

LGIU Policy Briefing

Schools causing concern: April 2016 DfE guidance

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Summary

The DfE has published new statutory guidance for local authorities on schools causing concern, and intervening in failing, underperforming and coasting schools. Regional Schools Commissioners will be expected to follow the document as guidance for how they will exercise the Secretary of State's powers of intervention in maintained schools causing concern and for how they will take formal action in academies causing concern. The guidance is effective from 18 April 2016.

Overview

The DfE has published new statutory guidance for local authorities (LAs) covering "schools causing concern" (within the meaning of section 44 of the Education Act 2005) and schools that are "eligible for intervention" (within the meaning of Part 4 of the 2006 Education and Inspection Act), and also other maintained schools about which the LA and/or Secretary of State have serious concerns.

The new guidance reflects changes under the Education and Adoption Act 2016 giving new intervention powers to the Secretary of State and extending the types of maintained schools eligible for intervention to include coasting schools. The new intervention powers of the Secretary of State will be exercised by Regional Schools Commissioners (RSCs), who will be expected to follow the new guidance when doing so. The Education and Adoption Act 2016 introduces new provisions for action to be taken in academies that are causing concern (those which are failing or coasting), and the Schools Causing Concern guidance now describes how RSCs will make decisions and take action in such cases. The guidance becomes effective on 18 April (when the provisions of the Education and Adoption Act 2016 commence, except those on coasting schools).

Briefing in full

The guidance comprises the following chapters: Introduction; Schools that have been judged inadequate by Ofsted; Schools that have met the coasting definition; Warning notices; Specific powers of LAs and the Secretary of State in maintained schools eligible for intervention; Other LA duties; and Governance. This briefing focuses more on the new content of the guidance than those parts which remain largely unchanged.

Chapter 1: Introduction

The guidance describes the three groups of schools which are causing concern and eligible for intervention:

- **those that have been judged inadequate by Ofsted.** An Academy order will be issued for all maintained schools that have been judged inadequate by Ofsted, requiring them to become sponsored academies, and there is a new duty on governing bodies and LAs to facilitate academy conversion. When an academy is judged inadequate, the RSC is able to terminate the funding agreement with the existing academy trust, identify a new sponsor and move the academy to that new trust

- **those that are coasting.** RSCs will be able to take formal action in any school which falls under the definition of coasting. They will consider a range of interventions, which could include requiring conversion to an academy with the support of a sponsor. Where an academy is coasting, the RSC may issue a termination warning notice, which will require the academy to take specific action and could ultimately allow it to be moved to a new sponsor
- **those that have failed to comply with a warning notice.** LAs and RSCs may give warning notices to maintained schools where they have concerns about unacceptable performance (including results below floor standards), a breakdown in leadership and governance, or the safety of pupils or staff being threatened. Where a maintained school fails to comply with a warning notice it will be eligible for intervention; arrangements for academies are described in each academy's funding agreement.

Chapter 2: Schools that have been judged inadequate by Ofsted

Schools that have been judged inadequate are those that Ofsted judges as requiring significant improvement (also known as a 'serious weaknesses' judgement) and those it judges as requiring special measures.

The Secretary of State has a duty to make an academy order in respect of any maintained school that has been judged inadequate by Ofsted, and the RSC (acting on behalf of the Secretary of State) will take responsibility for ensuring that the school becomes a sponsored academy as swiftly as possible, including identifying the most suitable sponsor and brokering the relationship between that sponsor and the school. In the case of a foundation or voluntary school with a foundation which is subject to an academy order, the RSC is required to consult about the identity of the sponsor before entering into academy arrangements; they will consult the trustees, the person(s) who appoint the foundation governors and, in a school with a religious character, the appropriate religious body.

Under new sections of the Academies Act 2010 as inserted by the Education and Adoption Act 2016, if a maintained school is the subject of an academy order, the governing body and LA will be under a duty to facilitate its conversion into an academy by taking all reasonable steps towards that end. RSCs can use the Secretary of State's power to give the governing body or the LA a direction, or directions, to take specified steps for this purpose; if the RSC has identified a sponsor for the school, the governing body and LA must take all reasonable steps to facilitate the sponsor taking responsibility for the school. Once the RSC has identified the sponsor for a maintained school that was judged inadequate, the sponsor will be under a duty to communicate to parents information about their plans for improving the school before it is converted to an academy. (If a maintained school had been judged inadequate by Ofsted before the Education and Adoption Act had taken effect, that school will also be required to become a sponsored academy through an academy order.)

