



DOYLE CLAYTON
Workplace Lawyers

Education Bulletin

Summer 2022

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Welcome to the Summer Term 2022 edition of our Education Bulletin! In this edition, we're looking at some legal updates and issues that might impact your school or college, as well as the Government's white paper on the school system and its review of SEND in England.

In this bulletin we cover:

- Latest government guidance for employers on Covid, including changes to sick pay
- The Schools Bill and the Government's white paper on improving children's education in England
- The green paper and consultation on changing the SEND and alternative provision system in England
- Key issues to consider if your independent school is going through a merger
- Updates to the Ofsted handbook regarding harmful sexual behaviour
- The events and conferences we will be attending this term

Latest guidance on Covid-19

In recent months there has been a gradual removal of all Covid-19 restrictions in England, with laws being replaced with guidance. New workplace guidance [Reducing the spread of respiratory infections, including COVID-19, in the workplace](#) replaced the Working Safely guidance from 1 April 2022 and covers respiratory infections in general, not just Covid-19. This says that:

- If a member of staff is unwell with symptoms of a respiratory infection, such as COVID-19, they should follow the [Guidance for people with symptoms of a respiratory infection such as COVID-19, or a positive test result for COVID-19](#) (including stay at home, avoid contact with others (particularly those who are at higher risk) and work from home if possible). Employers, in accordance with their legal obligations, may wish to consider how best to support and enable their workforce to follow this guidance as far as possible.
- To reduce the spread of infections, employers should encourage and enable staff to get vaccinated, consider ventilation and maintain a clean working environment by providing cleaning products, soap and hot water and/or sanitiser.
- There is no longer a requirement to report workplace outbreaks of respiratory infections to local public health teams. However, if an employer experiences high levels of people with respiratory symptoms in the workplace, the above actions should be promoted and applied more rigorously.
- The requirement for employers to explicitly consider COVID-19 in their health and safety risk assessment has been removed, but employers may still choose to do so.
- To control occupational health and safety risks, employers should continue to comply with the requirements for cleaning, ventilation and welfare facilities in the Workplace (Health, Safety and Welfare) Regulations 1992. Employers have a duty to consult with their employees, or their representatives, on health and safety matters.
- Employers may wish to consider the needs of employees at greater risk of serious illness from COVID-19. Guidance for such employees is set out in [COVID-19: guidance for people whose immune system means they are at higher risk](#).

Since 24 March, Statutory Sick Pay ("SSP") can only be paid to those who are not well enough to work. This means that if an employee has Covid-19 but is asymptomatic, then they are not entitled to SSP if



they do not come into work. In such a case, employers will need to decide whether to pay sick pay to the employee and so you may need to check what your policies say on this. SSP is also no longer payable from day 1 for Covid-related absences and is paid from day 4 in line with sickness for other reasons.

Many employers are therefore now taking the view that sickness absence due to Covid should be treated in the same way as any other sickness absence when it comes to monitoring sickness absence under their sickness absence policies.

Despite the removal of restrictions and a return to “business as usual”, Covid still has the potential to cause issues for employers, including how to deal with employees who want to work more flexibly, how to support employees with long Covid and whether they are classed as disabled and how to manage unvaccinated employees with high levels of sickness absence. If you have any queries on this, feel free to contact us.

The Schools Bill and the Government’s white paper on “Opportunity for all: strong schools with great teachers for your child”

The Government has published a [white paper](#) which aims to introduce and implement standards that will improve children’s education and support them if they fall behind. It sets out various measures which the Government says it will introduce to achieve its goal of nine in ten children achieving the expected standard in reading, writing and maths by the end of primary school by 2030 (compared to the current rate of seven in ten children), as well as to improve the national GCSE average grades in English language and maths.

A key message of the white paper is that the Government is pushing for all maintained schools to convert to academy status and to either form multi academy trusts (MATs) or join existing MATs. The white paper says that it plans to deliver a *“fully trust-led system with a single regulatory approach, which will drive up standards through the growth of strong trusts and the establishment of new ones”*. The Government aims for all schools to be in a MAT or to have plans to join or form one by 2030. If this plan comes to pass, this will clearly be a significant change to the current education system in England, where only 44% of mainstream schools are academies and, of these, 87% are in a MAT.

Academies are, of course, very different to maintained schools in that they are publicly funded independent schools which operate outside local authority maintenance. The white paper outlines that, under its plans, local authorities will step back from directly maintaining schools and will instead coordinate across local services to improve outcomes for children. This, they say, will allow them to champion all children in their area, especially the most vulnerable.

This is not the first time that the Government has proposed to make all state schools academies. The Government’s proposal in 2016 for all schools to be academised by 2020 was heavily criticised by teachers and schools, leading the DfE to change its position and agree not to introduce legislation to bring about blanket conversion of all schools.

