

**THE ACADEMIES BILL:  
Public law constraints: admissions, exclusions, special needs  
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1. In this paper, I shall examine the public law constraints that apply to Academies. I shall look first at the nature of Academies, and consider to what extent their decisions are subject to judicial review. I shall then look specifically at the areas of admissions, exclusions and special needs, exploring the law and practice that applied to the regimes put in place by the previous Labour administration and the likely approach under the proposed Academies Bill.

What are Academies?

2. In order to understand the nature of the public law constraints on Academies, it is necessary to analyse what kind of ‘beast’ they are. They are ‘independent’, but publicly funded, schools.
3. Until now, the statutory basis for the establishment of Academies has been section 482 of the Education Act 1996 (“the 1996 Act”), a provision inserted by section 65 of the Education Act 2002 (“the 2002 Act”). This replaced the provision that empowered the Secretary of State to enter into arrangements for the establishment, maintenance and carrying on of city technology colleges and city colleges for the technology of the arts.<sup>1</sup> (Section 65 of the 2002 Act was itself derived from the original legislative provision creating city technology colleges: section 105 of the Education Reform Act 1988).

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<sup>1</sup> (1) The Secretary of State may enter into an agreement with any person under which—  
(a) that person undertakes to establish and maintain, and to carry on or provide for the carrying on of, an independent school with such characteristics as are specified in the agreement and in subsection (2), and  
(b) the Secretary of State agrees to make payments to that person in consideration of those undertakings.  
(2) The characteristics mentioned above are that the school—  
(a) is situated in an urban area,  
(b) provides education for pupils of different abilities who have attained the age of 11 and who are wholly or mainly drawn from the area in which the school is situated, and  
(c) has a broad curriculum with an emphasis either on science and technology or on technology in its application to the performing and creative arts.

4. Section 482 of the 1996 Act provided that:

'(1) The Secretary of State may enter into an agreement with any person under which –

(a) that person undertakes to establish and maintain, and to carry on or provide for the carrying on of, an independent school in England with the characteristics mentioned in subsection (2) and such other characteristics as are specified in the agreement, and

(b) the Secretary of State agrees to make payments to that person in consideration of those undertakings.

(2) The characteristics mentioned above are that the school –

(a) has a curriculum satisfying the requirements of section 78 of the Education Act 2002, but with an emphasis on a particular subject area, or particular subject areas, specified in the agreement, and

(b) provides education for pupils of different abilities who are wholly or mainly drawn from the area in which the school is situated.

.....

(4) An agreement under this section shall make any payments by the Secretary of State dependent on the fulfillment of

(a) conditions and requirements imposed for the purpose of securing that no charge is made in respect of admission to (or attendance at) the school or, subject to such exceptions as may be specified in the agreement, in respect of education provided at the school, and

(b) such other conditions and requirements in relation to the school as are specified in the agreement.

(5) A school to which an agreement under this section relates shall be known as an Academy.'

The main set of rules governing the conduct of Academies was set out in the section 482 agreement with the Secretary of State.

5. In R (Elphinstone) v City of Westminster [2009] B.L.G.R. 158, Rix LJ explained at [15] that:

'The Education Act 1996 distinguishes between schools which are "maintained" by a local education authority . . . and "independent" schools which are not. Aspects of maintained schools, such as governance and curriculum (the national curriculum), are controlled and are the subject of detailed provision by statute (see also the School Standards and Framework Act 1998 and the Education Act 2002 ). Academies are a species of independent school dealt with separately: see section 482 of the 1996 Act. They are set up under contract between

the Secretary of State and a sponsor, after consultation with the local education authority concerned. Section 482(2) provides however that academies must agree to provide a curriculum “satisfying the requirements of section 78 of the Education Act 2002, but with an emphasis on a particular subject area, or particular subject areas, specified in the agreement” and to provide education “for pupils of different abilities who are wholly or mainly drawn from the area in which the school is situated”. Section 78 of the 2002 Act, which states the general requirements for the curriculum of maintained schools, requires a balanced and broadly based curriculum which promotes the spiritual, moral, cultural, mental and physical development of pupils at the school and of society and prepares pupils at the school for the opportunities, responsibilities and experiences of later life. The contract under which an academy is established is called a funding agreement.

