Autumn/Winter 2024

birketts
Next Level Law

Education Matters

Our legal update for the education sector

In this issue

Welcome

Welcome to the Autumn/Winter edition of Education Matters.

The change of Government was always likely to lead to wide-ranging change, and that is certainly the case for the education sector.

Within weeks of taking power, the new Government announced that the commencement of the Higher Education (Freedom of Speech) Act 2023 would be put on hold pending a review of options, including its repeal, and that with effect from January and April 2025 independent schools would lose their exemption from having to charge VAT on school fees and their eligibility to claim charitable rates relief. This edition contains an article by Edward Bouckley on the imposition of VAT on school fees, complemented by Denise Findlay's article on the financial implication this may have for separating parents.

Charlotte Sloan provides a useful run down of the key legislative changes that are expected to be implemented to employment law, particularly under the Employment Rights Bill, which will significantly enhance workers' rights.

One area, however, that has been noticeably absent from the deluge of proposed changes is transgender rights and particularly transgender children and youths. No doubt this reflects the complexity, contentiousness and sensitivities surrounding this area and the lack of accord within the Labour party and new Government as to how this should be addressed. Nonetheless, time and tide wait for no individual... and no Government, and education institutions, particularly schools, continue to grapple with very difficult situations without adequate Government guidance. For more on this issue, please see our article on gender questioning students.

Life in the education sector has seldom been quiet, but it now faces big changes. Some commentators are reporting that the new Government will need to slow down the pace of its proposed changes, but I wouldn't set much store by that. This new Government clearly has a different agenda, approach and perspective and change appears to be very much the order of the day.

If you have any questions or need advice about any of the topics covered, please do get in contact with me or a member of our Education Team.

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Government announces imposition of VAT on school fees

On 29 July 2024, Chancellor of the Exchequer, Rachel Reeves announced that all education services, boarding services and vocational training supplied by private schools will be subject to VAT.

The exact definition of "private school" is subject to consultation, however we would expect the definition to extend to all independent schools in the UK.

In a technical note issued by HM Treasury, the Government has confirmed that:

1. from 1 January 2025, all education services and vocational training supplied by a private school, or a connected person, for a charge will be subject to VAT at the standard rate of 20%
2. boarding and lodging services closely related to such a supply will also be subject to VAT at 20%
3. any fees paid from 29 July 2024 to 30 October 2024 in respect of a term starting in January 2025 onwards will be subject to VAT at 20%
4. the intention is that nurseries (including those attached to a private school) will remain exempt from VAT, with fees being subject to VAT from the first year of primary school (i.e. the academic year in which the child turns five)
5. other closely related goods and services other than boarding and lodging (such as school meals, transport, and books and stationery) provided by a private school, for the direct use of their pupils and that are necessary for delivering the education to their pupils, will remain exempt from VAT.

There is a big question over the status of fees already paid (prior to 29 July 2024) under any Fees in Advance Schemes (FIAs). HMRC's technical note makes it clear that HMRC will review such arrangements and, depending on the structure, may seek to impose VAT on supplies of education and related services despite the attempt to pay fees in advance. To date, insufficient detail has been provided to determine the steps HMRC will take in respect of, and how it will interpret, existing FIAs. However, it is clear that such arrangements are likely to face a great deal of scrutiny. Whether an FIA does, or does not, stand-up to HMRC's enquiry will depend on the terms, and operation of, the particular scheme. Where a school has taken advanced payments, each school should carefully consider its position and, if it is unable to pass on the VAT liability to the parents, explore alternative options (for example, whether or not the structure could be unravelled). Although it may be prudent to consider the contractual position of this, each school should take appropriate independent advice. It is also important to remember that we still do not know HMRC's approach to such schemes, and this will need to be factored into the decision making.

The Birketts view

To prepare for the forthcoming changes, an independent school should:

1. check the terms of its parent contract to ensure it has the right to pass VAT on to parents
2. if the school intends to pass the VAT on to parents, give notice to parents as such in accordance with the terms of the parent contract (usually not less than a term's notice will be required)
3. check the terms and operation of its existing FIA (taking appropriate independent advice, as required) to better understand whether fees already paid (prior to 29 July 2024) are likely to be taxable or exempt
4. if the school does not currently make any taxable supplies, register for VAT with HMRC (the school will be able to do this from 30 October 2024, but must have done it before 1 January 2025)
5. if the school does currently make taxable supplies, but is not registered with HMRC for VAT, it can voluntarily do so before 30 October 2024 (but must have done so by 1 January 2025)
6. if it has any comments on the draft VAT legislation, or any questions relating to it, contact the Government via email at independentschools@hmtreasury.gov.uk by 15 September 2024 (note that there are already a number of FAQs in the technical note).

