



North Tyneside Council

Vivienne Geary
Head of Law and Governance

North Tyneside Council
Quadrant
The Silverlink North
Cobalt Business Park
North Tyneside
NE27 0BY

Tel: (0191) 643 5339

Fax: (0191) 643 2451

E.mail: vivienne.geary@northtyneside.gov.uk

www.northtyneside.gov.uk

FIRST CLASS

Rt Hon Michael Gove MP
The Secretary of State for Education
Sanctuary Building
Great Smith Street
Westminster
LONDON SW1 3BT

Our Ref: VMG(LW)/JH

Date: 18 July 2013

Dear Sir

Re: Letter before Proposed Claim for Judicial Review concerning Kings Priory Academy Proposals

To:

Rt Hon Michael Gove MP
The Secretary of State for Education

Copied to the Treasury Solicitor, the King's School Tynemouth, the Priory Primary School and Woodard Academies Trust (details below; "the Interested Parties").

THE CLAIMANT:

North Tyneside Council
Quadrant
The Silverlink North
Cobalt Business Park
North Tyneside NE27 0BY

REFERENCE DETAILS:

Louise Watson, Senior Manager Legal Services on behalf of Vivienne M Geary, Head of Law and Governance

THE DETAILS OF THE MATTER BEING CHALLENGED:

The decisions challenged are those of the Secretary of State of 5 July 2013, to proceed with the proposal for the Kings Priory Academy to open on 1 September 2013 and to enter into a statutory funding agreement for that purpose ("the Funding Agreement").

North Tyneside Council was informed by email at 18:16 on Friday 5 July 2013 (i.e. after close of business) that the Secretary of State had decided to enter into the Funding Agreement. The letter setting out the Secretary of State's reasons was not sent to the Council until the following Wednesday, 10 July 2013.

THE ISSUE:

The factual background

The Council became aware on 3 September 2012 that the Governing Body of Priory Primary School (a community primary school maintained and funded by the Council) ("Priory School") and the Governing Body of the King's School Tynemouth ("King's School") (an independent school, which charges fees) had made an application under section 3 of the Academies Act 2010 to the Secretary of State for an Academy Order to be made in respect of Priory School.

Despite the Secretary of State's obligation under section 4(4)(b) of the Academies Act 2010, the Council was not given a copy of the Academy Order when it was made on 12 July 2012 i.e. near the start of the summer holiday period. The Secretary of State was in breach of his obligation under section 4(4)(b) of the 2010 Act during the summer holiday period in 2012, with the consequence that the Council discovered the existence of the proposal for a new academy from the press, when confronted with it by journalists and asked for comment in early September 2012. The Secretary of State had to be reminded of his obligation before belatedly performing it on 24 September 2012. Any arguments on delay or prejudice which the Secretary of State may now advance need to be considered in that context.

The Council responded to the subsequent consultation exercise undertaken by Priory Primary School's Governing Body and the Woodard Trust, making the following points (in summary):

- There had been no opportunity for the Council to contribute its views to earlier discussions between the Governing Body of Priory Primary School and the Woodard Academies Trust. The Council was not opposed in principle to academies, but it was opposed to these proposals in their current form due to the anticipated impact upon other schools and the lack of evidenced educational benefit.

- The Council raised concerns about the accuracy of the financial information relied upon in respect of the proposals. Financial considerations have been prominent in all discussions and literature regarding this matter to date. The Council asked for steps to be taken to ensure that members of the Governing Body of Priory Primary School and consultees were not misled regarding the true financial position of the King's School and of any resulting academy.
- The Council provided a commentary on the educational case for change, identifying risks and explaining that "*without further information as to how those risks will be mitigated it is unclear how any education benefits will be realised*".
- The Council raised further concerns about the impact the proposals will have upon other schools in the borough and upon which representations will be made to the Secretary of State for Education. The two main concerns "*centre upon the additional surplus capacity that the Academy would create in the whole school system at a time when secondary numbers are falling and the significant detrimental impact the merger of the two schools would have upon the principal feeder school which will experience a 35% decline in its pupil roll over a 5 year period.*"

