

**BRIEFING NOTE FOR SCHOOLS AND COLLEGES ON WHETHER LOCAL
AUTHORITIES HAVE A RIGHT TO WITHHOLD PAYMENTS TO SPECIAL
SCHOOLS AND COLLEGES IF DIRECTED TO CLOSE BY GOVERNMENT
BECAUSE OF COVID-19 PURSUANT TO A STATUTORY REQUIREMENT**

Background

1. I have been asked to advise NASS and Natspec on whether schools and colleges who are directed to close (i.e. are obliged in law to close) because of Covid-19 are entitled to be paid for the contracted education services even though they cannot delivery any on-site education services to children/young people pursuant to their contract with the local authority and even though the local authority does not terminate the contract as a whole or the individual placement agreement.
2. I have been asked to consider the terms of the National Schools and Colleges Contract, version 2.5, which is the most recent version with minor revisions in 2013.
3. This advice is based on a review of a blank version of this contract as it was drafted. I have not looked at any individual contracts.

What does the contract say?

General

4. The answer to the questions I have been asked depends upon the terms of the contract entered into between the school/college and the local authority. The answer will therefore depend on the terms of the general contract as it is applied to each individual purchased service.

5. First question for the school/college. **Did the parties enter into a contract under version 2.5 of the National Contract?**
6. If the answer is yes, were there any changes (variations or modifications) agreed and if so do they relate to the payment provisions? If the answer to this is yes, this advice may not be relevant and an individual school or college will need to take its own advice.

Clause 2 Period of Contract

7. This says that the Provider agrees to provide a Service as specified in the Contract in respect of Learners (i.e. *‘any Student whose educational, health and care needs are the responsibility of the Authority..’*).
8. I consider that the structure of the contract is intended to be a general contract for all Learners and not for an individual placement.
9. Clause 2 provides that the Contract (the whole Contract) can be terminated under clause 13 (fault termination), which I consider in more detail below.
10. Clause 14 provides that an individual placement can be terminated in certain circumstances. It seems to be drafted on two separate bases, fault termination in clause 14.1 and specific termination without notice in 14.2. I can only presume that individual length and termination of placements are dealt with elsewhere e.g. in the IPA or in the EHCP.
11. I mention this clause and clause 14 in this context because they are the operative clauses. I do not consider they are likely to be relevant to the issue under consideration, whether without terminating an individual placement a local authority can refuse to pay because the education has been partly or wholly ceased because of Covid-19.

Clause 3 Financial Arrangements

12. In my opinion, the obligation to pay fees for a specific Learner continues whether or not the school is open and continues:

11.1 until the contractual requirement to deliver a Service specifically for that Learner or in general is terminated; or

11.2 unless there is an applicable express or implied contractual exclusion from this obligation within the contract between the local authority and provider;

for the reasons set out below.

13. The Contract sets out the following:

3.2.1 The Authority will specify the payment arrangements which apply. Unless otherwise stated, clause 3.2.2 will apply.

3.2.2 The Provider shall be entitled to claim in respect of a Learner payment of those Fees specified in Schedule 2 (Individual Placement Agreement) in respect of that Learner from the date of his or her admission or the first day of each subsequent academic term or payment period as agreed in advance by the Provider and the Authority.

14. What are the exclusions under the contract and do any of them apply to a formal statutory direction to close the school? I have set each of these out very briefly as I anticipate that the local authority may well consider these to justify any decision that it does not want to pay. There are some potentially relevant situations/exclusions where the local authority may not be obliged to pay. These are set out below.

15. Clause 3.2.6 sets out the contractual provisions when the ‘*Authority will not be entitled to meet the Fees...*’. They are as follows:

3.2.6.1 Permanent exclusion.

3.2.6.2 Fixed term period exclusion exceeding 15 days where the school/College is unable to provide suitable alternative education for the period of the exclusion. Fees only payable for 15 days and once the Learner returns to school/College.

3.2.6.3 Learner directed not to attend on safeguarding advice and where the school/College is unable to provide suitable alternative education. Fees are only payable for 15 days and once the Learner returns to school/College and the cost of home tuition etc. will be deducted.

3.2.6.4 Safeguarding issues relating to another learner with an impact on the Learner, Learner does not attend on safeguarding advice and where the school/College is unable to provide suitable alternative education. Fees only payable for 15 days and once the Learner returns to school/College and cost of home tuition etc. will be deducted.

