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Please Quote: Z1214895/PHD/B5
Your Reference:

25 October 2012

Dear Sirs

**British Humanist Association & Jeremy Rodell v London Borough of Richmond upon
Thames
CO/7182/2012**

I continue to act for the Secretary of State for Education.

Please find attached by way of service:

- Letter to Court dated 25 October 2012;
- Approved Witness Statement of Mr David McVean (signed copy to follow);
- Exhibit DMV/1

I would be grateful if you could acknowledge receipt.

Yours faithfully

Philippa Harvey
For the Treasury Solicitor

Lee John-Charles – Head of Division
Neera Gajjar – Deputy Director, Team Leader
Litigation B5





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25 October 2012

Dear Sirs

R (oao British Humanist Association & Jeremy Rodell) v London Borough of Richmond upon Thames
CO/7182/2012

I continue to act for the Secretary of State for Education who has been joined to the above claim as an interested party.

Further to the Order of 18 October 2012, please find enclosed on behalf of the Secretary of State:

- Approved Witness Statement of Mr David McVean (signed copy to follow)
- Exhibit DMV/1

I would be grateful if you could acknowledge receipt.

Yours faithfully

Philippa Harvey
For the Treasury Solicitor

CC:

Leigh Day (Claimants); London Borough of Richmond and Diocese of Westminster (IP)

Lee John-Charles – Head of Division
Neera Gajjar – Deputy Director, Team Leader
Litigation B5



Name: David McVean
 Witness Statement No: 1
 Exhibit: DMV/1
 Dated: 25 October 2012

IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

CLAIM NO: CO/7182/2012

B E T W E E N:

THE QUEEN
 (on the application of **BRITISH HUMANIST ASSOCIATION & JEREMY RODELL**)
Claimants

-and-

LONDON BOROUGH OF RICHMOND
Defendant

-and-

(1)ROMAN CATHOLIC DIOCESE OF WESTMINSTER
(2) SECRETARY OF STATE FOR EDUCATION
Interested Parties

WITNESS STATEMENT OF DAVID MCVEAN

I, David McVean, of the Department for Education, Level 3, Sanctuary Buildings, Great Smith Street, Westminster, London SW1P 3BT, WILL SAY as follows:

INTRODUCTION

1. I am a senior civil servant in the Department for Education, currently holding the position of Deputy Director of the Education, Choice and Access Division in the Infrastructure and Funding Directorate. I have held this Deputy Director post since October 2010, within a span of 25 years with the Department.
2. My role involves oversight of teams of civil servants whose remit includes work on the Government's policy and the application of the law in terms of the provision of school

places, the establishment of schools, fair access, school choice and diversity.

3. I make this witness statement in support of the Secretary of State for Education's position in response to the Claimants' claim. The Claimants challenge the Defendant's decisions of 24 May 2012 to lease certain land to the Roman Catholic Diocese of Westminster and to approve proposals published by the Diocese under s. 11(1A) of the Education and Inspections Act 2006 ("the EIA 2006") for the establishment of two voluntary aided Catholic schools, one primary and one secondary. The Secretary of State's concern is with the second of the decisions under challenge. As I understand it, the Claimants contend that this decision was unlawful for two reasons. First, they say the Defendant failed to comply with s. 6A of the EIA 2006, the so-called "Academy presumption". Second, they say it failed to comply with the requirements for a lawful consultation.
4. The Secretary of State's involvement in this case is confined to the first of those two grounds of challenge. I am told that the Defendant resists that ground of challenge on the basis that these two schools were not established in response to a "need". The Secretary of State has nothing to add on that point; he considers this to be a matter for the Defendant. The Secretary of State does, however, advance a more general position in response to the Claimants' first ground. His position is not based on the specific facts of this case, but applies to all cases in which a local authority receives a proposal for the establishment of a voluntary aided school. Given its wider application, the Secretary of State considers this point to be of substantial importance.
5. The Secretary of State's position is that the Academy presumption under s. 6A of the EIA 2006 does not arise where a proposal has been made under s. 11(1A) of that Act for the establishment of a new voluntary aided school (as occurred in this case). In terms of the establishment of a school, s. 11(1A) offers an alternative route to s. 6A.
6. The purpose of my witness statement is to assist the Court in understanding the Secretary of State's policy intention behind s. 6A and s. 11(1A) of the EIA 2006, both of which came into force on 1 February 2012. I also explain why, if the Claimants are right in their contention that the Academy presumption under s. 6A applies even where proposals are made under s. 11(1A), this would tend to frustrate long standing policy

aims and established procedures that precede the changes to the EIA 2006 introduced by s. 37 and Schedule 11 to the Education Act 2011 ("the EA 2011").

7. The following aspects of my experience are relevant on these points. First, my teams provided policy input on the changes to the EIA 2006 which took effect on 1 February 2012, including s. 6A and s. 11(1A). Second, my teams work within a Directorate to implement those policies (as embodied in the law) by giving guidance to local authorities and other "proposers" (i.e. those other than the local authority who are proposing to establish new or replacement schools), including Dioceses and Diocesan Boards of Education. Third, my teams advise the Secretary of State on whether or not to approve proposals for new schools in circumstances where the legislation requires such approvals.
8. In the statement below, I refer to bundle of exhibits marked "DMV/1". The first of these is a document exhibited to this statement marked at pages 1-8. That document is entitled '*Establishing a New School: Departmental Advice for Local Authorities and New School Proposers*'. It was issued by the Department for Education in May 2012. It summarises the changes to the EIA 2006 with effect from 1 February 2012 and explains the structure and purpose of the various provisions of the revised Part 2 of the EIA 2006. Its contents are self-explanatory, and I do not repeat them here, save to emphasise and provide context for certain points. I can confirm that this document encapsulates the Secretary of State's position on how the statutory provisions referred to therein were intended to be and are currently being applied by the Department for Education.

POLICY INTENTIONS BEHIND THE AMENDMENTS TO PART 2 OF THE EIA 2006

9. By s. 14 of the Education Act 1996, local authorities are required to secure sufficient primary and secondary schools for their area.
10. This is achieved through the establishment and maintenance of a variety of types of school. For the purposes of this case, two types of school are relevant.
11. The first is the voluntary aided school (which is one of a number of types of maintained

school, the others being community, community special, foundation, foundation special, voluntary controlled and maintained nursery schools). In most cases, the foundation or trust supporting that school is a religious organisation. Religious organisations such as Dioceses have historically played an important role in the provision of school education in this country, providing schools before the State did so. They continue to do so and in fact account for around one third of all state funded schools.

12. The second type of school relevant to this case is Academies (the legal term that also includes Free Schools of all types, University Technical Colleges and some Studio Schools). Academies are the successors to 'city technology colleges' and 'city colleges for the technology of the arts'; the legislative regime governing Academies has evolved over the last approximately fifteen years, with the Academies Act 2010 now being the primary statute. In essence, an Academy is a publicly-funded independent school that gives heads and teachers greater freedoms and flexibilities which include: the ability to set their own pay and conditions for staff, freedom in delivering the curriculum, and greater control of their budget. This increased autonomy allows greater scope for innovation which in turn helps to raise standards for pupils.
13. The current Government took office on 11 May 2010. It introduced the Education Bill to Parliament in January 2011, which subsequently received Royal assent as the Education Act 2011 on 15 November 2011. By s. 37 and Schedule 11 to that Act, Part 2 of the EIA 2006 – which deals with the establishment of schools – was amended. These amendments took effect on 1 February 2012. I refer to the relevant sections (paragraphs 175-182) of the Explanatory Notes to the Education Bill (pages 9-10 of DMV/1).
14. As I explain below, these amendments were in pursuit of a number of the incoming Government's policy objectives.
15. These objectives included increasing the number of Academies, but at the same time making it more straightforward for voluntary aided schools to be established by trusts or foundations external to the local authority. This is part of the Government's intention that local authorities move towards being "commissioners" rather than "providers" of education. As I touch on below, however, local authorities retain a crucial role in the

provision of primary and secondary education.