The Council sent a pre-action protocol letter to the Governing Body of the Priory School (copied to the Interested Parties and the Secretary of State) dated 24 May 2013, which challenged the decision of the Governing Body of Priory Primary School made on 25 March 2013 that Priory School should merge with King's School and convert into an academy. The decision was challenged on the ground that it was tainted by the Chair of Governor's conflict of interest. In response, the Governing Body offered to re-take the decision, without any involvement on the part of the Chair. The Council accepted this offer. On 18 June 2013, three Governors absented themselves from the meeting in order to address the concerns raised regarding interests; and the Governing Body confirmed its earlier decision to merge with King's School and thus become part of the new academy.

In September 2012 and October 2012 the Council received assurances from the Department for Education that it would work in conjunction with the Council to prepare an impact assessment. However, despite prompting by the Council the Department did not engage with the joint assessment work. In the absence of a joint approach, Council officers gathered impact assessment data to inform the Council's own views upon the proposals. Requests to commence the work were not responded to and in March 2013 the Department's position changed to one of agreeing to consider evidence provided by the Council. In February 2013 the Department indicated that its impact assessment was near completion (this was without the benefit of any data or other input from the Council), when this was questioned and a copy of the document requested no response was received until 29 April 2013 when the position changed to that of indicating that although some work has been done on impact assessment documentation it was incomplete and the Department was unwilling to share the "work in progress".

On 1 May 2013 Department officials met with Council officers to discuss the Kings Priory Academy proposal. On 9 May 2013 the Council submitted information to the Secretary of State, including the following issues which were amongst those highlighted in the covering email:

"The proposal will introduce 930 (105 primary and 825 Secondary) additional maintained places at a time of falling school rolls and increasing surplus capacity because of a lower birth rate feeding through into secondary school provision. Overall the Secondary surplus capacity across our school system is currently 14.1% which was forecast to rise to 18.1% by 2015/16 without the additional places being introduced by the new Academy. Having taken account of the North Tyneside student population already being educated at Kings we estimate that surplus capacity will rise to 20.1% as a result of the net additional maintained places being added to the system.

The amalgamation of Priory Primary School with Kings School to create an all through 3 – 18 school will result in a disproportionate impact on neighbouring secondary schools and in particular Marden High School. The impact assessment (confirmed by the recent admissions data shared with the Authority by Woodard Academies Trust) indicates that this will result in a 35% decline in the roll of Marden."

The accompanying document explained that "Overall, the impact in year 7 in 2013/14 as a result of Priory pupils transferring to Kings Priory and the allocation of pupils to "external" places (based on the first preference applications to schools in North Tyneside) equates to 35% of the PAN [published admission number] at Marden High School".

The Council identified concerns about the King's School's financial position. The statement in the 2012 accounts showed that it had just over £1 million in creditors falling due within one year (i.e. by August 2013). There was a further £4 million owed to creditors (bank loans and overdrafts), falling due in more than one year. In the accounts it was further noted that:

"In May 2011 the overdraft used to fund the Oswin building project was replaced by a five year term loan repayable by instalments between 2013 and 2016 in line with projected cash flows. The bank loan is secured by a charge over the school's freehold property. Interest is charged at 3.25% above London Interbank Offered Rate (LIBOR) throughout the life of the loan". The Directors' Report explained that: "In common with other independent schools, the governors have invested substantial sums into new school buildings in recent years and have a continuing programme of refurbishment, development and investment to maintain excellent teaching facilities for our pupils. In common with most independent schools, and due to the having to fund their own capital investment plans, free reserves are at a negative balance illustrating the extent of the investment in our school".

