

DEPARTMENT FOR EDUCATION

ACADEMIES AND PFI ARRANGEMENTS

SECTION 6(2) OF THE ACADEMIES ACT 2010

OPINION

1. **Introduction and Summary**

1.1 This Opinion is addressed to my instructing solicitors and the Department for Education (“the Department”). I understand that it may be made available to others but it is not addressed to any other person and I do not undertake or accept any duty of care to any other person (including other clients of my instructing solicitors) to whom this Opinion may be made available.

1.2 I understand that the issues on which I am asked to advise have been the subject of advice from other counsel. I have not seen or considered any advice from other counsel on these issues and have no knowledge of any such advice, nor of the questions that were asked, nor of the identity of other counsel.

1.3 I understand that the Department intends to release my instructions and this Opinion to the PFI market and those interested in the academies programme. I have no objection, provided it is understood to be on the basis set out in paragraphs 1.1 and 1.2 above.

1.4 I do not think a local authority would *ipso facto* act unlawfully by continuing to pay unitary charge to a PFI provider under a pre-existing PFI project agreement relating to a school maintained by the authority, after conversion of that school to an academy. I do not think that by agreeing to contractual arrangements of

the type referred to in my instructions, the authority would be breaching section 6(2) of the Academies Act 2010 (“AA 2010”) which provides:

The local authority must cease to maintain the school on the date (“the conversion date”) on which the school, or a school that replaces it, opens as an Academy (“the Academy”).

- 1.5 I think the words “must cease to maintain” in section 6(2) do not bear their ordinary English meaning but, read in context, bear the meaning “must cease to do what the authority did when it had the statutory function of maintaining the school”. The contrary view is just arguable but the argument is weak and in my view would fail in the unlikely event that a legal challenge were brought.
- 1.6 A local authority might breach section 6(2) if it provided all or a high proportion of an academy’s funds and took contractual powers equivalent or substantially equivalent to the statutory functions exercised in respect of the school concerned before its conversion to an academy. It is always, ultimately, a question of fact and degree whether the prohibition in section 6(2) is breached.
- 1.7 But I do not think the prohibition would be breached in the paradigm case described in my instructions where, after conversion, the authority’s net funding is only of an “affordability gap” representing a small proportion of the academy’s annual budget; the authority retains only limited involvement in the management of the academy’s premises and facilities; and the academy trust controls and runs the academy, its premises and the education it provides.
- 1.8 Indeed I think it unlikely that a local authority would breach the prohibition if it provides less than 50 per cent of an academy’s funds and does not retain control over the academy’s premises or the content of the education provided by it.
- 1.9 I am of the view that the authority has power under section 16(1)(c) of the Education Act 1996 (“EA 1996”), read with section 579(5), and under section 2(1) and 2(4) of the Local Government Act 2000 (“LGA 2000”), and section

1(1) of the Local Government (Contracts) Act 1997 (“LGCA 1997”), and section 111(1) of the Local Government Act 1972 (“LGA 1972”), to enter into contractual arrangements of the type described in my instructions.

1.10 It follows that such contractual arrangements for the conversion of a maintained school to an academy will generally be *intra vires* and lawful, assuming the relevant powers are properly exercised and assuming the authority’s post-conversion involvement in the funding and management of the academy is not so substantial that the authority “crosses the line” and unlawfully maintains the academy.

2. The Facts

2.1 In this Opinion, I am being asked to advise on the basis of the generalised factual position set out in my written instructions. I am not asked to advise about the specific factual position in the case of any particular conversion of a maintained school to an academy. I have advised other clients about individual conversions in which payment of unitary charge by local authorities under PFI project agreements is intended to be continued after conversion.

2.2 Under the generic contractual arrangements described in my present instructions, the factual position is set out by reference to the standard form model agreements made available to me by the Department. I confirm that the model agreements sent to me, in general, conform to my experience of the actual terms used in the specific cases in which I have advised on the legality of conversion arrangements.

