



## Education Answers

### Free School Bids and the Diocesan Family of Schools

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#### **SUMMARY**

Guidance for Dioceses and others considering new schools with Church of England designation, and the reasons why one DBE cannot propose a new school in another Diocese.

#### **1. Introduction: Free School Bids, Other New School Bids And The Diocesan Family Of Schools**

1.1. Free School bids are already fairly common and may well increase markedly in some dioceses as a consequence of demographic growth and of both DfE and Church of England Education Office national policies. It is also still the case that new voluntary schools are sometimes created. This paper addresses some of the broad legal issues that making such bids raise and is intended to provide overall guidance to prospective bidders and Diocesan Boards of Education. It does not consider the bidding process in detail and specific advice should always be taken when bodies are considering bids or when the DBE becomes aware of a bid that would if successful lead to the establishment either of a new Church of England Academy or of a new non-church academy established by a Church of England body or a body including Church of England persons.

#### **2. Who Can Make Bids For The Establishment Of A Free School?**

2.1. In principle any person or group of persons may propose to establish a Free School. There are two routes (a) by direct application to the DfE and (b) by submitting a bid to the relevant Local Authority when it thinks it needs a new school and invites proposals for a new provision academy as required by s6A of the Education and Inspections Act 2006. . Other than that such a Free School would be the subject of academy arrangements under s1 of the Academies Act 2010, there is not otherwise any specific legislation in respect of route (a). The DfE publishes relevant guidance [at this link]([https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/541945/How to apply to set up a free school guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/541945/How_to_apply_to_set_up_a_free_school_guidance.pdf)).

### **3. What About Bids For New Voluntary Schools?**

3.1. In consequence of s6A Local Authority competitions for the establishment of a new maintained school are nowadays rare. However where such competitions occur any person may bid to promote a new voluntary school. More frequent are proposals under s10 for a new VC school (which require the consent of the Secretary of State) or under s11 for a new VA school (which require no such consent). In both cases any person can make the proposal (and the LA is free to support the proposal if it wishes).

### **4. Who Can Make Proposals?**

4.1. Other than as set out below, no legislation sets out specific limitations as to the persons able to establish a Free School or a maintained school that will either

(a) be designated as having a Church of England religious character or

(b) be established in such a way as to make it a "church school" as defined in the DBE Measure 1991 and thus bring it under the Measure.

4.1.1. In practice in modern times any such proposals have normally been made by the relevant DBE or occasionally by two DBEs acting in partnership.

4.1.2. However, nothing actually prevents local clergy or other local church groups or anyone else (unless a body with more narrowly defined powers – for which see below) proposing a new voluntary school which they might or might not intend to be designated as having a Church of England Religious Character

4.1.3. Also, nothing prevents a similar group from proposing a new Free School intended to have such a character.

4.1.4. The Education Acts do not prevent a person from one diocese proposing a school that would actually be established in another.

4.2. It should be noted however that (either under statutory Regulations for voluntary schools or under the non-statutory process required for Free Schools) consultation with the DBE of the diocese where the school is to be established is required in respect of all such proposals.

4.2.1. For maintained schools, under Regulation 9 of the Designation Regulations, a school may only be designated as a CE school with the approval of the DBE for the diocese in which the school is situated.

4.2.2. For academies, the Secretary of State is not required to consult the DBE, but he may do so, and in our view it would not be reasonable to designate an academy as being a CE school without the agreement of the DBE.

4.3. The general powers notwithstanding, however, our view is that other legislation as set out below prevents diocesan bodies from one diocese from establishing a school in another diocese.

### **5. What Is The Impact Of The Canons And Other Governing Law Of The Church Of England?**

- 5.1. The actions of a diocesan body or of any person either licensed by a diocesan bishop or appointed by a diocesan bishop as the bishop's officer are subject to the provisions of the Canons of the Church of England and to Church Measures and to its customs generally.
  - 5.1.1. Amongst other matters, these prevent one church person or body from exercising powers, rights and duties that belong in law to another church person or body.
  - 5.1.2. More specifically, the DBE Measure gives a DBE statutory "functions" in respect of its diocese alone. It has no powers to act in respect of any other diocese.
- 5.2. Hence, while a DBE might be thought to be able to promote a new Free School anywhere in England, it could not do so using its powers as a DBE, and such a school if promoted could not be a church school without the agreement of the DBE into whose area it fell.
  - 5.2.1. In consequence the DBE could not act unilaterally in the matter at all, since it has no powers to promote a school which is not a Church of England school.
  - 5.2.2. Similarly, individual persons (being either licensed or appointed by the bishop) cannot use the powers they are given to exercise within their own diocese within some other diocese without explicit invitation or permission so to act.
  - 5.2.3. The DDE specifically would have no power so to act in his corporate capacity in some other diocese.
- 5.3. None of this prevents individuals from acting in a purely private capacity (ie explicitly not ex officio) but in such circumstances any school they promoted could not be set up by them as a church school as defined by the Measure. If they wanted to set it up so as to be a church school then they would have to involve the diocese in which the school was to be established.
- 5.4. **LBMW advice is consequently** that:
  - 5.4.1. Church of England clergy or other licensed persons or bishop's officers do not have the authority to promote a new Free School otherwise than within their own parish or other geographical limits as specified in respect of their role; and
  - 5.4.2. no Diocesan Board of Education can promote a Free School or a new voluntary school other than within its own diocese.
- 5.5. This does not prevent two or more DBEs assisting one another in promoting a Free School or a new voluntary school nor an individual incumbent (for example) seeking support from others in respect of a proposal for the establishment of a new school in his own parish.

