

**Legal analysis of structures involving maintained nursery schools and succession planning for maintained nursery schools in an academised system**

**Presentation to the meeting of the All Party Parliamentary Group on Nursery Schools and Nursery Classes held at Central Hall Westminster on 17 May 2016**

1. Responding to need and opportunity – legal analysis of current initiatives led by maintained nursery schools
2. Limitations
3. The Solution – the Nursery Academy
4. A Pilot
5. Research proposal

## **1. Responding to need and opportunity – legal analysis of current initiatives led by maintained nursery schools**

Maintained nursery schools have responded in a number of ways to: the increasing demand from local authorities, families, national government, other schools, and other early years settings for their integrated services; to the reduction in funding; to the uncertainty around the future role of the local authority; to the outsourcing of children's centres; and to the difficulty around recruitment of specialist early years leaders.

In legal terms, maintained nursery schools are local authority schools. They have, with the rest of the maintained school sector, a common underpinning core of statutory education obligations and functions. But unlike the rest of the maintained school sector, they depend critically on the prevailing policy and performance of their local authority. Further, in contrast with primary and secondary schools, those running maintained nursery schools cannot rely on a common national rate of per pupil funding. They are not funded as schools but have the obligations of schools, including to take children with SEND. In addition, the statutory obligations on maintained nursery schools are greater than those imposed on early years settings in the private and voluntary sector.<sup>1</sup>

We have heard today how five different nursery schools are responding in the current context. All of these examples involve the development of group structures. Briefly, I will summarise from a legal perspective the range of group structures underpinning these examples and those of the maintained nursery schools that I am working with. Apart from the first example (Federation – which is, in the current context, purely a defence mechanism) they all involve group structures with a degree of innovation.

### a) Federation.

The governing bodies of two or more maintained nursery schools can 'federate'. That means several schools operate with only one governing body. The recent purpose of this for maintained nursery schools has usually been to cut the cost of a head teacher. This increases the headteacher/pupil ratio and reduces the number of leadership posts available to aspiring specialist early years teachers.

### b) Creation of a 'school company'.

This is a company limited by guarantee or shares registered under the companies acts at Companies House which is 'owned' by the governing bodies of the schools but is fully independent of the schools. It provides a vehicle for shared activities delivered by the independent company and for commissioning shared services for the schools. Increasingly a school company is being used to deliver 'Teaching School' activities where the Teaching School itself is a maintained nursery school. A school company is 'supervised'<sup>2</sup> by a local authority. School companies must comply with the school company regulations. Many of the advantages of the flexibility of company structures are lost with school companies because of the complexity and detail of these regulations and yet these are the only type of companies in which the governing body of a maintained nursery school can be a company member.

### c) A charitable incorporated organisation

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<sup>1</sup> For statutory functions of maintained nursery schools see Appendix 1

<sup>2</sup> School companies are established under s.11 of the Education Act 2002. Further details are given in Appendix 2

This is a fully independent corporate charity registered with the Charity Commission under the Charities Act 2011. It is fully independent of schools and local authorities. It cannot be 'owned' or controlled by governing bodies of maintained nursery schools. It serves as a legal vehicle for a partnership of maintained nursery schools to carry out some common activities but it does not replace the main work of a maintained nursery school.

d) Free school establishment

Applications are being submitted by maintained nursery schools to open free schools (primary and secondary). The outstanding maintained nursery school acts as the lead applicant with its specialist knowledge and expertise but remains independent of the free school and continues to operate as before.

e) Academy sponsor

A maintained nursery school, as the Teaching School of a Teaching School Alliance, becomes accepted as an academy sponsor and: (1) creates a multi academy trust (MAT) with four schools (one of which is Ofsted rated RI and needs support from the sponsor); (2) submits application to open an all through free school to join the MAT; and (3) creates a new charitable company registered with both Companies House and the Charity Commission to take on the role of academy sponsor. The maintained nursery school remains outside the MAT and the sponsor company and continues to operate as before.

f) Charitable company

A charitable company, registered with both Companies House and the Charity Commission is established by an Ofsted outstanding maintained nursery school which runs a fully integrated children's centre. It has been established to respond to an invitation issued by its local authority for tenders from independent organisations to run the local authority's children's centres (the local authority has taken a policy decision to outsource all its children's centres. The charity carries out educational research and has the power to run a nursery and children's centre but the maintained nursery school cannot, in law, be operated independently of the local authority. Since the children's centre is integral to the maintained nursery school it cannot be transferred as it is to an independent provider.