Also as a result of the Education and Adoption Act 2016, where an academy is judged inadequate by Ofsted, the RSC (on behalf of the Secretary of State) will be able to terminate the funding agreement of the academy (regardless of its terms); this is a power, rather than a duty – so the RSC may decide not to terminate it (eg. where a change of sponsor might prevent consolidation of improvements). Where termination is appropriate, the RSC must first give the proprietor of the academy an opportunity to make representations. Where a supplemental Church agreement has been entered into alongside the funding agreement, the RSC will also notify the appropriate diocesan authority and consider its representations, and must comply with any other terms specified in the supplemental Church agreement regarding termination.

Where an academy's funding agreement has been terminated because the academy has been judged inadequate, the RSC will usually identify a new sponsor and enter into a new funding agreement in respect of that academy (so-called 're-brokerage'); if it was previously a standalone academy, this will generally mean it will join a multi-academy trust (MAT). Where the academy is not

considered viable in the long term, its funding agreement may instead be terminated in order to close it.

Chapter 3: Schools that have met the coasting definition

The definition of a coasting school will be specified in regulations, but these are not yet available. Published alongside the guidance document, the [government response to the consultation](#) on intervening in failing, underperforming and coasting schools sets out the basis for the definitions in both primary and secondary schools (with forward links to more detailed accounts in the technical guidance for primary school accountability measures and for progress-8 secondary school performance measures).

Very briefly, the definition has three underlying principles: it is based on published performance data rather than Ofsted judgements and reflects headline accountability measures; it reflects the progress made by pupils in a school; and it considers performance over time, not a single year (a school will have to be below the coasting definition in three consecutive years to be defined as coasting).

For **primary** schools, coasting will be:

- from 2016, where fewer than 85% of pupils achieve the new higher expected standard at the end of primary school and pupils do not make good enough progress and average progress in reading *or* writing *or* mathematics is below a level set against the new primary progress measures; and
- an interim measure for 2014 and 2015, of fewer than 85% of pupils achieving level 4 in reading, writing and mathematics and below the median percentage of pupils making expected progress in *all* of reading, writing and mathematics.

For **secondary** schools, coasting will be:

- from 2016, where schools are performing below a level set against the new Progress 8 measure; and
- an interim measure for 2014 and 2015, of fewer than 60% of pupils achieving 5 A*-C GCSEs including English and mathematics and below the median percentage of pupils making expected progress in English and mathematics.

The 'progress bar' for both primary and secondary will not be set until after the 2016 performance data are published, showing the effect of the new measures. The regulations containing the definition of coasting will then be finalised in the autumn, subject to Parliamentary approval.

Coasting schools will be notified by RSCs that they have fallen within the coasting definition, after which the RSC will be able to take action if they consider this necessary. Coasting schools will be identified for the first time once the performance tables containing the revised 2016 results for key stage 2 and key stage 4 have been published. LAs are also able to take action in schools that they continue to maintain, but it is expected to be predominantly RSCs who will act, and their powers will take precedence. The same definition of a coasting school will apply to maintained schools and academies: 'RSCs will hold coasting academies to account just as robustly as they will maintained schools'; although the process for RSCs communicating with schools and determining the course of action will be comparable for maintained schools and academies, the actions they may take in an academy differ somewhat from those they may take in a maintained school.

Communication with a coasting school

Coasting schools will be notified by RSCs that they have fallen within the coasting definition. They will be identified for the first time once the performance tables containing revised 2016 results for key stage 2 and key stage 4 have been published; prior to this, RSCs may contact schools (on the

basis of provisional results) to begin informal discussions about their circumstances, but no formal action will be possible until the performance tables are published and it has been confirmed that the school falls within the coasting definition.

The RSC will set out in the notification letter what the school can expect to happen, including likely timescales; the RSC may request further information and/or to see the school's current plan for improvement, and may say that they (or a representative) would like to meet the school's leaders, governors or trustees. When the RSC has made their decisions about whether and what action must be taken, they will communicate this to the school in writing, specifying the action that must be taken and timescales, and any other arrangements. When a school has been notified that it has fallen within the definition of a coasting school, the governing body must inform parents of this, and keep them informed of further developments.

The process for RSCs determining the course of action for coasting schools

RSCs have discretion to decide on the specific course of action that will be taken with any school which falls within the definition of coasting. They may decide that a school: has met the coasting definition but is supporting pupils well, so no action is required; has a sufficient plan and sufficient capacity to improve, so no action is required; or, will need additional support and challenge to improve – in which case, the RSC will need to intervene to bring that about. The RSCs will make their decisions with the support and advice of their Headteacher Board.

