

EDUCATION AND INSPECTIONS ACT 2006

EXPLANATORY NOTES

COMMENTARY

Part 2: Establishment, Discontinuance Or Alteration of Schools in England

44. **Part 2** re-enacts much of the current law relating to school organisation for England, extends the requirement for a competition for new schools to special and primary schools, requires Secretary of State consent for new community schools, creates a new statutory procedure for schools to acquire a foundation and some minimum establishment and status requirements, and places school organisation decisions with local education authorities, abolishing the school organisation committee.
45. Annex B contains a table which compares the position of foundation schools and community schools.

Section 7: Invitation for proposals for establishment of new schools

46. This section provides that a local education authority in England may publish a notice inviting proposals (other than from local education authorities) for the establishment of a new foundation, voluntary, or foundation special school, or Academy.
47. Its provisions in part re-enact those of section 66 of the 2005 Act, which applied to secondary schools only, and now extends them to primary schools and special schools.
48. *Subsection (3)* specifies the basic information that the notice must contain, and provides that other information, and the manner in which the notice must be published, may be prescribed in regulations.
49. *Subsection (4)* provides that regulations shall prescribe the information that proposals brought forward in response to the notice must contain, and that they shall be submitted to the authority before the date specified in the notice.
50. *Subsection (5)* provides that after the date specified in the notice, a local education authority must publish any proposals received, and may publish proposals of its own for a foundation or foundation special school or, in cases where section 8 allows this, for a community or community special school.
51. *Subsection (6)* provides that regulations may prescribe the time within which proposals must be published, the manner in which they must be published, and the information which they must contain.
52. *Subsection (7)* provides for Schedule 2 to have effect in relation to the consideration, approval, and implementation of proposals.
53. **Schedule 2** provides for the proposals to be decided by the local education authority or adjudicator, in place of the school organisation committee and adjudicator. Amongst other things the Schedule includes provision for objections and comments to be made in respect of proposals; for related proposals to be decided together; for proposals under section 7, 10 or 11 to be decided by the adjudicator if they include proposals by local

education authorities or relate to the establishment of certain foundation schools; for the Secretary of State to be able to direct that proposals under section 7 should be decided by the adjudicator; and for diocesan authorities, the Learning and Skills Council for England, proposers and governing bodies to be able to ensure that proposals are referred to the adjudicator in certain circumstances. It also makes provision for the implementation of proposals.

Section 8: Proposals under section 7 relating to community or community special schools

54. This section sets out the circumstances in which local education authorities are permitted to publish proposals for a community school or community special school. *Subsection (1)* provides that in general such proposals may be published only where prescribed conditions are met and only with the consent of the Secretary of State. The consent of the Secretary of State is however not required in cases where further prescribed conditions are also met. This is intended to prevent authorities who fail to meet certain minimum standards from applying for consent and to enable authorities who meet demanding standards to publish proposals for new community schools in competitions without obtaining consent. All other authorities would have to obtain the consent of the Secretary of State.
55. *Subsection (2)* provides that the conditions must include conditions relating to the standards achieved by the authority in relation to its functions in respect of education, children's social services and childcare. It is intended that this will be measured by the annual performance assessment (APA) score.
56. *Subsection (3)* provides that further conditions that may be prescribed are conditions relating to the standards of schools in the local authority area or the extent of diversity among of any such schools.
57. *Subsection (4)* provides that in considering whether to give consent, the factors to which the Secretary of State must have regard include prescribed matters.
58. *Subsection (5)* provides that regulations may prescribe standards by reference to the opinion of the Chief Inspector or any rating awarded by the Chief Inspector following an inspection or review.

Section 9: Consultation and publicity in relation to notice and proposals under Section 7

59. This section provides that before publishing a notice under section 7, local education authorities in England must consult such persons as they consider to be appropriate, and in discharging this duty they must have regard to any guidance given by the Secretary of State. *Subsection (2)* provides that regulations may require local education authorities to take further steps to promote public awareness of the proposals brought forward.

Section 10: Publication of proposals with consent of Secretary of State

60. *Subsection (1)* provides that local education authorities in England may, with the consent of the Secretary of State, publish proposals for a new community, foundation, community special or foundation special school otherwise than under section 7. The subsection does not cover maintained nursery schools or 16-19 foundation or foundation special schools. Proposals for these may be published under section 11 without any need for the Secretary of State's consent.
61. *Subsection (2)* provides that other persons (proposers) may, with the consent of the Secretary of State, publish proposals for a foundation school, a voluntary school or a foundation special school otherwise than under section 7. The subsection does not cover 16-19 schools, schools to replace independent schools or new foundation special

schools to replace non-maintained special schools. Proposals for these may be published under section 11 without any need for the Secretary of State's consent.

