

BRIEFING

# A LEGAL BIND

## THE FUTURE LEGAL FRAMEWORK FOR ENGLAND'S SCHOOLS

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# CONTENTS

<b>Summary</b> .....	<b>3</b>
<b>1. Introduction</b> .....	<b>6</b>
<b>2. A ‘mixed economy’ of schools</b> .....	<b>7</b>
The state sector before 2010: a common statutory framework.....	7
The Coalition years: the Academies Act 2010 and the growth of contractual funding agreements .....	8
‘I want every school to be an academy’ .....	9
<b>3. Contractual funding agreements</b> .....	<b>10</b>
Why did they emerge? .....	10
What are their key features?.....	10
What benefits do they bring? .....	11
What are the drawbacks? .....	11
<b>4. Funding agreements and academy chains</b> .....	<b>14</b>
<b>5. One piece of the jigsaw</b> .....	<b>15</b>
<b>6. Conclusion</b> .....	<b>16</b>
<b>References</b> .....	<b>19</b>

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## SUMMARY

The government has promised to convert more maintained schools into academies. The number of academies has increased from around 200 in May 2010 to over 5,000 today. Prime minister David Cameron has expressed his desire for 'every school to become an academy'.

Most commentators have focussed on the implications of this announcement for the role of local authorities in the school system. However, any expansion of the academies programme must also take into account the growing difficulties that surround the legal framework that governs schools – specifically the fact that an increasing proportion of our schools are now governed through individual contracts (funding agreements) with the secretary of state for education, rather than through legislation. This may sound like a small technical issue, but it is at the heart of debates about school autonomy, and integral to how the government manages the education system.

As the government moves towards creating a 'fully academised' school system, it should try to address the difficulties that arise from the governance of academies through contractual funding agreements.

Contractual funding agreements set out the combination of freedoms and constraints that are placed on individual academies. They have come to reflect the principle that academies should be free from interference by future governments. However, in reality they emerged largely as a result of historical circumstance, and have a number of drawbacks which include the following.

### **They don't always protect autonomy**

The agreements have not always protected academies from interference, as governments have occasionally renegotiated funding agreements and placed conditions on academies through other means (such as funding, Ofsted, and league table changes). In theory there is no reason why an academy would gain more autonomy by signing a funding agreement than by being granted a set of freedoms through primary or secondary legislation.

### **They have created a large bureaucratic burden on government and schools**

While government can renegotiate funding agreements, in practice this is both costly and time-consuming. It therefore places a significant administrative burden on the Department for Education, as well as on schools, which increasingly need to employ lawyers to administer their contractual agreements.

### **They have created an inconsistent and contradictory set of freedoms among different academies**

The fact that renegotiating existing funding agreements is costly and time-consuming means that governments sometimes choose to impose conditions on new academies and free schools at the point at which they sign new funding agreements (rather than trying to impose new conditions on existing academies by renegotiating existing funding agreements). One such example is the requirement to provide careers guidance, which has been inserted and removed from funding agreements at various different times over the past decade. The upshot of these changes to conditions is that an inconsistent and sometimes contradictory set of freedoms and controls has emerged among different academies, depending on when they signed their funding agreements.

### **They risk tying academies to poorly performing chains**

A number of difficulties can arise when an academy joins a multi-academy trust because it is the trust, rather than the individual academy, that is party to the funding agreement. In the course of our seminar it was noted that many school governors did not realise that joining a trust meant that their school would cease to exist as a legal entity, and that they would cede all autonomy to the trust.

This is not inherently a bad thing if, for example, the trust is better at improving pupil outcomes. However, there is a risk that academies might find themselves tied to poorly performing chains and unable to leave – just as some maintained schools were tied to poorly performing local authorities before the introduction of the academies programme. This situation is also placing a huge burden on the governing bodies of schools that hastily converted to academy status and unwittingly ceded control of their schools to trusts. These local governing bodies are having to retrospectively put effective ‘schemes of delegation’ in place to clarify which duties trusts will delegate to them.

### **They are subject to less parliamentary scrutiny**

The government is able to make changes to the requirements placed on academies (through funding agreements) without parliamentary approval. This potentially gives government the power to make changes to schools’ terms and conditions without sufficient parliamentary scrutiny and oversight. Conversely, if school freedoms were guaranteed through legislation then such moves would, at least in theory, be subject to greater parliamentary oversight.



Given these difficulties, if the government pursues its ambition to see ‘every school become an academy’, it should use the opportunity to reform the way in which academies are governed.

