DfE revised guidance on maintained school organisation

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Summary
The DfE has published three new guidance documents on the School organisation: local-authority-maintained schools website:

- Making 'prescribed alterations' to local-authority-maintained schools (Ref: DFE-00104-2016, 50 pages)
- Deciding prescribed alteration and establishment and discontinuance proposals (Ref: DFE-00105-2016, 25 pages)
- Opening and closing local-authority-maintained schools (Ref: DFE-00106-2016, 28 pages)

The website states: “We have comprehensively reviewed and updated all 3 documents. The changes include corrections to discrepancies in the guidance on making ‘prescribed alterations’ to local-authority-maintained schools.” The documents were published on 28 January 2014, and DfE flagged up that they were under review on 11 February 2016.

The revised guidance expands on the January 2014 versions but relates only to maintained schools. The earlier suite of documents also covered Academies (including Free Schools). Since there have been no substantial changes to relevant primary or secondary legislation that bear directly on the subject matter, the legal position remains the same. However the context has been altered by two recent events. Firstly, enhanced powers to direct academy conversion, derived from the Education and Adoption Act 2016, which commenced on Monday 18 April 2016. Secondly the white paper Educational Excellence Everywhere (Cm 9230) (See Related Briefings) signalled the government’s intention to legislate: giving the Secretary of State new powers to require any school to become an academy; and to prevent any further community or voluntary schools adopting ‘Foundation’ status (see related briefings).

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

Overview
New guidance is usually preceded by legislative change, but not in this case. The guidance it replaces appeared in 2013/14 following primary legislation in 2011 with some guidance published in 2013; and a consultation on a 'streamlined' approached to aspects of school organisation leading to publication of new regulations at the end of 2013 with related guidance being issued early in 2014.

In December 2013, two new sets of regulations were made:

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• 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 followed on 28 January 2014, the day the regulations came into force. That guidance is identified as the precursor to the present documents, which was arranged as a 24 page main text with 53 pages in the three annexes: A: Further information for proposers; B: Guidance for Decision Makers; and, C: Foundation and Trust proposals, a total of 77 pages. The three new documents (which boil down to: ‘opening and closing’; ‘prescribed alterations’; & ‘guidance for decision makers’ - 103 pages in total) have been rearranged as well as updating the substance of the previous guidance.

The 2014 and 2016 documents are less than comprehensive as they have not subsumed or replaced two other items of guidance that were issued in 2013: The free school presumption’ (originally issued July 2013 but subsequently updated several times – most recently in February 2016) and Establishing new maintained schools: Departmental advice for local authorities and new school proposers (June 2013) which remain extant and are cross-referenced in the new guidance.

As noted above the reworking of the guidance arises from a change in context and mainly anticipates planned new legislation rather than responding to its passage into law. Consequently much of the text remains the same albeit rearranged and the differences are largely a matter of emphasis.

**Briefing in full**

**Making ‘prescribed alterations’ to maintained schools**

This document, like the others, is “statutory guidance” (see comment below), and has the purpose “to ensure that good quality school places can be provided quickly where they are needed”. A secondary purpose is to ensure “that local authorities and governing bodies do not take decisions that will have a negative impact on other schools in the area, and that changes can be implemented quickly and effectively where there is a strong case for doing so. In line with these aims it is expected that, where possible, additional new places will only be provided at schools that have an overall Ofsted rating of ‘good’ or ‘outstanding’.”

This signals a change to policy priorities compared to an equivalent statement in the 2014 guidance which referred only to supporting “the government’s aim of increasing school autonomy and reducing bureaucracy.”

A review date for the guidance is given of April 2017.

The bullet point list of ‘main points’ on page 6 flags up current Government policy priorities. In 2014 the first reference to communication with central government appears in Chapter 2 paragraph 4 which indicates that the Secretary of State must be informed by updating the department’s Register of Educational Establishments (EduBase) “Once proposed changes have
been implemented …” That statement now appears as the seventh, and final, bullet point in the summary. Three new statements precede it, as follows:

- Where a LA proposes to expand a school that is eligible for intervention they should copy the proposal to the relevant Regional Schools Commissioner.
- To enable the department to monitor potentially controversial proposals, the proposer should copy any proposal which falls within the definitions set out in part 3 to the School Organisation mailbox – schoolorganisation.notifications@education.gsi.gov.uk.
- It is the department’s view that governing bodies should convert to academy status rather than change category to a foundation. Governing bodies wishing to discuss this issue should email schoolorganisation.notifications@education.gsi.gov.uk and a member of the school organisation team will contact them to discuss the proposed change of category.

