



The Rt Hon Michael Gove MP  
Secretary of State for Education  
Department for Education  
Sanctuary Buildings  
Great Smith Street  
London SW1P 3BT

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Dear Secretary of State

### **Guidance for schools becoming Academies**

ATL, GMB, the NASUWT, the NUT, Unison and Unite are deeply concerned about the guidance you have published entitled *Guidance for schools becoming Academies* (DfE Guidance), particularly as the DfE Guidance fails to represent properly the legal position on the necessary consultation that will be required by schools converting to academy status.

We write to you today to set out the extent of our concerns regarding the Transfer of Undertakings (Protection of Employees) Regulations 2006 (TUPE) and the sections of the DfE Guidance concerning TUPE and the right to consultation. In addition to representations made previously by parties to this letter following publication of the DfE Guidance on schools converting to academy status, we set out below our continuing grave and serious concerns regarding the accuracy of the Government's guidance and advice.

We do not believe that the advice properly explains the legal duties and obligations that arise under TUPE and public law and, indeed, in some aspects is incorrect. We are concerned that the DfE Guidance is an insufficient statement of the requirements that both Governing Bodies and local authorities will have to meet and that the Guidance will therefore mislead Governing Bodies.

#### **1. Application of TUPE**

We are initially concerned that there is some ambiguity in the DfE Guidance over the application of TUPE. It is our belief that when any school converts to an academy under the provisions set out in the proposed Academies Bill, there will be a relevant transfer for the purposes of TUPE and therefore all TUPE requirements will apply and will have to be met.

Due to the nature of the change to academy status, and all that it will entail, we believe that the duty to consult will apply in all cases.

#### **2. The obligation to provide information under TUPE**

We do not believe that the DfE Guidance sufficiently explains to Governing Bodies the details of the requirement to provide information concerning the transfer to staff and their representatives. The DfE Guidance refers to 'an obligation to provide written information about the transfer'. However, TUPE is extremely prescriptive about the information that should be provided. In not setting out the level of detail that TUPE requires, a misleading impression is given to Governing Bodies that the obligation is easily satisfied. We believe that where Governing Bodies act on the basis of the current guidelines they will be in breach of the TUPE requirements. We believe that guidance must be amended to make clear the extent of the obligation to provide information so that Governing Bodies are fully apprised of the process that needs to be followed.

In addition, Governing Bodies/Academy Trusts, as the transferee for the purposes of TUPE, will have specific obligations to provide information to the existing employers of staff concerning measures that are envisaged taking place after the transfer. This is adverted to in paragraph 2.13 of the DfE Guidance. However, we do not believe this paragraph is satisfactory to make Governing Bodies aware of their duties. First of all, it refers to 'measures [which will be taken] in relation to staff once the transfer has taken place' without explaining that 'measures' has been given a particular and specific meaning in case law decided under TUPE. Again, the impression created by this is misleading to Governing Bodies and suggests that the requirements of TUPE are less demanding than they are both in law and in reality.

Secondly, it is not clear from the wording and positioning of paragraph 2.13 of the DfE Guidance that this information must be provided to the existing employer as soon as possible. It must be provided at the very beginning of the process of informing staff and their representatives and there is, indeed, a specific regulation of TUPE imposing this obligation on transferees. The obligation on Governing Bodies/Academy Trusts is not a secondary consideration, but a crucial part of the process.

#### **3. The duty to consult**

The consultation requirement imposed by TUPE is that consultation shall take place 'with a view to seeking... agreement to the intended measures'. This includes considering and replying to representations made by the staff and their

representatives. This requires a genuine attempt to achieve agreement and consultation should be approached in a receptive fashion.

