



## What is a company limited by guarantee?

- + A Free School will be operated by a charitable company limited by guarantee which means that it will have company law members. The members act as nominal guarantors for the company and pledge a certain fixed sum (£10 is specified in the DfE model Articles) to be contributed only in the event that the company is wound up when insolvent. This sum of £10 will be the maximum amount that each member would need to pay towards any debts of the company on winding up. Directors are not personally liable to the company for its liabilities provided that they fulfil their duties as company directors and charity trustees and act honestly and in good faith.

## What is the difference between a member and a director of a Free School?

A charitable company limited by guarantee has two tiers of governance:

- + **The members** are the people who create the company. They have rights and powers under company law to change its constitution, remove directors, receive the annual accounts of the company and attend and vote at company meetings (the same powers shareholders have in a company limited by shares).
- + **The directors**, who are often referred to as the governors or trustees, are responsible for the management and strategic direction of the company and therefore the school. In addition to their legal duties and responsibilities as company directors, they also have duties under charity law as charity trustees.

## **Can the members and the directors be the same people?**

- + While the roles of company member and company director are separate and distinct, they can be occupied by the same people. However, they must bear in mind the distinct responsibilities of each role and make decisions wearing their different 'hats' as either a member or a director. Generally there will be ongoing governance obligations as directors and possible periodic requirements for engagement as members, for example in an annual general meeting.

## **What is the difference between a governor and a director of a Free School?**

- + The Department for Education (DfE) model Articles of Association (as at July 2011) for Free Schools defines the 'governors' as the directors of the 'Academy Trust' (the company which operates the Free Schools). Therefore, the terms 'director' and 'governor' are interchangeable for the purposes of the DfE model articles.

## **Can you have separate directors and governors of a Free School?**

- + There is a danger with such an arrangement that, over time, the roles can become blurred and confused. However, since the model Articles permit the directors to delegate tasks to sub-committees the directors of a Free School could in theory arrange to separate the roles of 'directors' and 'governors'. In such a case, the company directors would delegate the operational running of the school to governors but the directors would nevertheless retain legal responsibility and accountability as company directors and charity trustees for the company and the school. Schools seeking such an arrangement would need approval from the DfE to adapt their model articles in a way which accommodated it explicitly.

## **What is the ideal number of directors?**

- + There is no ideal number, but a board needs an appropriate balance of skill and expertise and should not be so large as to become unwieldy. It makes sense to keep the board of directors small at the beginning of the process of establishing a Free School. This will assist with control and enable directors to make decisions speedily. Then, as the school moves closer towards opening, the board of directors can be expanded to be in line with the Articles of Association as they are specified in the funding agreement for the particular Free School. Once the school is opened, it will be necessary to have at least two elected parent governors.

## **If a Free School has been set up using Articles of Association other than the DfE's model articles, when is a good time to adopt the model articles instead?**

- + If a Free School has been established with different articles, or is an existing organisation (e.g. – a charity or an existing independent school) the model articles should be adopted before the Free School enters into the funding agreement.

## **Can an existing charity set up and open a Free School?**

- + Yes, many independent schools who wish to convert to become a Free School are registered charities. The process by which this happens depends on the school's existing legal structure. An independent school which is already established as a company limited by guarantee would need to change its Articles of Association so that they match the model articles provided by the DfE. However, groups should be aware that such negotiations may be expensive and time consuming and may decide it is easier to adopt the model articles in their entirety. Charities which do not currently run schools can establish Free Schools, provided within the scope of their charitable objects, which may, for example, include an object "to advance education". The legal mechanisms required will depend on the particular circumstances of the charity but would include, as a minimum, changing the charity's Articles of Association to match the DfE's model articles.

## **If 'pro bono' advice has been provided before the funding agreement has been entered into, can this advice be paid for retrospectively once the funding agreement is in place?**

- + No since pro bono support is, by definition, inconsistent with any contractual payment, including retrospective payment. If advice is given in return for later payment it is not pro bono advice, because it is in return for something. Advice in return for retrospective payment is contractual and the retrospective payment would be a contractual obligation. Pro bono advice may be accepted at any time, pre or post the funding agreement being in place, as it is free advice, not given in return for anything. Bear in mind that a decision to make payment for advice given on a pro bono basis before the funding agreement is actually a later decision to make a payment in return for nothing - an "ex gratia" payment. As a general principle of charity law, charities may not properly make such payments.

## **Can directors or members of a Free School provide services to that Free School without the Free School needing to tender for them?**

- + DfE guidance currently indicates that there must be "no personal or professional relationships between those who have responsibility for your school's spending and potential suppliers". However, well established general principles of company and charity law apply to manage actual and potential conflicts of interest, so the guidance is apparently presenting a tighter and perhaps clearer practical principle which may reflect DfE expectations. The appropriate management of conflict of interest requires formal safeguards to ensure decisions are made exclusively by reference to the best interests of the organisation. The most basic is that a decision to obtain services from a director or member should be made by the other directors without the participation of the affected director/member. Because the Free School will be a public authority services (unless gratuitous) should be obtained in accordance with the general public procurement principles of objectivity, transparency, fairness and equal treatment for other potential suppliers (and if the services are of high-value, or within particular categories, prescribed procedures may also need to be followed).

## How do promoters of Free Schools retain influence if the school is being set up by an academy provider?

- + There are a number of ways that the original promoters of a Free School can be involved in the running of the school. Depending on the circumstances, the original promoters can be:

### In a single-academy Free School

- + Directors of the Free School company (i.e. governors) appointed by the company members;
- + Parent directors (i.e. governors) of the Free School company elected by parents of pupils at the school;
- + Members of the Free School company;
- + Trustees of a separate charity which supports the Free School and has the power to nominate directors (governors) to the company limited by guarantee which oversees the Free School;
- + Employees of the Free School (subject to transparent recruitment procedures);
- + Members of sub-committees of the Board of directors.

### In a multi-academy Free School

- + Members of the local governing body (ie. governors) of the Free School appointed by the multi-academy Board of directors;
- + Members of the local governing body of the Free School elected as parent governors of the school by parents of pupils at the school;
- + Members of sub-committees of the local governing body of the school;

For more information on the services we can provide for Free Schools please contact Frank Shippam on **01603 227600** or **[frank.shippam@mapartners.co.uk](mailto:frank.shippam@mapartners.co.uk)**



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