Summary

DfE consulted in September 2013 on Changes to the System of School Organisation (see Related Briefings). The Government response was published on 18 December 2013 along with two sets of regulations:

- The School Organisation (Establishment and Discontinuance of Schools) (England) Regulations 2013 (SI 2013, No 3109); and,

Associated DfE guidance School Organisation: Maintained Schools: Guidance for proposers and decision-makers was published on 28 January 2014, the day the aforementioned regulations came into force.

This briefing also draws attention to the substantially revised DfE advice Making significant changes to an existing academy, originally published in September 2013 alongside the consultation on changes for the maintained school framework. Despite the fact that the consultation did not specifically identify the September 2013 document as a draft or invite comment, it has been substantially revised and was reissued, under the same title, in January 2014.

Two other DfE advice documents: The academy/free school presumption (July 2013) and Establishing new maintained schools: Departmental advice for local authorities and new school proposers (June 2013) have not been amended and remain extant. All these documents can be found on the DfE webpage School Organisation.

This briefing will be of interest to members and officers concerned with school place planning.

Overview

Two substantive changes have been made to the draft regulations arising from the consultation exercise; otherwise, the proposed changes to the framework for school organisation have been confirmed.

Firstly, the requirement to display hard copies of statutory notices locally in a conspicuous location, dropped from the draft regulations, has been reinstated. This recognises that reducing timescales and formal consultation requirements makes it more important to ensure that parents
Briefing in full

Changes to the System of School Organisation

As announced in the consultation document, the aim of the new regulatory framework is:

“… for schools to be more in charge of their own decisions about size and composition and to be able to respond to what parents want locally without being unduly restricted by process. In practice, this means that:

- individual maintained schools would have the freedom to make certain changes (e.g. enlargement of premises) without following a statutory process;
- the statutory processes would be slimmed down for certain other changes to maintained schools (e.g. a single sex school becoming co-educational) by reducing the length of the process and the level of prescription;
The requirement for academies to apply to the department for permission to make similar changes would be removed.”

The intention has been, as far as possible, to deal with maintained schools and academies in parallel so that proposing equivalent changes will result in similar actions being required of governance bodies across both sectors. Although the legal mechanisms are different, certain changes can be made by governance bodies themselves, whilst others can only be executed via a formal process; which, as before, may be initiated either by governors or an external body and determined by the LA, the Secretary of State or the Schools Adjudicator.

Alterations to Existing Schools

Freedoms for Maintained Schools

The new “freedoms” for governing bodies of maintained schools to act unilaterally are:

- expansion of premises (provided schools can get planning permission and fund the work);
- changes to a school’s lower or upper age range by a year or more (other than adding or removing a sixth form and in special schools where statutory proposals are still required);
- adding (but not reducing) boarding provision.

Statutory proposals are still required for:

- changing category of school (e.g. Community to Foundation)
- adding or removing a sixth form;
- adding or removing specialist SEN provision within mainstream schools or significant changes to special schools;
- altering single sex/coeducational status;
- major site changes involving opening, closing or moving sites beyond a minimum distance;
- ending or decreasing boarding provision; and
- removing selective admission arrangements in designated grammar schools.

This represents a slightly bigger apparent gain for community school governors who could previously initiate only a more limited range of changes. The difference is less significant for LAs which still have a stronger hold on community school purse strings and will remain the decision-maker (subject to appeal to the Adjudicator) on statutory proposals in most cases apart from schools changing category. The apparent anomaly arising from community schools’ new ability to expand their premises unilaterally without an equivalent freedom to increase pupil intake is unlikely to cause difficulties in practice – particularly at the present time when population expansion means many LAs need to secure additional school places. The differences between the draft and final regulations, noted above, did not affect these changes.