Paragraph 1.3 of the DfE Guidance states that consultation must be 'long enough for it to be possible to say that there has been a genuine attempt to agree these changes with staff.' We do not regard this as a fair or accurate representation of the duty to consult. The consultation requirement is not a hoop to be jumped through, which can be categorised as having been met simply by being able to 'say' there has been a genuine attempt to consult. There must actually be a genuine attempt to consult. The DfE Guidance regards the consultation obligation as a *fait accompli* and does not properly reflect the legal requirement for there to be genuine and meaningful consultation. This problem is compounded as a result of the Government's haste to establish the first cadre of new academy schools before the legislation governing conversion to academy status has been passed.

#### 4. Timescale

While we agree with the DfE Guidance in stating that the information and consultation process should commence as soon as a Governing Body passes a resolution in favour of converting to an academy, we are concerned that the guidance envisages this process taking place over a very short timescale. The information and consultation process cannot be rushed, especially given the detail of information that needs to be provided and the requirement for consultation to take place genuinely with a view to seeking agreement. All relevant parties involved must be able to form considered views on all the relevant matters and an artificial timescale cannot be imposed on this process.

In addition, the forthcoming school holidays will have a significant impact on the information and consultation process. There is case law to state that, where information is provided over a period of workplace closure, that does not satisfy the information and consultation obligations. Further, TUPE requires that staff representatives are allowed access to affected employees in the consultation process. This cannot realistically take place during the school holidays, especially when, due to the fixed nature of teachers' holidays, most teachers are likely to have made arrangements for the holiday period and will not therefore be available for consultation.

We therefore believe that in suggesting to Governing Bodies that the process can be completed within a short timescale, a considerable portion of which will be a period of school closure, the DfE Guidance is not compliant with the requirements and obligations of TUPE and could result in schools converting to academy status being subject to legal challenge.

#### 5. Changes to terms and conditions

The DfE Guidance contains a number of references to changes being made to working conditions. Paragraph 1.2 suggests that there is a 'duty to consult staff or representatives if the employer plans to make any changes to working conditions'. Paragraph 2.14 envisages that 'the staffing structure and terms and conditions of employment will remain unchanged, at least initially. Any changes must be subject to consultation with unions and affected staff.'

We believe that these references to changes to terms and conditions are both wrong in law and potentially extremely damaging. The effect of a TUPE transfer is that terms and conditions of employment cannot be changed for any reason connected to the transfer (subject to particular conditions laid out within the Regulations being satisfied) and this is equally the position before the transfer actually takes effect. To suggest that such changes can be made with consultation being the only constraint is wholly wrong in law, misleading to Governing Bodies and potentially damaging to staff in presenting the view that academy status will suddenly free Governing Bodies from the employment law obligations they owe to their staff. In addition, irrespective of any provision of TUPE, there are numerous requirements within other areas of employment law that govern and regulate the process for amending terms and conditions.

#### Summary

In summary, for the reasons set out above, we believe that the DfE Guidance as published is flawed in many respects and that it misrepresents the statutory obligations and duties imposed by TUPE and, in some cases, is incorrect in the advice that it gives.

It is the obligation of you and your Department to ensure that the pursuit of your policies is achieved lawfully and that any guidance you issue regarding the implementation of those policies is correct. We regard that any failure on your part to do so will be susceptible to legal challenge by way of judicial review. Should the guidance be left unamended, we further regard that any decisions made on the basis of such guidance would also be open to similar challenge.

We are therefore of the opinion that the guidance should be withdrawn and subject to detailed amendment.

Should you or any of your colleagues wish to discuss these matters with any of us, we would, of course, be very happy to do so. The matter is extremely urgent. Meetings of Governing Bodies are currently taking place and are following what we believe is mistaken and incorrect guidance.

Yours sincerely

Dr Mary Bousted  
**ATL General Secretary**

Paul Kenny  
**GMB General Secretary**

Chris Keates  
**NASUWT General Secretary**

Christine Blower  
**NUT General Secretary**

Dave Prentis  
**UNISON General Secretary**

Derek Simpson/Tony Woodley  
**Unite General Secretaries**