

Academies and special educational needs

In ACE Bulletin 123 (February 2005) we looked at how the law governing academies differs from that governing maintained schools and raised a number of our concerns, including the fact that local authorities do not have the power to name an academy in a child's Statement of special educational needs. In this information sheet David Woolf of Matrix Chambers gives the detail of the legal position.

Academies are governed by their funding agreements (between the sponsor and the DfES), not by the law and guidance covering maintained schools. As a result, children with special educational needs find themselves in a weaker position legally.

A maintained school must admit a child if that school is named in Part 4 of the child's Statement. If the school refuses to do so the child could institute judicial review proceedings, for which they would be likely to receive legal aid. However, a child whose Statement named an academy where the academy refused to admit them would have to judicially review the Secretary of State (SofS) and ask her to use her powers to require the academy to admit the child.

In consequence, academies are not (at least, not directly) subject to the jurisdiction of the Special Educational Needs and Disability Tribunal (SENDIST). They also cannot be the

school in question; but at an academy the LEA has no mechanism of control other than to ask the SofS to exercise her powers under the funding agreement.

Admissions

The (rebuttable) statutory presumption in favour of admission to the (maintained) school of parental preference does not apply. The Secretary of State's literature (including that sent to parents) says that an academy must agree to admit a child unless to do so would prejudice the efficient education of other children and there are no reasonable steps which can be taken to remove the incompatibility. But that test does not appear in all funding agreements, making the SofS's literature at the very least misleading.

Where an academy does not want to admit a child with a Statement, the funding agreements allow it to refer the matter to the SofS for determination, thus avoiding the procedurally fair specialist tribunal (SENDIST) which Parliament has put in place to resolve equivalent disputes in relation to maintained schools. The SofS has, instead, arranged for KPMG to "advise" her on each such case. It is not clear what relevant experience KPMG (let alone the individuals involved) has to carry out this activity. It seems inherently unlikely that they have the same expertise as the members of the SENDIST (chosen by the Lord Chancellor for their legal expertise and/or their expertise in SEN).

The KPMG process does not involve the child or parents at all (in contrast to the SENDIST processes which involve both). Indeed, the SofS receives (and passes to KPMG) material supplied by an academy (i.e. in support of its argument that the child should not be admitted) which the child and parents do not see and have no opportunity to comment on – a serious breach of basic principles of procedural fairness.

The SofS has stated that the existence of that regime does not preclude a parent appealing to the SENDIST and that she will use her powers under the funding agreements to ensure that academies give effect to decisions of the SENDIST. In fact, she has not done so in at least one case where the issue has arisen and has instead (consistent with the funding agreement in the most common form) allowed an academy to invoke the KPMG process even after the SENDIST had reached a clear decision in favour of the parental request for an academy placement. As well as creating the potential for delay (and thus prejudice to the education of the child) that process opens up the possibility that (on advice from KPMG) the SofS might reach a different decision to that reached by the SENDIST (and one which she would be contractually bound to the academy to give effect to in contrast to the decision reached by the SENDIST).

The SofS's power under the Funding Agreement takes effect in only private (contract) law and its effectiveness would depend on the SofS's willingness to go to court to seek an injunction against an academy which did not wish to comply. The court may well not be prepared to make such an injunction, just as the courts will not compel an employee to work.

Complaints

Complaints about an academy cannot be made to the LEA (in relation to matters of curriculum etc.). Equally, no complaint can be made to the SofS, who does not have the general and reserve powers she would have (under EA 1996) to direct a maintained school which acts unreasonably.

There are some residual protections arising from the fact that academies are regulated as independent schools including, for example, a basic requirement to have a complaints procedure; but it need not be equivalent to that in a maintained school.

subject of a request for a change of named school (para 8 Sch 27 Education Act (EA) 1996) or an appeal to SENDIST against an LEA's refusal to change the named school, in the way that a maintained school can be.

LEA's 'responsibility without power'

The LEA remains legally responsible (and is the only body legally responsible) for arranging the special educational provision specified in a child's Statement, but it cannot put in place and enforce arrangements under a local scheme of delegation to ensure that an academy makes the provision in the Statement (para 8.6 SEN Code of Practice) whereas it can for a maintained school. If an academy failed to make the provision, the LEA's only recourse would be to invite the SofS to exercise her powers under the funding agreement – a far weaker lever.

The LEA (and thus the child) is in the worst possible position when it comes to ensuring that the provision specified in a Statement is actually made: if a child is in a maintained school, the LEA can exercise control under its scheme of delegation; if the child were placed by the LEA in a conventional independent school (as many with the greatest needs are), the LEA would at least have powers under its contract with the independent

The “prejudice” argument

Academies consider that the “prejudice to other children” argument allows them to argue that admitting the child in question would leave the class with “too many” children with SEN. They are supported in such arguments by Cambridge Education Associates, who appear to have a multiplicity of roles in the process, including acting as consultants to individual academies and running the “mediation” process which seeks to resolve disputes between parents and academies. I am not aware of maintained schools trying to rely on such an argument. I doubt the SENDIST would accede to it. It is not clear what view the SofS would take.

The only way in which the “prejudice to other children” argument can be made to operate within the framework of the law is by the SofS inviting the SENDIST to treat it as guiding the Tribunal’s evaluation under s9 EA 1996 (the qualified obligation to have regard to the desirability of education in accordance with parental views) – a fudge and likely to cause, at least, confusion.