Because ‘prescribed alterations’ cover a range of different circumstances this document is approximately twice the length of the other two. After the summary the main section headings are:

2. Prescribed alteration changes.
3. Contentious / controversial proposals.
4. Changes that can be made outside of the statutory process.

Again, more detailed information is included in a series of annexes:

A. Information to be included in a prescribed alteration statutory proposals.
B. Information that must be included in foundation proposals.
C. Information to be included in proposals to remove a Trust.
D. Information to be included in proposal to reconstitute the governing body.
E. Further Information.
F. Contact details for RSC offices.

As is to be expected, the content of the guidance in its plain language explanation of the unchanged regulatory framework remains much the same. However section 3, contentious / controversial proposals, is new. It is short, less than one side, and consists of an instruction to LAs and governing bodies to notify the department via a dedicated mail box of proposals that would:

- result in an existing primary school becoming an all-though school / cross phase school;
- result in an increase of over 50% in the school’s capacity;
- increase the school’s pupil numbers to over 2,000;
- propose expansion onto a separate ‘satellite’ site; or
- have received objections from the LA and / or neighbouring school that the proposed change will undermine the quality of education.

This is justified by the DfE’s ‘keenness’ that “LAs and governing bodies act reasonably in line with the principles of public law, to ensure that the changes do not to have a negative impact on the education of pupils in the area” when they are proposing: enlargement of premises; changes to a school’s age range, and / or adding a sixth form.
Section 6 of the guidance, on the adoption or adjustment of foundation school status, is very similar to the equivalent part (annex C) of the 2014 guidance. Apart, that is, from some strong words of discouragement:

“It is the department’s view that governing bodies should convert to academy status rather than change category to a foundation. Governing bodies wishing to discuss this issue should email schoolorganisation.notifications@education.gsi.gov.uk and a member of the school organisation team will contact them to discuss the proposed change of category.”

Guidance for decision-makers

This document replaces Annex B in the 2014 version and covers all decisions relating to opening, closing and altering maintained schools. As such, it covers the same ground as the other two but from the perspective of the decision-maker rather than proposers.

It adopts a similar structure with a ‘Summary’ section by way of introduction, indicating the purpose, review date (April 2017) and target audience. The first three bulleted ‘main points’ allude to: the decision-maker’s need to be satisfied that consultation has been properly carried out; that all statutory requirements have been met; and, to consider whether a proposal to expand “is genuinely a change to an existing school or is in effect a new school which should have triggered the free school presumption. The bullet points continue:

- The 2016 White Paper Education Excellence Everywhere, sets out the department’s aim that by the end of 2020, all schools will be academies or in the process of becoming academies. The decision-maker should, therefore, take into account the extent to which the proposal is consistent with this policy.
- In determining proposals decision-makers must ensure that the guidance on schools causing concern (Intervening in falling, underperforming and coasting schools) has been followed where necessary.
- All decisions in relation to the opening and closing of a maintained school should be copied to the Secretary of State, within one week of the decision being made. The notification must be sent to schoolorganisation.notifications@education.gsi.gov.uk. The necessary amendments will then be made to the EduBase system.

Section two gives guidance on “factors relevant to all types of proposals” and thereafter separate sections deal with: alterations in general; establishment (opening); discontinuance (closing); and alterations that relate to foundations status.

The guidance in the new document is substantially the same as, and much of it is identical to, the 2014 text. Material differences include the following.

In the paragraphs on ‘Addition of post-16 provision’ (page 12), the previous guidance has been strengthened by five new bullet points indicating that to be approved new (or extended) sixth forms should: be of “good or outstanding” quality; provide a minimum of 200 places; offer a minimum of 15 A level subjects; show clear evidence of demand; and, be financially viable (including there being no adverse effect on 11-16 provision as a result of cross subsidy).