On 19 June 2013, the Council set out its concerns and asked the Secretary of State for an assurance that public funds would not be used to pay the outstanding debts of an independent school. The Council had not received a substantive response to this query by the date of the Secretary of State's decision.

Karen McGarry of the Department for Education asked on 26 June 2013 for the data behind the surplus place calculations which had been provided by the Council on 9 May 2013. The Council responded the next day to explain the figures (to Ms McGarry's satisfaction) as follows:

"The figures referred ... were based on an October 2012 update to the North Tyneside pupil projection model.

The current capacity in our mainstream schools for Year 7 upwards is 13,701. At the October 2012 census there were 11,766 pupils in Y7-13 in all of our mainstream schools. Therefore there were 1,935 surplus places which equates to the 14.1% figure quoted.

As you will appreciate, the model is continually updated, but at the time (October 2012) the projection for 2015/16 was 11,226. This figure equates to 2,475 surplus places, giving a figure of 18.1%.

With the additional state funded places at the proposed Kings Priory School of 345 (825 minus 480 pupils already in the school), this would give a total secondary capacity of 14,046. Given the projections of 11,226, this would equate to a surplus capacity of 2,820 places which is 20.1% figure. Again as referenced in the original e mail to Steve.

It should be noted that in reviewing the overall assessment of the school population across North Tyneside, consideration had been given to options for addressing the relatively high level of surplus places in 2015/16. However projections suggest that from this point the surplus capacity will reduce year on year to 2,090 places (15%) by 2018/19 and to 1,236 places (9%) by 2022/23 which is the level we retain to accommodate first preference applications. We were therefore considering options e.g. federations to strengthen resilience of schools without removing the capacity which would be required in future years. The introduction of additional school places through the Kings Priory Academy means this approach will have to be reviewed.

Notwithstanding this, our principle concern relates to the impact of Kings Priory on neighbouring schools, particularly Marden High School. Our opposition therefore is to the amalgamation of Priory Primary with King's School given that Priory is the main feeder to Marden High School."

The Council wrote to Ms McGarry again on 28 June 2013, following a telephone discussion in which Ms McGarry had mentioned that the Department did not share the Council's view regarding the impact of the proposed Academy on Marden High School. She had further indicated that it was not Department policy to release information relating to Free School proposals and that this policy would be applied in relation to Kings Priory School. The Council therefore wrote to request formally, under the Freedom of Information Act 2000, all information relating to the Department's detailed impact assessment of the Kings Priory Academy proposal and the supporting statistical analysis. To date, the Council has not received the information requested.

The Council was informed by email at 18:16 on 5 July 2013 that the Secretary of State had decided to enter into the Funding Agreement. The letter setting out the Secretary of State's reasons was not sent to the Council until 10 July 2013.

The legal framework

Under section 1(1) of the Academies Act 2010, "*The Secretary of State may enter into Academy arrangements with any person ("the other party")*". Academy arrangements include an "Academy agreement" (section 1(2)). An academy agreement is defined as an agreement between the Secretary of State and other party, under which the other party undertakes, in return for payments from the Secretary of State, to establish, maintain and carry on (or provide for the carrying on) of an educational institution in England which meets specified requirements (section 1(3)). Academies are prohibited from charging for admission to, or attendance at, the school (section 1(9)).

Payments by the Secretary of State under an Academy arrangement "*may be in respect of capital or current expenditure*" (section 2(1) of the Academies Act 2010). Section 2(3) provides that:

"If an Academy agreement makes provision for payments in respect of capital expenditure, the agreement may provide for the repayment to the Secretary of State, in circumstances specified in the agreement, of sums determined in accordance with the agreement."

Before the Secretary of State has the power to enter into "Academy arrangements" with any person for the conversion of a maintained school, a number of steps have to be completed.