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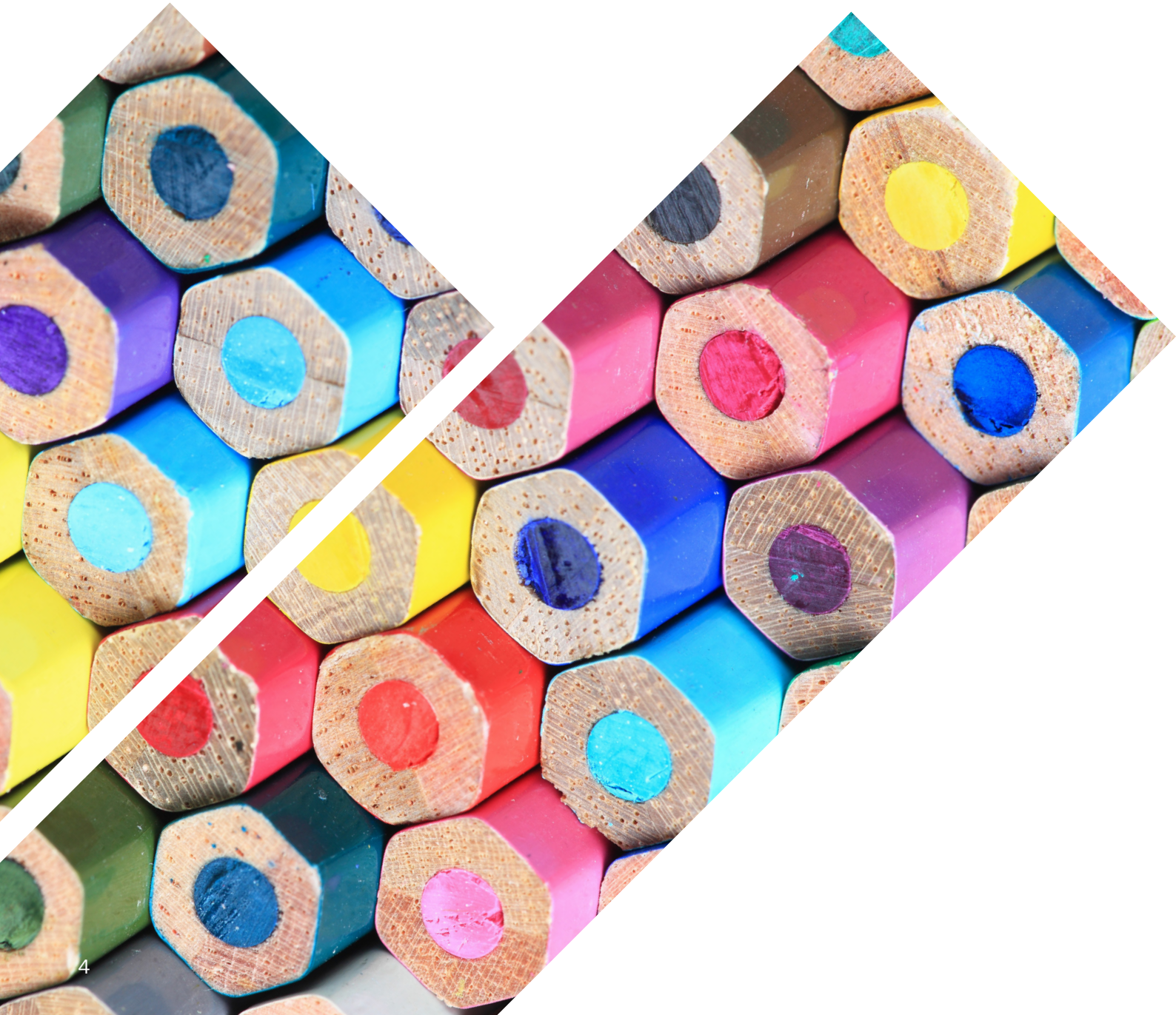
The above next steps are practical tips based on information contained in the technical note. Further guidance (for example, on VAT registration for schools) is yet to be published. Therefore, the information or dates provided in this note may be subject to change in the coming months.

