



# EDUCATION NEWSLETTER

February 2010



*Welcome to CFR's Education newsletter in which we, the education team at CFR, provide insight and commentary on legal issues which may be of interest or concern. These are challenging times for the education sector with uncertainty on the arrangement for Transfer 2010 and beyond, highly publicised incidents involving pupil/ teacher relations and ongoing concerns on child welfare. This newsletter seeks to address these concerns and highlight recent relevant developments.*

*The team sheet on the final page gives our team members all of whom are lawyers with particular expertise in their field and who have a focus on the education sector. I hope you find this of interest.*

Michael Black, Head of Employment

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## EXCEPTIONAL CIRCUMSTANCES REGULATIONS

The School Admissions (Exceptional Circumstances) Regulations 2010, which are due to come into effect on 1 March 2010, provide for the establishment and constitution of an Exceptional Circumstances Body and the Regulations outline the procedure for applications to the Body.

Importantly, the Regulations give examples of circumstances which may and may not be regarded as exceptional circumstances requiring the admission of a child to a particular school. It is anticipated that the Exceptional Circumstances Body and its panels should be established and available to hear their first applications in Spring 2010 as part of the Transfer 2010 process.

## NK'S APPLICATION (JUDICIAL REVIEW) - SPECIAL CIRCUMSTANCES APPLICATIONS

In August 2009, the Applicant sought leave to apply for Judicial Review of the decision of the Board of Governors ("the Governors") and the Independent Education Appeals Tribunal ("the Tribunal") to refuse a Special Circumstances Application in relation to the transfer of a pupil to secondary education.

A Special Circumstances Application was made to a Grammar School to alter a C1 grade awarded in the transfer test. This type of application requires the parents to furnish information in relation to the special circumstances and it also requires comparative educational evidence to be furnished by the pupil's primary school. The guidance makes it clear that it is the parents' responsibility to ensure that all information is provided to the Grammar School. In this case, the primary school provided limited information which did not contain all the comparable marks of other pupils. On the basis of the information available, the Governors did not regrade the pupil. An appeal was then made to the Tribunal and at that stage the primary school provided the comparative information. However, the Tribunal did not assess the new comparative information and it upheld the Governors' decision.

The Judge stated that in relation to an assessment made on the limited information made available by the primary school, the resulting refusal to regrade was a decision that the Governors and the Tribunal were entitled to reach. However, he held that where new information becomes available at the appeal stage, then the Tribunal should not disregard this relevant information, provided certain conditions are satisfied. These conditions are:

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- That the information in question is in the possession of the primary school and not the parents;
- That the Governors carrying out the assessment exercise have found the information from the primary school is insufficient for the proper completion of the assessment; and
- That the primary school has provided further information to the Tribunal on appeal.

As these three conditions were satisfied in this case, the Judge remitted the decision back to the Tribunal to reassess the pupil's grade in light of the new comparative information.

## Special Circumstances and Special Provisions

All schools should ensure that their admissions process is supported by a robust special circumstances and special provisions procedure. Those schools who have decided to include performance in one of the transfer tests as part of its admissions criteria are likely to face increased scrutiny on how they operate and administer their special circumstances and special provisions procedures. Such procedures will enable schools to assess pupils whose performance in the admissions test was adversely affected by an unforeseen event or circumstances or, in the case of special provisions, to assess pupils who were living outside Northern Ireland at the time of the transfer test or were unable to sit the transfer test for some reason.

Schools may face some novel claims for special circumstances or special provisions as a result of the new transfer procedure, for example:

- some parents may feel that their child's performance was adversely affected by sitting the test in a strange or new environment. Such a claim may or may not be linked to a pre-existing medical condition such as attention deficit disorder or autism
- other claims may relate to the adequacy of special access arrangements required by the pupil to sit the examination
- claims relating to swine flu where the pupil was only given a diagnosis by telephone in accordance with the Department of Health policy
- a pupil who turned up to sit the test but who had not been registered to do so by their parents.