2.3 Under such arrangements, the following are the salient features:

- (1) the local authority concerned will continue to pay unitary charge to the PFI provider pursuant to pre-existing PFI contractual arrangements under a project agreement (“the project agreement”) whereby the PFI provider provides and manages one or more schools in the authority’s area.

- (2) The local authority is in turn paid by the “academy trust” but there may be a shortfall known as the “affordability gap”. The affordability gap should represent only a small proportion of the academy’s proposed annual budget, typically less than 10 per cent.
- (3) The local authority funds the affordability gap until the relevant contracts expire, unless they are terminated earlier or other arrangements are agreed.
- (4) The authority may also remain involved, to a limited extent (e.g. in its role as freehold owner of the land) in the management of the academy’s premises and facilities. The academy trust may own the school premises on a freehold basis or under a long lease (e.g. from the local authority).
- (5) In some cases the authority may appoint one or two governors to sit on the governing body of the academy and act as directors of the academy trust, a charitable company limited by guarantee; but the authority will not make up more than one fifth of the members of the governing body.

2.4 Looking at the contractual matrix in slightly more detail, the following features are common to many academy conversions, using the model contract terms already mentioned, where pre-existing PFI arrangements are in place prior to conversion. The account which follows is drawn from experience of particular academy conversions in which I have advised, and is consistent with the account set out in my instructions and the model contract documents.

2.5 The pre-existing project agreement may be of long duration and may not be due to expire until the 2020s or 2030s unless terminated earlier for cause such as breach or *force majeure*. Under the project agreement, the PFI provider agrees to provide a certain school or schools which are now intended to become an academy or academies.

2.6 Unitary charge is payable by the authority to the PFI provider in the normal way. There are the usual clauses relating to default, compliance with legislation, non-fettering of statutory discretions and duties, relief from obligations in the event of relevant changes in the law, termination for breach or *force majeure*, compensation events and dispute resolution.

2.7 Under the proposed arrangements for the school concerned to become an academy, the following draft contracts are prepared:

- (1) a “school agreement” between the authority and the academy trust;
- (2) a “DFE principal agreement” between the authority, the Secretary of State and the academy trust;
- (3) a deed of variation, varying the project agreement so as to make appropriate provision consequent on the academy replacing the school;
- (4) a funding agreement between the Secretary of State and/or the Department and the academy trust;
- (5) draft articles of association of the academy trust or other relevant corporate vehicles;
- (6) lease or licence arrangements (depending on ownership of the school’s premises) between the authority, the school and/or the academy trust in respect of the school’s premises; and
- (7) a transfer of assets agreement between the local authority, or the outgoing governing body of the school, and the academy trust.

2.8 Thus, under the normal contractual structure, there are no direct contractual relations between the academy trust and the PFI provider, nor between the Department and the PFI provider; though I understand that non-legally binding letters of comfort are sometimes issued by academy trusts to PFI funders.

- 2.9 The model school agreement between the authority and the academy trust provides that it terminates on expiry by effluxion of time (which may be in the 2020s or 2030s) or on earlier termination of the project agreement, or on earlier closure of the academy. It requires the academy trust to pay to the authority a fixed or ascertainable sum in consideration for the services to be provided to the academy by the PFI provider pursuant to the project agreement.
- 2.10 The academy trust has the right, under the school agreement, to request the authority to take action to enforce its rights as against the PFI provider under the project agreement, should the PFI provider not properly perform its obligations under that agreement. Any dispute between the academy trust and the authority in that regard, if not resolved by agreement, is to be determined by the Department.
- 2.11 Also in the schools agreement, it is acknowledged that the academy trust has control of the academy's premises and that it can determine matters such as school hours, term dates and use of the premises. The authority agrees to indemnify the academy trust against losses suffered by it due to the default of the PFI provider under the project agreement. The amount payable to the authority is adjustable by reference to indexation, variations in the cost of insurance premiums, changes to the services provided by the PFI provider, and the like.
- 2.12 The authority agrees to fund the "affordability gap" which is its annual shortfall, i.e. the difference between sums the authority receives in respect of the academy and what it has to pay the PFI provider to provide the premises and manage them and the facilities.
- 2.13 The model DFE principal agreement between the authority, the Secretary of State and the academy trust is also structured so as to terminate on expiry of the project agreement or earlier termination of the school agreement. Under the model DFE principal agreement, the authority can recover directly from the

