

Coronavirus
Legal update and guidance for schools

1. Our most recent update on 23 December 2020 (available [here](#)) looked at what was *then* the government's eleventh-hour guidance regarding the phased return to schools in January 2021 and the programme of mass-testing that was to be offered to secondary schools from the start of the next term. Well, we got to one minute before midnight, and things changed again...
2. Whilst our 23 December note will remain relevant on the issues of mass-testing for *when* schools do return (assuming there isn't a u-turn on that programme), this note - aimed primarily at charitable independent schools - focuses solely on **the issue of fees for the current spring term** now that the Government has announced the second closure of schools in England (except for vulnerable children and children of key workers) until at least the February half-term.
3. Driven primarily by the experience last year when schools were closed for the summer term and the anticipation, therefore, of some degree of parental expectation, many independent schools will now be giving careful consideration to the fee arrangements for this term. For most schools term will have started, fee invoices will have already been issued, and indeed they will have fallen due for payment on the first day of the term.

This note is designed to be up-to-date as at 6 January 2021¹.

Introduction

4. **The first thing to remind schools of - and be absolutely clear about - is that there is no one right answer or approach.** What to do about the fees this term is, ultimately, is a decision for each school in light of their own circumstances² and, whilst there is some flexibility to determine what to do from a legal perspective, it is undoubtedly a decision that involves schools balancing competing priorities, interests and sensitivities; all under the general requirement for decisions to be made in the best interests of the charity. Some schools will be lucky enough to have greater flexibility to determine what to do, and others may find their decisions are more limited by the commercial reality.
5. With the timing of this latest closure coming literally on the eve of the start of term (or in some cases, after it had started) with fee invoices already issued and due for payment, there are, it seems to us, **three options for schools**:
 - 5.1.1 maintain the full charge for this term's fees;
 - 5.1.2 rebate or refund a portion of this term's fees; and
 - 5.1.3 discount next term's fees.

In our view, schools have flexibility from a legal perspective to decide between these options, and whilst charitable schools need to be mindful of the restrictions on goodwill or

¹ And is published ahead of any further DfE guidance being released relating to this latest closure of schools, although it is unlikely that anything in that guidance will affect the contents of this note.

² Indeed, sharing information between schools and sector associations (particularly commercially sensitive information) to try and adopt a more common or aligned approach is likely to raise **competition law** compliance issues, and could engage the rules against collusion, anti-competitive behaviour, etc. Schools should be very mindful of this risk.

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ex gratia payments, which will be relevant where schools are looking to reduce fees which have already been invoiced, these rules have not proven to be (nor should they prove) fatal to schools having this flexibility.

Maintaining the full charge

6. One option for schools is to maintain that the fees for this term remain due and owing in full. The ISBA Model Parent Contract includes an express right for the school to provide education remotely when the school site is closed, with no express corresponding contractual right to have the fees adjusted - ie, it is part of the parental expectation that the school has this ability, and that this is acknowledged as part of maintaining their child on the school's roll. It can be argued that parents starting this academic year knew about the possibility of further Covid-related disruption and so ought reasonably to have viewed a future transition to remote learning as likely - it was not completely out of the blue as it was last year. Schools will also need to consider whether any decision to 'freeze' fees this year amounts to a (de facto) discount which adequately accounts for this subsequent transition to remote education.
7. Regardless that, for many schools, this approach will be contrary to what parents may feel was a precedent that was set when schools were forced to close last time around, it helps to be mindful that it may also be subject to challenge under the Consumer Rights Act 2015.
8. Under the Act, a consumer who has received services from a trader that do not conform to the contract (and arguably there are sufficient differences between the on-site provision and what can be achieved remotely that would make this out) may have the right to a "*price reduction*" by an "*appropriate amount*". In more simple terms, consumer law principles say that schools cannot charge parents for services not provided. This is most obviously evidenced by the element of the fees that are attributed to the boarding provision in boarding schools: as boarding is no longer being provided, it ought not be charged for in full. How far this principle extends beyond such a divisible component as boarding is debatable, but undoubtedly there are elements of the on-site provision that parents contract with the school to provide that simply cannot be replicated in quite the same way remotely. Again, whether these differences mean that consumer law prohibits schools from charging full fees is far from clear, and so far as we are aware this has not yet been tested in the Courts. We are certainly aware though of some schools who maintained full fees even during the summer term closure and some who we anticipate will seek to maintain the full charge for this term.

A rebate or refund of part of this term's fees

9. Notwithstanding that it may be premature to consider refunding part of this term's fees (acknowledging that we do not yet know for how long schools will be closed this term), it is always open to a school to 'contractualise' a fee reduction, or, in other words, schools can vary the amount to be paid to them under the parent contract. If the price of a service is reduced by the 'trader' after the consumer has received their invoice then, if the consumer pays the invoice, it follows they are due a rebate or refund on the difference between the original price and the reduced price.
10. In advance of the summer term last year, this was easy: schools simply gave notice of the reduced fee *before* the first day of term (ie, the due date for payment), which had the effect of parents then only being contractually obliged to pay the reduced amount when the due date for payment came around.

