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CORONAVIRUS AND SCHOOLS – some brief legal notes

DATE REVISED [N/A] [N/A] / DATE OF LEGAL COMPLIANCE CERTIFICATION [18/05/20] [81] / DATE ORIGINATED 15/05/20] [82/(99)]

1. CORONAVIRUS AND SCHOOLS – some brief legal notes

- 1.1. *This paper highlights what appear to us to be the key legal issues arising from the Coronavirus guidance issued in England and Wales in respect of schools.*
- 1.2. *In particular we have looked at those aspects of the present situation and its relaxation that carry potential risks, duties or liabilities in respect of the governing bodies, boards of directors, site trustees and religious authorities of schools designated as having a religious character in England and in Wales. These bodies should take detailed legal advice from their own legal advisers or from LBMW if they are faced in due course with specific areas of concern.*

2. The statutory background

- 2.1. Both the English and Welsh Coronavirus Regulations are made under section 45R of the Public Health (Control of Disease) Act 1984. They are not identical. The Welsh coronavirus guidance published in respect of schools is explicitly said to be published under the Welsh Regulations. The English guidance on the other hand appears to be free-standing. That is in itself concerning.
- 2.2. In parallel the Coronavirus Act 2020 ("the CV Act") has been passed into law. However it is important to recognise that neither the English nor the Welsh guidance (nor any update of them) nor any regulations have been issued as yet under that Act.
- 2.3. However a small number of statutory notices have been published under the CV Act with the following effects:
 - 2.3.1.a child is not a pupil of a school merely because education is provided for him there on a temporary basis;
 - 2.3.2.parents keeping their child at home are not committing an offence;
 - 2.3.3.Ofsted inspections are suspended;
 - 2.3.4.the making of EHC plans is made subject to reasonable endeavours.
- 2.4. These notices have been issued with a one-month limit of effectiveness, no doubt this will be extended if required. Section 7 of the DfE Guidance to schools makes no reference to time limitations.
- 2.5. The powers that government has awarded itself in the CV Act are very wide-ranging, including the disapplication of various educational statutes and the power to make regulations without parliamentary approval. If use is made of these powers in due course they will need the most careful monitoring by the relevant national bodies in respect of schools designated as having a religious character and subject to the provisions of site trust deeds.

3. The supposed "closure" of schools

- 3.1. It is important to recognise that neither under existing guidance nor under the CV Act are schools being "closed" within the meaning of the Education Acts. All that is happening is that access to school premises is being denied to certain groups of persons or is being modified.

4. Running the school

- 4.1. Consequently, all the powers, duties and responsibilities of the governing bodies of maintained schools and the directors of academy trusts remain in place. They and their staff are still running the school for all educational purposes and perhaps (at least in England) for childcare purposes. All the relevant powers duties and liabilities also remain with them. None have been removed as yet by any legislation.

5. Using the school premises for non-educational purposes

- 5.1. In part schools are being used at present for non-educational (childcare) purposes. This is made more explicit in the Welsh guidance than is the case in England. It is however true in both.

- 5.2. In principle Local Authorities may direct maintained schools (including voluntary schools) in England and Wales under the respective "control of school premises" regulations. We are not aware however of any such directions actually being given. Nor is it we suggest clear whether it is really school governing bodies or Local Authorities who are running the "childcare" aspects of current provision.
- 5.3. The position is similarly unclear in respect of academies. Governing bodies and academy companies would be wise we suggest to think of themselves as being "in charge" unless they are explicitly directed otherwise by national or local government. The "Hubs" set up in Wales under its guidance may well be "in charge" of the non-educational aspects of Welsh schools at this point, but we see no parallel in England.
- 5.4. We advise the governing bodies of voluntary schools, the directors of academy trusts and the site trustees of schools designated as having a religious character to pass resolutions under the relevant control of premises regulations consenting to the use of their premises for these non-educational purposes so far as their consent is required.
 - 5.4.1. The detailed position is different in England from that in Wales and different also for VC and VA schools.
 - 5.4.2. These control regulations do not apply to academies.
 - 5.4.3. Model resolutions can be provided on request.

6. The employment of staff

- 6.1. Nothing in the regulations, the guidance or the CV Act changes or enables any changes in the employment of school staff (teaching or non-teaching), in their terms and conditions of employment, or in the rights and responsibilities of either employers or employees.
- 6.2. We presume that the government and local authorities (in consultation with the staff associations) have considered these contractual matters in respect of maintained schools and that the ESFA has done so in respect of academies and that discussions with the relevant trade unions have resulted in agreements that will not carry implications for employers of which they have not been made aware, are not protected against or are not resourced to address.
- 6.3. VA governing bodies and the directors of academy companies are advised to check the position for themselves and to ensure that they are complying with all relevant guidance. This is especially important in respect of health and safety issues for students and staff which are clearly key to the conduct of schools in current circumstances.