A number of options for reforming the legal framework governing academies were discussed at the seminar, including the following.

- Abolishing funding agreements and setting out academy governance through primary or secondary legislation. This would make academies more like the grant-maintained schools of the early 1990s, which were free from local authority control but had their freedoms and obligations set out in legislation instead of legal contracts.
- Retaining a slimmed-down funding agreement that requires academies to adhere to subsequent changes in primary or secondary legislation. This would be a ‘halfway house’ option whereby academies would still enter into legal contracts, but these contracts would contain clauses that require academies to adhere to legislation on certain issues.
- Reforming funding agreements so that they only run for a period of five years and must be renewed each time they expire. This would make them more similar to the contracts that have developed for charter schools in many US states. It would allow academies some certainty regarding the freedoms and constraints they have been given, but it would also give the government opportunities to update the terms of agreements, and regularly monitor academies’ performance.
- Encouraging the creation of school trusts that enable individual schools within them to retain their status as a legal entity, therefore allowing them to change trust.

None of these changes would represent a threat to school autonomy, as the government would continue to decide precisely what levels of freedom and constraint it wants to place on academies, just as it does at the moment. It would simply mean that these freedoms and constraints would be set out

in legislation (or a 'slimmed down' renewable contract) that would apply to all academies, rather than through individual funding agreements, with all the associated complications which that brings.

The government has committed to creating a self-improving system of autonomous schools. Yet contractual funding agreements have proven less able to provide a consistent set of freedoms across schools than a system based on legislation and common statute. The latter has the potential to allow all academies, regardless of the timing and circumstance of their creation, the optimal balance of autonomy and accountability necessary to deliver a first-class education to pupils.

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#### **The Future Legal Framework for Schools seminar**

This briefing is informed by discussions had as part of a seminar on 'The Future Legal Framework for Schools' held in Westminster in June 2015. The seminar was attended by a number of prominent figures from education law, policy, professional bodies, academia and academy trusts. Its purpose was to seek a better understanding of how the current legal framework that underpins England's schools has developed, of what challenges or opportunities it poses to the schools system as a whole, and of whether reform of the system could lead to improved outcomes over the course of the current parliament.

IPPR would like to thank the attendees for contributing to the discussion and helping to inform the ideas and arguments explored in this briefing paper.

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# 1. INTRODUCTION

Since the first city academy was established in 2002, the legal framework underpinning English schools has been transformed. Where once all schools were subject to a common statutory framework, with local education authorities exercising control and ensuring accountability, there are now contractual funding agreements between individual academies or academy chains and the secretary of state for education.

As the number of academies has increased, so too has the number of different funding agreements, with the common statutory framework applying only to the rapidly decreasing number of maintained schools.

These funding agreements are designed to guarantee academies' autonomy and their independence from central and local government control, and to set out a number of minimal constraints on how they are able to use these freedoms. However, in reality, government uses a number of additional means of granting or restricting academy freedoms, such as legislation, the Ofsted framework, performance league tables, the independent schools standards, and the *Academies Financial Handbook*.

With the number of academies set to increase over the course of the current parliament, it is important to consider whether the present system of ever-expanding numbers of contractual funding agreements provides the best possible means of governing our school system. Are funding agreements the best way to ensure the right mix of autonomy and accountability for our schools?

## 2. A 'MIXED ECONOMY' OF SCHOOLS THE EVOLUTION OF THE ACADEMY SYSTEM

### The state sector before 2010: a common statutory framework

At the close of the 20th century, the vast majority of schools in the state system were 'maintained' by their local authority. This had them operate under a common regulatory framework, set out in primary and secondary legislation, which allowed government to determine central aspects of schools' activities, such as governance arrangements, the curriculum, and exclusion procedures. Control and oversight was devolved to the local level, while the 'rules of the game' were set centrally and applied consistently across the country.

The Education Reform Act 1988 had, however, made possible the creation of a new form of school – City Technology Colleges (CTC) – that could operate under a different legal model which was designed to grant them additional freedom to innovate.<sup>1</sup> Rather than following the legislation that governed maintained schools, CTCs had individual funding agreements with the Secretary of State for Education. Their relationship was based on individual contract, rather than common statute, which government saw as the most appropriate means of affording these new schools additional freedoms to break from the general model followed by maintained schools.