Extended Freedoms for Academies

Because Academies (including ‘Free Schools’ and the other institutions falling within that generic status) are created by the Secretary of State contracting with a provider of school services, all detailed procedures regarding them lie within his executive decision-making powers. Consequently, the ‘academy’ paragraphs in the consultation were statements about policy intentions which would not require any regulatory changes to be approved by Parliament. Thus,
the same three ‘freedoms’ being offered to maintained schools via the new regulations (i.e.
expansion of premises, change to age range or adding boarding provision) will be given to
academies: “… provided they have secured any necessary funding, and have conducted a local
consultation as part of their decision making process, **without having to follow a formal process to seek agreement from ministers.**” Although, as will be seen, such agreement will in some
cases still be required.

In addition, the freedom to make changes in admissions arrangements (subject to compliance with
the Admissions Code) has been extended to “the first (around 200) academies where this was
written into their funding agreements”. This will remove the anomaly whereby the legislative
change which added Academies to the category of schools covered by the Code, and brought
them under the jurisdiction of the Office of the Schools Adjudicator, did not automatically change
all extant funding agreements. Therefore, Academies created before that time, whose de-facto
compliance with the Code could only be secured by writing their full admissions arrangements into
their funding agreement, were left subject to a form of dual control. These academies previously
had to go through a legally defined process of consultation and decision-making (and possibly
respond to objections to the Adjudicator). However, changes cannot take legal effect until
appropriate amendments to their funding agreements are made. It was unclear from the 2013
document and the consultation, how this would be achieved without formally amending all 200
funding agreements in order to give effect to the decision. The reissued 2014 document now
indicates that the ‘old style’ funding agreements will be amended, with appropriate ministerial
agreement, as and when material changes are requested.

The 2014 version also introduces a new “fast track” process to obtain ministerial approval for
amending academy funding agreements to make changes which maintained schools have
freedom to decide for themselves. With regard to changes which would require publication of a
statutory proposal for maintained schools, the position remains as outlined in the consultation
papers. Academies must secure Education Funding Agency consent by submitting a business
case for consideration, and a separate form has been published setting out the information that
will be required. However, in all cases Academies will need to contact the Education Funding
Agency whenever changes are made so that the details that are held for them can be kept up to
date.

**Procedures for Making Changes – the School Organisation (Prescribed Alterations to
Maintained Schools) (England) Regulations 2013 (SI 2013 No 3110)**

In addition to extending the scope of changes that can be made without an external process, the
procedural ‘streamlining’ announced via the consultation has now taken effect. This ‘streamlining’
can be summarised as:

- removing the requirement to consult before publishing proposals
- reducing the statutory representation period from 6 to 4 weeks.
- reducing the level of prescription for:
  - the detail that proposals must contain;
  - publication requirements;
  - the prescribed list of bodies to whom proposals must be sent.
As noted above the final version of the regulations have been slightly re-expanded in respect of specific requirements to notify religious bodies and the physical publication of notices at or near school sites. Nevertheless, the radical slimming down of the regulatory burden has been carried through. The new regulations are considerably shorter (at 32 pages), partly as a result of removing duplication and more succinct expression of similar provisions; but also by a reduction in the substance of what is required.

The substantial differences can be summarised as:

- Abolishing pre-publication statutory consultation - by removing the requirement that statutory proposals include an account of a prior consultation process, details of comments received and the proposer’s response to them.
- Consequentially depriving potential objectors of the ‘two bites at the cherry’ they previously enjoyed; as well as the opportunity to discover details of the identity and content of views expressed by others and the extent to which they have been taken into account by the proposer.
- Reducing the statutory ‘representation period’ from 6 weeks to 4 weeks.
- These two changes mean that the legal minimum time between proposals being formally put into the public domain and a decision being taken is now about a quarter of what it was before.
- The number of categories of named persons and bodies who must be consulted or informed at different stages in the process has been reduced from 14 to four:
  - The local authority
  - The Secretary of State
  - Relevant religious bodies
  - Where the school is a special school, the parents of every registered pupil at the school.
- The previous two generic categories “any other interested party”; and, “any other persons whom the governing body thinks appropriate” have been reduced to a requirement only to notify the second category – apparently allowing proposers a greater degree of discretion.
- The required manner of publication - placing a notice in a local newspaper with full details on a website - is a change of emphasis reflecting what has already become established good practice. Since the proposal to drop the requirement for notices to be published “at the school gates” has been abandoned, this has become the only area where the regulations have been strengthened rather than slimmed down.
- The requirement to make full information available to anyone who requests it remains in place; but, for such a right to be meaningful, an enquirer must be aware of the proposals in the first place.

