

Public Benefit and Fee Charging

Response by the Education Review Group to the Charity Commission consultation on the
draft supplementary Public Benefit and Fee-charging guidance
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Response by the Education Review Group to the Charity Commission consultation on the draft supplementary guidance: Public Benefit and Fee-charging

Background

This is the second response by the Education Review Group to the consultation conducted by the Charity Commission on public benefit as required by the Charities Act 2006. Our first response dated 5 June 2007 addressed the general public benefit guidance in so far as it applied to charitable fee-charging schools (the ‘First Response’). This response addresses the draft supplementary guidance on Public Benefit and Fee-charging in so far as it affects charitable fee-charging schools. We consider that our First Response is still relevant to this consultation and we have drawn on it in some parts of this response.

Who we are

This submission is made by the Education Review Group whose members have been drawn together by their concern for and interest in the education of the children and young people in England and Wales. The Education Review Group is diverse in terms of its members’ current work and their knowledge and experience of education in the UK as education experts, voluntary sector leaders, academics and lawyers. Our focus is on taking the opportunity provided by the consultation to think more creatively than ‘assisted places for the gifted’. We have drawn on a broad range of experience and knowledge of the education system in the UK and of how it impacts or otherwise on the disaffected and the disadvantaged as well as able pupils. We have also thought carefully about the ways in which the fee-charging sector could benefit a wider range (rather than just a greater number) of those who could not pay their fees.

Executive Summary

1. The Group welcomes the draft guidance but nonetheless believes that the Charity Commission should develop the guidance in relation to the analysis of what constitutes ‘direct’ benefit, the need for and the role of quantitative evidence and the reporting of public benefit.
2. The stand alone guidance on Public Benefit and Fee-Charging should in due course be tailored into separate guidance for each distinct sub-sector. For example, fee-charging schools would have their own supplementary guidance which would be annexed to the Education Supplementary guidance. The same could be done for health and other sectors.
3. More emphasis should be given at the beginning of the guidance to explaining the effect of different objects clauses: for example – the legal difference between an education purpose and a recreational purpose. It should be made explicitly clear that this guidance does not apply in the case of charitable

schools established for poor beneficiaries. The public benefit principle: “People in poverty must not be excluded from the opportunity to benefit” will not be relevant because the whole beneficiary class must be poor. Schools set up to educate poor beneficiaries should not be able to omit the poverty restriction without wide public consultation and appeal to the Charity Tribunal.

4. Factors relating to whether the service or facility of a school is delivered to particularly high standards or whether it is providing added advantages in comparison to similar services, will not in general, be relevant to adducing public benefit, unless it can be demonstrated that the added advantages benefit the wider public and not only the restricted fee-paying class. In particular, the Charity Commission should refer to the charity law restriction on ‘goldplating’ ie whether the application of charitable resources towards enhancing a service (ie a school), resulting in a service becoming more expensive and less accessible, is unreasonably preferred over the use of resources to widen access to a school and thereby demonstrate public benefit.
5. Factors relating to the ease with which a school can widen its services and the level of resources available are not relevant to the public benefit test but they may be relevant to the timescale in which remedial action is sought. It is not a question of how easy the task is for the trustees, but about having the will and ‘seeing’ other sorts of charitable educational needs. For example, a local authority may have financial resources available for contracting with charitable fee-charging schools to assist ‘Looked After’ children (where the local authority is the corporate parent) and children classed as ‘EEA’ who have exhausted all asylum appeals, but the Government will not deport them so the local authority is left to fund their education and support.
6. The guidance should include a reference to public benefit principle 1c: “benefits must be balanced against any detriment or harm”. An example, in relation to fee-charging schools would be the award of bursaries on academic merit to pupils who could not otherwise be able to afford the fees. Appendix 1 lists academic research conducted into the Assisted Places Scheme. Whilst there were some clear individual benefits in the Assisted Places Scheme, there were detrimental effects on the state schools which some of those individuals would otherwise have attended. In addition, whilst there were few socially disadvantaged pupils participating in the Scheme, those pupils were more likely to leave school earlier than their peers in the state sector. So, bursaries on merit to poor children will not only be disadvantageous to state schools, but they may be of disbenefit to the individual as well.
7. The benefits – both financial and social derived by a fee-paying pupil from attendance at a fee-charging school should be identified. The Charity Commission should discourage trustees of charitable fee-charging schools from disingenuously implying that the only financial benefit from its charitable status is the annual value of the tax breaks received: for example rate relief,

corporation tax relief, inheritance tax relief, stamp duty exemption and Gift Aid. In particular:

- 7.1 The capital value of the charitable assets owned by many of the most prestigious and successful schools dwarf the ‘tax breaks’. The total value of the benefits made available for a charitable school’s exclusive disposal – for example buildings, endowments and access to charitable funds should on a true basis be recorded as part of the public benefit analysis and we discuss this more in Appendix 2.
 - 7.2 The opportunity to attend fee-charging schools increases the statistical probability of an individual advancing in society quite considerably: a significant benefit. Research Evidence from the Sutton Trust is annexed at Appendix 1.
 - 7.3 Nuffield Foundation research indicates that those people who attended fee-charging schools in the 1980s and early 1990s receive an average pay premium of between 16% and 19% over the earnings of similar people who did not attend such schools.
8. Trustees should identify the full impact on a beneficiary. This would include not just the fees but also other required costs such as transport, uniform, ‘voluntary’ school trips, books, sports activities – any expense or activity which enables the pupil to participate fully in the life of the school.
 9. We are of the view that fee-charging schools should be providing ‘direct benefit’ to the public rather than ‘direct access’. Direct benefit is a broader concept and reflects the principle that the main public benefit task of trustees of a charitable school is to broaden the class of beneficiary that has access to the educational opportunities provided by the school to the restricted class. We set out below some examples of Direct/Indirect Benefit.

