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Foundation Member Guide

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Introduction

Thank you for agreeing to be a Foundation Member. In addition to the responsibilities of being an individual Member, Trustee or Governor within a school or multi academy trust (MAT) setting, there are extra considerations for all Foundation Representatives. This guide explores:

1. Section 1: The generic role of a Member in an academy trust (AT) and the specific considerations as a Foundation Member.
2. Section 2: The policy for representation of the Bath & Wells Diocesan Board of Education (DBE) Trust as a Corporate Member of an academy trust.

Your role as a Foundation Member is set out in section 1. In addition, The Bath & Wells DBE Trust is a Corporate Member of every MAT which includes a Church of England school within this Diocese. The Articles of Association allow a Corporate Member to appoint an individual to represent it at meetings. This is the person we refer to as a Corporate Member representative. Information specific to this role is set out in section 2, in addition to section 1. If you are unsure if you are a Foundation Member or a Corporate Member representative, please ask.

This guide also attempts to demonstrate how you might fulfil your role effectively and how a structure of meetings within your trust might be arranged.

We would like to work in partnership with you and your trust to help you fulfil your role. The Member's role is a relatively new concept within the education sector and is developing as academies themselves develop. We hold an annual meeting with each of the trusts that we work with to consider the Christian distinctiveness of the church school academies within the trust and hope that all Members will be part of this review process or preparation.

Section 1: The role of Foundation Members in an academy trust and how you might fulfil this role

The Members of a charitable company, such as an academy trust, are the equivalent of shareholders in a commercial company. This means they:

1. Appoint external auditors to ensure that the accounts are independently interrogated and are an accurate reflection of the financial position of the academy trust
2. Guarantee the debts of the academy trust (the extent of the guarantee is ten pounds per member if the company goes into insolvent liquidation)
3. Make changes to the constitution of the academy trust (by a resolution to change the Articles of Association)
4. Appoint and remove the directors (usually called Trustees in an academy trust) and hold them to account for the way that the AT operates. In particular, in a Church or Mixed Academy Trust, the Foundation Member(s) appoint(s)/remove(s) the Foundation Trustees.

In the standard model constitution for any academy trust which includes a Church of England School, the relevant DBE is itself appointed as a Corporate Member of the academy trust and has the right to appoint further Members to maintain a stated ratio of Members who are appointed to represent the interests of the Church of England. The DBE and any further Members appointed by it are referred to in this policy as Foundation Members.

Again, in the standard model Articles, a Corporate Member of an academy trust may at any time authorise an individual to act as its representative. Specific provisions relating to such representatives are included with references to the Corporate Representative.

In the past, Members, or most of them, have often also been Trustees. The role of Member has been limited to the formalities of appointing auditors, approving audited accounts, and appointing Trustees. The DfE has moved to a position where they expect little or no crossover between Members and Trustees, with the possible exception of the Chair of Trustees.

Consequently, a MAT should now have a majority of Members who are not Trustees, and so it is even more important that Members establish a means by which they are able to hold the trust board to account.

In a Single Academy Trust (SAT) this is more difficult. The Members are often all Governors and Trustees, but still the Members have a separate role. Many SATs are also reconfiguring their boards to ensure more separation.

1. Financial

1.1 Appointment of external auditors

The Academy Trust Handbook, published September 2021 (<https://www.gov.uk/guidance/academies-financial-handbook/academy-trust-handbook-2021>), previously known as The Academies Financial Handbook, restates the obligation in the Companies Act 2006 that the academy trust must appoint an auditor to certify whether their annual accounts present a true and fair view of the trust's financial performance and position, and that appointment must be made by Members, other than where the Companies Act permits the Trustees to appoint (e.g. for the trust's first period of trading).

The Handbook states that the contract with the auditor must be in writing. Usually, this is in the form of a letter of engagement. This letter of engagement must only cover the external audit. If additional services are purchased, there should be a separate letter of engagement. There is a requirement that trusts must retender their external audit contract at least every 5 years and consider relevant points from the audit and risk committee. Members appoint the external auditors.