If you would like any assistance in relation to reviewing your existing FIAs or parent contracts or advice on the upcoming VAT legislation in general, please do not hesitate to get in touch. with your main contact at Birketts or contact Ed Bouckley at Edward-Bouckley@birketts.co.uk.



VAT and school fees: financial implications for separating parents

The Government has confirmed that VAT will be payable on private school fees from January 2025, placing considerable pressure on parents mid-way through the school year. This will be particularly challenging for divorcing couples who are already stretched financially and where decisions about a child's education and what's best for a child are not always agreed.

When dealing with the finances on divorce, or assisting an unmarried parent under Schedule 1 of the Children Act, whether a parent is successful in obtaining a school fees order will depend on the judge's analysis of the available income and capital and the expenses of both parties. A court is highly unlikely to make a school fees order unless it is very clear that there is surplus income and/or capital from which these fees can be easily met.

The potential impact on divorce and financial settlements may affect not only those families where children are already attending private school but also where parents had hoped to send their children to private school, and where this was being factored into the negotiations, and in cases where there may be a disagreement as to whether a child should attend private or state school. For separating parents who can't agree about whether state or private school is the best option, the parent favouring the state system may now have a stronger case. In cases where parents disagree about which school a child should attend, the family court can make a Specific Issue Order.

For families who are considering factoring future school fees into any divorce settlement it's important to take into account an average annual percentage increase in addition to VAT. Most Private school fees increase annually by between 3% and 8%.

In the event private school fees become unaffordable, separating parents may choose to rethink their preferred location for housing, so that they can be nearer to preferred state schools. This may impact upon the capital required to re-house in a chosen area which is another element that may need to be renegotiated.

For separated couples with existing court orders detailing who is responsible for school fees, the increased costs may lead to difficulties meeting the payments. If a school fees order has been made and the paying parent can't afford the higher costs this may lead to the order being breached and the other parent having to apply to court. The parent making this application must be mindful that increased school fees may amount to a change in financial circumstances which necessitate a school fees order being varied.

In the majority of cases where a change is necessary it is likely to be something that parents can agree between themselves. If a change to an existing order is required and is agreed, the varied order can be sent to the court for the judge to consider without a court hearing being necessary.

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Where there is disagreement over how to manage the increased school fees or difficulties agreeing the appropriate school, family mediation can help facilitate discussions.

The Family Team at Birketts is able to assist with advice relating to school fees orders, child arrangements or any other family matter.

Inspections for playing field disposals: "spot checks" to monitor academy trust land sales

Government officials are contemplating the implementation of "spot checks" to oversee the sale of school playing fields by academy trusts.

The purpose of these checks is to enhance monitoring and ensure compliance with conditions set by the Department for Education regarding land disposals. Additionally, officials are exploring the possibility of direct communication with school leaders to verify their adherence to the terms of these sales.

School playing fields are essential spaces for physical activity, sports, and recreation. They contribute to students' health, well-being, and overall development. They also form part of an academy trust's estates, which it will have to maintain, and which it may consider selling to release much needed capital. Suitable outdoor space must be provided in schools for two main purposes:

1. Physical education (PE)

Schools must have outdoor areas that allow for PE activities in line with the school curriculum. These spaces should accommodate various physical exercises and sports.

2. Recreational play

Pupils should have access to outdoor play areas. These spaces promote social interaction, physical activity, and well-being.

However, when it comes to disposing of or changing the use of playing field land and maintaining playing fields, there are specific guidelines and considerations that educational institutions, local authorities and other relevant bodies must follow. In this article, we explore the importance of inspections, legal requirements and best practice related to maintenance of playing fields and their possible disposal.

Legal framework relating to change of use or disposal of school playing fields

Before any action is taken to change or dispose of school playing field land, the first step is to check who the legal owner of the land is. If the school is a maintained school, the land is likely to be owned by the local authority who maintains the school. Where the school is, or is part of, an academy trust, the land may still be owned by the local authority. That is because a common arrangement when a maintained school is converted or transferred to an academy trust, is for the school's estate, including playing fields, to be leased to the academy trust under a long lease by the local authority. The freehold therefore remains with the local authority.

Local authorities seeking to dispose of playing field land must obtain consent from the Department for Education under Section 77 of the School Standards and Framework Act 1998. This section outlines the criteria and procedures for such disposals. It ensures that playing fields are not casually sold off to fund other improvements, emphasising the need to protect these valuable spaces.