## 2. Limitations

All of these different group structures have at their heart a highly successful maintained nursery school. None of these groups would exist but for the maintained nursery school. None have chosen to close the maintained nursery school. In a fully academised system all of these group structures would be vulnerable.

Even if a local authority wanted to continue to support its maintained nursery schools after all of its other maintained schools have academised, would it have the funding and infrastructure to be able to do so?

Further, legislation prevents a maintained nursery school from providing advice and assistance to the proprietor of an academy (schedule 1 para 2A of Education Act 2002). Not only are maintained nursery schools prevented from converting to academies, they are also prevented from providing services to academies.

One cannot even say that the limitations are financial – since some of these joint enterprises have a very significant turnover. What many have in common is that they have started to charge for the services that they provide to a whole range of stakeholders where formerly they subsidised such provision from their core budget.

### **3. The Solution**

#### **Nursery Academies**

There is a solution to the limitations encountered by maintained nursery schools. If maintained nursery schools could, like all other local authority schools, convert to academies, then not only would the future for all of the group structures described in section 1 be safe, but the flexibility of the company structure underpinning academies would increase the scope for innovation. Further, the barriers to outsourcing childrens centres integrated with maintained nursery schools, which are encountered by local authorities, and the restriction on maintained nursery schools providing advice and services to academies, would both be lifted if maintained nursery schools could convert to academies. Whilst the introduction of a 'Nursery Academy' would ideally involve a small change to the Academies Act 2010, it would be possible to run a pilot without changing legislation, more of which is covered in section 4 below. A proposal for amending the Academies Act 2010 is given in Appendix 3.

#### **Nursery Academies as early years system leaders in an academised system**

The standard academy conversion process, involving application, assessment and consent by the DfE, would provide the opportunity to ensure that the maintained nursery school applicant either is or has the potential to operate as a system leader. Additionally or alternatively, the applicant maintained nursery school commits to assisting other nurseries, early years settings and schools.

The Nursery Academy then falls under the remit of the relevant Regional Schools Commissioner. Working with the Regional School Commissioner, the Nursery Academy acts as a beacon of good practice across the early years sector, provides advisory and school improvement services to primary schools with nursery classes, provides family learning advisory services to MATs and other schools with early years extended provision and provides specialist early years teacher training (in collaboration with local colleges/universities). They will also become centres of excellence for family learning.

To complete the advisory picture, there would be a Nursery Academy head teacher on the Head teacher advisory board for each Regional Schools Commissioner.

The education credentials, education statutory duties (Nursery Academies would be required to follow the schools admissions code in that they will be under a legal obligation to take children with EHC plans which name the Nursery Academy and looked after children as priority – unlike the private early years settings), their system leader obligations and their strategic placement in areas of deprivation would distinguish them from private early years settings and qualify them for 'school level' funding rates.

#### **MAT structures involving Nursery Academies**

MAT structures (because they are built on company structures) are very flexible. MATs may comprise different types of academy – not only primary and secondary but they may include alternative provision and special academies as well as 16 – 19 Academies. Nursery

Academies would enhance the experience and reach of MATs. Local circumstances would influence the particular make up of local MATs.

On the other hand, specialist Nursery Academy MATS could operate on a regional basis – and run all the Nursery Academies in a Regional School Commissioner’s region, for example. One advantage of a MAT is the higher level skills that are likely to be operating at Board level and the obvious economies of scale.

Nursery Academies as part of MATs would satisfy a number of government objectives – the economies of scale available to a MAT, independence from local authorities, coherent 0 – 19 education transition, more academies being rated ‘Good’ or ‘Outstanding’ by Ofsted. An influx of maintained nursery schools as academies would improve government statistics on academy Ofsted ratings ‘overnight’.

It is conceivable that Nursery Academies, from their independent position, could support the functions of a failing local authority relating to early years, looked after children and special educational needs.