62. *Subsection (3)* provides that regulations may prescribe the information the proposals must contain and how they must be published.
63. *Subsection (4)* provides that before publishing proposals the local education authority or proposers must consult such persons as appear to them to be appropriate, having regard to any guidance given by the Secretary of State.
64. *Subsection (5)* provides for proposals from proposers to be submitted to the local education authority who it is proposed should maintain the school, in accordance with regulations.
65. *Subsection (6)* provides for Schedule 2 to have effect in relation to the consideration, approval and implementation of proposals under this section.

Section 11: Publication of proposals to establish maintained schools: special cases

66. *Subsection (1)* provides for local education authorities to publish proposals to establish a new maintained nursery school or a new 16-19 foundation school or foundation special school.
67. *Subsection (2)* provides for other persons (proposers) to publish proposals to establish a new foundation school, voluntary school or foundation special school which is a 16-19 school or is to replace an independent school. Provision is also made for proposers to publish proposals for a new foundation special school to replace a non-maintained special school.
68. *Subsection (3)* provides that a foundation, voluntary or foundation special school is to be regarded as replacing an independent school if the independent school has been registered as such for two years and closes immediately before the proposals for the new school are implemented. *Subsection (4)* makes comparable provision for when a new foundation special school is to be regarded as replacing a non-maintained special school.
69. *Subsection (5)* provides that regulations may prescribe the information that proposals must contain and how they must be published.
70. *Subsection (6)* provides that before publishing proposals the local education authority or proposers must consult such persons as appear to them to be appropriate, having regard to any guidance given by the Secretary of State.
71. *Subsection (7)* provides for regulations to set out arrangements under which proposals from proposers must be submitted to the local education authority which is to maintain the school, and *subsection (8)* provides for Schedule 2 to have effect in relation to the consideration, approval and implementation of proposals.

Section 12: Establishment of a school as a federated school

72. This section re-enacts the provisions of section 68 of the 2005 Act in respect of England. It provides that a new maintained school may be a member of a federation from the outset.

Section 13: Schools established outside area of relevant LEA

73. This section provides that regulations may modify sections 7 to 12 and Schedule 2 where a school is proposed to be situated in an area different from that of the local education authority who published the notice under section 7, or, if the proposals are published outside a competition (that is, under sections 10 or 11), different from that of the local education authority who it is proposed should maintain the school.

Section 14: LEA in England not to establish a school in Wales

74. This section re-enacts section 69 of the 2005 Act in respect of England and has the effect that the power of a local education authority to establish and maintain a school within the area of another local education authority does not apply if the other local education authority is situated in Wales.

Section 15 and Schedule 2: Proposals for discontinuance of schools maintained by a local education authority

75. This section replaces existing provisions in the 1998 Act and provides for the publication of statutory proposals where a local education authority or school governing body wish to close a maintained school in England, including maintained mainstream schools, special schools and nursery schools.
76. *Subsection (1)* provides that a local education authority may publish proposals for the closure of any maintained school.
77. *Subsection (2)* provides that a governing body of a voluntary, foundation or foundation special school may publish proposals for the closure of their school.
78. *Subsection (3)* provides for regulations to prescribe the information to be contained within the proposals and the publication arrangements.
79. *Subsection (4)* requires the body formulating proposals to close a rural primary school to have regard to a number of factors. The factors are: the impact on the community of the closure, the availability and cost (to the local education authority) of transport for pupils to other schools; any increase in the use of motor vehicles and the likely effect of such and any alternatives to school closure. It also requires the body to have regard to guidance issued by the Secretary of State.
80. *Subsection (5)* provides for governing bodies to submit their published proposals to local education authorities in accordance with regulations.
81. *Subsection (6)* provides for Schedule 2 to have effect in relation to the consideration, approval and implementation of school closure proposals under this section.

Section 16: Consultation in relation to proposals under section 15

82. In relation to England this section replaces provisions of the 1998 Act which were inserted by the 2005 Act. It provides for consultation where the local education authority or the governing body propose to close a rural primary school or special school.
83. *Subsection (1)* requires the body proposing to close a rural primary school or special school, under section 15, to consult the following before publishing the proposals: registered parents of registered pupils at the school; in the case of a rural primary school, the local education authority and the district council or parish council for the area; in the case of a community or foundation special school, any local education authority that maintains a statement of special educational needs for any registered pupil at the school; and any other persons the body deem appropriate.
84. *Subsection (2)* requires the body proposing to close any other maintained school to consult persons they deem appropriate before publishing proposals.
85. *Subsection (3)* requires the body to have regard to guidance by the Secretary of State when consulting.

