Articles

Schools: The Legal Structures, the Accidents of History and the Legacies of Timing and Circumstance

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Introduction

When it comes to governance and legal structure, Secretary of State Michael Gove's trajectory for state schools in England[1] seems fixed: more academies (and their variants, including free schools, university technical colleges (UTCs) and studio schools) and more faith schools (whether academies or voluntary aided/controlled). This is to be achieved by a variety of routes.

The next Secretary of State (of whatever party) will take on responsibility for some 25,000 state-funded schools but, given the diverse range of school structures and legal/governance models they will then embody, that could not sensibly be called a 'school system'. In particular, each school will – far more than has ever been the case before – have a legal/governance structure which reflects the circumstances and political climate of the moment of its creation: not any considered response to its longer term (or even current) needs.

Supporters of what has happened will perhaps trumpet that diversity as an inherently good thing. This article is not concerned with that question. Rather it looks, from a legal perspective, at some of the practical problems thrown up by the sheer complexity of what has emerged; it looks at how that complexity now stands in the way of what politicians from all parties say should be done about schools; and it considers what, in legal terms, could be done in response (or at least, it seeks to start the debate).

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1 This article is not about Wales, Scotland or Northern Ireland.

How Have We Got Here?

Maintained Schools

The School Standards and Framework Act 1998 brought to an end the old 'grant maintained schools' and left us with a system of schools 'maintained by local authorities' comprising:[2]

(a) community schools;
(b) foundation schools;
(c) voluntary schools,[3] comprising:
  (i) voluntary aided schools, and
  (ii) voluntary controlled schools;
(d) community special schools; and
(e) foundation special schools.

Among these maintained schools, foundation schools[4] and voluntary schools[5] were divided into three different categories. In addition, some maintained schools retained a process of academic selection given their status as 'grammar schools'.

Despite that modest (compared to what we have now) complexity – which informed questions such as whether it was the school or the local authority which was the admissions authority, who exercised the function of employer when it came to the teaching staff, and who owned and paid for the upkeep of the premises – all of those state schools[6] were 'maintained schools'. That meant – and still

2 School Standards and Framework Act 1998 s 20(1).

3 Most but not all of which are designated as having a religious character.

4 School Standards and Framework Act 1998 s 21(1).

5 School Standards and Framework Act 1998 s 21(2).

6 'State school' is a term without legal meaning used here to refer to schools the ongoing costs of which are entirely, or almost entirely, met by the state.

means, for those schools – that governance, exclusions, teachers' pay, the curriculum, and so on, all operated (or came to operate) under a common framework set down by primary legislation and secondary legislation.

Academies and their Funding Agreements

Into that mix, the Education Reform Act 1988 dripped the legally novel 'city technology college' (CTC), an independent school funded by the state pursuant to a contract with the Secretary of State. Fifteen CTCs were created. Most of them have now become 'academies'. The basic CTC legal model was adopted and adapted (through amendment of the Education Act 1996[7] by the Learning and Skills Act 2000) to provide the 'City Academy' later to become simply the 'academy', with new academies being created by the 'discontinuance' of an existing maintained school and the creation, phoenix-like, of an academy in its place.[8] From July 2010, (pursuant to the Academies Act 2010 (2010 Act)) new academies have been created either from cold or by 'conversion' of a maintained school.

The academy legal model has (at least superficially) an elegant simplicity. As outlined by the 2010 Act (ie for academies created since September 2010):

> 'The Secretary of State may enter into Academy arrangements with any person (the other party).'[9]

And:

> 'An Academy agreement is an agreement between the Secretary of State and the other party under which—
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> (a) the other party gives the undertakings in subsection (5), and
> (b) the Secretary of State agrees to make payments to the other party in consideration of those undertakings.'

The 'undertakings' (subsection (5)) comprise an undertaking to establish, maintain, carry on and provide for the carrying on of, an educational institution which meets the requirements for an 'academy school'[10], a '16–19 academy'[11] or an 'alternative provision academy'.[12]

The requirements for the first of these,[13] 'an academy school', is simply that:

> '(a) it is an independent school,
> (b) it has a curriculum satisfying the requirements of section 78 of EA 2002 (balanced and broadly based curriculum),
> (c) it provides education for pupils of different abilities,
> (d) it provides education for pupils who are wholly or mainly drawn from the area in which it is situated, and
> (e) it is not an alternative provision Academy'[14]

During the passage of the Academies Bill through Parliament, a requirement for the academy arrangements (colloquially still generally called the 'funding agreement') to include the 'Special Educational Needs (SEN) obligations'[15] was added. However, that obligation only applied to academies newly created pursuant to the 2010 Act, and not the 267 which already existed by September 2010. The pre-existing academies (created by the Labour government between 2001 and 2010 using powers under Education Act 1996 s 482) had different contractual provisions dealing with SEN.

With the slight twist in to relation to SEN, the *underlying* legal structure, post 2010, is simple. The detail, therefore, was to be included within the

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7 See Education Act 1996 s 482.

8 For a description of the process see *Elphinstone v Westminster* [2008] EWCA Civ 1069, [2009] ELR 24.

9 Academies Act 2010 s 1(1).

10 Academies Act 2010 s 1A.

11 Academies Act 2010 s 1B.

12 Academies Act 2010 s 1C.

13 Academies Act 2010 s 1A.

14 Ie focused on meeting the needs of children who would not otherwise, by reason of exclusion, illness or otherwise, receive suitable education.