Direct/Indirect Benefit

Direct Benefit examples:

- Regular classes for state school pupils at the state school eg Physics or Maths, taken by a teacher employed by the fee-charging school
- Accepting ‘looked after’ children (with a funding contract from the local authority)
- Accepting ‘statemented’ pupils from the state sector (with a funding contract from the local authority)
- Choir started up and run by the fee-charging staff for the state school pupils at the state school, or joint choir with equal numbers of pupils from each school run by the fee-charging school

- Teachers at the fee-charging school teach sixth form state school pupils over the two year A level period to enable the state school pupils to increase their chances of obtaining places at the elite universities and in particular Oxbridge
- Joint or virtual A level classes between a state school and fee-charging school with common homework tasks for the pupils and moderated marking of pupils' work so that pupils from each school have equivalence (ie similar levels and quality of feedback on their work)

NB Local collaborative arrangements may be of Direct Benefit

Indirect Benefit examples:

- Use of sports hall or playing fields by neighbouring state school for PE classes taken by the state school teacher
- Head teacher of fee-charging school becomes governor of state school. As a charity trustee he or she must declare conflicts of interest
- Fee-charging school becomes a fully operative partner in the 14-19 collaboration, contributing sufficient expertise to enable the standards offered to be high enough for the fee-charging school to involve its own pupils in a substantive way. Depending on the degree of involvement and resources committed on an ongoing basis, this could develop into 'direct access/benefit'
- Operating a joint House system between a state school and fee-charging school such that all House activities are joint, sports teams are mixed etc

Direct Access but not Direct Benefit - detriment outweighs benefits due to detrimental effect on state sector:

- Appointing teachers in shortage subjects from the state sector who are 2+years qualified
 - Bursaries awarded on merit – see Research Evidence in Appendix 1. Academic bursaries to talented pupils who do not fulfil the poverty criteria and who are therefore a loss to a neighbouring state school in terms of: pupil performance (league tables); quality of teaching experience (retention of state school staff); and parental support for the school (parent governor, fundraising career networks)
 - Bursary to disadvantaged pupil qualifying under the poverty test for whom there is insufficient cultural adaptation by the fee-charging school and insufficient support and acceptance by the school's staff, governors and fee-paying pupils
10. An impact assessment approach should be made as regards reporting and evaluation. State schools are made rigorously and publicly accountable for their performance. Charitable fee-charging schools should be equally accountable to the public, not just the fee-paying parents, in their provision of

public benefit. (Appendix 3 sets out some protocols for public benefit reporting).

11. Fee-charging schools should account for and report on the public benefit they provide utilising appropriate data from their accounts. We put forward some reporting and accounting principles in Appendix 2.
12. The public benefit provided by fee-charging schools should be reviewed by bodies such as Ofsted, the Audit Commission, the Institute of Education in London, or similarly qualified, objective and independent bodies.
13. Trustees of fee-charging schools should be inducted and trained on public benefit. Fee-charging schools with trustees appointed by Oxford or Cambridge Universities should disclose this as a private benefit vis a vis state schools competing for places at such universities.
14. Fee-charging schools should adopt principles of good governance as set out in the Good Governance Code for the Voluntary Sector. In particular:
 - 14.1 Boards should be diverse and have sufficient representatives from the state sector
 - 14.2 Boards should advertise to fill vacancies
 - 14.3 Boards should include a sufficient number of individuals who were not privately educated and who are not privately educating their children.
15. Fee-charging schools could assist the state sector by:
 - 15.1 supporting state schools to achieve more representative success rates at entry to elite universities
 - 15.2 offering boarding facilities to teenagers with chaotic lives from urban areas
 - 15.3 providing teaching in state schools – particularly in shortage subjects such as individual sciences and modern languages
 - 15.4 providing educational opportunities for young people not in education, training or employment (NEETS)
 - 15.5 being involved in the new national 14 – 19 collaborations and diplomas

General Comments

The draft guidance is very welcome. It is thoughtful and clear and the Group appreciates the careful and detailed work that has obviously underpinned it. It is also practical and user friendly, as we recommended in our First Response, and we make some further practical suggestions here.

Whilst we agree strongly with the approach throughout this draft guidance, which draws trustees into an appropriate analysis of their charity in the context of charging fees, we believe that there is scope for developing the guidance in relation to the reporting of public benefit, the analysis of what constitutes ‘direct’ benefit, and the need for and role of quantitative evidence.

We also wish to recommend that the fee-charging guidance, which covers a few distinct sub-sectors, would be clearer if it dealt separately with each sub-sector. So, for example, fee-charging schools would have their own supplementary guidance which would be appended to the Education Supplementary guidance. The same could be done in due course for health, for example, and other sectors.

We have grouped our responses to the questions according to the sub-sections in the guidance as we found it helpful to keep in mind the main focus of each sub-section when answering the questions. Text in italics is taken directly from the draft guidance which is the subject of this response.

Consultation Questions

Section C: The Charity Commission’s approach to assessing public benefit and fee-charging.

Q1 Do you have any comments on our proposed approach to assessing the public benefit of fee-charging charities?

- 1.1 We agree with the statement in C2 that, in order to ‘*show that people who are unable to pay the fees charged have sufficient opportunity to access the charity’s benefits in a material way related to the charity’s aims*’, the trustees will have to consider the charity’s aims. However, where the objects of a charitable school include the requirement that the beneficiaries be poor, this will affect the application of the public benefit test. The public benefit principle 2c: ‘*People in poverty must not be excluded from the opportunity to benefit*’, will not be relevant because the whole beneficiary class must be poor. Since B1 states that this draft supplementary guidance deals solely with the effect of principles 2b and 2c, it would follow that this draft supplementary guidance

would not apply in the case of charitable schools established for poor beneficiaries. This should be clearly stated in the guidance.

1.2 More generally, we consider that in the context particularly of fee-charging schools, an analysis of the charity's purposes will be extremely important and should be the starting point. We consider that more emphasis and assistance could be given in the guidance on this. This will also be relevant for charities in sub-sectors other than education.

1.3 In relation to charitable schools that charge high fees, we consider that some of the factors listed on pages 16 and 17 of the guidance, if taken in isolation, are irrelevant to the assessment of whether the charity is established for the public benefit, in particular:

1.3.1

(a) "Is it a service or facility that is delivered to particularly high standards?"

(b) "Is the service or facility providing added advantages in comparison with similar services?"

In relation to (a) it is accepted by government that all children have need of a high standard of education and school facilities.

Factor (b) needs careful consideration and perhaps to be qualified. We believe that all parents, not just those who can pay, if asked, would accept the offer of 'added advantages' in relation to their children's education. If education experts and policy/decision makers with responsibility for the education of the whole school community – including the 93% of children who do not attend fee-charging schools, conclude that a particular school provides added value to the wider public then (b) will be a relevant factor. This might be the case where giving special attention to exceptionally talented pupils is in the national interest. However, the key is that the trustees must be able to demonstrate that the added advantages benefit the wider public and not the restricted class alone. We would argue that these two factors, (with the qualification relating to (b) above) do not add to the assessment of whether the restriction of the class of beneficiaries by the charging of high fees is acceptable.