## 6. What is the Impact of the DBE Measure 1991?

- 6.1. The DBE Measure has not been updated so as to reflect recent Education Acts and hence only touches on academies in rather general terms. However an academy is a "church school" as defined by the Measure if it meets (or will meet) the definition in section 10(1A) of the Measure. All references in the Measure to a "church school" would consequently include such an academy.

- 6.2. Hence s2(1)(c) (the promotion of new church schools) includes new church academies. A DBE cannot promote or assist in the promotion of an academy that is not in the diocese.
- 6.3. Similarly s3 in principle covers church academies, though the references to legislation given as the Measure now stands are only those that obtain for maintained schools.
- 6.4. It should be noted also that where the Education Acts give powers to the "relevant religious authority" in respect of Church of England schools this refers always to the DBE of the diocese in which the school stands. No other body can be the religious authority for a Church of England school.

## **7. What Possible Role Is There For An Academy Trust From One Diocese To Act Within Another?**

- 7.1. In our view a church academy trust in one diocese similarly has no power of itself to propose to establish a new church school in another diocese. What the DBE cannot do itself it cannot procure by means of an agency of which it is itself one of the proprietors.
- 7.2. However nothing prevents "joint enterprises". It is perfectly proper for diocese A to propose a new school but have an agreement with an academy trust in diocese B to take the proposed new Free School into its structure. Note however that the formal proposal must come from the diocese in which the new school is situated.
- 7.3. Then the detail is mainly a matter of changes to the articles of the host AT and careful wording of the rest of the academy documentation to ensure that the roles given to the DBE are allocated to the diocese in which the Free School actually sits.
- 7.4. This way forward reflects arrangements for sponsored academies already in place in various parts of England between one diocese and another.

## **8. What Impact Does The Memorandum Of Understanding Have On Such Bids?**

- 8.1. The Memorandum of Understanding signed in April 2016 between the National Society (Church of England Education Office) and the Secretary of State also contains provisions relevant to this situation.
- 8.2. Key Principle 2 immediately introduces the concept of preserving a "diocesan family of schools" and was deliberately made "subject to agreements between one DBE and another". This wording was added to indicate that one diocese might seek help from another. It does not however enable a diocese to intervene within the territory of another. KP2 also provides that it is for each DBE "to plan strategically for the exercise of this responsibility". The Memorandum therefore makes it clear that the desirability or otherwise of a church school in any specific location is entirely a matter for the DBE of the diocese where the school is intended to be created and for no other party.
- 8.3. Paragraph 14 of the main text of the Memorandum makes it plain that any discussions about a possible new Free School are for the RSC and the DBE of the diocese where it is to be established, not for other parties.

## **9. What Relationship Should Such Bids Have To DBE Policy?**

9.1. Hence policy decisions as to the placing of new church schools in any given diocese are for the DBE of that diocese alone and not for anyone else – within the diocese or outside it. Any other party that wishes to express an interest must before doing so consult with the relevant DBE in order that it can gain its prior agreement to work in partnership with it to make a bid under either of the regimes listed in paragraphs 1 and 2 above.

## **10. What About Bids Emerging From Bodies Other Than The DBE Within The Relevant Diocese?**

10.1. Nothing in principle prevents an existing diocesan academy trust from bidding to create a church Free School within the same diocese. The DBE (or its Umbrella Trust) will normally be a member of such an AT or MAT and so can influence such bids from inside the company. The DBE will also have to be consulted under either procedure and its strategic plan will be a relevant factor that both the RSC and the LA will need to take into account. In practice it is essential that any church MAT considering making a Free School bid consult with the DBE before so doing.

10.2. Other parties may also seek to make a bid but any clergy involved such be careful not to be acting outside their own parish and again prior consultation with the DBE is essential.

## **11. What About Major Extensions Of Existing Academies ?**

11.1. While s 2(3) of the DBE Measure has not been updated in detail to include explicit reference to academies, the requirement there to gain the prior advice of the DBE and to have regard to that advice in respect of proposals that would be statutory proposals if they were made in respect of maintained schools must be observed. Consultation with the DBE will also be mandatory once a proposal is published and the Secretary of State is required by the terms of the Memorandum to take account of diocesan policy in determining such proposals.

## **12. What About The Possibility Of A Church School Becoming Selective?**

12.1. Such a change would involve a change to the admissions policy of the school. This cannot be made without a church school consulting the DBE under the provisions of Regulation 12 of the School Admissions (Admission Arrangements and Coordination of Admission Arrangements) (England) Regulations 2012. This is reflected in s3(cc) of the DBE Measure, which explicitly requires that the school seek the advice of the DBE and "have regard to" that advice prior to the required statutory consultation.

## **13. Conclusions**

(a) The DBE of one diocese cannot itself promote a new school in another diocese;

- (b) nor can any of its MATs do so;
- (c) individual Church of England clergy must be careful in promoting a new school not to be doing so outside their own parish;
- (d) but nothing prevents one diocese (or one parish) providing assistance and resource for another under some contractual or partnering arrangement.