Throughout the 1990s, the landscape of the state-funded education sector was, therefore, one in which a single statutory framework underpinned the activities of the vast majority of schools, but with a small number of exceptions that were funded and regulated through individually negotiated contractual agreements with the secretary of state. During this period, according to former schools minister Andrew Adonis, the latter never comprised anything more than a 'small, parallel system, separate from the state school mainstream' (Adonis 2012: 57).

The creation of city academies in 2002 was a continuation of these small-scale experiments with increased school autonomy. It was intended that city academies, soon to become known simply as 'academies', would be a means of reinvigorating failing secondary comprehensives by injecting them with new leadership, new governance, a new ethos, new standards and (crucially in the eyes of the model's architects) greater independence (ibid: 56). It was felt that local education authorities had failed to improve these schools, and so new sponsors with additional freedoms were required to remedy them. The model of funding and regulatory arrangement chosen for this reform was simply an expansion of the city technology college model of separate contracts with the secretary of state.

This model of 'sponsored' academies continued to grow in popularity and coverage throughout each Labour administration; by 2010, there were around 200 of these new schools, many of which were found to have improved pupil outcomes as a result of their changed structures (Machin and Veroit 2011).

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<sup>1</sup> The 1988 Act also provided for the creation of grant-maintained schools. While these schools operated outside of local authority control, they were still regulated by statute; however, they were eventually brought back under local authority control in the late 1990s.

## The Coalition years: the Academies Act 2010 and the growth of contractual funding agreements

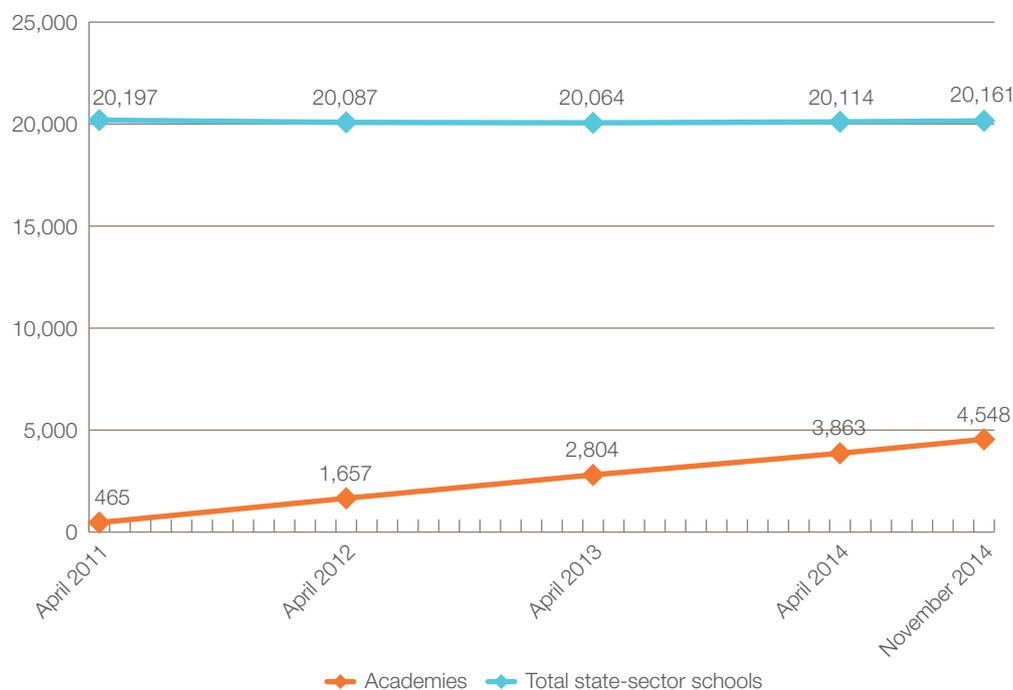
Following the Academies Act 2010, which was passed under the Coalition government, there was a rapid expansion in the academies programme. No longer would academisation be limited to failing comprehensives that required a sponsor to turn around their fortunes. *Good* schools that had proven themselves able to run their own affairs could now apply to be granted the additional freedoms afforded to 'sponsored' academies, severing their ties with local authorities. These schools would be known as 'converter academies'. The argument was that this would unleash a wave of innovation and spread best-practice by releasing the best school leaders from local authority oversight. A self-improving system would thereby be created – one in which teachers and school leaders would be the driving force behind improved pupil outcomes.

Meanwhile, the Coalition government also created a presumption in favour of academies should local authorities look to establish a new school in their area, requiring that they actively seek proposals from academy chains.