#### **4. A Pilot**

A Nursery Academy could be trialled without immediate change in legislation. It could involve a practical process modelled on the sixth form college transition to 16-19 academies

It would ideally need a small group of outstanding maintained nursery schools established regionally, whose local authorities are interested and willing to assist with facilitation, and which could continue operating permanently with the required minimum number of compulsory age children.

For each maintained nursery school an ‘Academy School’ would be established but it would, in practice, operate like a ‘Nursery Academy’. Provided that there is, at all times, at least one child over compulsory school age with SEND or one who is a ‘looked after’ child, registered at the school, then the school would qualify as an independent school – which is one of the legal requirements of an ‘Academy School’. The other requirements are already fulfilled by maintained nursery schools: to provide a broad and balanced curriculum under s 78 of Education Act 2002; and to educate pupils of different abilities who are drawn wholly or mainly from the area in which the school is situated.

The new Academy School would be created following the free school route or fast tracked by the DfE as a matter of policy authorised under the pilot. A company which forms the Academy Trust can be established very quickly.

Whilst the Academy Trust is being established the maintained nursery school would be discontinued following the statutory procedure under the Education and Inspection Act 2006. The assets, staff and land and buildings of the maintained nursery school would be transferred from the local authority to the Academy Trust which at the same time enters into a seven year funding agreement with the Secretary of State. The seven year funding agreement could be varied in the future if the pilot is successful and legislation is changed to formally introduce Nursery Academies.

The EFA would need to pilot a slightly different funding agreement for the new Academy School.

A not dissimilar process for sixth form colleges converting to 16-19 academies has been implemented by the government.

## **5. Research proposals**

Alongside a Nursery Academy pilot envisaged in section 5 above, the government could commission research to calculate the full cost to government of the places that maintained nursery schools currently provide to children with SEND and looked after children which would (if the maintained nursery school sector closes – as the current trajectory predicts) have to be provided at private independent nurseries or the nursery classes of primary schools.

Whether, in the absence of maintained nursery schools, the nursery classes of primary schools/academies or the private sector nurseries could generate and sustain the range and community impact of the enterprises illustrated by the groups who spoke to the meeting today and whose structures are described in section 1 of this paper should be assessed by government as part of the development of policy for the future of maintained nursery schools.

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### **Disclaimer**

**Please note that the content of this note and its schedules is presented as general information for the purpose of the All Party Parliamentary Group on Nursery Schools and Nursery Classes 2015/6. It does not constitute legal advice. Individuals and organisations should seek specific legal advice applied to their particular circumstances.**

## Appendix 1

### Some statutory obligations of maintained nursery schools

This is not an exhaustive list of the legal duties of maintained nursery schools but illustrates the range and scale of the statutory duties many of which are common to schools and academies but are not imposed in exactly the same way on the private sector early years settings.

#### School teaching qualification

1. The statutory framework for the early years foundation stage states that: for children aged three and over in maintained nursery schools and nursery classes in maintained schools:
  - there must be at least one member of staff for every 13 children;
  - at least one member of staff must be a school teacher as defined by section 122 of the Education Act 2002; and
  - at least one other member of staff must hold a full and relevant level 3 qualification.

Whilst there are qualifications requirements for the staff of early years providers in private settings, they do not have the statutory obligation to employ a qualified school teacher as defined above.

#### Curriculum requirements

2. Section 78 of the Education Act 2002 applies to schools (including maintained nursery schools) but not private early years settings. It provides that the curriculum must be a balanced and broadly based curriculum which:
  - promotes the spiritual, cultural, mental and physical development of pupils at the school and of society,
  - prepares the pupils at the school for the opportunities, responsibilities and experiences of later life.

#### Governing body duties

3. The statutory obligations on the governing bodies of maintained nursery schools include duties to:
  - conduct the school with a view to promoting a high standard of educational achievement at the school (Section 21(2) of the Education Act 2002).
  - promote the wellbeing of pupils at the school and promote community cohesion (Section 21(5) of the Education Act 2002).

- have regard to any relevant children and young people's plan.

These obligations have an outward community focus which is broader than just the immediate responsibilities to the children attending the nursery school.

