are schools buildings up to the new standard for leases?

The first stage of the Minimum Energy Efficiency Standard came into force in April 2018, affecting schools that act as landlords for their properties.

The first stage in the implementation of the Minimum Energy Efficiency Standard (MEES) came into force in April 2018. Wrigleys produced a general guide for clients who let properties which can be found here and, although schools do not often see themselves as landlords, they do sometimes end up in that position.

If schools are letting any properties, then they need to bear MEES in mind. Common examples where MEES could apply is where people are occupying caretaker's cottages or other housing stock, or outside businesses are providing nursery and/or breakfast club and/or after school services in properties owned by a school. If a school has inherited a children's centre or scout hut, or sub-lets part of its school back to the local authority or another entity then this may also fall within the ambit of MEES. Portable cabin style buildings are particularly vulnerable to falling foul of MEES.

Academy lease and long lease exception

One important exception is the leases for over 99 years do not fall within MEES so schools do not need to worry about any leases that have a really long term. This also means that the DfE template lease of a school from the local authority to an academy trust will not be caught by MEES.

What schools should be doing now

If schools are concerned that any buildings that they are letting are not up to scratch, then they should arrange for an EPC to be produced and consider its recommendations. If the building does not meet the standard of E or above, then schools cannot grant any new lease until that building meets the required standard. Schools should also be considering existing lettings – they have until 1 April 2020 to ensure existing residential lettings meet the required standard and until 1 April 2023 to ensure commercial lettings do the same.

If schools own buildings subject to an existing lease that will not reach an E rating, then they need to be reviewing the terms of that lease. Will the existing term end before 1 April 2020 for residential leases or before 1 April 2023 for commercial lettings? If so, will this give schools the opportunity to upgrade the building and will they have funds to be able to do so? If the term will not end before those dates, can schools bring the lease to an end anyway or do they gave the powers (and money) to undertake the necessary works whilst the tenant is still in occupation?

Schools that are converting to academies or academy trusts that are taking on new schools should add obtaining an EPC to their list of tasks prior to conversion/transfer of the school. This will allow them to assess whether MEES will apply to lettings in any relevant building.

Clerking for governing bodies

In this article, we look briefly at the role of the clerk, and what resources are available to schools to make sure that their clerk is supported.

It has recently been suggested that the governing bodies of a number of schools and academies may not be meeting their obligations in relation to clerking. In this article, we look briefly at the role of the clerk, and what resources are available to schools to make sure that their clerk is supported.

Boards can run the risk of relegating their clerk to an organisational or administrative role. Whilst these are important elements of a clerk's job description, the clerk should have the specialist knowledge to be able to guide the board as to its statutory, legal and ethical obligations and responsibilities.

The Governance Handbook suggests that boards should employ a "professional clerk". In the Clerking Competency Framework, this is to be taken to mean high-quality, tailored delivery of advice on regulatory and procedural governance matters. Rather more than a volunteer or the coerced minute taker. The risk of using a volunteer is that they may well lack the independence, knowledge and ability to speak up required of a clerk.

All maintained schools and academies are required to have a clerk to their governing body (in school regulations or the academy's articles of association). However this falls short of a requirement to have a professional clerk. It is the Clerk's role to provide efficient and effective:

- administrative and organisational support;
- guidance to ensure that the governing body/board works in compliance with the appropriate legal and regulatory framework, and understands the potential consequences for non-compliance; and
- advice on procedural matters relating to the operation of the governing body/board.

A key objective of a clerk is to provide an additional resource to help the governing body remain on mission, avoiding sinking into operational matters which can so easily divert energy and attention. The voluntary nature of governance makes it all the more important that schools and academies make the best possible use of everyone's time.

There are numerous resources available to schools and governing boards to support their clerk, or to assist in training someone new to the role. Whilst there is no standard qualification, there are programmes and certificates available, some of which include financial support. Useful starting points might be:

National Governance Association – certificate of clerking of school governing boards
DfE - Governance clerking development programme
ICSA: The Governance Institute

Chris Billington, Head of Education at Wrigleys comments: "The role of a clerk is often underestimated or unappreciated. However, it is vital - not only to comply with the governance framework, but as a matter of good governance generally. It is important that the board as a whole recognises and appreciates the key role of the clerk and ensures that it is adequately resourced."