7. Insurance

- 7.1. Similarly, all schools are advised to check with their insurers that all liabilities are appropriately covered.
 - 7.1.1. All insurance in respect of VC schools (and some in respect of VA schools) is a matter for the local authority.
 - 7.1.2. We presume that the RPA is believed by the DfE to cover academies in respect of all potential liabilities. If so they should make this clear.
 - 7.1.3. Local Authorities should make the insurance position plain to the schools that they maintain (including VA schools).
 - 7.1.4. VA school governing bodies should check their insurance arrangements, including any insurance arranged through their dioceses or other religious authority.
- 7.2. At national level it is we believe essential that the government provide the governing bodies of all schools and the directors of all academies and their site trustees with an indemnity in respect of any liabilities or any court action or any criminal prosecution under any legislation that might come to be attempted against them because of actions they have taken in respect of the Coronavirus epidemic – provided of course that governors/directors have followed guidance appropriately and used best endeavours within the resources at their disposal.
- 7.3. In particular we are concerned at the liabilities of school governing bodies (or indeed of the relevant site trustees)
 - 7.3.1. in respect of children accessing their site who are (under the notice now made) not pupils of the school
 - 7.3.2. in respect of staff asked to perform tasks that are not within their job descriptions and
 - 7.3.3. in respect of their employer's/landowner's health and safety liabilities in respect of staff, pupils and the general public.

8. The decision to "re-open" the school

- 8.1. "Re-open" appears to be the word being used but as noted above it is in fact not correct. The school has never been "closed". In addition, what is expected to happen from June 1st is much more complicated than just "re-opening". The functioning of the school and the balance of the tasks it is being asked to undertake will be radically changed from the situation prior to "closure". Some of the complications will be apparent from what has been said above.
- 8.2. However, in addition:

- 8.2.1. the decision to allow access to more children and to deploy staff accordingly is one for the governing body or AT/MAT directors following advice from the Headteacher. It must not be taken by the staff alone;
- 8.2.2. the decision must also be informed by a most careful Risk Assessment, which must be undertaken for every separate school in a MAT (since local factors will be very important) and must be fully shared with the governing body/directors;
- 8.2.3. it would be wise also for the policies to be followed in respect of the deployment of staff as a consequence of "re-opening" to be agreed by the governing body/directors, with special reference to the protection of staff (assuming only those resources of PPE etc that the governing body might reasonably expect to be available to it) and with careful consideration of the personal circumstances of staff, including (but not limited to) those who might themselves be clinically vulnerable or who might have family members in the same house who are clinically vulnerable;
- 8.2.4. in consequence of such procedures, the risks and liabilities following from any decision (whether to "re-open" or not to "re-open") will lie with the governing body/directors corporately;
- 8.2.5. hence the issues above about guidance (national or local), insurance and indemnity are ones about which the governing body/directors should seek assurance.
- 8.3. It may be worth addressing the re-opening date of 1st June, and the risk assessments which support that, on an interim basis, with a fixed review date of 28 days. This would allow for complete professional advice to be taken for the second risk assessment, offering further cover to governing bodies/directors through professional indemnity insurances and allowing them to take into account further developments at all levels.
- 8.4. By following the above, the governing body/directors will have taken (we believe) reasonable steps to protect the children, the staff and themselves.

9. The effects of school trust deeds

- 9.1. No consideration appears to have been given to these either in England or in Wales. Most trust deeds require denominational religious education, the conduct of the school in accordance with the tenets of the Church of England (or other denomination or religion) and the availability of the school to the children of a specific locality.
- 9.2. Many Church of England deeds are subject to "reverter" that provides that if the school is not being used for the purposes set out in the trust deed then the land reverts immediately to the heirs of the original donor. It is our view that the temporary prevention of children accessing the school under the current circumstances would not be likely to be held by a court to trigger reverter.
- 9.3. However it would be wise for a school to ensure that it was not put in a position where pupils from its immediate parish or other area of benefit were not allowed access but children from further afield were.

10. RE and worship

- 10.1. No notices relating to these have yet been published under the CV Act and, even if there were any, such notices would not be capable of over-riding the requirements of trust deeds any more than they could over-ride health and safety legislation or any other relevant legislation that is not specifically subject itself to disapplication or modification under the CV Act.
- 10.2. Hence we advise that all church schools (and other faith schools) including VC schools should ensure that RE continues to be provided in a way similar to the provision of other core subjects under the present circumstances, and that no child accessing the on-line educational provision of such a school should be left in any doubt as to its religious character or without immediate easy access to suitable prayers, Bible (or other appropriate sacred book) readings and familiar religious songs. Failure to do so is likely to put the school trustees in breach of trust and no school may force its trustees into such a position.
- 10.3. We note that for Wales (but not for England) the CV Act would enable a notice to be published disapplying the Basic Curriculum, including both RE and the National Curriculum. It seems to us essential that should any such power to remove the requirement for a school to provide RE come to be exercised it should be worded so as not apply to schools with a religious character.

11. Liaison

- 11.1. The governing bodies, directors, site trustees and religious authorities of schools designated as having a religious character will all wish to cooperate with national government, local government and all local schools in addressing the problems raised by Coronavirus. To

enable this the involvement of faith body representatives at every level in discussion and decision-making is surely essential. Such schools form one third of the entire provision in England and Wales.

- 11.2. Further, such cooperation is bound to raise many technical questions about powers, responsibilities and liabilities. This paper cannot give detailed answers to them all. We hope however that it will point the relevant bodies to the major issues and suggest possible solutions in the difficult task of continuing to educate and care for children in the context of the Coronavirus epidemic.

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May 18th 2020

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