15 Namely obligations requiring the proprietor of the academy to comply with the obligations imposed on maintained schools by Part 4 of the Education Act 1996 and regulations made under it: Academies Act 2010 s 1(7)–(8).

funding agreements (as was the position before 2010) or their practical implementation (particularly within academy 'chains' as below).

The earliest funding agreements were based on the old CTC agreements, mostly about money and property, not much about pupils and education, let alone teaching. As time went on, the Department for Education[16] adopted a 'model agreement' the content of which changed over time. With the emergence (as below) of ever greater types of academy, multiple 'models' have emerged (others came and went and some have changed repeatedly over time).[17] These 'models' were only applied to the funding agreements under negotiation at a specific time. Different 'models' applied at different times.

Other than where there has been statutory intervention (as to which, more below), the funding agreements put in place through this process have remained essentially unchanged, unless by consent of the parties to the agreement itself.[18] All are rolling agreements with long notice periods for no-fault termination, and provisions for fault-based termination only where something really major has gone wrong. In other words, they could remain in place forever. This has left a legacy of funding agreements which vary from agreement to agreement, including in relation to such crucial matters as SEN, admissions, exclusions, the curriculum and governance.

In theory it would be possible for the Secretary of State to renegotiate them all to bring them into line with the current model. Indeed, in 2006, the Department for Education stated an intention to do just that[19] but, for whatever reason, that has not in practice happened.

This article does not set out to debate the merits of the various models – the point is simply that we have a vast range without the differences set out in the varied contracts being justified or explained by the Secretary of State or anyone else[20] other than as accidents of history.

Academy Variants

As well as giving academies their own act of Parliament, Mr Gove has also introduced various 'flavours' of academy including the 'free schools', the UTCs and the 'studio schools'. Each are, in legal structure, an academy (newly created); but with the brand label 'academy' now seemingly reserved for academies created from the conversion of a maintained school or schools.

'Any person'

As noted above, the essence of an academy is a contract between the Secretary of State and 'any person'. But the Secretary of State's apparently universal practice over time has been to require the other party in fact to set up, or take the form of, a so-called 'academy trust' (being a charitable trust limited by guarantee) such that the funding agreement is a contract between that trust and the Secretary of State.

Behind the apparent simplicity of a commonly used legal vehicle is yet more complexity. In particular, the academy trust, though a single legal entity, may also actually comprise (through its 'members') multiple individuals or organisations. And single trusts (latterly described as 'academy chains', as below) have entered into multiple agreements for separate academies – or put in place a 'master agreement' with 'supplemental agreements' for each separate academy.

Accidents of History

Quite what has emerged for any particular academy (whether newly created or based on the conversion

[16] In its various guises over time.

[17] See thus, for example, model agreements for free schools, single academy trusts, multi academy trusts, stand-alone academies, converter academies, and so on.

[18] As far as I know, only a very few have been modified by agreement (as, for example, when Haberdasher's Aske's took over Monson Primary School, at which point various changes were made to other aspects of its funding agreement).

[19] In evidence to the court in *P v The Schools Adjudicator and Ors* [2006] EWHC 1934 (Admin) (unreported) 26 July 2006, aka 'Mary Mag'.

[20] I am not aware of the Secretary of State at any point publicly explaining the thinking behind any particular model, nor the thinking behind any change in the model: the new models are simply put on the website, with no explanation or discussion.

of a maintained school) depends on the circumstances of its creation and the political climate which existed at the time. Let me give some examples.

The earliest academies, created by the then Labour Government, were stand-alone academies created – by discontinuance of a maintained school and creation of an academy – with external 'sponsors' (such as Lord Harris and Reg Vardy) sitting behind the Trust. They were intended to be entirely free from local authority involvement. The range of permitted sponsors grew towards the end of the last government's time in office,[21] to include universities[22] as sponsors and local authorities as 'co-sponsors'[23] (albeit with restrictions on the local authority having overall control).

From September 2010 (under Secretary of State Gove and the Academies Act 2010) 'free schools' have been created. Some of these schools – as the original vision seemed to describe – seem to have been brought forward by groups of 'parents'. Others are, or have at least ended up as, arm's length extensions of private school foundations, and the like. Again, each has its own model agreement.

Over time, there has also been the emergence of 'academy chains' (such as the United Learning Trust: ULT) which 'sponsor' multiple academies.[24] In some instances of academy chains the chain sponsor 'top slices' the budget of the schools they operate by 4–6% to operate a central function with a budget of perhaps £4m and a staff of 40 people, taking on functions (presumably all within the contractual arrangements of the funding agreements) such as the appointment of head teachers, the setting of admissions policies and the specification of the curriculum. The chains therefore behave much like small local authorities – although actually with greater powers given the 'academy freedoms' (as to which see below) – but with no geographical focus (most are national or at least regional), no responsibility for education other than to the pupils on their roll, and with no democratic accountability. Ironically (given the cry for 'freedom'), some schools which have volunteered or been forced into 'chains' have found them more intrusive and controlling than the local authority was before.[25]

Why Academies?

As for the motivation for turning maintained schools into academies: prior to September 2010 the legal process was that maintained schools were discontinued and the replacement academies opened as new schools because the predecessor schools were considered to have failed. The creation of an academy was seen as the solution to the problem. From September 2010, the motivation for the creation of academies (now called 'conversion'[26]) has been much more varied.

