

CHANGE OF DfE RECOMMENDED GOVERNANCE STRUCTURE – (Revised 12 Mar 21)

Situation

There has been a change to DfE and ESFA guidance on recommended Governance structure which needs to be brought to the attention of the Governors and a discussion required on the following:

1. The status of the current CCHS an academy trust members, and
2. Continuing to have Staff Governors.

Background

- The revised DfE Governance Handbook published in October 2020, a new DfE document entitled 'Academy Trust Governance – Structures and Role Descriptors' also published in October 2020, and the Academies Financial Handbook for September 2020 all contained new guidance on the preferred structure for academies, in particular academy members. (Both of these documents are in the Governor Information section of the Governor Portal).
- All academy trusts have both trustees (governors) and members. CCHS converted to an academy trust on 1st January 2011 and the trust's Articles of Association (based on the DfE model at the time) are written such that the governors are the company directors and that the incumbents of the Management Committee are the company members.
- On conversion the Headteacher remained an ex-officio governor and, as a member of the Management Committee, therefore automatically became a company member.

Note: DfE uses the term trustee in all its documents whilst CCHS still uses the term governor.

New Guidance

The relevant change in the guidance is that academy members should be a separate level above, and ideally not the same people as, the trust board (Full GB). The following extracts show the significant sections of the documents listed above.

Governance Handbook (Page 57/58)

Please note that the current DfE model articles of association does not mention staff governors specifically but does state that the total number of employee trustees, including the Headteacher, should not be more than one-third of the total number of trustees.

20. The principal or any other employee who is appointed as an academy trustee is appointed on the basis that their role as academy trustees is dependent on their employment by the academy trust and that if they leave the academy trust, they cease to be an academy trustee. Our [model articles](#) give Members the

decision on whether to appoint the principal/ CEO as an academy trustee, if they are willing to be. **Our strong preference is for no other employees to serve as academy trustees** nor for academy trustees to occupy staff establishment roles on an unpaid voluntary basis, in order to retain clear lines of accountability through the academy trust's single senior executive leader.

30. Employees of the academy trust must not be appointed as Members under the current model articles. In addition, the latest version of the AFH will require all academy trusts, irrespective of the content of their articles, to ensure that from 1 March 2021, no Members of the academy trust may also be employees of the academy trust, nor occupy staff establishment roles on an unpaid voluntary basis. Academy trusts should also look to update their articles to reflect this change.
31. As set out above, it is the academy trustees who have the duty and responsibility in law to conduct the business of the academy trust subject to company and charity law, the articles of association and any direction from the Members. Although they can choose to delegate certain powers, they cannot give up these duties to a third party – even to the Members. Therefore, Members should avoid overstepping their powers or undermining the boards' discretion in exercising its responsibilities. In general, Members would not be expected to attend board meetings, sit on executive leaders' performance review panels, or even contribute to specific decisions in relation to the academy trusts' business.
32. Members play a limited but crucial role in safeguarding academy trust governance. While they must ensure they do not stray into undertaking the academy trustees' role, they should assure themselves that the governance of the academy trust is effective, that academy trustees are acting in accordance with the trust's charitable object(s) and that they, the Members, use their powers to step in if governance is failing. Members should not be involved in the day-to-day business of the academy trust. Members have a general duty to exercise their powers to further the academy trust's charitable object, which in the majority of trusts is 'to advance for the public benefit education in the United Kingdom'.³⁵
33. It is for each academy trust to determine how best to keep Members informed so they can be assured that the board is exercising effective governance and leadership of their academy trust. Members will want to be well informed of the skills the board needs to be effective and to have confidence in the board at all

times, with sufficient arrangements in place for them to know when they may need to exercise their powers – particularly to appoint or remove one or more academy trustees. If the governance of the trust by the board of academy trustees becomes dysfunctional the Members have a strong interest in ensuring the board has sufficient plans to use their powers to address the issues. It should be clear to academy trustees or others involved in governance of the trust (e.g. those appointed to committees including any LGBs) how they can escalate concerns to Members, where these are not satisfactorily addressed by the board.

34. The department's view is that the most robust governance structures will have a significant degree of separation between the individuals who are Members and those who are academy trustees. If Members also sit on the board of trustees, this reduces the objectivity with which the Members can exercise their powers and increases the risk of unchecked 'group think' by the board. The department's strong preference for effective governance is for at least the majority of Members to be independent of the board of trustees.
35. If a Member is operating as an academy trustee, any such Member shall have no greater power than other academy trustees and should remain conscious of the corporate nature of the board's identify and decision making and not seek to dominate the board because they are also a Member.