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In addition to Section 77, where the school is, or is part of, an academy trust, Schedule 1 to the Academies Act 2010 (inserted by Schedule 14 to the Education Act 2011) also requires consent from the Department for Education for disposing of or changing the use of land used by academy trusts. This ensures that even academy trusts adhere to the same standards when dealing with playing fields.

The School Playing Fields General Disposal and Change of Use Class Consent (No 7) 2023 can then grant permission as a class consent, for the disposal or change of use of playing fields under specific conditions. The conditions and information needed to be satisfied includes details about the location, area, total site area, and pupil count.

The legislative framework therefore means that before any deal to sell playing fields can proceed, the Secretary of State for Education must grant approval. Typically, their consent is also contingent upon a condition stipulating that the capital received

from the sale should be reinvested to enhance sports facilities at the affected school or local primary and secondary schools.

In 2023, a total of 15 deals involving playing fields were agreed. Additionally, the Department for Education mandates that academy trust accounting officers sign and return a letter confirming their commitment to complying with all terms of consent. Failure to do so could constitute a breach of the trust's funding agreement.

Interestingly, Department for Education officials do not verify compliance with the terms through any other means. It could well be that the method of monitoring is linked to the general obligation on educational establishments to maintain their estate.

Legal framework concerning the maintenance of school playing fields

Regular inspections of playing fields are a critical part of the legal framework that applies to a school's estate, for several reasons.

1. Safety and risk mitigation

Field inspections help reduce injury risk and liability by identifying issues and allowing time to correct potential hazards before players use the field. For instance, the National Football League (NFL) mandates pre-game inspections based on league-mandated criteria. Schools and local authorities could adopt a similar approach to ensure safety and comply with any reporting obligations. In addition, a field inspection procedure could support any application for consent to a disposal, where the report demonstrated that a playing field is not suitable and could be repurposed and replaced by a disposal.

2. Compliance with regulations

The rules governing playing fields can vary depending on the sport or activity but within an educational setting schools maintained by local authorities in England must abide by the School Premises (England) Regulations 2012 (the "2012 Regs") which set out standards and requirements related to various aspects of school premises.

Key areas covered include health, safety, and welfare thereby ensuring a safe and healthy environment for students and staff. This should include ensuring that all equipment is regularly maintained and inspected, any broken or hazardous equipment is removed. Boundaries are clearly marked out, visible and well-maintained. Fields should also have clear access points for emergency vehicles.

Inspections ensure compliance with regulations related to playing field maintenance, surface quality, drainage, and overall usability. By documenting field conditions, educational institutions can demonstrate their commitment to meeting legal requirements.

3. Preservation of quality

Playing fields require ongoing care to maintain their quality. Regular inspections help identify maintenance needs, such as reseeding, levelling, or addressing drainage issues. Preserving the quality of playing fields benefits students, athletes, and the community.

4. Best practices for inspections

4a. Frequency

Inspections should occur regularly, ideally before each sports season and after adverse weather conditions. High-traffic areas may require more frequent checks.

4b. Comprehensive assessment

Inspectors should assess various aspects, including turf quality, goalposts, fencing, irrigation systems, and safety features. Document findings and prioritise necessary actions.

4c. Involvement of experts

Consider involving experts, such as groundskeepers or sports field consultants, for detailed assessments. Their expertise ensures thorough evaluations.

These guidelines are general best practices and recommendations, rather than specific legislation. However, the school administrators, sports clubs, or local authorities have a legal duty to provide a safe environment or "Duty of Care". Negligence in maintaining safety standards can lead to liability. Therefore, regularly assessing risks associated with the field, including hazards like uneven surfaces, equipment, and weather conditions, taking corrective actions, clearly display warning signs for potential risks and informing users of any specific rules or restrictions, can help mitigate that liability.

The Birketts view

Playing fields are valuable assets that contribute to students' physical health and well-being. By adhering to legal requirements, conducting regular inspections, and prioritising safety, we can ensure that these spaces remain accessible, safe, and enjoyable for generations to come.

The regime for disposals can be used to improve the provision available by freeing up capital on unused or unsuitable playing field land, but this land should never be disposed of without ensuring that you have the evidence to show why it is no longer suitable and a clear plan to ensure that the provision of outdoor space is enhanced.