In reaching a decision on an application for special procedures or special provision, schools face the risk that their decision could be overturned by the appeals tribunal. If an appeal is successful, and the school is forced to admit a pupil and admission of that pupil means that the total number of pupils exceeded the number permitted by the Department, the school will not receive funding from the Department for that pupil for the first year. In the alternative, schools may face a direct challenge to their admissions policy by way of judicial review on the basis of the content of that policy or indeed how that policy is applied.

There are a number of potential pitfalls for Boards of Governors in assessing applications under the special circumstances and special provisions procedures. It is important that Governors have:

- no personal interest in the application on which they are adjudicating and should make decisions dispassionately according to the law and the materials before them
- a set procedure for making its decision
- arrived at their decision in a rational manner taking all relevant factors into account and excluding any irrelevant considerations, their decisions must be evidence based
- based their decisions, as far as is possible, on independent objective evidence of the child's academic ability
- made sure that their decision making process is compliant with the Human Rights Act, the determination of whether or not a child is admitted to a school will engage Article 6 of the European Convention on Human Rights
- read all of the papers that they have been provided with when considering the representations made
- properly reasoned all decisions made and that these reasons are communicated in writing

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In conclusion, many of the pitfalls can be avoided by a clear and detailed policy on how special circumstances and special procedures will be assessed, by giving Boards of Governors training on how to assess such applications and communicating the outcome of the process in a clear manner.

## ABUSE IN SCHOOLS

The media is awash with disturbing tales of inappropriate teacher/pupil relationships, one of the most recent cases being that of Brett Mead a teacher in Norfolk who was jailed for 5 years after sexually assaulting 3 pupils.

The implications for teachers in engaging in any inappropriate behaviour with pupils are potentially very serious risking not only disciplinary action against them by their employer but also criminal investigation, possible consequent conviction and imprisonment. Under the Sexual Offences Act 2003, it is an offence for anyone in a position of trust with a child under 18 years of age to be involved in sexual activity with that child or to incite the child to engage in sexual activity. If convicted, teachers could face jail terms of up to 6 months for a summary offence or up to 5 years if convicted on indictment.

The steps that should be taken by a school will depend on the seriousness of the complaint however in cases of alleged abuse by a member of staff, it would be normal to implement precautionary suspension whilst at the same time making a referral to Social Services and/or the Police. The member of staff who is the subject of the complaint should be given written confirmation of the suspension, as should the person making the complaint. Where a complaint is subject to investigation by the Police or Social Services then the school should ensure that its own investigations are undertaken in such a way so as not to prejudice any police investigation. Depending on the circumstances of the case, it may also be appropriate to await the outcome of any external investigation before implementing any internal disciplinary sanction.

It is hoped that the introduction of the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 (“the SVG Order”) which came into force in October 2009, will strengthen the protection for children and weed out those who could potentially harm pupils by preventing them from taking up employment in educational establishments in the first place. A new Independent Safeguarding Authority (“ISA”) will be established which will register those working with children and maintain lists of those barred from such work on the basis of harm or risk of harm. Schools will now be required to check whether a teacher is registered with the ISA prior to employing them.

Although the SVG Order is unlikely to eradicate cases such as the Mead case altogether it will hopefully make some inroads into increasing child protection in our schools.

## Q&A ON DATA PROTECTION

- Q.** We are in the process of compiling an emergency contact list to include details of staff names, addresses and mobile numbers which will be used by the School as part of a business continuity/disaster recovery plan. It is also possible that we will send the list to the School Governors and to all staff so that everyone has their colleagues’ details. We intend to get permission from staff in the first instance but please advise if we can force them to provide their information for this purpose? Does it contravene the Data Protection Act?
- A.** The relevant Data Protection principle for this particular issue is “*Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any matter incompatible with that purpose or purposes*”.

Therefore, if personal data, such as the home telephone number was collected for emergencies only then it would not be lawful to circulate it in a general directory without the data subject’s consent. It could also contravene the Human Rights Act which provides for the right of “*respect for private and family life*”. The business continuity plan follows a similar Data Protection principle. If that was not the purpose that the data was collected for, i.e. the person didn’t know when the number was collected, that it would be circulated for a business continuity plan, the information will need to be sought from the employee.

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