We have a further observation to make in relation to the 'added advantages'. When fees are set such that the 'added advantages' have become little short of luxury – perhaps to fill a gap in an exclusive market for example (as referred to at the end of the second box on page 16 of the draft guidance), then whoever the parent or pupil is, a school charging fees at a level to provide such services would not be meeting a 'charitable' need. This has been described as the 'goldplating' effect.

1.3.2

- *“How easy it is for the charity to widen access to its services?”*
- *The level of resources available to the charity*
- *The social and economic circumstances in which the charity carries out its work”*

The trustees have a duty to comply with the public benefit requirement irrespective of how they ran their charity prior to the Charities Act 2006. Even if the charity has not built up sufficient surplus funds to provide the model of direct access suggested in the draft guidance (subsidised places and bursaries), or is placed geographically in a low-density area with less potential for direct liaison with local schools, there are alternative sources of funding which may be available for meeting imaginatively defined charitable educational needs – as suggested later at 9.5. We assert that it is not a question of how easy the task is for the trustees, but about having the will, being open to the opportunities and ‘seeing’ other sorts of charitable education needs.

We therefore consider that these factors are not relevant to the public benefit requirement as it applies to charitable fee-charging schools and the application of charity law in that context. These questions may be relevant when the Charity Commission is considering appropriate action that it or the trustees must take having reviewed a charitable fee paying school’s public benefit report, in particular the time permitted for the trustees to comply with the law; but it is misleading to include these factors as guidance for trustees as to what public benefit means.

- 1.4 The Charity Commission also need to explain clearly in the guidance for fee-charging schools that there are two aspects of public benefit which need independently to be satisfied: (1) the need to broaden the class of beneficiaries generally – so that representatives of all income ranges must be able to access the charity’s benefits; and (2) the need to provide opportunities for people in poverty to benefit.

Q2 Are there other examples of factors when assessing the public benefit of fee-charging charities that you think we should take into account?

- 2.1 Although we stated at 1.3.2 above that the level of resources available to the charity is not relevant to the public benefit principle 2c – the requirement not to exclude people in poverty from the opportunity to benefit - we consider that the total value of the benefits made available for a charitable school’s exclusive disposal including the value of a school’s endowments, buildings and resources and access to charitable funds - assets for which the trustees of the school have full and unfettered discretion to apply - is relevant information. We understand

that the capital value of the charitable assets owned by many of the most prestigious and successful schools dwarf the 'tax benefits' regularly quoted by the fee-charging sector. (See also Appendix 2 on this).

2.2 The benefits: financial and social, derived by a fee-paying pupil from attendance at a fee-charging school need to be identified so that the trustees have objective and accurate information on which to judge and report whether the opportunities provided by the school to those who cannot afford the fees are educationally equivalent and adequate to sustain a claim to charitable status. So for example, taking the fee-charging school sector as a whole:

2.2.1 The 7% of school age pupils who attend fee-charging schools grows to a much higher percentage of those who perform well at GCSE; to an even higher one of those who achieve well at A level; to over 50% of those gaining places at Oxbridge; and then to an even higher proportion of those achieving prominence in the professions and in business. Opportunity to attend such schools clearly increases the statistical probability of an individual advancing in society quite considerably: a significant social benefit.

2.2.2 Earning power is greatly increased by attendance at fee-charging schools. According to research from the Nuffield Foundation, those people who attended private schools in the 1980s and early 1990s are now getting an average pay premium of between 16% and 19% over and above the earnings of similar people that did not go to a fee-charging school. Much of this premium comes from the better academic qualifications that private school pupils obtain. However, among the better quality schools a notable part of the earnings premium is more than can be accounted for just through the achieved qualifications; this part is likely to come from the social networks that are opened up. The private schools are able to deliver a high average standard of academic education, and excellent facilities, because their fees have increased by a factor of two and a half since 1980 (after allowing for inflation) and because of their endowments of buildings and equipment. The long term advantage a private education conveys is reinforced by various studies by the Sutton Trust about the educational backgrounds of the top professions. (Please refer to papers 6,8,9 and 10 of the Research Evidence in Appendix)

2.2.3 Many charitable schools effectively provide (for their pupils): free use of school buildings and facilities, given or purchased using charitable funds derived from historic endowments; and tax-relieved and/or gift-aided legacies, bequests, donations, and development appeals. If the value of the historic endowments and premises is taken into account the true annual cost of education per pupil may be considerably in excess

of the fees currently charged (which even without this adjustment can be as much as £25k). Whilst we recognise that there can be technical difficulties in equitably valuing some of their assets we are nonetheless of the view that they should be accounted for. This particularly relates to heritage assets. The Accounting Standards Board (ASB) is currently consulting for the third time on a method of addressing this. The outcome of that consultation will be relevant for fee-charging schools and we recommend that the Charity Commission points this out in its guidance to trustees.

(Please also see Appendix 2 which provides a practical proposal for quantitative assessments in this context. Notwithstanding any difficulties over valuation of assets, we would urge the Charity Commission to discourage trustees from disingenuously implying that the school's sole financial benefit from its charitable status is the value of the tax benefits received.)

Section D: Summary of key issues for trustees to think about when charging fees

Q3 Do you think the key questions for trustees set out in section D3 are the right questions and are they helpful?

“D3 Key Questions:

(1) What fees do you charge for the services or facilities provided by your charity? (see section E1)

(2) What is the impact of charging the fees on who can have the opportunity to benefit? (see section E2)

(3) What steps have the trustees taken, or can they take, to provide direct access to the benefits of the service or facility provided by the charity to people who are unable to afford the fees charged? (see section F)

(4) What other opportunities to benefit related to the charity's aims (if any) do you provide for people who are unable to afford the fees charged? (see section G)

(5) What is the overall effect of all the measures taken by the trustees to enable people who are unable to afford the fees to benefit? (see section H)”.

- 3.1 We consider that the Key Questions for trustees in D3 are mainly appropriate but we would want the Charity Commission to develop Key Question 1 further to ensure that the trustees identify (and measure) the true costs of providing the services. The information would be needed by trustees to complete the ‘Public Benefit Statement of Account’ that we propose in Appendix 2. In relation to Key Question 3, we would also want to see a more sophisticated interpretation of ‘direct access’ than is given in the guidance and to recommend additional considerations for trustees when charging fees.