While this article provides an overview, specific local regulations and procedures may vary. Always consult relevant authorities and legal documents for precise guidance on playing field maintenance and disposals. If you have any further questions, feel free to ask.

All change ahead: how Labour will change the legal landscape in the education sector

Following their victory in the General Election in July, the new Labour Government pledged to bring about a plethora of legislative and economic changes, that will undoubtedly impact the education sector. We now have more detail on these changes after the first draft of the Employment Rights Bill was published on Thursday 10 October 2024.

As has been widely covered in the media some changes will pose significant challenges for the independent school sector. Already struggling with the increase in the TPS employer contribution rate, the Labour Government was swift to confirm that private schools would lose their VAT exemption on private school fees, intended to take effect from January 2025. Schools will also suffer the loss of their eligibility to claim charitable rates relief, which is intended to take effect from April 2025. As a result, many independent schools are embarking on cost cutting measures including restructures and redundancies to ensure that they do all they can to reduce the pain they need to pass on to parents, by way of increased school fees whilst safeguarding their own financial health. More on this topic can be found in Ed Bouckley's article on page 3.

In the longer term, the new Government is also looking to overhaul the inspection regime to provide parents with more information on school performance, and to modernise the curriculum to prepare the next generation for the modern world, something it says the existing curriculum does not do. In all of its proposed changes affecting the education sector, the new Government has been noticeably silent on transgender rights. The previous Government had consulted on non-statutory guidance on gender questioning children in schools, and this remains hotly disputed within schools, across the parent community and society generally. Schools, and the wider education sector, desperately need clarity from the new Government on this issue, yet no reassurance has been given that any will be forthcoming. More information on this issue can be found in our article on this topic on page 10.

The new Government promised an extensive shakeup of employment law and aimed to implement its New Deal proposals within the first 100 days of their term. It was not realistic to expect much legislation to be introduced within this timeframe, instead, this timeframe has resulted in the publication of the Employment Rights Bill together with an indication of the timescales for the start of a formal consultation on some of the provisions and the draft secondary legislation which is to follow and a little more information about the intended Equality (Race and Disability) Bill, which has not yet been published.

As always, the devil will be in the detail and clearer following the consultation which could result in substantial changes to the current proposals. However, it is clear that significant change is coming, and we have set out below a summary of the key employment law changes which will be of most relevance to the education sector.

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- **Day one rights:** making parental leave, sick pay and protection from unfair dismissal available from day one of employment for all workers. It has been confirmed that this will be subject to a statutory probationary period (an 'initial period of employment') for new hires, during which time employers will be able to terminate employment without following a full process. Details of how this will work will be set out in separate Regulations and the length of the probationary period will be consulted over, but the Government is currently proposing a period of nine months.

- **Flexible working:** strengthening the right to work on a flexible basis, but it remains a right to request flexible working. Employers will still have the ability to refuse a flexible working pattern on the specified statutory grounds, provided it notifies the employee of the grounds for refusal and that it is reasonable to refuse on that basis. . This is likely to put more onus on education institutions to consider flexible working requests, including the right to work from home, which are not always easy to accommodate in the teaching environment.
- **Trade union reforms:** new rights for trade unions and reform to existing legislation in relation to trade union recognition favourable to trade unions. This includes increasing the rights of union officials to access workplaces to recruit and organise members, which might lead to unions having more presence across the education sector.
- **Fire and rehire:** strengthening the existing Code of Practice on 'fire and rehire'. This Code, introduced under the previous Government, came into effect on 18 July. The Employment Rights Bill provides for 'fire and rehire' to be added to the list of reasons constituting an 'automatic' unfair dismissal, other than in very limited circumstances when a business has no alternative due to financial circumstances affecting the employer's ability to carry on the business as a going concern. This will impact the options available to educational institutions in the absence of agreement to change terms including hours and patterns of work and changes to pension provision.
- **Zero-hours contracts:** banning what the Government describes as "exploitative" zero-hours contracts and providing workers with a right to a contract that reflects hours they regularly work over a 12-week reference period.
- **Pay gap reporting:** extending equal pay to cover race and disability and introducing mandatory ethnicity and disability pay gap reporting, which will be more complex than the existing gender pay gap reporting obligations.

The new Bills will need to go through the usual legislative process for approval and it may still be a few months before the significant changes proposed are set out in details and take effect. However, employers in the education sector should expect a flow of changes over the course of the next few years which will impact the way people work, the contractual terms upon which they are employed and the ability of the employer to change them.