Even then, there is only a neutral playing field for a parent requesting an academy (by comparison with the position for a maintained school) if (for the purposes of s9 EA 1996) placing a child at an academy is neutral in terms of the LEA’s funds. That, in turn, is only the case if the DfES funds the academy as would the LEA through delegated funds. That, in turn, depends upon the DfES replicating the schemes of delegation by which each LEA in question funds schools in its area. In some cases, that will be very complex. If the DfES does not get it right, LEAs (which retain statutory responsibility for arranging the provision in a Statement) will argue (before the SENDIST) against such placements (on s9 grounds). The (independent) Tribunal will have to accede to such arguments if they are made out in fact and law, as they may well be; thus preventing academies being a neutral option.

Moreover, academies (and indeed possibly the DfES) appear to consider that “prejudice to other children” can be made out where their aspiration is to prevent what they see as “too many” children with SEN being admitted to a particular class or year group. A maintained school would be unlikely to raise such an argument and most unlikely to succeed with it before the SENDIST. Given that the SofS is the decision-maker when it comes to admitting children to academies, a different (and less friendly to children with SEN) approach seems likely.

Exclusions

Not all academies provide for a right of appeal against a permanent exclusion (a particular issue for some children with SEN) to an independent appeal panel (as they would have in a maintained school). In some, the appeal is to a panel which is, in effect, the governors.

I have heard apparently credible first hand accounts of at least one academy operating what appears to be an unlawful regime in

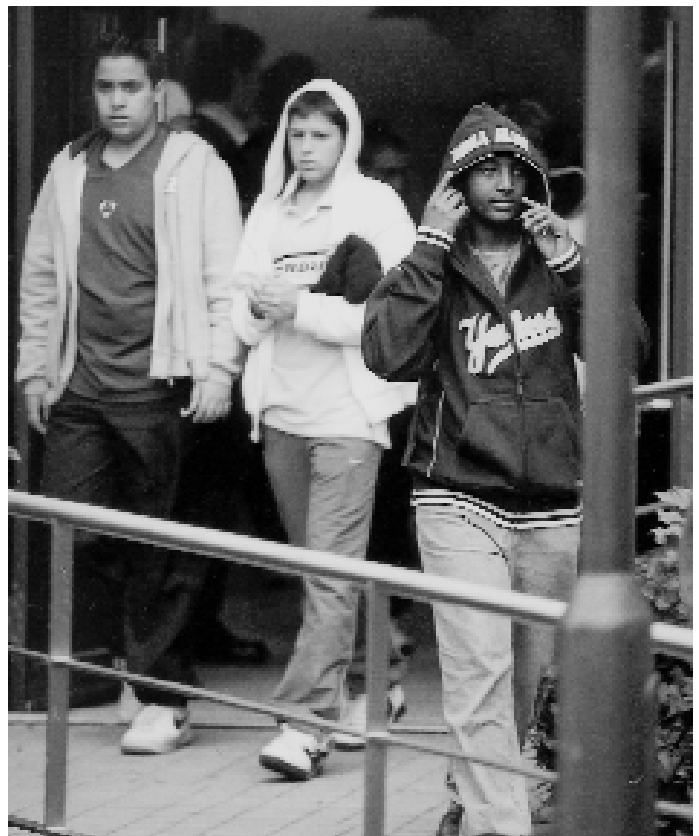
Other concerns

Academies may well not be “public authorities” for the purposes of the Human Rights Act 1998 (HRA). Accordingly, a pupil placed at an Academy would have no protection in relation to the HRA issues arising in relation to e.g.:

- * Uniform (some operate particularly strict uniform codes) – Arts 8 and 9 European Convention on Human Rights (ECHR).
- * Privacy (some are known to have near universal CCTV coverage within their buildings) – Art 8 ECHR.

relation to temporary exclusions, including in relation to children with special educational needs. What appears to happen is the child is temporarily excluded for a given offence for a set period (typically a couple of days) but then told by the school not to return at the end of the specified period (and given information on alternative placements) or that if they do, they will face immediate permanent exclusion.

If this is correct, it is unlawful. In particular, a child who has been temporarily excluded should be allowed (indeed encouraged) to return to school at the end of the period of the exclusion. And the contemplated permanent exclusion would be most unlikely to be lawful. The effect of these arrangements would be to keep the temporary and permanent exclusion rates apparently low, because the temporary exclusion is being extended – albeit unlawfully – and the child kept out of school without being formally permanently excluded (which would engage various procedural protections and safeguards). The process is not the same as, and should be distinguished from, the process operated in some maintained schools of managed moves or transfers to another school of children who have been repeatedly temporarily excluded and who are back in class but at risk of permanent exclusion. That is lawful. This is not.



Pupils at academies may not be protected in relation to Human Rights issues such as uniform or privacy, unlike those attending maintained schools.

Less protection for vulnerable children

The Education (SEN) (Approval of Independent Schools) Regulations 1994 SI 651 do NOT apply to academies. These set out the requirements for an independent school to be approved to take children with Statements of Special Educational Needs (under s347 EA 1996) and impose detailed requirements in relation to the qualifications of teachers, the presence of appropriately qualified health and welfare personnel, the requirement to have an incident and punishment book, the requirement to make reports to LEAs, prospectus requirements and so on. Similar requirements would apply to a maintained school were one being contemplated in replacement for the existing school. However, as far as I have been able to ascertain at present, there are no equivalent requirements in relation to academies generally, nor would any be introduced by the existing funding agreements I have seen.)