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[21] The changes of approach appear to have come from the changes of Secretary of State during the period.

[22] See thus *Chandler v Secretary of State for Children and Families* [2009] EWCA Civ 1011, [2010] ELR 192; *Chandler v Camden* [2009] EWHC 219 (Admin), [2009] BLGR 417.

[23] See thus, for example, Manchester City Council's co-sponsorship, along with local industry of six secondary school academies in its area, announced in October 2007 and coming into effect over the period up to 2010.

[24] According to Andrew Adonis' *Education, Education, Education: Reforming England's Schools* (Biteback Publishing, 2012), at p 136, as of March 2012 there were in excess of 150 sponsors with over 50 sponsoring more than one academy and seven sponsoring more than 10 academies. Those numbers are likely to have grown materially since then.

[25] The Department for Education uses the term 'sponsor' and talks of 'partnership', but the terms are highly misleading in implying a relationship between two separate legal entities (ie the 'school' and the 'sponsor'). In fact, the school has no separate legal identity. It is simply the educational activity which the sponsor provides at the named location pursuant to the particular funding agreement. Sponsors vary in how much local decision-making they allow for (ie by the staff – including Head Teacher – *they* employ on site and the local 'governing body' to which *they* choose to delegate some decision-making powers). The academy chain thus have even greater control over the academies they run than did local education authorities prior to the introduction of (for example) delegated budgets and so on into the maintained school sector over the last 30 years.

[26] Academies Act 2010 s 6.

Essentially there are now two strands of academies: the 'stand alone' academies and the 'sponsored'[27] academies.

Stand-Alone Academy

The rush of 'stand-alone' academies came immediately following the introduction of the 2010 Act, when the Government encouraged applications (for 'academy orders') from secondary schools (and later also primary schools) that had been rated 'outstanding' (a threshold later reduced) by Ofsted. Motivations varied: for some it may have included the offer of 'freedoms' (as to which see below), for others it was receiving the slice of the funds previously spent by the local authority on maintained schools (as opposed to central functions) in the area, and thus (at least in the short term) more cash – albeit with more legal obligations as well. Now that the promise of extra funds has largely dried up, it is not clear how many schools will still go this way. The legacy remains that the 'academy trust' – and thus the counter party to the funding agreement – is essentially a reincarnation of the former governing body of the predecessor maintained school.

Sponsored Academy

With sponsored academies, the 'any person' with whom the Secretary of State contracts is some other entity, including one of the existing chains, or another academy, such as a local secondary school in the case of a sponsored primary academy. Conversion to being a sponsored academy will often have been forced onto the school community after the school has become 'eligible for intervention'.[28] If this occurs, the local authority or the Secretary of State can impose an Interim Executive Board (ie instead of the governing body) the members of which can – as they invariably seem to do – then exercise the powers of the governing body in bringing forward academy conversion.[29]

In many instances, 'encouraged' by or on behalf of the Department for Education, maintained school governing bodies have decided to 'jump before they are pushed' in seeking academy conversion at the point the school becomes eligible for intervention.

Latterly, in a growing number of cases – and particularly now that Ofsted has decided to designate any school not achieving an 'outstanding' or 'good' rating as 'requiring improvement', thus lowering the bar for schools to be 'eligible for intervention' – schools are applying to become sponsored academies not because they want to but because they fear the outcome of an impending Ofsted report and hope that jumping early (ie before even the threat of being pushed has emerged) might lead to a better outcome.

Particularly in those latter cases (and the variants of them), the school community appears rarely to have any real influence over the 'choice' of sponsor and thus the legal/governance arrangements which are imposed.

We are thus currently seeing a wave of 'conversions' where schools have, or see themselves as having, little or no choice over becoming an academy,[30] and where they appear to have little or no real control over whether the sponsor is a chain (seemingly selected for the purpose by the Department for Education) or not, and if so which chain (something which – given their difference in style and approach – can have a profound effect on the governance and day-to-day

[27] The word 'sponsor' has been used in quite distinctly different ways through the history of academies.

[28] Within the meaning of Education and Inspections Act 2006 Part 4: generally though 'requiring significant improvement': s 61; or being placed in 'special measures' by Ofsted: s 62.

[29] See *Moyse v Secretary of State for Education* [2012] EWHC 2758 (Admin), [2012] ELR 551 aka 'Downhills' for a description of one example of the legal process in operation.

[30] It is not clear that any of the recent or current conversions are from schools which are genuinely enthusiastic about becoming an academy (other than where additional money is offered); most fear loss of autonomy and community involvement/governance (with the prospect of being taken over by a chain which is more controlling and less accountable than ever was the local authority before and with no focus or base in the local community).

operation of the school). And, as above[31], once the 'conversion' has taken place, the former school no longer has a separate legal identity – it simply becomes one of the premises from which the chain provides education under contract with the Secretary of State.

What About the 'Presumption in Favour of Academies'?

