

Function Providers

Relevant for:

- Staff that are active and contributing in the Teachers' Pension Scheme
- Staff currently opted-out of the Teachers' Pension Scheme

May 2018

Important

This guidance applies to staff that are active and contributing in the Teachers' Pension Scheme, or are currently opted-out of the Teachers' Pension Scheme.

Where an educational function is outsourced under the 'Best Value' directive to the private sector, the new contracting employer can choose to apply to Teachers' Pensions to become an accepted Function Provider. This will allow them to be an eligible scheme employer and thus participate in the Teachers' Pension Scheme.

This guidance does **not** apply to staff being transferred under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) to an Independent Provider delivering public services, who were previously employed by either a:

- Maintained School, or an
- Academy

The staff concerned in this scenario will be subject to New Fair Deal (NFD), which although has a similar outcome, follows a different process. Separate guidance is provided for New Fair Deal.

Note: Where this guidance may be ultimately found to differ from the Regulations, the Regulations will prevail at all times. For completeness, the relevant extract from the Regulations is shown in Appendix 1 and must be viewed as the authoritative statement.

Key Points

- Many local authority education functions can be contracted out under 'The Contracting out (Local Education Authority Functions) (England) Order 2002' (as amended) to an external organisation.
- Individuals who are engaged on an educational function that is to be compulsory transferred to an independent provider in the private sector will be able to remain in their Public Sector pension scheme as long as they are wholly or mainly engaged on the outsourced contract
- Educational functions include (but not limited to):
 1. Music tuition
 2. Outdoor education (excluding sport)
 3. School Improvement Services
 4. Adult Education
 5. Home tuition
 6. Swimming tuition

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- Eligibility will continue if the service is subsequently retendered and moved on to another independent provider
- Any new hires to compliment or replace previously transferred staff can be enrolled in the Teachers' Pension Scheme, with the exception of any new 'organisers*'

(* an 'organiser' is a person who performs duties in connection with the provision of education or services ancillary to education. This does not include administrative functions. An example of an organiser would be an individual who performs a school inspection role).
- All employees will be required to be enrolled into the Teachers' Pension Scheme, including any that had previously opted out. This is to establish eligibility in the scheme and meet auto enrolment requirements
- Members will be at liberty to opt-out at any time
- A bond, guarantee or indemnity will be required from new employers to the Scheme to provide at least 3 months' worth of employer and employee contributions, to protect the Scheme from short term contribution deficiencies in the event of the employer becoming insolvent
- New employers will be required to provide information to confirm that employees are eligible for scheme membership on an ongoing basis
- All employees will be required to be enrolled into the Teachers' Pension Scheme, including any that had previously opted out. This is to establish eligibility in the scheme and meet auto enrolment requirements. Members will be at liberty to opt-out at any time.

Background

Local Authorities are increasingly looking to manage their treasury budgets by transferring certain (non-statutory) central services to the private sector.

This would mean that the affected staff would ordinarily have to leave their Public Sector pension scheme behind at the point of transfer.

One early solution proposed by The Local Government Pension Scheme (LGPS) was to introduce the concept of 'Admitted Body Status' in 1999, to allow independent contractors, who take on local authority services or functions, to offer transferring staff continued eligibility to the LGPS during the contract or any subsequent transfer between different contractors as long as they remain employed in connection with the delivery of the outsourced service.

The Teachers' Pension (Amendment) Regulations 2000 (2000/665) introduced similar provisions for educational functions that were to be outsourced. A 'Function Provider' was defined under the Teachers' Pension Scheme Regulations at this juncture and is the equivalent to an 'Admitted Body' under LGPS.

It allowed a Function Provider to become an eligible employer under the Regulations and therefore allow a transferring member to continue their membership of Teachers' Pension Scheme.

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Youth and Community Workers

Youth and Community Workers are specifically named within the Teachers' Pensions Regulations as being eligible to contribute to the Teachers' Pension Scheme, but only if they are receiving direct funding or grants from a Local Authority.

If this ceases, due to the role being 'spun out' under 'Best Value' to an independent provider in the private sector, the eligibility prescribed in the Regulations falls away at this point.

Therefore, the new employer will have to offer an alternative pension arrangement to meet their employer duties under the Pensions Act 2008.

Applying for Function Provider status

Only where a Local Authority has outsourced services under 'Best Value' can Function Provider status be considered. Function Provider status cannot be granted where the contracting employer is not a Local Authority.