6. It can be seen, therefore, that Academies are ‘a species of independent school’, albeit one that is underpinned by statute.
7. The received wisdom is that academies are subject to public law constraints, and aggrieved parents and pupils may, in certain circumstances, seek relief by way of judicial review. The basis for this proposition is the decision of Dyson J (as he then was) in the case of R v. Governors of Haberdashers’ Aske’s Hatcham College Trust, ex part T [1995] ELR 350. The case actually concerned a city technology college, but the legal analysis would apply equally to Academies. The statutory framework for setting up CTCs was, as explained above, almost identical to that for the setting up of Academies. The soundness of this decision has not been considered by the higher courts. Indeed, in R v. Bacon’s City Technology College, ex parte W [1998] ELR 488, the correctness of the decision in Hatcham College was not conceded by the CTC, reserving their position in case the matter went to the Court of Appeal.
8. The Hatcham College case was an application for judicial review of the decision to refuse to admit the child T to the college. The Court considered the jurisdictional question: whether or not an admission decision by a CTC was amenable to judicial review.
9. The Court noted that decisions made by ‘local education authorities concerning admission to public sector schools . . . are amenable to judicial review. That is because those decisions are taken by bodies, the source of whose power is statutory, and the decisions are made in the exercise of public law duties or functions.’ This was to be contrasted with

decisions made by 'private schools', which are not amenable to judicial review, as 'the source of power of such schools is not statute but consensual, and the decisions are not made in the exercise of public law duties or functions'. It was argued, on behalf of the child, that CTCs 'fall on the same side of the line as public sector schools fall'. For the CTC, it was argued that 'they were to be assimilated to private schools for this purpose'.

10. To resolve the issue, Dyson J. stated that it was necessary to examine the nature and status of CTCs. Dyson J. held that:

'No CTC can be established unless the Secretary of State makes an agreement with the person undertaking to establish, maintain and carry on a school having the characteristics specified in section 105(2) of the [Education Reform Act 1988]. Moreover, CTCs are wholly or partly publicly funded. It is a condition of such funding that no charge shall be made in respect of admissions to the school, and subject to any exceptions specified in the agreement, in respect of education provided at the school. In a nutshell, therefore, CTCs are publicly-funded non-fee paying urban schools for pupils drawn wholly or mainly from the areas in which the schools are situated, whose curriculum is broad but with an emphasis on science and technology. Both the existence of CTCs and their essential characteristics derive from the exercise by government of statutory power. On the face of it, CTCs would seem to be public law bodies and their decisions as to admissions, amenable to public law.'

11. It was argued on behalf of the CTC that this was 'too superficial a view': that the statute expressly stated that CTCs were 'independent' schools; there were no detailed statutory provisions governing the constitution, powers and duties of the governing bodies of such 'independent' schools: the constitution, powers and duties of the governing body are derived from the articles of association and scheme of government adopted by the company setting up the CTC; and there was no requirement to secure that the CTC follows the national curriculum. Further, it was argued that section 105 did not establish CTCs, it merely enabled agreements to be entered into. Yet further, it was contended that 'relations between the college and its pupils and parents are not regulated by statute, but are consensual.'

12. Dyson J rejected these arguments. The learned judge examined the case law in which the Courts had considered whether or not decisions of a particular body are amenable to judicial review: in particular, R v. Panel on Take-overs and Mergers, ex parte Datafin

[1987] 1 QB 815. In that case, it was held that the source of power will often be decisive (statutory vs. consensual), however, it may be helpful to look at the 'nature of the power': is the body exercising public law functions, or does the exercise of functions have public law consequences.