Department any amounts due to it from the academy trust but not paid. The authority's obligations under the DFE principal agreement are mainly to provide information.

2.14 The terms of any deed of variation varying the project agreement will vary from case to case, depending on the scope of the project agreement. The deed of variation must make appropriate provision consequent on the academy replacing the maintained school. The deed of variation is not intended to make the academy trust a party to the project agreement. It does not need to make any major changes to the substantive rights and obligations of the PFI provider and the authority under the project agreement.

3. The Relevant Law: Discussion and Analysis

3.1 References below to legislation are to that legislation as amended, save where indicated.

3.2 Sections 1 and 2 of the AA 2010 provide for the making of an agreement or arrangements between the Secretary of State and "any person" (section 1(1)) for the setting up of an academy. Sections 1 and 2 contemplate a bipartite arrangement whereby funding is provided to the academy trust by the Secretary of State. They do not make provision for a tripartite agreement which includes local authority funding.

3.3 Section 4(3) of the AA 2010 provides that "[a] maintained school is 'converted into an Academy' if "Academy arrangements" are entered into in relation to the school or a school that replaces it." By section 6(2):

The local authority must cease to maintain the school on the date ("the conversion date") on which the school, or a school that replaces it, opens as an Academy ("the Academy").

3.4 Section 4(3) and section 6(2) both use the expression "the school[,] or a school that replaces it". Thus an academy may either replace its predecessor or

continue its predecessor. It follows that a new academy is a “school” within section 4(3) and 6(2). It appears to be a question of fact and degree which analysis applies in any case.

- 3.5 If on the facts the correct analysis is that the academy replaces the old school, then the latter ceases to exist but the local authority clearly cannot “maintain” the academy any more than it can maintain the academy’s predecessor, because an academy is by definition a non-maintained, independent school: see EA 1996 section 463 and AA 2010 section 1(5) and 1(10), derived from the former section 482 of EA 1996.
- 3.6 Section 6(9) is consistent with that analysis. It provides that where an academy takes over from a school, the local authority need not go through the statutory procedure leading to closure of the school, i.e. leading to the authority ceasing to maintain the school concerned. As pointed out in my instructions, provision to the same effect is made in section 68(4) and (5) of the Education and Inspections Act 2006 where the Secretary of State directs closure (under section 68(1)) of a school in “special measures”.
- 3.7 Where a maintained school is converted into an academy, the governing body of the school concerned is dissolved pursuant to paragraph 5(1) and 5(2)(a)(iv) of the Education Act 2002, with effect from the conversion date, i.e. the date on which the school becomes or is replaced by an academy.
- 3.8 In such a case, section 6(2) of the AA 2010 does not merely relieve the local authority of its duty to maintain the school which becomes or is replaced by an academy. Section 6(2) enacts an express obligation (“must cease to maintain”) prohibiting the authority from continuing to maintain the school which becomes or is replaced by an academy.
- 3.9 What does “maintain” mean in that context? The duty to maintain, where it exists, principally includes the duty of defraying all (or in the case of voluntary aided schools, nearly all) the expenses of the school, and in some cases

providing its premises. Section 22 of the School Standards and Framework Act 1998 (“SSFA”) provides in part (in similar terms to the former section 34 of EA 1996):