In order for the employer to be an accepted Function Provider under the regulations, the following actions will be required from the contracting parties:

1. Actions required from the ceding Local Authority

The Local Authority needs to:

- Notify Teachers' Pensions of the proposed date of the change.
- Apply to Teachers' Pensions to request that the employees, employed as part of the outsourced service, may remain in the Teachers' Pension Scheme. If this is not arranged prior to the contract start date, the employees may not be allowed to remain in the Scheme
- Explain to Teachers' Pensions why the services are being outsourced and demonstrate how they fall under the 'Best Value arrangements' together with the name of the proposed Function Provider
- Provide Teachers' Pensions with a list of the people being transferred and a description of each of their roles
- Ensure that the out-sourced provider is fully aware of their responsibilities regarding the Teachers' Pension Scheme
- Ensure that employees are aware of the change and the implications for their pension
- Arrange with the proposed Function Provider to provide a bond or a guarantee that is equal to at least 3 months' contributions due on behalf of each member from both the member and the employer. This includes any Additional Voluntary Contributions (AVC's) a member(s) may be paying
- Once the Function Provider has been accepted as a Scheme Employer, the ceding authority will need to provide withdrawal indicators via Monthly Data Collection to notify the withdrawal of the transferring members from their service.

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2. Actions required by the new Function Provider

The new provider will need to:

- Apply to become a Function Provider, and, subject to the application being accepted, will become an eligible employer
- To arrange (in conjunction with the ceding authority, if necessary) a bond or guarantee as described above*.
(*We are increasingly aware that due to a lack of trading history, many Function Providers are finding it difficult to obtain terms on a commercially viable basis, if at all. Therefore many ceding authorities are acting as an interim 'bondsman' until an accountable credit history can be established by the new employer. It is important that the Function Provider monitors the adequacy of the guarantee as the ultimate withdrawal of support from the ceding authority and/or the addition of further eligible staff will increase the quantum of the liability that will be called upon in the event of the Function Provider becoming insolvent. **Allowing a guarantee to lapse will result in the removal of Function Provider status.**)
- Once accepted as an eligible employer, notify Teachers' Pensions of the engagement of the transferring eligible staff under the new establishment number. This will include the contractual enrolment of those staff eligible to be in the Scheme (including those who have previously opted-out of the Teachers' Pension Scheme or part-time non-joiners who have been employed on a contract since before 01 January 2007).
- The Function Provider will be required to submit employee salary and service. Further details will be provided at that time.
Note: Any employer/employee contributions that have been deducted by the Function Provider must not be remitted immediately to Teachers' Pensions, but be held by them until they have received formal acceptance of their Function Provider status.
- If the ceding authority 'spins out' any further services to the existing Function Provider, if this is done under a separate contract, then a further application/guarantee will be required in respect of each transferring function, unless the transfer includes Youth and Community Workers, in which case they will fall out with the scope of our Regulations and alternative pension provision will need to be contemplated.

As scheme employers in the public service pension schemes, they will also be subject to requirements of the Scheme regulations and the jurisdiction of the Pensions Regulator and Pensions Ombudsman.

Please contact the Teachers' Pensions establishments' team for more details:

<mailto:TPEstabs@teacherspensions.co.uk>

Types of Function Provider

Many local authority education functions can be contracted out under 'The Contracting out (Local Education Authority Functions) (England) Order 2002' (as amended) to an external organisation.

Their powers to trade are found in the Local Government Act 2003 or under the general power of competence in the Localism Act 2011. Any profits made by a wholly- or partly-owned company can

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be reinvested in other council services. This does not, however, apply to statutory responsibilities to provide specific services to individuals'; these services cannot be provided on a commercial basis.

Guidance on matters to be considered by local authorities when deciding whether to use their trading or charging powers was published by the Local Government Association in 2012.

However, the Local Authority cannot itself engage in commercial enterprises and must establish a separate company through which it can trade its services.

An example of this type of entity would be Local Authority Trading Companies (LATCo). This is an 'arms-length', private company limited by guarantee (the same structure as an Academy), but wholly owned by the ceding authority.

There are 2 principle types:

1. A 'teckal' company only exists to contract services back to the ceding authority. It can, however, source up to 20% of its revenue from trading independently. The profits which are generated must be returned back to the authority to offset against costs. These are the 'teckal' conditions. Assuming they continue to meet these conditions, they are exempt from EU procurement rules.
2. The other type of LATCo is one that is established under 'Best Value', and is a 'for profit' entity, trading with other Local Authorities and/or private suppliers. It has to compete for contracts and they are not guaranteed to retain the functions from which they have been devolved. They are subject to EU procurement rules.

<https://www.gov.uk/government/publications/libraries-alternative-delivery-models-toolkit/alternative-delivery-models-explained>

Joint Ventures/Existing Function Providers awarded further contracts

A Function Provider (FP) established by a Joint Venture (JV) of two or more Local Authorities (LA) for the purpose of outsourcing an educational service to the private, voluntary or independent sector (see step 2 above).

If there is ONE agreement between the contracting parties, then one FP application and guarantee will be required. There will be one establishment number allocated upon acceptance.