The ‘new schools’ section has been rearranged with a recast explanation of the competition requirements. It now includes an external link to guidance on “promoting fundamental British
values”. Previous sections covering ‘New Voluntary aided schools’ and ‘Replacement grammar schools’ have been omitted.

The closures section has replaced a single paragraph about “Schools causing concern” with a hot-link to departmental guidance. It is not separately made clear in the text but that guidance was revised and reissued in March 2016 (see Related Briefings) and runs to some 45 pages. Among other things it covers (at p.37) the Secretary of State’s power to direct a school closure (see comment below).

Section 6 “factors relevant to proposals to change category to foundation” is identical to the 2014 text; except that the discouraging statement in the ‘alterations guidance’ (quoted above) indicating the government’s view that this should not happen is reproduced at the beginning.

Opening and closing maintained schools

This guidance relates to The School Organisation (Establishment and Discontinuance of Schools) (England) Regulations 2013 (SI 2013 No 3109). These regulations followed amendments to the framework introduced by the Academies Act 2010 and the Education Act 2011. The previous default position requiring an open competition was replaced by 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 remain in place, and can be followed if a suitable academy solution cannot be found, and in a limited range of other circumstances where continuing maintained provision is deemed acceptable.

There have not been legislative changes to the closure (discontinuance) procedure for maintained schools. As before there is a practical distinction between a ‘closure’ that results in the complete disappearance of an institution and a one that is the technical consequence of a change of status. Most frequently a technical ‘closure and re-opening’ will take place when an existing maintained school becomes an academy. This also applies when, for example, a school without a religious character is designated as having one.

The first section of the document, headed ‘summary’ indicates that it is “statutory guidance” (see comment below), says its purpose is “to ensure that good quality school places are provided where they are needed” and that it will be reviewed in 2017. It cross refers, with hot links, to the relevant legislation and related guidance and includes a bullet point list of ‘main points’.

Sections 2 to 4 cover: establishment of new schools; school closures; and the statutory process; respectively. There are three annexes, providing more detail on:

A. School closure consultations.
B. Statutory proposals for school closures.
C. Statutory proposals for establishing a new school.

A fourth, Annex D, provides a list of associated legislation, regulations and other relevant guidance - with hot links.

Broadly speaking the substance of the guidance remains the same; although since it has been rewritten, rather than revised, it has sometimes been recast in different words. In places more information is included, although overall it remains concise as compared to the voluminous
documentation that existed before 2014. Occasionally, it has been reduced. For example the section “Who can close a school?” (section 3, page 8) refers only to LAs and governing bodies. The equivalent section in the 2014 guidance (paragraphs 43 – 47, pp17 and 18) is longer and also covers the power of the Secretary of State to direct the closure of a school.

This power not only remains in place but may be used more frequently in the future as a result of increased powers to direct academy conversion. Decisions, exercisable by Regional School Commissioners (RSCs) on behalf of the Secretary of State, that a school should become an academy inevitably involve closure of the predecessor maintained school. This is made clear at page 37 in the recent guidance on Schools Causing Concern (updated 24 March 2016) which is not mentioned here but does appear as hot link at p.17 in the Guidance for decision-makers (see below).

Comment

The CSN briefing on the 2014 Guidance (see Related Briefings) welcomed the revision to regulations and guidance to take account of legislative changes in 2010 and 2011. It did however identify flaws, including typographical and grammatical errors as well as omissions of substance. The latest revision seems to have benefited from more thorough proof reading and the opportunity to fill some gaps has been taken. For example, the previous failure to mention 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 has now been rectified. [Section 176, Education Act 2002, as extended by s.167, Education and Inspections Act 2006].

However the opportunity to consolidate all extant guidance has again been missed by leaving the same two DfE advice documents: The Establishing a new school: free school presumption and Establishing new local-authority-maintained schools in place. The ‘presumption’ guidance has been expanded considerably since it was originally issued in 2013 and now contains a lot of material about what should be done to create new academy provision in response to basic need. However there is a considerable amount of overlap with the second of these two documents which could easily, and beneficially, have been incorporated into the new guidance.