3.2 For a charity with education purposes, the obligation of the trustees is to educate the beneficiaries in accordance with the charity's objects. As far as we are aware, the purposes of education charities relating to schools do not require trustees to deliver a 'service' for payment. Rather, the requirement is to educate or to provide a school in order to educate. It is the choice of the trustees to educate or to run a school by delivering a contractual service for payment. The aim of a school, as defined in the draft Education Supplementary draft guidance is stated as: *"to provide pupils with a range of educational opportunities within which they can fully realise their individual potential"*. As stated in Section C of the draft Education guidance, the courts have given a wide meaning to education but have made clear also that:

3.2.1 Not all experience is educational (C2 of the Education guidance)

3.2.2 Just giving people information is not necessarily educating them (C3 of the Education guidance)

3.2.3 Education needs to have a sufficient structure for it to be capable of educating the intended audience (C7 of the Education guidance)

And further (C2 of the Education draft guidance): Education in the charity law context *"requires the education to be deliberate. The educative nature of the experience needs to be intended, or drawn out and explained or analysed, or to be structured in a way that is capable of increasing learning or understanding or skills or capabilities."*

3.3 We believe that all of this is relevant when considering the meaning of 'direct access'. It is direct access to the education which is the fundamental charitable benefit, not necessarily direct access to the 'service' which is charged for. And, it is not who pays but who benefits which is the consideration for trustees. Logically, therefore, in the context of charitable schools it is 'direct benefit' which should be identified and provided, a broader concept than 'direct access'. Whichever term the Charity Commission chooses to use (direct access or direct benefit) we assert that it must have the following features in the context of fee-charging schools:

3.3.1 Educational opportunities that enable pupils to reach their full potential

3.3.2 Educational experience which is deliberate, intended, drawn out and explained

3.3.3 Experience which is capable of increasing learning or understanding or capabilities

3.3.4 Beneficiaries for whom the education is needed and relevant, including:

- specific and identifiable children or groups of children, or students,
- of the appropriate age

- whether in full or part time attendance at the provider charitable school
- whether paying fees for the ‘service’ or not
- taught by the teachers of the provider charitable school, whether in the school’s buildings or elsewhere

3.4 We do not believe that it is essential for ‘direct benefit’ that an individual child must attend a fee-charging school as a full-time pupil – ie have a contract with a school which provides it with services. This is so in the case of all the relevant example purposes given in the draft Education supplementary guidance, eg

3.4.1 “*to run a school to educate boys*” (page 22 Education guidance)

3.4.2 “*to run a school for girls aged between 12-18*” (page 23 Education guidance)

3.4.3 “*to educate young people in Hampshire*” (page 23 Education guidance)

3.4.4 “*to advance the education of boys and/or girls by the provision of a school [...] and any other boarding school or day school for the education of girls and boys*” (Annex to Education guidance)

It will, in all cases of full time bursary places for individual children, be necessary to fine-tune and ‘fit’ the service to be provided with the particular charitable need. This would involve identifying cultures which may in the long term be harmful to a particular child (Research evidence from the Assisted Places Scheme reveals that some pupils left the fee-charging school prematurely at 16 for cultural reasons).

As state schools gain in quality of buildings and resources, it may be the case that pupils at state schools have greater need of qualified Maths teachers, for example, than use of ancient listed buildings and sports facilities. Thus the charitable need should be identified realistically and with transparency.

3.5 The Annex to the draft Education guidance on the purpose of a school has not embraced the current education context of the majority of schools in England and Wales where collaboration between schools involving cooperation and exchange between teachers and pupils is not only encouraged but, for example, in the case of the 14-19 reforms, required. Schools (in the state sector) are not expected to operate in isolation. Federations of schools, including involving voluntary aided state schools with charitable foundations, have had statutory force for some years. We consider that, even though the purpose set out at 3.4.4 above is described as ‘*narrowly framed*’ in the Education Supplementary guidance, in the modern context any school could work with ‘other’ pupils and teachers provided it fulfilled the legal definition of ‘education’. In most cases,

for schools in England and Wales in the modern context, therefore, opportunities for ‘direct access’ would not be confined to full time attendance at a particular school, and Section F should make this clear (thereby extending the considerations for trustees in relation to Key Question 3 in D3 of this guidance).

- 3.6 There should be an additional obligation for transparency when assessing the impact of charging fees on who can benefit. Trustees should be expected, whenever it can be quantified, to put a value on and disclose the benefits they provide for the people who cannot afford the fees, in terms of the resources the school has applied to and for their benefit (see Appendix 2). This can then be compared with and even assessed as a proportion of the value (in terms of costs) provided to the beneficiaries who pay fees. Whilst this will not be the only measure of public benefit impact it will nevertheless be at least one objective measure to be taken into account. This will contribute to the assessment by trustees of the “*overall effect of all the measures taken by trustees*” – Key Question 5. In this regard, a further question could be included such as: “What is the total value of the costs to the school of the benefits in financial terms provided to the pupils who pay the fees?”
- 3.7 In relation, further, to Key Question 5, it will be relevant when assessing the overall impact of measures taken by trustees, to take into account the potential for detriment or harm. Where certain measures have been identified by research or education experts as having potential for detriment to the wider public, trustees should be asked to provide evidence to demonstrate that the overall benefit to the public of a particular measure outweighs any detriment or harm. An example in relation to charitable fee paying schools would be the award of bursaries on academic merit to pupils who would not otherwise be able to afford the fees. It would therefore be necessary, in the context of fee-charging schools, to include a reference to public benefit principle 1c: “*benefits must be balanced against any detriment or harm*” in Key Question 5. Research evidence throwing some light on the effect of offering subsidised places for individual children who could not otherwise afford the fees is provided in Appendix 1.
- 3.8 Key Question 2 should be developed for fee-charging schools so that trustees are expected to identify the full impact of charging fees on a beneficiary. This would include not just the fees but also other required costs such as transport, uniform, ‘voluntary’ school trips, subscriptions, text books, sports equipment, school theatrical performances which are charged for, etc. In short, any expense or activity which enables the pupil to participate fully in the full life of the school.

Q.4 Do you have any general comments on section D?

4.1 Trustees should be advised that, as a general rule, any opportunity or activity provided to people unable to afford the fees will not count towards the public benefit requirement if the school receives payment for the activity. For example:

- where a school charges for the use of any of its facilities;
- where teachers are paid by examining boards or other organisations for providing external examination or curriculum services
- collaboration with a state school which benefits from external funding (for example the private-state school partnerships initiative funded by the DCSF and formerly by the DfES) as part of a government scheme
- where services are received by the fee-charging school - those of a new teacher on probation, for example
- where the benefit given, eg supervision of trainee or probationary teachers, does not transmit to the state sector because, for example, that teacher proceeds to work in fee-charging schools and not state schools.

The exception to this principle would be funding targeted at and exclusively used for children falling outside the restricted class of fee-paying beneficiaries such as the examples given in 9.5 and 9.6 later.