11. However, with the due date for payment of this term's fees already upon us (if not already passed), giving advance notice of the fee reduction is not an option. The way then for a school to 'contractualise' the fee reduction is by relying on the parents' arguable right to a price reduction (see paragraph 8 above) to conclude that, as a matter of consumer law, it has no contractual right to charge what might be described as "full fees" but that it only has the contractual right to charge a reasonable (lower) price for the remote education provision. Having reached this conclusion, schools can give parents notice of the appropriate reduction and, correspondingly, offer to refund the relevant portion of payments already received (or waive that same portion if payment has not yet been made). Schools will need to take care with the wording of their communication with parents for two reasons. First, because of the inevitable tension between wanting to extol the virtues of the remote provision whilst recognising that it is sufficiently different to the on-site provision that it potentially justifies a reduction in the fees. And second, to avoid any suggestion that the rebate or refund is being made as a 'goodwill' gesture.
12. Indeed, the benefit of 'contractualising' the fee reduction is that it helps schools navigate the restrictions on making *ex gratia* (or goodwill) payments as well as ensuring that the payment (or waiver) for the benefit of parents is within its powers (ie, in furtherance of the school's charitable objects). Schools need to be mindful of these restrictions, which are relevant where schools are looking to reduce fees which have already been invoiced³, but they are not proving fatal to the flexibility that schools have to decide between the three options set out in paragraph 5 above.

A discount on next term's fees

13. The difficulty many schools will face in seeking to reduce this term's fees and apply a refund or rebate will be determining where to pitch the level of the reduction in circumstances where the full extent of the closure of schools this term is uncertain - we know it will be until the half-term point at least, but beyond that is unknown. Schools will also not yet know the extent of any savings they can realise or which additional costs will be incurred this term. (That said, there is nothing preventing schools from determining a percentage reduction that would apply if the school were to be closed for the full term, possibly using the previous summer term as the benchmark, and using that to offer a *pro rata* reduction if it turns out that on-site provision resumes before the end of this term. Obviously this implies the refund or rebate being made later in the term once it is clear whether on-site provision this term will resume or not.)
14. So a third option is to maintain the fees for the spring term at the full level, but 'contractualise' a reduction of the *next* term's fees by saying now that a reduction may be applied and reflected in the invoice issued ahead of the summer term. This is one of the (few) advantages of the closure being in this middle term of three across the academic year, as compared to last time when it was the final term of the year (and therefore not going to work for those due to leave at the end of that year). This option gives schools some time to assess the implications of this latest lockdown and to defer any decision on potential discounts or refunds until next term.

³ An *ex gratia* payment is a payment (other than a charitable payment) that a charity is not legally obliged to make, but where there is a strong **moral** imperative to make it. This includes waiving an entitlement to a payment. Charities can make *ex gratia* payments but only with an Order from the Charity Commission. Otherwise, the payments would be made in breach of trust. The Charity Commission has published guidance on *Reducing or returning contractual fees in return for a modified fees* (available [here](#)) as part of its Covid guidance for the charity sector.

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15. The decision for schools under this option is whether they commit to a certain level of reduction now on a similar *pro rata* percentage basis referred to in paragraph 13, or whether they 'contractualise' the principle but say that the amount of any reduction will be kept under review across the term with reference to, for example, any savings that may be made across the term based on the eventual period of closure, and that a decision on the corresponding reduction, if any, will be notified ahead of the following term.

Communication

16. Whatever option is considered, one point cannot be stressed (or repeated) enough: **that the communications with parents on fees are extremely important**. That is in terms their tone, honesty, clarity of message and, above-all, empathy and sensitivity. Schools have lessons - good and bad - to draw on this time around, but it remains the case that maintaining good communications will be key to keeping parents informed, engaged and on-side.
17. And schools should be reminded of their communications on fees during the last closure, because if they made any form of promise as to what would happen if schools were closed again, as they now are, that may have an impact on the approach this time around.

Other fee-related issues

18. Whichever option a school decides to adopt, consideration will need to be given to a number of important associated issues, including:
- 18.1 the **wording of the school's parent contract** (terms and conditions), including the extent to which it gives the school the ability to transition to remote learning, whether it addresses refunds in such circumstances, and the engagement (or otherwise) of the force majeure provisions. Some force majeure provisions require schools to follow set procedures if they wish to rely on them; the ISBA Model Parent Contract has been updated to clarify that the transition to remote learning is one of the ways the school reduces the impact of the force majeure event so that the parents do not have a right to terminate;
- 18.2 **what parents have previously been told about the school's approach**. For example, some schools will have already told parents the approach they would look to take in the event of a further national lockdown; other schools will have told parents that any discount applied to the summer term's fees last year was a 'one-off' and would not be repeated;
- 18.3 **financial support and hardship funds**. Schools will normally want to signpost the availability of financial support and hardship funds for parents in particular financial difficulty. This may also be relevant to justifying the school's decision on fees, for example where the school decides to prioritise financial support for those in particular need over a (higher) discount for all parents;
- 18.4 handling **complaints about fees**, which can sit slightly awkwardly alongside the school's existing complaint policy (which will not have been drafted with such complaints in mind) and also where the complaint will usually involve a challenge to the decision of the governors;

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- 18.5 **the likely unavailability of insurance for any losses**, given the approach taken by insurers last year, although schools may wish to check this with their brokers or insurers, as the exact position will depend on the wording of the relevant policy.

If you require further information about anything covered in this briefing, please contact [Paul Jones](#) or [Jeremy Isaacson](#) or your usual contact at the firm on +44 (0)20 3375 7000.

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