The last government introduced the notion of 'schools competitions'[32] requiring a local authority, which saw the need for a new school in its area, to invite proposals, including from would-be academy sponsors, to establish such a school. In limited circumstances, the local authority could, itself, propose a community school as one of the options (but if it did then an Adjudicator, not the local authority, would decide on the winner).[33] Even in those circumstances, it was still possible for an academy proposal to come forward if the process was not triggered by the local authority identifying the need for a school (including one supported and facilitated by the local authority) without a competition ever being held.[34]

The Coalition Government has taken that one step further by amending the Education and Inspections Act 2006 (through the Education Act 2011) to create, what many saw at the time, a presumption in favour of academies.

Section 6A of the 2006 Act, as amended, thus provides that:

> 'If a local authority in England think a new school needs to be established in their area, they must seek proposals for the establishment of an Academy.'

That seemed pretty clear. However, it did not stop Richmond Council approving proposals for two new voluntary aided schools in its area, both to be on land it owns (which it will lease to the schools for a peppercorn rent), both to be maintained by it (ie their running costs paid by it) and, for one, for the capital costs of the buildings to be met. The legality of that proposal was challenged by the British Humanist Association and a local group which would have preferred an academy with a 50% faith admissions criterion to a voluntary aided school with nearer 100% faith admissions. The court – encouraged by submissions from the Department for Education which seemed keener on encouraging a faith voluntary aided school than pursing the academy presumption – upheld the legality of Richmond's action, including on the basis that the local authority was entitled to conclude that school places for children from Catholic families were needed rather than an academy school.[35]

As this demonstrates, it cannot be presumed that all new schools will be academies, as seemed to be the new world after the Education Act 2011.

So Where Does That Leave Things?

The result (now and certainly by the time of the next Secretary of State) is that we will still have in place examples of all the different types of maintained school going back to the 1998 Act (as above) *and* a vast range of other schools created under the umbrella of 'academies' manifesting a variety of legal governance arrangements.

Each school (and thus the community it serves) will – in legal terms – have a governance structure based on the particular circumstances and political climate at the time and the reasons for the school's creation, whether that was rewarding success, punishing failure or anticipating future events and/or whether it was a time when local authorities were seen by the Secretary of State as the enemy or as partners in setting up new schools and – for

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[31] See n 25.

[32] Under the Education and Inspections Act 2006.

[33] For a description of the process in practice see *Chandler* (as above).

[34] At the time the legislation was coming forward, academies were seen as antithetical to local authorities so I suspect the parliamentary draftsman did not foresee, and thus did not preclude, what later became a theme: local authority co-sponsored academies outside the competition process.

[35] *The British Humanist Association and Rodell v London Borough of Richmond upon Thames* [2012] EWHC 3622 (Admin), [2013] ELR 79. See Case Reports, pp 134–137.

those academies provided by 'chains' – how the particular chain chooses (over time) to organise the schools it provides.

As time goes on these arrangements will be overlaid by further local changes, including some which may have come about without any public involvement at all[36] and often against the wishes of the school and its community. As an example, in October 2010, the Emmanuel Schools Foundation (set up by Reg Vardy along 'creationist' lines), which by then provided four academies, was 'taken over' by ULT, apparently 'at the behest alone' of the original sponsors and resented by the affected school communities.[37]

It is estimated that a quarter of 'converter' academies (ie those which were allowed/encouraged to convert on their own because they were judged to be doing well) have now become 'associate members' of academy chains, albeit without that necessarily changing their formal governance/legal arrangements,[38] further adding to the complexity.

Statutory Intervention

Parliament has also intervened, but not in a coherent or systematic way.

Discrimination Law

Thus, for example, the prohibitions on discrimination in the Sex Discrimination Act 1975, the Race Relations Act 1976, and the Disability Discrimination Act 1995 applied to all schools, including independent schools and, incidentally, therefore to academies. So too their successor provisions in the Equality Act 2010.

Freedom of Information

Although the Labour Government was reluctant to impose the requirements of the Freedom of Information Act 2000 (FOIA) on academies, the Coalition did so, through the Academies Act 2010,[39] effective on all existing and future academies. Although that did not override existing funding agreements (because they were simply silent on the issue of FOIA and the Act said nothing about academies), it did mean the funding agreements were now supplemented by statutory rules, regardless of what was negotiated by the sponsor during its formation and subsequently.

Permanent Exclusions

Statutory overriding of funding agreements came soon after, however, with the Education Act 2011. In particular, in accordance with a general election commitment to make it easier for head teachers permanently to exclude pupils, the Coalition Government moved to replace the long-standing regime of independent *appeals* against permanent exclusion with a regime of independent *reviews*.[40]

The legal problem which arose was that the permanent exclusion/appeal regime in Education Act 2002 only applied directly to permanent exclusions from maintained schools. The funding agreements for some academies contractually bound them to follow the maintained school statutory regime (thus if that latter changed, they would follow automatically). But some agreements had 'hard wired' a regime of appeals, and some had even gone as far as directly to incorporate (albeit selectively) provisions from the regulations and guidance which would have applied to maintained schools at the time. That, in turn, meant that changing the statutory provisions for maintained schools (to weaken the position of the excluded pupil) would indirectly bite on some but not all academies.

This resulted in statutory intervention effectively to override the funding agreements. In particular, the newly created s 51A of the Education Act 2002 – which applies only to England, leaving the old regime under s 52 applying only now to Wales –

[36] At least the conversion to academy status requires a 'consultation', albeit one which stakeholders often feel is not a meaningful consultation.

[37] Adonis, op cit, at p 206.

[38] Adonis, op cit, at p 198.