In the case of a maintained community school, "*The governing body of a maintained school in England may apply to the Secretary of State for an Academy order to be made in respect of the school*" (section 3(1) of the Academies Act 2010);

By virtue of section 4(1):

"The Secretary of State may make an Academy order in respect of a maintained school in England if—

(a) an application in respect of the school is made under section 3 [i.e. by the Governing Body, in the case of a maintained community school], or

(b) the school is eligible for intervention (within the meaning of Part 4 of EIA 2006)".

An Academy order is defined by section 4(2) as "*an order for the purpose of enabling the school to be converted into an Academy*".

The effect of an Academy order is that "*The local authority must cease to maintain the school on the date ("the conversion date") on which the school, or an educational institution that replaces it, opens as an Academy ("the Academy")*" (section 6(2) of the Academies Act 2010).

In the case of a maintained school, it is only converted into an Academy if “Academy arrangements are entered into in relation to the school or an educational institution that replaces it” (section 4(3) of the Academies Act 2010).

Before the conversion of a maintained school, section 5(1) of the Academies Act 2010 provides that “*there must be a consultation on the question of whether the conversion should take place*”. Section 5(2) provides that “*The consultation may take place before or after an Academy order, or an application for an Academy order, has been made in respect of the school*”. The consultation must be carried out by the maintained school’s governing body (unless it is eligible for intervention, as defined) (section 5(4)). “*The consultation must seek the views of such persons as the person carrying it out thinks appropriate*” (section 5(5)).

If the Secretary of State is deciding whether to enter into Academy arrangements in relation to “*an existing educational institution that, if the arrangements are entered into, will provide education for pupils of a wider range of ages*”, section 9 of the Academies Act 2010 applies. In such a case, “*The Secretary of State must take into account what the impact of entering into the arrangements would be likely to be on maintained schools, Academies, institutions within the further education sector and alternative provision in the area in which the institution is proposed to be, or is, situated*” (section 9(2)).

Further, in such a case, the person with whom the Secretary of State proposes to enter into Academy arrangements “*must carry out a consultation on the question of whether the arrangements should be entered into*” and “*the consultation must seek the views of such persons as the person carrying it out thinks appropriate*” (section 10(1)-(3) of the Academies Act 2010).

The grounds of challenge

(a) The public sector equality duty

The Secretary of State has failed to comply with his public sector equality duty, under section 149 of the Equality Act 2010.

The decision letter, under the heading “Public Sector Equality Duty”, did no more than quote the statutory provisions and state that in exercising his powers by signing the Funding Agreement, the Secretary of State “*was implementing a policy the impact of which is directed at achieving those statutory objectives and the impact of which was measured in equality impact assessments carried out in 2010 and 2011*”.

This appears to reflect a blanket assumption by the Secretary of State that academies *per se* have no adverse equality implications and that he does not have to do anything further to comply with the equality duty when making a decision about any particular Academy proposal. This is wrong as a matter of law. The equality implications of a particular Academy proposal depend upon the impact of that proposal in the locality, not on generic and abstract macro-assessments.

The following principles are well established: *R (Brown) v Secretary of State for Work and Pensions* [2009] P.T.S.R. 1506 per Aikens LJ, considering one of the predecessor duties, in the Disability Discrimination Act 1995) (approved by the Court of Appeal in *R (Domb) v London Borough of Hammersmith and Fulham* [2009] LGR 843):

“91 Secondly, the “due regard” duty must be fulfilled before and at the time that a particular policy that will or might affect disabled people is being considered by the public authority in question. It involves a conscious approach and state of mind. [...]

92 Thirdly, the duty must be exercised in substance, with rigour and with an open mind. The duty has to be integrated within the discharge of the public functions of the authority. It is not a question of “ticking boxes”. [...]

95 Fifthly, (and obviously), the duty is a continuing one.”

The continuing nature of the duty was emphasised by Pill LJ in *R (Bailey) v London Borough of Brent* [2011] EWCA Civ 1586 at paragraph 83:

“The section 149 duty must be kept in mind by decision makers throughout the decision-making process. It should be embedded in the process but can have no fixed content, bearing in mind the range of potential factors and situations [...] What observance of that duty requires of decision makers is fact-sensitive; it inevitably varies considerably from situation to situation, from time to time and from stage to stage.”