Taken together, these policies meant that by the time of the last election, 61 per cent of secondary schools and 15 per cent of primary schools were academies, and their number continues to rise (see figure 2.1) (DfE 2014). In December 2015 more than 5,068 academies were open, with many more in the pipeline (DfE 2015).

**Figure 2.1**

Total number of academies and state schools (primary and secondary), April 2011–November 2015\*



Source: DfE 2014

\*Note: These figures do not include university technical colleges or studio schools.

The 2010 Act is particularly significant in that it crystallises in law the model of individual funding agreements that had been used by previous Labour administrations. It allows the secretary of state to 'enter into Academy arrangements with any person',<sup>2</sup> although this generally requires the formation of an academy trust to act as the other party to the contract. The Act sets out only very minimal requirements on what a school must do to be classified as an academy. In summary, it must:

- be an independent school (that is, independent from the local authority)
- offer a broad and balanced curriculum
- provide education for pupils of different abilities
- provide education for pupils who are wholly or mainly drawn from the area in which the school is situated.

### 'I want every school to be an academy'

The current government plans to continue this process of academisation, and thereby to extend the number and importance of individual funding agreements, rendering fewer schools subject to the common statutory framework that continues to exist alongside the Academies Act. At the time of writing, the government is in the process of passing legislation that will allow it to forcibly convert more 'inadequate' and 'coasting' schools into academies.<sup>3</sup>

The prime minister made clear the government's ambition to increase the proportion of English schools that are academies in August 2015 when, in the course of setting out his vision for education reform, he said, 'I want every school to be an academy'.<sup>4</sup> This commitment was repeated by the chancellor in his most recent Autumn statement, in which he said that the government's goal was to 'help every school to become an academy' and 'make local authorities running schools a thing of the past' (HMT and Osborne 2015).

Given this overarching ambition, and the individual policies designed to bring it to fruition, there is a need to consider the challenges and opportunities that arise from continuing to govern academies through individual contracts. We need to understand whether the system that has emerged is best-placed to meet the needs of pupils and their parents. Does it assist schools and teachers in their aims of raising pupil attainment and closing the gap between the least and most disadvantaged pupils? Or does this system actually impose additional barriers to achieving these aims?

The optimal system will be one that possesses a number of key features; in the conclusion we suggest what those features are. However, first it is necessary to explore why contractual funding agreements emerged, and their benefits and drawbacks.

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2 <http://www.publications.parliament.uk/pa/cm201011/cmbills/057/11057.1-5.html>

3 The education and adoption bill is passing through parliament at the time of writing. Regulations introduced under the bill will define when a school is deemed to be 'coasting'.

4 <http://www.bbc.co.uk/news/education-33944203>

### 3.

## CONTRACTUAL FUNDING AGREEMENTS

### Why did they emerge?

As we have discussed above, the model of individual contractual funding agreements was largely a product of historical circumstance. It was effectively a ready-made solution to the problem of how to create state-funded schools that were independent of local education authorities, with those 15 city technology colleges having already been set-up using the same model. Andrew Adonis has written of what was then his ambition that academies would eventually replace secondary comprehensives (Adonis 2012: 56). However, contractual funding agreements were largely a quick-and-easy means of affording the early academies the space and independence to succeed: they were not intended to be part of any long-term plan for the management of these schools as they expanded in number, as they have in the years since.

The Academies Act 2010, by contrast, took this model and enshrined it in law as the means by which all future academies must be established. The small number of criteria that a school must now satisfy in order to become an academy, and the sole requirement that each school is able to enter into a mutually agreeable contract with the secretary of state, means that the statutory framework regulating academies remains extremely sparse.

### What are their key features?

The early contractual funding agreements for academies were primarily concerned with money and property, and had comparatively little to say about teaching, pupils and education (Wolfe 2013). The very first academy funding agreement, for example, had a relatively small number of clauses and gave the headteacher complete control over the school's curriculum, governance, pay and conditions. So hand-picked (and therefore trusted) were the headteachers, sponsors and school locations that government gave itself very little power to intervene in the schools' affairs. Autonomy and independence was all-important – a fact that was reflected in the minimal content of the early funding agreements.

As time went on, the Department for Education came to adopt a 'model' funding agreement that was simply applied to newly formed academies upon their creation. However, changing political priorities meant that the model was repeatedly revised – numerous times between 2002 and 2010, and even more frequently under the Coalition between 2010 and 2015.

Each time such a revision has been made, the controls and regulations imposed by government on academies have splintered further. Crucially, new model agreements do not override those that came before it, which means that only those academies created *after* the latest model has been drawn up are required to act in accordance with it. So, for example, an academy that signed a funding agreement in 2007 will have a very different set of freedoms and obligations to one which became an academy in 2013.

