

CAUGHT IN THE ACT CONFERENCE – 19 NOVEMBER 2011

Workshop on education and the law – David Wolfe, Matrix Chambers

Introduction

- As a public law barrister, David deals with a range of cases involving human rights and other issues, often with a focus on education. Many of his individual cases concern pupils threatened with exclusions and where special needs are involved.
- He recently launched a blog on education law particularly as it relates to academies and free schools – www.acanofworms.org.uk. Interestingly, there have been many hits on his blog originating from the Department for Education intranet, although officials have not engaged with him directly about the material.
- Two questions were asked at the beginning of the Workshop which were considered at various points throughout the discussion; what changes had David seen in his casework as a result of the increasing establishment and conversion of schools into academies, and what could in due course be done to reverse in a progressive way the change in schools structures and governance.
- On the first question, David confirmed that his casework involved almost no complaints regarding maintained schools, but at least one a week relating to academies and the way in which they operate.

Summary of the relevant law

- By way of background, David gave a summary of the current framework of education law and the historical context to it. There are around 25,000 maintained schools, with a variety of governance structures and arrangements including community, voluntary-aided, voluntary-controlled and some grant maintained schools.
- Since the Education Act 1944, a large body of education law has developed applying specifically to maintained schools, with detailed provisions in relation to governance, admissions, exclusions, curriculum and many other matters. Much of this is set out in secondary legislation but at least has still been subject to some level of parliamentary scrutiny.
- It is important not to generalise about the law in academies because the operation of academies is governed to a large extent by their individual funding agreements. General legislation and principles of law will apply, such as freedom of information and equality and human rights legislation. However, most other matters are school specific. For example, academy funding agreements are not required to apply the statutory Admissions Code. Funding agreements are in principle governed by contract law and consist of a contract with the Secretary of State, and can only be amended by agreement with the Secretary of State.
- The current version of the Model Funding Agreement is very different to agreements used for the early academies, around 9 or 10 years ago, and does have more detail about what should apply – e.g. the principles of the Admissions Code. In fact, the DfE have sometimes tried to get

early academies to modify their funding agreements to take on board requirements on maintained schools but without success. This will lead to an emerging legacy of problems about lack of consistency and unfair treatment of parents and pupils. The funding agreements are 'rolling contracts' which continue indefinitely unless a seven year notice period is exercised by the academy.

- In the Education Act 2011, there are now provisions making it easier for maintained schools to exclude pupils. Exclusion Appeals Panels are now empowered only to recommend reinstatement not to require it. In practice, this is likely to mean many schools will not reinstate excluded pupils. However, many academy funding agreements simply apply the current appeals approach including that Panels can direct reinstatement. Those academies are likely to face challenges that they should abide by their funding agreements rather than the less stringent requirements of the new legislation. Ironically, the newer 'Gove' academies are more like maintained schools than under New Labour.
- There is an important untested legal argument about privity of contract: the funding agreements are contracts between the academy trust and the Secretary of State and therefore in theory do not confer rights on anyone else such as pupils. So when a pupil wants to rely on a right or procedure in the funding agreement, it would be possible for the academy to argue that they cannot. However, David has found that academies often tend to concede individual cases in practice so as to avoid embarrassing publicity and political attention.
- The Academies Act 2010 had two main effects; enabling primary and special school academies, and making it easier for non-academy maintained schools to convert to academies. There are now almost no procedural hurdles to becoming an academy and the consultation requirements are minimal. The Education Act 2011 gives greater powers to the Secretary of State to force struggling schools to become academies and creates 'PRU' academies. It is therefore a further significant erosion of the maintained sector. It also virtually removes all possible options for the creation of new community schools. There is no legal mechanism for academies to convert back to community status even if they would like to. So to answer the question at the start of the Workshop, primary legislation would be required for that to happen smoothly. A new more progressive Government would find it easier to legislate to require all schools to abide by certain core principles on issues such as SEN and exclusions, rather than a radical reversal of the academies structural and governance framework.

Further questions and comments

- Are funding agreements secret? Gove has now made academies subject to freedom of Information legislation. The DfE have put funding agreements on the website. The agreements including annexes on key issues, such as governance and admissions. However, free school agreements are not yet public. David has written to all of the 24 newly established free schools, with a limited response (four so far, including the new Maharishi free school). Secrecy on admissions procedures may explain the delay. Financial information is almost always redacted from funding agreements disclosed.
- The legal requirements for consultation at the point of creation of an academy are not set out in detail in the law but basic legal minimum standards of still apply.