- (1) A local authority are under a duty to maintain the following schools—
 - (a) any maintained schools which they are required to maintain by virtue of section 20(4) or (5);
 - (b) any maintained schools established by them [...]
 - (c) any maintained schools established in their area [...] otherwise than by them or any other local authority; and....
- (3) In the case of a community school, a community special school or a maintained nursery school, the local authority's duty to maintain the school includes—
 - (a) the duty of defraying all the expenses of maintaining it, and
 - (b) the duty of making premises available to be used for the purposes of the school.
- (4) In the case of a foundation, voluntary controlled or foundation special school, the local authority's duty to maintain the school includes—
 - (a) the duty of defraying all the expenses of maintaining it, and
 - (b) the duty, under any enactment of providing new premises for the school.... .
- (8) In this Act—
 - (a) in relation to a school maintained (or proposed to be maintained) by a local authority , “the local authority” means that authority; and
 - (b) in relation to schools falling within subsections (3) to (6), “maintain” shall be read in accordance with those subsections.

3.10 Section 22 is part of the edifice of Part II of the SSFA which enacted a new framework for maintained schools. Part III deals with admissions. By section 142(1) “maintained school” except in Part III has the meaning in s.20(7) which provides:

“‘maintained school’ means (unless the context otherwise requires) a community, foundation or voluntary school or a community or foundation special school,’.

- 3.11 The entry in the index of defined expressions in section 143 cross-refers to other provisions where the meaning of “maintained school” is to the same effect. There is no definition of the verb “maintain”, only of the phrase combining the adjective “maintained” with the noun “school”.
- 3.12 The AA 2010 was enacted against the background of EA 1996 and SSFA. Indeed, section 17(4) provides that the operative sections of the AA 2010 (sections 1-13, 15 and 16) “are to be read as if those sections were contained in EA 1996”. And section 142(8) and (9) of SSFA provide that except where an expression is given a different meaning in SSFA, the SSFA shall be “construed as one with” the EA 1996.
- 3.13 Section 14 of EA 1996 enacts the well known general duty of local authorities to secure that sufficient schools are available in their area. Section 16(1) enables them, for the purpose of fulfilling their functions under EA 1996, to establish (section 16(1)(a)) and maintain (section 16(1)(b)) primary and secondary schools and to “assist any primary or secondary school which is not maintained by them” (section 16(1)(c)).
- 3.14 This provision is important because it demonstrates that an authority may assist a school without maintaining it; that is to say, assisting a school and maintaining it are two different things. Moreover, the assistance to a non-maintained school can be financial: see section 579(5) of EA 1996 which provides:
- (5) For the purposes of this Act a school shall be regarded as “assisted” by a local authority who do not maintain it if the authority make to its proprietor any grant in respect of the school or any payment in consideration of the provision of educational facilities there.
- 3.15 To qualify for such assistance, the institution must be a “school”. A school is defined in section 4 of EA 1996 as an educational institution outside the further

and higher education sectors for providing primary or secondary education or both, whether or not it also provides further education. By section 5, a primary school and a secondary school are, respectively (and not surprisingly) schools for providing, respectively, primary and secondary education.

- 3.16 Primary and secondary education are defined in section 2 in terms which make it plain beyond doubt that an academy can provide primary and secondary education. Indeed that is generally the purpose of an academy. So an academy is a “school” within EA 1996 and can be financially assisted by an authority which does not maintain it.
- 3.17 Similarly, relatively old cases such as *Watt v. Kesteven CC* [1955] QB 408 establish that under the former section 8 of the Education Act 1944 (the forerunner of what is now section 14 of EA 1996) a local authority could perform its duty to secure availability of sufficient schools in its area by making arrangements with other schools including by direct grant aid to schools not maintained by the authority.
- 3.18 Apart from the duty to fund a maintained school, what are the other incidents of the duty to maintain a school, where it arises? The answer is that a local authority’s duty to “maintain” a school is multi-faceted and variable. The local authority’s role is greater in the case of community and voluntary controlled schools than in the case of foundation and voluntary controlled schools. The latter have greater autonomy under the statutory scheme.
- 3.19 I do not attempt an exhaustive survey of the myriad provisions in statute and regulations. Some of the relevant provisions are found in Part 3 of the Education Act 2002 which (with numerous regulations) makes detailed provision about maintained schools and their governance.
- 3.20 To give just a few examples, foundation schools are more particularly provided for in section 21 of the SSFA and regulations made under it. They may own and control the school’s land and assets. Foundation and voluntary aided