During some periods revisions to the model funding agreement have sought to restrict the number and type of freedoms afforded to academies. For example, between 2007 and 2010 a number of clauses were added or amended in order to create additional controls, such as a requirement to follow the national curriculum in core subjects, and to follow the same rules as maintained schools

in the provision of careers advice and the setting of food standards. A number of additions have also been made to enable the government to intervene in the case of poor performance. John Nash, parliamentary under-secretary for education, has written of his frustration that early funding agreements prevented the government from taking ‘strong and swift’ action over underperforming academies.<sup>5</sup>

At others times, revisions have sought to *expand* academy freedoms. Michael Gove, for example, after his appointment as secretary of state for education in 2010, pledged to ‘enhance the abilities of academies to innovate and improve by removing burdens, duties and bureaucratic requirements that have accrued over time’ (DfE 2010: 53). In the early years of the Coalition government, academies were granted additional freedoms on the curriculum, the provision of careers guidance, and crisis management plans.

### What benefits do they bring?

The main argument in favour of the use of individual funding agreements has been that they allow government to directly set out the suite of freedoms and constraints that academies must abide by. They reflect the principle that academies should be autonomous from government and, in theory, free from any future government interference once that agreement is signed. Contractual funding agreements, by freezing an agreed set of controls and freedoms in time, in theory allow schools to behave more like private contractors, who have increased security from future government interference. In reality, however, the controls and freedoms afforded to schools can often be subject to significant ‘tinkering’, as successive ministers look to stamp their authority on schools policy.

Another perceived benefit of funding agreements is that they give school leaders a different relationship with government: the psychological impact of signing a funding agreement means that school leaders may feel they have greater autonomy than they did when governed by statute (regardless of whether or not this is actually the case). A funding agreement may make school leaders feel that they have a ‘permission to innovate’ that is perhaps lacking under other systems.

As has already been mentioned, independence was a key plank of the academies programme at its launch, and was a necessary condition for the establishment of the new leadership, governance, ethos and standards required to improve pupil outcomes. Funding agreements were seen as one means of enshrining this approach in the way schools are governed.

### What are the drawbacks?

Critics note that funding agreements do not give as much protection from future government interference as their proponents make out. This has been demonstrated in several ways.

- Governments have renegotiated changes to academy funding agreements a number of times – for example, in relation to school food standards and intervention in the event of poor performance.<sup>6</sup>
- In a small number of cases, governments have legislated to override the freedoms contained in academy funding agreements – in relation to special educational needs (under the Children and Families Act 2014), exclusions policy (through an amendment to the Education Act 2002) and the requirement to provide universal infant free school meals (through an amendment to the Education Act 1996).

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5 <http://schoolsweek.co.uk/untouchable-academies-to-be-brought-into-line/>

6 See <https://www.gov.uk/government/news/new-school-food-standards>. The ‘Background for editors’ section explains how the Department for Education has to enter into renegotiations with existing academies that have already signed a funding agreement.

- Governments have also used a number of other levers to impose conditions on academies, including by making changes to their financial requirements through the *Academies Financial Handbook*,<sup>7</sup> and by changing league tables to incentivise schools to offer more academic qualifications.<sup>8</sup>

This demonstrates that government is still able to make retrospective changes to academy freedoms and conditions if it wants to. Freedoms afforded by individual contracts are, in reality, never entirely free from the possibility of government interference. Considered in this light, there is little practical difference between setting out an academy's freedoms in a legal contract and setting them out in secondary legislation. In fact, doing it through legislation would probably be simpler and more transparent for schools than the increasingly complicated mix of regulations, handbooks, league table incentives and the like that is accumulating currently.

On the other hand, while government *can* renegotiate funding agreements, in practice it is costly and time-consuming to do so. The government has only been prepared to legislate to override *all* funding agreements in a small number of cases – to ensure fair treatment and compliance with new special educational needs reforms, for example – in which academies would anyway have been highly unlikely to object. In other cases it has entered into a round of voluntary renegotiations with individual academies. However, such moves place a large bureaucratic burden on both the Department for Education and schools themselves, which increasingly have to employ lawyers to enter into contractual discussions.