Section 17: Direction requiring discontinuance of community or foundation special school

86. This section re-enacts section 32 of the 1998 Act in its application to England.

*These notes refer to the Education and Inspections Act 2006
(c.40) which received Royal Assent on 8 November 2006*

87. *Subsection (1)* provides for the Secretary of State, if he considers it expedient to do so in the interests of the health, safety or welfare of pupils at a school, to direct a local education authority to discontinue a community or foundation special school on a date specified in the direction.
88. *Subsection (2)* provides that the direction may include a requirement that the local education authority notify people as specified in the direction.
89. *Subsection (3)* sets out the persons the Secretary of State must consult before giving a direction.
90. *Subsection (4)* requires the Secretary of State to give written notice of the direction to the head and governing body of the school.
91. *Subsection (5)* requires a local education authority to discontinue a school on the specific date given in a direction and provides that there is no requirement to publish statutory proposals for the school's closure.

Section 18: Alterations that may be made under section 19

92. This section provides that regulations may prescribe the alterations to maintained schools that require the publication of statutory proposals.
93. *Subsection (2)* provides that such alterations must include a change in the category of the school; the acquisition by a foundation or foundation special school of a foundation; and any change in a school's instrument of government which results in the majority of governors being foundation governors.
94. *Subsection (3)* provides that other alterations may be prescribed in regulations as requiring statutory proposals.
95. *Subsection (4)* provides that a maintained school may not change, acquire or lose a religious character; change category to a community or community special school; change category from a mainstream school to a special school or from a special school to a mainstream school; or change category from a maintained nursery school to any other kind of school or from any other kind of school to a maintained nursery school. The effect of *subsection (4)* is that any of these changes could be achieved only by discontinuing the existing school and establishing a new school in its place.

Section 19: Publication of proposals for alteration of school

96. *Subsections (1)* and *(3)* provide that where a local education authority or the governing body of a maintained school propose to make a prescribed alteration to a maintained school, and the proposals are ones that these bodies respectively may make, they must publish statutory proposals to do so.
97. *Subsection (2)* defines the alterations that may be proposed by a local education authority as -
 - in the case of community schools, community special schools or maintained nursery schools, those that are prescribed in regulations;
 - in the case of foundation schools or voluntary schools, an enlargement of the premises, an increase in the number of pupils in any relevant age group, the establishment or discontinuance of special educational needs provision, or the establishment of provision suitable for pupils over compulsory school age; and
 - in the case of foundation special schools, an enlargement of the premises, an increase in the number of pupils for whom the school is organised to make provision, or a change in the type of special educational needs for which the school is organised to make provision.

98. *Subsection (3)* provides that where the governing body of a maintained school propose to make a prescribed alteration to a school, they must publish proposals under this section, and that in the case of a community school, a community special school or a maintained nursery school, the prescribed alteration must be designated by regulations under this subsection as capable of being proposed by the governing body.
99. *Subsection (4)* provides that if the governing body of a voluntary aided school are unable or unwilling to continue their capital contribution to the school, they must publish proposals to become either a voluntary controlled school or a foundation school, as they shall determine. (This re-enacts the provisions of paragraph 3 of Schedule 8 to the 1998 Act.).
100. *Subsection (5)* provides for the section to have effect subject to section 20.

Section 20: Restriction on power of governing body to publish foundation proposals

101. This section provides that
- a) a foundation school which, immediately before the day Part 2 comes into force, was a foundation school with a foundation,
 - b) a voluntary school, or
 - c) a foundation school which having been a voluntary school immediately before the day Part 2 comes into force, changed category to foundation school on or after that date
- may only publish certain proposals under section 19 with the consent of the school's existing trustees, and of anyone by whom the foundation governors are appointed.

