

## **Proposed Academy Conversion: St John's Catholic School and Sixth Form Centre**

### **GOVERNORS' SUMMARY: FUNDING AGREEMENT**

#### **Purpose**

The Funding Agreement is the fundamental legal document which allows the Academy Trust to operate. It sets out:

- the relationship between the Secretary of State for Education and the Academy Trust;
- the way in which the Government exercises control over the Academy; and
- the financial framework within which the Academy operates; and
- the basis on which the Academy is accountable for complying with its Funding Agreement obligations.

In a sense, it regulates how the Academy is to be operated from an external and financial perspective and complements the Articles of Association, which cover how the Academy's internal operations and decisions are regulated.

Conversion cannot occur and academy funding is not available without the Funding Agreement being in place.

To ensure consistency across the education sector, the Academy Trust is required to enter into a Funding Agreement which is based on a Model Funding Agreement produced by the DfE.

#### **Core Principles of Academy Funding**

The underlying principles of funding for an Academy are that the Academy:

- should receive an equivalent level of funding from the Government as would be received by an equivalent sized maintained school with similar characteristics;
- will receive further funding to meet any additional services it must provide, which would have been carried out by the local authority, if the Academy were a maintained school;
- will not be financially advantaged or disadvantaged by converting to an Academy, but has greater freedom in how the governing body applies its budgeted funds.

#### **The Basic Funding Structure**

Unlike maintained schools, the Academy funding year runs from September to August to reflect the academic year (although the Secretary of State for Education has power to change that).

The Young People's Learning Agency (YPLA) (which is due to be replaced in 2012 by the Education Funding Agency) is responsible for calculating and paying the grant funding and issues a notice of grant funding to each Academy in March for the following academic year.

The core funding is made up of:

- the General Annual Grant ("GAG") and Earmarked Annual Grant ("EAG"), which cover recurring operating expenditure (which is not at the same time capital expenditure);
- the Capital Grant, which covers capital expenditure (eg expenditure on land and buildings and any major repairs or replacements other than normal wear and tear replacements).

The GAG corresponds approximately to the amount of funding that a maintained school of an equivalent size to the Academy receives for ongoing operating costs and will be adjusted for:

- functions the Academy has to carry out which the local authority would have carried out, if the Academy was a maintained school;
- any reduction in business rates for which the Academy is eligible as a charitable trust;
- insurance, which is paid separately. The Academy Trust is reimbursed for its insurance policy premium, broker fees and insurance tax. It does not get reimbursed for vehicles' insurance, unless the vehicles are used solely for maintenance purposes.

Securing the Capital Grant is less certain than the GAG and is to a large extent at the Secretary of State's discretion.

### **The Overall Structure of the Funding Agreement**

The Funding Agreement breaks down into a number of sections, broadly as follows:

#### Introduction/ Legal Agreement

- Definitions used in the Funding Agreement
- Confirmation that in return for the Academy Trust running the Academy, the Secretary of State for Education will make the payments set out in the agreement on the terms of the agreement

#### Characteristics of the Academy

- The essential nature of the Academy (providing a broad, balanced curriculum for pupils of different abilities wholly or mainly from the local area)

#### Conditions of Grant

- The conditions the Academy must comply with to receive funding

#### Grants to be paid by the Secretary of State

- Details of what the grants are, what they include/ exclude and how they are paid

#### Financial and Accounting Requirements

- How the Academy must manage its finances, budgets, surpluses
- Accounts reporting requirements
- Academy borrowing powers
- Conditions on the disposal of certain assets

#### Termination

- How the agreement can be ended by the Secretary of State or the Academy
- What happens after the agreement has ended

#### General Provisions

- provisions dealing with access to the Academy's records and how formal communications are to be handled

#### Land

- Restrictions on the Academy's ability to transfer its land

#### Annexes

- Supplemental agreement and Obligations/ policies on Admissions, SEN and Exclusions

## **Funding Agreement: The Key Provisions In More Detail**

### **Conditions of Grant (Clauses 12 to 33A)**

As you would expect, the Academy must comply with a whole series of conditions to receive funding. These are set out below.