The CSN briefing on the September consultation (see Related Briefings) noted that, taken as a whole, the previous statutory framework could be seen as burdensome - particularly where minor or non-contentious changes were concerned - but the revised approach went a long way in the opposite direction. In particular, the absence of substantial guidance about the responsible use of the wider discretion afforded proposers was considered to be problematic. However, the new guidance published alongside the regulations (see below) has done much to fill that gap.
Types of Proposal and Decision-Making

The regulations remain structured as in the draft; being organised with eight main regulations and more detailed provisions contained in schedules. The key regulations (3, 4, & 5) relate respectively to:

- Alterations to maintained schools by governing bodies: foundation bodies
- Other alterations to maintained schools by governing bodies; and
- Alterations to maintained schools by local authorities.

The first (regulation 3) defines the process for community, or voluntary schools converting to become foundation schools (with or without a “foundation”) or existing free-standing foundation schools “acquiring a foundation” (i.e. becoming “Trust Schools”). In these cases, the governing body is the decision-maker but the LA has a right of appeal to the Schools Adjudicator. However, the already limited, grounds for such appeals have been curtailed. In the previous regulations, such appeals could be made on four possible grounds:

- Failure properly to consult according to the regulations;
- Failure to have regard to ministerial guidance on consultation;
- Failing to have regard to consultation responses; and that
- The local [education] authority considers that the proposals will have a negative impact on standards at the school.

The new regulations include only the fourth ground – negative impact on standards – as a basis for objection.

Regulations 4 and 5 relate to changes initiated respectively by governors and LAs. They detail the status of specific kinds of alteration (as listed in schedule 2) and the sections in the primary legislation under which proposals can be published and by whom.

Regulation 6 activates the schedules relating to publication, determination and responsibility for implementing various kinds of proposal between governors and the LA and the possibility of appeals to the Schools Adjudicator.

Regulation 7 confers a power (and implied duty) on the Secretary of State to issue guidance to the various bodies (governors, LAs, and the Schools Adjudicator) subject to the regulations.

Regulation 8 revokes the previous regulations.

Opening and Closing Schools: the School Organisation (Establishment and Discontinuance of Schools) (England) Regulations 2013 (SI 2013 No 3109)

As noted in the previous briefing these regulations follow amendments to the framework introduced by the Academies Act 2010 and the Education Act 2011 and remain unchanged from the draft apart from the two issues relating to religious bodies and ‘school gate publication’ noted above. Previously, the default position was that an open competition would be held to determine which of the various categories of ‘maintained’ or ‘academy’ school would best meet the identified need. Since the 2011 Act, there is now a “presumption” that any new school will be an academy.
Nevertheless, provision for holding competitions and opening other categories of school has remained in place.

There was no change in primary legislation relating to the closure (discontinuance) of schools except in so far as this was a technical consequence of an existing maintained school converting to become an academy. But, obviously, there was no perceptible change on the ground from one day to the next when such technical closure and re-opening instruments were executed. However the policy intention to encourage the creation of new schools to meet parental demand for different kinds of education, even when there was no shortage of places in the area, implied that there might also be more schools opening and closing than was previously the case.

In the light of all this, the legislative requirements for opening new mainstream schools have been “streamlined” by:

- removing the statutory requirement to hold a public meeting;
- reducing the level of prescription on:
  - how maintained school proposals must be published; and what must be done to revoke determined proposals where circumstances have changed such that there are no longer needed;
  - the detail that proposals must contain;
  - the length of the representation period for non-academy bids;
  - the bodies – other than the Secretary of State – who must be informed of non-academy bids.
- increasing the discretion allowed for the LA to determine who should be informed if no academy proposals are received or approved (apart from their duty to notify local Anglican and RC religious authorities).
- updating the conditions under which a decision may be made subject to ‘conditional approval’ and reducing the list of bodies that must be notified separately leaving this largely to the LA’s discretion.

