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# Understanding academy trusts

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This guidance has been developed jointly by Browne Jacobson, leading education law experts, and the NAHT. It has been created to provide senior leaders, particularly in maintained schools, with factual information about the implications and mechanics of academy status.

## A. What is an academy?

An academy is a state funded, independent school which is operated by a charitable company known as an academy trust.

A single academy trust (“SAT”) operates just one academy. In a multi-academy trust (“MAT”), the academy trust will be set up to operate a number of academies.

Academy trusts enter into a funding agreement with the Secretary of State for Education. These contractual terms govern key aspects of the operation of the academy including its characteristics, the type of funding it will receive and obligations linked to the running of the academy, for example around admissions and the curriculum.

Once a school converts to academy status, it ceases to be maintained by the local authority.

### *How does an academy differ from an independent school?*

An academy is technically an independent school and key legislation which governs how independent schools operate also currently applies to academies<sup>1</sup>. However, unlike independent schools, academies are:

- publicly funded
- operated in accordance with the terms of a funding agreement entered into with the Secretary of State for Education. The terms of this funding agreement apply many additional requirements on academies, including terms which bring academies in line with maintained schools in a number of respects. The model funding agreement can be found on the Department for Education’s website
- obliged to adopt the Department for Education’s model articles of association and comply with the Academy Trust Handbook on matters of governance; and
- subject to intervention by the Secretary of State, who has the ability to terminate their funding agreement in certain circumstances.

### *How does an academy differ from a free school?*

A free school is a type of academy. The term “free school” is used by the Department for Education to identify any new provision academy, i.e. a brand new school as opposed to an academy which has opened following the conversion of an existing maintained school.

Like academies, free schools are operated by academy trusts and governed by the terms of a model funding agreement, the terms of which are largely the same as academies. Where a local authority identifies the need for a new school, it must first seek proposals for that school to be a free school. This is known as the “free school presumption”.

### *Is academy status reversible*

There is currently no legal route through which an academy can convert back to being a maintained school. Where a funding agreement is terminated, either mutually or following intervention by the Secretary of State, the academy would either close (which is highly unusual) or transfer to a different academy trust.

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<sup>1</sup> The Education (Independent School Standards) Regulations 2014

### *Can an academy choose to leave a MAT?*

It is possible for academies to move between MATs but an individual academy does not have the power to take this decision independently. A transfer to another MAT would need to be agreed by the relevant MAT at trust level and also approved by the Regional Director, on behalf of the Secretary of State for Education.

### **B. Regulation and inspection**

All academy trusts are exempt charities. This means that whilst academy trusts have charitable status and are required to comply with charity law, they cannot register with the Charity Commission and are not directly regulated by the Charity Commission.

Instead, the principal regulator of academy trusts is the Department for Education. In practice, this regulatory role is performed by the Education and Skills Funding Agency (“ESFA”), an executive agency of the DfE. The ESFA must be satisfied that academy trusts have appropriate arrangements for sound governance, financial management, value for money and accounting.

The Charity Commission does retain some interest and powers in addressing any non-compliance. Where there is concern, the ESFA may refer academy trusts to the Charity Commission and, in turn, the Charity Commission may use its regulatory powers. Charity Commission approval is also still required for some transactions.

All academy trusts are subject to inspection by Ofsted under Ofsted’s common inspection framework. In addition, MATs can be subject to “summary evaluations” by Ofsted. These are not formal graded inspections but involve Ofsted exploring the extent to which the MAT overall is delivering a high quality of education and improving pupils’ achievement. They result in Ofsted producing a public letter designed to give MATs recommendations on any areas for improvement and acknowledge where the MAT is having a positive impact on the quality of education that its academies provide.

### **C. Governance of academies**

Like any company, an academy trust must have articles of association. The articles of association are the key constitutional document for an academy trust, setting out the rules according to which it is governed. They must be approved by the Department for Education and are filed at Companies House. There are model articles of association for academy trusts which can be found on the Department for Education’s website.