13. Dyson J. analysed the situation as follows: the existence of CTCs derives from statute, and the exercise of the Secretary of State's powers under the statute; Parliament has decided that the means by which this is to be done is by the 'Secretary of State entering into agreements with persons who agree to run the schools.' The Secretary of State can, by virtue of section 105, and the mechanism of the terms of the funding agreement control important aspects of the running of the school, including admissions policies and procedures. 'None of these features is present in the case of private schools. A private school does not owe its existence to governmental power'. Private schools do operate within a statutory framework of control, but (as had been pointed out by Brooke J. in R v. Fernhill Manor School, ex parte A [1993] 1 FLR 620), and with which Dyson J agreed, 'the relationship between the private schools and those who attend them are founded on the contract which is made between the school and those who are paying for the teaching and education of the pupil at that school. That contract is a completely private contract and is not underpinned by statute.'
  
14. Dyson J. was also conscious of the fact that 'If CTCs are not susceptible to judicial review, pupils and parents at CTCs will be left without a remedy if they are victims of a wrong . . . unless they have private law rights.' Dyson J. rejected the submission that they had contractual rights: 'the relationship between parents and CTCs is no more founded in contract than that between parents and maintained schools.'
  
15. I have little doubt that the same approach would be arrived at today if a Court was asked to consider whether an Academy was amenable to judicial review. The same principles apply: the source of the power for the creation of Academies is *statutory* – the Secretary of State is empowered by statute to enter into a funding agreement for the creation of the Academy; the nature of the functions will have public law consequences (admission to school, expulsion from school, provision of special educational needs, for instance); and

there is no real alternative remedy available to the pupils/parents. It is also notable in this regard that the new government has accepted that 'academies are obliged to follow the Human Rights Act'.<sup>2</sup>

16. As bodies that are amenable to judicial review, Academies will (insofar as the decisions in question are *justiciable*) need to make decisions that comply with principles of public law if they are to defeat any challenges.

### Admissions

17. Taking first the issue of school admissions. As 'independent' schools, Academies are not subject to the comprehensive statutory admissions framework that applies to maintained schools: see s 86(8) of the School Standards and Framework Act 1998 ("SSFA"). However, much of that framework is imposed on Academies through their funding agreements. The terms of the funding agreements have varied from time to time.

18. The latest version of the Model Funding Agreement<sup>3</sup> provides at Annex B for admission arrangements to an Academy. It contains the following terms:

(i) The Academy Trust will act in accordance with, and will ensure that an Independent Appeal Panel is trained to act in accordance with, all relevant provisions of the School Admissions Code and the School Admission Appeals Code published by the Department for Education ("the Codes") as they apply at any given time to maintained schools and with equalities law and the law on admissions as they apply to maintained schools. For this purpose, reference in the Codes or law to "admission authorities" shall be deemed to be references to the governing body of the Academy Trust.

(ii) The Academy Trust will take part in the Admissions Forum set up by the LA and have regard to its advice; and will participate in the co-ordinated admission arrangements operated by the LA and the local in-year fair access protocol.

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<sup>2</sup> Per Lord Hill of Oareford, HL, 7 July 2010.

<sup>3</sup> See <http://www.education.gov.uk/academies/supporting-documents>.

(iii) The Secretary of State may:

(a) direct the Academy Trust to admit a named pupil to the Academy on application from a local authority. This will include complying with a School Attendance Order. Before doing so the Secretary of State will consult the Academy Trust;

(b) direct the Academy Trust to admit a named pupil to the Academy if the Academy Trust has failed to act in accordance with this Annex or has otherwise failed to comply with applicable admissions and equalities legislation or the provisions of the Codes; and

(c) direct the Academy Trust to amend its admission arrangements where they fail to comply with the School Admissions Code or the Admission Appeals Code.

(iv) Where the Academy is a faith academy, the relevant faith body (a) has to be consulted on admission arrangements (b) has the right to issue guidance on the adoption of faith criteria and (c) has the right of objection to admission arrangements.

(v) The Academy Trust shall ensure that parents and 'relevant children' will have the right of appeal to an Independent Appeal Panel if they are dissatisfied with an admission decision of the Academy Trust. The Independent Appeal Panel will be independent of the Academy Trust. The arrangements for appeals will comply with the School Admission Appeals Code published by the Department for Education as it applies to Foundation and Voluntary Aided schools. The determination of the appeal panel is binding on all parties.