16. An additional policy objective was the reduction of bureaucratic burden where possible and appropriate. Pursuant to this objective, Part 2 of the EIA 2006 was amended so as to remove the requirement for the Secretary of State's consent for the publication of proposals outside of the competitive process to establish a new maintained school in certain circumstances, namely those set out in the new s. 11 of the EIA 2006. Since the introduction of competition, there have been arrangements to allow for the publication of proposals for voluntary aided (and other types of maintained) schools outside of the competitive process. Under the Education Act 2005 (new secondary schools) and the EIA 2006 (which extended competitions to include new primary and special schools), the Secretary of State's consent was required whenever a local authority or other proposer wished to propose a new or replacement maintained school. Whether or not a school was then approved to be established was subject to a statutory process and local decision making. The current Government considered this policy and decided that in certain circumstances where consent had routinely been granted for publishing proposals, it would be consistent and appropriate (i.e. less bureaucratic) for them to no longer need to seek consent.
17. This case focuses on two new provisions of Part 2 of the EIA 2006, namely s. 6A and s. 11(1A). I explain the policy intention behind each below.

The Academy presumption

18. A major amendment was the new s. 6A of the EIA 2006, which provides in relevant part that:
 - (1) If a local authority in England think a new school needs to be established in their area, they must seek proposals for the establishment of an Academy.
19. This "Academy presumption" was introduced because Government considers that Academies tend to deliver considerable autonomy, innovation, choice and improvements in standards. Its policy is (and was at the time the Education Act 2011 received Royal assent) to encourage an increase in the number of Academies. S. 6A

- seeks to provide that encouragement to local authorities when they take the view that a new school needs to be established in their area. Where a local authority identifies such a need, the “default setting” is that Academy proposals must be sought.
20. While Academies benefit from significant autonomy, the local authority retains an important role: it assesses the Academy proposals it receives, and its views are taken into account by the Secretary of State when he decides whether or not to enter into a funding agreement with the proposer of the Academy. If he does decide to do so, local authorities work closely with the proposers to establish the new Academy, with assistance from a Departmental project lead, if required.
 21. The process to be followed by a local authority under s. 6A is summarised in the flowchart at Annex A to exhibit at page 8 of DMV/1: see section A, entitled ‘*LA decides, under its duties to plan and secure sufficient schools, it needs a new school*’.
 22. As that flowchart illustrates, s. 7 of the ELA 2006 arises where the s. 6A process has not resulted in any or any suitable Academy proposals. S. 7 provides for a “competition” under which the local authority invites proposals for maintained schools and Academies (so as to provide a second opportunity for suitable Academy proposals to be found). S. 6A is therefore intended to precede the statutory competition process: the latter can only arise where the former has been complied with.
 23. In most cases, the local authority is the decision-maker with respect to proposals from “proposers” (i.e. a party other than the local authority itself). In contrast, where the local authority itself puts forward a proposal for a new school (under s. 10 or s. 11, discussed below), the decision-maker is the Schools Adjudicator.
 24. The Secretary of State’s consent is required before a competition is carried out under s. 7. That consent is not granted unless the Secretary of State is satisfied that s. 6A has been complied with. Where an Academy proposal is submitted under the s. 7 competition, it will be considered and, if deemed suitable, the competition will result in the Academy proposal being accepted. This is summarised in the middle part of the flowchart at Annex A to exhibit at page 8 of DMV/1.

25. These provisions therefore embody the policy of encouraging a growth in Academies by making an Academy the presumption where a local authority forms the view that a new school needs to be established, and where suitable proposals are forthcoming.
26. Furthermore, s. 6A and s. 7 are not the only ways in which an Academy can be established. Under s. 1 of the Academies Act 2010, the Secretary of State has a wide power to enter into Academy arrangements. This extends, for example, to the annual competitive Free Schools exercise whereby the Secretary of State invites proposals for new Free Schools within a certain period. The application forms received are then assessed against published criteria and due diligence checks are conducted. Shortlisted applicants are invited for interview before a decision is made on the application. The Secretary of State then announces the successful applicants. This process is entirely separate from that under s. 6A and s. 7 of the EIA 2006.

Voluntary aided schools and other circumstances not subject to the Academy presumption

27. I do not wish to play down the importance of Academies as a policy priority for the Secretary of State. It is important to be clear, however, that the policy intention behind the changes to the EIA 2006 has never been for the Academy presumption to apply in all cases. Rather, it is intended to replace the previous school competition arrangements. The Secretary of State and his Departmental officials have recognised throughout that an Academy will not always be the optimal solution. In some cases, proposals not instigated by the local authority, for example, by a Diocese or a community group, will be more suitable. In other cases, it would be unduly burdensome for the particular need identified by the local authority to be met by undergoing the process of seeking Academy proposals or by undertaking a competition under s. 7. S. 10 and s. 11 of the EIA 2006 were therefore introduced as alternatives to a school competition and to the Academy presumption which precedes a competition. As I have explained above, the position before the amendments to the EIA 2006 was that voluntary aided schools could be established outside of a competition. The amendments to the EIA 2006 were intended to preserve that position.
28. Another of the Secretary of State's key policy aims behind the changes to the EIA 2006 was to provide diversity of school providers, as there was a continuing parental demand

for certain types of school other than Academies, particularly in relation to voluntary aided schools with a religious character. Although the majority of state-funded schools are and will continue to be schools without a religious character, the Secretary of State (and the Government more broadly) values the long standing contribution that "faith schools" make to education and the schools system. The Secretary of State has always been clear that he supported the establishment of faith schools, and that he wished to make it more straightforward to establish them.

29. The new s. 11(1A) of the EIA 2006 was intended to safeguard those policy objectives. It provides that:

(1A) Where any persons ("proposers") propose to establish a new voluntary aided school in England, they may publish their proposals under this section.

30. The intention for proposals published under s. 11(1A) is that, when a local authority is considering a proposal from a "proposer" (i.e. someone other than the local authority itself), it is not under a duty to invite proposals for an Academy before lawfully being able to approve that proposal.
31. S. 11(1A) provides a particular route by which proposals for a particular type of school (i.e. voluntary aided) can be approved without the need for the local authority first to consider whether a new school needs to be established in its area (the trigger for the s. 6A duty). S. 11(1A) can also be utilised where, having received a proposal from a proposer, the local authority then takes the view that a new school needs to be established in its area. It is therefore intended to be an alternative to s. 6A in circumstances where a local authority is approached with a proposal for a new voluntary aided school.
32. S. 11(1A) is accordingly among the "special cases" in which the Academy presumption is not intended to apply. The same applies to the circumstances catered for by s. 10. S. 10 and s. 11 allow for the establishment of new or reconfigured maintained school provision outside the s. 7 competition process outlined above. Broadly, the difference between the two sections is that the requirement for the Secretary of State's consent to publish proposals is retained for the s. 10 cases, but dispensed with for the s. 11 cases,

in accordance with the policy objective mentioned above of reducing bureaucracy where possible and appropriate. These sections are explained further in pages 1-7 of DMV/1 and summarised in the bottom part of the flowchart at Annex A.

