

Decision-making resources for Boards of academy trusts



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Introduction

Whilst School Trust Boards may be familiar with some of the procedures that academy trusts can use to make decisions between Board meetings with the developing Coronavirus (COVID-19) situation over the coming weeks, school trusts (whether their schools are open or closed) may need to make important and urgent decisions. This pack has been prepared to support you with that task.

Whilst many decisions will be led by the senior leadership team, there will be some decisions where they want Board support and others where a formal Board decision is required. Whilst it may be possible to have some discussions relatively informally by email exchanges or phone calls, there will be times when it is important to have a Board resolution taken at a meeting (or as if it had been passed at a meeting of Trustees) because the subject matter is so important. Beyond the more obvious potential decisions on school closure, for example, there may need to be decisions in connection with Free School Meal provisions for children.

Where there is not a planned Board meeting (or a committee meeting with delegated authority to make the required decision) then your Trust will have the following options:

1. Hold a Board meeting on short notice with Trustees participating via telephone or video conference;
2. Pass written Board resolutions; or
3. Provide for urgent decision-making by the Chair or Vice Chair.

Clearly, the above options may also be relevant if members of the Board cannot attend meetings as they are following the latest Government advice concerning self-isolation. Indeed, you may want to put in place new arrangements for all meetings to be held by virtual means during this uncertain period.

In the following sections we provide guidance on each of the above options. Whilst we have sought to cover the common issues that will arise, please do speak to a member of the team if a question or issue that arises is not covered and they will be able to help you. You can continue to reach us by phone (0370 270 6000) or email (education@brownejacobson.com) at any time.

The information contained within this document is correct as at 1st March 2020.

Board Meetings

It is likely that for urgent and important decisions that your Trust needs to take, calling Board meetings on short notice and allowing Trustees to join by telephone or video conference will be the most convenient and robust approach.

In this section we refer to provisions in the Department for Education's (DfE) current model articles of association for academy trust (**Model Articles**). It is important you check the wording in your own articles of association (**Articles**) in case you have made any changes to the DfE model.

Notice

As you will be aware, the Model Articles (Model Article 111) provide for at least seven clear days' notice to be given of Board meetings. The notice must include a copy of the agenda.

However, the Model Articles do also anticipate that on occasions urgent Board business may need to be facilitated and allows shorter notice as follows:

“provided that where the chairman or, in his absence or where there is a vacancy in the office of chairman, the vice-chairman, so determines on the ground that there are matters demanding urgent consideration, it shall be sufficient if the written notice of a meeting, and the copy of the agenda thereof are given within such shorter period as he directs.”

This means that the Chair can determine the notice period depending on the urgency of the matters requiring urgent decision. It would be good practice for the grounds for urgency to be formally recorded - doing this within the meeting notice would be a sensible approach.

Quorum

Under the Model Articles the general provisions for quorum to transact business at a Board meeting is set at “any three Trustees, or where greater, any one third (rounded up to a whole number) of the total number of Trustees holding office at the date of the meeting, who are in each case present at the meeting and entitled to vote on the matters to be resolved” (Model Article 117).

The Articles do include different quorum provision for a small number of decisions (for example, removing the Chair from office).

Trustees Present

The Model Articles provide for Trustees to participate in meetings (so count in the quorum too) by either telephone or video conference (Model Article 126) provided they have given notice of their intention to do so at least 48 hours before the meeting with their telephone number or details of the video conferencing arrangements and the Trustees

have access to appropriate equipment. If the arrangements do not work on the day, then the meeting can still proceed provided that the meeting is otherwise quorate.

Clearly, the Model Articles do not take account of the short-notice provisions explained above in respect of provision for joining by telephone or video conference. A pragmatic approach would be for the Chair's notice to confirm the arrangements for confirming attendance by telephone or video conference in the notice to reflect the shorter notice period for calling the meeting where it is less than 48 hours. It is also likely that meetings are scheduled already so perhaps invite Trustees to provide notice under Model Article 126 immediately for all meetings until further notice.