1.2 Monitor the accounts

Annual accounts are often difficult to scrutinise for those without a financial background. However, it is possible to concentrate on several key areas. Note that the accounts have already been scrutinised and signed off by the Trustees, so Members are just ensuring they understand the headlines for the year.

1.2.1 Independent Auditors' Report

Unfortunately, the auditors' statements use double negatives, especially under the paragraph on the going concern and matters on which the auditors are required to report by exception. However, the report should highlight any concerns the auditors may have, and be effectively a management letter.

1.2.2 Independent Auditors' Assurance Statement

Again, there is the use of double negatives, but look at the conclusion for anything that has come to light during the audit. Effectively, the statement is letting the board and Education & Skills Funding Agency (ESFA) know that the board is financially secure through its self-assurance and internal controls.

1.2.3 Comparison between years

The accounts always show two years' information, the year of the accounts and the previous year, both in the main statement of accounts and the balance sheet. It is always worth comparing the two years to see if there are significant variations and to ask the question 'why?' If there has been any growth in the MATs, there will be differences, but still ask.

1.2.4 Statement of Funds: Analysis of Academy by Funds Balance

This means each individual surplus/deficit carried forward. Compare the two years and look for significant changes, especially for schools in deficits or large surpluses. If a school is in deficit there should be a short statement in the accounts of their plan to balance their budget, especially if the school has been in deficit for the two years. Also, ask why a school has a large surplus. Ask what the trust's policy is in respect of school deficits/surpluses; is there a percentage in respect of surpluses the trust works to? This should be checked with the trust's reserves policy.

1.2.5 Notes of the financial statements: staff

As 80% to 85% of any trust's expenditure is spent on staff, the section on staff is another area to peruse, check changes in staff numbers, staff costs and the number of higher paid staff.

1.2.6 Going concern

The statutory accounts will include a statement in respect of the MAT continuing to be a going concern. Usually, an organisation should have enough cash to meet the first six to eight weeks' expenditure, although MATs do receive their income monthly from ESFA, usually a twelfth of the planned budget.

1.2.7 Connected organisations, including related party relationships/transactions

As this is topical it is worth checking. An example of a connected organisation for the Bath & Wells MAT (BWMAT) would be the rent for Flourish House. They must get ESFA approval to take out a lease with the Diocese, because we are related.

1.2.8 Reserves policy

Look at the proposal and any changes year on year.

1.2.9 Pension liability

One thing not to worry about is the pension scheme liability, although this will be the largest liability in the balance sheet by far, and several pages in the notes are devoted to Pension Commitments. Parliament has agreed, at the request of the Secretary of State for Education, to a guarantee that, in the event of academy closure, outstanding local government pension scheme liabilities would be met by the Department of Education (DfE). The guarantee came into force on 18 July 2013.

2. Guarantee £10

A charitable company, like any not-for-profit company, is described as Limited by Guarantee because, instead of liability being limited to what shareholders have invested, the liability is limited to the amount the Members guarantee. In an academy trust, the guarantee is £10. If you are the Corporate Member Representative, you are not giving this guarantee yourself, the Bath & Wells DBE Trust is.

3. Changing the Articles

An academy trust might need to amend its Articles of Association, for example, to update to a new model of church/mixed MAT Articles, or to change its name or objective. This may be done either at a meeting or by written resolution but may only be done by the Members and requires a 75% majority as well as the written consent of the DBE (and in some cases the DBF or local Site Trustees). Sometimes we are aware of upcoming changes to Articles, but they always require approval through our legal advisor, so please let us know at your earliest convenience.

4. Appointment and removal of Trustees, Succession Planning and holding Trustees to account

4.1 Appointment of Trustees

Members are responsible for the appointment of the Board of Trustees and should plan for vacancies. A standing agenda item should be the list of Trustees with the dates upon which their terms of office expire, their skillsets, which central committees they sit on, and possibly their attendance record.

Members might contact any Trustee whose term of office is due to expire over the following twelve months to ask whether they wish to be considered for re-appointment.

Re-appointment should not be automatic. Consider whether the requirements of the trust board have changed. Consider whether the individual has been able to contribute time for meetings, etc., or if the skills required on the board have changed.