[39] Academies Act 2010 s 14 and Schedule 1 paragraph 10.

[40] This article is not concerned with the detail of that change, only with how it was then extended to cover academies.

was designed mostly to deal with the position in maintained schools. But s 51A(12) provided:

> 'Regulations may make provision for this section and regulations made under it to apply, with prescribed modifications, in relation to Academies or a description of Academy.'

Part 4 of the School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012 (SI 2012/1033) did just that. It replicated (in substance) the permanent exclusion regime as it now applies in maintained schools for academies (although not accompanied by the statutory rules on behaviour policies, which might be thought to underpin permanent exclusion).

Accordingly, *secondary legislation* has overridden funding agreements, albeit in a way which, perhaps, academies might have welcomed and which could possibly have been achieved by renegotiating all the problematic agreements.

Special Educational Needs

That process is now to go one step further, if proposals currently in the Children and Families Bill 2013 come into effect. Among other things, the Bill repeals and replaces the whole of Part 4 of the Education Act 1996 which makes provision for special educational needs (SEN) in maintained schools.

As noted above, some pre-2010 academy funding agreements imposed similar obligations on the academies. Thus, for example, almost all required the academy to have regard to the SEN Code of Practice. However, there were variants, including the absence of any express reference to the potential for, or operation of, an appeal to the Special Educational Needs and Disability Tribunal (a problem which necessitated the Upper Tribunal's intervention).[41] From September 2010, academy agreements have, at least, imposed the 'SEN obligations' on academies.

Even then, parental requests for an academy place, under part 4 of an SEN statement, were not on an equal footing as those for a maintained school.[42] That is now to change. The proposed provisions would treat academies equivalently to maintained schools for all purposes when it comes to SEN. These changes are being brought about by primary legislation (cf the secondary legislation used for exclusions, as above) perhaps in recognition of the fact that, in many instances, it will, in practice, make it harder for academies to resist being named in SEN statements.

Crucially, these statutory provisions will specifically override funding agreements in a way which most probably could never have been achieved by agreement. As below, that sets a notable precedent in legal and political terms.

Other Issues: The Operation in Practice of Funding Agreements

As explained above, the statutory provisions which prescribe the framework for exclusions, admissions and the curriculum in maintained schools do not apply to academies. These matters were determined by the specific funding agreement for the particular academy.

That, of course, throws up interesting legal and enforcement issues, because parents/pupils are not parties to those agreements. Successive Secretaries of State have been reluctant publicly to confront the fact that funding agreements made it harder – compared to the position in an equivalent maintained school, where the rights are statutory and can be enforced by judicial review – for parents and pupils to enforce their rights.

As far as I am aware, the courts have only considered this issue in one appeal from the First-tier Tribunal (FTT) brought before the Upper Tribunal (UT) in *SC v London Borough of Hackney*.[43] The issue in that case was whether or not the FTT had jurisdiction to consider appeals against the local authority's refusal to name Mossbourne Academy in the SEN statements of some children whose parents requested it.[44] In

[41] *SC v LB Hackney* [2012] UKUT 214 (AAC), [2012] ELR 474.

[42] Paragraph 3(3) of Schedule 27 Education Act 1996 only applies to parental requests for maintained schools and thus not to parental requests for academies.

[43] [2012] UKUT 214 (AAC), [2012] ELR 474.

[44] For further detail see D Wolfe, 'Special Educational Needs

considering that issue, the UT had to consider what would happen if the FTT ordered that Mossbourne should be named, and Mossbourne nonetheless refused to admit the child in question.[45] The UT judge found a way. As far as I know, it has not yet been tested in practice. But even if it works in practice, it is highly convoluted and certainly does not provide parents/pupils with easy access to justice.

Does the Diversity of Arrangements Matter?

Academy enthusiasts might argue that 'diversity' is a good thing in itself, including when it comes to the governance and legal structures of schools. This article is not the place to debate whether that is right or wrong, or how far it can be taken. But I doubt whether anyone would argue in favour of the sheer complexity of what has emerged in practice over time, as above, including (for example) the hurdles to be jumped by a pupil with SEN wishing to force an unwilling academy to admit them.

For the time being there are three big problems (although no doubt there will be others), which will grow over time:

First: the circumstances of individual schools will change such that the specific and particular legal and governance structure (including thus whether stand-alone or sponsored, which sponsor/chain/etc) which might have been appropriate at the time of their creation, are no longer suitable.

Secondly: politicians of all parties (and thus presumably the next Secretary of State) continue to want to make changes to the school system (indeed the public demands it in many instances) which, given that it is no longer a system at all, they will struggle to do.

Thirdly: local authorities still have statutory obligations when it comes to education of the children in their area; and indeed, the public still expects action from them. But their ability to respond meaningfully gets ever less.

Let me deal with those in turn.