### **Special Educational Needs and Disability**

4. Maintained nursery schools must ensure that there is a **qualified teacher** designated as the Special Educational Needs Co-ordinator<sup>3</sup> (SENCO). There is a lesser obligation on early years providers in private settings who merely have to “have arrangements in place for meeting children’s SEN”. Those in group provision are expected to identify a SENCO” but there is no requirement for that person to be a qualified teacher.
5. Various provisions of the Children and Families Act 2014 apply to maintained nursery schools including the obligation to prepare a report on the following:
  - the implementation of their SEN policy
  - their arrangements for the admission of disabled children
  - the steps being taken to prevent disabled children from being treated less favourably than others
  - the facilities provided to enable access to the school for disabled children, and
  - their accessibility plan showing how they plan to improve access over time

### **Behaviour, discipline and exclusion**

6. Maintained nursery schools, unlike private early years settings, must comply with certain sections of the Education and Inspections Act 2006 dealing with discipline, behaviour and exclusion.

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<sup>3</sup> See section 67(2) and 67(3) of the Children and Families Act 2014

## Appendix 2

### Key legal points arising from the School Company Regulations 2002

#### School companies

##### Sections 11 – 13 Education Act 2002

1. Maintained nursery school governing body has power to form, invest, become a member of a school company which can:
  - (i) purchase goods and services for schools who are members of the company;
  - (ii) provide services or facilities to other schools either directly or facilitating that provision by a third party;
  - (iii) exercise functions which a local education authority is able to contract out.
2. The local authority's consent is needed for governing body to use any of these powers.
3. A maintained nursery school which has exercised any of these powers may provide staff to the company.

##### School Companies Regulations 2002 (as amended)

4. Company members are limited to:
  - Maintained school governing bodies
  - LA
  - Independent school (this includes academies)
  - Company which provides education or educational or ancillary services
  - HE/FE governing body
  - Individuals (who are not disqualified by listing in schedule 1)

And the following schools are excluded:

- In special measures or serious weaknesses
  - With deficit budget
  - Previously members of disqualifying school companies.
5. Directors can be paid reasonable remuneration for providing services to company under contract. The Articles of Association must:
    - contain conflict of interest provisions
    - provide that at least 40% directors must not be paid
    - provide for a remuneration committee
    - provide that surplus/ profits are either a) applied for the objects; b) give proportions or procedures in which they can be distributed to members; or c) either of these optionally
    - provide that the company cannot borrow without consent of the supervising LA.
  6. The company must have a designated supervising local authority which:
    - must provide Secretary of State with names of members, name and number of company and the fact that it is the supervising authority;
    - has duty to (a) monitor the management and finances of the school company;

(b) notify the members of the company if the company is poorly managed or at risk of becoming insolvent; and (c) notify the Secretary of State within 28 days of changes to membership, name and registered number.

7. The company must:

- Send its annual accounts each year to the supervising LA within 4 months of financial year end
- send its constitution to the LA with 28 days of becoming a school company
- notify the supervising LA with 28 days of any changes to the constitution with a copy of the revised constitution.

8. The supervising LA has following powers:

- to require information on finances, management, and contracts to which the company is a party
- to direct the company to take steps to comply with these Regulations
- subject to warning notice, to require a member of the company to reduce its involvement in management of the company and /or to resign from the company in following circumstances: special measures or serious weaknesses (or likely to be); deficit budget or failure to comply with the regulations.

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## Appendix 3

### Nursery Academies

The Academies Act 2010 could be amended very simply to provide for an additional category of 'Nursery Academy'. Whilst 'Academy Schools' apply to children of compulsory school age, a Nursery Academy would apply to children up to age 5 (or 7 - the end of key stage one). This would be analogous to a 16-19 academy but also borrowing from the statutory description of an alternative provision academy. The statutory provision might read:

A Nursery Academy is....

*"..an educational institution..... which is principally concerned with providing full-time or part-time education suitable to the requirements of persons under compulsory school age [and up to the age 7].*

- *It provides education for children of different abilities*
- *It provides education for children who wholly or mainly drawn from the area in which it is situated.*

*'Education' means education suitable to the child's age, ability and aptitude and to any special educational needs the child may have. 'Education' may also include educational activities and childcare services suitable for the families of the children at the academy and the community living or resorting to the area served by the academy."*

This could become a new section 1E to the Academies Act 2010.

To complete the legislation change, an 'Academy Order' (which facilitates academy conversion) would be available to maintained nursery schools under section 4 of the Academies Act by making a change to the definition of 'maintained school' in that section.

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