As envisaged in the consultation the new regulations have reduced the level of prescription required to close a maintained school, whilst retaining a statutory consultation period. The streamlining includes: how proposals must be published; the detail they must contain; the length of the representation period; and the bodies who must be informed of the decision.

These changes are similar in form to those in the ‘alterations’ regulations but are more radical in effect because they relate to decisions with a larger impact on local communities. The old competition process, involving a two-stage consultation and (potentially) a mechanism to decide between competing proposals, previously took at least a year to complete. It will now be possible to contain the whole process within a school term. However, the context is now very different. The LA will already have developed the case for a new school in order to undertake its responsibilities under the “academy/free school presumption”; and a competition will only take place if no suitable promoter has come forward. In these circumstances, it is likely that any promoter willing to run a voluntary of a foundation school, but not an academy/free school, will already have been identified; and, in the absence of any potential promoters, it would clearly be desirable for the fall-back position (i.e. a LA promoted foundation or community school) to be reached sooner rather than later.
Advice and Guidance

Since the autumn consultation, there have been considerable changes to the advice and guidance documents, relating both to academies and to maintained schools.

Two DfE advice documents: The academy/free school presumption (July 2013) and Establishing new maintained schools: Departmental advice for local authorities and new school proposers (June 2013) remain in place and are unchanged.

The academy/free school presumption document, aimed at Local Authorities and new school proposers, sets out in plain language how the statutory ‘presumption’ in favour of academies works. The expectations about establishing the need for a new school, assessing the impact of creating one, appropriate consultation and taking “all necessary steps to ensure the widest possible range of groups and organisation that might be interested in establishing the new school are aware of the opportunity” are dealt with in three paragraphs. The remainder of the document covers: funding; communicating with DFE; processes for approving sponsors and assessing their proposals; and, how the process will be completed via a funding agreement between the proposer and the Secretary of State. The criteria by which the department will judge proposals are broadly and briefly stated. For example, in assessing the suitability of potential sponsors the Secretary of State will reject any who “advocate violence or other illegal activity” and expect to see evidence of “… respect for democracy; support for individual liberties within the law; and mutual tolerance ….”. But beyond that there are no express limitations on the Secretary of State’s discretion.

The second document, Establishing new maintained schools, is short - 12 paragraphs setting out the limited circumstances whereby a new maintained school can be opened. In addition to stating that the academy presumption has replaced automatic competitions, it reminds LAs that it is still possible to seek consent to propose a new maintained school without first going through the competition process. All such applications will be considered on their merits but the need to apply has been diminished by the removal of the requirement to seek consent in specific cases where previously it was invariably given. These include when a ‘new school’ is technically required because existing schools are to be amalgamated (e.g. the merger of infant and junior schools on the same site to become a single primary) or where a school acquires, loses or changes its religious character. It is also now unnecessary for the LA to seek formal permission to propose a new maintained school when a competition has failed to attract a suitable provider.

The previous briefing lamented that this advice, although satisfactory as far as it went, was ambiguous and incomplete. That lack of clarity and absence of guidance on a range of key topics has now been rectified by the publication of an additional document: School organisation, maintained Schools: Guidance for proposers and decision makers (January 2014) with three separately bound annexes: Annex A: Further information for proposers; Annex B: Guidance for Decision Makers; and, Annex C: Foundation and Trust proposals.

This new suite of documents replaces the raft of previous guidance relating to the system put in place by the Education and Inspections Act 2006 and the 2007 regulations that followed. It explicitly identifies nine separate publications that have now been superseded. Taken together these previous publications amounted to several hundred pages of text but the new material is presented much more concisely in a 24 page main document with 53 pages in the three annexes.
The relevant primary legislation is identified. In addition to the new statutory instruments that have just come into force, the guidance lists five further sets of extant regulations pertinent to school organisation. This list seems to be comprehensive – covering foundations (and their removal), school premises and governance (constitution, roles, procedures and allowance) – although *The School Governance (Federations) (England) Regulations 2012* (SI 2012/1035) are left out.