4.2 Depending on the school's charitable objects, we are of the view that it will be rare for 'community service' activities of the pupils of fee-charging schools to constitute public benefit in accordance with charitable legal public benefit principles. This would also include activities as part of the curriculum of the fee-paying pupils: for example personal and social development and citizenship education. These activities will almost certainly be of benefit and should be actively encouraged, but it is important to make the distinction between benefit in broad non-legal terms and what constitutes charitable legal public benefit. In saying this we acknowledge that there may be ancillary private benefit attaching to charitable public benefit: for example the PR effects of corporate giving.

4.3 Family discount should not count towards broadening the class of beneficiaries.

Section E: Setting and assessing the impact of charging fees

Q5 If you work in a particular area or field where there are additional rules or guidance that affects at what level you can set your fees, whether as a minimum or maximum, please let us know and explain what they are.

- 5.1 We have suggested a revision of the summary of key points arising from section E of the guidance at 21.1 later.

Section F: Providing direct access to the service or facility that is charged for

Q 6 Do you think that, where the provision of the service or facility that is charged for is one of the primary aims of a charity, trustees should, first of all, seek to provide opportunities to people who cannot afford the fees to directly access the service or facility that is charged for?

- 6.1 This is a very complex area. Complexity arises because ‘direct access’ to the ‘service’ could mean full time attendance at a school or it could mean education provided by the school – the latter providing greater flexibility. Further, the Research Evidence in Appendix 1 suggests that the former activity may not always be beneficial to an individual attending the school and can have adverse effects not only on the state schools that might otherwise have provided the education, but in some cases also on the individual concerned.
- 6.2 We consider that the analysis of the methods of providing direct benefit is limited in the draft guidance and we would recommend that when choosing or assessing activities to provide such opportunities, certain principles are applied by the trustees so that the underpinning rationale is revisited. Such a rationale would reflect that the main public benefit task of the trustees of a charitable school which charges high fees is to broaden the class of beneficiary that has access to the educational opportunities provided by the school to the restricted class. The trustees will need, on grounds of public accountability for the tax reliefs they benefit from, to be able to demonstrate the impact of their initiatives when reporting on public benefit. The methods used by the trustees will clearly need to be chosen so as to maximise the impact they will make. Impact measurement is something all charities should be grappling with and various tools and reporting packages have been developed to assist with this. The important question is therefore ‘which methods give the greatest impact’ and then it is for the trustees to provide performance indicators for this.
- 6.3 We would favour an impact assessment approach to choosing activities which provide ‘direct’ benefit over an automatic assumption that bursaries are the best method. The impact approach would enable a fee-charging school to choose methods which provide education services broadly equivalent to those provided to its own fee-paying pupils to the greatest number of beneficiaries unable to afford the fees. Fee-charging schools should develop tools to measure impact in terms of genuine opportunities offered and taken up, quality of education provided, the level of poverty and need in each beneficiary in the unrestricted class and the numbers benefitting.

- 6.4 Further, when determining whether an activity or initiative provides ‘direct’ benefit, it will not only be the charitable purposes which are relevant but also the legal meaning of ‘education’. We agree with the legal meaning of ‘education’ at C2 in the Education supplementary guidance: that education in the charity law context requires “*the education to be deliberate. The educative nature of the experience needs to be intended, or drawn out and explained and analysed, or to be structured in a way that is capable of increasing learning or understanding or skills or capabilities.*”.

Q7 Is our understanding of the difference between bursaries and scholarships correct?

- 7.1 The terms ‘bursaries’ and ‘scholarships’ are not technical, precise or universal. We consider that it is not the name or descriptor which attaches to funding which is important but the characteristics of how that funding is currently employed that determines its nature and effect.

Each case as set out below, needs to be considered on its own facts. Broadly, funding with characteristics 7.1.1 (a) (b) (c) (d) of a pupil at a fee-charging school would by any objective view potentially constitute public benefit but we consider that 7.1.1 (e) (f) and (g) would not.

7.1.1 Qualification for the funding:

- (a) Poverty, eg in receipt of state benefits including those such as eligibility for free school meals at a state school, using the PASC data framework to identify and report very precisely on the socio-economic background of applicants and pupils attending a school.
- (b) Low income (properly means tested, not taking outgoings and mortgage commitments into account).
- (c) no parental history of attendance at fee paying schools
- (d) ‘Looked after’ by the state.
- (e) Ability – whether assessed by ‘aptitude’ or ‘attainment’ test.
- (f) Level of attainment comparable with similar age fee-paying pupils at the school so that all pupils arrive at the school at the ‘same stage’ and differentiation of teaching is not necessary
- (g) One or more siblings at the school.

7.1.2 Features of the funding:

- (a) Received by the individual pupil or the school?
- (b) Provided by an independent charitable trust?
- (c) Provided by a trust associated solely with the school?

The treatment of the features identified in 7.1.2 is given later in Appendix 2.

- 7.2 We agree with the questions that trustees should ask themselves about the impact of the subsidy of places at the school on page 31 of the guidance. We recommend that the Charity Commission include such questions on a public benefit report form which trustees should complete when reporting on public benefit. This would aid transparency and consistency and enable fair comparisons and judgments to be made.
- 7.3 We wish to repeat the views we expressed in our First Response concerning bursaries and scholarships. We consider that this whole area has been given too simplistic a treatment by the Charity Commission. In addition to the views expressed in our First Response, there is research evidence based on the Assisted Places Scheme, introduced by the 1980 Education Act and abolished as one of the first acts of the New Labour government elected in 1997, which, whilst not commissioned for charity law purposes, nevertheless throws light on the whole process and effects of taking individual children out of the state sector and placing them in fee-charging schools.

A report for the Sutton Trust on ‘The Educational and Career Trajectories of Assisted Place Holders’ suggests that there were some clear individual benefits for participants in the Assisted Places Scheme. The nature and extent of these is currently being explored in further research by Professor Whitty and his colleagues. However, in assessing the ‘public benefit’ of the scheme and of current bursary offers, any individual benefits would need to be weighed against their effects on the state schools which some of these individuals would otherwise have attended and on the pupils who do attend them. These effects are discussed in the other listed publications in Appendix 1 by the same research team. The researchers found very few socially disadvantaged pupils participating in the Assisted Places Scheme and these were more likely to leave school earlier than their peers in the state sector.