(vi) Pupils on roll in any predecessor maintained school will transfer automatically to the Academy on opening. All children already offered a place at any predecessor school will be admitted.

19. On its face, therefore, it can be seen that under the current arrangements Academies are ordinarily obliged to adhere to the same principles as maintained schools. The admissions criteria must comply with the School Admissions Code; the Academy must participate in the Admissions Forum for the area; and parents have a right of appeal to an independent appeals panel. The Secretary of State can also direct admissions.

20. Furthermore, the relevant local authority must include Academy Admission arrangements in its report to the Schools Adjudicator, and the Adjudicator may include his consideration of Academy arrangements in his report to the Secretary of State but only the Secretary of State may amend Academy admission arrangements: see paragraph 12 of the Schools Admissions Code. Ultimately, therefore, when considering the content of admissions arrangements much is left in the hands of the Secretary of State to ensure that there really is compliance with the Code.
21. With respect to individual admissions decisions, parents who are disappointed by the decision of an 'independent appeals panel' for admissions will be able to challenge that decision by way of judicial review if a public law error has been made.
22. There is no indication, as yet, that the arrangements for regulating admissions to the new Academies following the passage of the Academies Bill will differ in any way from that under the existing law. During the passage of the Bill in the House of Lords, Lord Hill of Oareford, the Parliamentary Under-Secretary of State for Schools, stated as follows:

Academies must comply - as is the case with maintained schools-with admissions law and the codes, and that is achieved through the funding agreement. I confirm that all future academy arrangements will contain this requirement. This is not, as some may fear, a voluntary requirement but a contract that is enforceable by the Secretary of State. The approach is consistent with that taken by the previous Government, who never sought to require in legislation academies' compliance with the admissions code. We do not see any reason to change that.

(see footnote 2).

### Exclusions

23. Similarly, Academies are not subject to the comprehensive statutory framework that applies to decisions to exclude pupils from maintained schools. The appropriate arrangements are governed by the funding agreement.

24. The latest funding agreement contains references to Exclusions at Annex C, as follows:

(i) the Academy Trust shall act and shall ensure that the Principal shall act in accordance with the law on exclusions as if the Academy were a maintained school. For this purpose, reference in the law on exclusions to the Head Teacher and Governing Body shall respectively be deemed to be the Principal and Governing Body of the Academy Trust;

(ii) the Academy Trust shall ensure that the Local Authority is informed of an exclusion decision in the same circumstances as required by maintained schools under the law on exclusions;

(iii) the Academy Trust shall ensure that in carrying out their functions the Principal and the Governing Body have regard to the Secretary of State's guidance on exclusions including in relation to any appeals process as if the Academy were a maintained school;

(iv) the exceptions to these duties are that the Academy Trust shall make arrangements for enabling appeals against any decision of the Governing Body to exclude permanently a pupil in accordance with the functions assigned to the Local Authority. Any appeal panel will be impartial, constituted in accordance with the Secretary of State's guidance and any decision of such a panel will be binding on the Academy Trust. The requirements in relation to appeals apply to the Academy Trust only to the extent that the Local Authority is required to carry out such functions for maintained schools under the law on exclusions. The Governing Body is not expected to seek the advice of a Local Authority officer when considering an exclusion, although a Local Authority officer may attend any meeting to consider an exclusion at the request of a parent.

25. Annex C makes it clear (footnote 2) that a parent may seek a judicial review of any appeal panel (further recognition that Dyson J's decision in Hatcham College is considered good law). However, that Annex also points out that a parent may not appeal to the Commissioner for Local Administration (the Local Government Ombudsman) about maladministration as the Commissioner's remit is limited to considering the conduct of appeal panels constituted by Local Authorities.

