



BATES WELLS & BRAITHWAITE LONDON LLP

Free Schools - Governance FAQs

These questions were raised at a workshop held by Bates Wells and Braithwaite (BWB) and New Schools Network (NSN) on 11 July 2011 specifically for Free School promoters.

These answers are given on a general basis for information only. They do not constitute legal advice. Specific advice should be sought for specific cases.

References to the experiences of existing Free School groups have been provided by NSN with the consent of the groups mentioned.

Some Free Schools will be part of larger multi-academy providers. The answers given here apply to single Free Schools unless otherwise stated.

Q1. What is the difference between a member and a director of a Free School?

A Free School will be operated by a charitable company limited by guarantee. It has two tiers of governance like any company:

- **The members of the company** have rights and powers under company law to change its constitution, remove directors, receive the annual accounts of the company and attend and vote at company meetings (the same powers shareholders have in a company limited by shares).
- **The directors of the company**, who are often referred to as the governors or trustees, are responsible for the management and strategic direction of the company and therefore the school. In addition to their legal duties and responsibilities as company directors, they also have duties under charity law as charity trustees.

If the Free School is one of a number of schools operated by a multi-academy provider, its legal structure is likely to be more complex and the governors of the school may not have legal duties as company directors and charity trustees, but under delegated authority.

Q2. Can the members and the directors be the same people?

A. While the roles of company member and company director are separate and distinct, they can be occupied by the same people. However, they must bear in mind the distinct responsibilities of each role and make decisions wearing their different 'hats' as either a

member or a director. Generally there will be ongoing governance obligations as directors and possible periodic requirements for engagement as members, for example in an annual general meeting.

Q3. What is the difference between governors and directors of a Free School?

A. The Department for Education (DfE) model Articles of Association (as at July 2011) for Free Schools define the 'Governors' as the directors of the 'Academy Trust' (the company which operates the free schools). Therefore, the terms 'director' and 'governor' are interchangeable for the purposes of the DfE model articles.

Q4. Can you have separate directors and governors of a Free School?

A. We are not aware, that the DfE have permitted changes to the model articles to make such an arrangement explicit. There is a danger with such an arrangement that, over time, the roles can become blurred and confused.

However, since the model Articles permit the directors to delegate tasks to sub-committees the directors of a Free School could in theory arrange to separate the roles of 'directors' and 'governors'. In such a case, the company directors would delegate the operational running of the school to governors but the directors would nevertheless retain legal responsibility and accountability as company directors and charity trustees for the company and the school.

Schools seeking such an arrangement would need approval from the DfE to adapt their model articles in a way which accommodated it explicitly. For example, [The ARK Bolingbroke Academy](#) which will open in 2012 is currently in negotiation with the DfE and their academy sponsor to create this kind of school governance model].

Q5. What is the ideal number of directors?

A. There is no ideal number, but a board needs an appropriate balance of skill and expertise and should not be so large as to become unwieldy. It makes sense to keep the board of directors small at the beginning of the process of establishing a Free School. This will assist with control and enable directors to make decisions speedily. Then, as the school moves closer towards opening, the board of directors can be expanded to be in line with the Articles of Association as they are specified in the funding agreement for the particular Free School. For example, [the proposed Wapping High School](#) started with only 3 directors, but added a further 2 directors to provide further educational expertise as the project progressed.

Once the school is opened, it will be necessary to have at least two elected parent governors.

If you require additional directors/governors for your school NSN can help you find them through our online networking tool which can be found [here](#).

Q6. What is limited liability?

A. As mentioned above, a Free School will be a charitable company limited by guarantee which means that it will have company law members. The members act as nominal guarantors for the company and pledge a certain fixed sum (£10 is specified in the DfE model Articles) to be contributed only in the event that the company is wound up when insolvent. This sum of £10 will be the maximum amount that each member would need to pay towards any debts of the company on winding up.

Also, Directors are not personally liable to the company for its liabilities provided that they fulfil their duties as company directors and charity trustees and act honestly and in good faith.

As a separate legal entity, the company enters into contractual relationships in its own name. For example, most of the Free Schools which opened in September 2011 contracted a project management company to help them deliver their school once they had been approved. The company, rather than individuals involved with it is also an employer and a property owner, or lessee. A company is “legal person”, with its own assets and liabilities.

Bear in mind however, that you cannot enter into any contracts which use or anticipate using public funding from the DfE *before* your school has been approved and has signed a funding agreement.

Q7. If a Free School has been set up using Articles of Association other than the DfE’s model articles, when is a good time to adopt the model articles instead?