Gender questioning children: a summary of the legal position for schools

As part of its consultation that opened on 19 December 2023 and closed on 12 March 2024, the previous Conservative Government published draft non-statutory guidance for schools and colleges on gender questioning children (the Guidance).

It was expected that the results of this consultation would be published in 2024, but with the recent change in Government, this has been delayed.

The previous Government also published, as part of its consultation that opened on 16 May 2024 and closed on 11 July 2024, draft statutory guidance on teaching sex education in schools (the Sex Education Guidance). Unlike the Guidance, the Sex Education Guidance will be statutory, meaning that schools will have to follow it, unless there are exceptional circumstances.

This article seeks to explain the legal context surrounding the Guidance, why the lawfulness of parts of the Guidance has been questioned, and the steps that should be taken to resolve them. In addition, it will cover the Sex Education Guidance and what action the new Labour Government may take.

Existing statutory obligations relevant to education providers

Below is a summary of the current statutory obligations placed on schools which relate to the areas addressed in the Guidance.

Education Act 2002

- Sections 78 and 79 oblige schools to follow a curriculum that promotes the spiritual, moral, cultural, mental and physical development of pupils and of society, and prepares pupils for later life.
- Section 80B requires schools to have regard to guidance published by the Secretary of State in relation to relationships, sex and health education.
- Section 175 requires schools to make arrangements with a view to safeguarding and promoting the welfare of pupils and to have regard to relevant guidance.

Education (Pupil Registration) (England) Regulations 2006

- Schools must keep an admissions register of all of its pupils' legal names and sexes.

The School Premises (England) Regulations 2012 and the Education (Independent School Standards) Regulations 2014

- The regulations impose statutory requirements for both maintained and independent schools to provide sex-separated toilets for pupils aged eight or over (apart from individual toilets in fully enclosed rooms), and suitable changing accommodation and showers for pupils who are aged 11 years or over at the start of the school year.

Equality Act 2010

Chapter 1 Part 6 prohibits discrimination, harassment and

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victimisation in schools in the way in which schools treat their current, former and prospective pupils. It does not govern the horizontal relationship between pupils themselves.

In particular, schools are under a duty not to discriminate in relation to:

i. admissions

ii. exclusions

iii. provision of education

iv. access to any benefit, facility or service

v. any other detriment.

Further, the Equality Act protects individuals from being discriminated against if they have the protected characteristic of gender reassignment. This is defined as:

"*A person has the protected characteristic of gender reassignment if the 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.*"

A person in law is "*an expression denoting an entity that the law recognises as having its own distinct personality*" meaning natural persons and corporate organisations able to act in their own right are capable of possessing legal rights and liabilities. There is no age limit to this very wide definition.

The definition of gender reassignment is equally wide. There is no requirement for an individual to have undergone any medical treatment or surgery. Gender reassignment under the Equality Act is seen as a personal process, rather than a medical one. It just requires a proposal to change their gender, which does not need to be irrevocable.

Whilst children under the age of 18 cannot apply for a gender recognition certificate to legally change their gender they nonetheless may be protected against discrimination on the grounds of gender reassignment under the Equality Act.

The courts have grappled with the definition of gender reassignment under the Equality Act. In the employment tribunal decision in *Taylor v Jaguar Land Rover Ltd* the claimant was deemed to fall within the protected characteristic of gender reassignment despite having no intention to dress as a woman every day nor undergo gender reassignment surgery.

Although in that case the claimant was an adult, this approach suggests that children who are not old enough to acquire a gender recognition certificate, may fall within the protected characteristic of gender reassignment if they have stated that they wish to live and identify as the opposite sex. This does not necessarily mean those that are gender questioning will be protected but as the law

stands at present, it is a possibility, and ultimately it will be a decision for the courts and would need to be assessed on a case-by-case basis.

In line with the Equality and Human Rights Commission's (EHCR) response to the Guidance, schools need to draft a policy that balances the need to avoid directly or indirectly discriminating against children with the protected characteristic of gender reassignment, and other protected characteristics such as sex or religion. The wide definition of gender reassignment, the uncertainty of whether those who are gender questioning will be protected under the Equality Act 2010, and the difficulty of balancing different protected characteristics and views are likely to pose an issue for schools when preparing such a policy.