Structure

The academy trust **must** have at least three Members, although the department's strong preference is for academy trusts to have at least five Members. Having more Members increases the range of perspectives represented and ensures that Members can take decisions via special resolution without requiring unanimity.

Members can be individual people or corporate bodies. **Employees of the academy trust must not be Members. The department's current model articles of association for trusts do not allow Members to be employees.**

Independence from the trust board

As the responsibility to conduct the academy trust's business sits with the Academy Trustees, it is important Members do not overstep their powers or undermine the trust boards' discretion when exercising its responsibilities. **The department's strong preference is therefore for at least the majority of Members to not sit on the trust board.**

It is important for Members to be kept informed about academy trust business so they can be assured that the trust board is exercising effective governance. This must include providing the Members with the academy trust's audited annual report and accounts.

One way in which some academy trusts decide to keep Members informed and engaged is for one or more Members to also serve as an Academy Trustee on the trust board, which may be through appointing the Chair of the Academy Trustees as a Member. When operating as an Academy Trustee such Members have no greater power than other Academy Trustees, and should remain conscious of the corporate nature of the trust board's identity and decision making and not seek to dominate the trust board because they are also Members. **It remains the department's strong preference however that at least the majority of Members should remain independent from the trust board.**

Academies Financial Handbook (Page 10/11)

Can employees be members?

- 1.4 No. Members **must not** be employees of the trust, nor occupy staff establishment roles on an unpaid voluntary basis. This requirement is effective from 1 March 2021.

Can trustees be members?

- 1.5 There should be significant separation between the individuals who are members and those who are trustees. If members sit on the board of trustees this may reduce the objectivity with which the members can exercise their powers. The Department's strong preference is for a majority of members to be independent of the board of trustees.

ESFA Guidance to Clerk

I put this issue to the ESFA Academy Questions Helpdesk on 28th October 2020:

(Preceded by CCHS background information plus this final question)

Can you please confirm that because our Articles of Association pre-date these current DfE/ESFA documents by nearly 10 years that we are permitted to stay with our current structure, ie:

1. The Headteacher as both a Member and as an ex-officio Governor/Director/Trustee of the Academy Trust company, even past March 2021, and
2. The two staff members can remain on the Governing Body as Governors/Directors/Trustees?

ESFA eventually came back on 21st December 2020 with the following answer:

Dear Ms Newton,

I am sorry that it has taken some time to provide a response to your enquiry. In considering this, whilst the trust is permitted to continue with the current structure, we would encourage you to consider changing this structure as a matter of good practice as set out in the Academies Financial Handbook.

Thank you

Shalyni Saravanann

The Role of Academy Members - Summary

The role of the Members is to oversee the Trust governance and ensure its effectiveness. The Members would step in if they thought that Governors were failing in their duties. (See Annex A).

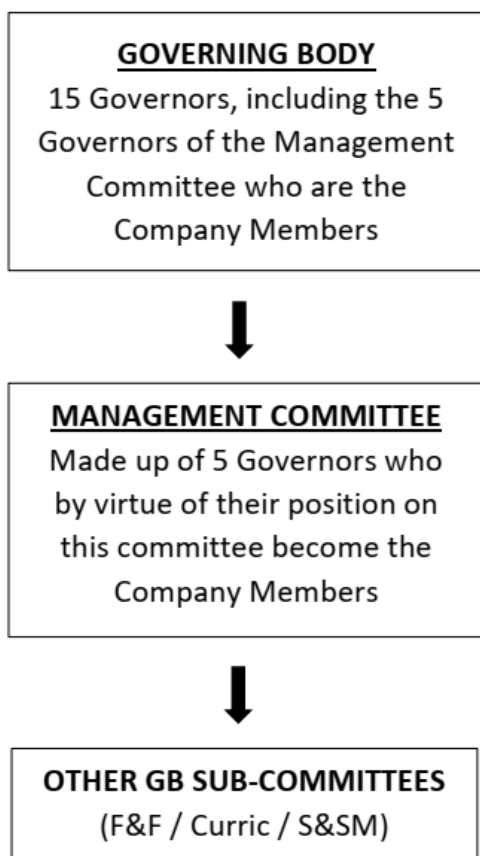
UPDATE – March 2021

At the Management Committee meeting held on 5th March 2021, in order to comply with the new regulations, the Headteacher was removed as a Member of CCHS Academy Trust Ltd with effect from 1st March 2021.