- 7.4 Anthony Seldon, Head Teacher of Wellington School, a charitable fee-charging school, considers that academic bursaries are not in the public interest, as reported in The Times on May 19 2008: “Bridge the class chasm in schooling”. We would recommend that this is an area requiring further research focussed, in particular, on identifying the public benefit or otherwise of bursaries – if the

Charity Commission proceed to give approval to such methods of providing public benefit.

- 7.5 In addition, we consider that the reporting process required and implemented for the Assisted Places Scheme might provide useful tools in the context of public benefit reporting.
- 7.6 We are concerned that, whilst entry scholarships and bursaries to academically gifted students whose families have a low income may be of benefit to some of those persons, such awards can be harmful to the state sector and the wider public as a whole. We are therefore very concerned that the guidance allows fee-charging schools to pass the public benefit test by virtue of such provision. Not only are these awards arguably harmful to the state sector, they also constitute private benefit to the fee-charging school by boosting its league table results.
- 7.7 We also question how many young people may be eligible. For example, one could anticipate a situation where low income families are apparently welcomed in principle, but no children apply, or there are no children who can meet the criteria. This could be because children from low income families have not been to a prep school which would have prepared them for the entrance exam or their parents have not paid for private tuition. State secondary schools do not prepare their pupils for the 'Common Entrance Exam' at 13, for example, which is a requirement for entrance to some fee-paying schools at age thirteen. It might also be the case that low income families could not take up the offer because of transport issues, because the pupils have no friends at the school or they or their parents feel intimidated. As only 2% of pupils at grammar schools are entitled to free school meals, is the percentage likely to be higher in fee-charging schools?
- 7.8 A distinction exists between scholarships which are for academic merit and bursaries which are based on 'relief of need'. In our view, further to the argument given in paragraph 7.5, where merit-based scholarships involve a fee reduction for families who have previously shown their ability to pay full fees, this should not be counted as a public benefit. The Independent Schools Council's claim that for every £1 the sector receives in tax relief it gives £3 in charitable benefit includes merit-based scholarships and therefore does not satisfy the poverty test.
- 7.9 Bursaries are theoretically given on grounds of need, including where a family falls on hard times. Such circumstances may impact on other grant-making charities which are approached by parents to, for example, assist with fees for a family post-divorce or to make up the other half of a 'half-scholarship'. Any such grants awarded should be taken into account in the overall accounting for the charitable resources from which a charitable fee-paying school benefits,

notwithstanding that the immediate beneficiary is the family. (See also Appendix 2 on this).

- 7.10 In relation to bursaries based on need, any qualifying bursary should include full allowances for uniform and other necessary equipment such as text books, sports activities, trips etc. At present low income families may self-exclude to avoid these expenses.
- 7.11 Insofar as there are awards to low income families, then these should not be done on the basis of academic ability. Requiring children who are poor to be clever enough to pass an entrance test is not only more likely to have a detrimental effect on the state sector, it will restrict the ‘opportunity to benefit’ still further and would constitute private benefit for the fee-charging school. It may be a public benefit for the fee-charging schools to educate some of the most disadvantaged children such as statemented pupils, pupils qualifying for free school meals or pupils who have been excluded from other schools. Educating such pupils would not constitute private benefit because such pupils are not immediately likely to boost league table results. Fee-charging schools might need training in how to cope with and educate such pupils. Such expenses should qualify as public benefit expenditure
- 7.12 Trustees need to apply a poverty test that is robust and consistent with the rest of the charitable purpose heads.

Q8 Do you agree that ways that are designed specifically to assist people who cannot afford the charges are likely to have greater impact on increasing the opportunities to directly access the service or facility that is charged for, and are therefore more likely to be sufficient in meeting the public benefit requirement, than other measures?

- 8.1 We agree that it is for the trustees to determine whether or how much to subsidise places at a school and that the only legal requirement is that they must meet their obligation to ensure that the school materially benefits a sufficiently large class of beneficiaries and that people in poverty have the opportunity to benefit. But the provision of subsidised places at a school is not the only means to provide ‘direct access’ or ‘direct benefit’ as we have already described earlier in 3.3 and 3.4.

Q9 Aside from offering bursaries, in what instances might there be a more appropriate way for educational charities to open up direct access to the educational service or facility?

- 9.1 The boarding element of a fee-charging school could be utilised by offering valuable residential provision for teenagers with chaotic home lives from urban areas.
- 9.2 A fee-paying school might provide teaching in state schools, particularly in shortage subjects such as the individual sciences in secondary schools or modern languages in primary schools, prioritising schools unable to provide qualified teachers with degrees in the relevant subjects. In a recent article a Head Teacher of a fee-charging school recommended that schools ensure that subject teachers be fully competent in teaching their degree subject in schools. This would be little more than a vain hope for some state schools where teachers are often not teaching their degree subject due to shortages in supply. This is exacerbated by the increasing trend of transfer of teachers of key shortage subjects from the state sector to the fee-charging sector (see paper 7 of the Research Evidence paper 7 in Appendix 1). There is a strong argument that the fee-charging schools have a positive duty to share their teachers qualified in shortage subjects with state schools. Interestingly, this was a feature of the two hospitals – public and private - in the *Re Resch* case (*Re Resch's Will Trust, Le Cras v Perpetual Trustee Co Ltd* [1967] 3 All E.R. 919). The same doctors worked in both hospitals. The outcomes of this work should be assessed in terms of measurable benefits to the state school pupils concerned and the value added by the fee-paying school's contribution.
- 9.3 Specialist educational teaching could be provided by a fee-charging school to enable groups of students at one or more specific state schools to achieve more representative success rates at entry to elite universities including Oxbridge.
- 9.4 A fee-charging school which has a record of success in securing places for its pupils at the elite universities, particularly Oxford and Cambridge, could commission and participate in research which explored effective ways that the school could assist local state schools to secure a more representative number of places for pupils with the necessary aptitude or ability.
- 9.5 The following opportunities for collaborative working and assistance to be provided by fee-charging schools situated within the local authority catchment area have been identified as being of educational public benefit by a director of children's services at a local authority ('LA'):
- 9.5.1 The LA's 'looked after' children need to be placed. 'Looked after' children are children of the 'public'. The public are their 'parents'. The corporate parent group of the LA has already discussed approaching fee-charging schools but the costs were very high. The local authority would be able to subsidise these in whole or in part. This is an obvious and easily quantifiable way the fee paying schools could help. The LA would provide the training and support for the school staff. They would not need to place the most difficult children.