However, some argue that there is value in bringing maintained schools under the same regulatory framework, plus the 2022 white paper includes a new proposal that local authorities with successful schools can set up their own MATs. It therefore remains to be seen whether schools, unions and local communities will challenge these plans.



Other proposals in the white paper include:

- 500,000 teacher training and development opportunities by 2024.
- Specialist training to drive better literacy through a new National Professional Qualification for Leading Literacy.
- Up to £180m investment in the early years workforce, including training for early years practitioners to support literacy and numeracy teaching.
- £30,000 starting salaries for teachers with additional incentives to work in the schools with the most need.
- Free ready-made resources, guidance and lessons, designed in partnership with teachers and experts, which will reduce teachers' workload and allow them to focus on responding to the needs of their class.
- A new arms-length curriculum body that works with teachers across the country to co-create free, optional, adaptable digital curriculum resources to deliver a rigorous, high-quality curriculum.
- A richer, longer average school week.
- Up to 6 million tutoring courses by 2024 with action to cement one-to-one and small group tuition as a permanent feature of the school system.

The Government says that the white paper forms part of a wider programme of change, alongside the SEND Review, Independent Care Review, Skills for Jobs White Paper and Levelling Up White Paper.

The Schools Bill

In the Queen's speech in May 2022, the Government proposed a Schools Bill which aims to level up opportunity by delivering a stronger and more highly performing school system, as well as to support the Government's ambition for 90% of primary school children to achieve the expected standards in reading, writing and maths by 2030. The Bill, which will apply to England only, will include the main elements of:

- Strengthening the regulatory framework for academy trusts and establishing new statutory standards, as well as intervention powers to tackle serious failures.
- Supporting more schools to become academies in strong trusts by removing barriers to conversion for faith schools and grammar schools and bringing schools into the academy sector where this is requested by local authorities.
- Enabling better, more targeted, and more consistent multi-agency support by reforming the attendance legal framework, including requiring schools to publish an attendance policy and making attendance guidance statutory.
- Implementing a direct National Funding Formula, so that each mainstream school will be allocated funding on the same basis.
- Establishing 'children not in school' registers.
- Improving safeguarding by expanding registration requirements for independent educational institutions, enhancing enforcement, and working with Ofsted to expand investigatory powers.
- Strengthening the current teacher misconduct regime to include more educational institutions and increasing powers to investigate individuals who commit misconduct and enact appropriate regulatory discipline procedures.

We do not yet know when the Government will introduce this Bill but we will keep you posted on this.



Government consultation on changing the SEND and alternative provision system in England

The Government published a [green paper](#) in March 2022 on the future of the special educational needs and disabilities (SEND) and alternative provision (AP) systems. There is a public consultation on the green paper's proposals, which closes on 1 July 2022.

The green paper acknowledges that the SEND system is failing to deliver for children, young people and their families and sets out the Government's proposals for a system that offers children and young people the opportunity to thrive, with access to the support they need so they can fulfil their potential.

The paper identifies 3 key challenges facing the SEND and AP system:

1. Navigating the SEND and AP system is not a positive experience for too many children, young people and their families.
2. Outcomes for children and young people with SEND or in AP are consistently worse than their peers across every measure.
3. Despite the continuing and unprecedented investment, the system is not financially sustainable.

The Government is consulting on proposals to deliver greater national consistency in the support that should be made available, how it should be accessed and how it should be funded.

The paper concludes that there is a need for much greater consistency in how needs are identified and supported, so decisions are made based on a child or young person's needs, not where they live or the setting they attend. The paper proposes the following:

- Establishing a new national SEND and AP system setting nationally consistent standards for how needs are identified and met at every stage of a child's journey across education, health and care.
- Creating new local SEND partnerships bringing together education, health and care partners with local government to produce a local inclusion plan setting out how each area will meet the national standards.
- Supporting parents and carers to express an informed preference for a suitable placement by providing a tailored list of settings, including mainstream, specialist and independent.
- Introducing a standardised and digitised Education Health Care Plan process and template to minimise bureaucracy and deliver consistency.
- Making mediation mandatory before starting proceedings in the SEND tribunal.

The consultation closes on 1 July 2022, after which the Government will publish a national SEND delivery plan, setting out its response to the consultation and how the proposals will be implemented. In the meantime, you can submit your views on the Government's proposals here: <https://consult.education.gov.uk/send-review-division/send-review-2022/>

Key issues to consider if your independent school is going through a merger

Alongside the pressure from Government for all maintained schools to form or join multi-academy trusts, increasing numbers of independent schools are considering joining a local or national group of schools. The financial uncertainty caused by the pandemic and other world events means many schools are attracted to the economies of scale and protection from financial turbulence that can come with being in a group of schools.