The guidance is organised in five chapters as follows:

- Chapter 1: summary.
- Chapter 2: significant changes, expansion age range changes and adding boarding provision.
- Chapter 3: significant changes prescribed alterations, and the statutory process.
- Chapter 4: establishing new provision. The academy presumption and new maintained schools.
- Chapter 5: School closures, including specific statutory guidance on rural schools, amalgamations and mergers.

As is clear from their titles, the three annexes provide more detailed guidance targeted at, respectively: those who are wishing to initiate change or develop "proposals"; those who are required to carry out quasi-judicial functions as "decision makers"; and matters related to the creation of foundations and trusts.

This document is not further summarised here, because it is relatively short and worth reading in its entirety. Some implications of the new material are discussed in the commentary below.

As noted above, the document: **Making significant changes to an existing academy: Departmental advice for academy trusts**, which was apparently presented for information rather than debate during the autumn consultation has, in fact, been revised and reissued. The document is addressed to academy trusts wishing to make a change to their existing arrangements and describes the administrative processes they must follow and matters to be taken into account. Broadly speaking the requirements parallel the statutory framework that applies to the maintained sector, but take account of the different control mechanism - which is a contractual arrangement between the Academy Trust and the Secretary of State.

A distinction is drawn between a “significant change” and those of lesser importance. In the first instance, it is for the Academy Trust to exercise its own judgement in deciding whether the contemplated change is “significant”. In practical terms, a significant change is one that requires amendment to the contractual relationship embodied in the funding agreement, and therefore requires the approval of the Secretary of State. If none is needed the academy can simply proceed on its own authority.

If the change is significant, the Academy Trust must normally submit a business case to the Education Funding Agency (EFA). It is clear from the guidance and the separate document *(Preparing a business case for a significant change at an existing academy)* the preparation and submission of a ‘business case’ amounts to a similar set of considerations and processes (e.g. local consultation) to the publication and determination of statutory proposals. This process is managed by the EFA but the decision-making power resides with the Secretary of State. For this reason there is no formal “guidance to decision makers”, as it would be otiose for the Secretary of...
State to issue guidance to himself. But, for the same reason, it may be inferred that decisions are actually made according to similar considerations. Following approval of the change itself there will be a need to update the legal documentation, e.g. articles of association and funding agreement.

A key difference between the 2013 and 2014 versions of this document is the introduction of a “Fast Track” process that will apply to a defined sub-set of significant changes. They remain technically “significant” because they require modification to the legal documentation for an academy – but they are deemed to require less rigorous scrutiny before approval because they are the same as changes that would not require publication of a statutory proposal in the maintained sector. This is clearly an attempt to make sure that the rules applying to academies are not more burdensome than for maintained schools. The new version says:

“Fast track significant changes – expansions, age range changes (by up to two years), adding boarding provision and amending admissions arrangements in ‘old style’ funding agreements – do not require a formal business case. Approval from the Secretary of State is still required but he is likely to approve the majority of these requests, provided that he is assured that adequate local consultation has taken place and responses have been taken into account, any financial arrangements are sound, and appropriate planning permissions and other relevant agreements have been secured, where necessary.”

Another key difference is the addition of a new section, “Physical expansions onto satellite sites”, which did not appear in the 2013 version. The section opens with the words “The establishment of new selective schools in all cases is prohibited by statute. Expansion of any existing academy onto a satellite site will only be approved if it is a genuine continuance of the same school.” It goes on to say that decisions will take into account: the rationale for the choice of site; how it will be used; the admission arrangements; the extent of pupil movement between sites; governance, leadership and management arrangements; and staff deployment and contractual arrangements. It concludes with the statement; “The purpose of considering these factors is to determine the level of integration between the two sites; the more integration, the more likely the change can be considered to be an expansion.”

This section closely resembles an equivalent paragraph (7) on page 7 of the ‘Maintained Schools’ guidance – with two differences. It lacks the reference to selective schools but includes an additional statement to the effect that where a proposed ‘expansion’ is deemed to fulfil ‘basic need’ that would justify a new school, this will trigger the academy presumption.