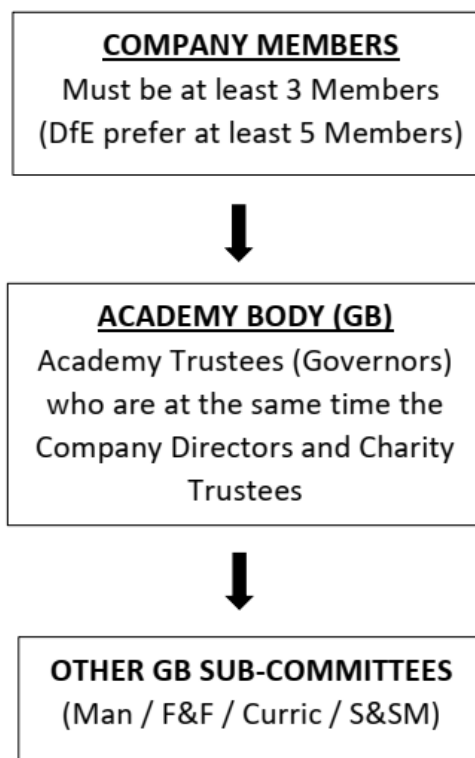
Two issues remain which need GB discussion:

1. Whether the CCHS trust remains with its current structure (as per the ESFA reply above) or whether it changes its structure to match the new DfE-preferred structure, with an additional level of company members (without the Headteacher) (see the diagram below), and
2. Whether to retain staff governors on the trust board (Full GB). (See DfE extract Page 1, Para 20).

CURRENT CCHS STRUCTURE



DfE PREFERRED STRUCTURE



Extra Considerations

1. There will need to be an amendment of the Articles of Association irrespective of what is chosen following the removal of the Headteacher as a Company Member.
2. A new level of Company Members will require finding additional people to act as Members plus additional meetings.

Wendy Newton
Clerk to Governors

15th March 2021

Annex A

Extract from the DfE document entitled 'Academy Trust Governance – Structures and Role Descriptors' also published in October 2020

Academy trust role descriptor: Members

Role

Members play a limited but crucial role in safeguarding academy trust governance. While they must ensure they do not stray into undertaking the Academy Trustees' role, they should assure themselves that the governance of the trust is effective, that Academy Trustees are acting in accordance with the trust's charitable object(s) and that they, the Members, use their powers to step in if governance is failing. Academy trusts are founded by Members, who may then appoint additional Members to join them. The first Members are the signatories to the memorandum of association which is drawn up when the academy trust is first established. These first Members agree the academy trust's first articles of association, which include the academy trust's charitable purpose.

Members should not be involved in the day-to-day business of the academy trust and must ensure they do not assume the powers of the Academy Trustees. However, they do have an important role in an academy trust, based on a number of key powers set out in the department's [model articles of association](#) and in company law. In the case of trusts which include Church academies, the role of the Members is set out in the appropriate Church's [model articles of association](#). These include powers to appoint and remove the board and direct the Academy Trustees to act in certain circumstances.

Members have a general duty to exercise their powers to further the academy trust's charitable object, which in the majority of trusts is 'to advance for the public benefit education in the United Kingdom'¹. In trusts which include Church academies², Members must also ensure that the religious character of the Church academy is preserved and developed as part of ensuring the charitable objects of the trust are met. It is essential that Members are aware of the powers available to them and know when and how to use those powers effectively.

Members should make sure they are familiar with their own articles of association and funding agreement. Additional guidance that Members may find helpful is shared in the [Further Information](#) section.

The powers of Members

Members help to ensure that Academy Trustees are exercising effective governance by utilising a range of powers including:

- **Appointing and removing Academy Trustees:** Members can appoint Academy Trustees and remove any or all serving Academy Trustees.
- **Appointing and removing Members:** There must always be a minimum of three Members. Members can appoint new Members or remove existing Members except:
 - the foundation/sponsor body or a related body, e.g. religious body, and any Members appointed by the foundation/sponsor.³
- **Directing Academy Trustees:** Members can, by special resolution, direct Academy Trustees to take a specific action where Academy Trustees are unable, or unwilling to act in the best interests of the academy trust. Members should consider using this power if they believe the trust board is failing to carry out its core functions, or is acting unlawfully. Other examples of when members might consider issuing a direction to Academy Trustees include where they believe an external review of governance should be carried out and the Academy Trustees have not done so, where the board has failed to act on child safeguarding, and where the academy trust is in breach of its funding agreement.
- **Amending the academy trust's Articles of Association:** Members can amend the articles of association (including the objects clause), subject to any restrictions in the articles, the funding agreement or charity and company law. Members can also change the name of the academy trust and wind it up. Academy trusts must gain permission from the Charity Commission for changes to some clauses; these are known as regulated amendments. These clauses relate to the academy trust's charitable object, benefits, and arrangements on dissolution or winding up of the academy trust.
- **Appointing and removing Auditors:** Members appoint the academy trust's auditors and will receive and review (but do not have to sign off) the academy trust's annual audited accounts (subject to the Companies Act).