



Governors' duties and responsibilities as governors of an Academy Trust

The governors and members of an academy trust are not covered by the legislation that regulates the powers and activities of the governors of maintained schools. Nor are they required to comply with the Regulations and create the structures imposed by maintained school legislation.

Being the governor of an academy is to be in different legal territory.

The *Education (Independent School Standards) (England) Regulations 2010* apply, though with some exceptions, and form a brief framework with which governors should be familiar. However, the provisions of the Academies Act 2010 and of the documents that flow from the Act modify these Regulations in significant areas. In particular the academy Funding Agreement carries significant provisions on important aspects of the academy's life (such as employment, admissions, and the religious life and teaching expected) that are imposed contractually on the academy in return for the funding provided by the Secretary of State.

The Articles of the academy company also contain significant provisions and create consequences that are set out in detail below.

Companies Act and charity law

Governors are legally directors of a company for the purposes of the Companies Act 2006. The academy trust is a company with members rather than shareholders. The governors are legally responsible for managing the academy trust's affairs and looking after its assets. The academy trust is as such exempt from registration as a charity but nevertheless guidance given by the Charity Commission outlines what governors ought to do in order to comply with their obligations under charity law.

The importance of governors' meetings

Ordinarily the day-to-day affairs of the academy trust are managed by the head teacher and other members of staff. Governors'

responsibilities are discharged through decision-taking in governors meetings. Governors need to make sure that they hold regular meetings and that they attend unless exceptional circumstances arise. Governors are accountable to the members of the academy trust through General Meetings of the academy trust. Members have the power to remove governors by a majority vote and we suggest should indeed do so if they are not satisfied with the way in which the academy's affairs are being managed.

Governors must insist on information

Governors should make sure that they receive regular reports about the finances and affairs of the academy trust, including budgets, cash flows and management accounts. They can be legally liable to make good the loss to creditors and at risk of being disqualified from acting as a governor or director, if they allow the academy trust to continue to incur liabilities (including by allowing staff to continue to work in expectation of their salaries being paid) at a time when there is no reasonable prospect of the academy trust avoiding going into insolvent liquidation. An academy trust is insolvent if it is unable to meet its debts as and when they fall due -- which means paying salaries, pension contributions, PAYE, suppliers and so on on the contractually due dates. (This is known as insolvency on the 'cash flow basis'). It would also be insolvent if its net assets were less than its liabilities (insolvency on the 'balance sheet basis').

Liability for pension shortfalls

The department has published guidance from the Charity Commission on the effect of the shortfall in the Local Government Pension Scheme on the balance sheets of academy trusts which are liable to contribute to the scheme on behalf of their staff, indicating that the academy trust's obligation to contribute does not represent an immediate contingent liability, which could have the effect that the balance sheet of an academy trust is negative and hence that the academy trust is insolvent on the balance sheet basis. We do not necessarily agree with the department's guidance since the department is not able to alter company law but the governors would be extremely unlucky if they were held liable for acting on that guidance.

Financial information

Accordingly Governors need to be careful to make sure that the information which they receive establishes that the forthcoming expenditure has been properly budgeted, prudent provision has been made for forthcoming liabilities, sensible reserves are maintained for

unexpected or difficult to value liabilities and full records are kept of all income and expenditure.

Companies Act 2006

The Companies Act 2006 imposes specific duties on governors as directors, to

1. act only within their powers
2. promote the success of the academy trust
3. exercise independent judgement
4. exercise reasonable care skill and diligence
5. avoid conflicts of interest
6. not accept benefits from third parties and
7. declare an interest in a proposed transaction or arrangement

Governors' duties under the Companies Act

Directors need to familiarise themselves with the Articles of Association of the academy trust and if they are in doubt as to whether any proposed action is within their powers they should take legal advice; and they must make sure they any exercise their power as for the purposes for which they are conferred. Their duty to promote the interests of the company includes having regard to the interests of staff, the need to foster the academy trust's business relationship with suppliers and with the community, the impact of the academy trust on the environment, preserving the academy trust's reputation for high standards of business conduct and the need to act fairly if the interests of members differ. The governors obligations to act in an independent judgement is qualified to the extent specified in the articles of association. Governors must exercise the skill and care expected of reasonably diligent persons; and if they have special skills must exercise those. To avoid conflict of interest, Governors must notify the academy trust at the earliest opportunity of interests which they have in other businesses; and seek advice if any transaction is proposed with any business in which a governor has an interest. Governors' obligations not to accept benefits from third parties are not limited to those which would be an offence under the Bribery Act, if receiving the benefit is likely to compromise the independence of the governor.

Charity law

In addition to the duties imposed by the Companies Act, Governors must comply with responsibilities imposed by charity law. These include not being remunerated for their services. If it is proposed that a governor should supply other services to the academy trust you should seek legal advice.