33. Two further practical and procedural distinctions are worth highlighting. First, proposals invited under s. 6A and s. 7 require the local authority to provide both a site and capital for the envisaged school. This requirement does not apply to proposals under s. 10 or s. 11, though local authorities are not prohibited from providing such assistance if they wish to.
34. Second, while the process to be followed under s. 6A is largely a matter for the local authority, the law lays down distinct processes to be followed for s. 7 on the one hand and for s. 10 and s. 11 on the other: see Schedule 2 to the EIA 2006 and the School Organisation (Establishment and Discontinuance) Regulations 2007 (as amended).

CONSEQUENCES IF THE ACADEMIES PRESUMPTION WERE TO APPLY IN ALL CASES

35. The Claimants argue that the Academy presumption under s. 6A applies even where proposals are made under s. 11(1A). If that is right, this would tend to frustrate some of the policy aims behind the changes to the EIA 2006 and the longer standing overarching policy aims (which were intended to survive the changes to the EIA 2006) of being able to publish certain new school proposals outside of competitive arrangements.
36. First, it would tend to frustrate the aim of increasing diversity of provision and choice for parents and pupils. Requiring local authorities always to apply the Academy presumption under s. 6A would, in effect, render the alternative routes offered by s. 10 and s. 11 of the EIA 2006 redundant, as they would have to give way to an Academy solution. This would not increase diversity. As I have indicated, while the Secretary of State remains committed to increasing the number of Academies, the policy intention is not to impede proposers' non-Academy proposals under s. 10 and s. 11 of the EIA 2006 from coming to fruition if appropriate in the circumstances. S. 6A is intended to be a presumption (and to apply where the conditions referred to in that section arise); it is

not intended to be a “straightjacket” preventing or impeding diversity.

37. Second, moving beyond diversity in general, the approach advocated by the Claimants would tend to frustrate the establishment of faith schools in particular – contrary to the Secretary of State’s policy objective. In some cases, particularly the main churches and Jewish groups, religious organisations will not wish to establish an Academy. This is mainly because only 50% of places at an Academy can be prioritised on the basis of faith when that Academy is oversubscribed. This is set down in paragraph 1.36 of the School Admissions code, which provides that:

Faith based oversubscription criteria in schools with a religious character
 1.36 As with other maintained schools, these schools are required to offer every child who applies, whether of the faith, another faith or no faith, a place at the school if there are places available. Schools designated by the Secretary of State as having a religious character (commonly known as faith schools) may use faith-based oversubscription criteria³⁰ and allocate places by reference to faith where the school is oversubscribed.

³⁰ Funding Agreements for entirely new Academies (i.e. not converters from the maintained or independent sectors, or those sponsored Academies with a predecessor school) and Free Schools with a religious character provide that where the school is oversubscribed at least 50% of places are to be allocated without reference to faith.

38. Third, the Claimants’ construction would tend to frustrate the objective of reducing burdensome bureaucracy where possible and appropriate. For example, it would mean that the Academy proposal process had to be gone through even in circumstances where a proposer puts forward a suitable proposal which enhances diversity and choice and/or meets a specific demand, without the local authority having identified a need to establish a new school.
39. Finally, even on the Claimants’ construction, the s. 6A presumption could lawfully be bypassed anyway. S. 6A applies only where the local authority is the decision-maker. By paragraph 11 of Schedule 2 to the EIA 2006 and regulation 18 of the School Organisation (Establishment and Discontinuance of Schools) (England) Regulations 2007, if the local authority has not determined the proposals within two months of the end of the representation period, they must refer them to the Schools Adjudicator for decision. A s. 11(1A) proposal could in that way still be assessed without the Academy presumption being triggered, but in a way which takes the decision-making away from

the local authority, and which involves significant delay. Such situations would be highly undesirable.

40. It should also be borne in mind that any maintained schools established under s. 7, s. 10 and s. 11 could subsequently choose to convert to Academy status at a later date, if they meet the relevant criteria.
41. For these reasons, I respectfully invite the Court to find that s. 6A of the EIA 2006 does not arise in all cases where a proposal for the establishment of a new school is being considered, and in particular that it does not arise where a proposal is submitted by a proposer under s. 11(1A) of the EIA 2006.

STATEMENT OF TRUTH

42. I believe that the facts stated in this witness statement are true.

Signed: David McVean

Dated: 25 October 2012

IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
CLAIM NO: CO/7182/2012

BETWEEN:

THE QUEEN
(on the application of
BRITISH HUMANIST ASSOCIATION &
JEREMY RODELL)
Claimant

-and-

LONDON BOROUGH OF RICHMOND
Defendant

-and-

(1)ROMAN CATHOLIC DIOCESE OF WESTMINSTER
(2) SECRETARY OF STATE FOR EDUCATION
Interested Parties

WITNESS STATEMENT OF
David McVean

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Ref: Z1214895/PHD/B5

Solicitor for the Second Interested Party

IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

CLAIM NO: CO/7182/2012

B E T W E E N:

THE QUEEN

(on the application of BRITISH HUMANIST ASSOCIATION & JEREMY RODELL)

Claimants

-and-

LONDON BOROUGH OF RICHMOND

Defendant

-and-

(1)ROMAN CATHOLIC DIOCESE OF WESTMINSTER

(2) SECRETARY OF STATE FOR EDUCATION

Interested Parties

EXHIBIT DMV/1

ESTABLISHING A NEW SCHOOL

DEPARTMENTAL ADVICE FOR LOCAL AUTHORITIES AND NEW SCHOOL PROPOSERS

ABOUT THIS DEPARTMENTAL ADVICE

1. On 1 February 2012, section 37 of the Education Act 2011 was commenced, introducing Schedule 11 of the Act. This makes changes to part 2 of the Education and Inspections Act 2006 in relation to the process for establishing new schools, including the academy/Free School presumption. This advice is non-statutory and has been produced to help new school proposers and local authorities understand their duties in relation to these changes.

EXPIRY/REVIEW DATE

2. This advice will be reviewed by October 2012.

WHAT LEGISLATION DOES THIS ADVICE RELATE TO?

- The Education Act 2011 (EA 2011)
- The Education and Inspections Act 2006 (EIA 2006)
- The School Organisation (Establishment and Discontinuance of Schools)(England) Regulations 2007, as amended (Establishment and Discontinuance Regulations)

WHO IS THIS ADVICE FOR?