First: Things Change

At the simplest level, academies post 2010 are divided into those which were allowed/encouraged to become stand-alone academies because they were well regarded by Ofsted; those which were encouraged/forced to become academies because they were badly regarded; those in the middle which have been left alone; and those new schools which have been created in response to external initiatives. As time goes on, whatever it was that triggered the change is likely to have changed. Even at a basic level, the 'super head' which secured the Ofsted 'outstanding' or the weak head whose inaction was punished with a 'notice to improve' may have retired or moved on (indeed, in the latter case, is likely to have been forced out).So the previously outstanding school may now be struggling, or vice versa. Likewise the school which saw academy conversion as the way out of local authority meddling, may now be run by (and beleaguered by) a far more interventionist chain HQ. The current structures cannot respond to these changes. Refreshingly, Andrew Adonis (a passionate supporter of academies) has recognised the problem (at least in part) and suggested a legal solution:[46]

> 'There is, however, one important missing link in the developing academy system: namely, what should happen when Ofsted identifies an academy as failing? At present, no-one has the job of "managing" failing academies, and it is undesirable that this role should be taken on by the Department for Education, either in its bureaucratic or political guise.
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> Where a "sponsored" academy is found to be failing, Ofsted should conduct an audit of the academy's governance to answer one critical question: are the sponsors and their governors up to the job of improving the academy radically? Where they are they should be given appropriate time to set improvement in train before re-inspection. Where they are not, Ofsted should replace the sponsor (using the Secretary

Law – Where Are We Now Given the Children and Families Bill and the Latest Case-Law?' [2013] Ed Law 18.

[45] Which, in a maintained school, would be a simple judicial review to enforce the obligations under Education Act 1996 s 324(5).

[46] Adonis op cit, at p 202.

> of State's existing powers in this regard), conducting an open competition for a successor sponsor and brokering the transfer of sponsorship.'

He does not explain what he means by the Secretary of State's 'existing powers', or how Ofsted would come to be exercising such powers, or what legal basis there would be for 'brokering a transfer of sponsorship'. He seems to have in mind some mechanism for a party to a contract to be able to substitute the other party for one they prefer, but that is not presently the law. Maybe he has in mind that the Secretary of State would terminate an existing agreement (pursuant to powers, which vary one agreement to the next) and then enter into a fresh agreement with a new academy trust. But that is not what he describes; and it would be a pretty 'nuclear' option. What is thus clearly missing currently are any legal mechanisms (other than inspect and terminate) for dealing with (for example) a poorly performing academy which previously did well. Certainly there is nothing which would allow for a more subtle and supportive regime of external intervention to encourage school improvement. Andrew Adonis also contemplates another problem, the predicament of a school which no longer likes its sponsor (perhaps because the top slice is too big, or the oversight too prescriptive):[47]

> 'Successful academies – that is those rated as outstanding by Ofsted – should have a straightforward right to leave the chain, and either become a free standing academy subject to its own governance or to join another. It would be quite wrong for academy chains to become resented local authorities in a new guise.'

Again, it is not clear what he has in mind since – as above – the 'academy' in question has no legal existence free standing from the chain of which it is part (unlike a maintained school which has a freestanding legal existence, through its governing body, and can therefore be severed from the local authority which maintains it).

The academy is, in law, simply the legal label given to the school which the sponsoring chain has established at a particular location and has maintained in exchange for payment pursuant to its agreement with the Secretary of State. Imagine A[48] contracts with B[49] to provide a service to C.[50] C and B's staff cannot somehow insist that B is displaced such that the contract is now with D.[51] And yet that seems to be the proposal. It would clearly require statutory intervention. Even then, it suffers from offering only a 'nuclear' option.

Finally, as Andrew Adonis again puts it:[52] 'What happens if a sponsor dies, disappears or fails? The government has reserve powers of intervention, including an ultimate power to close an academy and withdraw funding.' More subtle forms of intervention will be needed.

Secondly: People (Including Politicians) Want to Change Things

One of the big ideas promoted with the growth of academies was their 'freedoms': including, as it was put, freedom from local authority control and freedom from legal constraints. The first has a mixed experience, as above, with many academies still having local authority involvement in their governance and others finding the local authority now replaced with the management at HQ of the chain. As for the second, headlines included the freedom to change the school day,[53] the freedom to break with the School Teacher's Pay and Conditions agreements and freedom from the National Curriculum. The Pearson Academies Commission Report[54] makes interesting reading on this subject, including research indicating that only 10% of academies had extended the school day,

[47] Adonis op cit, at p 202.

[48] Here the Secretary of State.

[49] An academy chain.

[50] The pupils to whom the academy chain has agreed to provide education.

[51] Another academy chain.

[52] Adonis op cit, at p 139.

[53] Although actually, a maintained school could do the same.

[54] January 2013.

only 12% had changed terms and conditions and just under a third were using curriculum freedoms. That is notable because senior politicians from all the major parties continue to argue for national interventions of a kind which, without primary legislation, will not apply to academies.

On 5 February 2013, in a speech to the Social Market Foundation, Secretary of State Gove trailed proposed changes to the National Curriculum (the consultation for which opened on 7 February 2013 and closed on 16 April 2013) explaining that 'this new curriculum will provide parents everywhere with a clear guide to what their children should know in every subject as they make their way through school.' Immediately, of course, adding the (necessary) qualification that 'Of course, academies will have the freedom to vary any part of the national curriculum they consider appropriate.'[55]

In his speech to the Labour Party conference on 4 October 2012, Labour's Shadow Secretary of State, Stephen Twigg made a parallel suggestion:

> 'Every young person must study English and Maths until 18. Incredibly, we are one of the only developed countries in the world that doesn't require this.'

