CSN POLICY BRIEFING

School Organisation – DfE consultation and recent advice

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Author Alan Parker
LGiU/CSN Associate

Summary

The DfE is consulting until 24 October 2013 on changes to the regulatory framework for local authority maintained schools: Changes to the System of School Organisation. The consultation including draft of two supporting sets of regulations: The School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2013 and The School Organisation (Establishment and Discontinuance of Schools) (England) Regulations 2013. This briefing also summarises recent DfE advice and guidance related to the opening, closing and making changes to maintained schools and Academies: advice on Establishing new maintained schools: Departmental advice for local authorities and new school proposers (June 2013), advice on The academy/free school presumption (July 2013) and guidance on Making significant changes to an existing academy (September 2013).

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

Overview

The two 'advice' documents that appeared in June and July, between them provide a plain language explanation of the current arrangements for responding to the need for a new school aimed at both local authorities and "new school proposers" (the generic term for any organisation, individual or group of individuals, other than a LA, who may wish to be involved in setting up and running a new institution). These take into account changes introduced by the Academies Act 2010 and the Education Act 2011 to the previous framework that was put in place by the Education and Inspections Act 2006. They replace the former guidance, initially produced in 2007, which had remained technically extant, but subject to the disclaimer that it did not reflect current government policy, following the presumption that any new school would be an academy replacing 'open competitions' as the default mechanism. Interim advice was produced in September 2012. As CSN explained then the updated webpage merely flagged up the fact that although the context had been changes the regulations remained in force the guidance had not been updated. (see CSN Briefing January 2013). CSN was advised that new regulations (and also updated guidance) would be produced "in due course". These documents constitute that advice.

The third document "Making significant changes to an existing academy", which is self-described as "Guidance" is new - as opposed to being a replacement for a previous version. Academies (of all types including 'Free Schools') are controlled via a contract (the 'Funding Agreement') with the Secretary of State and consequently fall outside the scope of the regulation based processes which apply to maintained schools. Whilst the original academies were few in number - and of

relatively new creation - any necessary changes and developments were managed by the academies unit within the Department with any consequential changes to the funding agreement being agreed on an ad hoc basis. Now that the sector has been massively and rapidly expanded by 'conversion' as well a newly created institutions, the Department has evidently decided to codify and publish the procedures it will use. Broadly speaking these mechanisms mimic the statutory processes and will do so more closely if/when the proposed new regulations (see below) come into force.

The consultation paper, titled "Changes to the System of School Organisation", was launched on September 12th and seeks responses by October 24th 2013. The related draft regulations, helpfully published as part of the consultation, use the same titles as those they will replace: *The School Organisation (Prescribed Alterations to Maintained Schools) (England) Draft Regulations 2013*; and *The School Organisation (Establishment and Discontinuance of Schools) (England) Draft Regulations 2013*. The consultation document also refers to proposed changes to academies – although, since these lie within the executive power of the Secretary of State, no formal legislative or parliamentary process will be required to bring them about.

Two main changes are proposed. Firstly to extend the freedom for all school governors to execute some changes, for maintained schools without the need to publish statutory proposals, or without a formal application to the Secretary of State in the case of Academies. Secondly, where a statutory proposal (or a more formal application for academies) is still required, the process is to be "streamlined". In practice this will mean a very significant reduction in the consultation requirements namely:

- fewer stages of consultation and shorter minimum timescales;
- curtailing the prescribed information that must be published; and,
- a very limited list of defined organisations and individuals who need to be consulted.

Taken together this raft of documents can be seen as a further stage in the process of re-engineering the mechanisms for opening, closing and modifying schools initiated with the publication of the Academies Bill shortly after the 2010 election. It seems to be incomplete as there are still inconsistencies and gaps between the remaining advice and guidance documents.

Briefing in full

Consultation on Changes to the System of School Organisation

The DfE consultation document Changes to the System of School Organisation was published on 12 September. Consultation closes on 24 October 2013. The Department's aim, as set out in the document, 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 is to deal with both maintained schools and academies in parallel by proposing equivalent changes that will result in similar actions being required of governance bodies across both sectors when change is contemplated. 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.

