EXPLANATORY MEMORANDUM TO

THE SCHOOL GOVERNANCE (AMENDMENT) (ENGLAND) REGULATIONS 2012

2012 No. 421

1. This explanatory memorandum has been prepared by the Department for Education and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The School Governance (Constitution) (England) Regulations 2007 ("the Constitution Regulations") set out the arrangements for the constitution of governing bodies of maintained schools, including maintained nursery schools, in England. The School Governance (Federations) (England) Regulations 2007 ("the Federation Regulations") make provisions for the federation of maintained schools in England.

The School Governance (Amendment) (England) Regulations 2012 make minor changes to the Constitution Regulations and to the Federation Regulations concerning the eligibility criteria for the appointment of foundation governors in foundation and voluntary aided schools. They also make a number of amendments to both sets of Regulations largely to clarify the drafting of those Regulations.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Background

4.1 In this section the legislative background to regulations 2(5) and (6) is set out in paragraphs 4.2 to 4.4; and to the other regulations in the remainder of the section.

4.2 The eligibility criteria for appointment as a foundation governor in foundation and voluntary aided schools are set out in regulations 16 and 18 of the Constitution Regulations. The regulations specify that, in certain circumstances, people who are eligible for appointment or election as parent governors must be appointed as foundation governors. The eligibility for election or appointment as a parent governor are set out in regulation 4 and Schedule 1 of the Constitution Regulations.

4.3 The interaction and interpretation of regulations 16 and 18 with regulation 4 and Schedule 1 was considered in R v His Grace The Archbishop

of Westminster and Westminster Roman Catholic Diocese Trustee (England and Wales Court of Appeal (Civil Division)) [2011] EWCA Civ 433.

4.4 The School Governance (Amendment) (England) Regulations 2012 seek to clarify the intention of the original regulations with regard to the circumstances in which certain categories of parents can be appointed as foundation governors.

4.5 The eligibility criteria for the appointment as a staff governor (2(2)); the Constitution Regulations 2007 define a "staff governor" as being among other things "a person who is elected in accordance with Schedule 2 as a governor by persons who are paid to work at the school and is himself a person so working at the time when he is elected". The reference to those who "are paid to work at the school" has caused some uncertainty and the amended wording, which refers to those employed under a contract of employment for the person to work at the school, is more accurate.

4.6 The definition of foundation governor (2(3)); this inserts into regulation 8 of the Constitution Regulations 2007 a third element in the definition of a foundation governor which leaves the determination of a person's suitability to the person making the appointment. The three elements will now be that the person:

i) is appointed for the purposes of securing that the character of the school, including where the school has a particular religious character, such religious character, is preserved and developed;
ii) where the school has a foundation, is appointed for the purpose of securing that the school is conducted in accordance with the foundation's governing documents, including where appropriate, any trust deed relating to the school; and
iii) would in the opinion of the person entitled to appoint the foundation governor be capable of achieving the purposes for which they would be appointed as a foundation governor.

4.7 The disqualification criteria for appointment as a partnership governor (2(4)); the current regulations disqualify someone from being a partnership governor who is employed by the local authority in connection with their education functions – the amendment disapplies that disqualification where the employment is under a contract providing for that person to work wholly at schools maintained by the local authority. This will allow teachers in LA maintained schools to be treated on the same basis as those in Academies and is in line with the policy;

4.8 The reference to "interim executive member" in regulation 22 (2(7)); regulations under section 19 EA 2002 do not apply to interim executive boards, so that the inclusion of a reference to interim executive member in regulation 22 is otiose and therefore best removed.

4.9 The definition of "appropriate religious body" (2(8))**;** the Secretary of State does not have powers to designate religious bodies, so the reference in the regulations is out of line with statutory powers. The amendment removes

the involvement of the Secretary of State and allows for the possibility that there is no such body. The amendment does not make any changes to the Secretary of State's powers to designate schools as having a religious character;

4.10 Remove the disqualification from serving as a governor whilst detained under the Mental Health Act (2(9)(a); the current regulations disqualify a person from holding office or continuing to hold office as a school governor while they are detained under the Mental Health Act 1983. The provision is unnecessary as anyone detained under the Act would not be able to attend a governing body meeting if one was to take place during the period of detainment. A governor in this situation would be in the same position as other governors who might not be able to attend the meeting.

4.11 Update the restrictions from serving as a governor during bankruptcy (2(9)(b); a person subject to a bankruptcy restrictions order or interim order is currently disqualified; this amendment extends the grounds to someone who is subject to a debt relief restrictions or interim order. A debt relief restrictions order is a court order that can be imposed on a person who, while subject to a debt relief order, has acted dishonestly, for example.

4.12 The other amendments to the Federations Regulations make changes to the definition of foundation governor (3(3) which correspond to those made by regulation 2(3); and to the disqualification criteria for appointment as a partnership governor which correspond to those made by regulation (2(4)).