Comment

The previous briefing welcomed the, already long overdue, revision to regulations and guidance to take account of legislative changes to the system of school organisation following new primary legislation in 2010 and 2011. It was also helpful, for the first time, to see the public codification of departmental practice with regard to academies/free schools. A major criticism was, however, that a large amount of previous guidance, some of it statutory and all of it necessary and important, was apparently about to be withdrawn without being replaced. This problem has now been resolved by the publication of a new document which fills that gap. However, in the absence of formal consultation, that new document contains flaws and raises questions that might have been avoided by wider scrutiny. There are a number of typographical and grammatical errors which may be evidence of hasty drafting.
On matters of substance, it is now more important than before that good advice and guidance on school organisation matters for the maintained schools is in place. The academy presumption and the rapid growth of that sector has reduced the number of occasions when maintained school procedures need to be used; and slimming down the regulations widens the element of discretion over the exact procedures it is appropriate to adopt. Just because certain steps are no longer specifically prescribed in the main regulations does not mean they are entirely unnecessary - or indeed may not actually be required under different legislation. The new guidance has gone some way towards filling this gap but, too often, it errs on the side of brevity, doing little more than repeat the regulatory requirement in plain language. An opportunity to consolidate all extant guidance has also been missed.

It is made clear that removing the specific statutory requirement does not absolve proposers of a general duty to undertake a form of consultation appropriate to the matter in hand. However, there is still no mention of the specific requirement for LAs and school governors to consult pupils (over the age of three according to their age and understanding) in connection with any decisions that might affect them. [See Section 176 of the Education Act 2002, as extended by s.167 of the Education and Inspections Act 2006].

Informal and/or voluntary consultation aside, the only statutory opportunity for interested parties to make their views known on most kinds of proposal is via a four-week representation period. At different places the guidance says, or implies, that this four-week period is fixed and can be neither less nor more than the time specified. Whilst it is just possible to construe the wording of the regulations in this way it is highly debateable as to whether that is a correct interpretation. In almost any educational context, the function of a statutory timescale is one of two things: either to ensure that enough time is allowed for a process; or that an action or outcome is not delayed for too long. It is rarely, if ever, both at the same time. In this case, the timescale clearly functions as the minimum time necessary to allow interested parties to comment on a proposal. Bearing in mind the previous timescale was six weeks and the additional statutory requirement for prior consultation has been removed it is hard to imagine that parliament would have intended the period of time allowed to be artificially constrained if circumstances dictated otherwise. It is also difficult to see how such a limitation on the flexibility allowed to proposers could be enforceable. If the matter came to dispute, the general test applied by the courts would be whether interested parties had been given sufficient information and time to consider and respond to the matter in hand. It is easy to see how extensive and complex proposals might justify a longer response time. It is more difficult to see how anyone might construct an argument that they had been disadvantaged by having six rather than four weeks to submit comments on a particular proposal.

The impact of the decision to drop the requirement that “any other interested party” should be consulted in favour of the weaker “any other persons whom the governing body thinks appropriate” would have been ameliorated by giving advice about the general responsibilities of public bodies in these circumstances. That opportunity has been missed.

Two paragraphs (33 and 34) cover the ‘academy presumption’ and include a cross reference to the previous publication (see above). Bearing in mind its brevity, greater overall streamlining could have been achieved by incorporating the separate document into the main text.

Paragraph 22 in Annex A is perplexing in that, under the heading “Changes of Category”, it lists the six permutations whereby an existing maintained school can change its status to become
either Voluntary Aided or Voluntary Controlled. In saying that these changes require a statutory proposal, but making no further comment, it implies that changing status to become a foundation school is either not possible or can be done without a statutory process: neither of these propositions is true. The explanation lies in the fact that the acquisition of foundation status is covered under a different part of the regulations. However by failing to describe all possible ‘changes of category’ in the same place the guidance tends to obscure rather than illuminate the totality of the regulations.

Paragraph 3 in Annex B, correctly, says that decision-makers should not be unduly influenced by the numbers of people expressing a particular view, and that more weight should be given to responses from those with a closer connection (e.g. parents with children at the school). However, it fails to mention an equally important consideration, which is that the cogency of an argument or the intrinsic validity of a comment in relation to the guidance should carry more weight than mere expressions of opinion or preference.

