Governance of Maintained Schools: Recent Regulations and Guidance

Date: 21 January 2013
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Summary
Contains briefing about DfE advice and guidance related to new regulations on the composition of maintained school governing bodies, namely:

- Guidance on the School Governance Constitution Regulations 2012
- Advice on the School Governance Federations Regulations 2012
- Advice about the establishment and governance of new maintained schools relating to The School Governance (New Schools) England Regulations 2007.

Overview
Three advice and guidance documents on the governance of maintained schools appeared during September and October 2012. They relate only to ‘maintained’ schools – i.e. not academies or ‘free schools’ - and are part of the Government’s wider tidying-up exercise following the policy and legislative changes introduced in 2010 and 2011.

Although there is a strong ‘presumption’ that any new schools will be academies or ‘free schools’ it is still possible, in limited circumstances, for a new community, foundation or voluntary school to be created. Similarly, whilst many schools are converting to become academies many maintained schools still exist and it is therefore necessary for the legal framework that defines them and regulates their activities to be kept up to date.

For the most part the advice and guidance, and associated regulations, replace equivalent documents that were put in place in 2007 following the previous major overhaul of school structures and governance brought about by the Education and Inspections Act 2006. The exception is the documents relating to temporary governing bodies for new maintained schools; where the 2007 regulations remain in force and the advice has been reissued rather than replaced.

Briefing in full

Guidance on the School Governance Constitution Regulations 2012
This Departmental document, entitled in full as The School Governance Constitution Regulations 2012: Guidance for Governing Bodies, Local Authorities, School Leaders in England and Governor Organisations and Other Organisations with an Interest, was published on 24 October 2012. Its...
function is to explain The School Governance (Constitution) (England) Regulations 2012 (SI 2012/1034) which were laid before Parliament in April, on the commencement of section 38 (Constitution of governing bodies: maintained schools in England) Education Act 2011 which amended (for England) s.19 (Governing bodies) Education Act 2002. The regulations came into force on 1 September 2012.

The 2011 Act made several changes to the composition of governing bodies. Maintained school governing bodies must consist of parent governors, an elected staff governor and the head teacher and a person appointed by the foundation if there is one. A person can be appointed by the local authority if that person meets the ‘eligibility criteria’ set by the governing body.

The Regulations, and therefore the guidance, are restricted to the structure of governing bodies, and the way individual people are appointed to serve as governors. They do not cover the responsibilities of governing bodies or how they conduct their business which is prescribed elsewhere, for example s.23 (General responsibility for the conduct school) Education Act 2002 and the School Governance (Procedures) Regulations 2002 (SI 2002/1377). Both the regulations and the guidance are arranged to describe four aspects of the structural requirements for the constitution of governing bodies:

- a description of the different categories of governor defined in the regulations;
- how governing bodies are to be constituted within parameters of required minimum and permitted maximum numbers and proportions of each category of governor;
- requirements relating to individuals who can become governors, including the types of person eligible to be appointed for each category of governor, their terms of office, removal and disqualification; and
- processes for the ‘making’ and amendment of the ‘instrument of government’ – which is the document which defines the constitution of each maintained school.

There are two annexes containing helpful additional information. Annex A summarises various permissible permutations of the number of governors in each category for governing bodies of different sizes in separate tables for each different kind of school (for convenience, a copy is attached to the pdf version of this briefing). Annex B provides a model which can be used as template to draft the instrument of government for any school.

Much of this remains the same as before and will be familiar to those who already work with school governing bodies. There are, however, a number of changes as follows:

- The Regulations allow governing bodies constituted on or after 1 September 2012 to have a minimum size of seven members, rather than nine as under the 2007 Constitution Regulations. This, however, remains subject to the requirement that ‘foundation governors’ must hold a majority in voluntary aided schools and ‘qualifying’ foundation schools, which means that it would not be technically feasible for those categories of school to have a governing body this small.
- There is a new formal requirement that the governing body should ensure that collectively its members have the skills needed to discharge their responsibilities effectively.
- The method of appointing the local authority governor has been amended such that schools now have a right to reject (with reasons) the nomination of a particular individual.
- A new definition of co-opted governor has been introduced.
The role of sponsor governor has been removed.

The framing of the regulations (see regulations 2 and 4) means that there is no requirement for all governing bodies immediately to be reconstituted to comply with them. Thus the 2007 regulations remain in force with respect to all schools with an instrument of government that was made before 1 September 2012 unless or until there is a need to change it for some other reason. At this point the new regulations come into play.