'The RSC will give consideration to any views or evidence provided by the local authority responsible for that school. RSCs may also work with local authorities where they are already providing help to a coasting school to ensure the necessary support is in place for the school to make sufficient improvement. Where a coasting school is a school with a religious character, and therefore a religious body is responsible for the school, or there is a trust responsible for a foundation school, RSCs and local authorities will recognise these bodies and their responsibilities for ensuring high quality education in their schools and bringing about improvement where it is needed. RSCs and local authorities will take account of the views of these bodies when making decisions about what action may be necessary in a school, and seek to work collaboratively with them. Where an intervention is necessary, the RSC will ensure that the arrangements safeguard the religious character and ethos of the school, working closely with the appropriate religious body.'

In making decisions about whether a coasting school requires action, and what action is necessary, RSCs will consider the school in the round, seeking to take account of its context, wider achievements and overall provision to pupils, and the factors which may have led it to fall within the coasting definition. Indicative factors include:

- performance data and other quantitative information
 - education performance data beyond that which meant the school was identified as coasting
 - performance of the school compared with similar schools
 - performance of pupils with particular characteristics
 - other data, such as pupil cohort size, attendance and mobility of pupils
- other information about the school, its plans and capacity to improve
 - whether the school's plan is sufficient and has the rigour and credibility to bring about the necessary improvement
 - whether the school has the capacity to deliver against the plan, taking account of Ofsted judgements
 - the effectiveness of the school's pupil premium strategy, and the school's response to any pupil premium review.

Schools and LAs should cooperate fully. Ultimately, if there is any disagreement between the RSC and the governing body or the LA, the RSC's powers take precedence, and the RSC will make the final judgement.

Although most middle schools are deemed secondary schools, they are subject to the coasting definition in relation to key stage 2 rather than key stage 4. The coasting definition will not apply to maintained nursery schools, infant or first schools or 16-19 schools (which lack the relevant data), and will not apply to special schools or alternative provision – though, where there are concerns about persistent poor performance in such schools, LAs or RSCs may issue a warning notice.

What action RSCs may take in coasting maintained schools

Once a maintained school has been notified that it is coasting and eligible for intervention, there is a range of decisions and steps the RSC may take, including:

- no further action necessary at this stage – possibly because: despite meeting the definition, the RSC is convinced it is supporting its pupils well; there has been a recent change in leadership that the RSC is satisfied will lead to improvement; the RSC has agreed to the school's request to join a multi-academy trust (MAT), which the RSC considers will ensure the school makes the necessary improvements; or, the RSC has concluded that the school already has a sufficient, rigorous and credible plan for improvement in place and the capacity to deliver against it – and should be allowed to do so
- the school needs some additional support and challenge, so the RSC will work with the school to identify appropriate support from a variety of possible sources (eg. Teaching School Alliances, National Leaders of Education or high performing local schools) – with further action possible if necessary
- the governing body should be required to enter into arrangements, with the RSC using the Secretary of State's power to direct this
- governance needs improving, so if the school (and/or LA on its behalf) is unable or unwilling to do this, the RSC could exercise the Secretary of State's power to appoint additional governors or replace the governing body with an Interim Executive Board (IEB)
- a sponsored academy solution is required, so the RSC will exercise the Secretary of State's power to make an academy order.

What action RSCs may take in coasting academies

'Where an academy has fallen within the coasting definition, the RSC will make the same considerations and take into account the same factors, acting swiftly and robustly, as for a maintained school.'

Where an academy has fallen within the coasting definition and the RSC has notified it of this, the Secretary of State now has the power to terminate its funding agreement and move it to a new trust; before doing so (on behalf of the Secretary of State), the RSC must first give the academy proprietor a termination warning notice. This must require the proprietor to take specified action to improve the academy by a specified date. Where the proprietor fails to comply with the warning notice, then the funding agreement may be terminated. Where a supplemental Church agreement is in place alongside an academy's funding agreement the RSC will notify the appropriate diocesan authority that the academy has fallen within the coasting definition, and also notify that authority before issuing a termination warning notice, and allow reasonable time for them to make representations, including any action they intend to take to remedy the situation.

Where an RSC has considered it necessary to terminate an academy's funding agreement, it will often be the case that a new sponsor is identified and a new funding agreement entered into (so-

called 'rebrokerage'); where the coasting academy was previously a standalone academy, it will join a MAT – remaining open, with the new sponsor and the RSC ensuring minimal disruption to pupils' education during the transition.