- 9.5.2 The state schools in the LA area have the usual subject shortage issues – secondary teachers not teaching their degree subject. The LA needs the fee-charging schools to provide the teaching where LA schools have shortages – which is not necessarily in the best schools. But the LA can't afford to lose a teacher on an exchange. One problem identified, however, is that arrangements need somehow to be mutual. It can be demoralising for state schools to be always on the receiving end.
- 9.5.3 Some LAs have significant numbers of unaccompanied children – refugees and asylum seekers - who have been sent to England by their parents. The LA has to house and educate them. Many of the children are well motivated and do well academically but English is their second language. Government funding has been available but it is insufficient. This is exacerbated in the case of children who are classified as 'EAA' – they have exhausted all appeals ie they are not genuine asylum seekers but the government will not deport them so the LA is left to fund their education and support. Fee-charging schools could provide places for these children.
- 9.6 It has been proposed, and we understand it is currently receiving attention from all parties, that extra state funding be attached to children from disadvantaged backgrounds. We would consider that it would be of public benefit for a fee-charging school to accept and teach such pupils - funded on the same basis as a state school - provided that appropriate support and cultural accommodation was given to avoid any of the detriment to the individual pupils identified in the research on the Assisted Places Scheme.
- 9.7 Participation in the 14 – 19 diplomas and collaborations could provide direct benefit depending on the role that a particular fee-charging school plays. A leading role in a consortium - which makes the local arrangement work effectively - in addition to providing some of the teaching of the whole range of pupils involved in the consortium which the state schools are unable to provide, could qualify. But a minor role simply offering use of a laboratory for example would not constitute direct benefit.
- Q10 Do you have any comments on our approach to assessing the impact of measures taken to open up direct access to the service or facility that is charged for?**
- 10.1 Section F3 uses 'impact' as a determinant of sufficient public benefit. We agree with this approach. Since legislation now requires public benefit to be a reporting requirement and the Charity Commission is designated as the regulator which receives and regulates reports from registered charities then it is appropriate that the Commission should set the standards for such reports. Since fee-charging schools benefit from current and historic tax reliefs they

should be publicly accountable for their benefits. Such accountability should be sufficiently robust to withstand analysis and scrutiny, particularly because of the privileged position such schools have in the 'education market' for teachers and pupils.

- 10.2 We question whether it is necessary, helpful or appropriate for the Charity Commission to set out the practical issues for trustees as on page 33 and 34. The important issue is that the trustees report with transparency, consistency, and objectivity the impact of their actual and proposed measures. The guidance on pages 33 and 34 strays into business planning which the Charity Commission would claim is not their role in any other aspect of working with Charities. (Appendix 3 gives some important principles for reporting public benefit.

Q 11 Do you think that it should matter whether the funding is organised by the charity itself, or by another charity (such as a grant-making charity), or by another body that is linked to the charity (but which may not be a charity itself), or by a local authority, or by another independent third party? (Section F4)

- 11.1 We consider that the source of the funding is important. We have classified three sources of funding: public funding from a local authority such as described in 9.5; funding from a charity associated closely with the school which funds are administered by the trustees of the school; and funding from a charity which is controlled by a different group of trustees. Broadly speaking we would accept that the school could use the funding from the first two sources (subject to the qualification in 4.1) towards its public benefit requirement provided that the funding was utilised for an activity which would qualify according to the criteria in 7.1. (Treatment of the different sources of funding is developed in Part 1 of Appendix 2, paragraphs 13 - 15).

Q 12 Do you think our approach to assessing whether or not trustees' decisions to take no further action regarding public benefit is right? (Section F4)

- 12.1 We agree that there is no legal requirement for a charity to fund places or services by charging higher fees (page 35). But nor is there any legal obligation to charge for services. A charitable trust would normally be established with a fund of money which would then be used for the charitable purposes given in the declaration of trust, such as to operate a school. Further donations can be sought and investments accumulated to provide an income. But there is no obligation under charity law to charge for the services provided.
- 12.2 We are aware that some fee-charging charitable schools have sought public funding for a variety of reasons. A few schools have become 'Academies' which are then funded directly by the government. We note that this has not

been included by the Commission as an option by the guidance nor has the sponsoring of Academies, as discussed here under 14.3.

- 12.3 We agree that the Charity Commission should consider regulatory action to ensure that a charity meets the public benefit requirement (page 35 of the guidance). If, however, trustees decide not to take further action and the Charity Commission issues formal advice to the trustees “*by way of legal protection*” this does not prevent the Charity Tribunal or the courts taking a different view and overruling the Charity Commission’s decision. The guidance currently implies that the Charity Commission’s advice would be the end of the matter. We consider that this is misleading.

Q13 Do you agree with our approach as regards insurance schemes? (Section F5)

- 13.1 This is not, as far as we are aware, relevant to fee-charging schools.

Section G: providing other direct opportunities to benefit.

Q14 Do you have other examples of ways in which organisations might provide other opportunities to benefit to people who are unable to pay the fees? (Section G3)

- 14.1 We have set out some examples of activities which are capable of providing indirect benefit in the table in the Executive Summary. Further detail is given here.
- 14.2 Fee-paying schools that teach pupils in the 14-19 age range could be fully involved in the new 14-19 partnerships which are designed to provide the rich and varied curricula for this age group. There is a strong case for saying that fee-charging schools should be fully involved in the 14-19 national initiative. Typically the partnerships consist of state schools, colleges, employers and local authorities. Charitable fee-paying schools which are acting in the public interest should be contributing to this national and all-embracing initiative. Refusal by a fee-charging school to participate in 14 – 19 diplomas would have the effect of widening the chasm even more between the ‘private’ sector and the state sector. The Charity Commission should explore this point with leaders and experts responsible for the state sector.
- 14.3 Since several fee paying schools are now sponsoring Academies as part of their public benefit requirement each such case should be broken down and analysed in the same way as for any collaboration – eg how much teacher time is contributed by the fee-charging school? Use of a sports field for free would be

quantified as ‘market rental value per pupil hourly use’. Value of salary at an hourly rate for teachers while they attend planning meetings for example. If, after a number of years the effect of the sponsorship is to significantly improve the school (to nothing less than ‘Good’ by Ofsted’s standards) then this might be evidence enough of public benefit? But this takes time, and for now the specific benefits need to be identified in terms of what the fee paying school is actually putting in.

Section H: Assessing overall effect of measures to provide opportunities to benefit for those who are unable to afford the fees charged.