If there is a separate agreement for each ceding LA with the FP, then each LA will need to make a FP application and provide a separate guarantee. Each LA will then be allocated their own FP establishment number upon acceptance.

Similarly, a Function Provider who has successfully tendered for additional contracts will have to make a further Function Provider application for the new function(s) it has acquired.

New Fair Deal (NFD) v Function Provider (FP)

| Available to: | Local Authorities | Maintained Schools | Academies | Special Schools | FE/HE* |
|---------------|-------------------|--------------------|-----------|-----------------|--------|
| NFD | | ✓ | ✓ | ✓ | ✓ |
| FP | ✓ | | | | |

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(* only if the FE/HE establishment specifically requests access)

| | New fair deal | Function provider |
|---|---------------|-------------------|
| Available to existing employees | ✓ | ✓ |
| Available to new employees (post transfer) | | ✓ |
| Continued access on a second or subsequent compulsory transfer | ✓ | ✓ |
| Letter of Request required | | ✓ |
| Participation agreement required | ✓ | |
| Bond / Guarantee required | ✓ | ✓ |
| Contractually enrol opted-out members upon transfer | ✓ | ✓ |
| Statutory requirement to provide such information to the scheme manager as is necessary to ensure the efficient running of the Scheme | ✓ | ✓ |
| Duty to deduct and pay contributions to the scheme within the statutory time limits | ✓ | ✓ |

Contact

All enquiries must be initially channelled via the Teachers' Pensions Establishments Team.

<mailto:TPEstabs@teacherspensions.co.uk>

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Annex 1 - Extract from Schedule 1 of the TPRS 2010

Accepted function providers

14.—(1) A function provider is accepted pursuant to this regulation in respect of a function or service if the Secretary of State gives it a written notice specifying—

(a) that function or service, and the local authority to which the function or service relates, and

(b) the date on which it becomes accepted in respect of that function or service, which must be a date agreed between the Secretary of State and the function provider.

(2) A function provider may be accepted only if—

(a) it makes a written application to the Secretary of State specifying the function or service in respect of which it wishes to be accepted, and

(b) a guarantee is provided to the Secretary of State.

(3) The functions or services in respect of which a function provider may be accepted are—

(a) a function which it performs on behalf of a local authority in accordance with a direction under section 497A(4) of EA 1996;

(b) an education function of a local authority which it is nominated to exercise under section 497A(4A)(1) of EA 1996 or section 15(6) of the Local Government Act 1999(2);

(c) a service which it provides or makes available under a best value arrangement for the purposes of, or in connection with, the exercise of an education function of a local authority.

(4) A function provider who immediately before 1st September 2010 was accepted under regulation B3A of TPR 1997(3) in respect of a function or service is treated as accepted pursuant to this regulation in respect of that function or service.

(5) A function provider accepted in accordance with this regulation ceases to be so accepted in respect of such functions and services, and from such date, as the Secretary of State may specify in a written notice given to the function provider by the Secretary of State.

(6) A notice under paragraph (5) may be given if—

(a) the function provider makes a written application to the Secretary of State,

(b) the function provider fails to comply with any provision of these Regulations or TSAVCR 1994,

(c) where a guarantee was previously provided to the Secretary of State, either the guarantee lapses or because of a change in circumstances the Secretary of State considers that the guarantee is insufficient,

(d) a proposal for a voluntary arrangement has been made or approved in relation to the function provider under Part 1 of IA 1986,

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(e) an administration application has been made, a notice of intention to appoint an administrator has been filed with the court or an administrator has been appointed for the function provider under Schedule B1 to IA 1986,

(f) a receiver, manager or administrative receiver has been appointed for the function provider under Part 3 of IA 1986,

(g) a winding-up petition has been presented, a winding-up order has been made or a resolution for voluntary winding-up has been passed in relation to the function provider under Part 4 or 5 of IA 1986, or

(h) notice has been received that the function provider may be struck off the register of companies or an application to strike it off has been made under Part 31 of CA 2006.

(7) A function provider accepted in accordance with this regulation must give written notice to the Secretary of State immediately upon the occurrence of any of the events mentioned in paragraph (6)(d) to (h).

(8) In these regulations “function provider” means a body corporate other than a local authority which—

(a) is specified in a direction under section 497A(4) of EA 1996,

(b) is nominated under section 497A(4A) of EA 1996 or section 15 of the Local Government Act 1999, or

(c) provides or makes available services under a best value arrangement.

(9) In this regulation—

“best value arrangement” means a contract or other arrangement made with a local authority for the provision of, or the making available of, services for the purposes of, or in connection with, the exercise of an education function of that local authority;

“guarantee” means a bond, guarantee or indemnity in a form and amount, and provided by a person, approved by the Secretary of State in respect of sums due from the function provider under these Regulations and TSAVCR 1994