

9 February 2021

Minister for Education Wales
Department of Education for Wales

Our ref: ST/Wales/PAP/JR/

By email only: correspondence.kirsty.williams@gov.wales
NewProceedings.WG.Legal@gov.wales
Ruth.Conway@gov.wales

Dear Minister,

We write this letter in accordance with the pre-action protocol for judicial review. We hope that by writing this letter we can avoid judicial review as we have no desire to enter into litigation at this difficult time. We do not want to detract from the efforts that are being made to address COVID-19. We recognise the difficult decisions that the Government is faced with. However, as is set out below, teachers are currently at risk of being required to work in an environment that appears to be unsafe.

The Claimant

The proposed Claimant is the National Association of Head Teachers ('the NAHT').

Details of the claimants' legal advisers, if any, dealing with this claim

Simon Thomas, NAHT, 1 Heath Square, Boltro Road, Haywards Heath, RH16 1BL

Email: simon.thomas@naht.org.uk

Tel: **Irrelevant & Sensitive**

The defendant's reference details

Not yet identified

Interested Parties

None

The matter being challenged

In late January 2021 the Government stated that:

If we continue to see the numbers of community transmission fall over the next month then our intention would be to see the return of our youngest learners from 22 February in a phased approach.

NAHT
1 Heath Square | Boltro Road
Haywards Heath | West Sussex
RH16 1BL | www.naht.org.uk
Irrelevant & Sensitive
e: info@naht.org.uk
General Secretary: Paul Whiteman

On 5 February the Education Minister announced that the aspiration to open schools on 22 February will now be implemented, with Foundation Learners (i.e. pupils between the ages of three and seven) to return to schools and other learning environments on that date

In an open letter to headteachers, the Education Minister stated that:

Today our Technical Advisory Group, scientists and public health officials who advise Government, have published a paper in which they advise that the improvement in the public health situation allows us to consider a “partial and phased return to face-to-face learning in schools”.

Factual background

The Government had initially planned to open schools on 18 January. That decision was reversed in light of concerns about the new variant.

Relevant public health advice

The government’s statements indicate that it seeks to rely on scientific advice when responding to COVID-19. In particular, it has established the Technical Advisory Cell (‘TAC’). The government website states TAC:

... provides coordination of scientific and technical advice to support Welsh Government decision makers during emergencies.

The TAC summary of advice dated 23 December 2020 stated that:

A new variant of coronavirus has been identified in the UK, including Wales. Evidence suggests the new variant is easier to transmit ...

A further TAC summary of advice dated 22 January 2021 stated that:

As at 20 January, VOC 202012/01 (VOC1, identified in Kent) continues to increase in all parts of Wales, forming around 70% of recent cases. Six genomically probable or confirmed cases of VOC2020/12/01 have been reported in Wales (the variant linked to South Africa). No cases of the variants linked to Brazil have yet been identified in Wales.

These TAC summaries contained little information regarding schools. The summary dated 23 December 2020 merely stated that:

High numbers of incidents continue to be reported, mainly in residential care homes and school settings.

The summary dated 22 January 2021 stated that:

Most school pupils are currently being taught online, with some face-to-face learning for vulnerable children and children of critical workers. Schools surveillance information is available on the Public Health Wales dashboard.

On 5 February 2021 the Government’s Technical Advisory Group (“TAG”) published its most recent information, “Consideration for changing the operation of schools to

allow more face-to-face learning". In the section headed "Key Messages", this report notes that:

The UK is at UK COVID-19 Alert Level 5 since 4th Jan 2021, indicating an ongoing material risk of healthcare services being overwhelmed. Any easements would be likely to increase that risk while the UK remains at that level.

The circumstances to enable easing of restrictions will require a combination of the following: lower community prevalence and case rates; lower test positivity rates; manageable hospital and ICU occupancy; R_t below 1; evidence of sustainability of a lower level for these indicators, or that rises in these indicators can be responded to swiftly by re-imposing restrictions...