#### General Conditions

To ensure entitlement to funding, the Academy Trust must:

- ensure the Academy is at the heart of its community, promoting community cohesion and sharing facilities with the community;
- assess pupil performance and give pupils the opportunity to study for external qualifications (as with a maintained school);
- be responsible for teachers' and employees' level of pay and conditions;
- focus on pupil needs;
- not charge for admission (except to the extent maintained schools can charge);
- establish a mechanism for dealing with the receipt/management of donations and use reasonable efforts to obtain donations through that mechanism to further the Academy's fundamental purpose (its "object" as set out in the Articles of Association).

#### Governance

The governing body must:

- manage the operation of the Academy;
- consider, but not be bound by, guidance issued by the Secretary of State on the Academy's governance.

#### Conduct

As you would expect, the Academy must operate in accordance with:

- the terms of the Funding Agreement (including a requirement that staff and governors undergo a Criminal Records Bureau Check);
- all legislation applicable to academies;
- the terms of the Academy Trust's Articles of Association.

#### Pupils

The Academy must:

- specify pupil capacity and age range;

- adhere to the supplemental agreement, admissions, SEN and exclusions policies set out in the Annex.

#### Designated Teacher for Looked After Children

The Academy Trust must comply with all statutory and regulatory provisions and guidance relating to designating a person with responsibility for promoting the educational achievement of looked after children who attend the Academy.

#### Teachers and Other Staff

No one can be employed by the Academy Trust to prepare lessons, teach or assess pupil development, unless:

- they are a qualified teacher (under section 132 of the Education Act 2002); or
- are eligible to do so under the Education (Specified Works and Registration) (England) Regulations 2003.

This requirement does not apply to any person whose employment transfers to the Academy Trust under TUPE or who was carrying out this type of activity immediately before the transfer, and in either case was not qualified or eligible. However, the Academy Trust must ensure any such people meet the requirements as soon as possible.

The Academy Trust must also ensure:

- all teachers employed at the Academy have access to the Teachers' Pension Scheme ("TPS");
- that the Academy Trust complies with the TPS statutory provisions;
- all employees (other than teachers) have access to the Local Government Pension Scheme.

#### Curriculum

The Academy must provide a broad and balanced curriculum, including English, Maths and Science and must provide religious education and a daily act of collective worship. It must publish information relating to its curriculum and how parents and prospective parents can get further information on the curriculum.

The Academy must also consider guidance from the Secretary of State on sex and relationship education to ensure that children are protected from inappropriate teaching materials and learn the nature of marriage and its importance for family life.

The Academy must avoid political indoctrination and make sure political issues are treated in a balanced way.

#### Assessment

The Academy Trust must comply with guidance issued by the Secretary of State relating to the assessment of pupils, so Academy performance can be measured alongside maintained schools in league tables.

### Exclusions Agreements

The Academy Trust must enter into an Exclusions Agreement with an LA, if the LA invites it to do so, dealing with payment flow between the Academy and the LA on the same basis as the payment flow for a maintained school, if the Academy (1) admits a pupil who has been permanently excluded from a maintained school, the Academy itself or other academy which has a similar exclusions agreement with the LA or (2) permanently excludes a pupil.

### School Meals

The Academy must provide school lunches, if requested to do so by or on behalf of pupils (unless it would be unreasonable to do so). It can charge for School meals, but must otherwise fund the cost of school lunches from its GAG. It must provide free school meals for eligible pupils, funded out of its GAG.

### Charging

The Academy Trust has the same limited ability to charge for education, books, materials, transport and lodging as a local authority has under the Education Act 1996 and related secondary legislation.

### International Education Surveys

The Academy can be required by the Secretary of State to participate in international education surveys.

## **Grant To Be Paid By The Secretary of State (Clauses 34 to 65)**

### General Points

As outlined above, the Secretary of State makes the following payments to the Academy Trust:

- "GAG" and "EAG" for recurrent operating expenditure (being expenditure which is not capital expenditure); and
- "Capital Grant" for capital expenditure (the definition of what constitutes capital expenditure is set out in clause 36 and is in line with general accounting principles).