school governing bodies fix the dates of school terms and holidays; those of community and voluntary controlled schools are fixed by the local authority: Education Act 2002 section 32.

- 3.21 The governing body of a foundation or voluntary aided school employs the school's staff; while the staff at a community or voluntary controlled school are employed by the local authority: sections 35 and 36 of the Education Act 2002 (and regulations). The governing body of a foundation or voluntary aided school determines admissions to the school, while the governing body of a community or voluntary controlled school only does so if the local authority has expressly delegated that function to the governing body (see section 88 of the SSFA).
- 3.22 The above examples show that the duty to maintain goes beyond merely funding a school and, in some cases, providing its premises. It includes, to a greater or lesser extent depending on the type of school, a role in managing the school concerned. In the case of an academy, the principal obligations of its provider are defined by the funding agreement and the minimum requirements set out in the AA 2010. The local authority is not a party to the funding agreement.
- 3.23 Local authorities also have general power to provide grant assistance under contracts with other bodies such as charities or private organisations where they consider that to do so would be likely to promote or improve the economic, social or environmental well-being of their area: LGA 2000 section 2(1).
- 3.24 By section 2(4) of the LGA 2000:
The power under subsection (1) includes power for a local authority to—(a) incur expenditure, (b) give financial assistance to any person, (c) enter into arrangements or agreements with any person, (d) co-operate with, or facilitate or co-ordinate the activities of, any person, (e) exercise on behalf of any person any functions of that person, and (f) provide staff, goods, services or accommodation to any person.

- 3.25 The power under section 2(1) of the LGA 2000 is subject to express limitations. The relevant one here is section 3(1) which provides:
- The power under section 2(1) does not enable a local authority to do anything which they are unable to do by virtue of any prohibition, restriction or limitation on their powers which is contained in any enactment (whenever passed or made).
- 3.26 The obligation to “cease to maintain” a school which becomes, or is replaced by, an academy, is a “prohibition, restriction or limitation” of a local authority’s powers which is contained in an enactment – the AA 2010. It follows that the authority could only rely on its powers under section 2(1) and 2(4) of the LGA 2000 to enter into contractual arrangements of the type described in my instructions if by doing so the authority does not “maintain” the academy.
- 3.27 Provided the authority does not “maintain” the academy, it can in my view rely on its powers under section 2(1) and 2(4) to enter into such contractual arrangements. In *Brent LBC v. Risk Management Partners Ltd.* [2009] EWCA Civ 490 (not appealed to the Supreme Court on this point; see [2011] 2 WLR 166, SC), Moore-Bick LJ at paragraph 178 of his judgment observed that a local authority could validly exercise the power “by providing funds to an organisation to enable it to set up a business that will serve local residents”; see also the judgment of Pill LJ at paragraphs 115-125.
- 3.28 The Oxford English Dictionary (2nd edition) includes meanings of the verb “maintain” which would clearly cover, as a matter of ordinary linguistic usage, what the local authority proposes to do in cases of the type I am considering: including the meanings “stand by”; “support”; “assist”; “[t]o support (one's state in life) by expenditure, etc.”; “to bear the expense of”; “to sustain (life) by nourishment”; “[t]o provide (oneself, one's family, etc.) with means of subsistence or the necessaries of life; and “to bear the living, educational, etc., expenses of (a person).”
- 3.29 The entries for the verb “maintain” used in other legislation, in Stroud’s Judicial Dictionary (7th edition) and Words and Phrases Legally Defined (4th

edition) show that it takes its meaning from its legislative context. This is not surprising, for the verb “maintain” is found in legislation applicable in fields as diverse as highways, health and safety (the obligation to maintain machinery) and matrimonial law (the obligation to pay maintenance to a former spouse).