As a result, the government may decide not to intervene in an academy's affairs even where it may be in the best interest of pupils that it does so. For maintained schools, amendments to secondary legislation can be made to update certain controls with relative ease, whereas this process is far more complicated for academies due to the primacy of their funding agreements. For example, when the government wanted to introduce minimum food standards to ensure that schools did not serve unhealthy meals, it was able to easily amend legislation for maintained schools, but had to engage in lengthy contract renegotiations with individual academies and academy chains.<sup>9</sup>

Government can, of course, easily amend the model funding agreement to ensure that *newly* formed academies are required to abide by the most up-to-date combination of controls and regulations. However, this has created a situation in which there is huge variation between academies in terms of the kinds of education and wider services that they are expected to provide, and in terms of how they are expected to organise their internal procedures. In many cases, in fact, the controls and regulations placed on one academy may directly contradict those placed on another. Decisions to add freedoms to, or remove them from, one model agreement have often been reversed subsequently – in some instances even within the course of a single parliament. For example, controls on the provision of careers advice were inserted in to a revised model funding agreement during Ed Balls' time as secretary of state for education, but were first removed and then reinserted during the tenure of his successor, Michael Gove. Depending on when, over the course of this period, an academy signed its funding agreement, it may or may not now be required to provide careers advice to its pupils.

In a more recent example, the current secretary of state, Nicky Morgan, announced in her party conference speech that parents will be given a right to request that adequate childcare is provided in schools. However, she stated that this would only apply to maintained schools and new academies<sup>10</sup> – presumably because the government

7 <https://www.gov.uk/government/publications/academies-financial-handbook-2015>

8 <https://www.gov.uk/government/publications/english-baccalaureate-ebacc>

9 See <https://www.gov.uk/government/news/new-school-food-standards>

10 <http://schoolsweek.co.uk/schools-wont-be-forced-to-provide-wraparound-childcare-themselves-under-morgans-plans/>

was not prepared to enter into a lengthy round of contract renegotiations with existing academies. It would therefore apply to some academies but not others, depending on when they converted.<sup>11</sup>

There is something instinctively unsatisfactory about this situation. If government feels that the need to provide careers advice or childcare is important enough to amend the model funding agreement for, then surely it is something that should be applied to all schools. However, the complex system of individual contracts prohibits such a universal change from being made.

This complexity is important because it means that new government reforms can apply to different combinations of schools. Depending on how new reforms are introduced, they might apply solely to maintained schools, solely to newly created academies, or to all state-funded schools.

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<sup>11</sup> The government has subsequently 'rowed back' from this announcement, and has suggested that it will issue non-statutory guidance instead. See [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/482577/Wraparound-and-holiday-childcare-consultation-document.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/482577/Wraparound-and-holiday-childcare-consultation-document.pdf)

## 4. FUNDING AGREEMENTS AND ACADEMY CHAINS

A further area of discussion at our seminar was the growing confusion around academy chains in particular, given the number of schools that have converted into academies before going on to join multi-academy trusts.

Academies that are subsumed into trusts do not benefit from the autonomy that would otherwise be available to them; instead that autonomy is, for the most part, transferred to the trust leadership. This is not necessarily a problem, of course: we know that the best trusts have improved pupil outcomes and narrowed the attainment gap among their students. However, it does contradict the argument that individual funding agreements are necessary in order to increase the autonomy of individual schools: in many cases, it is *chains* that benefit from increased autonomy.

The system of contractual funding agreements also allows for the cessation of individual schools as separate legal entities in their own right should they join a multi-academy trust. As it is the trust that holds the funding agreement with the secretary of state, the Trust assumes the legal rights and responsibilities set out in that contract. The individual academies within the chain therefore have no legal existence independent of the trust (Wolfe 2013).

This is important because it means that academies within trusts become unable to decide to move to another chain, or to become self-governing, stand-alone academies. There are a number of reasons why an academy might wish to make such a change – it might be getting poor value for money out of the support and services provided by the chain, for example, or the chain might be acting as a ‘drag’ on standards. However, the system of individual funding agreements with trusts as the contracting party does not allow for an academy to leave a chain. Maintained schools, by contrast, are separate legal entities.

The current system of individual contracts can, therefore, often irretrievably transfer autonomy from schools to chains. This is vitally important, because it means that an academy can become tied to a chain that is struggling to improve pupil outcomes – just as, before the introduction of academies, some maintained schools were tied to poorly performing local authorities. This is already proving to be a problem, as standards have slipped and the attainment gap has widened at some academy chains (Hutchings et al 2015: 4).