26. Challenges to decisions of the independent appeals panel for exclusions from an Academy will, it is suggested, be treated in exactly the same way as exclusions from maintained schools. This is illustrated by the case of R. v Bacon's City Technology College Governors Ex p. W., referred to above. This was a relatively standard judicial review of an exclusion decision (inadequacy of reasons, unfairness, disproportionate punishment), and there is no indication from the judgment that the Court considered the matter any differently from maintained school exclusions.
27. There is no indication that the arrangements for regulating exclusions will differ in any way under the new Bill. Indeed, during the passage of the Bill in the House of Lords, Lord Hill of Oareford, gave the following assurance:

I have shared with noble Lords the new version of the exclusions annexe to the funding agreements, which continues to impose these legal requirements on academies. I am happy to put on the record that this annexe will be included in all future academy arrangements, both contractual funding agreements and grant arrangements.

It was also explained that:

Academies are independent schools and are therefore covered by the Education (Independent School Standards) (England) Regulations 2003. These state that an academy must have in place, and must implement effectively, a policy on promoting good behaviour that outlines what sanctions will be taken in the event of any misbehaviour.

(see footnote 2).

### Special Educational Needs

28. Under the current academies legislation, although Academies are defined by section 482 as 'independent' schools, they are deemed to be non-independent for the purpose of the local authority's duty pursuant to section 316 of the 1996 Act to educate children with special educational needs (SEN) in a mainstream school. Children with SEN can, therefore, be educated in Academies.
29. The statutory duties owed by the governing body of a maintained school to children with SEN do not apply to Academies, under the current legislation. As with admissions and exclusions,

the approach to SEN is governed by the funding agreement. The latest model funding agreement contains the following points:

(i) The Governing Body of the Academy Trust must comply with all of the duties imposed upon the governing bodies of maintained schools in Part 4 of the Education Act 1996 as amended from time to time (that is: sections 313 (Duty to have regard to the Special Educational Needs Code of Practice 2001); 317 (Duties in relation to pupils with special educational needs), 317A (Duty to advise parents that special educational provision is being made); and 324(5)(b) (Duty to admit the child where a school is named in the statement)); The Education (Special Educational Needs) (Information) Regulations 1999 as amended from time to time; The Education (Special Educational Needs Co-ordinators) (England) (Amendment) Regulations 2008 as amended from time to time.

(ii) The Secretary of State may (whether following a complaint made to him or otherwise) direct the Academy Trust to comply with an obligation described in this Annex where the Academy Trust has failed to comply with any such obligation.

(iii) Where a child who has SEN is being educated in the Academy, those concerned with making special educational provision for the child must secure that the child engages in the activities of the school together with children who do not have SEN, so far as is reasonably practicable and is compatible with: (a) the child receiving the special educational provision which his learning difficulty calls for, (b) the provision of efficient education for the children with whom he will be educated, and (c) the efficient use of resources.

(iv) In addition to complying with the duties imposed upon the governing bodies of maintained schools set out in The Education (Special Educational Needs) (Information) Regulations 1999 (as amended from time to time), the Academy Trust must ensure that the Academy's prospectus includes details of the arrangements for the admission of disabled pupils; the steps taken to prevent disabled pupils from being treated less favourably than other pupils; and the facilities provided to assist access to the Academy by disabled pupils.

(v) The Academy Trust must ensure that pupils with SEN are admitted on an equal basis with others in accordance with its admissions policy.

(vi) Where a local authority ("LA") proposes to name the Academy in a statement of SEN made in accordance with section 324 of the Education Act 1996, it must give the Academy Trust written notice that it so proposes. Within 15 days of receipt of the LA's notice that it proposes to name the Academy in a statement, the Academy Trust must consent to being named, except where admitting the child would be incompatible with the provision of efficient education for other children; and where no reasonable steps may be made to secure compatibility. In deciding whether a child's inclusion would be incompatible with the efficient education of other children, the Academy Trust must have regard to the relevant guidance issued by the Secretary of State to maintained schools.

(vii) If the Academy Trust determines that admitting the child would be incompatible with the provision of efficient education, it must, within 15 days of receipt of the LA's notice, notify the LA in writing that it does not agree that the Academy should be named in the pupil's statement. Such notice must set out all the facts and matters the Academy relies upon in support of its contention that: (a) admitting the child would be incompatible with efficiently educating other children; and (b) the Academy Trust cannot take reasonable steps to secure this compatibility.