In the absence of a professional clerk the key functions as outlined above will largely fall onto the chair of the governing body or will be directed by the Headteacher, Principal or CEO. This can only increase the demands on their time and denies the school or academy the benefit of the independent advice and guidance the professional clerk should bring. This should be of concern to all schools and academies at a time when governance failings are in the national press and very much a focus of Ofsted and ESFA inspections and reviews.

Updated schools safeguarding guidance from September 2018

New statutory guidance on "Keeping Children Safe in Education" is expected to be in place for 3 September 2018.

A copy of the new, and current, guidance is available here. All schools and academies are required to have regard to this advice.

Key changes within the new guidance are listed below:

General

- The document now refers throughout to the Teaching Regulation Agency (TRA), which assumed the professional misconduct functions of the National College for Teaching and Leadership (NCTL) on 1 April 2018.

The TRA also supports schools with safeguarding responsibilities, including via its teacher database pre-recruitment checks. Further information on the TRA can be found here.

Part 1 – Guidance to be read and understood by all staff

- There is an increased focus on the Designated Safeguarding Lead (DSL) and their deputies having a complete safeguarding picture.
- All staff must be aware of school systems which support safeguarding, including the school's behaviour policy and safeguarding response to children who go missing from education.
- There is additional detail on the potential need of a child for early help.
- Concerns about a child's welfare should be acted on immediately and that staff should follow the school's child protection policy and speak to the DSL or their deputy.
- Staff must not assume that someone else will take action. There is a reminder of the importance of sharing information at an early stage.
- The role of the local authority is set out in more detail, including that the local authority should make a decision where a case is referred to them within one day of the referral and should let the referrer know the outcome.
- Every teacher is under a duty to report female genital mutilation to the police. Staff should also speak to their DSL about such cases.
- A new section on "contextual safeguarding" has been added. This means that the environment outside the school should be considered when making safeguarding decisions and referrals. Staff are advised that as much information as possible should be passed on as part of the referral process, including any external factors which may be a threat to children's safety or welfare.

Parts 2 - 5

- Governing bodies and proprietors should have a senior board level lead to take overall responsibility for safeguarding arrangements.
- Each school within a trust must have its own child protection policy reflecting local circumstances. There may be an over-riding child protection policy for the trust, but each school should have its own local version.
- Schools should, where reasonably possible, have more than one emergency contact number for each student or pupil.
- The guidance now makes clear that the DSL must be from the school senior leadership team.
- The DSL should consider sharing information with a new school in advance of a child transferring in order to ensure that support is in place as soon as the child arrives.
- At least one person conducting a staff recruitment interview must have completed safer recruitment training.
- Specific reference is made to children who were formerly looked after children, with a reminder that these children remain vulnerable and that agencies should continue to work together to safeguard them.
- The local authority has ongoing responsibilities for care leavers and DSLs should have the details of the appropriate personal adviser appointed to support the care leaver.
- There is specific guidance on the use of "reasonable force" where necessary to safeguard children and young people.
- Academy trusts and independent schools must check that members and trustees are not barred from taking part in the management of the school under section 128 Education and Skills Act 2008. Enhanced DBS checks on all members and trustees including the chair of the board of trustees should also be carried out.
- There is an additional recommendation that maintained schools (to which section 128 does not apply) check with the Teaching Regulation Agency whether someone they propose to recruit as a school governor is barred under section 128.
- Schools continue to be responsible for the safeguarding of a pupil on their roll who has been placed with an alternative provision provider. Schools should obtain written confirmation from the alternative provider that appropriate safeguarding checks have been carried out on those working at the alternative provision establishment.
- Further guidance on child on child sexual violence and sexual harassment (peer on peer abuse) is included. The guidance continues to evolve in response to newly identified threats to young people. It now includes new information on the risks of peer on peer abuse, homelessness, domestic abuse, so-called "county lines" drug dealing, honour based violence, sexual violence and sexual harassment, on-line threats and radicalisation.

  The current guidance, which has been in place since September 2016 continues to apply and should be referred to before the new guidance supersedes it this September.

Education Specialist, Graham Shaw joins Wrigleys

Wrigleys is delighted to have Graham Shaw join the team of education specialists.

Graham joins the team working with schools, academies, multi academy trusts ("MATs"), colleges, universities and independent schools.

One of the country's foremost legal authorities in the education sector having advised in this field since 1999, Graham is a dedicated enthusiast with a special interest in schools, academies and MATs. Until recently Graham led the Northern education team of a national firm

Graham says "Wrigleys is the leading Yorkshire based law firm advising schools, academies and MATs and I look forward very much to working with colleagues to further embed the firm's presence in the sector"

Chris Billington, head of education at Wrigleys welcomes Graham. "Graham joins Wrigleys as a leading education lawyer adding further strength to our specialist team".