- 3.30 In Bennion on Statutory Interpretation, 5th edition, the well known point is made in section 202 (page 588) that the context of an enactment includes other Acts *in pari materia*. In section 261 of the same work (at page 762) the learned author states that where two Acts are required by a provision in the later Act to be construed as one, every enactment in the two Acts is to be construed as if it were contained in a single Act, except in so far as the context indicates that the later Act was intended to modify the earlier Act.
- 3.31 As already pointed out above, this reasoning clearly applies to the relationship between the AA 2010 and the EA 1996, and between the SSFA and EA 1996. It follows that the word “maintain” in section 6(2) must be given the same meaning as it bears in the SSFA and in EA 1996. Since the verb “maintain” is undefined, the meaning must be the aggregate of all the authority’s funding and management functions in relation to a school which it has the duty to maintain.
- 3.32 I can find no specific reference in the parliamentary debates on the Academies Bill to the question what scope should be given to the prohibition in section 6(2) against a local authority maintaining an academy which continues or replaces a school. On 7 July 2010 during the report stage, two amendments were tabled in the Lords to what was then clause 5 of the Bill (now section 6 of the Act), but they were not moved. Nor do the explanatory notes, issued by the government when the AA 2010 was passed, shed any light on the issue.
- 3.33 Instructing solicitor and many of those involved in the PFI market and the academies programme will be familiar with the LGCA 1997, and with section 111(1) of the LGA 1972. I do not propose to restate those provisions here. The

case law on section 111(1) is well known and extensive. I see no difficulty with the invocation of section 111(1) in a case of the type I am considering.

3.34 For present purposes, section 111(1) has to be read in conjunction with performance of the function set out in section 16(1)(c) of EA 1996: giving financial assistance to a school not maintained by the authority. But section 111(1) of the LGA 1972 does not in practice add anything to the broader powers in section 2 of the LGA 2000.

3.35 The LGCA 1997 has been given relatively little consideration in case law, apart from the analysis of Stanley Burnton LJ at first instance in *Brent London Borough Local authority v Risk Management Partners Limited* [2008] EWHC 692 (Admin), at paragraph 101 and following; cf. per Rix LJ on appeal, [2009] EWCA Civ 490, at paragraph 61 and following. Those analyses are not directly relevant here, but I see no difficulty with applying section 1(1) of the LGCA 1997 to contractual arrangements of the type being discussed here.

4. Advice

4.1 In the light of the discussion and analysis above, my views are as follows. The typical contractual arrangements described in my instructions would not amount to a proposal to maintain the new academy concerned in breach of section 6(2) of AA 2010. I am of the view that the authority has power, in such a case, under section 16(1)(c) of EA 1996, read with section 579(5), and under section 2(1) and 2(4) of the LGA 2000, and section 1(1) of the LGCA 1997, and section 111(1) of the LGA 1972, to enter into contractual arrangements of the type proposed.

4.2 While it is ultimately always a question of fact and degree whether the authority concerned in such arrangements would breach the prohibition in section 6(2) of the AA 2010 against maintaining a new academy, an authority which agrees to fund an annual shortfall being the difference between what it pays out and what it receives each year, (i.e. an affordability gap) amounting to a small proportion

of the academy's overall annual budget, would not thereby breach the prohibition.