Plan for the recruitment of replacement Trustees before the existing term of office ends. Inviting the trust board to make suggestions is one means of identifying candidates, but consider advertising locally or contacting Academy Ambassadors to widen the pool of candidates,

The process for appointing Foundation Trustees is set out in our Memorandum of Understanding and in our published procedure at:

<https://www.bathandwells.org.uk/content/pages/documents/schools-application-form-for-academy-foundation-representative.docx>

4.2 Removal of Trustees

Ultimately, the Members may remove individual Trustees and replace them with individuals whose skills the Members believe will improve the performance of the board. With the exception of the CEO, Trustees are not employed by the trust and may be removed by the person who appointed them, usually the Members. Foundation Trustees are appointed by the DBE and may therefore be removed by the DBE.

There is a risk that if Members act in bad faith, or otherwise unfairly, a Trustee could bring a claim for loss of office, therefore a decision to remove a Trustee mid-term should not be taken lightly, but it is reasonable where a Trustee is not making a significant contribution to the trust board, or because of misconduct. If a Foundation Trustee no longer meets the criteria as such, our Memorandum of Understanding stipulates that he/she must either be removed or redesignated.

4.3 How do we know if the Trustees are doing a good job?

In October 2020 the DfE published governance structures and role descriptors for members for the first time, which included reference to the role of Members:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/924673/Academies_governance_role_descriptors.pdf

This is expanded in The Governance Handbook 2020, which states, ‘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... 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.’

Questions for you to ask the trust might be:

- What is your governance structure? What are the indicators the trust’s governance is operating effectively and what are the red flags that Trustees would act on?
- What are the trust’s charitable objects and how do Trustees ensure they are complying with them?
- What are the Trustees’ responsibilities as company directors and how do Trustees ensure they are complying with them?
- What is the procedure for Trustees to escalate concerns to Members if these concerns have not been acted on by the trust board?

4.3.1 Strategy and Performance

If you were shareholders in a commercial company, you would be asking whether the company was producing adequate profits. In an academy trust, your profit, in keeping with your charitable objects, is the educational experience and outcomes for the children in your schools. This is what determines what is in the best interests of the company.

Review the Strategic and Annual School Improvement Plan and review results against those plans. Is the strategy on course? Has the strategic plan changed and, if so, are you satisfied that the change is in the best interests of the trust? If not, is your board missing strength in this area? Is the trust achieving the targets it has set for itself, in terms of the percentage of teaching assessed as good or outstanding, impact of Pupil Premium, impact of SEND provision, and results generally? If not, does the board need strengthening in this respect?

SIAMS inspections/mid-term review – review against School Improvement Plan.

4.3.2 Foundation Governance

Invite comments from the CEO or Chair of Directors as to how the Foundation Trustees are contributing to the board.

4.3.3 Compliance

Has the board implemented and reviewed all the policies it says it will implement and review?

Has the trust complied with those policies, and with external requirements? The trust should have a process for internal audit.

Ask the board to confirm how it has audited compliance with its policies, and to demonstrate that audit, for example, in relation to HR policies: How many claims have been received and/or settlements paid out? What is the percentage of staff turnover, and does this indicate any HR issues? Does the board need strengthening, or might you recommend that the board increase the HR capacity or training? These are all questions that could be asked.

How many meetings?

There is no legal requirement to hold anything other than an AGM and certainly this was general practice at the start of MATs. However, as the role of Member has become slightly clearer, it has seemed to many that one meeting is simply not enough. You might like to consider a pattern of 3 meetings per year, allocating one of three strands for each of these planned meetings.

The Strategy and Planning focussed meeting might be planned for September/October, by which time the July results will have been available and analysed by the board and the School Improvement Plan for the year just started will be in place.

Audited accounts will usually be ready in December/January, so meet then to look at finance.

A meeting focussed on compliance might balance the year, happening around Easter, or perhaps your trust is considering growth and would like to share plans.

Alternatively, some MATs only hold one Members meeting, the AGM, each year, but have an open invitation to Members to attend their board meetings. Minutes of trust board meetings should be made available. Whilst not suggesting Members should attend all meetings, they might like to attend some to get a better understanding of how the Trustees are operating.