In this case, the Secretary of State’s decision will guarantee places at the new Academy for all the current (fee-paying) pupils of King’s School. Similarly, the pupils at Priory Primary School will transfer automatically to the Academy. According to the Secretary of State, the new Academy will have higher academic standards than the other schools in the area and is expected to be very popular with local parents. On the Secretary of State’s own case, the Academy will have a moderate impact on Marden High School and it is not disputed that there will be a 35% decline in its expected intake in this academic year.

Despite this obvious adverse impact on the children at Marden High School, the Secretary of State appears not to have considered whether a greater proportion of them (in comparison to the group of children at the fee-paying King’s School) have particular protected characteristics such as their race, any disability (including special educational needs) or their gender. Without the Secretary of State having identified and had due regard to the equality implications of this particular academy proposal, the decision is necessarily unlawful.

If the Secretary of State refuses to revisit his decision, we will develop our arguments as necessary and we will of course consider the Secretary of State’s response to this letter, but the point seems quite a short and simple one and we cannot see any answer to it. It is far from being technical or academic: it goes directly to the provision of state education to all school age children on an equal basis across the whole of North Tyneside, irrespective of race, gender, disability and any other relevant protected characteristic.

(b) The consultation exercise was unlawful

The decision letter dated 10 July 2013 stated that:

“The Secretary of State has agreed to fund the existing loan and overdraft of one of the predecessor schools by securing a charge against the assets of The Woodard Corporation on the land and buildings of the Kings School, Tynemouth. This enables the continued all-through educational provision in the heart of the community In considering the costs of the proposal the Secretary of State has concluded that the provision of 980 additional state sector places represents good value for money.”

No information was provided to consultees about the King’s School’s finances or about the Secretary of State’s intentions in this respect. The omission of such important information vitiated the consultation exercise. It follows that the Secretary of State’s decision was unlawful; his power to enter into a Funding Agreement is conditional on there having been a (lawful) consultation process.

The Council only became aware of the Secretary of State’s intentions in relation to funding when it received the decision letter of 10 July 2013, despite having requested an assurance that the Secretary of State would not use public funds to pay the outstanding debts of an independent school. Consultees were entitled to formulate their responses in the consultation exercise with knowledge that the Secretary of State intended to use public funds to underwrite the debt of the King’s School.

(c) The Secretary of State breached his statutory duty to take into account the impact on maintained schools in the area

The Secretary of State’s conclusion that the adverse impact on Marden High School would be moderate, is misconceived and founded on a serious error of fact.

The Secretary of State does not dispute the Council’s analysis that there will be a 35% decline in its expected intake for Year 7 in this academic year. This is a school which had failed to fill its admission numbers this academic year. The impact on this academic year’s intake (alone) is clearly significant and will have implications for that year group as it progresses through the school.

Further, the Secretary of State’s conclusion that the impact would be spread across other schools in future years, is irrational. The Council’s area already has a surplus of secondary school places of 14.1%, which is expected to rise to 18.1%. Whilst Marden High School is popular, even now it cannot fill its admission number on first place preferences alone. The Secretary of State relies on the number of applications where it is named as second or third preference and describes it as “*clearly oversubscribed*”. This is a misuse of language: applicants in this area normally receive an offer of a place at their school of first preference. It is wrong to say that applicants who express Marden High School as their second or third preference choose that school. They do not go there. That is why it has failed to fill its admission number this year, even before applying the anticipated 35% decline to its intake. There is no reason to suppose that more children than previously will choose Marden High School as their first choice if the Academy opens. The 35% decline is set to be repeated next year and in future years, with significant implications for Marden High School.