However, some of the changes, now subsumed in the September regulations, were actually brought in via an amendment to the 2007 regulations in the form of The School Governance (England) (Amendment) Regulations 2012 (SI 2012/0421) which were laid before Parliament in February and came into force on 17 March 2012.

These made a number of minor changes as follows:

- alterations to the definition of ‘staff governor’;
- an extension of the discretion given to those who appoint foundation governors;
- those who work in schools and are employed by the local authority can now be partnership governors; and
- amending regulations about the appointment of parent governors in qualifying foundation and voluntary aided schools.

There are also some small changes to the grounds for disqualification of individuals from holding office by removing detention under the Mental Health Act 1983 from, and adds being the subject of a debt relief restrictions order or an interim debt relief restrictions order to, the list of disqualification criteria.

These amendments did not have the same transitional implementation process built into them; and therefore they came into force immediately. So, although it would perhaps be unreasonable to expect governing bodies to have carried out an audit to discover if any governors ought to be removed as a result, these changes should be taken into account when new appointments are made under an existing instrument.

Advice on the School Governance Federations Regulations 2012

This Departmental document The School Governance (Federations) (England) Regulations 2012: Departmental Advice for Local Authorities, School Leaders, School Staff and Governing Bodies was published on 21st September 2012. Its function is to explain 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.

As with the general ‘Constitution’ regulations and guidance (see above) these documents replace their equivalents dating from 2007, and cover much the same ground as before. Namely: how to establish or join a federation; different categories of governor; how federated governing bodies are to be constituted; instruments of government, procedures, staffing, financing and charitable status of federated governing bodies; the procedures for a federated school to leave a federation; the procedures to dissolve a federation; and discontinuance of federated schools. However, one aspect of the regulations - applications for Academy Orders by federated schools – is new (see below). Also, as with the general regulations, they are being ‘phased in’ taking effect only for new
federations constituted after 1 September 2012 or when there is some other reason for the instrument for the federated governing body to be reviewed or amended.

Because the constitution of a federated governing body is built on the platform of the arrangements for single schools the changes outlined above, namely:

- minimum size of seven members;
- requirement to ensure that the governing body has the skills needed to be effective;
- changes to the appointment of the local authority governor;
- introduction of a new category of co-opted governor; and
- removal of the sponsor governor category;

also apply here.

However, there are some changes that are specific to federations following changes made by s. 29 (Discontinuance of federated school: governing body not to be dissolved) Education Act 2011 and s.57 (Academy conversions: federated schools) to schedule 1 (Dissolution of school governing body on dissolution of school) Education Act 2002 and three sections of the Academies Act 2010:

- A school within a federation can now close or convert to an Academy, without first having to undertake a statutory procedure to leave the federation.
- A defined group of individual members of a federated governing body can apply for an Academy order in respect of a school within the federation, without requiring the agreement of the whole federated governing body.
- Provision is also made regarding the transfer of school surpluses after a maintained school converts to Academy status, and for the determination of the amount of any school surplus that should be attributed to a federated school converting to Academy status.

The material difference here is that previously the existence of a federation could be construed as a barrier to academy conversion. Because academies cannot legally be federated with maintained schools, an individual school would have to leave its federation before it could convert. However, since the same entity is the governing body for all the schools in the federation and must agree to any changes, a majority could block the aspirations of a subgroup to take a single school out of the federation. Under the new arrangements the regulations allow a subset of governors to seek academy conversion from ‘within the federation’; provided that the group of individuals together make up a proportion of the whole governing body at least equivalent to the number of schools in the federation, and that their number include:

- the Headteacher for the school in question (which may, or may not, mean an ‘executive head’ of the whole federation as this will depend on the employment contracts of relevant senior staff);
- any parent governors elected to represent the school in question;
- any staff governors who work at the school in question;
- (in the case of foundation and voluntary schools) any foundation governors appointed to represent the school in question.
If the application for academy status is successful the existing school would be closed which would automatically trigger a requirement for the federated governing body and the LA (or LAs in a cross-border federation) to reconstitute the federation – or dissolve it if only one school would remain after departure of the converting school (or schools).

Advice about the Establishment and Governance of New Maintained Schools

The exact status and provenance of the DfE document Advice about the Establishment and Governance of New Maintained Schools is slightly confusing. It is flagged as having been updated on 18 September 2012 and is described on the web page in the following terms:

“This is non-statutory advice from the Department. The aim of this document is to explain the provisions in the School Governance (New Schools) (England) Regulations 2007. These regulations came into force on 25 May 2007.”