Under the heading “Education standards and diversity of provision”, paragraph 12 of Annex B, says: “The decision-maker should also take into account the extent to which the proposal is consistent with the government’s policy on academies as set out on the department’s website.” Whilst it is obvious that guidance published by the Secretary of State is likely to reflect the policy of the government of the day; it is arguable that this formulation offends an important constitutional principle – namely the separation of powers. One reason why we have a hierarchy of primary legislation, regulations and statutory guidance is to ensure that the administration of public services takes place within a transparent framework which is clear, consistent and subject to Parliamentary scrutiny. Attempting to bind legally independent quasi-judicial decision-makers to adherence to unspecified “government policy” is to strengthen the executive in relation to the legislature and the judiciary, and to take a dangerous step towards government by decree.

Paragraphs 13 -15 in Annex B encapsulate the current policy position that surplus places, or the lack of “need”, should not obstruct the fulfilment of “demand” for the new provision under consideration. This reflects the market approach that has long been understood but not previously reflected in formal guidance to which decision-makers must “have regard.”

Paragraphs 39 & 40 in Annex B cover questions relating to special educational needs (SEN) and carry forward the “SEN test” from previous guidance. Broadly, this states that any change affecting pupils with SEN should represent an improvement in provision for them. However, in the process of compression to reduce the volume of guidance, the important distinction between SEN provision in mainstream schools and the separate considerations that apply to special schools is all but lost.

Many of the points made in the Comment in the CSN Policy Briefing on the September DfE consultation remain pertinent, but need not be repeated in detail here. They include:

- The irksome implication that individual schools are expected to be the main engines of change, whilst LAs retain the legal duty to secure a sufficiency of schools.
- The further limitation on the scope for objection to foundation proposals, apparently excludes the possibility of challenging any kind of procedural impropriety associated with the, albeit streamlined, statutory process. The remaining ground, impact on standards, was
always hard to prove and will still be difficult to argue even in the face of a blatant abuse of process.

- The “academy/free school presumption” is now well understood but it is helpful to have it codified in a public document.
- Simplification of the competition process and the ability immediately to publish LA proposals for a new school will assist LAs when a suitable external promoter cannot be found.
- Making changes to bring the separate processes that apply in the maintained and the academy sectors closer together and setting them out side-by-side, serves both to emphasise their differences and expose different directions of travel.
- It is apparent that the Education Funding Agency will operate a more bureaucratic and rigorous process in respect of making organisational changes to Academies than the equivalent steps that will apply in the maintained sector.

The introduction of the “fast track significant changes” procedure in the revised version of the academy advice is clearly an attempt to narrow the gap between sectors. However it remains the case that the business case required by the EFA is more prescriptive and more onerous (e.g. it must include evidence of prior consultation which is no longer required in a statutory proposal) than the statutory minimum demanded by the maintained school regulations. Even the ‘fast track’ process still requires formal approval by the Secretary of State. In both cases, following approval, a number of separate legal processes must be completed by the Academy Trust and/or governors under the supervision of EFA.

The other major change - paragraphs concerning expansion onto additional sites – in both the academy and maintained documents betrays anxiety on two fronts. Recent controversy concerning the expansion of grammar school provision into Sevenoaks may have informed the unequivocal reminder that primary legislation precludes the creation of new selective schools. Secondly, there would appear to be a concern that creating a ‘satellite school’ under the umbrella of an existing maintained institution could become a device to circumvent the academy presumption. In all cases, a series of tests must be applied to establish that any expansion onto additional sites will genuinely form an integral part of the original institution.

**External links**


Related briefings

School Organisation – DfE consultation and recent advice (September 2013)
Capital funding for new school places: National Audit Office report (March 2013)
How can we encourage good schools to expand? DfE research (January 2013)
DfE advice on establishing a new school (July 2012)
Education Act 2011 (November 2011)

See also Standing Room Only: Have we enough school places? (LGiU, September 2013)

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