The Academy Trust must not:

- budget for expenditure in any academy financial year exceeding its expected income;
- enter into commitments likely to have a substantial impact on future levels of grant, without the prior approval of the Secretary of State.

Nothing the Academy Trust decides on expenditure commits the Secretary of State to paying a particular level of grant, so strong budgetary control is key.

### Capital Grant and Arrangements to Pay

The Capital Grant is paid at the discretion of the Secretary of State, so is not certain.

If the Academy Trust wants a Capital Grant, it must apply to the Secretary of State, with accompanying evidence that all necessary planning and other consents have been obtained.

The Academy Trust must obtain the Secretary of State's written approval to any expenditure, for which a Capital Grant is sought, before it is incurred, although the Secretary of State cannot unreasonably withhold his consent.

The Academy Trust must then submit its claim for payment in a specified format with the appropriate supporting documentation. There is no timeline within which the Secretary of State must pay the grant, but we would expect it to be within a reasonable time of the claim being submitted.

#### General Annual Grant (GAG)

The GAG for recurrent operating expenditure includes:

- salaries of teachers or employees;
- materials and equipment;
- building repairs and maintenance;
- insurance and administration costs.

The GAG includes:

- funding equivalent to the funding which would be received by an equivalent sized maintained school with similar characteristics, but with adjustment to reflect any reduced business rates because the Academy Trust is a charity, and any insurance payable by the Secretary of State which is paid for on a straight reimbursement basis;
- funding to recognise the functions which would have been carried out by the local authority if the Academy were a maintained school, but which the Academy must now carry out;
- funding for additional expenditure: this is payable on the same basis as that applied to maintained schools and is (a) funding deemed necessary for the Academy and approved by the Secretary of State or (b) payments in relation to grants made available to maintained schools, where the Academy meets the same criteria and conditions as a maintained school would need to meet.

#### GAG and Pupil Numbers

The GAG is calculated on the basis of the number of pupils. The Secretary of State can adjust the funding to reflect a variation in pupil numbers from the numbers previously used to calculate the GAG and the basis of any adjustment will be set out in the annual letter of funding.

In the first year of conversion, the pupil number count will usually be done on the same basis as the local authority determined the budget share of the pre-conversion school, adjusted by any numbers counted in any subsequent Schools Census. This will be determined by the Secretary of State as part of the approval process of the draft Funding Agreement.

### Start-up Period

Larger GAGs are available to new Academies. They are mentioned in the standard Funding Agreement but are not applicable to converter Academies.

### Earmarked Annual Grant (EAG)

The EAG is paid for recurrent operating or Capital Expenditure for specific purposes agreed between the Academy and the Secretary of State, as set out in the annual letter of funding.

Although the relevant clause (clause 54) refers to Capital Expenditure, we are clarifying why this is the case, as all other references to EAG exclude Capital Expenditure. We would recommend that you proceed on the basis that Capital Expenditure is not part of the EAG, and that the specific provisions dealing with Capital Expenditure and Capital Grants apply to Capital Expenditure instead.

Applications for a specific EAG have to be made to the Academies Division of the DfE.

### Payment of GAG and EAG

The Academy is notified during the preceding academic year of the proposed GAG and EAG and associated assumptions. The amount of GAG will be formally notified to the Academy in an annual letter of funding received no later than 31 March preceding the relevant academic year. EAG amounts will either be included in the annual letter of funding or confirmed as soon as practicable afterwards.

The GAG is paid in monthly instalments on or before the 25<sup>th</sup> of every month and the detailed arrangements are set out in the annual letter of funding.

### Other Relevant Funding

Other funding streams for the Academy Trust could include:

- from the Secretary of State, the cost of redundancies incurred by the Academy Trust on conversion, subject to the Secretary of State's prior approval;
- from the local authority, the cost of SEN provision for statemented pupils.

