

Minimum service levels in education

CST response to the consultation – January 2024

Introduction

The Confederation of School Trusts (CST) is the national organisation and sector body for school trusts in England. This document sets out CST's response to the Department for Education (DfE) consultation on Minimum Service Levels for Education (hereafter 'MSLs' and 'regulations'), published on 28 November 2023 and closing on 30 January 2024.

CST represents more than 70% of all academy schools in England. This places us in a strong position to consider this issue from the viewpoint of the system's leaders and employers in self-governing organisations (hereafter 'trusts'). CST is completely apolitical. We work with political parties and politicians across the spectrum to advance education for public benefit. It is important to emphasise that our work is 'for public benefit'. We advocate on behalf of trusts and we strongly believe in a wider civic role for our trusts and a responsibility to act on the system itself to improve it.

While CST welcomes the opportunity to respond to this consultation, we have strong concerns about the consultation process and format, which we believe have inhibited a full and fair consideration of the issues.

More than 90% of our members have conveyed that they are concerned the proposed regulations will undermine Article 11 rights, particularly for special school and primary staff. They are also concerned that the regulations could have a severe and deleterious impact on good industrial relations and could put employers in direct conflict with their staff. Almost all of our members (99%) believe that the best way to minimise further disruption to children's education is to maintain good industrial relations and to seek to resolve any disputes in a timely manner. And 94% believe that the proposed regulations could further undermine recruitment and retention of teachers, leaders and support staff. These points are addressed in greater detail below.

Given our members' concerns, we wrote to the Secretary of State for Education on 4 December 2023, following the publication of the consultation, to raise the following questions with government:

- Is the Government satisfied that school staff, in particular in primary and special schools, will be able to exercise their Article 11 rights if the minimum service levels are imposed?
- On what basis does the Government conclude that restricting strike action in this way amounts to a proportionate interference with Article 11, both generally and specifically for those individuals identified in a work notice?
- What consideration did the Government give to the fact that voluntary arrangements through the pandemic have previously proved successful? We believe that less restrictive measures like those co-constructed with the sector during the Covid pandemic could or are likely to achieve the same aims.

We have not, to date, received a reply.

We have taken the decision to respond to the consultation in writing rather than using the consultation portal because the questions necessarily limit our ability to fully express our concerns. We also note that this short nine-week consultation commenced three weeks before the end of term and ran over the Christmas period.

The Impact Assessment – crucial to a full understanding of the DfE’s proposal – was not released until 20 December, the final day of term for many. The timing of this consultation process is in direct contravention of the DfE’s stated intention to reduce workload in schools. Finally, we note that the new regulations were proposed without any prior input from the group that is arguably most impacted – employers – and does not align with the spirit of working together in close partnership and in good faith to find practical and effective solutions to the significant challenges we face as a sector.

We believe the culture of engagement needs to change. We hold that relational trust has been much misunderstood and under-valued in our public services. The DfE must be able to act on behalf of children, parents, and the wider public, but it does not need to exercise ‘blunt’ regulation to achieve this. Our schools and their staff deserve to be treated with the respect they have earned through their professionalism and the selflessness with which they have approached their mission to educate our children.

If there is one abiding legacy from our experience during the pandemic, it is that in times of disruption, school staff will move heaven and earth to serve their children and ensure the safety and continued provision for the most vulnerable, as well as those in key assessment years. This cannot mean, however, that they forfeit their right strike for fair and equitable pay and working conditions when necessary. And in the context of a severe recruitment and retention crisis and already delicate industrial relations, we are deeply concerned about the potential impact of these regulations and the message that they send.

Our response is in three parts. First, we believe the regulations place trusts in an untenable position because they fail to meet the principle of proportionality, leaving trusts open to significant legal challenges. Second, we believe the regulations are fundamentally unworkable and impractical. Finally, and most importantly, we believe the regulations are ill-timed and counterproductive.