3. This advice is for:
- Local authorities;
 - New school proposers; and
 - Dioceses and Diocesan Boards of Education.

KEY POINTS

- The new "presumption" for an academy/Free School requires local authorities to seek proposals to establish an academy/Free School in the first instance where they identify a need for a new school.
- Local authorities must continue to plan for and secure sufficient schools for their area in line with their duties under section 14 of the Education Act 1996.
- Local authorities should assess the proposals they receive against the criteria in paragraph 12 below before forwarding all of the proposals to the Secretary of State. He will take into consideration any preference they indicate.
- Local authorities can no longer hold a school competition without the Secretary of State's consent, nor enter their own community or foundation school proposals into a competition.
- Despite the academy/Free School presumption, in certain exceptional circumstances it is still possible to publish proposals for a new maintained

- school outside of a competition, under sections 10 or 11 of the EIA 2006.
- The Secretary of State's consent is no longer required to publish certain proposals, including those for the establishment of new voluntary aided schools, primary schools resulting from infant/junior amalgamations, and new schools resulting from the reorganisation of existing faith provision.
- "Academy" is the legal term which also includes Free Schools of all types, University Technical Colleges (UTCs) and some Studio Schools, including 16-19 and alternative provision (PRU) establishments. This document uses "academy/Free School" as the collective term for these types of schools.
- "Proposer" in this document refers to the body or group that is proposing the new school.

THE EDUCATION ACT 2011

4. Section 37 of EA 2011 introduces Schedule 11, which makes a number of changes to the process for establishing new schools. In particular, it introduces new section 6A of EIA 2006 which sets out the academy/Free School presumption. It makes changes to the existing school competition arrangements (amended section 7 of EIA 2006) and removes the need for local authorities and other proposers to seek the Secretary of State's consent before publishing proposals for certain types of new maintained schools (amended sections 10 and 11 of EIA 2006).

ACADEMY/FREE SCHOOL PRESUMPTION (under section 6A of EIA 2006)

5. Flow chart A at Annex A of this document sets out the revised process for establishing new school provision under the academy/Free School presumption (section 6A) and the new competition process (section 7).

6. Existing statutory requirements mean that local authorities, in their role as commissioners, must plan and secure sufficient schools for their area. Where a local authority identifies the need to establish a new school, new section 6A of EIA 2006 places the authority under a duty to seek proposals to establish an academy/Free School and to specify a date by which proposals must be submitted.

7. It will be for local authorities to decide how best to do this, how to consult on the proposed new school and with whom (e.g. local community, Diocese and any others affected by the proposals). They should be clear from their school place planning about the type (e.g. mainstream, special educational needs, alternative provision), age range, gender and capacity of the academy/Free School they wish to see established.

8. The local authority should take steps to ensure that groups or organisations that might be interested in establishing the new school are aware of the opportunity.

9. The local authority should notify the Department at the outset of its intention to seek proposals for a new academy/Free School and confirm the site it will make available and that it will provide all the capital funding needed to establish the school (as they were required to do for academies established through the previous school competition process). The Department will publish on its website (<http://www.education.gov.uk/schools/leadership/schoolorganisation>) details of those local authorities that are seeking to establish new schools, including links to their

websites. The Department will also inform the Independent Academies Association and New Schools Network, to alert potential proposers/sponsors to the new school's requirements.

10. Once the specified date for academy/Free School proposals has passed, the local authority should send the Secretary of State a notification setting out:

- the steps the authority has taken to seek proposals for an academy/Free School;
- copies of all proposals submitted and the authority's assessment of the proposals;
- confirmation that the authority will provide the required site and all the capital funding needed to establish the new school.

11. The local authority is responsible for meeting project development costs. For lead-in and setup costs, the Department will discuss with the local authority on a case by case basis to identify and agree the most appropriate mechanism to meet these. Until longer term funding arrangements are agreed, the expectation is that local authorities will contribute to these costs. A consultation document on funding reform was published on 26 March 2012.

12. The local authority should provide the Department with an assessment of the proposals it has received, based on the following criteria:

- the quality of the places being added into the system, based on the proposer's vision and educational plan;
- the capability and capacity of the proposer to deliver their proposal to time and on budget, based on their expertise and experience;
- value for money, confirming that the proposer considers that the costs of establishing the new academy/Free School can be met within the estimate of capital costs outlined by the local authority and, where they cannot be met within that estimate, an explanation of the reasons for the additional costs and how any shortfall will be met.

13. The local authority may state its preference, which the Secretary of State will take into consideration when deciding whether or not to enter into a Funding Agreement with any of the proposers.

14. The notification should be submitted to the Department for Education (school.organisationproposals@education.gsi.gov.uk).

15. Where a suitable proposer is identified, it will be for the proposer to work to establish the new academy/Free School with support from the local authority and the Department, as required. The local authority will continue to have an interest because of its duties to secure sufficient suitable schools.

OTHER IMPORTANT CHANGES

SCHOOL COMPETITIONS (under section 7 of EIA 2006)

16. If there is no suitable academy/Free School proposal, a statutory competition can be held with the consent of the Secretary of State (section 7(1)). This will not require a separate application for consent, since the Secretary of State will indicate to the local authority that a competition can be held, if he is satisfied that there is no suitable academy/Free School proposal.

17. Where consent to hold a competition is given, the local authority must follow the statutory process set out in Schedule 2 to the EIA 2006 (as amended by EA 2011) and the Establishment and Discontinuance Regulations.

18. Significant changes made by EA 2011 are:

- The removal of section 8 EIA 2006, which means that local authorities can no longer submit their own community or foundation school proposals in a competition).
- The new section 7A EIA 2006, which means that at any time before the date specified for the return of proposals, the Secretary of State may direct a local authority to withdraw a competition notice; or, a local authority may withdraw a competition notice with the Secretary of State's consent. This allows a competition to be ended where circumstances have changed e.g. where the new school is no longer needed or an alternative option is found, such as the enlargement of one or more existing schools instead.

19. Academy/Free School proposals and proposals for foundation (by proposers other than a local authority), voluntary controlled and voluntary aided schools, can be submitted into the competition by the deadline specified in the first notice.

COMPETITION – DECISION MAKING

20. The arrangements for deciding a competition have also changed. Since local authorities cannot enter their own school proposals, the Schools Adjudicator will no longer have a role in deciding competitions (unless the local authority is involved in the foundation of a proposed foundation school – paragraph 10 of Schedule 2 EIA 2006).

21. Important changes arising from EA 2011 are:

- Where an academy/Free School proposal is entered into a competition by the specified deadline, the Secretary of State must consider these proposals first to decide whether he is willing, in principle, to enter into a Funding Agreement with the academy/Free School proposer (paragraph 7A of Schedule 2 EIA 2006).
- If an academy/Free School proposal is deemed suitable, the competition ends and the proposer works with the Department and local authority to progress its proposal.

- If an academy/Free School proposal is not considered suitable, or no academy/Free School proposal is received, the competition continues and it is for the local authority to decide which maintained school proposal wins (paragraph 8 of Schedule 2 EIA 2006, subject to the local authority's involvement in any foundation school's foundation); there is no right of appeal.
- Where a competition does not identify a suitable academy/Free School or maintained school, the local authority may publish its own community or foundation school proposal under amended section 11 of EIA 2006; the Schools Adjudicator will be the decision maker in such cases.

ESTABLISHING A NEW MAINTAINED SCHOOL OUTSIDE OF A COMPETITION (under section 10 or section 11 of EIA 2006)

22. It is still possible to publish proposals for maintained schools in certain circumstances as set out below. Flow chart B at Annex A of this document sets out the statutory process for establishing a new maintained school under sections 10 and 11. Proposals under section 10 require Secretary of State consent.

MAINTAINED SCHOOL PROPOSALS – SPECIAL CASES (under section 11 of EIA 2006)

23. In the interests of reducing bureaucracy, the consent of the Secretary of State is no longer required to publish maintained school proposals in the circumstances outlined below.