#### *What is the structure of governance in an academy trust?*

All academy trusts have a board of trustees and members. Most MATs also establish local governing bodies or the equivalent at academy level. We explain those terms and titles in more detail below. In addition:

- the Department for Education has published guidance entitled “*Academy Trust Governance - Structures and Role Descriptors*” which includes more detail and includes diagrams explaining common governance structures in an academy trust;
- the Governance Handbook (which applies to both academy trusts and maintained school governing bodies) sets out the government’s vision and priorities for effective governance, covering (amongst other things) structures, people and compliance in detail;
- there is further information about the governance roles and associated responsibilities in the Academy Trust Handbook, published online by the Department for Education.

#### **Members**

Members have a similar role to shareholders of a company limited by shares. The original members of the academy trust will be the founding members and the “subscribers” to the academy trust’s key constitutional document, the articles of association.

The members have specific but quite limited powers. For example, it is the members who are able to amend the articles of association but generally speaking they have a much more “hands-off” role than the trustees.

An academy trust is required to have at least three members and none of the members can be employees of the academy trust. The Department for Education’s strong policy preference is for there to be at least five members and for the majority of the members to be individuals who are not also trustees so that there is appropriate separation between these two layers of governance.

The members have a general duty to exercise their powers to further the academy trust’s charitable purpose, the advancement of education. The expectation is that members will have clear oversight of trust business and use their powers to intervene if governance at trustee level was dysfunctional.

### **Board of trustees**

The trust board is the decision-making body of the academy trust. Subject to directions given by the members and requirements of company law, the board of trustees manages all of the business of the academy trust and exercises all of its powers. The trust board is accountable and responsible for all of the academies within the academy trust.

“Trustees” is the charity law term for the individuals who sit on the trust board. All of these individuals are also, in company law, “directors” of the academy trust and are registered at Companies House as such.

The chair of the trustees is responsible for ensuring the effective functioning of the board and providing clear leadership, keeping the board focused on its core functions, which are:

- ensuring clarity of vision, ethos and strategic direction
- holding executive leaders to account for the educational performance of the organisation and its pupils, and the performance management of staff
- overseeing and ensuring effective financial performance.

Most academy trusts’ articles of associations state that the minimum number of trustees is three. In a non-faith school, the majority of trustees is usually appointed by the members but there are other categories of trustee too, for example “co-opted trustees”, appointed by the board and the Chief Executive Officer (in a MAT) or Principal (in a SAT) is also permitted to be a trustee in certain circumstances.

In putting together the board of trustees, both existing and future MATs are expected to take a skills-based approach and have regard to the Competency Framework for Governance published by the Department for Education. This framework highlights the knowledge, skills and behaviours needed for effective governance and is a clear step away from the stakeholder model of governance. Maintained schools considering joining a MAT should certainly not assume that they will be directly represented at board level.

Having said that, all academy trusts are required to reserve places for the election of parents/carers within their governance structure. A SAT must have these places at board level, so there must be at least two parent trustees. In a MAT, if there are local governing bodies in place (see below), parent representation can be at academy level if there are at least two parent governors on each local governing body. If this requirement is not fulfilled, the MAT is required to have parent trustees at board level.

### **Local governing bodies**

In a MAT, a trust board may decide to set up a local governing body (“LGB”) in respect of a particular academy or more than one academy. For example, in some larger MATs, a single LGB will oversee two or three academies in a particular region.

The roles and responsibilities of an LGB will be governed by the scheme of delegation and/or terms of reference. In some MATs there is a significant level of delegation to LGBs whereas in others it is more limited. There are also models which link the extent of delegated powers to the performance of the particular academy.

The terms of reference should also set out the proposed composition of the LGB and procedural points, for example relating to frequency of meetings and appointments and resignations.

### ***What happens to governors of a maintained school on conversion?***

In law, the governing body of a maintained school (as an entity) dissolves on the conversion date. However, in reality, the governors of a maintained school often continue to play a part in the running of the academy post-conversion.