## 5. ONE PIECE OF THE JIGSAW

Participants in our seminar also pointed out that the problems surrounding legal governance and funding agreements are just one piece of a larger jigsaw. The growth of the academies programme has also thrown up a number of thorny questions around the lack of accountability, transparency and collaboration that is currently developing in the school system. There is a danger that the system is becoming atomised as schools convert into academies and are ‘freed’ from local authority oversight.

The government has recognised these concerns, and the introduction of regional schools commissioners is a welcome step on the road to restoring accountability in what has indeed become an increasingly fragmented schools system. However, a number of changes could be made that would provide these commissioners with the ‘levers’ they need in order to be effective. These include:

- appointing commissioners at a county- or city-regional level, rather than the much larger regions that they currently oversee,<sup>12</sup> so that they are close enough to schools to be able to spot emerging problems<sup>13</sup>
- having commissioners appointed by combined authorities, partnerships of local authorities or elected mayors, rather than by Whitehall
- having commissioners take responsibility for maintained schools as well as academies, bringing all schools together under a common framework based on local need.

While such debates about the ‘middle tier’ of the school system are important, they do not directly relate to the question of whether schools should be held accountable through funding agreements or by statute. It is therefore important to treat them as analytically distinct concepts. It would be perfectly possible, for example, to have a system in which schools are governed through primary or secondary legislation but are not accountable to local authorities (indeed, this was the case for grant-maintained schools in the early 1990s). Similarly, schools could be governed through contractual funding agreements, but these agreements could be issued and managed by local authorities in a wholly devolved system.

While it is essential to develop effective models of accountability for the school system, this is a much wider debate – one that is beyond the scope of this paper. The key point is that a return to governing academies through common statute does not have to involve any particular level of freedom, or any particular model of oversight and accountability: these can be designed separately.

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12 The regions that the eight regional schools commissioners currently cover are the East of England and north-east London; the East Midlands and the Humber; Lancashire and west Yorkshire; the north of England; south-central England and north-west London; south east England and south London; south west England; and West Midlands. <https://www.gov.uk/government/organisations/schools-commissioners-group/about/our-governance>

13 IPPR has explored the issues around regional school commissioners, and specifically made the case for locally-appointed commissioners, in greater depth in a previous report: see Muir R with Clifton J (2014) *Whole system reform: England's schools and the middle tier*, IPPR. <http://www.ippr.org/publications/whole-system-reform-englands-schools-and-the-middle-tier>

## 6.

# CONCLUSION

## CREATING A CLEARER SYSTEM

### What features would an effective legal framework have?

An effective legal framework for schools would possess a number of key features.

**First, it would achieve the best possible balance of autonomy and accountability.**

The success of academies in many deprived areas has demonstrated how important increased autonomy for school leaders can be to raising pupil outcomes. Accountability is also vital in order to allow parents the means by which to seek redress, and to ensure that school leaders are answerable for the decisions they take. Accountability checks must be present at both the local and national levels, alongside sufficient levels of parliamentary oversight and scrutiny.

**Second, it would provide a consistent set of minimum requirements across all schools.**

Parents, politicians and teachers all agree that there are fundamental components of a pupil's education which are so important that they should be universally guaranteed in all schools (even if there is disagreement as to precisely what these fundamental components are or should be). Schools should not, by virtue of having simply signed a contract, be able to opt out of these certain 'basic minimums' that have been decided by the elected government of the day.

**Third, it would provide a consistent and logical rationale for why some schools should be granted additional freedoms beyond the agreed set of minimum standards.**

There is no need for uniformity of school type: a mixed economy of schools can bring welcome diversity and innovation into the system. However, the *rationale* for any variation in the freedoms afforded to schools, outside of the agreed 'basic minimums', needs to be based on more than simply the timing of a school's conversion to an academy. It makes no sense, for example, for an outstanding academy to be forced to offer careers guidance, and a poorly performing academy to be exempt from this requirement, simply because the latter school signed its funding agreement a few months earlier than the former.

**Fourth and finally, it would be open to change by future governments.**

Seeking to protect academy freedoms through contractual funding agreements has actually caused successive governments, which naturally still wish to alter school freedoms and controls according to their political preferences, to turn to a number of alternative means of intervention. This has caused the system to become an incredibly messy and burdensome array of contracts, laws, directives and standards that schools and chains must continuously navigate their way through. A simple and transparent legal framework, by contrast, would surely make innovative practice among school leaders more likely and widespread. That such a system is absent is evidenced by the proliferation of legal firms that provide costly and time-consuming advice to schools.