Alterations to Existing Schools

Freedoms for Maintained Schools

The new "freedoms" for governing bodies of maintained schools are:

- expansion of premises (provided the school can 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. It does create an anomaly, in that community schools could unilaterally expand their premises but do not have an equivalent freedom to increase pupil intake because the LA remains the admissions authority.

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 are statements about policy intentions which will 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****."*

In addition, the freedom to make changes in admissions arrangements (subject to compliance with the Admissions Code) will be 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 have to go through a legally defined process of consultation and decision making (and possibly respond to objections to the Adjudicator). However, the changes cannot take legal effect until appropriate amendments to their funding agreement are signed off on behalf of the Secretary of State. Sensibly, this dual process is to cease but, presumably, all 200 funding agreements will have to be formally amended in order to give effect to the decision.

With regard to equivalent changes where a statutory proposal would be required for maintained schools the position now is that: *"Academies will still need to secure Education Funding Agency consent for all other significant changes not listed here. They will also need to contact the Education Funding Agency to make changes to their funding agreements, and the details that are held for them."* The detail on this is elaborated in the separate DfE guidance Making significant changes to an existing academy. This is not part of the consultation as that document, albeit newly published, merely represents a codification of current practice rather than any change.

Procedures for Making Changes – the draft School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2013

In addition to extending the scope of changes that can be made without an external process, the consultation document says: *"For alterations where a statutory process is to be retained, we intend to streamline the legislative requirements by introducing new secondary legislation – The School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2013."*

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.

It is, however, only by looking at the new draft regulations alongside the current ones that the magnitude of the proposed changes can be appreciated. The 2007 regulations cover 62 pages whilst the draft (which is rendered in slightly larger type) is only 32. Excluding the schedule regarding land transfers (which is identical in both documents) the shrinkage is from 56 to 26

pages. Much of this has been achieved by (helpfully) removing duplication and more succinct expression of similar provisions; but there is also a reduction in substance.

Currently pre-publication statutory consultation is required because formal statutory proposals must include an account of a prior consultation process, comments received as a result and the proposer's response to them. Thus, as well as extending the timescale by providing potential objectors with 'two bites at the cherry', any recipient of the formally published proposals can also see who has already expressed a view and the extent to which those views have been taken into account by the proposer. This mechanism also provides a means of checking that appropriate consultation has been undertaken. Allowing only 4 weeks between the first public notification of the proposal and the decision being taken, leaves very little time for those who may have an interest to discover that a change is being proposed, find out what it is, understand the implications, form a view and respond.

The potential difficulties for such people are compounded by the other 'streamlining' measures. The list of statutory consultees in the current regulations contains nine specific categories of individual and institution - covering everyone who might possibly have an interest, and five more when religious or health interests are involved. These cover any local authorities – including parish and district councils, schools - including feeders, parents, staff, MPs and community interests. Additionally there are two generic ones: "any other interested party"; and, "any other persons whom the governing body thinks appropriate". A shorter subset of this list, but with the addition of the Secretary of State, must also be sent the full details of the statutory proposal when it is published. Since the draft regulations include no statutory requirement to consult, there is no directly equivalent list of 'consultees'; but it might reasonably be assumed that, for a single stage process, the two lists would be conflated. However, the remaining single list is cut to just three categories:

- the local authority
- where the school is a special school, the parents of every registered pupil at the school; and,
- any other persons whom the governing body thinks appropriate.

[In future, the Secretary of State would not be informed until the proposals have been approved and implemented]

Arguably that the previous consultation list was burdensome and resulted in proposers having to send out substantial documentation to many individuals and bodies that had no real interest in receiving them. There may be some truth in this, but the revised approach goes a long way in the opposite direction. The new list is even more limited than the 'second stage' on the current process. The regulations could have been streamlined by reducing the number of categories but making them descriptive of the general characteristics of individuals and bodies who might be expected to have a genuine interest. But, of the two 'catch all' categories in the previous regulations only the more limited one is retained in the draft. Proposers will be entitled to choose whom they would like to consult; rather than having a duty to inform anyone who might reasonably be considered by an objective observer to have an interest. Strangely, amongst parents it is only those with children at special schools who are now deemed worthy of particular mention in the regulations.