Headteacher should have disclosed her relationship with a child sex offender even though she had no statutory duty to do so

Senior staff may have an implied contractual duty to disclose relationships with sex offenders to assist the governors in their safeguarding duties

The statutory duty to disclose

Under the Childcare Act 2006 and the Childcare (Disqualification) Regulations 2009 (the Regulations), certain childcare providers

and those who manage childcare providers are required to be registered in order to provide childcare. Those who have committed certain violent and sexual offences and offences against children are disqualified from working with children in certain settings (see below). Headteachers who manage such childcare provision must comply with the Regulations.

The Regulations apply to staff who provide any care for a child up to and including reception age. This includes education in nursery and reception classes and/or any supervised activity (such as breakfast clubs, lunchtime supervision and after school care provided by the school) both during and outside of school hours for children in the early years age range.

The Regulations also apply to staff who are employed to work in childcare provided by the school outside of school hours for children who are above reception age but who have not attained the age of 8. This does not include education or supervised activity for children above reception age during school hours (including extended school hours for co-curricular learning activities, such as the school's choir or sports teams) but it does include before and after school childcare provision.

Disqualification by association occurs when someone working in a relevant setting lives in a household where someone who is disqualified lives or is employed. In such a case, there is a statutory duty to disclose although it is possible to apply to OFSTED to waive disqualification. The statutory guidance on the Regulations is available here.

Case details

In Reilly v Sandwell Metropolitan Borough Council,the Supreme Court has upheld the decision of an employment tribunal that the decision to dismiss a headteacher who did not tell the school about her close friend's conviction for a child sex offence was fair.

Ms Reilly was a primary school headteacher with an exemplary disciplinary record and a long career in teaching. She had a close relationship with Mr Selwood, who was convicted of making indecent images of children. Ms Reilly did not cohabit with Mr Selwood, nor was she in a romantic or sexual relationship with him, but she jointly owned a house with him and occasionally stayed the night. Following his conviction, she decided that she was not under a duty to disclose her relationship to the school. She sought advice on this point from a number of probation officers. There was conflicting evidence as to the advice she had been given. Later the school governors found out about the conviction. Ms Reilly was suspended, subjected to a disciplinary procedure and summarily dismissed. This was on the basis that she had committed gross misconduct by breaching an implied term of her employment contract under which she had a duty to disclose the relationship.

Ms Reilly brought an unfair dismissal claim in the employment tribunal. The employment tribunal found that the reason for dismissal was not unfair although there were serious procedural errors in the appeal. However, the tribunal found that Ms Reilly would have been very likely to have been dismissed even if the procedure had been fair and that she contributed to her dismissal by not disclosing the relationship. Her compensation was therefore reduced by 100%.

This decision was upheld by the EAT and the Court of Appeal. The Supreme Court also agreed. Although Ms Reilly was not under a statutory duty to disclose because she was not living in the same household as Mr Selwood, the courts held that the failure to disclose was a breach of her employment contract. The headteacher was under a contractual obligation to "advise, assist and inform the Governing Body in the fulfilment of its responsibilities" which included its safeguarding responsibilities and to "be accountable to the Governing Body for the maintenance of the safety of all pupils". It was also relevant that the disciplinary rules in the contract of employment identified as misconduct a failure to report something which it was her duty to report.

The Supreme Court held that her relationship potentially posed a danger to children and it was not for the headteacher unilaterally to assess the risks to the children in the school. She should have disclosed the facts in order that the governors could assess the risk and decide on the best steps to take in the circumstances. It was also relevant that she did not show any insight into her duty to report this matter during the disciplinary process. The school was reasonable in deciding it was inappropriate for her to continue in her role as headteacher.

Comment

The Supreme Court commented that, "had she disclosed her relationship to [governors], it is highly unlikely that [Ms Reilly] would have been dismissed, still less that the tribunal would have upheld any dismissal as fair. Far more likely would have been the extraction by the governors of promises by Ms Reilly that she would not allow Mr Selwood to enter the school premises and perhaps, for example, that outside the school she would not leave information about pupils, for example stored electronically, in places where he might be able to gain access to it."