The Secretary of State thereby breached his statutory duty under section 9(2) of the Academies Act 2010 to “take into account what the impact of entering into the arrangements would be likely to be on maintained schools, Academies, institutions within the further education sector and alternative provision in the area in which the institution is proposed to be, or is, situated”. His consideration of that issue was founded on the misconception that Marden High School is oversubscribed, when plainly it is not.

(d) The Secretary of State’s conclusion that the proposal was good value for money was irrational

Under the heading of value for money, the decision letter of 10 July 2013 recorded that “*The Secretary of State has agreed to fund the existing loan and overdraft of one of the predecessor schools by securing a charge against the assets of The Woodard Corporation on the land and buildings of the Kings School, Tynemouth. This enables the continued all-through educational provision in the heart of the community [...]. In considering the costs of the proposal the Secretary of State has concluded that the provision of 980 additional state sector places represents good value for money*”.

In circumstances where there is an anticipated surplus of 18.1% in secondary school places and where the King’s School’s loan and overdraft amount to approximately £5 million, it is difficult to see how any reasonable Secretary of State could find that the proposal for the new academy represents good value for money.

(e) In light of the above failings, the decision was irrational

The cumulative impact of points (b), (c) and (d) above is that no reasonable Secretary of State could have decided to enter into the Funding Agreement. The matters relied on in this letter, quite apart from the breach of the public sector equality duty in section 149 of the Equality Act 2010, are therefore not ones that can be cured by revisiting the decision challenged in short order.

The details of the action that the defendant is expected to take

The decision of 5 July 2013 was unlawful for the reasons set out in the grounds above. It follows that the Secretary of State is expected not to rely on that decision to proceed with the proposal for the Kings Priory Academy. Any lawful decision to proceed could only be taken following:

- (i) further discussion with the Council to confirm the impact on other schools in the area (including consideration of any steps the Department for Education would suggest could mitigate such impact);
- (ii) consultation on whether the proposal is good value for money in the circumstances, and
- (iii) compliance with the public sector equality duty (including consideration of steps that could be taken to mitigate any adverse impact on groups with protected characteristics).

The details of the legal advisers, if any, dealing with this claim

Louise Watson, Senior Manager Legal Services, Law and Governance, North Tyneside Council on behalf of Vivienne M Geary, Head of Law and Governance

Contract details: louise.watson@northtyneside.gov.uk (0191) 643 5325

The details of any interested parties

The Treasury Solicitor
One Kemble Street
London WC2B 4TS

The Governing Body of the King's School
Huntington Place
Tynemouth
Tyne and Wear NE30 4RF

The Governing Body of Priory Primary School
Percy Park Road
Tynemouth
Tyne & Wear NE30 4LS

Woodard Academies Trust
1 Adam Street
London
WC2N 6LE

The details of any information sought:

Information relating to the (i) educational impact assessment; and (ii) equality impact assessment is sought at this stage (see next section below). A substantive response to the Council's request (referred to above) under the Freedom of Information Act 2000 is required.

The details of any documents that are considered relevant and necessary:

The Secretary of State is asked to provide the Council with a copy of its educational impact assessments (referred at the top of the fourth page of the decision letter dated 10 July 2013).

Further, please provide copies of all information that was before the Secretary of State when he says he complied with the public sector equality duty. Please confirm whether or not this information included the equality impact assessments from 2010 and 2011 (referred to on the final page of the decision) and, in any event, please provide copies of those EIAs.

The address for reply and service of court documents:

Louise Watson
Senior Manager Legal Services
Law and Governance
North Tyneside Council
Quadrant
The Silverlink North
Cobalt Business Park
North Tyneside NE27 0BY

louise.watson@northtyneside.gov.uk

Proposed reply date:

You are requested to reply by no later than 4pm on Thursday 25 July 2013. In light of the correspondence to date and the urgency of this matter (with Kings Priory Academy due to open on 1 September 2013), we have requested a response within 7 days.

Yours faithfully



Vivienne Geary, LL.M Solicitor
Head of Law and Governance