Similarly, the proposed manner of publication, i.e. placing a notice in a local newspaper with full details on a website, now excludes the previous requirement for notices to be published at the school gates. Whilst the addition of the website requirement makes obvious sense - reflecting what has already become established good practice; removing the physical 'school gate' publication risks disenfranchising less 'digitally aware' parents who do not scrutinise 'small print' newspaper announcements.

In both the current and the draft regulations there is a requirement to make full information available to anyone who requests it; but for such a right to be meaningful an enquirer must be aware of the proposals in the first place.

Types of Proposal and Decision-Making

As with the current regulations, the draft is organised with a small number of main regulations (9 currently, 8 in the draft) with more detailed provisions contained in schedules. The key regulations (numbered 3, 4, & 5 as before) 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 current regulations such appeals can 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 consider that the proposals will have a negative impact on standards at the school.

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

On the face of it, removal of the regulations mentioning formal consultation would render those conditions one redundant. However the requirement to publish proposals and invite representations about them is, de facto, a form of obligatory consultation. There is also extant guidance, and indeed some common law presumptions about the proper conduct of public affairs, to the effect that the appropriate consultation of interested parties is always required. It is therefore strange that LAs would in future appear to be disbarred from blowing the whistle on any kind of procedural impropriety associated with the, albeit streamlined, statutory process. The final ground, being hypothetical, was always hard to prove and may remain difficult to argue even in the face of a blatant abuse of process.

Proposals covered by the 4th and 5th regulations, relating to those initiated respectively by governors and LAs, all fall to be determined by the LA with the possibility of appeals to the Schools Adjudicator. The categories where change could in future be effected without formal

publication are removed and, as noted above, some processes are curtailed and some remaining requirements are expressed more concisely. Otherwise the effect of the draft regulations will be broadly the same as before.

Opening and Closing Schools: the draft School Organisation (Establishment and Discontinuance of Schools) (England) Draft Regulations 2013

The second set of draft regulations: *The School Organisation (Establishment and Discontinuance of Schools) (England) Draft Regulations 2013* is closely related to the other advice and guidance documents covered in this briefing, although they are not formally subject to consultation. They are therefore dealt with together.

The draft regulations follow amendments to the primary legislation introduced by the Education Act 2011 designed to implement a key policy change about meeting any need for new publicly provided schools. 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 (in any of its variants including "free schools"). 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 consultation document indicates an intention to "streamline" the legislative requirements for opening new mainstream schools by:

- removing the statutory requirement to hold a public meeting;
- reducing the level of prescription on:
    - how maintained school proposals, and revocation of proposals where circumstances have changed and the proposal is no longer needed, must be published;
    - 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. This will be for the LA to determine and they need only inform others if no academy proposals are received or approved.
- updating the conditions that a decision may be subject to 'conditional approval' and reducing the list of bodies that must be notified separately leaving this largely to the LA's discretion.

The consultation document says that the draft regulations will reduce the level of prescription required to close a maintained school, whilst retaining a statutory consultation period. The streamlining would include: 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.

Comparison of the draft with the current regulations reveals a much slimmer document (21 pages as against 56). The new version reflects most of the changes relating to information, publication and named consultees in the 'alterations' regulations outlined above. However, with regard to the creation of new schools, the change is more radical. Self-evidently, creating a completely new school is a bigger issue than altering an existing one and the community of interest is both potentially larger and more difficult to identify. Currently the LA is required to undertake a first stage public consultation, setting out the need for the new school and a draft specification for the type of institution that will be required. Next, a formal competition notice, based on the final specification must be published allowing four months for bidders to respond. Those responses are then published and representations invited before the decision process is completed. Taking into account the statutory timescales and certain practical considerations, it has usually taken at least a year, and often longer, to progress from the first consultation to a decision. Under the new regulations, there will be no requirement for consultation on the specification, and the periods for responses to the invitation and representations on bids are both four weeks. The whole process could therefore fit comfortably into a school term.

It is, of course, important to recognise that 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 unlikely that a further four-month search would find one. Similarly, if a promoter is available who would be willing to run a voluntary of a foundation school but not an academy/free school, they will doubtless already be aware of the opportunity and better prepared to bid. Again, if there is no willing promoter at all, it would clearly be desirable for the fall-back position (i.e. the LA itself sets up a foundation or community school) is reached sooner rather than later.