If your school is considering joining a group or merging with another school then there are many things you'll need to consider and plan for, and this will depend on the nature of the transaction. We summarise some of the key issues here:

- **Various legal documents** will need to be produced by your solicitors and negotiated with the other party to ensure that the transaction is properly documented and agreed. You'll need to take advice on how long the whole process will likely take and plan accordingly, including when to announce the merger.
- **Due diligence** is vital and you will want to find out as much about the other party as possible in order to assess whether the merger is worthwhile. You also need to understand whether there are any hidden liabilities and/or matters that require further investigation. A thorough due diligence exercise should enable you to make an informed decision as to whether or not to proceed with the merger. If you still wish to proceed it may also lead to you needing to include warranties and indemnities in the contract and/or re-negotiate the deal.
- **Will there be any employment issues?** Depending on the nature and circumstances of the transaction, a merger may give rise to a relevant transfer under the *Transfer of Undertakings (Protection of Employment) Regulations 2006* (TUPE). If so, there will be various obligations on the school in terms of sharing employee information and consulting with affected staff, plus the affected employees will benefit from various protections and rights including having their current terms protected post-merger. You will need to take legal advice on this and factor any consultation into your timings.
- **Don't forget about your school's sponsor licence!** If you have a sponsor licence for sponsoring staff and/or pupils on work or student visas then you may need to take some action in relation to your licence before and/or after the merger has taken place, depending on the nature of the transaction. This is something that is often missed, so if you're considering any kind of merger or acquisition you should inform your immigration advisers at an early stage so they can plan for this.
- **A good communication strategy** for your dealings with staff, parents and pupils is key to the success of your merger. The head, governors or proprietor need to present a consistently positive outlook to win "hearts and minds", plus it is sensible to consider and address the views of parents, pupils and staff at an early stage.
- **Take professional advice**, including from accountants, surveyors and possibly PR advisers, as well as solicitors specialising in corporate, employment and possibly immigration law.

If your school or college is considering merging with another school or group then feel free to get in touch with Doyle Clayton's education team, who can support you with this.

Updates to the Ofsted handbook regarding harmful sexual behaviour

Ofsted updated its [school inspection handbook](#) in February and April 2022. The handbook describes the main activities carried out during inspections of maintained schools and academies and the evaluation criteria that inspectors use.

Of note are the updates to clarify Ofsted's approach to harmful sexual behaviour. As set out in the new paragraph 67, Ofsted will look at how leaders ensure that their school's culture addresses harmful sexual behaviour. Inspectors will expect schools to assume that sexual harassment, online sexual abuse and sexual violence are happening in the community, and potentially in the school and put in place a whole-school approach to address them. Schools therefore need to ensure that they have policies and procedures in place that make it clear that sexual harassment, online sexual abuse and sexual violence (including sexualised language) are unacceptable.

A new paragraph 235 also requires schools to have effective behaviour policies in place regarding harmful sexual behaviour, which include details of appropriate sanctions that should be consistently applied.

A new paragraph 251 sets out that Ofsted will expect schools to address sexual harassment, online abuse and sexual violence in the curriculum, as well as safeguarding risks (including online risks), issues of consent, and what constitutes a healthy relationship both online and offline. It also expects schools to provide effective pastoral support and to be alert to factors that increase a child's vulnerability, such as mental ill health, domestic abuse, having additional needs, and being at greater risk of exploitation and/or of feeling unable to report abuse (for example, girls and LGBT children).

In considering how schools handle allegations of sexual harassment, abuse and violence, Ofsted will now consider whether staff have a good awareness of the signs that a child is being neglected or abused, as well as an awareness of barriers that could prevent a pupil from reporting harmful sexual behaviour. It will also consider whether staff are confident and well trained in handling reports of sexual harassment, abuse or violence.

State schools and academies will therefore need to review their policies, curriculum and staff training to ensure that they can demonstrate their supportive culture and their awareness and teaching around harmful sexual behaviour.

Doyle Clayton events

Finally, we wanted to let you know that our education team will be exhibiting at the following conferences this term:

- The ISBA annual conference on 17-18 May 2022 in Birmingham;
- The UKCISA annual conference from 15-17 June 2022 in Newcastle; and
- The Autism show on 17-18 June 2022 in London.

If you will be attending any of these events do come and say hello!

If you have any queries regarding any matters raised in this Education Bulletin, please contact Doyle Clayton's Head of Education, [Simon Henthorn](mailto:shenthorn@doyleclayton.co.uk), on 0203 696 7172 or shenthorn@doyleclayton.co.uk.

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