Additionally governors are responsible for making sure that the academy trust only provides services which respond to the need for a charity to provide a public benefit. This is a highly technical question and in this area again, governors need to take legal advice on any questions where there is any doubt whether goods money or services are provided to the public at large.

Dealings with members

As directors, governors must account to the members of the academy trust in General Meetings. They should make sure that they report on the activities of the company and provide the directors reports and accounts required by the Companies Act. Members have an independent role in holding the governors as directors to account. As there would then be a conflict between their interests as employed workers and their role as independent members the head teacher and members of staff should not become members of the academy trust.

Committees

Other than Members or Governors meetings, no formal committee structure is required for the governance of academies except for advisory committees for the individual academies held by multi-academy trusts. Even these have no more than delegated powers that may always be removed or modified by the governors. The extensive Regulations that provide for a range of committees in maintained schools do not apply to academies. Nor does legislation regulating the relationships between schools (such as Collaboration or Federation Regulations) apply to academies. Both internally and externally governors must develop for themselves structures that enable them to carry out their role effectively and efficiently and should not simply replicate without careful consideration the patterns they have inherited from their previous existence as a maintained school. Hence the governors of an academy might sometimes with advantage be fewer in number than the governing body membership of the predecessor school.

Corporate compliance

As well as the obligations to report to the Department of Education under the Funding Agreement, the governors must make sure that the academy trust complies with its obligations under the Companies Act, for instance to file information at Companies House promptly on any changes to the governing body. If the academy trust were to create any mortgage or charge, the academy trust will similarly have to file details of the obligation at Companies House. The academy trust will

also have to file an annual return and audited accounts. If any change becomes necessary to the Articles of Association of the academy trust, this is a matter for the members and Governors should take legal advice on the procedure necessary for the members to make that change. The academy trust is not obliged to appoint a company secretary to deal with corporate compliance, but our recommendation would be that the academy trust do so so that it is clear that one person at least has responsibility to make sure that these points are continuously dealt with. A company secretary can be one of the governors or if desired, we can provide a company secretary.

Policy matters

The governors ought to lay down policies in a wide range of areas, many of which will be familiar to those on the governing body of a school converting into an academy trust. These could include

- Decisions which have an impact on the religious character and ethos of the academy trust
- the appointment removal or dismissal of the head teacher and the appointment of any replacement or joint appointee
- the appointment removal or dismissal of other staff
- disciplinary and grievance procedures by members of staff
- capital expenditure on improvements to the structure
- substantial capital expenditure e.g. on ICT
- setting an annual budget for the Academy
- complaints by parents
- appeals against any decision to exclude a child
- admissions criteria
- joint initiatives or ventures with other schools including pupil exchanges, teacher exchanges, off site premises such as nature centres
- use of school premises by outside bodies such as sports clubs
- policy with regard to the provision of services to the local authority or other schools, in relation to special needs pupils
- any decision to close the Academy temporarily or permanently
- any decision to cease to be an Academy
- any decision to move site
- any decision on the allocation of funding received from the Department under the funding agreement
- any decision on applications for special funding
- setting policy on any issues relating to legal compliance and forthcoming legislation
- any decision on compliance with Data Protection and Freedom of Information requests
- any decision on handling litigation such as staff complaints

A number of these are of such importance that Governors may not be in a position to take a decision without consulting the members. Whenever it is not immediately obvious to governors whether a matter is one within their power or which requires to be decided by the members, they should take legal advice.

Unusual events

Governors should make sure that decisions on how to handle unusual circumstances are not taken without their approval. These may include decisions referred to above, which clearly should not be taken by members of staff, except to the extent that the governors have expressly delegated management and authority to commit the academy trust in the particular case. Decisions such as a proposal to remove the head teacher or member of staff or any which may result in litigation or a dispute or in response to an obligation to disclose information, should obviously not be taken without prior legal advice.

Potential liability of governors as directors

Directors of a company can be made liable for the company's obligations in certain circumstances under the Companies Act, in particular where they have not behaved prudently or they have failed to look after the company's assets. As indicated directors can be made personally liable if a company goes into insolvent liquidation. These points apply just as much to Academy Trusts. Similarly, Governors can be made jointly liable as directors for a wrong done by the company. They could also be exposed to proceedings for causing personal injury, including for corporate manslaughter.

It is prudent for governors to make sure that the academy trust takes out Directors & Officers insurance. Such policies normally cover the cost of successfully defending legal proceedings but governors must as indicated still be careful and prudent in their actions, if they wish to avoid the risk and anxiety of proceedings or prosecution.

Conclusion

We recommend all Governors brief themselves fully on their powers and responsibilities at the outset. If they do so and take professional advice wherever required, they will be able to discharge their duties effectively and without running the risk of later liability or recrimination.