Where a maintained school is joining an existing MAT, the precise expectations and proposals in this respect should be something that the existing governors discuss with the MAT. Governors may also wish to refer to the proposed terms of reference and scheme of delegation which should be available in readiness for implementation from the conversion date.

Where a school is voluntarily converting, it is usually the case that the majority, if not all of the school's existing governors will sit on the academy's LGB. Where a school is being forced to academise because it has been deemed to be underperforming, the MAT may be less inclined to allow current governors to remain. However, this is likely to depend on the circumstances and the MAT in question.

## **D. Staff**

In an academy, the employer of staff is the academy trust. It is the academy trust that is therefore party to employment contracts as the employer.

### ***How does academy conversion affect staff pay and conditions?***

The Transfer of Undertakings (Protection of Employment) Regulations (“TUPE”) apply where a maintained school is converting to an academy, or where an existing academy is transferring to another academy trust. TUPE operates to protect the existing school staff from being dismissed as a result of the conversion or transfer, and to preserve transferring employees' terms and conditions and continuity of service.

Changes to terms and conditions can only be made during a TUPE transfer in limited circumstances. In general terms, academy trusts can operate outside of the School Teachers' Pay and Conditions Document (“STPCD”) but if the relevant academy trust (the new employer) is proposing to make changes to existing terms and conditions, they will have to declare these as a ‘measure’. A measure could be anything from something relatively minor, like a change to pay dates, or something more significant like proposed redundancies. Where measures are proposed, this may trigger the obligation to consult with unions on the proposed changes to terms and conditions as part of the conversion process.

One consequence of an academy conversion is that the academy trust will not be a party to the national negotiations on terms and conditions of staff. This means that there will be no automatic contractual right to future changes to nationally agreed terms. Often, academy trusts apply nationally agreed terms in any event, although they are not obliged to do so.

In addition, the STPCD becomes a contractual rather than statutory entitlement for employees following the transfer. As above, this means that they can operate outside of the STPCD if they wish, although this is subject to the restrictions on changing terms and conditions for staff who have transferred via TUPE.

Ultimately therefore, the impact on pay and conditions will depend on the position of the particular academy trust. Often, academy trusts do not propose to make any changes to terms and conditions, but that is not always the case.

In respect of longer-term implications, if a member of teaching staff later leaves the employment of the academy trust to return to local authority employment or to employment with another academy or school, their continuity of employment for contractual purposes (i.e. for calculating entitlement to sick pay and certain “family friendly” rights, for example maternity/adoption/paternity leave and pay) will not automatically be maintained. These benefits will be calculated on the basis of their continuous employment with their current employer only, unless the new employer opts to honour the previous service. This also applies to support staff where the prospective employer does not follow the Green Book terms.

### ***Do all MATs have a CEO?***

The board of trustees is required to appoint a single senior executive leader. The term “CEO” does not necessarily need to be used for this job role; some academy trusts use the term “executive principal” for example.

As explained below, the expectation is that the CEO or equivalent will also be the accounting officer of the academy trust.

## **E. Funding & financial management**

### ***How is an academy funded?***

As an academy, funding is provided directly from central government, rather than via the local authority.

The ESFA funds academies on the same basis as maintained schools. However, payments and allocations are made based on an academic year (1 September - 31 August), known as the “Academy Financial Year”, rather than the financial year of 1 April to 31 March used by local authorities.

Academies’ revenue funding is calculated using the pupil numbers taken from the autumn census return, although in some cases an academy’s funding agreement may provide for these figures to be based on pupil estimate figures.

Most funding for academies comes from the revenue funding known as the general annual grant (“GAG”). This is made up of the school budget share which is calculated on the same basis as for maintained schools. Where appropriate, the GAG may also include funding for high-needs places and students aged 16-19 years.

The ESFA pays GAG in 12 equal instalments during the Academy Financial Year.

Academies will also receive any relevant funding outside of their GAG, for example early-years funding, pupil premium and universal free school meals for infants.