VOC202012/01 ("the New UK Variant") is now the dominant variant in Wales, and there is still uncertainty around how much more transmissible this variant is but our understanding is improving.

This uncertainty means there is not yet the evidence to identify whether further opening schools for face-to-face learning for all students would lead to healthcare in Wales being overwhelmed at this time...

The public health management, behaviour and spread of new variants should be carefully considered prior to opening schools for face-to-face education

The report goes on to acknowledge that the test positivity rate in Wales over the most recent 7-day period was over 10% (and much higher in some areas of north Wales) and that the most recent ONS data indicated that infection rates in Wales may have levelled off (i.e. stopped falling).

The report notes that "*the risks are compounded by uncertainties around*" the New UK Variant. It indicates evidence to suggest the variant may be 56% more transmissible than the earlier variant and that "*there is a realistic possibility that infection with (the New UK Variant) is associated with an increased risk of death*". It also notes that a higher ratio of early cases of the New UK Variant were found among 0-19 year olds (which indicates that school settings contributed significantly to the spread of this new variant).

The report goes on to state that:

Key measures such as low levels of prevalence, an R_t number below 1, a lower test positivity rate, and lower levels of hospital occupancy and ICU occupancy would allow a return to more face-to-face learning in schools and potentially other easements. However, the current level of uncertainty, particularly over the transmissibility of the new variant, means that a precise level for these measures which would allow such relaxations cannot be reliably identified at present.

The report goes on to present statistics regarding the cumulative incidence of COVID-19 among staff and pupils in schools in Wales. The report suggests that for staff in primary and special schools, rates of COVID-19 have been higher than those in the general working age population to a "*statistically significant degree*". While suggesting that the rates of COVID-19 deaths for those "*working in teaching and educational locations*" is lower than in the general population, the report notes that a "*reliable rate*" could only be calculated for secondary teaching professionals. As to

that rate, it was found that male secondary educational professionals had a higher death rate, to a statistically significant degree, than those in other professional occupations.

There is nothing in the report that indicates TAG supports a return of pupils to face-to-face education. Rather, TAG appears to be saying that when a return occurs, it needs to be “*partial and phased*”.

By implication the Government also relies on the advice of the UK Government’s Scientific Advisory Group for Emergencies (‘SAGE’) as well as TAC/TAG when it takes decisions regarding the response to COVID-19. In particular, the government website states that TAC provides:

... regular weekly updates to senior Welsh Government officials about emerging SAGE outputs, Welsh modelling forecasts and up-to-date situation reports.

SAGE minutes published on 22 December 2020 state that:

It is highly unlikely that measures with stringency and adherence in line with the measures in England in November (i.e. with schools open) would be sufficient to maintain R below 1 in the presence of the new variant. R would be lower with schools closed, with closure of secondary schools likely to have a greater effect than closure of primary schools. It remains difficult to distinguish where transmission between children takes place, and it is important to consider contacts made outside of schools.

It is not known whether measures with similar stringency and adherence as Spring, with both primary and secondary schools closed, would be sufficient to bring R below 1 in the presence of the new variant. The introduction of Tier 4 measures in England combined with the school holidays will be informative of the strength of measures required to control the new variant but analysis of this will not be possible until mid-January.

The latest SAGE minutes are those dated 14 January 2021 which state:

The relaxation of non-pharmaceutical interventions (NPIs) could lead to a further epidemic wave if it is not done cautiously. ...

ACTION: SPI-M and Task and Finish group on Children to consider epidemiological impact of school reopening ...

The variant B.1.1.7 appears to have increased transmissibility compared to other variants and has grown quickly to become the dominant variant in much of the UK.

It appears to us that the published information:

- a. Contains no solid scientific evidence regarding whether the impact of the New UK Variant can be managed if schools are re-opened. In fact, the latest TAG report suggests that the new variant is much more transmissible, may cause more serious illness, and disproportionately affected those in the youngest age groups (i.e. those who attend school) in its earlier stages. The report more generally suggests that the “*current level of uncertainty*” regarding the New UK Variant means it is not yet possible to know what the effect of re-

opening schools will be (or even to know if such a step could result in the health system in Wales being overwhelmed).