Outcome of the Cass Review and further developments

In January 2020, a Policy Working Group (PWG) was established by NHS England to undertake a review of the published evidence on the use of puberty blockers and masculinising/feminising hormones in children and young people with gender dysphoria to inform a policy position on their future use. Given the increasingly evident polarisation among clinical professionals, Dr Cass was asked to chair the group as a senior clinician with no prior involvement or fixed views in this area.

The current evidence base suggests that children who present with gender incongruence at a young age are most likely to desist before puberty, although for a small number the incongruence will persist. It also suggests there are other factors which may lead to gender incongruence, such as autism and the influence of peers and social media. The Cass Review recommended greater support and advice for parents and families about how best to support their children in a balanced and nonjudgemental way. Helping parents and families to ensure that options remain open and flexible for the child, whilst ensuring that the child is able to function well in school and socially, is an important aspect of care provision and there should be no lower age limit for accessing such help and support.

In response to the Cass Review, on 29 May 2024 the Conservative Government passed temporary emergency legislation to ban puberty blockers unless they are being provided as part of an authorised clinical trial. The Medicines (Gonadotrophin-Releasing Hormone Analogues) (Emergency Prohibition) (England, Wales and Scotland) Order 2024/727 (the Order) took effect on 3 June 2024 and was due to expire on 2 September 2024 but has been extended until 26 November 2024. The Secretary of State's opinion was that the Cass Review showed evidence that was sufficiently concerning to require an urgent change to the law to avoid private and overseas prescriptions being given to children in the UK.

The lawfulness of the Order was challenged by TransActual CIC, a community interest company seeking to improve life for transgender people in the UK, and a 15-year-old transgender female who was unable to access puberty blockers as a result of the Order.

The High Court held that the Order was not unlawful (R (TransActual CIC and Anor) v Secretary of State for Health and Social Care and Anor). However, it did recognise the evidence it heard about the difficulties gender questioning children have experienced in obtaining access to UK registered GPs and mental health services since the Order was made (which has meant some children and adults are going to EEA/Swiss providers instead). The High Court heard evidence indicating that on 30 April 2024 there were 5,676 children and young people on the waiting list for gender services, most of whom had been waiting between two and five years. The Good Law Project also provided evidence indicating that four young people have made suicide attempts

following the ban on puberty blockers.

TransActual has stated that it intends to appeal this judgment, and that it is seriously concerned about the safety and welfare of young transgender people. It has also been reported that the British Medical Association has called for the ban to be lifted.

What the Guidance says and why is it considered contentious?

When a child is questioning their gender, they may ask a school to make certain changes to accommodate their social transition. Social transition refers to the process under which people change their name, pronouns or want to use different facilities.

The Guidance sets out five principles for schools to consider when responding to such a request, with principles three and five being particularly contentious.

Principle 1: schools and colleges have statutory duties to safeguard and promote the welfare of all children.

Principle 2: schools and colleges should be respectful and tolerant places where bullying is never tolerated.

Principle 3: parents should not be excluded from decisions taken by a school or college relating to requests for a child to socially transition. The guidance suggests that where a child confides in their teachers about their gender identity, teachers can listen without automatically alerting parents but, for safeguarding reasons, confidentiality cannot be promised. The only exception being where this may raise a significant risk of harm for the child. It is highly likely, however, that there will be circumstances where children do not want their parents to be involved. For those children with the requisite capacity to competently decide that they do not want their parents involved, it could give rise to a breach of confidentiality if a school ignores their wishes and involves their parents.

Principle 4: schools and colleges have specific legal duties that are framed by a child's biological sex.

Principle 5: there is no general duty to allow a child to socially transition. This principle may raise risks of discrimination. A school could be deemed to be treating a student less favourably by applying a presumption against them being able to socially transition at school. For example, the Guidance states that schools must record a child's legal name in the admissions register to comply with its statutory duties. This approach is not consistent with the Equality Act and, if followed, could present a legal risk for schools as it could be directly discriminatory to allow a non-transgender child to be known

by another name, but not a child who is socially transitioning. This issue has been raised by the EHCR in its response to the consultation.

The Guidance is explicit in that primary school aged children should only be referred to by their (birth) sex-based pronouns. For older children, it suggests that schools do not need to specify pronouns and can decline a request to change a child's pronouns. The Guidance states that it is expected that there will be very few situations in which schools will be able to agree to a change in pronouns. Being misgendered is, understandably, a hurtful experience which can cause transgender individuals to feel invalidated. Continuing acts of misgendering pupils may be seen as treating an individual less favourably than others and/or subjecting them to a detriment. It could also be argued that the deliberate misgendering of a child by a teacher could amount to harassment and/or victimisation.