There will be cases when the RSC does not consider it necessary to issue a termination notice to an academy which has met the definition of coasting – for similar reasons to those applying in the case of a maintained school (see above).

Whatever action the RSC has decided to take, they will monitor the school's progress and keep under review whether additional action is needed. The RSC (or a representative) may also visit the school to see what progress is being made, and may revise a decision at any time until the school ceases to meet the definition of coasting.

Chapter 4: Warning notices

(Parts of this chapter, including the description of types of warning notice and the circumstances in which they may be given, are little changed from the previous guidance; the briefing focuses on elements which are new.)

Local authorities are expected to continue to issue warning notices to challenge maintained schools to improve; they should work with RSCs to discuss where they judge that a performance standards and safety warning is necessary. 'By having the same powers, RSCs will be able to issue a warning notice where, in the RSC's opinion, it is appropriate to act – for example, where the local authority has failed to act swiftly enough in a specific case, has generally not acted swiftly or robustly enough in the past, or lacks capacity to act.' The RSC may also act where a warning notice issued by the LA, or the action which follows such a notice, is considered insufficiently robust. (LAs must give copies of warning notices they issue to maintained schools to the relevant RSC, and *vice versa*.)

The guidance sets out the circumstances in which a warning notice may be issued (by the LA or RSC) to a maintained school under four headings: performance standards and safety warning notices; breakdown in the way a maintained school is governed or managed; the safety of pupils or staff at a maintained school is threatened; and teachers' pay and conditions warning notices (which the Secretary of State, and therefore RSCs, do not have the power to issue). It also sets out the process for issuing a warning notice (what must be included, to whom it must be sent, etc.), and emphasises that LAs are expected to work with RSCs to discuss where they judge an improvement notice is necessary. If the RSC gives a warning notice, any earlier performance standards and safety warning notice given to the school by the LA will cease to have effect. All warning notices must be copied to Ofsted at the time of issue, and those issued to maintained schools by RSCs will also be published online.

Where a governing body has failed to comply with a warning notice to the satisfaction of the RSC or the LA within the compliance period, and the issuing LA or RSC has given reasonable notice that they propose to intervene, the school is eligible for intervention and further action may be taken.

Arrangements for academies to be issued with a warning notice where they have not been judged inadequate by Ofsted, and have not met the coasting definition, but are otherwise causing concern, are specified in their academy funding agreements. Such warning notices can usually be given on the same grounds as those specified in statute for maintained schools (see above).

'RSCs are responsible for addressing underperformance in academies, so will take action in line with the funding agreement for the academy in question. RSCs will hold academies to account for underperformance just as robustly as they would for maintained schools. Where a local authority has concerns about standards, management or governance, or safety in an academy, it should alert the relevant RSC. Warning notices issued to academy trusts by RSCs will be published online, as well being shared with Ofsted at the time of issuing.'

Chapter 5: Specific powers of local authorities and the Secretary of State in maintained schools eligible for intervention

Where a maintained school is eligible for intervention (ie. when it has been judged inadequate by Ofsted, has been notified that it is coasting, or has failed to comply with a warning notice) there are a number of statutory powers the LA and the Secretary of State may use to drive school improvement (those of the Secretary of State will generally be exercised by RSCs). LAs' intervention powers enable them to: require the governing body to enter into arrangements; appoint additional governors; appoint an interim executive board (IEB); and suspend the delegated budget (though an IEB has a right to a delegated budget). The Secretary of State's intervention powers enable the Secretary of State (and RSCs acting on the Secretary of State's behalf) to: require the governing body to enter into arrangements; appoint additional governors; direct closure of the school; appoint an IEB; take over responsibility for an IEB; make an academy order (which is a duty in the case of a school judged inadequate).

'Local authorities and RSCs will work closely and co-operatively to drive improvement in maintained schools that are causing concern. However, where a local authority fails to act in a maintained school that is causing concern, does not act swiftly or robustly enough, or has generally not acted swiftly or robustly enough in the past, the RSC will use the intervention powers of the Secretary of State to do so. The local authority must notify the relevant RSC each time they intend to use their intervention powers and obtain consent from the RSC before appointing an Interim Executive Board (IEB). The RSC will also notify the local authority before requiring the governing body to enter into arrangements, appointing additional governors, appointing an IEB or when the Secretary of State directs a local authority to close a maintained school. When a local authority has been notified that the RSC intends to exercise the Secretary of State's intervention powers in a maintained school, the local authority may not use its intervention powers in relation to that maintained school until the RSC notifies the local authority that it may do so.'