One possible reason for keeping it separate is that the three latest documents are identified as “Statutory Guidance” whilst the other two are identified as “Non Statutory”; but, if so, it is not a good one. There is absolutely no reason why ‘statutory’ and ‘non-statutory’ guidance should not coexist in the same document; but highlighting the distinction without explaining it appears disingenuous. All three of the latest publications contain the formulation: “This is statutory guidance from the Department for Education. This means that recipients must have regard to it when carrying out functions relating to …” whereas the others simply say “This advice is non-statutory.” These statements are true, as far as they go, but taken together they are potentially misleading. It would be easy to draw the inference that ‘statutory guidance’ is somehow stronger or more binding than the other kind. But this is not the case. The distinction is actually between guidance that the Secretary of State is obliged or permitted to issue because the requirement for it to be made available is mentioned on the face of an Act or in regulations. Non-statutory guidance is any other advice which the Secretary of State decides to offer because the Department think it will be helpful. However such advice can only be issued on matters that fall within the Secretary of
State’s responsibilities and, if it is offered, recipients are legally obliged to “have regard to it”. From the point of view of the recipient, this is a legal distinction without a practical difference, being dressed up to imply that the target audience must do what they are told.

Except for formal codes of practice (like the School Admissions Code) which do come with a higher expectation of compliance, all guidance in education legislation have the same ‘have regard’ status; which, put simply, means it should be followed unless there is a good (enough) reason not to. What constitutes a good enough reason will depend on the context. Where the guidance simply describes regulations in plain language there is strong obligation to comply; but this derives from the law that sits behind it rather than the guidance itself. In general, the further guidance strays from its legislative underpinning the weaker it gets.

Aspects of the new guidance are, arguably, neither ‘obligatory’ in the sense it seeks to imply, nor ‘statutory’ according to the actual meaning of the term. This is where the guidance seeks to secure compliance with government policy intentions which go beyond the present legal framework; or in anticipation of planned changes to it. For example the new category of “contentious/controversial proposals” is not reflected anywhere in regulations as being different from any other ‘prescribed alteration’ and there is certainly no explicit requirement for them to be distinguished in guidance.

The attempt to dissuade schools from converting to Foundation Status and become academies instead is another example. The phrase “Governing bodies wishing to discuss this issue ... and a member of the school organisation team will contact them ...” in the passage quoted above, is probably careful enough to the keep the guidance the right side of any possible legal challenge. However the sub-text which is ‘if you are thinking of doing this let us know so that we can talk you out of it’ is not appropriate. Repeating the passage in the Guidance for decision-makers is, arguably worse. Whilst a governing body, thinking about making a change, might be considered fair game, the statutory ‘decision-maker’ has a different statutory role. Such decisions are defined as ‘quasi-judicial’ which creates a legal obligation on the decision-maker to give appropriate consideration to all relevant factors and to avoid being influenced by inappropriate considerations. Intervention by a DfE official at this stage seeking to influence the outcome in a particular direction may be deemed inappropriate.

Clearly the government is entitled to have policies and make them known. It is also reasonable for it to seek information and monitor developments in which it has an interest. However, pressuring independent actors to act in accordance with government policy before it has persuaded Parliament to change the law is arguably not wise and may lead to government by decree. There is also a pragmatic question about the wisdom of issuing guidance ahead of planned legislative change given the calls from Government backbenchers for changes in the policy and the opposition of the Opposition.

**External links**

DFE webpage: [School organisation (maintained schools)](https://www.gov.uk/government/publications/school-organisation-maintained-schools) giving access to:

• **Opening and closing local-authority-maintained schools** (Ref: DFE-00106-2016, 28 pages)

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

The School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2013 (SI 2013 No 3010)

DfE document The Free School Presumption (February 2016)

DfE webpage Establishing new local-authority-maintained schools (June 2013)

DfE webpage Schools Causing Concern (March 2016)

DfE webpage: School Organisation giving access to current school organisation documents

**Related briefings**

Schools causing concern: April 2016 DfE guidance (April 2016)

DfE White Paper: Educational Excellence Everywhere (March 2016)

School Organisation – 2014 regulations and DfE guidance (February 2014)

School Organisation – DfE consultation and recent advice (September 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)

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)