Section 21: Proposals under section 19: procedure

102. This section provides that regulations may make provision about the publication and determination of proposals under section 19. *Subsection (2)* gives examples of specific provision that may be made, and in particular provides that regulations may make provision about the referral of proposals to the adjudicator in prescribed cases. *Subsection (3)* provides that regulations may confer functions on local education authorities, governing bodies and the adjudicator.
103. *Subsection (4)* provides that regulations may enable the Secretary of State to require proposals to be referred to the adjudicator.
104. *Subsection (5)* enables the local education authority or the adjudicator to make a transitional exemption order allowing the full requirements of the Sex Discrimination Act 1975 in respect of co-educational schools to be phased in if a single-sex school becomes co-educational. (This re-enacts the provisions of paragraph 21 of Schedule 6 to the 1998 Act.)
105. *Subsection (6)* provides that regulations may require any persons exercising functions under the regulations to have regard to guidance issued by the Secretary of State.

Section 22: Right of governing body to determine own foundation proposals

106. *Subsections (1) to (3)* provide that regulations under section 21, in relation to proposals under section 19 by a governing body of a community or voluntary controlled school to change category to a foundation school, must provide for the proposals to be determined by the governing body, and not be referred to the adjudicator. This applies only if the proposals do not involve the acquisition of a foundation or a change to the instrument of government which results in the majority of governors being foundation governors. Similar provision is made in respect of proposals for a change of category from community special school to foundation special school.

107. *Subsections (4) and (5)* provide that, in relation to certain proposals published under section 19 by a governing body which involve the acquisition of a foundation, or result in the majority of the governors being foundation governors, regulations under section 19 must provide for the proposals to be determined by the governing body unless the local education authority wish them to be referred to the adjudicator.

Section 23: Rights of interested bodies in relation to proposals under section 21

108. This section provides that regulations made under section 21 must make provision in connection with the referral of certain proposals to the adjudicator in certain circumstances.
109. *Subsection (1)* provides that if regulations made under section 21 provide for the governing body of a school to determine proposals falling within *subsection (2)*, the regulations must provide for the local education authority to be able refer the proposals to the adjudicator for determination.
110. *Subsection (2)* specifies the proposals that may be referred to the adjudicator as envisaged in *subsection (1)*. These are proposals to acquire a foundation, and proposals for a foundation to appoint a majority of the governing body of a school.
111. *Subsection (3)* provides that regulations may restrict the matters to which the local education authority may have regard in deciding whether to require such proposals to be referred to the adjudicator.
112. *Subsection (4)* provides that if regulations made under section 21 provide for proposals to be determined by a person other than the adjudicator (for example by the governing body of the school concerned), the regulations must provide for specified bodies to be able to refer the proposals to the adjudicator after the initial determination. The specified bodies are Church of England and Roman Catholic diocesan authorities and, in the case of proposals relating to 14-19 provision, the Learning and Skills Council for England. This does not apply where section 22 restricts or excludes the possibility of a reference to the adjudicator.
113. *Subsection (5)* provides that, if regulations made under section 21 provide for a local education authority to determine proposals which they have published in relation to a foundation, voluntary or foundation special school, the regulations must provide for the governing body and trustees of the school to be able to refer the proposals to the adjudicator after the initial determination.

Section 24: Proposals under section 19: implementation

114. This section provides that regulations may make provision in connection with the implementation of approved proposals for the alteration of schools (including arrangements under which the duty to implement the proposals may be removed, or the proposals modified).
115. *Subsection (3)* provides that regulations in respect of proposals for a school to change its category or gain a foundation may include provision about changes to the constitution of the governing body and the transfer of property or staff. *Subsections (4) and (5)* give further detail of what regulations in relation to the transfer of property may cover.
116. *Subsection (6)* provides that regulations may require any prescribed persons, in exercising functions under the regulations, to have regard to guidance issued by the Secretary of State.
117. *Subsection (7)* provides that regulations may in particular make provision corresponding to the provisions of Schedule 2 governing the implementation of proposals for the establishment or discontinuance of schools.

118. *Subsection (8)* provides that a school's change of category is not to be taken as authorising any change in the religious character of the school.

Section 25: Proposals for removal of foundation or reduction in foundation governors