- b. In particular, there is nothing that outlines the risks to pupils and teachers of maintaining in-person tuition. The most specific data regarding staff at primary schools, as set out in the TAG report, appears to suggest that they were already significantly more likely to contract COVID-19 compared with the general population *before* the full emergence of the New UK Variant.
- c. The evidence that exists suggests that it will be difficult to prevent infection rates increasing if schools re-open.
- d. Consistent with that infection rates in Welsh schools peaked in December 2020. The Public Health Wales dashboard indicates that COVID rates in schools in all areas of Wales gradually increased throughout November and December 2020, reaching a peak around 12-13 December; notably, secondary schools in Wales were open for the last time on 11 December 2020 (with primary schools across Wales closing within a week of that date). Public Health Wales data also suggests that the weeks beginning 7 December 2020 (when all schools remained open) and 14 December 2020 (when some primary and special schools remained open) were two of the weeks with the highest numbers of new cases since the beginning of the pandemic in Wales. The numbers of cases decreased substantially week-on-week in January 2021 (when schools were closed).
- e. All of these matters explain why SAGE appears to have required further work to be undertaken on the risks associated with schools reopening for face-to-face education.

Announcement 5th February 2021

In her announcement on 5th February, communicated at a press conference and supplemented by way of a “*letter to headteachers*”, the Education Minister notes that the decision to re-open schools beginning on 22 February has been taken in light of lower community transmission rates now as compared with January. While relying on the TAG report of today’s date (discussed above), the Education Minister’s statements do not engage with the suggestions in that report that the situation is currently too uncertain to allow face-to-face learning to resume, nor with the concerning statistical and other evidence identified in that report (as set out above). The letter also appears to misunderstand the TAG report. As already noted, it appears that a conclusion was reached that the TAG report positively supports a return. That is not correct.

The Education Minister’s letter also cites the advice of the Chief Medical Officer, also published today. Dr Atherton’s brief advice does not identify or describe any further scientific evidence or analyse the level of risk facing teachers and pupils in any detail. He suggests that “*any headroom should be dedicated to a phased return of primary school children*”, and that schools “*have been successful in providing safe environments for children and teachers*”, but these statements (a) beg the question of whether there *is* the necessary headroom to allow safe re-opening of schools (according to the TAG report, it is not yet possible to say) and (b) do not engage with

whether the different qualities of the New UK Variant mean that mitigations used to date may not be effective to prevent transmission in schools.

The issue

The assessment of the risks associated with reopening schools and how to manage them is not simply a matter for the Welsh Government.

In particular, headteachers are subject to a range of legal obligations that require them to assess risk. For example:

- a. Under section 28 of the Children Act 2004 and/or section 175 of the Education Act 2002 they are required to have regard to the need to safeguard and promote the welfare of children. They will also be subject to both common law and contractual duties that require them to safeguard children.
- b. Many headteachers will be subject to obligations since in practice they act (on behalf of local authorities and of governing bodies) as employers of teachers and other school staff. That imposes duties on them to safeguard employees' safety. It should be remembered that the duties imposed on employers under the Health and Safety at Work etc Act 1974 ('the 1974 Act'), related secondary legislation (such as the Management of Health and Safety at Work Regulations 1999 ("MHSWR") and at common law extend beyond a duty to keep employees and others safe. Employers are required to provide information to employees needed to keep those employees safe (section 2(2)(c) of the 1974 Act / MHSWR, reg 10). They are also required to carry out and review risk assessments (MHSWR, regs 3(1)-(3)) and consult with employees regarding measures to safeguard employees (section 2(6)).
- c. Many or all headteachers will be public authorities for the purposes of Human Rights Act 1998. That means that they are subject to a duty under article 2 of the European Convention on Human Rights ('article 2') to take reasonable steps to prevent a real and immediate risk of death. A real risk is one that is more than remote and fanciful (*Rabone and another v Pennine Care NHS Trust* [2012] 2 AC 72 at [38]) and an immediate one is one that is present and continuing (*Rabone* at [39]). Plainly COVID 19 gives rise to a real and immediate risk. The large number of deaths and the scale of the public response required demonstrates that that must be true.