24. Further detail about these special cases is given in section 11 of EIA 2006, as amended by EA 2011:

- proposals for a new voluntary aided school;
- proposals for a new community or foundation primary school that is to replace a maintained infant and a maintained junior school;
- proposals for a new school resulting from the reorganisation of existing faith schools in an area, including an existing faith school losing or changing its religious designation; or
- local authority proposals for a new foundation or community school, where suitable academy/Free School proposals have not been identified and a competition has been held but did not identify a suitable provider.

25. Proposals for former independent schools wishing to join the maintained sector and new local authority maintained nursery schools can still be published under section 11, as before.

26. In each case a statutory process, as set out in Schedule 2 to EIA 2006 and the Establishment and Discontinuance Regulations, must be undertaken. The Schools Adjudicator will decide local authority proposals, and local authorities will decide proposals from other proposers (except foundation school proposals where the local authority is involved as a member of the foundation (Trust), in which case the Adjudicator will be the decision maker).

OTHER NEW MAINTAINED SCHOOL PROPOSALS (under section 10 EIA 2006)

27. Where an academy/Free School approach is not considered to be appropriate and the proposal does not fall under section 11 special cases, it is still possible to apply to the Secretary of State for consent to publish proposals for replacement community schools, or brand new or replacement foundation or voluntary controlled maintained schools. Each application will be considered on its merits and the particular circumstances of the case, including whether the need for a new school might be better met by an academy/Free School. Where consent is given to publish new maintained school proposals, a statutory process must be followed, as set out in Schedule 2 to EIA 2006 and the Establishment and Discontinuance Regulations.

TRANSITIONAL PROVISIONS

28. Proposals published under sections 7 (where the first notice, inviting proposals for the new school, has been published), 10 or 11 of EIA 2006 prior to the commencement date of the relevant provisions of EA 2011 on 1 February 2012, must continue under the relevant legislation in place prior to the commencement of the new EA 2011 provisions, until they are concluded.

FURTHER SOURCES OF INFORMATION

Associated resources (external links):

- Education Act 2011
<http://www.legislation.gov.uk/ukpga/2011/21/contents/enacted>
- Education and Inspections Act 2006
<http://www.legislation.gov.uk/ukpga/2006/40/contents>
- Academies Act 2010 <http://www.legislation.gov.uk/ukpga/2010/32/contents>
- New Schools Network – An independent organisation devoted to improving education
<http://newschoolsnetwork.org/>
- Independent Academies Association – A national body which is regularly consulted by government and opposition on matters relating to educational change and development
<http://www.iaa.uk.net>

You may also be interested in (internal links):

- Keeling Schedule for section 37 (Schedule 11)
<http://www.education.gov.uk/aboutdfe/departementalinformation/educationbill/a0077986/education-bill-keeling-schedules>
- School Organisation (Establishment and Discontinuance of Schools)(England) Regulations 2007

<http://www.education.gov.uk/schools/leadership/schoolorganisation/a00192027/school-organisation-decision-table>

- **Free Schools**
<http://www.education.gov.uk/schools/leadership/typesofschools/freeschools>
- **Sponsored Academies**
<http://www.education.gov.uk/schools/leadership/typesofschools/academies>
- **University Technical Colleges and Studio Schools**
<http://www.education.gov.uk/schools/leadership/typesofschools/technical>

Annex A – Flow Chart

**PROCEDURES TO ESTABLISH A NEW SCHOOL
MANAGED BY JOE ARDRETT 21 OF THE EDUCATION ACT 2004 ADDRESSING THE
CONSENT AND INSPECTIONS ASPECTS**

A. LA requires either its failure to plan and secure sufficient schools, it needs a new school

Academy/Free School presumption (s7A of EIA 2006)
LA to seek proposals to establish a new Academy/Free School (FS) – LA to provide all the required site and capital funding needed to establish the school. Lead-in and setup revenue costs will be addressed on a case by case basis.
LA notifies SofS of requirements, link to details on LA website can be made from dedicated page on DfE website.
After deadline, LA must report back to SofS re: Academy/FS interest, even if none.
Where proposals are received the LA assesses and may state its preference to SofS for decision.

SofS announces decision. Chosen Academy/FS proposal progressed.

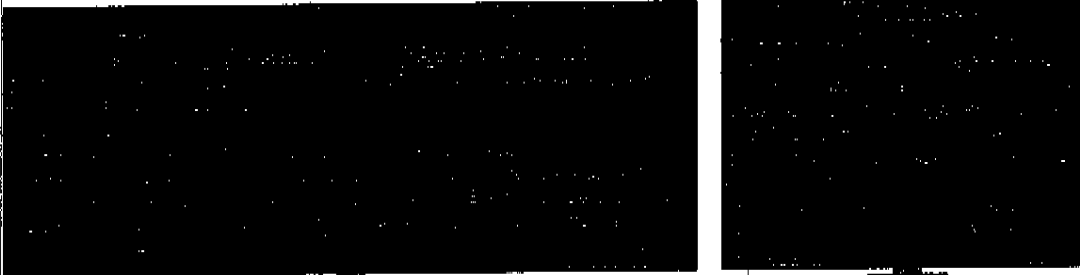
If no proposals or no suitable proposals – SofS consent required to move to competition

Competition (s7 of EIA 2006) – LA to provide site and capital
LA invites proposals for maintained schools (i.e. VA, VC, foundation) and Academies/FS – to be submitted by specified deadline.
LA cannot enter its own proposal in the competition.
Competition can be stopped by the SofS (or LA can seek SofS consent to do so) at any time before the specified deadline.
Where at the specified deadline there are Academy/FS proposals, the competition is suspended to allow SofS consideration of these. If selected, the competition ends and the chosen Academy/FS proposal progressed.

If the SofS is satisfied that there are no suitable Academy/FS proposals the competition continues with publication of the second notice summarising the maintained school proposals received, followed by a 6 week representation period, to include a public meeting.
The LA is decision maker unless it is involved in the Trust of a foundation school bid, in which case the Schools Adjudicator will be decision maker.

If no proposals or no suitable proposals are received, the LA can publish proposals for its own community or foundation school. SofS consent is not required; proposals would be published under s11 (see below).
The Schools Adjudicator will decide the proposal.

B. There is a separate process for the establishment of new schools in certain limited cases, which are outlined below:



Education Bill

These notes refer to the Education Bill

as brought from the House of Commons on 11th May 2011 [HL Bill 67]

Explanatory Notes

New schools

Clause 36: Establishment of new schools

175. Clause 36 gives effect to Schedule 11 which makes amendments to Part 2 of EIA 2006, which deals with the establishment of new schools.

Schedule 11

176. *Paragraph 2* inserts new section 6A into EIA 2006, placing a duty on local authorities to seek proposals for the establishment of an Academy where they are of the view that there is a need for a new school in their area. The local authority must specify a date by which proposals must be submitted and after that date must notify the Secretary of State of the steps taken to satisfy this duty and the proposals that have been submitted or if there have been no proposals. The notification to the Secretary of State must identify a site for the school and any other matters prescribed by regulations.