119. This section provides for the governing bodies of certain foundation schools with foundations to publish proposals to remove the foundation or to reduce the proportion of governors appointed by the foundation.
120. *Subsection (1)* provides for this section to apply to foundation and foundation special schools where either or both of two conditions is met.
121. *Subsection (2)* sets out the first condition, which is that the school was established pursuant to proposals implemented under the Act.
122. *Subsection (3)* sets out the second condition, which is that the school acquired its foundation pursuant to proposals implemented under the Act.
123. *Subsection (4)* enables the governing body of a school meeting either of these conditions at any time to publish proposals to remove a foundation or to alter the school's instrument of government so as to reduce the proportion of governors appointed by the foundation so that they no longer constitute a majority.
124. *Subsection (5)* provides for a prescribed proportion of governors to be able to require the governing body to publish proposals for either of the changes mentioned in *subsection (4)*, in accordance with procedures set out in regulations.
125. *Subsection (6)* provides that the governing body is not required to publish proposals under *subsection (5)* (proposals required to be published by the prescribed proportion of governors) at any time within a prescribed period beginning with the date on which (a) proposals for either the establishment of the school, the acquisition of the foundation, a relevant change in instrument of government or a change of category to foundation or foundation special school were implemented under the Act (and regulations made under the Act) or (b) proposals published under *subsection (5)* were rejected.
126. *Subsection (7)* defines the term "relevant change" for the purposes of *subsection (6)*, that is a change to the instrument of government which results in the majority of governors being foundation governors.
127. *Subsection (8)* defines the term "foundation" for the purposes of the section.

Section 26: Proposals under section 25: procedure

128. This section provides for regulations to make provision about the publication and determination of proposals under section 25.
129. *Subsection (2)* lists the provision that may be made in regulations. In particular, it includes provision enabling proposals to be treated as being approved if a specified proportion of the governing body other than a majority approves them, in prescribed circumstances.
130. *Subsection (3)* provides for regulations to require the governing body to ensure that any matters related to the transfer of land or compensation which might be payable under *subsections (3) or (4)* of section 27, if proposals published under section 25 were approved, are resolved before proposals are published. It also provides for regulations to enable or require such matters to be referred to the adjudicator for determination.
131. *Subsection (4)* provides that regulations may require any prescribed person to have regard to guidance by the Secretary of State when exercising functions under this section.

Section 27: Proposals under section 25: implementation

132. This section provides for regulations to make provision about the implementation of proposals published under section 25.
133. *Subsection (2)* provides that regulations may make provision about changes to the school's instrument of government and the reconstitution of its governing body; for the transfer of property, rights and liabilities; and about the manner and time within which things must be done.
134. *Subsection (3)* provides that regulations made under *subsection (2)(b)* may make provision relating to the matters mentioned in section 24(5)(a) to (i). Section 24(5)(a) to (i) set out a detailed list of matters relating to the transfer of property, rights and liabilities.
135. *Subsection (4)* provides that regulations may authorise or require a foundation to pay compensation to the governing body, local authority or a prescribed person where they have incurred capital expenditure in relation to land which forms part of the school premises (or previously formed part of the school premises) and which is not transferred to the governing body.
136. *Subsection (5)* provides that regulations may authorise or require a governing body to pay compensation to the foundation where the foundation has incurred capital expenditure in relation to land which forms part of the school premises (or previously formed part of the school premises) and which is transferred to the governing body.
137. *Subsection (6)* provides that regulations may require any prescribed person to have regard to guidance from the Secretary of State when exercising functions under this section.
138. *Subsection (7)* makes clear that the implementation of proposals under section 25 does not authorise any change to, or loss of, the religious character of a school.
139. *Subsection (8)* defines the term "foundation" for the purposes of the section.

Section 28: Restriction on establishment, alteration or discontinuance of schools

140. This section replaces existing provisions in the 1998 Act (in their application to England). It prohibits the opening or closing of maintained schools, or the making of prescribed alterations to them, without the publication and determination of statutory proposals.
141. *Subsection (3)* provides that the prohibition does not apply where the Secretary of State has issued a direction to the local education authority to close a community or foundation special school (e.g. in the interests of health and safety) or to close a school in special measures, or where the governing body of a foundation or voluntary school give notice that they intend to close the school.
142. *Subsection (4)* prohibits the making, without the publication and determination of statutory proposals, of an alteration which involves the removal of a foundation or the reduction in the proportion of governors appointed by the foundation so that they no longer constitute a majority.

Section 29: Abolition of school organisation committees

143. This section has the effect of abolishing school organisation committees.

Section 30: Amendments relating to school organisation

144. This section provides for Schedule 3 to have effect. Schedule 3 amends existing legislation relating to school organisation. It makes changes to reflect the new changes in the Act in respect of England but the continuation of existing legislation in respect

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of Wales. It also makes changes to reflect the replacement of the school organisation committee as decision-maker by the local education authority (in England).

Section 31: Transitional provisions

145. This section provides that the Secretary of State may make such transitional provisions as he considers appropriate in connection with the commencement of this Part.

Section 32: Interpretation of Part 2

146. This section defines terms used in Part 2 of the Act.