Advice and Guidance

The two DfE advice documents: Establishing new maintained schools: Departmental advice for local authorities and new school proposers (June 2013), and The academy/free school presumption (July 2013) are on the DfE web page headed *The academy/free school presumption*. Some, but not all, of the text in the first document appears on a separate DfE web page *Other important Changes* in the *School organisation* pages of the DfE website.

The academy/free school presumption document, as well as being easy to find, is relatively straight forward. It is aimed at both Local Authorities and new school proposers and sets out in plain language how the requirements of the primary legislation that created the 'presumption' is operated by DfE. As these processes are undertaken via direct executive powers there is no secondary legislation (i.e. regulations) to explain, and everything is contained within the dozen or so pages of the 'advice'. The expectations about the way LAs will operate are broadly and briefly stated. 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 the department; 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. Again, 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 the Secretary of State's discretion is not fettered.

By contrast the second document, **Establishing new maintained schools**, is even shorter (12 paragraphs only, covering two and half sides of text) but considerably more problematic. The advice is self-described as being "*part of the department's guidance to Local Authorities (LAs) on the establishment of new schools* . . [setting out] . . *the now limited circumstances in which the establishment of a new maintained school can be proposed."* It performs that limited task well enough, summarising the 2011 amendments to the 2006 legislation about new schools. 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.

However, the advice has a number of significant shortcomings. Firstly, its references to the relevant regulations are ambiguous and incomplete.

The advice alludes to the "Establishment and Discontinuance Regulations" without giving a full reference or stating where they can be found. In June, when presumably it was known that a new draft replacing the extant 2007 version was about to be published, it may have been felt convenient to use a form of words that would remain true both before and after the new regulations come into force. However, this is unhelpful (if not actually misleading) because it precludes any useful advice being given on the content of the regulations; and, indeed, it is completely silent on those aspects of the process governed by the regulations.

There are also at least two other sets of regulations pertinent to establishing new maintained schools. These are: *The School Governance (Constitution) (England) Regulations 2012 (SI 2012/1034)* which were laid before Parliament in April and came into force on 1 September 2012; and, *The School Governance (Federations) (England) Regulations 2012 (SI 2012/1035)* which were laid before Parliament in April and came into force on 1 September 2012. Both of these sets of regulations have current departmental advice associated with them and are still available on the DfE website. (See "Related Briefings" below). However there are no cross-references and the newer document seems not to comprehend that LAs or promoters contemplating opening a new school might need to know about the legal requirements on governance.

Secondly, the document, unusually, gives no explicit indication of what previous guidance it replaces. It can be inferred from statements on the website, and the fact that much has now disappeared, that a very large amount of previous guidance was out of date and due to be republished. However it is unclear if this newer document is intended to be complete or whether there is still more to come. The obvious candidate for a predecessor document relating to the system put in place by the 2006 Act and 2007 regulations, was "**Establishing a new Maintained Mainstream School: A guide for Local authorities"** (there was also a number of other

documents e.g. covering Special Schools and separate advice for potential Trust School promoters). This document was nearly 100 pages long (it went through several revisions between 2007 and 2010 election so it is difficult to be precise) and was divided into three main parts with a number of annexes. The first (roughly 5 pages) section gave an overview of the process and respective roles of the different players; the second (roughly 35 pages) was a detailed exposition of the legal requirements and practical considerations related to running a competition; and the third (roughly 20 pages) provided "guidance for decision makers". The annexes contained templates for the various documents, information gathering and publication aspects of the process.

Whilst there was clearly a need for revision in the light of the changed framework, and doubtless scope for the previous lengthy exposition to be slimmed down, the complete absence of advice on key aspects of the LA role is perplexing. Now that creating new maintained schools is expected to be the exception rather than the rule, some general practical advice on how best to go about it would seem to be even more useful than before. Similarly, the apparent removal of all guidance for decision makers is problematic: 152 different LAs can be required to take quasi-judicial decisions on these matters and be subject to scrutiny by the Schools Adjudicator (and possibly the courts by way of subsequent judicial review). General administrative law requires all public authorities, when making such decisions, to take into account all relevant considerations and avoid being improperly influenced by any other matters. Public guidance on what constitutes a relevant consideration in this context would therefore be helpful for all concerned.