3.2.6.5 Absence of Learner because of illness and school/College unable to continue to provide suitable/appropriate education. Fees only payable for 15 days and cost of home tuition etc. will be deducted after this up to equivalent of daily rate for Learner.

3.2.6.6 Death of Learner, IPA terminated 7 Days later. Additional costs of coroner, inquest etc. payable plus any additional staffing which Provider contracted to pay until the end of the relevant notice period.

3.2.6.7 Serious breach of the Agreement, liability to pay, ends on the date of letter notifying school/College of termination.

3.2.6.8 Placement of less than a week, liability is one additional day.

3.2.6.9 Placement of more than a week and less than an academic half term, liability one additional week.

3.2.6.10 Placement of more than a full academic half term, less than a full academic term, liability two additional weeks.

16. A statutory direction does not apply to any of the above. If a Learner dies of Covid-19 (or anything else), then the termination provisions may apply.

Clauses 13, Breach of Contract and Termination and 14, Termination of a Particular Placement

17. These deal with breach termination. Force majeure is not breach termination, so I consider the breach provisions of these clauses are irrelevant to the questions I am asked to consider.

Clause 15 Force Majeure

18. A direction is expressly identified as force majeure.

19. This says '*Neither party will be liable for delay or failure to perform the obligations of the Contract if the delay or failure result from circumstances beyond their reasonable control including but not limited to..... direction...In the event of delay or failure arising from any such cause the Authority will have the right to make alternative arrangements for the provision of the Service and both parties will have the **right to seek to renegotiate the Fee and the terms of the Contract.***' (My bold).

20. If there is a direction closing a school/College this is defined as an event of force majeure. It is not a contractual failure so the local authority is not entitled to allege failure because of this. The clause is clear.
21. The right to renegotiate does not imply any more than that, there is no obligation to agree pursuant to this right as far as I can see. I accept that the Authority may seek to raise a dispute and mediate this although I cannot see that there is any obligation to agree to this.

The financial/moral argument - the local authorities decision-making process

Other arguments

22. Are there any other arguments if a local authority refuses to pay? If an authority refuses to pay, I consider that the school can raise further issues as set out below.
23. Grant funding for SEND children is provided through the high needs block and this money is ring-fenced for a local authority to fulfil its statutory duties towards such children. The local authority cannot use this money for other spending. Funding of these services ought to be out of this block. This block sum is paid in any event, so the local authorities are not suffering any loss because of the closures. Any argument that the block grant is insufficient ought to be irrelevant, it is an argument between local and central government. I suggest that if a local authority refuses to pay the school/college should point this out to the local authority and ask to see their legal justification for refusing to pay together with a FOIA request for the supporting information on this.
24. In addition, the above ought to be relevant to a dispute resolution process.
25. As a local authority is obliged to take proper decisions, taking into account all relevant and proper considerations, disregarding all irrelevant considerations there is a

possible argument that a decision to refuse to pay is improper and open to a judicial review.

26. I considered whether there is an argument that a local authority would be in breach of its statutory duties towards children with SEND under the Children & Families Act and/or other legislation if it refuses to pay the schools/colleges. Without any information to justify this, I do not consider this is an argument worth making at this stage. However, it may be worth considering if there is some information showing inadequate reasons for taking a decision to refuse to pay and provided the relationship between this and a failure to secure proper delivery of statutory duties. It would not be a simple argument to make, though.

Conclusion and next steps

27. I consider that for contracts entered into under the standard National Contract, version 2.5 there is no justification for a local authority to refuse to pay schools/colleges if there is a statutory direction requiring them to close.
28. In my view, the DfE ought to be invited to inform local authorities as formal statutory guidance to local authorities, preferably as part of any direction, that they should fulfil their contractual obligations to independent schools/colleges and continue paying or they are in breach of their grant.

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Note: this advice is provided for NASS and Natspec. It is based on considering a blank Version 2.5 of the standard form of National Schools and Colleges Contract and not any individual contract. It is not advice to any individual school or college and accept no liability to any individual school of college. I do not know the details of any individual

contracts or agreements between a school and college and a local authority. Schools and colleges may use this advice as the basis for discussions with individual local authorities, at their own risk. The precise terms on which they have contracted with a local authority may be different to the standard National Contract. It will depend on the terms of any individual contract/agreement entered into. Schools and colleges ought to take their own legal advice if they consider this is necessary.

Further, I have not been asked to nor have I considered whether any contracts which are entered into are legally sound and/or can be challenged or are arguably illegal for example because of breaches of the public contracts regulations 2015 or otherwise.