However many Members' meetings you have, the business of the Members is to ascertain whether the Trustees as a whole are doing a good job, how they might do even better, and where there may be weaknesses in the trust board.

Whether or not your Chair of Trustees is also a Member, he or she will chair Members' meetings and any Trustee may attend Members meetings (in accordance with the Model Articles). Their purpose there is to demonstrate to you as Members that they are effectively managing the trust.

They will appreciate informed support and challenge, so inform yourselves.

- Attending Trustee meetings (if invited) from time to time and/or keeping up with their minutes will give you an insight into how the Trustees are operating,
- Understanding pupil data and progress against the strategic and school improvement plans will tell you whether those plans agreed by the Trustees are coming to fruition.
- Obtaining information, such as the number of complaints and staff grievances upheld, and issues identified in internal audits, tells you about compliance.

Members appointing and evaluating each other

Consider how you are dealing with your role: it is for the Members to appoint new Members? Prepare to be challenged by the Chair of Trustees in respect of how you are working. Do you require some training? Is there a Member who is not attending or contributing at meetings, perhaps finding it difficult to prepare by reading papers, etc.? Challenge and support yourselves as well as the trust board.

Written resolutions

Not all decisions need be made in a meeting. If an issue has arisen between meetings, e.g., the resignation of a Trustee or a requirement to update the Articles, you can make a written resolution. This can give you the flexibility to react between meetings, but the downside is that you will not always have had the opportunity to discuss the issue as a group.

If you are the Corporate Representative, you should not sign a written resolution yourself, but send it to the Education Department for signing on behalf of the DBE Trust, with an explanation as to the background and giving an outline of the discussion you have had, if any, with the other Members.

Section 2: Policy for representation as a Corporate Member of an academy trust

In Bath and Wells, like some other Dioceses, the DBE is not incorporated. The Bath & Wells DBE Trust has been set up to be the Corporate Member of academy trusts. This new trust has the same membership as the DBE and exists solely for the purpose of being the Corporate Member to all trusts that have a church school within.

Appointment of Corporate Member Representatives

Corporate Member Representatives are unlike other individual Members of an academy trust in that they are not appointed personally as a Member. They are specifically appointed to represent the DBE and are obliged to follow direction from the DBE Trust. As such, their appointment is entirely at the discretion of the DBE – neither the other Members nor the Trustees have any authority to influence their appointment, there is no minimum or maximum term of office, and they may be replaced, temporarily or permanently, with immediate effect.

This means that a Corporate Member Representative must know how the DBE wishes to act in any decision making, or whether the DBE requires that Corporate Member Representative to use his or her own expertise, knowledge, and discretion to decide, without specific direction from the DBE.

The DBE's internal process for appointments will include liaison with the academy trust.

There may be circumstances where the DBE will require a Corporate Member Representative to step away so that an individual with particular and specific expertise may attend meetings in his or her place.

Registers

The Register of Members for the academy trust should include the DBE Trust as the Member at all times (not an individual's name). We can provide a generic corporate biography, if required, for your trust.

The academy trust may also keep a record of any authorised Members given notice of and attending meetings.

Decision making – Members' Resolutions

If an academy trust wishes to put a resolution to its Members, it must either circulate a written resolution to each Member or give proper notice that a resolution is to be put before the Members at a meeting.

If the resolution is an Ordinary Resolution, for example, a resolution to appoint auditors or to approve the audited accounts, 14 days' notice should be given, usually by circulating an agenda which sets out any resolution to be made, or a written resolution. A simple majority is required to pass an Ordinary Resolution.

If the resolution is a Special Resolution, for example a resolution to change the Articles of Association, then 21 days' notice is required, or a written resolution circulated, and 75% of the vote is required.

Some resolutions require consent from the DBE, for example, the appointment of Foundation Members or Trustees, or to change the Articles of Association. In these cases, the Member may either seek that consent before making the resolution or may make the resolution subject to obtaining that consent.

Who is authorised to act for the DBE in a Members' Resolution?