However, the URL leads is an un-amended version of 2007 ‘advice’ which describes itself as having the status of “Statutory Guidance”. It continues to use the term “LEA” instead of “LA” which is both contrary to departmental policy and inconsistent with legislation since the power contained in s.162 of the Education and Inspections Act 2006 to change all legislative references retrospectively was activated. Confusion is further compounded by the fact that the hot-link behind the reference to the regulations brings up another copy of the same 2007 “Guidance”. The relevant regulations are The School Governance (New Schools) England Regulations 2007 (SI 2007/958).

This has been checked with the Department. The misdirected URL behind the reference to the regulations is a simple error which should be corrected shortly. However, the intention of the updated webpage is to flag up the fact that because the regulations remain in force the guidance has not been updated. Hence, the new “advice” on the web page draws attention to the old “guidance” in the downloadable document. There is an expectation that new regulations (and also updated guidance) will be produced in due course but, as yet, no firm date can be given.

Since the advice/guidance and regulations on the website are formally unchanged there is little that can be said about them. Given current policy and other legislative and regulatory changes the creation of a completely new maintained school, whilst still technically possible, will be a relatively rare occurrence. In these circumstances it is understandable that it might not have been considered a high priority to recast the regulations and update the advice/guidance.

These documents relate mainly to the creation of a temporary governing body and its operation during the period (usually of about a year) before it is replaced by a permanent body defined by the new school’s instrument of government. The operation of such bodies is, by definition, provisional and there is a degree of flexibility built into the 2007 regulations. The permanent constitution of any such new school would, of course, be governed by the 2012 regulations and guidance outlined above and, for practical purposes, this fact would necessarily inform any temporary governing body that needed to be established.

However, in these circumstances, it would seem even more important that the associated advice/guidance should be recast to explain the relationship between the older, but still extant, regulations and the newer ones. The fact that the same document is described as both “non-
statutory advice” and “statutory guidance” is less of a problem than it might seem, as the distinction is more apparent than real (see commentary below) but there is another potential anomaly which might be more significant.

Given the changes to the federation regulations, it is perhaps more likely that the dissolution of a federation will lead to an existing maintained school having to establish a new governing body from scratch whilst it is reconstituted as an entirely separate institution. This is analogous to a ‘new school’ situation but; although the federation regulations provide for the creation of temporary governing bodies where a new school is to be included within a federation from inception, they are silent on processes that apply to any maintained school that might be left ‘hanging’ on dissolution of a federation. Similarly, the advice (see above) on the 2012 ‘Federations Regulations’ cross-reference the ‘Constitution Regulations’ and guidance but does not say how they might relate to the separate 2007 ‘New School Regulations’.

A second anomaly is that the 2007 regulations and guidance still refer to the possibility of a temporary governing body including “sponsor governors” when any such temporary governors could not be included in the permanent body as the category has now been abolished. Doubtless, these inconsistencies will be removed when the planned updating takes place; but, in the mean time, any authority needing to set up a temporary governing body for a new, or de-federated, school would be well advised to have regard to the newer as well as the 2007 regulations and ensure that all appointments are consistent with both.

Comment

The first of these three documents is defined as “Statutory Guidance” the second as “Non-Statutory Advice” and the third – perplexingly – as both. As has been pointed out in these briefings before, DFE seems to have a shaky institutional understanding of the legal status of this kind of document. The Department’s own explanation of its distinction between the two can be found here. Essentially, they use “guidance” for occasions when guidance 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”.

The term “non-statutory advice” (which incidentally is not used in the general explanation of the difference between “guidance” and “advice”) is both meaningless and potentially misleading. Any advice or guidance issued by a government department must be, in some sense, ‘statutory’ as it has to fall broadly within the statutory functions of the relevant ministers. It is, of course, true that the provision of guidance is sometimes mentioned on the face of statute and sometimes not. It is also correct that where formal guidance is issued those to whom it is directed must ‘have regard’ to it when taking relevant decisions. This means the advice/guidance must be considered and taken into account but it need not be followed slavishly if there is good reason to do something else. On rare occasions, legislation allows Ministers to issue guidance which carries a stronger requirement of compliance (e.g. the School Admissions Code which requires those to whom it applies to “act in accordance” with it). However, it is strongly arguable, contrary to the position adopted by DfE, that there is also a ‘common law’ duty to ‘have regard’ to formal advice issued by government departments, as anyone with experience of Judicial Review cases will understand.
But, notwithstanding the legal argument, there is no practical difference. Clearly “advice” must be followed if it is an accurate representation of the statutory duties it seeks to describe. Similarly it could safely be ignored only if there is good reason to believe that this is not the case. Here, all three documents have a similar function i.e. a plain language explication of the regulations that sit behind them. In each case, the obligation to comply resides in the regulations themselves; so, from the point of view of the user, nice distinctions about which of the Secretary of State’s powers is being invoked to issue each advice/guidance document are entirely irrelevant. Unfortunately, it also has the inconvenient consequence of information about essentially the same topic being listed in different places on DfE website!