Under Model Article 108 the Trustees may, subject to the Articles, regulate their proceedings as they think fit and so Trustees could resolve to adopt a procedure for Board meetings to be held via a telephone or video conferencing facility. Alternatively, the Trustees could look to use the power to make rules under Model Article 137 to do this. You may want to get these arrangements in place as soon as reasonably practicable.

Practical Considerations/Tips

- Make sure you have up-to-date contact numbers for all Trustees and your Clerk.
- If your Clerk cannot attend a meeting on short notice, make sure you arrange for minutes to be taken.
- Consider agreeing in advance the telephone or video conferencing facility you will use (e.g. Microsoft Teams) and make sure everyone is set up and knows how to use it. You may want to have a short user-guide prepared and a test call made to ensure individuals are comfortable with using the technology.
- Holding meetings by telephone or video conference is different than face-to-face meetings so consider agreeing some basic ground rules in advance to help the meeting run smoothly (e.g. mute your microphone when not talking).
- Under the Model Articles (Model Article 104) the proceedings of Board committees and Local Governing Boards are subject to regulations made by the Trustees. You should check your Scheme of Delegation to see what flexibility you have included in the calling and holding of meetings and potentially update it (even if it is a temporary update through a Board resolution).

Written Board Resolutions

If the Trustees are likely to agree to a proposed resolution and it is not something that requires detailed discussion or explanation then it may be convenient to pass a written board resolution, instead of convening a Board meeting.

This procedure is unlikely to be appropriate if any Trustee has a conflict of interest in the subject matter of the resolution, or not everyone is available to sign and/or the decision requires discussion. You may also feel uncomfortable using this procedure for significant decisions.

In this section again, we refer to provisions in the Model Articles, so it is important you check the wording in your Articles in case you have made any changes to the DfE model.

Written Resolution

Under the Model Articles (Model Article 123) a valid Board resolution can be passed in writing where a resolution in writing is signed by all the Trustees entitled to receive notice of a meeting of Trustees (or of a committee of Trustees). The resolution can consist of several documents in the same form, each signed by one or more of the Trustees.

We have included in the annex (page eight) a form of board-written resolution which you could adapt.

The resolution will be passed when it has been signed by all the relevant directors. The wording of Model Article 123 is potentially ambiguous in terms of whether the Trust has to wait to receive the original of each signed resolution before it is passed. Certainly, from an evidential perspective it would be preferable for the Trust to have received the hard copy signed resolutions. However, for some decisions taking into account the wider circumstances you may be content to proceed with Trustees emailing all Trustees with their signed agreement along with a confirmation that they have put the original in the post to the Trust.

We have included for some of our clients wording in their Articles to allow for Board resolutions to be agreed using electronic means (for example, email) to reflect more modern articles of association so do make sure you check exactly what your Articles say on this point. This may be something to pick up as an amendment to your Articles in due course if your Articles include the wording from the Model Articles on written Board resolutions.

Minutes

Once a written Board resolution is passed then this needs to be confirmed to the Trustees. The resolutions should then be placed with the board minutes to record the resolutions.

Chair's Action

In the education sector many are familiar with the concept of 'Chair's Action'. This concept became familiar to many through the governance regulations for maintained schools. There is not an equivalent to Chair's Action as set out in regulations in the DfE Model Articles.

In the case of maintained schools, Regulation 8 of the School Governance Regulations 2013 sets out the basis on which the Chair (or in their absence the Vice Chair) can take urgent decisions (often called 'Chair's Action'). This regulation only applies to any decision that could be delegated by the governing body to an individual but not to those matters that cannot be delegated pursuant to Regulation 19 (save for a limited carve-out concerning the exclusion of pupils - the DfE's exclusion's guidance in effect limits the sole role of the Chair to those instances where a public exam is imminent at paragraph 57

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/641418/20170831_Exclusion_Stat_guidance_Web_version.pdf).

For school trusts, you should check whether you have included an equivalent to Chair's Action in your scheme of delegation (or other relevant governance documentation). It may be that your Trust has never used this as a deliberate policy decision. However, it may have been used in your Trust by relying on 'custom and practice'. If that is the case, now may be a sensible time to formalise your approach so that everyone understands the approach that can and cannot be taken.