Chris Billington, Head of Education at Wrigleys comments: "Senior leaders in schools must err on the side of caution and disclose relationships with convicted sex offenders even where they are not under a statutory duty to do so. Such a disclosure will of course trigger a difficult assessment for schools. Governors and trustees should ensure that they consider (and carefully document as evidence of undertaking their safeguarding role) the particular circumstances. However, that does not mean schools should automatically look to suspend or dismiss as a knee-jerk reaction as this could be a breach of contract and/or unfair dismissal."

Is the application of zero tolerance behaviour policies to SEN pupils unlawful?

Tribunal criticises academy trust for imposing behaviour policy at the expense of a disabled pupil's education

The TES has recently reported on a decision of the First Tier Tribunal of the Health, Education and Social Care Chamber (previously known as the SEND tribunal). The tribunal found that an academy trust failed in its duty to make reasonable adjustments by imposing its behaviour policy rigidly to the detriment of the education of a child with special educational needs.

The 15-year old pupil (X), who has attention deficit hyperactivity disorder and epilepsy, was given a fixed-term exclusion and was also excluded from a work placement. X was later permanently excluded from the school.

The parents of X argued that the academy trust had failed to meet their son's needs and the exclusions were the result of his disability, which led to challenging behaviour. They went on to claim that X's education suffered as a result of his treatment by the school.

The tribunal, which heard the evidence in February 2018, reported that "the question of [X's] actual education appears to have become secondary to the zero-tolerance policy of the school". The tribunal noted that the pupil's education was becoming a series of detentions and exclusions and that the behaviour policy was being imposed rigidly, resulting in X being put at a "substantial disadvantage" when compared to non-disabled pupils. The tribunal stated that the school should have made reasonable adjustments to the policy for X rather than continuing with the "inflexible application of its policy".

The tribunal concluded that the school's actions had compromised X's education and ruled that the school should issue a letter of apology to X for its failure to make reasonable adjustments. Additionally, the tribunal recommended that the school organise training for all staff, which should include positive behaviour management techniques. A copy of the tribunal's judgment was also to be placed on X's file. No financial compensation is available in the SEND tribunal.

The Tribunal did not agree that the permanent exclusion of X was itself discriminatory, recognising the exclusion as a proportionate way of achieving a legitimate aim.

This case highlights the need for schools to apply their policies in a flexible manner, taking into account any reasonable adjustments which may be needed for disabled students who would otherwise be disadvantaged by such policies.

The application of "zero tolerance" behaviour policies has been the subject of a recent hearing of the House of Commons Education Select Committee as part of its inquiry into alternative provision. A witness to the inquiry who works to promote the interests of disabled children has commented that such zero tolerance policies may be unlawful as they fail to take into account the needs of disabled pupils. Details of this on-going inquiry are available here.

Chris Billington, Head of Education at Wrigleys comments that: "It is notable that in this case the Tribunal made reference to the various measures that the academy did put in place to support X. However that did not help when it came to the application of the behaviour policy itself. If a series of detentions and exclusions is not achieving the desired change in behaviour then the school has to look at their approach."

The Education Select Committee cites an upturn in the number of exclusions in recent years with 35.2 permanent exclusions per day in 2015/16, up from an average of 30.5 per day in 2014/15. It also notes that pupils with identified special educational needs account for almost half of all fixed term and permanent exclusions.

The transfer from SEN statements to EHC plans and complaints to the Ombudsman

The Local Government and Social Care Ombudsman, Michael King, has stated that 80% of the EHC plan complaints received by his office have been upheld

The Ombudsman's report, from October 2017, identifies a number of issues which may arise during the local authority assessment process. Delay in making the assessment is a particular problem. The Ombudsman reports that during the investigation period less than 60% of plans were issued within the 20 week time frame with some subject to significant delays of up to 90 weeks. The report also highlights a failure to gather a full range of evidence to support the needs assessment; not involving all relevant parties in the decision making process; and failing to name a school in a final plan.

Schools will be aware that children with Statements of Special Educational Need (SEN) should be transferred on to Education, Health and Care (EHC) plans by 1 April 2018. Recent reports suggest that many transfers are still to be made, and may not be completed before the deadline. Local authorities must carry out and conclude an EHC needs assessment as soon as reasonably practicable.

Chris Billington, Head of Education at Wrigleys notes that: "If the April deadline for transfer is not met, any existing statement will have effect as if it was within an EHC plan. In the meantime, it is important that schools and local authorities ensure that provision, as set out in the SEN statement, remains in place until such time as the transfer to an EHC plan can be made."

The Ombudsman's report is available here.

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