1. Written resolutions may only be signed by an authorised signature, which means the Diocesan Director of Education or another Member of the DBE.
2. Where a resolution is to be put to a meeting, the proposed resolution and any supporting documents, recommendations or advice from the Corporate Member Representative must be sent to the DBE, giving at least the notice period set out for that type of resolution. The DBE, through the Education Department, will direct its Corporate Member Representative as to how he or she should vote on the DBE's behalf.
3. Where the resolution is to appoint auditors, approve audited accounts or appoint non-Foundation Members or Trustees, the DBE will usually rely on its Corporate Member Representative to act on its behalf without specific direction.
4. Where the resolution is to appoint Foundation Members or Trustees whose appointments have already been approved through the DBE's published process then the Corporate Member Representative should rely on that prior approval as a direction to vote in favour of the appointment.
5. In all circumstances, the Corporate Member Representative must act as directed by the DBE. If the Corporate Member Representative is unable to do so because of a difference of opinion, or inability to attend a meeting, then he or she must inform the DBE as soon as reasonably practical so that the DBE can appoint a replacement Corporate Member Representative in time to attend the meeting on its behalf.

How does the academy trust obtain consent from the DBE for certain decisions?

The DBE has published policies and procedures for the approval of Foundation Members and Trustees (see above). A resolution to change the Articles of Association should be presented by the academy trust CEO, trust Chair or its solicitors, liaising with the DBE or its solicitors, to agree draft Articles before these are put to the Members as a resolution.

Communication with the DBE – holding the trust board to account

Communication with the DBE is via the Diocesan Education Department. The Foundation Member policy sets out some suggestions as to how foundation and other Members might fulfil their obligation to hold the trust board to account. Corporate Member Representatives

have a particular obligation to liaise with the DBE as to how the Members of their academy trust are achieving this.

This should include the provision of the timetable and standing agenda items for Members' meetings, feedback on the effectiveness of those meetings, including the effectiveness of other Foundation Members and Foundation Trustees, and any concerns you have about the operation of the trust board.

Any documents received as Corporate Representative are received on behalf of the DBE and should therefore be provided to the DBE¹. This includes all agenda and supporting documents, newsletter, updates, draft minutes, signed minutes and any other communication in the capacity as Corporate Member Representative.

Corporate Member Representative taking part in complaints and HR procedures

If a Corporate Member Representative is asked to take part in an investigation or decision-making procedure relating to a complaint or human resources process such as a grievance or disciplinary procedure, they should only agree on the basis that they take part in their personal capacity, not on behalf of the DBE. This may mean that such person will be neither internal nor independent according to the policies of the academy trust.

If a Corporate Member Representative nonetheless takes part in such a process, it should be made clear to all parties that they are acting in their personal capacity and not as a representative of the DBE. No information relating to the process from which any individual concerned might be identified should be shared with the DBE.

Attending meetings

If a Corporate Member Representative is unable to attend a meeting, they should let the DBE know as early as possible so that the DBE may find someone else to attend or send a proxy vote as appropriate.

Resignation of Corporate Member Representative

A Corporate Member Representative may retire at any time, either by notice or with immediate effect. The DBE will appoint a new Corporate Member Representative.

Removal of Corporate Member Representative

The DBE may, at any time and without notice, replace a Corporate Member Representative. This may be because they are unable to attend a particular meeting or because expertise is required for a particular item on an agenda. In these cases, the replacement may be temporary. In the case where particular expertise is required, the DBE may seek consent

¹ Information which includes personal data should never be included in a Members' meeting unless the topic for discussion is the appointment or removal of a Member or Trustee. In both cases, the sharing of this information with the DBE is serving a legitimate purpose, the DBE being itself a Member of the academy trust.

from the academy trust that the usual Corporate Member Representative may nonetheless attend the meeting but not vote.

If the DBE considers that it is not adequately informed, consulted or represented by an individual it may, entirely at its direction, replace that individual with or without notice.

The DBE will replace any Corporate Member Representative who would be disqualified as a Member of the academy trust in their personal capacity.

In the rare case where a Corporate Member Representative is also a Foundation Trustee of the academy trust, removal as Corporate Member Representative will not automatically lead to removal of that individual as Foundation Trustee. The DBE seeks to reduce these cases and will not replicate this duplication in roles

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