

ESTABLISHING A NEW SCHOOL

DEPARTMENTAL ADVICE FOR LOCAL AUTHORITIES AND NEW SCHOOL PROPOSERS

ABOUT THIS DEPARTMENTAL ADVICE

1. On 1 February 2012, section 37 of the Education Act 2011 was commenced, introducing Schedule 11 of the Act. This makes changes to part 2 of the Education and Inspections Act 2006 in relation to the process for establishing new schools, including the academy/Free School presumption. This advice is non-statutory and has been produced to help new school proposers and local authorities understand their duties in relation to these changes.

EXPIRY/REVIEW DATE

2. This advice will be reviewed by October 2012.

WHAT LEGISLATION DOES THIS ADVICE RELATE TO?

- The Education Act 2011 (EA 2011)
- The Education and Inspections Act 2006 (EIA 2006)
- The School Organisation (Establishment and Discontinuance of Schools)(England) Regulations 2007, as amended (Establishment and Discontinuance Regulations)

WHO IS THIS ADVICE FOR?

3. This advice is for:

- Local authorities;
- New school proposers; and
- Dioceses and Diocesan Boards of Education.

KEY POINTS

- The new “presumption” for an academy/Free School requires local authorities to seek proposals to establish an academy/Free School in the first instance where they identify a need for a new school.
- Local authorities must continue to plan for and secure sufficient schools for their area in line with their duties under section 14 of the Education Act 1996.
- Local authorities should assess the proposals they receive against the criteria in paragraph 12 below before forwarding all of the proposals to the Secretary of State. He will take into consideration any preference they indicate.
- Local authorities can no longer hold a school competition without the Secretary of State’s consent, nor enter their own community or foundation school proposals into a competition.
- Despite the academy/Free School presumption, in certain exceptional circumstances it is still possible to publish proposals for a new maintained

school outside of a competition, under sections 10 or 11 of the EIA 2006.

- The Secretary of State's consent is no longer required to publish certain proposals, including those for the establishment of new voluntary aided schools, primary schools resulting from infant/junior amalgamations, and new schools resulting from the reorganisation of existing faith provision.
- "Academy" is the legal term which also includes Free Schools of all types, University Technical Colleges (UTCs) and some Studio Schools, including 16-19 and alternative provision (PRU) establishments. This document uses "academy/Free School" as the collective term for these types of schools.
- "Proposer" in this document refers to the body or group that is proposing the new school.

THE EDUCATION ACT 2011

4. Section 37 of EA 2011 introduces Schedule 11, which makes a number of changes to the process for establishing new schools. In particular, it introduces new section 6A of EIA 2006 which sets out the academy/Free School presumption. It makes changes to the existing school competition arrangements (amended section 7 of EIA 2006) and removes the need for local authorities and other proposers to seek the Secretary of State's consent before publishing proposals for certain types of new maintained schools (amended sections 10 and 11 of EIA 2006).

ACADEMY/FREE SCHOOL PRESUMPTION (under section 6A of EIA 2006)

5. Flow chart A at Annex A of this document sets out the revised process for establishing new school provision under the academy/Free School presumption (section 6A) and the new competition process (section 7).

6. Existing statutory requirements mean that local authorities, in their role as commissioners, must plan and secure sufficient schools for their area. Where a local authority identifies the need to establish a new school, new section 6A of EIA 2006 places the authority under a duty to seek proposals to establish an academy/Free School and to specify a date by which proposals must be submitted.

7. It will be for local authorities to decide how best to do this, how to consult on the proposed new school and with whom (e.g. local community, Diocese and any others affected by the proposals). They should be clear from their school place planning about the type (e.g. mainstream, special educational needs, alternative provision), age range, gender and capacity of the academy/Free School they wish to see established.

8. The local authority should take steps to ensure that groups or organisations that might be interested in establishing the new school are aware of the opportunity.

9. The local authority should notify the Department at the outset of its intention to seek proposals for a new academy/Free School and confirm the site it will make available and that it will provide all the capital funding needed to establish the school (as they were required to do for academies established through the previous school competition process). The Department will publish on its website (<http://www.education.gov.uk/schools/leadership/schoolorganisation>) details of those local authorities that are seeking to establish new schools, including links to their

websites. The Department will also inform the Independent Academies Association and New Schools Network, to alert potential proposers/sponsors to the new school's requirements.