Comment

Generally, this consultation about changes to the system of school organisation is welcome if a little tardy; arriving, as it does, three years after the enactment of primary legislation that started to dismantle the previous system. Since that time, amendments to the framework of primary legislation have sat uncomfortably alongside older regulations and less than transparent administrative practices. The proposals encapsulated in the draft regulations for maintained schools and the public codification of departmental practice with regard to academies/free schools will go a long way towards providing a more coherent system. For convenience, some comments can be found by the description of the draft regulations above.

There could be minor quibbles that some of the documentation (e.g. the June paper on Establishing new Maintained Schools and paragraphs 3.2 and 3.3 of the consultation paper) describes regulatory changes that are still subject to a parliamentary process as if they were already in force. Some LA officers and members may find it irksome that the consultation is framed as if individual schools are expected to be the main engines of change, when it says the government wants: "*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."* The proposals also do nothing to rectify the asymmetrical distribution of powers and responsibilities. Schools, and those who would promote new ones, are encouraged to pursue their own aspirations. The Secretary of State maintains final control over all developments in the Academy sector. But LAs, which are legally required to secure a sufficiency of schools, have to rely to a large extent on securing the voluntary cooperation of other players to fulfil that duty. Nevertheless procedural streamlining will help LAs as much as anyone.

However, there are a number of more important questions and concerns. The proposed changes will bring separate processes that apply in the maintained and the academy sectors closer together - but also serve to emphasise the differences between them. Maintained schools are public institutions, defined in public law and controlled via regulations made by Parliament. Academies are private institutions which enter into a contract with the Secretary of State to deliver a public service which is defined, and controlled via that contract. Placing these documents alongside each other reveals that fundamental distinction starkly and also exposes different directions of travel.

With regard to 'existing schools', the Prescribed Alterations to Maintained Schools regulations will be considerably less onerous even if not be consistent with a 'localist' approach. Prior consultation before publication of a formal statutory proposal becomes discretionary, less information than hitherto has to be provided to fewer people who have a just four weeks to object. If the LA and a maintained school agree, the change can happen quite quickly; and if they don't, the matter will be resolved by the Schools Adjudicator according to criteria she is apparently free to work out for herself. The Secretary of State has largely stepped back from the process requiring only to be told when a change is to be implemented.

By contrast, it is now clear that an academy contemplating a similar change is required to put together a convincing business case for the Education Funding Agency. That case must also include evidence of prior consultation, lasting at least 8 weeks, with the LA (which has a right to make 'reasonable objections' for consideration by the EFA) and a nine-point list of other bodies and individuals. Thereafter, the EFA will make a recommendation to the Secretary of State who decides. If approved there may be a number of separate legal processes to complete between EFA and the academy trust and/or governors including: a 'deed of variation'; a new Funding Agreement; and formal resolutions to change the Memorandum and Articles of Association for registration at Companies House.

Bearing in mind that academy status has been consistently sold on the basis of increased autonomy and freedom from LA bureaucracy some might consider that the playing field has now not merely been levelled but tilted somewhat in the opposite direction. Since the new Prescribed Alteration regulations also simplify the conversion process for Foundation status, it may make this more attractive to community or controlled schools currently looking at academy conversion.

With regard to the creation of new schools, the "academy/free school presumption" has now been in place for some time. It is helpful to have this set out in a public document but it is unlikely to be news to anyone who has already had occasion to be involved - which must include most, if not all, LAs. Similarly, from the LA point of view, simplification of the regulations governing the competition process and the ability immediately to publish LA proposals for a new school when a suitable external promoter cannot be found will be very helpful.

The position with regard to official advice and guidance is less satisfactory. Few will mourn the removal of the literally hundreds of pages of overlapping and repetitive documentation that burgeoned after 2007. In attempting to produce separate documents geared to the needs of different audiences the Department made life quite difficult for anyone who needed to get an overview of the whole picture. However, when the new government arrived in 2010, this morass of material was left to atrophy – the daunting task of revision being postponed in favour of more urgent concerns. However it would now appear the overblown previous guidance has been

cleared away only to leave a vacuum. The previous plethora of advice and exposition has been replaced by a paucity of necessary information.

