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To Directors of Education/Children's Services, Chief Executives of Multi-Academy Trusts, Sixth-form Colleges and Independent Schools

Dear Colleagues

Covid-19 – Reopening of Schools on 8 March 2021

I am writing to you on behalf of members of the NASUWT (The Teachers' Union) in relation to the announcement by the Prime Minister on 22 February 2021 regarding the reopening of schools in England on 8 March 2021. The Union notes that the Government has published its guidance¹ explaining the actions that schools/colleges must take to minimise the risk of transmission of coronavirus in their school.

The Union appreciates the time and effort, which has been expended to produce the Guidance on reopening and the good intentions which lie behind it. The NASUWT has considered carefully the DfE guidance issued which all employers are required to follow. The purpose of my letter is to remind you that the health and safety legislation underpins the government guidance and employer's health and safety obligations are non-delegable. In other words, it is not sufficient for an employer simply to follow government guidance and assume it has met its health and safety obligations.

The NASUWT is also sure that you will share our view that, when dealing with a life-and-death situation as a result of the global pandemic, it is essential that the guidance on which employers base their decisions is robust and accurate to enable the right decisions to be reached. The NASUWT is clear that no teacher should be expected to go into a school that is not safe, and until it can be demonstrated that it is safe to do so, we will be continuing to support and advise members on that basis.

¹ Schools Coronavirus (COVID-19) operational guidance

The NASUWT looks forward to working with you to ensure that the health, safety and welfare of staff and pupils are protected in these unprecedented circumstances.

The NASUWT recognises that schools and employers have been placed in a situation where the wrong decision will result in people becoming seriously ill and dying, and will therefore appreciate that there can be no compromise on health and safety. If this means that where schools/colleges are unable to open fully and safely by 8 March 2021 because they are unable to make the necessary arrangements to safeguard the safety of staff and pupils, then that position must be accepted.

The NASUWT has a legal obligation to its members to act to protect their safety and wellbeing, including their contractual, common law and statutory rights. More importantly, the Union recognises its members' duties toward the pupils in their care under the Children's Act 1989. Section 3 of the Act provides that a person who has care of a child may do what is reasonable in all the circumstances of the case for the '*purpose of safeguarding or promoting the child's welfare.*'

The risks posed to teachers, including NASUWT members, by the resumption of classroom teaching are greater than those faced by most of the rest of the public. In the case of early years teaching this is because of the difficulties of ensuring effective social distancing and with all younger pupils, such a risk is greater because of the likelihood of non-compliant behaviour outside of the classroom.

In rare, but realistic instances, a teacher could die and/or contract debilitating long Covid-19. This is not an exaggeration or hyperbole.

The Legal basis

Although the Government has it within its power to require schools to be reopened under Schedule 17 of the Coronavirus Act 2020, as a public authority (including local authorities) it must exercise its powers consistently with Article 2 (Right to Life) and Article 8 (Right to Respect for Private and Family Life) of the European Convention on Human Rights (ECHR). The NASUWT's position on its members' Convention Rights is clear and unambiguous, namely:

1. If any of its members died from contracting Covid-19 having been required to return to school pre-vaccination, his or her **Article 2** rights would be infringed. This is particularly the case since the Government has it within its power to provide early vaccination to teachers, including NASUWT members.

2. Having its members placed at risk of catching and transmitting a serious disease to their families/support bubble is a material infringement of their right to family and private life.

In addition, and as indicated above, an important aspect for you as Employers is that your obligations under the Health and Safety legislation are non-delegable. I refer you to the following health and safety legislation for ease of reference:

1. Section 2 of the Health and Safety at Work Act 1974.
2. The duties in the Management of Health and Safety at Work Regulations 1999 (the '1999 Regulations').
3. The duties in the Workplace (Health, Safety and Welfare) Regulations 1992.
4. The duties in the Personal Protective Equipment at Work Regulations 1992 to provide suitable personal protective equipment ("PPE"), if you cannot otherwise adequately control the risks to the health and safety of employees from the pandemic.
5. The duties in the Control of Substance Hazardous to Health Regulations 2002.
6. The duties in the Safety Representatives and Safety Committees Regulations 1977

Under these primary legislation and statutory instruments, it is for the employer to satisfy itself (and its liability insurer) that there is no unreasonable risk to the health and safety of staff, including NASUWT members, and it cannot be absolved from this duty, which is found in primary legislation by an order made, or action taken, under Schedule 17: *R v Secretary of State for Social Security, Ex p Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275, which was cited with approval and applied by the Supreme Court in *R (on the application of Unison (Appellant) v Lord Chancellor (Respondent)* [2017] 3 WLR 409 at paragraph 103.

Therefore, primary legislation merely sets out a statutory power, which cannot abrogate the duty placed on Employers by section 2 of the Health and Safety at Work Act. It is noteworthy that a breach of the general duties under this provision is a criminal offence.

The NASUWT's expectation is that all Employers must ensure that all schools and settings have completed their pre-opening health and safety checks, including consulting on and publishing an updated risk assessment together with an assessment of the equality impact of the measures to be implemented

In that context, you must ensure that:

1. Full compliance with your health and safety obligations including, but not limited to, an **up to date** and **satisfactory** risk assessments for all employees. As indicated in the Government guidance, treat them as 'living documents'. The risk assessment must address individual staff member's circumstance, particularly those with protected characteristics.
2. Members of staff, including NASUWT members, are not required to attend work until you provide a safe place and safe system of work in compliance with your legal obligations and until such compliance has been evidenced to their satisfaction.
3. You will take all steps necessary to comply with your legal obligations (including equality impact assessment) and notify the NASUWT of the date by which this will be achieved;

Requested Action

The Union writes to you, not only to prompt you of your contractual, common law and statutory obligations (including our members' Convention rights, where applicable), but also to emphasise that the ultimate responsibility for decision on the safety and wellbeing of our members rest with you.

Given the importance and immediacy of these issues, we trust that this matter will be given your immediate attention and that you will reply as a matter of urgency to the point set out above. Should you fail to do so, all legal rights are expressly reserved, including that of NASUWT members. Therefore, it may be appropriate to share this correspondence with your liability insurers.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Patrick Roach', written in a cursive style.

Dr Patrick Roach
General Secretary