10. Once the specified date for academy/Free School proposals has passed, the local authority should send the Secretary of State a notification setting out:

- the steps the authority has taken to seek proposals for an academy/Free School;
- copies of all proposals submitted and the authority's assessment of the proposals;
- confirmation that the authority will provide the required site and all the capital funding needed to establish the new school.

11. The local authority is responsible for meeting project development costs. For lead-in and setup costs, the Department will discuss with the local authority on a case by case basis to identify and agree the most appropriate mechanism to meet these. Until longer term funding arrangements are agreed, the expectation is that local authorities will contribute to these costs. A consultation document on funding reform was published on 26 March 2012.

12. The local authority should provide the Department with an assessment of the proposals it has received, based on the following criteria:

- the quality of the places being added into the system, based on the proposer's vision and educational plan;
- the capability and capacity of the proposer to deliver their proposal to time and on budget, based on their expertise and experience;
- value for money, confirming that the proposer considers that the costs of establishing the new academy/Free School can be met within the estimate of capital costs outlined by the local authority and, where they cannot be met within that estimate, an explanation of the reasons for the additional costs and how any shortfall will be met.

13. The local authority may state its preference, which the Secretary of State will take into consideration when deciding whether or not to enter into a Funding Agreement with any of the proposers.

14. The notification should be submitted to the Department for Education (school.organisationproposals@education.gsi.gov.uk).

15. Where a suitable proposer is identified, it will be for the proposer to work to establish the new academy/Free School with support from the local authority and the Department, as required. The local authority will continue to have an interest because of its duties to secure sufficient suitable schools.

OTHER IMPORTANT CHANGES

SCHOOL COMPETITIONS (under section 7 of EIA 2006)

16. If there is no suitable academy/Free School proposal, a statutory competition can be held with the consent of the Secretary of State (section 7(1)). This will not require a separate application for consent, since the Secretary of State will indicate to the local authority that a competition can be held, if he is satisfied that there is no suitable academy/Free School proposal.

17. Where consent to hold a competition is given, the local authority must follow the statutory process set out in Schedule 2 to the EIA 2006 (as amended by EA 2011) and the Establishment and Discontinuance Regulations.

18. Significant changes made by EA 2011 are:

- The removal of section 8 EIA 2006, which means that local authorities can no longer submit their own community or foundation school proposals in a competition).
- The new section 7A EIA 2006, which means that at any time before the date specified for the return of proposals, the Secretary of State may direct a local authority to withdraw a competition notice; or, a local authority may withdraw a competition notice with the Secretary of State's consent. This allows a competition to be ended where circumstances have changed e.g. where the new school is no longer needed or an alternative option is found, such as the enlargement of one or more existing schools instead.

19. Academy/Free School proposals and proposals for foundation (by proposers other than a local authority), voluntary controlled and voluntary aided schools, can be submitted into the competition by the deadline specified in the first notice.

COMPETITION – DECISION MAKING

20. The arrangements for deciding a competition have also changed. Since local authorities cannot enter their own school proposals, the Schools Adjudicator will no longer have a role in deciding competitions (unless the local authority is involved in the foundation of a proposed foundation school – paragraph 10 of Schedule 2 EIA 2006).

21. Important changes arising from EA 2011 are:

- Where an academy/Free School proposal is entered into a competition by the specified deadline, the Secretary of State must consider these proposals first to decide whether he is willing, in principle, to enter into a Funding Agreement with the academy/Free School proposer (paragraph 7A of Schedule 2 EIA 2006).
- If an academy/Free School proposal is deemed suitable, the competition ends and the proposer works with the Department and local authority to progress its proposal.

- If an academy/Free School proposal is not considered suitable, or no academy/Free School proposal is received, the competition continues and it is for the local authority to decide which maintained school proposal wins (paragraph 8 of Schedule 2 EIA 2006, subject to the local authority's involvement in any foundation school's foundation); there is no right of appeal.
- Where a competition does not identify a suitable academy/Free School or maintained school, the local authority may publish its own community or foundation school proposal under amended section 11 of EIA 2006; the Schools Adjudicator will be the decision maker in such cases.