### ***What about capital funding?***

Like maintained schools, academies continue to have access to funding to help maintain and improve the condition of school buildings and grounds.

Like local authorities, larger MATs receive direct School Conditions Allowance to invest in the schools for which they are responsible. Smaller MATs and SATs are able to bid into the Condition Improvement Fund (“CIF”).

In addition, devolved formula capital (“DFC”) is capital funding allocated to each academy to spend on capital projects, calculated using the DfE’s formula.

### ***How is academy funding regulated?***

Academy trusts are charitable companies acting in the public interest. They are required to act in accordance with HM Treasury’s guidance on Managing Public Money.

All academy trusts are required to comply with the Academy Trust Handbook (“ATH”) as a condition of their funding agreement. The ATH describes the financial responsibilities of academy trusts as well as setting out when approval must be sought from the ESFA for certain financial transactions.

As charities, academy trusts are required to prepare an annual report and accounts in line with the Charity Commission’s Statement of Recommended Practice (“SORO”) and the ESFA’s Account Direction. In accordance with company law, academy trusts are also required to appoint an auditor to confirm whether or not the annual accounts present a true and fair performance of the trust’s financial performance and position.

All academy trusts must have an accounting officer whose role includes specific responsibilities for financial management. The accounting officer must be a senior executive leader - in SATs the expectation is that the Principal will be the accounting officer and in a MAT it should be the chief executive. More information about the accounting officer’s role can be found in the ATH.

The board of trustees must also appoint a chief financial officer (“CFO”) who is the trust’s finance director, business manager or equivalent. Responsibility for the trust’s detailed financial procedures are delegated to the CFO. More information about the CFO’s role can be found in the ATH.

The ESFA is able to intervene where it has concerns about an academy trust’s compliance with financial management requirements.

### ***What is top-slicing?***

Multi-academy trusts often deduct a percentage of income from each of their academies’ budgets to fund central costs. This is known as top-slicing and it is a decision that is made at trust level.

The amount that MATs top-slice varies but it would typically be between 3-5% of an academy’s GAG. In some MATs, the amount of the top-slice varies, for example based on Ofsted grade and therefore the purported level of support that the academy will need to draw from the MAT’s central services.

Some trusts call this something different, for example a “central services charge” or a “membership fee”.

### ***What is GAG-pooling?***

The Academy Trust Handbook allows MATs to “*amalgamate GAG for its academies to form one central fund*”. That central fund can then be applied to meet the running costs of any academy within the MAT as the MAT considers appropriate. This is commonly referred to as “GAG-pooling” and is something that more academy trusts appear to be exploring.

Some argue that this funding model gives MATs more flexibility to address the needs of particular academies at any given time and operate in the best interests of the MAT as a whole. It is reflective of the fact that the MAT is a single legal entity.

The counter-position is that this represents a detriment to the provision for pupils in schools negatively affected, as funding specifically earmarked for an individual school through the factor-based National Funding Formula (NFF) can be directed to other schools within a MAT. Understandably this can cause concern and uncertainty for individual schools around how much of their allocated GAG will actually be available to resource their school and whether they will receive the full funding allocated to them in the NFF.

In an attempt to alleviate some of that concern, the Academy Trust Handbook includes a requirement that MATs have an appeals mechanism through which the Principal of an individual academy can appeal to the MAT and then onto the ESFA if they feel their academy has been treated unfairly. The ESFA’s decision can result in the MAT being prevented from applying pooling provisions.

## F. Academies and intervention

The Department for Education is clear that it will hold an academy causing concern to account just as robustly as it would a maintained school causing concern.

There are various ways in which academies may be subject to intervention, including:

*(i) where the ESFA has concerns about financial management and/or governance in an academy trust*

In these circumstances, the ESFA may issue, and publish, a Notice to Improve (“**Ntl**”). The academy trust must comply with the Ntl. The funding agreement may be terminated where there is non-compliance with a Ntl.