177. *Paragraph 3* amends section 7 of EIA 2006 so that before publishing proposals for a competition for the establishment of a new school the local authority must obtain the consent of the Secretary of State. In addition, section 7 is amended to remove the ability of the local authority to publish any of its own proposals for a new foundation or community school in a section 7 competition. In consequence, *paragraph 5* repeals section 8 of EIA 2006, which prescribed the circumstances in which the local authority could enter its own proposals for a new school in a competition.

178. *Paragraph 4* inserts new section 7A into EIA 2006 which provides for the local authority (with the consent of the Secretary of State) to withdraw, or for the Secretary of State to direct the withdrawal of, a section 7 notice at any time before the end of the period that proposals may be submitted. The effect of this new provision is that a competition can be halted at this early first stage.

179. *Paragraphs 6* and *7* make amendments to sections 10 and 11 of EIA 2006 which deal with publication of proposals outside a competition. The amendments to section 10 (proposals that require the Secretary of State's consent) provide that the following proposals for a new school can be published with the consent of the Secretary of State:

- local authority proposals for a community or foundation school to replace one or more maintained schools (except infant and junior amalgamations, which do not now require consent), excluding those providing education suitable only for persons over compulsory school age;
- proposals for foundation, and voluntary controlled schools by other proposers (except those within section 11(2) as amended).

180. Under the amended section 11 of EIA 2006 the following proposals will be able to be made without the Secretary of State's consent:

- Local authority proposals for a new community or foundation primary school to replace a maintained infant and a maintained junior school;
- Proposals for the establishment of a new voluntary aided school;
- Proposals for a new foundation or voluntary controlled school resulting from an existing religious school changing or losing its religious designation;
- A new foundation or voluntary controlled school with a religious character replacing an existing religious school, resulting from the reorganisation of faith schools in an area ; and
- Local authority proposals for a new community or foundation school where following publication of a section 7 notice no proposals are approved by the local authority, no Academy arrangements are entered into, or no proposals are received.

181. *Paragraphs 10 to 17* make amendments to Schedule 2 to EIA 2006 which deals with the consideration and approval of proposals under Part 2 of EIA 2006 by the local authority or the adjudicator (in respect of local authority proposals). These amendments are consequential on the amendments made by paragraphs 3 to 9.

182. In addition, these paragraphs have the effect that Academy proposals are no longer submitted to local authorities for approval. Instead, any Academy proposals entered into a section 7 competition will be referred to the Secretary of State, for him to decide if he wishes to enter into Academy arrangements with the proposer. Where there are both Academy and non-Academy proposals in a competition, the Secretary of State must first decide the Academy proposals and notify the local authority if he enters into Academy arrangements as a result of the proposals. If the Secretary of State decides against entering into Academy arrangements in such a case, the non-Academy proposals will be considered by the local authority. Even if the Secretary of State approves the Academy proposals, paragraph 7A of Schedule 2 also enables him to direct that all or any of the non-Academy proposals be considered by the local authority. In such a case, it would be possible for a section 7 competition to result in the approval of both Academy proposals (by the Secretary of State) and non-Academy proposals (by the local authority). This might happen, for example, where Academy proposals are for a small school but the local authority has identified a need for a larger school in its area.

IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

CLAIM NO: CO/7182/2012

B E T W E E N:

THE QUEEN

(on the application of BRITISH HUMANIST ASSOCIATION & JEREMY RODELL)
Claimants

-and-

LONDON BOROUGH OF RICHMOND

Defendant

-and-

(1)ROMAN CATHOLIC DIOCESE OF WESTMINSTER
(2) SECRETARY OF STATE FOR EDUCATION

Interested Parties

EXHIBIT DMV/1

ESTABLISHING A NEW SCHOOL

DEPARTMENTAL ADVICE FOR LOCAL AUTHORITIES AND NEW SCHOOL PROPOSERS

ABOUT THIS DEPARTMENTAL ADVICE

1. On 1 February 2012, section 37 of the Education Act 2011 was commenced, introducing Schedule 11 of the Act. This makes changes to part 2 of the Education and Inspections Act 2006 in relation to the process for establishing new schools, including the academy/Free School presumption. This advice is non-statutory and has been produced to help new school proposers and local authorities understand their duties in relation to these changes.

EXPIRY/REVIEW DATE

2. This advice will be reviewed by October 2012.

WHAT LEGISLATION DOES THIS ADVICE RELATE TO?

- The Education Act 2011 (EA 2011)
- The Education and Inspections Act 2006 (EIA 2006)
- The School Organisation (Establishment and Discontinuance of Schools)(England) Regulations 2007, as amended (Establishment and Discontinuance Regulations)

WHO IS THIS ADVICE FOR?

3. This advice is for:
- Local authorities;
 - New school proposers; and
 - Dioceses and Diocesan Boards of Education.

KEY POINTS

- The new "presumption" for an academy/Free School requires local authorities to seek proposals to establish an academy/Free School in the first instance where they identify a need for a new school.
- Local authorities must continue to plan for and secure sufficient schools for their area in line with their duties under section 14 of the Education Act 1996.
- Local authorities should assess the proposals they receive against the criteria in paragraph 12 below before forwarding all of the proposals to the Secretary of State. He will take into consideration any preference they indicate.
- Local authorities can no longer hold a school competition without the Secretary of State's consent, nor enter their own community or foundation school proposals into a competition.
- Despite the academy/Free School presumption, in certain exceptional circumstances it is still possible to publish proposals for a new maintained

- school outside of a competition, under sections 10 or 11 of the EIA 2006.
- The Secretary of State's consent is no longer required to publish certain proposals, including those for the establishment of new voluntary aided schools, primary schools resulting from infant/junior amalgamations, and new schools resulting from the reorganisation of existing faith provision.
- "Academy" is the legal term which also includes Free Schools of all types, University Technical Colleges (UTCs) and some Studio Schools, including 16-19 and alternative provision (PRU) establishments. This document uses "academy/Free School" as the collective term for these types of schools.
- "Proposer" in this document refers to the body or group that is proposing the new school.

THE EDUCATION ACT 2011

4. Section 37 of EA 2011 introduces Schedule 11, which makes a number of changes to the process for establishing new schools. In particular, it introduces new section 6A of EIA 2006 which sets out the academy/Free School presumption. It makes changes to the existing school competition arrangements (amended section 7 of EIA 2006) and removes the need for local authorities and other proposers to seek the Secretary of State's consent before publishing proposals for certain types of new maintained schools (amended sections 10 and 11 of EIA 2006).

ACADEMY/FREE SCHOOL PRESUMPTION (under section 6A of EIA 2006)

5. Flow chart A at Annex A of this document sets out the revised process for establishing new school provision under the academy/Free School presumption (section 6A) and the new competition process (section 7).

6. Existing statutory requirements mean that local authorities, in their role as commissioners, must plan and secure sufficient schools for their area. Where a local authority identifies the need to establish a new school, new section 6A of EIA 2006 places the authority under a duty to seek proposals to establish an academy/Free School and to specify a date by which proposals must be submitted.

7. It will be for local authorities to decide how best to do this, how to consult on the proposed new school and with whom (e.g. local community, Diocese and any others affected by the proposals). They should be clear from their school place planning about the type (e.g. mainstream, special educational needs, alternative provision), age range, gender and capacity of the academy/Free School they wish to see established.

8. The local authority should take steps to ensure that groups or organisations that might be interested in establishing the new school are aware of the opportunity.