Clearly, the granting of Chair's Action is both a significant power and responsibility for the Chair and Vice-Chair. Trustees are charity trustees and company directors and therefore are subject to a range of statutory duties and so it may be that your Trust would prefer to rely on the power to call Board meetings on short notice in the case of urgent decisions.

You may also be able to identify a range of decisions that are likely to arise over the coming weeks and months and therefore be able to agree a specific and limited delegation to a Trustee or a small group of Trustees in respect of those identified matters.

However, you may decide that with appropriate clarity around when and how it may be used, it is sensible to provide for urgent decision-making by the Chair either for a limited time or more generally going forward. If you haven't documented an equivalent and you want to do so now, then you have two options:

1. You could incorporate suitable wording into your Scheme of Delegation (or other relevant documentation); or
2. You could pass a Board resolution setting out the provisions for Chair's Action.

In practice, we anticipate the second option will be best and you can agree to incorporate it into your Scheme of Delegation in due course.

We have set out overleaf a proposed form of resolution that you could adapt to your circumstances. We have included a variety of different options.

Draft wording

*IT IS RESOLVED THAT with immediate effect and until [revoked by the Board] OR [the Government has confirmed that the UK is in the [Post Pandemic Period (as defined by the World Health Organisation)] in respect of Coronavirus (COVID-19)] in order to facilitate the Trust making urgent decisions that arise between Board and committee meetings the Chair (or Vice Chair) may use the following decision-making procedure (to be known as **Chair's Action**):*

1. *Notwithstanding any provisions of the Trust's Articles of Association (the **Articles**) and [Scheme of Delegation], if the Chair is of the opinion that a matter of urgency exists [and it is not practicable to arrange a Board meeting on short notice in the circumstances] either:
 - (i) *after receiving a written report from the [Principal/Executive Principal/CEO] which clearly states, amongst other things, why the item concerned could not be brought to a regular meeting and why it would qualify for urgent decision under this procedure; or*
 - (ii) *as a result of other information that is brought to their attention and a delay in exercising the function would likely be seriously detrimental to the interests of the Trust, [the/any] Academy, pupil or their parent or a person who works at the Trust,**

then, in consultation with the [Principal/Executive Principal/CEO], they may exercise any function of the Trust which [(i)] can be delegated to an individual under the Articles, the Trust's funding agreements with the Secretary of State for Education (including the relevant Academies Financial Handbook) [or (ii) any function relating to the exclusion of pupils].

2. *Where it appears to the Vice Chair that:
 - (i) *the circumstances mentioned in paragraph 1(i) and/or 1(ii) apply; and*
 - (ii) *the Chair (whether by reason of vacancy in the office, incapacity or otherwise) would be unable to exercise the function in question before the detriment referred to in that paragraph is suffered,**the reference in paragraphs 1 and 3 to the Chair is to be read as if it were a reference to the Vice Chair.**
3. *The Chair may decide, on receipt of a request for a decision under Chair's Action, that the matter should be dealt with instead by a special Board meeting called on short notice, in which case a meeting shall be called promptly.*
4. *Any action under Chair's Action should be reported in writing as soon as possible to the Trustees (together with a copy any written report from the [Principal/Executive Principal/CEO]. A record of the decisions taken shall also be included with the Board's minutes.*

Example Written Board Resolution

[name of Academy Trust] (the Trust)

Company Number: [insert]

Trustees' Written Resolutions

I, the undersigned, being a trustee of the Trust RESOLVE pursuant to article [123] of the articles of association of the Trust that:

1. [insert resolution]
2. [insert resolution]

Agreement to the resolutions

Please read the notes at the end of this document before signifying your agreement to the resolution.

The undersigned, a Trustee entitled to vote on the above resolution on the date of circulation of it by the Trust, irrevocably votes in favour of it.

Signed:

Dated:

NOTES

Please indicate your agreement to the resolution by signing and dating this document where indicated above and returning it to the Trust [by post addressed to the [Clerk] at [address] and] by email by scanning a copy of the signed document and emailing it to [name of trustee] at [email address] copying in all other Trustees [and confirming in your email that you have sent the original in the post]. If you do not support the resolution you do not need to do anything.

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