

Directing a pupil to Alternative Provision: Academies

WHERE DOES THE POWER COME FROM?

Although maintained schools have a statutory power pursuant to s29A of the Education Act 2002 to direct a pupil off-site to alternative provision ("AP") for their education in order to improve their behaviour, the position for Academies is somewhat different. For Academies, the ability to do this will be contained in the Trust's Articles of Association:

The DfE model Articles of Association provide the following:

5. *In furtherance of the Objects but not further or otherwise the Academy Trust may:*

- (f) co-operate with other charities, other independent and maintained schools, academies and institutions within the further education sector, voluntary bodies and statutory authorities operating in furtherance of the Objects and to exchange information and advice with them
- (j) provide educational facilities and services to students of all ages and the wider community for the public benefit.

DfE Academy Articles of Association Model One, Updated June 2021.

The model Articles further provide at Article 105 that any delegation of powers by the Trustees must be in writing.

TAKING THE DECISION AND POTENTIAL CONSEQUENCES

The Principal can make a decision to direct a pupil to AP and does not need a parent's consent in order to do this. This therefore makes the process inherently risky in terms of challenge from parents: there might be a formal complaint, or even a disability discrimination claim (if the pupil has a disability as defined in the Equality Act 2010 and the parent/young person considers that the direction

to AP amounts to unfavourable treatment¹) or a judicial review. Academies therefore ought to be certain that the power to direct a pupil to AP has been properly delegated by the Trustees to the Principal. This is often contained within a scheme of delegation in multi academy trusts, but may not be something that the Trustees of a single academy trust have considered. Having the delegation of this power clearly documented will be helpful in defending a potential legal challenge.

SEND CONSIDERATIONS

As referred to above, schools must ensure that they are adhering to their obligations under the Equality Act and treating people with protected characteristics, such as disability, in a way that is not unfavourable or discriminatory. The SEN Code of Practice and the DfE Exclusions Guidance both emphasise the need for schools to ensure that any patterns of challenging behaviour have been investigated in the light of possible special educational needs. The test for whether a person has a disability contained in the Equality Act has a low threshold, and it is important to note that many additional learning needs may constitute a disability, irrespective of whether or not there is any sort of formal diagnosis. It is therefore very important that a school is able to demonstrate that SEN has been properly investigated and considered when taking decisions about pupils going to AP, particularly in relation to managing challenging behaviour (which is frequently an indicator of underlying unmet needs) in the event that a parent brings a SEND Tribunal claim against the Academy Trust for disability discrimination.

If the pupil being directed to AP has an Education, Health and Care Plan, the local authority with responsibility for the EHCP must be given clear information about the placement (see below).

¹ Special Educational Needs and Disability is a complex area of law and we advise that you seek legal advice on your specific circumstances.

WHAT WILL THE AP PLACEMENT ACHIEVE?

Academies should refer to the [DfE Guidance for Alternative Provision](#). Although it applies to maintained schools rather than Academies, it is an example of good practice and therefore helpful for Academies to align their policies and procedures with the guidance.

Academies should ensure that they can demonstrate how the pupil's behavioural needs have been assessed and what is required to meet those needs. It would be prudent to be able to demonstrate why the particular AP setting has been selected, e.g. do they have experience in dealing with a particular profile of needs, do they have particular resources or a certain type of learning space which is relevant, and have they got a proven track record and/or a well-established working relationship with the school?

If a pupil is being directed to AP, the parents must be given certain information about the placement, including what the objectives of the placement are, and how often the placement will be reviewed (and by whom). Parents should be involved in the reviews and the Trust should ensure that their views are considered. Reviews should be regular (the DfE Guidance for maintained schools does not prescribe a timescale) and they should inform the decision making as to whether the placement is achieving its aims.

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For further information and advice, please contact the School Support Service team on 0345 070 7437 or schoolsupport@wslaw.co.uk

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This briefing note is not intended to be an exhaustive statement of the law and should not be relied on as legal advice to be applied to any particular set of circumstances. Instead, it is intended to act as a brief introductory view of some of the legal considerations relevant to the subject in question.