1. The proposed regulations are not proportionate

The proposed regulations implicate and curtail the human rights of school staff.¹ The principle of proportionality requires that in limiting these rights, public body decision-makers must choose the least restrictive option by taking into consideration the individuals’ circumstances and making a reasoned decision, including why they consider any restriction on human rights is justifiable. Where regulations are deemed disproportionate, they are open to the legal challenge. We strongly believe the regulations are disproportionate as proposed and that employers will be on the front line of potential legal challenges.

¹ [Minimum Service Levels for Education, Government Consultation](#) (28 November 2023) at p. 7.



The proposed regulations are not the least restrictive option

We believe the DfE has not chosen the least restrictive option and that far less restrictive means exist for achieving the intended aim. This includes the more effective use of the existing non-statutory guidance and a set of voluntary MSLs achieved through good faith negotiations.

The government's own analysis concluded that MSLs in education were unnecessary and inadvisable

The research briefing² accompanying the Strikes Bill made clear that MSLs were unnecessary in the education sector. This is due to the presence of important differentiating factors in the education sector (as compared to other public sectors) that mitigate the impacts of industrial action on wider society, such as statutory duties regarding the organisation, management, and control of a school, safeguarding and supervision of children both on and off site and health and safety duties. It also concluded that MSLs in education sector would be 'difficult and very burdensome to implement'. We will address that point below.

Effective use of the existing non-statutory guidance is a less restrictive means

We believe the government is using a 'sledgehammer to crack a nut'. The research briefing specifically cites the DfE's [Handling Strike Action in Schools](#) guidance as a less restrictive means of minimising the impact of strikes, thus negating the need for MSLs in the education sector.³ The guidance fulfils the intended aim of minimising the impact of strikes in all the ways that are envisioned in the regulations. It already expects leaders to take all reasonable steps to keep schools open for as many pupils as possible. It prioritises vulnerable children, the children of critical workers and those taking formal assessments. The important difference is that the guidance operates on good will, leaving it in the capable hands of school and trust leaders to use their professional judgement to decide how and when to take the necessary steps to keep their schools open.

We firmly disagree with the claim that the guidance has not been consistently followed by our members and that vulnerable cohorts are not being prioritised. Where practicable, our member trusts have continued to provide a high level of education to their children during strike action and made every effort to minimise disruption, especially for the most vulnerable. Where schools have closed, this represents the minority of cases where conditions may have been such that staff felt compelled to exercise their legal right to strike under the Human Rights Act.

Europe's MSLs are achieved through voluntary agreement, ensuring a less restrictive means

We believe a less restrictive and voluntary set of MSLs could be reached through further negotiations with unions and employers, conducted in good faith. In their responses to this consultation, unions have clearly indicated their willingness to work constructively with the government on this issue.

The implicit suggestion that these regulations merely bring us 'in line' with MSLs in France and Italy wholly misrepresents how MSLs are arrived at in those countries – through mutual voluntary agreement and collective bargaining – and glosses over the less restrictive nature of their MSLs.

² [Research Briefing, Strikes \(Minimum Service Levels\) Bill 2022-23](#) (13 January 2023) at pp. 32-33.

³ [Research Briefing, Strikes \(Minimum Service Levels\) Bill 2022-23](#) (13 January 2023) at pp. 32-33.



Italy's MSLs are set out in collective agreements that are reached through negotiation between the service provider and local trade unions⁴ and overseen by an independent statutory body to ensure agreements 'provide an appropriate balancing of the right to strike with the other constitutional rights'.⁵ Similarly, France's MSLs were achieved through an agreement negotiated with the trade unions.⁶ By contrast, these proposed regulations are not the result of such negotiation and individuals in England lack the protective feature of an independent statutory bodies overseeing these agreements.