## **Financial and Accounting Requirements (Clauses 65 to 79A)**

### General Requirements

The Academy Trust must:

- appoint an accounting officer and notify the Secretary of State of their identity;
- comply with Academies Financial Handbook published by the DfE;
- before 15 February in each year, submit to the Secretary of State a budget for the forthcoming academic year, approved by the governing body and



setting out income (including income from sources other than GAG, EAG and grants) and expenditure;

- prepare accounts and an annual report in compliance with the relevant Charity Commission Statement Of Recommended Practice and any direction from the Secretary of State;
- have the accounts audited annually by independent auditors and filed with the Secretary of State and charity Principal Regulator by a date specified by the Secretary of State after each financial year (the Academy Articles require this to be done by 31 December) and with Companies House by 31 May after each financial year;
- publish on its website its annual accounts, annual report, memorandum and articles of association, funding agreement and a list of the names of all governors;
- abide by the requirements of the Charity Commission and pay regard to the Charity Commission's guidance to charities and charity trustees.

### Surpluses

Once open, an Academy Trust can carry forward unspent GAG into a new academic year, if agreed by the Secretary of State. Since the Secretary of State can decide the percentage of carry forward allowed, the permitted carry forward could be zero. The Secretary of State will specify the purposes for which any carried forward amount can be used.

Surpluses arising from income sources other than the DfE can be kept by the Academy Trust, but must be shown separately in the Academy Trust's balance sheet.

Any GAG savings made, which aren't allowed to be carried forward as above, will be taken into account in the payment of any subsequent GAG.

### Dealing with DfE funded assets

Certain restrictions apply to an Academy's dealings with assets funded in whole or in part by the Secretary of State. The Academy Trust cannot, without the prior written agreement of the Secretary of State:

- sell or buy any freehold property;
- grant or take up a lease or tenancy lasting more than 3 years;
- give any guarantees, indemnities or letters of comfort over those assets;
- write off any debts or liabilities owed on those assets above write-off levels specified by the Secretary of State;
- offer to make ex-gratia payments in relation to those assets.

### Dealing with any assets

Whether or not it needs the Secretary of State's approval, the Academy Trust must always give 30 days' notice to the Secretary of State of its intention to enter into any of the following transactions:

- giving a guarantee, indemnity or letter of comfort;
- writing off any debts;
- offering to make ex-gratia payments;
- selling or buying any freehold property;
- granting or taking up a lease or tenancy lasting more than 3 years.

### **Borrowing Powers (Clauses 80 to 81)**

The Academy Trust is not permitted to borrow any money by securing it on assets wholly or partly funded by the Secretary of State or which otherwise puts those assets at risk, unless it has got the Secretary of State's specific approval and that approval is only granted in limited circumstances.

An overdraft facility can be used to cover short-term cash-flow needs, but prior approval of both the Secretary of State and the Academy Trust's members must be obtained.

Whether or not it needs the Secretary of State's approval, the Academy Trust must give 30 days' notice to the Secretary of State of its intention to borrow.

### **Disposal of Assets (Clauses 82 to 88)**

The consent of the Secretary of State is required for the sale, disposal or reinvestment of proceeds from disposal of a capital asset:

- funded by a Capital Grant above amounts specified by the Secretary of State; or
- transferred to the Academy Trust from a local authority for nil or nominal consideration (which would include assets acquired at conversion).

Reinvestment of sale proceeds which exceed a figure to be specified by the Secretary of State is subject to Parliamentary approval. This is likely to be a high figure, and has previously been £1,000,000.

If a capital asset was acquired with the help of a Capital Grant from the Secretary of State, on its sale, the Secretary of State is entitled to be repaid the same proportion of the sale proceeds as the proportion the Capital Grant was to the original acquisition cost.

The Academy Trust must get the best price reasonably obtainable for assets wholly or partly funded by the Secretary of State, unless he agrees otherwise.

Whether or not it needs the Secretary of State's approval, the Academy Trust must give 30 days' notice to the Secretary of State of its intention to dispose of any asset at less than the best price reasonably obtainable.

### **Termination of the Funding Agreement (Clauses 89 to 110)**

### Termination by either side

Either the Secretary of State or the Academy Trust can end the Funding Agreement by giving at least 7 academic years' notice, which then has to expire on a 31<sup>st</sup> August.

