

Successful challenge to Secretary of State's refusal to revoke directive academy order

Our client, Yew Tree Primary School, challenged the Secretary of State for Education's (SSE) decision not to revoke a directive Academy Order.

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Our client, Yew Tree Primary School, challenged the Secretary of State for Education's (SSE) decision not to revoke a directive Academy Order. The Academy Order had been issued when the school was judged to be inadequate by Ofsted, but it came out of this category before conversion to academy status had taken place.

In its decision in July 2021, the court held that the SSE's refusal to revoke the Academy Order was irrational. This is the first case that has been decided against the SSE with regard to forced academisation and the revocation of a directive Academy Order under section 5D of the Academies Act 2010. It is also the first time that the associated sections of the Department for Education's Schools Causing Concern guidance have been tested in court.

Background to the case

In January 2019, the school was inspected by Ofsted and graded inadequate. In April 2019, the SSE made a directive Academy Order in respect of the school, as he is obliged to do when a school receives an inadequate judgment, in accordance with section 4(A1) of the Academies Act 2010.

Ofsted carried out a monitoring visit in October 2019. This was converted into a full section 5 inspection and Ofsted concluded that the school had improved, such that its overall effectiveness grade was now requires improvement.

In light of the revised Ofsted grade and the continued improvement being made by the school, the governing body wrote to the Regional Schools Commissioner ("RSC") requesting that the Academy Order was revoked. However, both the RSC and then the National Schools Commissioner refused to revoke.

On 17 April 2020, having received a pre-action letter from the school in March, the refusals to revoke were both withdrawn by the SSE on the basis that the DfE was in the process of reviewing its approach to decision-making on requests to revoke. The school was told that a new decision would be taken once the wider approach had been reviewed. Meanwhile, routine Ofsted inspections were suspended due to the Coronavirus pandemic.

The SSE's review of its wider approach to revocation resulted in an updated version of the DfE's Schools Causing Concern Guidance ("Guidance"), published on 2 October 2020. This Guidance stated that the SSE's power to revoke an Academy Order (as set out in section 5D of the Academies Act):

"can be used at the discretion of the Secretary of State and it will only be used in exceptional circumstances and not just because a school's Ofsted rating has improved."

The Guidance gave examples of those exceptional circumstances, including the second example which states:

"The school has been re-inspected by Ofsted and judged Good or Outstanding, and the Secretary of State is satisfied that the improvement can be sustained without the support of a strong sponsor. Ofsted's findings will be one of a number of sources of information the Secretary of State will consider when deciding whether improvement can be sustained without the support of a strong sponsor"

When the school made further submissions in support of revocation in October 2020, it cited exceptional circumstances, in accordance with the Guidance, including this second example. The LA also submitted evidence supporting the fact that the school had improved and was continuing to improve.

However, the SSE's decision, made in December 2020, was to refuse to revoke the Academy Order once again. The school then issued a judicial review claim to challenge this decision on the basis that:

- it was irrational of the SSE to conclude that this case did not amount to exceptional circumstances warranting revocation of the Academy Order; and
- the policy set out in the Guidance is applied rigidly by the SSE in practice so as to amount to an unlawful fetter of the SSE's discretion. The SSE will in fact not revoke an Academy Order unless an applicant provides externally validated evidence provided by Ofsted reports.

The court's decision

The court ruled that the SSE's refusal to revoke the Academy Order in December 2020 was irrational. The Judge acknowledged that the school could not strictly fall under the second example within the Guidance as it had not been judged to be good or outstanding by Ofsted. However, the school was unable to point to an Ofsted judgment due to the suspension of inspections. It had instead submitted other evidence to support it being a good school.

The fact that Ofsted inspection was, unusually, unavailable, compelled the SSE to look at other evidence. When it came to the SSE's consideration of that evidence, the court identified a number of flaws:

1. By the time of the December 2020 decision, 23 months had passed since the January 2019 Ofsted inspection. This time lapse meant that the SSE had nearly two years of progress at the school to evaluate in deciding whether to revoke the Academy Order. The assessment of the rapid improvement that could be made by an academy sponsor needed to be determined on the basis of the facts as they were in December 2020, not as they had been in January 2019, nor even October 2019. The Judge had "the strong impression" that the SSE had not engaged with the evidence showing the progress that the school had made, in particular in the 14 months since October 2019. The SSE had concluded that the school's position had not substantially changed but there was clearly a wealth of evidence to contradict this.
2. The SSE's treatment of the LA's evidence was "highly unsatisfactory". The Judge considered the LA's evidence, relevant both to the question of the performance of the school in December 2020, and to the question of the sustainability of progress. The SSE dismissed this evidence too readily and did not seek to clarify where it claimed points were unclear.
3. The SSE had applied "less weight" to the information provided by the LA because of the "wider context of the LA overall not being supportive of academisation". Yet, the SSE had provided no evidence to support that proposition. The Judge concluded that the SSE's view regarding the LA's opposition to academisation was "entirely without evidential basis".

The court did not uphold the school's second ground that the SSE had unlawfully fettered his discretion under s.5D 2010 Act. The court accepted the SSE's submissions that the policy is to consider evidence other than Ofsted inspection outcomes yet hold the view that inspection evidence is likely to be more robust. Further, given how recently the Guidance had been published, the school was unable to point to sufficient data to support the assertion that the SSE had applied the policy in an overly rigid way across a number of cases.

The practical implications of this case

The unusual circumstances of the Coronavirus pandemic were a key aspect of this case. The suspension of Ofsted inspections meant that the school could not be further re-inspected, and the parties had to turn to other forms of evidence to consider the school's further improvement. However, even in normal times, if there is other substantial evidence pointing towards significant improvement, this judgment confirms that the SSE should give it genuine consideration. That evidence may include submissions from the local authority ("LA") and the SSE should ignore those at his peril.

It is not hugely uncommon for directive Academy Orders to be issued but for the conversion to academy status to be delayed by many months, for example, because a suitable sponsor cannot be identified. In these cases, where revocation is under consideration, the court clearly expects the SSE to be considering the full duration of the improvement journey from original inspection to revocation decision, not a more limited period.

As time passes, if there is a prominent pattern of the SSE not revoking Academy Orders despite strong evidence, from Ofsted or otherwise, that a school is no longer one for concern, it may also be possible to pick up and succeed on the fettering of discretion argument made in this case.

Policy changes are on the horizon and a further push towards the academisation of all schools is expected in the coming months, with particular focus on Requires Improvement schools. We don't know exactly what this shift will look like yet, but there may well be changes to the Guidance, policy and possibly even law which alter the picture and the impact of this case quite significantly.

Contact



Katie Michelin

Partner

katie.michelon@brownejacobson.com

+44 (0)115 976 6189

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