The guidance describes, in respect of each power, the consultation and notification requirements on LAs and RSCs when exercising their intervention powers, including, for Church of England and Roman Catholic schools, the need to consider the relevant Memorandum of Understanding, which describes how RSCs and Dioceses will work together when intervention powers are being exercised in those schools.

Points of particular interest for LAs include:

- where an LA applies to the RSC (acting on behalf of the Secretary of State) for consent to constitute the governing body of a maintained school as an IEB, the RSC may give the LA directions about its membership, including who the interim members should be. ('This power will enable the RSC to contribute to the make-up and the arrangements of the IEB where it is felt that the local authority is best placed to take the IEB forward.')
- where an LA has already appointed an IEB, the RSC may take over responsibility for arrangements in respect of its members
- RSCs *can* (ie. have power to) make an academy order in respect of a maintained school in two circumstances: on the application of the governing body; or if the school is eligible for intervention because it has met the coasting definition or has failed to comply with a warning notice
- RSCs *must* (ie. are under a duty to) make an academy order in respect of a maintained school that has been judged inadequate by Ofsted.

Chapter 6: Other local authority duties

'Section 13A of the Education Act 1996 states that a local authority must exercise its education functions with a view to promoting high standards. Beyond this statutory guidance, local authorities

have considerable freedom as to how they deliver their statutory responsibilities. Local authorities should act as champions of education excellence across their schools, and in doing so should:

- understand the performance of maintained schools in their area, using data to identify those schools which require improvement and intervention
- work with the relevant RSC, to ensure swift and effective action is taken when underperformance occurs in a maintained school...
- encourage good and outstanding maintained schools to take responsibility for their own improvement and to support other schools, and enable other schools to access such support...

‘Academies are accountable to the Secretary of State. Therefore, local authorities should focus their school improvement activity on the schools they maintain. Local authorities should raise any concerns they have about an academy’s standards, leadership or governance directly with the relevant RSC.’

LAs have responsibilities towards those children and young people (under 25) in their area who have, or may have, special educational needs (SEN), and must exercise their functions to identify children and young people with SEN. These SEN duties apply regardless of where the child is educated.

LAs have overarching responsibilities under the Children Act 1989 in respect of the safeguarding of children in need, or those suffering or at risk of suffering significant harm, regardless of where those individual children are educated or found. Where a local authority has concerns about an academy or free school’s safeguarding arrangements or procedures, these concerns should be reported to the relevant RSC or the Education Funding Agency (EFA) who have responsibility to take any necessary improvement action and to monitor the situation. Concerns about an independent school’s safeguarding arrangements or procedures should be reported to the Independent Education Safeguarding in Schools Division at the DfE.

Chapter 7: Governance

This chapter repeats the existing (non-statutory) guidance on matters such as promoting good governance, provision of training, maintaining up to date records of governors in maintained schools, working with religious bodies and, where there are concerns about governance in an academy or free school, raising them with the relevant RSC or the EFA.

In addition, there is a section on schools causing concern and charity law. This points out that the members of the governing body of a foundation or voluntary school and the charity trustees of an academy trust or MAT are charity trustees in law, and are legally responsible for its effective governance; they have a number of duties under charity law which mirror their duties as school governors and trustees (explained in Charity Commission guidance, *The Essential Trustee*).

‘If a school is causing concern or eligible for intervention, then the trustees may also be in breach of one or more of their charity law duties. It is important to remember, however, that the trustees continue to be bound to comply with their charity law duties (for example to make decisions solely in the charity’s interests). RSCs and local authorities should bear this in mind when exercising powers of intervention, and as far as possible take an approach that allows charity trustees to comply with their duties and take an active role in resolving the concern.’

Comment

If the recent White Paper, *Educational Excellence Everywhere* (see ‘Related briefings’), signals the end of local government’s role in maintaining schools, this guidance describes the process by which RSCs will increasingly take over from LAs responsibility for schools causing concern. Not only will

Ofsted judgements of maintained schools as inadequate lead to their automatic conversion to academies, but RSCs (exercising the powers of the Secretary of State) will be primarily responsible for coasting schools and potentially involved with other maintained schools causing concern, with the power to over-ride the judgement of the LA and – for example ‘where a local authority fails to act in a maintained school that is causing concern, does not act swiftly or robustly enough, or has not acted swiftly or robustly enough in the past’ – to intervene over the LA’s head.

This marks a major transfer of accountability, from locally elected representatives to a small band (currently eight) of appointed regional officials, themselves accountable to a single appointed national schools commissioner. Time will tell if any educational benefit will accompany this democratic deficit.