### Termination by Secretary of State

#### Failure in characteristics or compliance

The Secretary of State can end the Funding Agreement if the Academy:

- no longer demonstrates the Academy characteristics entitling it to funding;
- no longer complies with the grant conditions; or
- has materially broken the terms of the Funding Agreement.

In those circumstances, the Secretary of State can serve written notice on the Academy, stating:

- the grounds on which he proposes to terminate the agreement;
- any remedial action he requires within a specified timescale;
- the form in which the Academy Trust should respond to the termination notice and a deadline for giving that response.

If no response is received by the deadline, the Secretary of State can terminate the agreement on 12 months' notice or less.

If a response is received by the deadline, the Secretary of State has 3 months to consider whether the proposed remedial action resolves the problem. If he is not satisfied with the proposed solution, he may terminate the agreement, but must meet with the Academy Trust to discuss concerns, if the Academy Trust requests a meeting. If he is still not satisfied after the meeting, he can terminate the agreement on 12 months' notice.

### Failure in Standards

The 12 month termination period above may be reduced if the Secretary of State has served a termination notice because the school does not meet the required standards and there is a risk of serious harm to the pupils' welfare and there has been a final determination that the Academy should be struck off the Register of Independent Schools.

### Notice of Special Measures

The Secretary of State can terminate the Funding Agreement where the Chief Inspector has given notice that special measures are necessary under section 13 of the Education Act 2005 and these have not been implemented in a proper and timely way. Termination can be immediate, or on 12 months' notice, or the Secretary of State can appoint further governors under his powers in the Academy Trust's Articles of Association and remove existing governors.

### Insolvency

The Secretary of State can terminate the Funding Agreement immediately on giving written notice if the Academy Trust becomes insolvent.

#### Change of Control

The Secretary of State can terminate the Funding Agreement immediately on giving written notice if there is a "change in control" of the Academy Trust. This is to prevent an unsuitable person or organisation having a position of influence over the Academy.

In practice, to have "control", a member of the Academy Trust has to have a majority of member voting rights or to be able to secure that a majority of other members vote in accordance with his/her wishes. This is probably an unlikely scenario for most academies. If the Academy Trust feels there is a change of "control" (assuming there is a "control" issue in the first place), it must inform the Secretary of State.

#### Indemnity on Termination

The Secretary of State will indemnify the Academy Trust (ie pay its losses) if the Funding Agreement is terminated for reasons other than:

- failure to satisfy the Academy characteristics or other conditions of funding;
- a special measures termination event;
- other material breach of the Funding Agreement.

The amount of the indemnity is determined by the Secretary of State and paid as and when he decides, but he must act reasonably. The indemnity may cover:

- redundancy costs;
- costs of breaking existing purchase or other contracts because of the termination;
- costs of disposing of assets;
- professional and other fees arising on termination.

#### Consequences of Termination

On termination of the Funding Agreement, the school ceases to be an Academy and the assets funded by the Secretary of State are transferred to whoever the Secretary of State nominates, if needed for educational purposes. If not needed for educational purposes, unless the Secretary of State determines otherwise, the Academy Trust must pay the Secretary of State a sum equivalent to the same percentage of their value at termination, or (with his agreement) at disposal, as the percentage he funded on their acquisition.

#### **General Provisions (Clauses 111 to 119)**

The Academy Trust must provide the Secretary of State with all information he reasonably requires in relation to the Academy and give DfE officials access to the Academy premises at any reasonable time.

The Academy Trust must provide the Secretary of State in advance with all papers prepared for Governors' and Members' meetings and two DfE officials are entitled to attend and speak at all those meetings. Minutes of all meetings should be sent to the DfE.

#### **Land (Clause 115A)**

None of the land acquired from the local authority can be disposed of without the Secretary of State's approval.

Assuming the land is leased, other terms relating to the land will be dealt with in the lease from the local authority.

#### **Annexes**

Annexes B, C and D detail the Supplemental Agreement, Admissions, SEN and Exclusions policies the Academy Trust is required to enter into.

BHP Law September 2011  
Funding Agreement Single Academy Model Mainstream 11 July 2011