Moreover, the details of MSLs in Europe only serve to underline how the regulations being proposed in England are disproportionate. The MSLs in France 'may not be equivalent to a normal level of service' and requires only 'on-site supervision'.⁷ By contrast, a key assumption in the DfE's Impact Assessment is that 'The quality of education provided to children and young people attending face-to-face education is broadly equivalent on a strike day to a non-strike day'.⁸ France has mitigated the impact of MSLs on employers by introducing strike percentages and compensation for cover staff.⁹

The Impact Assessment fails to fully account for negative impacts on employers and school leaders

The cost-benefit analysis contained in the Impact Assessment is flawed and incomplete and does not present a fair and accurate picture of the true costs to employers and school leaders.

The 'Health Impact Assessment', for example, fails to take into consideration the health and wellbeing impacts on school and trust leaders. According to the [Teacher Wellbeing Index 2023](#), wellbeing in the sector has declined significantly over the past year, and school and college leaders' wellbeing and mental health are a serious concern. Senior leaders are at particular risk, with 89% of them reporting feeling stressed, rising to 95% amongst headteachers. The DfE would be hard-pressed to suggest that the proposed regulations would not increase already unsustainable stress levels amongst school and trust leaders.

Similarly, the assessment makes no mention of the cost and workload associated with potential legal risks for employers in implementing the regulations (set out further below), nor those associated with the massive administrative workload built into the proposed MSLs. Trusts will be required to carry out risk assessments and consultations in every workplace for every strike scenario, within strict and limited time scales. The suggested rota system means re-assessing the school arrangements multiple times within a single dispute and issuing relevant work notices as a result. On top of existing requirements around employment rights, this is an enormous new burden on trust and school leaders.

⁴ [The right to strike in the public services](#) – Italy, European Public Service Union and European Trade Union Institute, 2021 at p. 8.

⁵ [Research Briefing, Strikes \(Minimum Service Levels\) Bill 2022-23](#) (13 January 2023) at p. 27.

⁶ [The right to strike in the public services](#) – France, European Public Service Union and European Trade Union Institute, 2021 at p. 10.

⁷ [Research Briefing, Strikes \(Minimum Service Levels\) Bill 2022-23](#) (13 January 2023) at p. 27.

⁸ [Minimum Service Levels for Education, Impact Assessment](#) at p. 4.

⁹ [Minimum Service Levels for Education, Government Consultation](#) (28 November 2023) at p. 11.



The proposed regulations fail to properly consider individuals' circumstances

The proposed regulations do not strike the right balance between minimising loss to children's education and honouring individuals' human rights. As proposed, the regulations are potentially illegal and discriminatory, creating significant legal liability for trusts as employers, with all the associated cost, workload and disruption that this entails. The cost of defending against these legal challenges comes at a time when schools are already experiencing extreme financial hardship.

The sheer number of individuals impacted by the proposed regulations must be taken into consideration in any proportionality analysis. By the government's own estimates, 2.3 million employees work in the pre-primary, primary, secondary or the higher education sectors:¹⁰

- 78,000 estimated to be working in pre-primary education
- 1 million estimated to be working in primary education
- 750,000 estimated to be working in secondary education, including further education
- 500,000 estimated to be working in higher education

This amplifies the weight of any impact arising from the proposed regulations.

The regulations unjustifiably interfere with the right to strike

There is a strong argument that the proposed regulations illegally undermine the right to strike under Article 11 of the European Convention on Human Rights and Human Rights Act 1998. MSLS as envisioned in the regulations would negate the intended effect of strike action, which is to create conditions that will encourage redress for fair and safe working conditions, benefits and levels of remuneration. Trusts will be on the front line of those legal challenges.

The DfE admits the regulations discriminate against females

The regulations potentially violate the prohibition of discrimination under Article 14. Females constitute 76% of teachers and the vast majority of support staff. The Equalities Impact Assessment (EIA) admits that 'female employees may be more likely to receive a work notice if MSLS are introduced.'¹¹ The EIA also admits that staff experiencing pregnancy and maternity 'could be more likely to receive a work notice' and the likelihood of discrimination claims on the grounds of pregnancy and maternity are increased.¹² It considers these both of these impacts justified given the overarching policy intentions. However, when the less restrictive means described above are taken into consideration, this justification no longer holds and employers potentially become legally liable for violating the Equality Act 2010.