ESTABLISHING A NEW MAINTAINED SCHOOL OUTSIDE OF A COMPETITION (under section 10 or section 11 of EIA 2006)

22. It is still possible to publish proposals for maintained schools in certain circumstances as set out below. Flow chart B at Annex A of this document sets out the statutory process for establishing a new maintained school under sections 10 and 11. Proposals under section 10 require Secretary of State consent.

MAINTAINED SCHOOL PROPOSALS – SPECIAL CASES (under section 11 of EIA 2006)

23. In the interests of reducing bureaucracy, the consent of the Secretary of State is no longer required to publish maintained school proposals in the circumstances outlined below.

24. Further detail about these special cases is given in section 11 of EIA 2006, as amended by EA 2011:

- proposals for a new voluntary aided school;
- proposals for a new community or foundation primary school that is to replace a maintained infant and a maintained junior school;
- proposals for a new school resulting from the reorganisation of existing faith schools in an area, including an existing faith school losing or changing its religious designation; or
- local authority proposals for a new foundation or community school, where suitable academy/Free School proposals have not been identified and a competition has been held but did not identify a suitable provider.

25. Proposals for former independent schools wishing to join the maintained sector and new local authority maintained nursery schools can still be published under section 11, as before.

26. In each case a statutory process, as set out in Schedule 2 to EIA 2006 and the Establishment and Discontinuance Regulations, must be undertaken. The Schools Adjudicator will decide local authority proposals, and local authorities will decide proposals from other proposers (except foundation school proposals where the local authority is involved as a member of the foundation (Trust), in which case the Adjudicator will be the decision maker).

OTHER NEW MAINTAINED SCHOOL PROPOSALS (under section 10 EIA 2006)

27. Where an academy/Free School approach is not considered to be appropriate and the proposal does not fall under section 11 special cases, it is still possible to apply to the Secretary of State for consent to publish proposals for replacement community schools, or brand new or replacement foundation or voluntary controlled maintained schools. Each application will be considered on its merits and the particular circumstances of the case, including whether the need for a new school might be better met by an academy/Free School. Where consent is given to publish new maintained school proposals, a statutory process must be followed, as set out in Schedule 2 to EIA 2006 and the Establishment and Discontinuance Regulations.

TRANSITIONAL PROVISIONS

28. Proposals published under sections 7 (where the first notice, inviting proposals for the new school, has been published), 10 or 11 of EIA 2006 prior to the commencement date of the relevant provisions of EA 2011 on 1 February 2012, must continue under the relevant legislation in place prior to the commencement of the new EA 2011 provisions, until they are concluded.

FURTHER SOURCES OF INFORMATION

Associated resources (external links):

- Education Act 2011
<http://www.legislation.gov.uk/ukpga/2011/21/contents/enacted>
- Education and Inspections Act 2006
<http://www.legislation.gov.uk/ukpga/2006/40/contents>
- Academies Act 2010 <http://www.legislation.gov.uk/ukpga/2010/32/contents>
- New Schools Network – An independent organisation devoted to improving education
<http://newschoolsnetwork.org/>
- Independent Academies Association – A national body which is regularly consulted by government and opposition on matters relating to educational change and development
<http://www.iaa.uk.net>

You may also be interested in (internal links):

- Keeling Schedule for section 37 (Schedule 11)
<http://www.education.gov.uk/aboutdfe/departentalinformation/educationbill/a0077986/education-bill-keeling-schedules>
- School Organisation (Establishment and Discontinuance of Schools)(England) Regulations 2007

<http://www.education.gov.uk/schools/leadership/schoolorganisation/a00192027/school-organisation-decision-table>

- Free Schools
<http://www.education.gov.uk/schools/leadership/typesofschools/freeschools>
- Sponsored Academies
<http://www.education.gov.uk/schools/leadership/typesofschools/academies>
- University Technical Colleges and Studio Schools
<http://www.education.gov.uk/schools/leadership/typesofschools/technical>

Annex A – Flow Chart