9. The local authority should notify the Department at the outset of its intention to seek proposals for a new academy/Free School and confirm the site it will make available and that it will provide all the capital funding needed to establish the school (as they were required to do for academies established through the previous school competition process). The Department will publish on its website (<http://www.education.gov.uk/schools/leadership/schoolorganisation>) details of those local authorities that are seeking to establish new schools, including links to their

websites. The Department will also inform the Independent Academies Association and New Schools Network, to alert potential proposers/sponsors to the new school's requirements.

10. Once the specified date for academy/Free School proposals has passed, the local authority should send the Secretary of State a notification setting out:

- the steps the authority has taken to seek proposals for an academy/Free School;
- copies of all proposals submitted and the authority's assessment of the proposals;
- confirmation that the authority will provide the required site and all the capital funding needed to establish the new school.

11. The local authority is responsible for meeting project development costs. For lead-in and setup costs, the Department will discuss with the local authority on a case by case basis to identify and agree the most appropriate mechanism to meet these. Until longer term funding arrangements are agreed, the expectation is that local authorities will contribute to these costs. A consultation document on funding reform was published on 26 March 2012.

12. The local authority should provide the Department with an assessment of the proposals it has received, based on the following criteria:

- the quality of the places being added into the system, based on the proposer's vision and educational plan;
- the capability and capacity of the proposer to deliver their proposal to time and on budget, based on their expertise and experience;
- value for money, confirming that the proposer considers that the costs of establishing the new academy/Free School can be met within the estimate of capital costs outlined by the local authority and, where they cannot be met within that estimate, an explanation of the reasons for the additional costs and how any shortfall will be met.

13. The local authority may state its preference, which the Secretary of State will take into consideration when deciding whether or not to enter into a Funding Agreement with any of the proposers.

14. The notification should be submitted to the Department for Education (school.organisationproposals@education.gsi.gov.uk).

15. Where a suitable proposer is identified, it will be for the proposer to work to establish the new academy/Free School with support from the local authority and the Department, as required. The local authority will continue to have an interest because of its duties to secure sufficient suitable schools.

OTHER IMPORTANT CHANGES

SCHOOL COMPETITIONS (under section 7 of EIA 2006)

16. If there is no suitable academy/Free School proposal, a statutory competition can be held with the consent of the Secretary of State (section 7(1)). This will not require a separate application for consent, since the Secretary of State will indicate to the local authority that a competition can be held, if he is satisfied that there is no suitable academy/Free School proposal.
17. Where consent to hold a competition is given, the local authority must follow the statutory process set out in Schedule 2 to the EIA 2006 (as amended by EA 2011) and the Establishment and Discontinuance Regulations.
18. Significant changes made by EA 2011 are:
- The removal of section 8 EIA 2006, which means that local authorities can no longer submit their own community or foundation school proposals in a competition).
 - The new section 7A EIA 2006, which means that at any time before the date specified for the return of proposals, the Secretary of State may direct a local authority to withdraw a competition notice; or, a local authority may withdraw a competition notice with the Secretary of State's consent. This allows a competition to be ended where circumstances have changed e.g. where the new school is no longer needed or an alternative option is found, such as the enlargement of one or more existing schools instead.
19. Academy/Free School proposals and proposals for foundation (by proposers other than a local authority), voluntary controlled and voluntary aided schools, can be submitted into the competition by the deadline specified in the first notice.

COMPETITION – DECISION MAKING

20. The arrangements for deciding a competition have also changed. Since local authorities cannot enter their own school proposals, the Schools Adjudicator will no longer have a role in deciding competitions (unless the local authority is involved in the foundation of a proposed foundation school – paragraph 10 of Schedule 2 EIA 2006).
21. Important changes arising from EA 2011 are:
- Where an academy/Free School proposal is entered into a competition by the specified deadline, the Secretary of State must consider these proposals first to decide whether he is willing, in principle, to enter into a Funding Agreement with the academy/Free School proposer (paragraph 7A of Schedule 2 EIA 2006).
 - If an academy/Free School proposal is deemed suitable, the competition ends and the proposer works with the Department and local authority to progress its proposal.

- If an academy/Free School proposal is not considered suitable, or no academy/Free School proposal is received, the competition continues and it is for the local authority to decide which maintained school proposal wins (paragraph 8 of Schedule 2 EIA 2006, subject to the local authority's involvement in any foundation school's foundation); there is no right of appeal.
- Where a competition does not identify a suitable academy/Free School or maintained school, the local authority may publish its own community or foundation school proposal under amended section 11 of EIA 2006; the Schools Adjudicator will be the decision maker in such cases.

ESTABLISHING A NEW MAINTAINED SCHOOL OUTSIDE OF A COMPETITION (under section 10 or section 11 of EIA 2006)

22. It is still possible to publish proposals for maintained schools in certain circumstances as set out below. Flow chart B at Annex A of this document sets out the statutory process for establishing a new maintained school under sections 10 and 11. Proposals under section 10 require Secretary of State consent.

MAINTAINED SCHOOL PROPOSALS – SPECIAL CASES (under section 11 of EIA 2006)

23. In the interests of reducing bureaucracy, the consent of the Secretary of State is no longer required to publish maintained school proposals in the circumstances outlined below.

24. Further detail about these special cases is given in section 11 of EIA 2006, as amended by EA 2011:

- proposals for a new voluntary aided school;
- proposals for a new community or foundation primary school that is to replace a maintained infant and a maintained junior school;
- proposals for a new school resulting from the reorganisation of existing faith schools in an area, including an existing faith school losing or changing its religious designation; or
- local authority proposals for a new foundation or community school, where suitable academy/Free School proposals have not been identified and a competition has been held but did not identify a suitable provider.

25. Proposals for former independent schools wishing to join the maintained sector and new local authority maintained nursery schools can still be published under section 11, as before.

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5

OTHER NEW MAINTAINED SCHOOL PROPOSALS (under section 10 EIA 2006)

27. Where an academy/Free School approach is not considered to be appropriate and the proposal does not fall under section 11 special cases, it is still possible to apply to the Secretary of State for consent to publish proposals for replacement community schools, or brand new or replacement foundation or voluntary controlled maintained schools. Each application will be considered on its merits and the particular circumstances of the case, including whether the need for a new school might be better met by an academy/Free School. Where consent is given to publish new maintained school proposals, a statutory process must be followed, as set out in Schedule 2 to EIA 2006 and the Establishment and Discontinuance Regulations.

TRANSITIONAL PROVISIONS

28. Proposals published under sections 7 (where the first notice, inviting proposals for the new school, has been published), 10 or 11 of EIA 2006 prior to the commencement date of the relevant provisions of EA 2011 on 1 February 2012, must continue under the relevant legislation in place prior to the commencement of the new EA 2011 provisions, until they are concluded.

FURTHER SOURCES OF INFORMATION

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- **University Technical Colleges and Studio Schools**
<http://www.education.gov.uk/schools/leadership/typesofschools/technical>

Annex A – Flow Chart

PROCESSES TO ESTABLISH A NEW SCHOOL INTRODUCED BY SECTION 11 OF THE EDUCATION ACT 2004 ATTENDING THE CONSULTATION AND INSPECTIONS ACT 2006

A. LA cannot enter its bids to plan and secure sufficient schools, it needs a new school

Academy/Free School presumption (s11A of EIA 2006)
LA to seek proposals to establish a new Academy/Free School (FS) – LA to provide all the required site and capital funding needed to establish the school. Lead-in and setup revenue costs will be addressed on a case by case basis.
LA notifies SofS of requirements, link to details on LA website can be made from dedicated page on DfE website.
After deadline, LA must report back to SofS re: Academy/FS interest, even if none.
Where proposals are received the LA assesses and may state its preference to SofS for decision.