And that

> '... all schools should ensure pupils get a minimum of two hours of PE a week, and that every pupil in every school gets a healthy meal.'[56]

Most recently, Liberal Democrats at their conference on 9 March 2013 resolved that every child should be taught by a qualified teacher, or someone working towards a teaching qualification with a spokesperson explaining that 'Parents quite rightly want to see high standards and professional staff in all schools, including academies and free schools.'

But the point is not just about the curriculum (or even just school meals!). As examples, Andrew Adonis identifies a number of key changes which he argues should be made across the board to improve schools. They include raising the starting salary for target groups of teachers in maths, physics, chemistry, IT and computing as well as for head teachers[57] separating the appointment of the governing body members from the appointment of the chair with the latter appointed through open competition.[58] An incoming Secretary of State could do all that in maintained schools (through the School Teachers Pay and Conditions (STPC) document and changing regulations) but not in academies.

In community schools and voluntary controlled schools, the local authority is the 'admissions authority' and it sets up independent appeal panels. In academies and voluntary aided schools (almost all of which have a designated religious character), that is the job of the school. On 5 March 2013, the Administrative Justice and Tribunals Council wrote to the Secretary of State complaining of the lack of independence in the panels which hear appeals against academy admission decisions arguing that 'the most obvious solution would be for local authority appeal panels, which currently hear appeals for the schools they still run, to handle those for all state schools in their area, including academies and faith schools.'

If the next Secretary of State wants to do anything about such problems, he or she will need to promote primary legislation and it will need to apply to academies and their variants.

Thirdly: Local Authorities – Life In Them Yet?

Local authorities still have many statutory responsibilities, not just to deal with issues such as children permanently excluded from schools or

[55] Of course it is not strictly a 'freedom to vary any part of the national curriculum' since the National Curriculum does not apply to them in the first place.

[56] The 'healthy meals' point has, of course, had a high profile history since celebrity chef Jamie Oliver launched his campaign, the spotlight of which very publicly turned to academies, not currently bound by the statutory rules on school meal dietary standards. In response, a Government spokesman apparently said: 'We trust schools to act in the best interests of their pupils. There's been a lasting culture change in attitudes since Jamie's School Dinners.'

[57] Adonis op cit, at p 224.

[58] Adonis op cit, at p 142.

those with SEN (something which the proposals in the Children and Families Bill 2013 would *enhance*).

It is worth recalling ss 13 and 14 Education Act 1996:

> '13 General responsibility for education
>
> (1) A local authority shall (so far as their powers enable them to do so) contribute towards the spiritual, moral, mental and physical development of the community by securing that efficient primary education and secondary education and, in the case of a local authority in England, further education, are available to meet the needs of the population of their area. ...
>
> 14 Functions in respect of provision of primary and secondary schools
>
> (1) A local authority shall secure that sufficient schools for providing-
>
> (a) primary education, and
> (b) education that is secondary education by virtue of s 2(2)(a) are available for their area.
>
> (2) The schools available for an area shall not be regarded as sufficient for the purposes of subsection (1) unless they are sufficient in number, character and equipment to provide for all pupils the opportunity of appropriate education.
> (3) In subsection (2) 'appropriate education' means education which offers such variety of instruction and training as may be desirable in view of-
>
> (a) the pupils' different ages, abilities and aptitudes, and
> (b) the different periods for which they may be expected to remain at school,
>
> including practical instruction and training appropriate to their different needs.
> (3A) A local authority in England shall exercise their functions under this s with a view to-
>
> (a) securing diversity in the provision of schools, and
> (b) increasing opportunities for parental choice. ...'

It is probably a good thing that the courts have identified these duties as 'target duties' (which are therefore almost impossible to enforce by legal action)[59] since local authorities now have little or no ability to do anything about them.

That might not matter if local authorities were not still publicly held to account for things over which they have increasingly little control. Visiting Ipswich on 25 January 2013, Sir Michael Wilshaw, head of Ofsted, apparently said that Suffolk's 'state schools' should be doing better and the local education authority[60] needed to 'shake things up'.

It is notable that he focussed on 'state schools' rather than 'maintained schools' – Suffolk's secondary schools are mostly now academies – but also that he considered the *local authority* as somehow responsible for what happens in *all* the state schools in its area, even though it has no direct legal or governance relationship with many of them.

Like any of us, the local authority could ask the Secretary of State to use *his* powers to get them to do better (presumably by threatening to take one of the nuclear options above – a very crude response) but why make the *local authority* the scapegoat? Why not then simply say that the *Secretary of State* should 'shake things up' – as it is to him that those academies are legally answerable? Or, if the issue is the need for new schools and business sponsors, why not say that local business should be coming forward (as happened say, in Manchester) to sponsor academies?

The simple truth is that politicians, regulators and the public still see *local authorities* (ie 'the council')

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[59] *The British Humanist Association and Rodell v London Borough of Richmond upon Thames* [2012] EWHC 3622 (Admin), [2013] ELR 79 at para [20]; *R v Inner London Education Authority, ex parte Ali* (1992) 2 Admin LR 822,at pp 827–828.

[60] I assume that he did not refer to local *education* authority, since that term dropped away in 2010, but that is how the BBC reported his comments.

as responsible for education in an area, and as being the key driver for necessary improvement. Andrew Adonis makes a similar point:[61]

> 'Local authorities are alive and well in respect of many of the functions which would be performed by any new "middle tier". They remain responsible for ensuring that there are sufficient school places in each locality, for special educational needs, for excluded children and other children out of school, and for school transport among other system wide services. Local authorities are also, vitally, a commissioner of new schools, including free schools, alongside the Education Department. This commissioning role flows not only from their education powers: as public landowners they are crucial in facilitating the establishment of new schools, whose biggest set-up challenge is often finding suitable land and premises.'