*(ii) where an academy has been graded inadequate by Ofsted*

The Secretary of State has statutory powers to terminate an academy’s funding agreement following a determination by Ofsted that the academy either requires significant improvement or requires special measures. In practice, following an inadequate judgement, the relevant Regional Director (“**RD**”) will send the academy trust a Termination Warning Notice (“**TWN**”), setting out their concerns as a result of the inspection and asking for any representations on behalf of the academy trust. If the RD is satisfied that the academy trust has the capacity to ensure quick and sustainable improvement, they may choose not to take any further action.

*(iii) academy not making necessary improvements*

As with maintained schools, where an academy has received more than two below Good judgements, the RD may write to the academy trust under the coasting school regulations. The RD will assess the capacity of the academy trust to achieve rapid and sustained improvements and whether intervention should be recommended to support the academy to improve. If the RD considers that intervention in the academy is appropriate, they will issue a TWN.

*(iv) Termination Warning Notice on other grounds*

There are also other grounds set out within the funding agreement upon which the Secretary of State may issue a TWN. To some extent, these mirror the grounds upon which a maintained school may receive a warning notice from its local authority or the Secretary of State, for example, where there has been a serious breakdown in the way that the academy is managed or governed or where the safety of pupils or staff is threatened. The Secretary of State can also issue a TWN if the academy trust is in breach of its funding agreement.

On a practical level, under the current legal framework, “termination of the funding agreement” equates to the forced transfer (or “re-brokerage”) of the academy to another MAT. It is possible for an academy to be closed completely but this is highly unusual.

Further information on intervention in academies can be found in the Department for Education’s *Schools Causing Concern* guidance.

## G. Responsibilities and legislative framework

The academy trust company (the SAT or MAT, as applicable) is the entity which operates the academy and where legal responsibility will therefore sit. For example, it is the academy trust, not the individual academy, that enters into any contracts or agreements, employs staff and has the legal interest in land.

From an education law perspective, the key regulations that apply to academies are the Education (Independent School Standards) Regulations 2014 (“**Independent School Standards Regulations**”). These cover matters including the quality of education to be provided, welfare, health and safety of pupils and school premises.

We have commented further on some specific areas below.



- Health and safety

As an employer, the academy trust is responsible for the health and safety of its staff, pupils and visitors and key health and safety legislation (for example, the Health and Safety at Work Act 1974) applies directly to the academy trust. There are also requirements in the Independent School Standards Regulations that relate to health and safety.

- Admissions

An academy is its own admissions authority and is bound by admissions law, including compliance with the School Admissions Code and the School Admissions Appeals Code.

- Safeguarding

Like a maintained school, an academy has a statutory duty to safeguard and promote the welfare of its pupils and to have regard to *Keeping Children Safe in Education*, the statutory guidance issued by the Department for Education. In relation to checks required to verify the suitability of staff and governors, there are also requirements set out in the Independent School Standards Regulations and the articles of association.

- Complaints

The requirements for academies in relation to parental complaints differ slightly to those that apply to a maintained school. Academies must meet the requirements set out in the Independent School Standards Regulations. The Department for Education has published best practice guidance for academies' complaints procedures.

- SEND

Academies are bound by the SEN Code of Practice and the funding agreement clauses require an academy to admit a child if the local authority names the academy in an Education Health and Care Plan ("EHCP").

Academies, as public bodies, are also bound by the relevant provisions of the Equality Act, including the public sector equality duty.

- Freedom of Information

Academies are classed as public authorities for the purposes of the Freedom of Information Act. This means that any person has a legal right to ask for access to information held by an academy.

- Decision-making

It is also important to remember that an academy trust is a public body and therefore is required, in accordance with public law, to take decisions which are fair and reasonable. Failure to do so may leave the academy trust subject to challenge by way of judicial review.

## H. Some key documents

The latest versions of all of the documents below are available on the Department for Education's website:

- Academy Trust Handbook (updated annually)
- Model articles of association
- Model funding agreements
- Schools Causing Concern guidance (Chapter 4)
- Governance Handbook.

# Contact us

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Please note:

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