Accordingly, following the Guidance does raise issues as to potential non-compliance with the existing Equality Act legislation and therefore leaves schools at risk of challenge in following it.

What the Sex Education Guidance says about gender reassignment

The Sex Education Guidance states:

- Pupils should be taught the law about gender reassignment and schools should be clear that an individual must be 18 before they can legally reassign their gender. The guidance states: "*This means that a child's legal sex will always be the same as their biological sex and, at school, boys cannot be legally classified as girls or vice versa.*"
- If a child is questioning their gender, schools should refer to the Guidance.
- Schools should not teach about the broader concept of gender identity due to it being a highly contested and complex subject.
- If asked about the topic of gender identity, schools should teach the "*facts of biological sex and not use any materials that present contested views as fact, including the view that gender is a spectrum.*" It also stated that schools should consult with parents on the context of external resources on this topic in advance and make all materials available to them on request.

Similarly to the Guidance, this raises issues as to compatibility with existing Equality Act legislation and puts schools in a difficult position whereby they may be open to challenge if they either choose to follow or depart from the Guidance.

Does the Equality Act 2010 provide sufficient protection for schools and gender questioning children?

Society has moved on significantly in the 14 years since the Equality Act was introduced in 2010. It is unlikely that the legislators foresaw the myriad of issues that would arise with gender reassignment, particularly in respect of school aged children. The Cass Review, the Guidance, and the Sex Education Guidance all raise the question of whether the Equality Act needs review and amendment.

By way of example, the Equality Act 2010 uses the phrase "transsexual" which is now considered largely obsolete, with the term "transgender" or "trans" being more commonly used.

In the context of school policy and safeguarding, it would provide greater certainty for schools if the Equality Act 2010 was amended to ensure it was consistent with any and all government guidance. For example, if it is the Government's intention for school aged children to be deemed "gender questioning" rather than "trans", it would be sensible for this to be reflected in the Equality Act perhaps by having a general exception similar to that which exists regarding single sex schools or applying an age qualification to the definition of a person for the purposes of the Equality Act, so that the protected

characteristic of gender reassignment requires a person to be aged 18 or over. What should not happen is for Government policy to be brought in through guidance, leaving schools to grapple with the legal consequences.

These are unquestionably difficult, emotive and contentious issues. The authors are not expressing any view on what amendments should be made, rather that there exists a need to recognise that the law must be consistent with Government guidance and policy. Any move to limit the protection of children from gender reassignment discrimination will be highly controversial and subject to legal challenge, all the more reason for it to be carefully considered and debated at the highest level so that a clear statutory pathway can be adopted. The alternative is that the Guidance and Sex Education Guidance are implemented without amendments to current legislation, exposing any school following them to the risk of legal action being brought against it for discrimination.

What might the new Government do?

Both the Guidance and the Sex Education Guidance were products of the previous Conservative Government. The new Government made the following promises in its manifesto:

"Labour will finally deliver a full trans-inclusive ban on conversion practices, while protecting the freedom for people to explore their sexual orientation and gender identity.

We will also modernise, simplify, and reform the intrusive and outdated gender recognition law to a new process. We will remove indignities for trans people who deserve recognition and acceptance; whilst retaining the need for a diagnosis of gender dysphoria from a specialist doctor, enabling access to the healthcare pathway."

We will have to wait and see what the new Government will introduce in order to achieve these aims and what the future may be for the Guidance and the Sex Education Guidance. It is perhaps unlikely, however, that the new Government will be quick to amend the Equality Act, given in its manifesto it stated: "*Labour is proud of our Equality Act and the rights and protections it affords women; we will continue to support the implementation of its single-sex exceptions*."

In Conclusion

Whilst clarity on this subject is clearly needed for the education sector, the Guidance needs to reflect current legislation, in particular the Equality Act, or else the relevant legislation needs to be amended. The issues that are arising on this topic merit full and comprehensive consideration and debate, and schools, students and parents should understand their respective rights and entitlements.

It remains to be seen what direction the current Government will take on this subject and how this will impact upon the draft Guidance and Sex Education Guidance. We would note that, even prior to the General Election, it had been said that the Guidance might amount to a "high watermark" from which the final guidance may well resile. At this stage, we will have to wait and see whether the issues discussed in this article are addressed and surmounted.

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