There are at least two reasons why good advice/guidance on the residual mechanism for creating new maintained schools is arguably more important than before. Despite the emerging anecdotal evidence that more new maintained schools are being created due to a shortage of suitable academy sponsors, the competition/statutory proposal route is still the fall-back position. This being the case those required to operate it will do so less frequently and are more likely to need advice on what to do.

Slimming down the regulations also widens the element of discretion and therefore uncertainty over procedure. Just because certain steps are no longer specifically prescribed does not mean they are entirely unnecessary. For example the consultation paper itself says (at paragraph 1.2) *"Although we are removing the duty to follow a statutory process, we would still expect some form of consultation to be undertaken …".* All public bodies are governed by a legally enforceable expectation that they will operate according to certain well-established common law principles and some other statutory requirements which overlay the specific regulations. For example, no public body should take any important decision without making itself aware of the impact on people who will be affected and taking their views into account. Section 176 of the Education Act 2002, as extended by s.167 of the Education and Inspections Act 2006 created a general 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. Legislation on equalities and freedom of information may also create duties which would apply in particular circumstances.

Thus, simply following the minimum requirements set out in the slimmed down regulations may not be enough to meet the actual statutory responsibilities. It is difficult to expect those who are involved in these process infrequently (and in many cases they will only ever do it once) to know what to do unless the regulations are supplemented by appropriate plain language guidance. It makes sense for the same set of procedural rules to cover all school organisation decision making; an individual project could be anything from a minor and uncontroversial change to a single primary school; to a major reconfiguration of provision across a wide area. The current regulations were framed to be adequate for largest of projects. The proposed minimalist version will be adequate for small projects but it needs to be made clear in guidance that in other cases the context may require a process that goes beyond the statutory minimum.

There are substantial gaps in the revised advice that has so far been made available and uncertainty over whether more will be forthcoming once the regulations come into effect. There are also unnecessary obstacles to the clarity and accessibility of the documents that do exist.

DfE still draw a distinction between the nomenclature "statutory guidance" and "non-statutory advice". They use "guidance" for occasions when this is explicitly referred to on the face of legislation; and "advice" when the department thinks it is helpful to provide further explanation about statutory provisions despite the absence of any explicit requirement to do so. It says that there is a duty to "have regard" to guidance but not "advice". For reasons that have been pointed out in CSN briefings before (and are therefore not fully rehearsed here), this is a distinction without a difference and it is both legally questionable and dangerous to assume that there is no duty to "have regard" to a document labelled as "advice". That distinction is, in fact impossible to maintain. Most official documents about school organisation contain elements of both kinds of information.

Indeed the convention is not followed in these documents. For example “Making significant changes to an existing academy” is described as “Guidance” although there is no statutory duty on the Secretary of state to provide it. Whereas paragraph 1 of “Establishing new maintained schools”, which is headlined as “Advice” uses both terms in the same sentence!

From the point of view of the consumer there is absolutely no need to make this distinction which in any event is not a reliable guide to the strength of the advice. It will invariably be clear from context where statements relate to absolute obligations, or matters where there is a greater degree of discretion. However where the provision of advice or guidance is mentioned in statute, it is incumbent on ministers to offer it. DfE officials may therefore wish to note that some of the gaps identified here relate to matters that were previously described as “statutory” (e.g. the absence of any ‘guidance for decision makers’ about determining statutory proposals). The Secretary of State may therefore be vulnerable to claims that he is in breach of his statutory duty to provide it.

External links

DfE consultation to 24 October 2013 Changes to the System of School Organisation.

DfE draft The School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2013

DfE draft The School Organisation (Establishment and Discontinuance of Schools) (England) Regulations 2013

DfE advice Establishing new maintained schools: Departmental advice for local authorities and new school proposers (June 2013)

DfE advice on The academy/free school presumption (July 2013)

DfE guidance on Making significant changes to an existing academy (September 2013)

DfE webpage Statutory Guidance

DfE webpage Departmental Advice

DfE webpage School Organisation

Related briefings

Capital funding for new school places: National Audit Office report (March 2013)

DfE advice on establishing a new school July 2012

How can we encourage good schools to expand? DfE research (January 2013)

School admissions: Adjudicator’s Report 2012 and DfE advice on Fair Access Protocols (December 2012)

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)

For further information, please visit www.lgiu.org.uk or email john.fowler@lgiu.org.uk