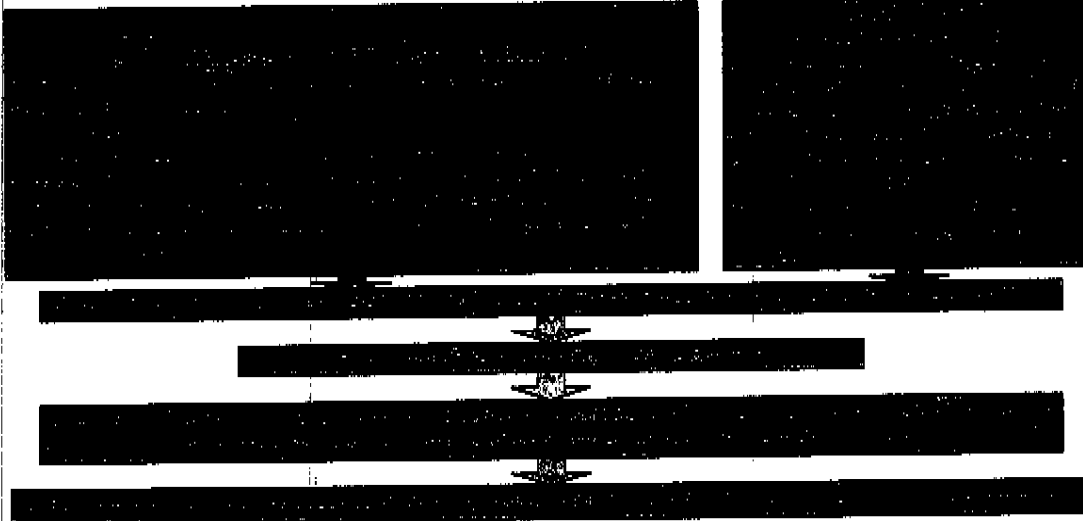
SofS announces decision: chosen Academy/FS proposal progressed. **If no proposals or no suitable proposals – SofS consent required to move to competition**

Competition (s7 of EIA 2006) – LA to provide site and capital
LA invites proposals for maintained schools (i.e. VA, VC, foundation) and Academies/FS – to be submitted by specified deadline.
LA cannot enter its own proposal in the competition.
Competition can be stopped by the SofS (or LA can seek SofS consent to do so) at any time before the specified deadline.
Where at the specified deadline there are Academy/FS proposals, the competition is suspended to allow SofS consideration of these. If selected, the competition ends and the chosen Academy/FS proposal progressed.

If the SofS is satisfied that there are no suitable Academy/FS proposals the competition continues with publication of the second notice summarising the maintained school proposals received, followed by a 6 week representation period, to include a public meeting.
The LA is decision maker unless it is involved in the Trust of a foundation school bid, in which case the Schools Adjudicator will be decision maker.

If no proposals or no suitable proposals are received, the LA can publish proposals for its own community or foundation school. SofS consent is not required; proposals would be published under s11 (see below).
The Schools Adjudicator will decide the proposal.

B. There is a separate process for the establishment of new schools in certain limited cases, which are outlined below:



Education Bill

These notes refer to the Education Bill

as brought from the House of Commons on 11th May 2011 [HL Bill 67]

Explanatory Notes

New schools

Clause 36: Establishment of new schools

175. Clause 36 gives effect to Schedule 11 which makes amendments to Part 2 of EIA 2006, which deals with the establishment of new schools.

Schedule 11

176. *Paragraph 2* inserts new section 6A into EIA 2006, placing a duty on local authorities to seek proposals for the establishment of an Academy where they are of the view that there is a need for a new school in their area. The local authority must specify a date by which proposals must be submitted and after that date must notify the Secretary of State of the steps taken to satisfy this duty and the proposals that have been submitted or if there have been no proposals. The notification to the Secretary of State must identify a site for the school and any other matters prescribed by regulations.

177. *Paragraph 3* amends section 7 of EIA 2006 so that before publishing proposals for a competition for the establishment of a new school the local authority must obtain the consent of the Secretary of State. In addition, section 7 is amended to remove the ability of the local authority to publish any of its own proposals for a new foundation or community school in a section 7 competition. In consequence, *paragraph 5* repeals section 8 of EIA 2006, which prescribed the circumstances in which the local authority could enter its own proposals for a new school in a competition.

178. *Paragraph 4* inserts new section 7A into EIA 2006 which provides for the local authority (with the consent of the Secretary of State) to withdraw, or for the Secretary of State to direct the withdrawal of, a section 7 notice at any time before the end of the period that proposals may be submitted. The effect of this new provision is that a competition can be halted at this early first stage.

179. *Paragraphs 6 and 7* make amendments to sections 10 and 11 of EIA 2006 which deal with publication of proposals outside a competition. The amendments to section 10 (proposals that require the Secretary of State's consent) provide that the following proposals for a new school can be published with the consent of the Secretary of State:

- local authority proposals for a community or foundation school to replace one or more maintained schools (except infant and junior amalgamations, which do not now require consent), excluding those providing education suitable only for persons over compulsory school age;
- proposals for foundation, and voluntary controlled schools by other proposers (except those within section 11(2) as amended).

180. Under the amended section 11 of EIA 2006 the following proposals will be able to be made without the Secretary of State's consent:

- Local authority proposals for a new community or foundation primary school to replace a maintained infant and a maintained junior school;
- Proposals for the establishment of a new voluntary aided school;
- Proposals for a new foundation or voluntary controlled school resulting from an existing religious school changing or losing its religious designation;
- A new foundation or voluntary controlled school with a religious character replacing an existing religious school, resulting from the reorganisation of faith schools in an area ; and
- Local authority proposals for a new community or foundation school where following publication of a section 7 notice no proposals are approved by the local authority, no Academy arrangements are entered into, or no proposals are received.

181. *Paragraphs 10 to 17* make amendments to Schedule 2 to EIA 2006 which deals with the consideration and approval of proposals under Part 2 of EIA 2006 by the local authority or the adjudicator (in respect of local authority proposals). These amendments are consequential on the amendments made by paragraphs 3 to 9.

182. In addition, these paragraphs have the effect that Academy proposals are no longer submitted to local authorities for approval. Instead, any Academy proposals entered into a section 7 competition will be referred to the Secretary of State, for him to decide if he wishes to enter into Academy arrangements with the proposer. Where there are both Academy and non-Academy proposals in a competition, the Secretary of State must first decide the Academy proposals and notify the local authority if he enters into Academy arrangements as a result of the proposals. If the Secretary of State decides against entering into Academy arrangements in such a case, the non-Academy proposals will be considered by the local authority. Even if the Secretary of State approves the Academy proposals, paragraph 7A of Schedule 2 also enables him to direct that all or any of the non-Academy proposals be considered by the local authority. In such a case, it would be possible for a section 7 competition to result in the approval of both Academy proposals (by the Secretary of State) and non-Academy proposals (by the local authority). This might happen, for example, where Academy proposals are for a small school but the local authority has identified a need for a larger school in its area.