The regulations discriminate against older FE teachers.

In the EIA, the DfE admits 'members of the FE workforce are disproportionately more likely to receive work notices because they teach exam year cohorts' and, as they are generally older, there

¹⁰ [Research Briefing, Strikes \(Minimum Service Levels\) Bill 2022-23](#) (13 January 2023) at p. 13.

¹¹ [Minimum service levels in education equalities impact assessment](#) at p. 7.

¹² [Minimum service levels in education equalities impact assessment](#) at p. 8.



may be a 'negative impact on the basis of age'.¹³ Once again, it considers this impact justified given the overarching policy intentions. However, when the less restrictive means described above are taken into consideration, this justification no longer holds and employers potentially become liable for violating the Equality Act 2010.

The regulations will potentially violate contracts of employment and employment law

The proposed regulations create a risk that staff will be issued with work notices requiring them to undertake work that is not contemplated under the terms of their contracts. Employers may have to issue a wider work notice requiring more people to work, to avoid slipping into the territory of potentially breaching the contracts of their staff by asking them to carry out work that is outside of their role. This puts the employer in the invidious position of either having a very wide workplace notice (further invalidating the right to strike) or requiring staff to carry out work outside of their role – potentially in breach of contract.

The 'discretion' afforded to trusts to issue work notices to deliver the MSL may sound like a nod to their professional judgement, but in truth it merely shifts the burden of legal responsibility to trusts. Trusts will become responsible for justifying and defending decisions made around issuing work notices, with staff and unions as well as parents.

2. The proposed regulations are unworkable and impractical

The government's own analysis concluded that MSLs in education were inadvisable

The research briefing¹⁴ accompanying the Strikes Bill made clear that MSLs were unworkable and inadvisable in the education sector, concluding, **'The large number of employers in the education sector would also likely make minimum service arrangements difficult and very burdensome to implement.'**

As of November 2023, there are 2,333 trusts (10,553 academy schools) and 153 local authorities employing school staff. Ensuring compliance across such diverse employers and settings will require monumental monitoring and enforcement mechanisms.¹⁵ These employers vary greatly in size and operation. The one-size-fits-all approach contemplated by the regulations is not practical in all instances and lacks the flexibility required to accommodate varying circumstances. The regulations involve numerous specific requirements and the complexity of the regulations themselves will impact implementation. The consultation fails to set out how these regulations will be enforced and the consequences of non-compliance.

Many specific aspects of the proposed regulations are simply unworkable and impractical:

- **Small and standalone trusts** – For smaller trusts and standalone academies – that still represent the majority of trusts in the country – tracking and assuring compliance will be a greater burden and they will find it more challenging to meet the requirements due to limited

¹³ [Minimum service levels in education equalities impact assessment](#) at p. 6.

¹⁴ [Research Briefing, Strikes \(Minimum Service Levels\) Bill 2022-23](#) (13 January 2023), p. 32-33.

¹⁵ This section was amended on 29 January 2024 to correct the figures stated.



resources. Unlike in a larger trust, it will also individualise the responsibilities for all decisions to the standalone Principal, with all the attendant relational complications that will entail. Some school leaders in standalone trusts and maintained schools, where they have been balloted for strike action, may be in the invidious position of having to issue a work notice to themselves.