- Where pupils/parents challenge the legality of what an academy/free school is doing, the academies will pay solicitors privately where maintained schools usually take advantage of local authority advice and law departments. Defending a judicial review case for example can cost up to £20,000 even at the initial stages. There will also often be legal costs associated with academies legal obligations as an employer. Sacking teachers can be very expensive. So-called 'freedoms and flexibilities' tend to come at a price. It is possible to take challenges on academy conversions, although difficult. David has acted for parents in such cases. In several cases those proposing conversions have been forced to reconsider. Those consulting are still supposed to approach consultation with an open mind so blatant evidence that shows 'sham' consultations can be helpful.
- If we are right about free schools seeking to manipulate admissions, can they be challenged? Yes, if they breach sex or race discrimination laws for example. Particularly if preference is given to, say, the children of sponsors, this is likely to be unjustified discrimination on a prohibited ground. We should watch out for this because the 'free school funding agreement template' uses wording as a precedent to the effect that, 'the Admissions Code shall apply unless this documents states otherwise...' The Education Act 2011 extends the right to complaint about admissions to the Schools Adjudicator but specifically excludes complaints based on 'embedded departures' from the Admissions Code as is likely to be the case for many free schools. It is also important to note that many funding agreements only deal with 'high-level' issues – for example the policy on permanent exclusions rather than fixed-term exclusions. Academies are finding new ways to get round exclusions rules, such as sending pupils to do 'community service' type placements.
- What is happening with academies and the powers of individual governors? Many chains of academies have overall 'master' funding agreements with local supplements. In some cases, the local governing body is more like a parent –teacher association with all key issues determined by the sponsor. Also, many head teachers don't appreciate that they are constrained by the terms of their funding agreements.
- What about the Tories' position on inclusion in schools? This is a real concern (and an issue raised in the current Green Paper on SEN). At the moment parents can appeal to the SEN Tribunal if the school they wish to have named on their child's statement refuses to take them. However, they must do this within one month of the refusal. Advice can be obtained from the IPSEA (www.ipsea.org.uk).
- What about OFSTED's position about academies? There is a detailed statutory regime applying to OFSTED. In theory, since academies and free schools are independent schools, they are actually only subject to minimum inspection requirements. In fact, OFSTED has tended to do similar inspections for academies to those in maintained schools.
- What will happen with academy mergers? Is this possible? Yes, for example (say) Capita could simply 'buy out' (say) ULT or ARK and the legal arrangements would not change substantially, although there would usually be an option to 'novate' funding agreements or other contracts.
- The new Admissions Code has currently been laid before Parliament, so people with concerns about it should try and get their MPs to 'pray against' it.

- Are academies subject to rules on competitive tendering? They are not in the same position as public authorities bound by EU law rules, so can operate largely like private businesses although general legal requirements such as the Bribery Act 2010 will apply.
- Are there ways to complain about academies? Apart from their own internal complaints processes (and to the Secretary of State), the current route is through the YPLA, although this has not proved fruitful and the YPLA is about to be abolished (by the Education Act 2011). It is very hard to get statistics and information about complaints.
- It is important to try and counteract the expectation that many people have that applying for secondary school should not in itself be a campaign issue. It is possible to get across how important the issues are – especially that through academy conversions, pupils and parents essentially lose most of their rights to protection against unfair treatment.
- What types of exclusions are happening in academies? Often the impact is on pupils who are able but who are ‘low level’ disrupters (and thus not subject to formal exclusions, even fixed term exclusions). Schools are doing things like sending pupils home with laptops to work through the curriculum on their own. For some older academies, for example in Brent, head teachers had previously agreed to abide by the LEA processes but the new Act is likely to change practice and exclusions could dramatically increase, probably with a disproportionate adverse impact on black and working class pupils. It appears that the new academy PRUs will not be subject to legal protections such as on how long pupils can stay there, or that the curriculum can only be disapplied temporarily.
- The NUT has also put in a general freedom of information request on emerging free schools to try and find out more about proposers and the details of proposals.
- How can schools be closed by sponsors? In reality, despite the seven year notice provisions in funding agreements, the trust could probably be wound-up and there is little the Secretary of State could do legally to stop that happening or seek compensation.