### Potential ways forward

The great advantage of the academies programme is that it allows schools, teachers and education experts the freedom to work out how to raise pupil outcomes. It leads us closer to a school-led, self-improving system where power is devolved to those with real expertise. Individual funding agreements are not, however, a necessary condition of such a system. A system based

**on statute (or a ‘slimmed down’ renewable contract) would be better able to provide a set of freedoms that are consistent across schools; these freedoms could be the same as those enshrined in individual funding agreements.**

As an increasing number of schools become academies over the course of the current parliament, the current system of funding agreements will only become even messier if it is left unreformed. Individual contracts were a necessary means of getting the first academies up and running, and have therefore played an important part in the story of school reform over the past decade. However, they are not an appropriate means of managing an entire school system.

A greater number of layers of accountability between central government and academy chains are welcome, if imperfect in their current form. However, if we are to guarantee a consistent set of rights to all pupils, and a consistent level of autonomy to all academies, the creation of such layers of accountability must be accompanied by a shift towards a coherent legal system that underpins all schools. A number of possible reforms were suggested by attendees of our ‘Future Legal Framework for Schools’ seminar, including the following.

- We should return to a system of statutory relationships between government and individual schools as legal entities. This would not preclude academies having autonomy and flexibility, but it would restore government’s ability to intervene and make changes that apply to all schools in the system. This could involve legislating to override all existing funding agreements to reassert the primacy of individual schools as legal entities, and requiring them to follow regulations set out in law. This new legislation could then, if the government saw fit, set out different freedoms and requirements for different types of school, but these freedoms and requirements would be guaranteed through statute rather than by individual contracts.<sup>14</sup> This would make academies more like the grant-maintained schools of the early 1990s.
- The government could move towards a system whereby academies are put on a new ‘slimmed down’ version of the funding agreement. This new funding agreement could contain more clauses that oblige academies to follow constraints and rules set out in primary or secondary legislation. It would essentially be a ‘halfway house’ that gives academies some sense of contractual independence while retaining government’s ability to impose changes on all schools. There is already a precedent for this, in that academies are required to abide by regulations on special educational needs set out in the Children and Families Act.
- We should reform funding agreements so that they work more like a standard contract between the government and a service provider. Instead of funding agreements that continue on a rolling basis, we should have contracts that are renewed every five years. This would be similar to the system of contracts that has developed for charter schools in many US states. It would allow academies some certainty over the freedoms and constraints they have been given, but it would also give the government opportunities to regularly update the terms of the contracts to ensure that there is more consistency between them. It would also provide a regular opportunity for the government to monitor performance, and to withdraw a contract if a school provider is performing poorly.<sup>15</sup>
- We should move towards a system whereby all academies are made part of ‘school groups’ (or federations), each of which implement one of a number of different operating models of education, which parents would then be able to choose from. Academies should then be encouraged to join a particular group

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<sup>14</sup> See Wolfe 2013 for a fuller discussion of this model.

<sup>15</sup> For a more detailed discussion of this recommendation see Academies Commission (2013) *Unleashing greatness: Getting the best from an academised system: The Report of the Academies Commission*, Royal Society for the encouragement of Arts, Manufactures and Commerce (RSA). <https://www.thersa.org/discover/publications-and-articles/reports/unleashing-greatness-getting-the-best-from-an-academised-system/>

according to whether they agree with the operating model. Such a system could be achieved by setting out in legislation the means by which academies are able to join school groups, and the set of controls and freedoms that all school groups would be subject to.<sup>16</sup> This new model may or may not involve the abolition of funding agreements, but it would ensure that academies do not become 'subsumed' within chains, and would therefore prevent the problems associated with this.

- We should expand more radical forms of school ownership and governance such as mutuals, co-operatives and 'maintained school trusts'.<sup>17</sup>

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16 For a fuller discussion of one version of this model, see Grotberg A and Robb M (2015) *Education in chains*, Reform. <http://www.reform.uk/wp-content/uploads/2015/03/Education-in-chains.pdf>

17 For more information on these models see Glatter R (2013) 'To Whom Should Our Schools Belong? Towards a new model of ownership', in Julian C (ed) *Making It Mutual: The ownership revolution that Britain needs*, ResPublica. [http://www.respublica.org.uk/wp-content/uploads/2013/03/qrz\\_Making-It-Mutual\\_The-ownership-revolution-that-Britain-needs.pdf](http://www.respublica.org.uk/wp-content/uploads/2013/03/qrz_Making-It-Mutual_The-ownership-revolution-that-Britain-needs.pdf)

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