(viii) After service by the Academy Trust on the LA of any notice stating that it does not agree with the LA's proposal that the Academy be named, the Academy Trust must seek to establish from the LA, as soon as is reasonably practicable, whether or not the LA agrees with the Academy Trust. If the LA notifies the Academy that it does not agree with the Academy Trust's response, and names the Academy in the child's statement, the Academy Trust must admit the child to the school on the date specified in the statement or on the date specified by the LA.

(ix) Where the Academy Trust consider that the Academy should not have been named in a child's statement, they may: (a) contact the SEN Dispute Resolution Service and attempt to resolve the disagreement with the LA through negotiation with the LA; or (b) ask the Secretary of State to determine that the LA has acted unreasonably in naming the Academy and to make

an order directing the LA to reconsider. The Secretary of State's determination shall, subject only to any right of appeal which any parent or guardian of the child may have to the First-tier Tribunal (Special Educational Needs and Disability), be final.

(ix) If a parent or guardian of a child in respect of whom a statement is maintained by the local authority appeals to the First-tier Tribunal (Special Educational Needs and Disability) either against the naming of the Academy in the child's SEN statement or asking the Tribunal to name the Academy, then the decision of the Tribunal on any such appeal shall be binding and shall, if different from that of the Secretary of State be substituted for the Secretary of State's decision.

(x) Where the Academy, the Secretary of State or the First-tier Tribunal (Special Educational Needs and Disability) have determined that it should be named, the Academy Trust shall admit the child to the Academy notwithstanding any provision of Annex B to this agreement.

30. Under the present arrangements, therefore, the requirements imposed on Academies by the funding agreement are analogous to those that would be available to parents under the legislation applying to maintained schools. Ultimately, much is left in the hands of the Secretary of State. In the first instance, the Secretary of State will need to be informed if arrangements for a particular child at the Academy are not properly being attended to.

31 During the passage of the Academies Bill in the House of Lords particular concern was expressed as to the protection for children with SEN under the current arrangements. It was felt strongly that these children were not appropriately protected, and that statutory safeguards needed to be put in place, rather than simply rely on the funding agreement mechanism: which could, of course, be amended from time to time by the Secretary of State. Accordingly, an amendment was made to the Bill which requires that 'Academy arrangements in relation to a school within subsection 5(a)(i) must include provision imposing obligations on the proprietor of the school that are equivalent to the SEN obligations'. The 'SEN obligations' are defined as 'the obligations imposed on governing bodies of maintained schools by (a) Chapter 1 of Part 4 of EA 1996 (children with special educational needs), and (b) regulations made under any provision of that Chapter.' The effect of this is to make *mandatory* that which is currently

contained in the model funding agreement. This will prevent the Secretary of State from departing from the current arrangements if convenience or politics was to dictate otherwise.

32. The amendment was explained by Lord Hill of Oareford, as follows:

My Lords, in essence, this group of amendments would put on the face of the legislation requirements that are covered by academy funding agreements. As we know, since their inception, academies have been regulated by funding agreements. That was thought to be appropriate for many years, including by the previous Government and we agree with them. We intend to retain the funding agreement route as the principal regulatory mechanism for academies. I know that I deviated from this principle in relation to SEN, because we recognise that there are specific concerns around that about which I wanted to send a signal. But as a matter of principle, we are keen to stick to the well established idea that these safeguards should be delivered through the funding agreement.

(see footnote 2).

#### Conclusion

33. As things currently stand, therefore, the arrangements under the new Academies Bill in respect of admissions, exclusions and SEN, are unlikely to differ in any material way from those under the present legislative and administrative regime. There will be a slight strengthening to the SEN framework, simply to make it mandatory that the SEN obligations that currently feature in the model funding agreements cannot be diluted.
34. As with the present arrangements, however, the enforcement regime is in the first place via the Secretary of State. If this proves unsatisfactory, parents will have the ability to seek recourse to the Courts, relying on principles of public law.

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