These legal obligations make it clear that headteachers must be in possession of sufficient information to ensure that:

- a. They are running their school in a manner that safeguards all attending the school and can effectively assess the risks posed to staff.
- b. They can provide their staff with the information they need to safeguard themselves.
- c. They can consult their staff to develop further improvements in the safe operation of their school.

It should also be noted that teachers may be legally entitled to refuse to return to work. Section 44(1)(d) of the Employment Rights Act 1996 ('section 44(1)(d)') provides that employees enjoy a right to withdraw to a place of safety. Headteachers are of course also employees and are equally protected by the rights under section 44(1)(d), the Convention and under the health and safety legislation identified above.

In the most recent TAG report, as set out above, the Government's own scientific advisers indicate extreme uncertainty about the viability of opening schools given the existence of the New UK Variant (in the TAG report). They also point to concerning statistics regarding the disproportionate exposure of primary school staff to COVID-19. In these circumstances, and in light of the legal obligations they owe to staff and to pupils, headteachers find themselves in an invidious position.

It is imperative that headteachers have clarity as to the Government's view of their rights and responsibilities. As a result, we invite you to confirm that:

- a. Headteachers (and/or governing bodies in appropriate cases) retain a power not to open their schools in accordance with today's announcement if they conclude that risks to health and safety cannot safely be managed.
- b. Today's announcement is without prejudice of the potential right of any school employee not to attend their workplace in reliance on section 44(1)(d).

For the avoidance of doubt, our position is that it would be unlawful for the Government to require schools to re-open in line with today's announcement unless the Government publicly acknowledges that headteachers / governing bodies retain a legal power not to open their school if they determine that this is necessary in light of the legal obligations identified above. The Government has no power at present to require schools to open. Further, a hard requirement imposed on all headteachers to open schools would be unlawful on the grounds that it would:

- a. Violate the article 2 rights of headteachers and other school staff (having regard to the obvious risks associated with attending educational workplaces and the lack of evidence that these risks can be effectively managed notwithstanding the extra transmissibility of the New UK Variant); and/or
- b. Constitute a policy giving rise to an unacceptable risk of illegality, in that schools will be at an unavoidable and significant risk of violating the above-mentioned legal obligations vis-à-vis members of staff as well as pupils: see e.g. the decision of the Court of Appeal in *ZK v Redbridge LBC* [2020] EWCA Civ 1597 at [62]-[63]; and/or
- c. be unreasonable and irrational for the reasons given above.

If you dispute the propositions we identify in the two paragraphs above and are of the opinion that headteachers are under a legal obligation to open their schools regardless of their judgment as to the health and safety risks this involves, we ask that you fully particularise (i) the basis on which it is said that headteachers would be acting unlawfully if they were to refuse to open schools and (ii) how the Government contends that it is possible to comply with the legal obligations identified in this letter in the absence of any power to keep schools shut.

Details of the action that the defendant is expected to take

As set out above we seek confirmation that the Defendant accepts headteachers and governing bodies retain the power not to open schools if they consider this necessary; or alternatively confirmation that in view of the lack of supporting scientific evidence, schools will not reopen.

Details of any information sought

Please disclose any documentation which is not in the public domain and bears on the matters raised in this letter, for example, correspondence between Government officials and scientific advisers bearing on the question of the risks associated with school re-opening at this time.

We seek an explanation

Address for reply and service of court documents

As our offices are closed please send any communications to:
simon.thomas@naht.org.uk

Proposed reply date

In light of the urgency of this matter we seek a response by 5pm on 11th February 2021. Failing a satisfactory response, we reserve the right to apply for judicial review. We have set the short time for a response because of the obvious urgency of our complaints in light of the proposed reopening on 22 February. In particular, we need to allow time for litigation.

Yours faithfully,

Personal Data

Simon Thomas
NAHT – Head of Legal