What he does not there recognise is that the accidents of history which have given us the current legal and governance structures for schools no longer deliver what the next Secretary of State (of whatever party) is likely to want from them.[62]

So What Next?

So what could the next Secretary of State do about all that, in legal terms?

Option 1: More of the Same?

The current approach is one of incremental change (with no obvious theme or explanation) with the Secretary of State imposing some changes only on maintained schools (eg curriculum changes) while imposing others on all state schools including academies (eg SEN reform). That piecemeal approach could, of course, continue.

Option 2: Back to Maintained School Status

Another 'big' option would be for legislation to convert all academies into a form of maintained school. That way, all of the obligations which currently do, and in the future will, apply to maintained schools (both constraining them but in some instances giving them powers which academies lack) would also apply automatically to such schools. It would be akin to what happened in 1998 when the grant maintained schools were brought back under local authority oversight.

A new, bespoke, form of maintained school could be created, or an existing form adopted and if necessary tweaked, such as the 'voluntary aided' model. Recall that voluntary aided schools need not be designated as having a religious character (albeit that most in currently practice are).

The 'VA' model has the advantage that VA schools own or lease their own premises (like academies) so any wholesale conversion need not concern itself with large (and potentially expensive) property transfers and related issues. But the VA route would, of course, still leave the 'admissions appeals' problem identified above, since VA schools are their own admissions authorities.

Option 3: A Bespoke Approach

The third alternative would be to adopt the approach taken by Secretary of State Gove to exclusions or to SEN, as above, namely to override funding agreements by regulations or by primary legislation (or perhaps both) but on a wider range of issues and in order to bring proper coherence and restore a schools 'system'.

The first academies had (and still have) funding agreements which have the least legal similarity to the position in maintained schools. No coherent argument has ever been advanced to justify that position: why should children in academies have different rights in relation to healthy meals; and so on?

By and large, each new model funding agreement (and thus each new wave of academies) has adopted provisions similar to those that apply in maintained schools (with the exception of provisions relating to curriculum, which are closest

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[61] Adonis op cit, at p 201.

[62] For a further discussion on the changing role and position of local authorities when it comes to schools, see N Harris, 'Local Authorities and the Accountability Gap in a Fragmenting Schools System' (2012) 75(4) *Modern Law Review* 511.

to the position in maintained schools in those academies created at the end of the last Government's time in office). The current structure, which depends on the particular academy, the time it was created and the reason it was created, offers a real opportunity and challenge to an incoming Secretary of State: namely to identify exactly what it is (in terms of legal and governance arrangements) that should be common across all schools and then to give effect to that principled assessment. It is in the next Secretary of State's interest to adopt this approach, not least because politicians of all parties clearly want to do something about what goes in *all* state schools, whether it is about curriculum, meals, staff, or other things.

If they want some control over what is taught in all schools (and all seem to), then the Secretary of State (or whoever is to decide) needs the power to bring that about (which does not, of course, mean the current National Curriculum being applied to all schools; it could mean a looser, less prescriptive framework, but still one that is applied to *all* schools). Similarly, if they want to provide at least some input into teacher salaries in all schools (as Andrew Adonis would have it), the appointment of governing bodies, the standards of school meals, and so on, then that will take statutory intervention (at least to override academy funding agreements). The local authority could also be made the admissions authority for all state schools, thus ending the arguments about 'independent appeal panels' and the like.

Now is also the time to provide local authorities, which remain generally recognised as the appropriate public authority to have the task of promoting and maintaining standards in schools in their areas, with the legal powers they need to oversee and intervene, including in a subtle, supportive and nuanced way (which would mean that 'nuclear options' can be avoided). Likewise, now is the time to provide (at the very least) proper oversight of academy chains (and give academies a corporate status separate from their 'sponsor')[63] if they are to continue to exist in anything like their current form.

The most direct way to do all that, in legal terms at least, would be for primary legislation to establish each school as a separate legal entity (as is already the case for maintained schools) and then specify (as the Secretary of State has done for permanent exclusions and SEN) that the position in academies is to be as that in maintained schools across a range of subject areas, with exceptions being the subject of specific debate and specification.

Therefore, if there is an educational argument in favour of a different approach in some schools rather than others (and particularly now that academies and maintained schools exist in all areas and in all guises alongside each other), then let's hear it, let's debate it, and let's have it defined in a systematic and coherent way, rather than simply being a school-by-school consequence of the particular moment in time and situation in history prevailing at the time of its creation and/or conversion.[64]

That approach could have the big advantage (as some would see it) of not requiring a change in legal status of any schools (ie academies could still be academies and so on), and also need not impact on land ownership and other issues which would be tricky (or prohibitively expensive) to adjust. Notably, it would deliver the things for which *all* the major parties are calling.

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[63] That would enable academies to change from one sponsor to another (as Andrew Adonis contemplates, op cit) or provide a mechanism for restoring academies back to being legally akin to maintained schools – ie with local authority as 'sponsor'.

[64] Recall, as above, the very limited way in which academies have actually used the legal 'freedoms' which were so trumpeted.