

## The law behind grammar schools

27/10/2015

**Local Government analysis: Has Nicky Morgan's recent decision to approve the opening of a satellite grammar school changed the rules about selective education? Emma Sutton, education barrister at No.5 Chambers, considers the implications of this decision.**

### Original news

Education Secretary defends opening of new grammar school, LNB News 16/10/2015 19

*Guardian, 16 October 2015: In a parliamentary written statement, the Education Secretary, Nicky Morgan, has granted approval for the Weald of Kent Girls' Grammar School in Tonbridge to build a new satellite school nine miles away in Sevenoaks, Kent. Ms Morgan defended the government's decision to allow expansion as genuine and argued that it would not pave the way for a change in government policy towards selective schooling.*

Legal foundation for grammar school annexe questioned, LNB News 19/10/2015 45

*Guardian, 19 October 2015: Government ministers who approved the decision to allow a grammar school to build a new satellite school in Sevenoaks have been urged to publish the legal advice they received following reports that there was only a 50% chance of successfully defending a legal challenge.*

### What restrictions did the School Standards and Framework Act 1998 (SSFA 1998) place on grammar schools?

Grammar schools select their pupils by examination of their high academic ability, usually at 11 plus, and are designated as such under SSFA 1998, s 104. A 'grammar school' is defined by SSFA 1998, s 104(2) as a school which selects all (or substantially all) of its pupils on the basis of general (ie academic) ability. Grammar schools are designated as such by order made by the Secretary of State under SSFA 1998, s 104.

The significant restriction imposed by SSFA 1998 is that no new grammar schools can be created although existing grammar schools may continue. Section 39 of the Education and Inspections Act 2006 restates SSFA 1998, s 99 which prohibits any new selection by ability, other than for banding or sixth forms. Consequently, only grammar schools or schools with partially selective arrangements which already had such arrangements in place during the 1997/98 school year are permitted to continue to use selection by ability since that school year.

### How firm a ground is the Education Secretary on in her claims that, as a satellite, the new school is not going to lead to a flood of new grammar schools?

Perhaps not a floodgate, but the doors have been opened--although not by reason of any changes to the law, but due to its recent application. This also has to be put into context. There are currently 163 schools designated under SSFA 1998, s 104(5) as grammar schools in England with a total of around 164,000 pupils. There are no state grammar schools in Wales and although some retain the name 'grammar school', they are non-selective and have no special status.

The law relating to the establishment of additional sites for existing schools has been in existence for a number of years and is contained in:

- o the School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2007, SI 2007/1289 (as amended in the School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2013, SI 2013/3110 (the School Organisation Regulations 2013))
- o the School Admissions (Admission Arrangements and Coordination of Admission Arrangements) (England) Regulations 2012, SI 2012/2886, and
- o the Schools Admission Code

It is arguable that a maintained school or a selective academy can increase in capacity or enlarge to an additional site subject to consultation and, in the case of an academy, subject to the Secretary of State's approval. The consultation proposal must describe why an additional site is necessary. The statutory provisions clearly envisage the possibility of an existing maintained school enlarging its capacity and/or expanding its premise to an additional site.

It is arguable that grammar schools could increase in number to the extent of opening satellite campuses in a town lacking selective provision without breaching the prohibition on the creation of a new grammar school.

The crux is that any proposal to expand onto an additional site will need to ensure that the new provision is genuinely a change to an existing school. Decisions will need to be taken on a case-by-case basis, but proposers will need to be very clear in providing detailed reasons for the expansion and a clear rationale for the approach and a particular site identified.

It is vital that the level of integration between the two sites is considered and the following factors would be relevant--the upshot being that the more integration there is, the more likely the change would be considered as an expansion compared to the creation of a new school:

- o How will the new site be used (eg which age groups/pupils will it serve)?
- o What will the admission arrangements be?
- o Will there be movement of pupils between sites?
- o How will whole school activities be managed?
- o Will staff be employed on contracts to work on both sites? How frequently will they do so?
- o What governance, leadership and management arrangements will be put in place to oversee the new site (eg will the new site be governed by the same governing body and the same school leadership team)?
- o How will facilities across the two sites be used (eg sharing of the facilities and resources available at the two sites, such as playing fields)?
- o Is the new site in an area that is easily accessible to the community that the current school serves?

### **Could other existing grammar schools use this as a precedent to consider opening their own satellite school? What are the legal/regulatory hurdles to this?**

Yes, this could be used as a precedent--however, the decision will always be fact specific. The building of more grammar schools in areas already subject to the system, and where more places are required due to population growth, may be arguable although there has to be a degree of realism about 'floodgate' arguments as most parts of the UK do not have an explicitly selective education system of this sort.

In terms of hurdles to expansion, a consultation process would be undertaken by the governing body or local authority when there is a proposal to enlarge the premises of a maintained school by a capacity of more than 30 pupils and by 25% or 200 pupils (whichever is less) (School Organisation Regulations 2013, Sch 2, Pt 1, para1(1)) and where a school proposes to transfer to a new site, except where the main entrance of the school on the proposed new site would be within two miles of the main entrance of the school on its current site (unless the school is transferring to a site within the area of another local authority) (School Organisation Regulations 2013, Sch 2, Pt 1, para14).

Regard must be had to the statutory guidance on expansion and the proposer would need to have in mind that the presumption that proposals to expand successful and popular schools should be approved does not apply to grammar schools or to proposals for the expansion of selective places at partially selective schools.

Consequently, when a consultation process is undertaken and/or an adjudicator has to adjudicate, it is not likely that the expansion of a grammar school will be readily permitted.

### **Could the creation of the new school be challenged? If so, on what grounds?**

Yes it could, either by an adjudicator or the administrative court by way of judicial review with the primary argument being based on unlawfulness. There is an obvious juxtaposition between a grammar school seeking to increase numbers and expand its capacity and in doing so establish a new site as against the prohibition on the establishment of new grammar schools. A challenge could also be brought on other public law bases (eg, unreasonableness/irrationality). However, whether a challenge would be successful or not would depend on the precise grounds of any claim which would be fact sensitive.

**Could the Free School movement create a grammar school in all but name (ie a selective state-funded school)?**

It is highly unlikely--a Free School is required to adhere to the national admissions code.

*Interviewed by Fran Benson.*

*The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor*



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