- **Issuing work notices** – The proposed regulations risk inflaming any existing workplace employee issues as well as creating new ones, leaving school leaders to manage this type of fallout. Some examples:
 - Pursuant to the Trade Union and Labour Relations Act 1992, the names on the work notice must be ‘blind’ to the staff member’s union membership and intention to strike. This means a proportion of those issued with work notices will be staff who *are not part of the dispute*. This can only lead to aggravation in the workplace, especially since it will be seen by the whole category of those not involved in the dispute as a ‘favourites’ or ‘most valuable’ list. If a non-unionised teacher not intending to strike does not receive a notice, how will that make them feel about their importance in the school?
 - If a staff member is currently under a performance improvement plan, for example, or has raised a grievance of discrimination against a colleague, issuing them with a work notice may give them grounds to argue it is victimisation. If the work notice is not issued to them, others may argue it is inappropriate.
- **Critical workers** – This presents significant practical challenges and administrative burdens to implement correctly. The concept of ‘critical workers’ is too loose for this provision to withstand determined challenge (is the food vendor on a train a critical worker in transport services, but not the petroleum delivery manager who keeps the economy running?) It is also highly impractical for schools to maintain a register of children whose parents fit into such a broad category, particularly in schools with high mobility. This represents a shift from a permissive list used for partial openings to a list used to calculate a legal enforcement.
- **Consultations** – The Act places a duty to consult with unions on the content of the work notice, which obviously adds to the pressure and workload. The short time scales around the issuance of strike and work notices make this responsibility even more restrictive and burdensome. These consultations will be subject to challenge for quality and timeliness. This is not addressed in the DfE’s impact assessment.
- **Remote education** – Unlike during the pandemic, falling back on the ‘fail safe’ of remote education is highly unrealistic and unfairly raises expectations that cannot be met. Many families still lack sufficient digital connectivity. The quality and depth of teaching required in the lead-up to exams will preclude the type of ‘mass teaching’ seen during the pandemic.

3. The proposed regulations are ill-timed and counterproductive

We strongly believe the proposed regulations are ill-timed and counterproductive in achieving the intended aims.





We are facing significant challenges in relation to teacher recruitment and retention

The Initial Teacher Training target has only been achieved once in the last nine years. This past year we saw the lowest recruitment numbers to date, with secondary subjects hit the hardest. We will soon be in a situation where we may not be able to teach subjects such as physics in secondary schools in England.

We believe that it is wrong that the DfE has chosen this moment – without input from the sector – to propose regulations that further add to workloads, stress and uncertainty, as well as impinging on staff's ability to exercise their right to strike to obtain fair and equitable pay and conditions. We believe that this proposal will impact significantly on our ability to recruit and retain teachers and leaders.

The proposed regulations are counterproductive

We believe the regulations will cause more friction in an already delicate relationship with unions. The impact assessment admits that 'The implementation of MSLs may lead to changes in the relationship between trade unions, education employees and employers. These knock-on impacts are highly uncertain and could lead to costs or benefits for the education sector depending on many factors.'¹⁶ What is certain is that voluntary agreements between employers and unions will be made more difficult and unions may increasingly seek alternative forms of industrial action short of striking in order to avoid MSLs, such as 'working to rule' and 'go slows' which will lead to potentially even greater disruption to education.

The regulations will also potentially poison relationships within schools. The responsibility to draw up work notices will necessitate more questioning of staff as to their intentions and introduce unnecessary tensions, as described above.

Finally, the regulations will further damage the social contract between schools and families. In their ground-breaking study,¹⁷ Public First found that the pandemic has caused a 'seismic shift' in parental attitudes towards school attendance and 'a fundamental breakdown in the relationship between schools and parents across the socioeconomic spectrum'. Parents from poorer families, in particular, 'expressed a fundamental mistrust of schools' and 'do not think that schools and teachers have the best interests of their children at heart.' The proposed regulations will further fray the fabric of that all-important relationship by introducing potential pressures and disagreements around the issuance or non-issuance of work notices by employers.

Conclusion

CST has attempted to engage constructively with government on this issue. However, our concerns are deep and wide ranging. We continue to believe that it would be more productive for the

¹⁶ [Minimum Service Levels for Education, Impact Assessment](#) at p. 19.

¹⁷ [Listening to, and learning from, parents in the attendance crisis, Public First](#) (September 2023).

government to address the underlying issues rather than adding further complexity to what is already a complex situation.

As the organisation representing trusts as employers and the leadership of trusts, we stand ready to engage in constructive dialogue with government to find a less restrictive means of securing educational provision in periods of industrial action.

Revised 29 January 2024