5. Territorial Extent and Application

5.1 This instrument applies to England.

6. European Convention on Human Rights

6.1 As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 Foundation governors in foundation and voluntary aided schools are appointed for the purpose of securing that the character of the school, including where the school has a particular religious character, is preserved and developed. Regulations 16 (1) (f) and 18 (1) (e) of the Constitution Regulations require a foundation to appoint:

> "such number of foundation governors who are eligible for election or appointment as parent governors that, when they are counted with the parent governors, comprise one third or more of the total membership of the governing body."

7.2 Eligibility for election or appointment as a parent governor is dealt with by regulation 4 and Paragraph 10 of Schedule 1 to the Constitution Regulations. Regulation 4 requires a parent governor to be person elected by parents of registered pupils at the school who is himself a parent at the time when he is elected or a person appointed by the governing body in accordance with paragraphs 9-11 of Schedule 1.

7.3 Paragraph 9 of Schedule 1 requires governing bodies to appoint parent governors if insufficient parents stand for election. Paragraph 10 provides:

> 10.(1) Except where paragraph 11 applies, the governing body must appoint as a parent governor—
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> (a) a parent of a registered pupil at the school;
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> (b) a parent of a former registered pupil at the school; or
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> (c) a parent of a child under or of compulsory school age.
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> (2) The governing body may only appoint a person referred to in sub-paragraph (1)(b) or (c) if it is not reasonably practicable to appoint a person referred to in the sub-paragraph which immediately precedes it.

7.4 Where a governing body is to appoint parent governor (when the number of parents standing for election is less than the number of vacancies) it must follow an appointment process using a 3- stage test detailed in paragraph 10 of Schedule 1.

7.5 The Court of Appeal decided that the staged process set out at paragraph 10 of Schedule 1 is not applicable to the appointment of foundation governors and that any of the persons listed in paragraph 10 as part of the 3-stage process is eligible. Their view was that, for parent governors, eligibility is determined in 10(1)(a) and the mechanics of appointment are set out in 10(1)(b) but for a foundation governor the only question to be considered was eligibility.

7.6 These regulations are intended to clarify that when appointing foundation governors who are eligible for election or appointment as parent governors, appointing bodies must first try to appoint parents of current pupils at the school and only if, in the opinion of the person entitled to appoint foundation governors, it is not reasonably practicable to appoint someone from that category of parent who would be capable of achieving the purposes for which they would be appointed as a foundation governor, will they be able to appoint parents of former pupils. Again, only if this is not reasonably practicable will they be able to appoint parents of children who attend other schools.

7.7 The other regulations are intended to clarify the Constitution Regulations and the Federation Regulations.

Consolidation

7.8 This is the final amendment that will be made to the Constitution and Federation Regulations, pending new versions of both sets.

8. Consultation Outcome

8.1 Regulations 2(5) and 2(6) were subject to public consultation from 7 October 2011 until 18 November 2011. A shortened consultation period of six weeks was carried out as the legislation affects specific categories of schools (foundation and voluntary aided schools) and the relevant representative bodies were notified of the consultation. Seven responses were made to the consultation. One respondent set out an objection to faith schools being part of the maintained school sector and made no comment on the draft regulations. The other six responses were supportive of the proposals.

8.2 The Catholic Education Service requested that the regulations make clear that the determination of a person's suitability to preserve and develop the religious character of a school, and therefore to be a foundation governor, rested solely with the appointing body. This has been accepted. The Church of England Board of Education also suggested that the order of consideration for appointment be changed so that it read that appointing bodies must first appoint parents of current pupils at the school and only if this is not reasonably practicable will they be able to appoint able to appoint parents of children who attend other schools. Again, only if this is not reasonably practicable will they be parents of former pupils. They argued that it was preferable to appoint parents of children currently in education as the phrase “parents of former pupils” could mean that their children are no longer in education. We have not taken this suggestion forward as we believe that the link with the school should take precedence.

8.3 The other regulations have not been subject to any consultation as they are minor and intended to clarify the existing regulations.

9. Guidance

9.1 An explanation of the legislation will appear on the Department’s website and the Governors’ Guide To The Law will be amended to reflect the legislation.

10. Impact

10.1 An Impact Assessment has not been prepared for this instrument since it will not impose any significant cost or increase in workload to schools or local authorities.

11. Regulating small business

11.1 This legislation does not apply to small business.

12. Monitoring & review

12.1 We will monitor the operation of the regulations through regular meetings with the relevant representative bodies: the Catholic Education Service; the Church of England Board of Education and the Foundation and Aided Schools and Academies National Association.

13. Contact

13.1 Geoffrey Friston at the Department of Education Tel: 01325 735571 or e-mail: geoff.friston@Education.gsi.gov.uk can answer any queries regarding the instrument.