- 4.3 In my view the authority may also lawfully retain responsibility for dealing with the PFI provider, the academy trust and, where necessary, the Department in relation to issues arising from the provision of any premises (whether owned freehold by the academy trust or leased by it from the authority); and from the management of the academy's premises and facilities, as provided for in the model contract documents. These documents do not contemplate any direct contractual link between the academy trust and the PFI provider, nor between the Department and the PFI provider.
- 4.4 In exercising such limited management functions, the authority will bear some financial risk of having to indemnify against claims made against the academy trust or of having to meet claims against it brought by the academy trust. The authority also has financial protection under the DFE principal agreement against failure of the academy trust to pay amounts due to the authority under the school agreement, in that it has the benefit of a guarantee from the Department in respect of any unpaid amounts.
- 4.5 In such a case, the authority does not retain control over the academy's premises; nor does it employ the staff; nor does it set term dates; nor does it underwrite the funding provided each year by the Department, the academy trust or any other source; nor does it determine admissions to the academy; nor does it determine the content of the education provided. Its influence on the running of the academy is limited to minority membership of the governing body not exceeding 20 per cent of its voting power.
- 4.6 I accept that if a matrimonial law approach to the verb "maintain" were adopted, it would be rightly said that a significant financial contribution each year amounts to maintenance, as in the case of a former spouse making periodical payments of maintenance following a divorce. But I do not think

that would be the right approach. The statutory concept of a local authority maintaining a school has a specific meaning in the context of the detailed statutory scheme governing state education in England.

- 4.7 That specific meaning makes the matrimonial law approach inappropriate. As demonstrated above, the statutory concept of maintenance of a school is very different from the ordinary meaning of the verb “maintain” in other contexts such as matrimonial law or according to ordinary dictionary definitions. The special statutory meaning of “maintain” in section 6(2) of AA 2010 is directly imported into that subsection by section 17(4) of AA 2010, via section 142(8) and (9) of SSFA.
- 4.8 There could be cases where a local authority’s involvement in the funding and management of an academy were so substantial that the authority would “cross the line” and unlawfully maintain the academy. But I think that would be very unusual in the context of the model contractual arrangements I am considering here and where the affordability gap funded by the authority, in my experience, is unlikely to form a large proportion of the academy’s annual budget.
- 4.9 The contractual arrangements can be given the added protection of a certificate under the LGCA 1997. Such a certificate is not necessary to confer *vires* on the authority. It already has the necessary *vires* as explained above; but a properly drawn certificate would confer an additional source of power to enter into the proposed contractual arrangements. I am not asked to advise on the requirements for certification under the LGCA 1997.
- 4.10 After conversion of the school to an academy, the PFI project agreement can be continued but the authority should resolve to continue it not pursuant to 16(1)(b) of EA 1996, as would be appropriate in the case of a maintained school; but pursuant to section 16(1)(c) which empowers a local authority to “assist any primary or secondary school which is not maintained by them”; and

pursuant to the other relevant statutory powers further discussed in this Opinion.

- 4.11 For the sake of completeness, I should add that I am not advising on whether a local authority, or a company (such as an academy trust) wholly or partly controlled by a local authority, can lawfully become a party to statutory “Academy arrangements” under section 1 of the AA 2010, i.e. being “the other person” (see section 1(1)) with whom the Secretary of State enters into such arrangements.
- 4.12 Nor am I asked to advise on whether a local authority could become a member of a corporate body, or appoint officers or elected members to its board, for the purpose of that body becoming the proprietor of a newly created academy.
- 4.13 Those questions are not the same as the question on which I am advising here, although the prohibition against maintaining an academy in section 6(2) of the AA 2010 would be relevant to finding the correct answer.

TIM KERR QC
11 KBW CHAMBERS

**DEPARTMENT FOR
EDUCATION**

**ACADEMIES AND PFI
ARRANGEMENTS**

**SECTION 6(2) OF THE
ACADEMIES ACT 2010**

OPINION

**Legal Adviser's Office
Department for Education
Level 1, Sanctuary Buildings
Great Smith Street
London SW1P 3BT**

Ref: Ben Newman, Senior Lawyer