With regard to the substance of the advice, the material changes in regulations that are flagged up are consistent with the direction of coalition government policy over its first two years. Some, e.g. the small increase in the autonomy of maintained schools which can now reject an individual nominated to serve as a LA governor are obvious.

The decision to abolish the category of ‘sponsor governor’ alongside changes to the co-option powers is mentioned but not elaborated or explained in the guidance. The sponsor governor category was something of an anomaly in that such individuals were full members but were not counted as such for certain calculations about the proportionality of different categories of governor. It is also true that they were associated with an, now largely forgotten, initiative to encourage schools to raise match funding from external organisations in connection with specialist school status. The preferred route for such philanthropy was subsequently directed to participation in trust schools and, more recently, is now focussed on promoters of academies and free schools. It might also be considered confusing in that the term ‘sponsor’ is now more commonly understood to relate to academies than maintained schools. On balance, therefore it is likely that any particular individuals that a school wishes to recruit (in particular with regard to the new duty to secure appropriate skills) could be co-opted if they did not qualify under any other category.

**External links**

The School Governance Constitution Regulations 2012: Guidance for Governing Bodies, Local Authorities, School Leaders in England and Governor Organisations and Other Organisations with an Interest

The School Governance (Federations) (England) Regulations 2012: Departmental Advice for Local Authorities, School Leaders, School Staff and Governing Bodies

Advice about the Establishment and Governance of New Maintained Schools

**Related briefings**

Education Act 2011 (November 2011)

For further information, please visit [www.lgiu.org.uk](http://www.lgiu.org.uk) or email [john.fowler@lgiu.org.uk](mailto:john.fowler@lgiu.org.uk)
From the DfE guidance on the School Governance Constitution Regulations 2012

### Constitution of governing bodies by category of governor

<table>
<thead>
<tr>
<th>Category</th>
<th>Foundation/trust governors</th>
<th>Partnership governors</th>
<th>Parent governors</th>
<th>Staff governors (including headteacher)</th>
<th>Local authority governors</th>
<th>Co-opted Governors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Community</td>
<td>N/A</td>
<td>N/A</td>
<td>At least 2</td>
<td>Headteacher + 1</td>
<td>1</td>
<td>As determined by the GB and no more than 1/3 where they are also eligible to be elected as staff governors when counted with the staff governor and headteacher.</td>
</tr>
<tr>
<td>Foundation with no foundation</td>
<td>N/A</td>
<td>At least 2 but no more than ¼</td>
<td>At least 2</td>
<td>Headteacher + 1</td>
<td>1</td>
<td>As determined by the GB and no more than 1/3 where they are also eligible to be elected as staff governors when counted with the staff governor and headteacher.</td>
</tr>
<tr>
<td>Foundation with a foundation that appoints a minority of the GB</td>
<td>At least 2 but no more than 45%</td>
<td>N/A</td>
<td>At least 2</td>
<td>Headteacher + 1</td>
<td>1</td>
<td>As determined by the GB and no more than 1/3 where they are also eligible to be elected as staff governors when counted with the staff governor and headteacher.</td>
</tr>
<tr>
<td>Qualifying Foundation</td>
<td>Overall control of GB, A majority of up to 2 over all other categories of governor</td>
<td>N/A</td>
<td>At least 2</td>
<td>Headteacher + 1</td>
<td>1</td>
<td>As determined by the GB and no more than 1/3 where they are also eligible to be elected as staff governors when counted with the staff governor and headteacher.</td>
</tr>
<tr>
<td>Voluntary controlled</td>
<td>At least 2 but no more than 1/4</td>
<td>N/A</td>
<td>At least 2</td>
<td>Headteacher + 1</td>
<td>1</td>
<td>As determined by the GB and no more than 1/3 where they are also eligible to be elected as</td>
</tr>
</tbody>
</table>

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1. Including community special schools and maintained nursery schools
2. Including foundation special schools
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<td>Voluntary aided</td>
<td>Overall control of GB.</td>
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