A. If a company has been established with different articles, or is an existing organisation (e.g. – a charity or an existing independent school) the model articles should be adopted before the Free School enters into the funding agreement. For example, [Liverpool Lighthouse](#), an existing AP provider which has submitted a proposal to open an AP Free School in 2012, will establish a separate company which adopts the DfE’s Articles of Association if it is approved

Companies created specifically as a vehicle for a Free School should use the DfE’s model articles as standard.

Q8. Can an existing charity set up and open a Free School?

A. Yes, many independent schools who wish to convert to become a Free School are registered charities. The process by which this happens depends on the school’s existing legal structure.

An independent school which is already established as a company limited by guarantee would need to change its Articles of Association so that they match the model articles provided by the DfE. For example, the [Maharishi School](#), which converted from independent

to Free School status in 2011, negotiated with the DfE and the Charity Commission in order to change its articles in a way which satisfied their requirements and the objectives of the school. However, groups should be aware that such negotiations may be expensive and time consuming and may decide it is easier to adopt the model articles in their entirety.

Charities which do not currently run schools can establish Free Schools, provided within the scope of their charitable objects, which may, for example, include an object "to advance education". The legal mechanisms required will depend on the particular circumstances of the charity but would include, as a minimum, changing the charity's Articles of Association to match the DfE's model articles. For example, 'Everton in the Community', the charitable arm of Everton FC has [applied to open an AP Free School in 2012.](#)]

Q9. If 'pro bono' advice has been provided before the funding agreement has been entered into, can this advice be paid for retrospectively once the funding agreement is in place?

A. No since pro bono support is, by definition, inconsistent with any contractual payment, including retrospective payment. If advice is given in return for later payment it is not pro bono advice, because it is in return for something. Advice in return for retrospective payment is contractual and the retrospective payment would be a contractual obligation.

Pro bono advice may be accepted at any time, pre or post the funding agreement being in place, as it is free advice, not given in return for anything. Many groups benefit from pro-bono expert advice. For example, [The Free School Norwich](#) received free advice from volunteers on commercial law, finance, public relations and school governance.

Bear in mind that a decision to make payment for advice given on a pro bono basis before the funding agreement is actually a later decision to make a payment in return for nothing - an "ex gratia" payment. As a general principle of charity law, charities may not properly make such payments.

Q10. Can directors or members of a Free School provide services to that Free School without the Free School needing to tender for them?

A. [DfE guidance](#) currently indicates that there must be "no personal or professional relationships between those who have responsibility for your school's spending and potential suppliers".

However, well established general principles of company and charity law apply to manage actual and potential conflicts of interest, so the guidance is apparently presenting a tighter and perhaps clearer practical principle which may reflect DfE expectations.

The appropriate management of conflict of interest requires formal safeguards to ensure decisions are made exclusively by reference to the best [interests](#) of the organisation. The

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most basic is that a decision to obtain services from a director or member should be made by the other directors without the participation of the affected director/member.

Because the Free School will be a public authority services (unless gratuitous) should be obtained in accordance with the general public procurement principles of objectivity, transparency, fairness and equal treatment for other potential suppliers (and if the services are of high-value, or within particular categories, prescribed procedures may also need to be followed).

For example, an original member of the steering committee for the proposed [Wapping High School](#) took up employment with the educational services provider which the school subsequently appointed to provide pro-bono advice during the preparation of the application. The directors of this school undertook a mini-tendering exercise when selecting who to work with and properly managed the potential conflict of interest.

Q11. How do promoters of Free Schools retain influence if the school is being set up by an academy provider?

A. There are a number of ways that the original promoters of a Free School can be involved in the running of the school. Depending on the circumstances, the original promoters can be:

In a single-academy Free School

- Directors of the Free School company (i.e. governors) appointed by the company members;
- Parent directors (i.e. governors) of the Free School company elected by parents of pupils at the school;
- Members of the Free School company;
- Trustees of a separate charity which supports the Free School and has the power to nominate directors (governors) to the company limited by guarantee which oversees the Free School;
- Employees of the Free School (subject to transparent recruitment procedures);
- Members of sub-committees of the Board of directors.

In a multi-academy Free School

- Members of the local governing body (ie. governors) of the Free School appointed by the multi-academy Board of directors;
- Members of the local governing body of the Free School elected as parent governors of the school by parents of pupils at the school;
- Members of sub-committees of the local governing body of the school;

- Directors of the multi-academy company elected by and from among the parent governors of the local governing bodies.

Further information:

Contact NSN for more help in finding legal expertise: info@newschoolsnetwork.org

A copy of the DfE's model Articles of Association can be found at: <http://www.education.gov.uk/schools/leadership/typesofschools/freeschools/guidance/a0074737/free-schools-model-funding-agreement>

DfE guidance on legal issues affecting Free Schools will be published on their website: <http://www.education.gov.uk/schools/leadership/typesofschools/freeschools>