Q15 Would it be helpful, or more likely to mislead, if we used the concept of what ways might have greater weight than others in any public benefit assessment? (Section H2)

15.1 We consider that the term ‘value’ is more meaningful than ‘weight’ in this context as it will facilitate judgments of a more objective nature. It is more appropriate for the charity itself to assess and report on the value it provides than for the Charity Commission to make subjective and unresearched judgments. Case law (Re Resch in particular) refers to direct and indirect benefits. The analysis of public benefit provided by a school should first identify whether a benefit is ‘direct’ or ‘indirect’ and then determine its value. Value can be assessed in monetary terms and hence be objective and comparable. This is appropriate because the class restriction is, by its very nature, monetary. That said, we agree that direct benefits are likely to provide more value to the public than indirect benefits.

Q16 Do you think that, in assessing public benefit, opportunities to benefit that provide direct access to the service or facility that is charged for, such as offering free places, subsidies, discounted fees, or concessions, should be given more importance than ways that provide other opportunities to benefit related to the charity’s aims, such as local collaborative arrangements, or should they be given equal importance? (Section H2)

16.1 We consider that opportunities that provide direct benefit are essential. We have developed this earlier in 3.3 and 3.4. However, we do not agree with the classification of ‘local collaborative arrangements’ as necessarily ‘indirect’. We also consider that the assumption that all bursaries are necessarily for the public benefit is flawed (please refer to the Research Evidence in Appendix 1. (As we have already stated, scholarships on merit do not benefit the state sector and therefore the public.) This would be a simplistic and misleading analysis both of particular ‘public benefit’ activities conducted by schools and the nature and context of schools in England and Wales.

Q17 Is using the concept of what ‘impact’ a particular way or initiative has on providing opportunity to benefit a useful one? If not, what might be a more helpful phrase to use? (Section H2)

17.1 We consider that the concept of ‘impact’ is appropriate and helpful, and is consistent with current trends and initiatives which charities generally are taking to demonstrate to funders and the public the effect and success of their activities. We believe that the Charity Commission should set some ‘rules’ for impact measuring and reporting but should not itself be making subjective impact judgments. (See also our response to Q 10).

Q18 Do you think that the Commission should, either as a matter of law or good practice, take into account the financial or other value that these additional ways of opening up direct access have compared with the income the charity makes from charging for its charitable services? (Section H2)

18.1 As a matter of law a charity is required to protect and maximise its assets for the benefit of its current and (in relation to endowments) future beneficiaries. Trustees are expected to account on SORP principles for their stewardship of the charity’s assets. This should take into account the assets applied for beneficiaries who cannot afford the fees and do not attend the school as well as beneficiaries who attend the school. Impact is only important in so far as it can be measured, evaluated and reported. We have set out some proposals for quantified reporting of the direct and indirect public benefit provided by fee-charging schools based on the expenditure incurred on particular activities and comparing those that benefit the fee-paying pupils with those that benefit the wider beneficiary class. This could in future be taken further into financial accounting at full SORP level, as distinct from the public benefit reporting currently proposed in the Commission guidance. The advantage of this is that it would remove the need for the Charity Commission to ‘make up its own rules’ in an area on which it is not an expert, it would give trustees more certainty about what accounting principles would apply ‘across the board’ and it would render claims made by trustees verifiable and so aid transparency and fair comparisons to be made.

Q19 Do you think that as a matter of good practice, the trustees of high fee-charging charities should consider expressing their charity’s public benefit by assessing and reporting quantified (financial, social or other) value of the benefits they provide, alongside the value of the tax breaks, or other benefits, they receive? (Section H2)

19.1 Ideally, as a principle, we think that it should be an essential public benefit reporting requirement for high fee-charging schools to assess and report the

quantified (financial, social or other) value of the benefits they provide to their fee paying pupils and to those who are unable to afford the fees. We also consider it essential for the school to identify all the benefits which it receives. Subject to the important qualification that follows, we consider that it would be good practice for the school to assess the quantified value of the benefits it provides against the value of the tax breaks and all the other benefits they enjoy as a result of their charitable status. The qualification is that it should not be too simplistic. The Commission should take advice of auditors when verifying the validity of such calculations to avoid misleading results and to allow fair comparisons across the sector where relevant and helpful. However, in Appendix 2, we have set out what we consider a practical way forward, based on expenditure and costs.

19.2 Calculations and reporting should be fine-tuned so as to identify the financial value received from the school by various classes of beneficiaries. For example, figures from one charitable trust serving four fee-paying schools has identified the following for 2008/9:

- 117 non-means tested scholarship awards, or 2.9% of pupils
- Full fee remission, available for parents earning £15k or less, which, in line with Charity Commission recommendations (two thirds of the median national income) provides for 39 pupils, or 0.975%
- Partial fee assistance, for parents earning up to £50k p.a. (or £65k for boarding) benefits a further 143 pupils, or 3.58%

So 7.48% of pupils receive some form of assistance with fees.

We note that no data are available for pupils who would be entitled to free school meals in the state sector, for which this is the criterion for poor/disadvantaged. We contend that fee assistance to families in which parents earn £50k or £65 should not qualify as providing opportunities for people in poverty.

General Questions

Q20 Do you think that the amount of detail and examples we have provided in this draft supplementary guidance strikes the right balance?

20.1 Whilst much of this guidance directs and guides trustees of fee paying schools appropriately, it is long and detailed and the trustees' task is not aided by the inclusion of information relevant to charities with purposes other than education. The considerable public attention given in particular to the effect of the public benefit test on fee-charging schools would suggest that the Commission needs to be as clear and unambiguous as possible in its guidance to that sector. The inclusion of principles and examples not relating to fee charging schools is unhelpful in this regard.

Equally, there are issues which are specific and fundamental to fee-charging schools which need to be addressed so that trustees can identify their school's particular situation and seek legal advice if necessary. Such issues which have already been raised include:

- 20.1.1 the charity's purposes – examples could be given, the legal difference between an education purpose and a recreational purpose could be explained, for example;
- 20.1.2 how to recognise and identify assets and resources from which the school benefits but which are not accounted for in the contract fee paid by the pupil for attending the school;
- 20.2.3 what is meant by poverty – we consider that the same test should apply across the different charitable heads with additional measures appropriate to each sub-sector. So for example, the measure used for schools would be entitlement to free school meals.

We repeat our suggestion made at the beginning in General Comments that it would be more helpful and effective for there to be separate guidance for fee-charging schools annexed to the Education Supplementary guidance. This could be taken in stages so that the content of this guidance relevant to education purposes could be extracted and attached as a further annex to the Education supplementary guidance. This stand alone guidance would remain as it is until further relevant supplementary guidance is published enabling it to be separated out further.

Q21 At the end of sections E – G we have included some key points for trustees to note about each section. Do you have any comments on these key points sections and do you find them helpful? (Sections E – G)

- 21.1 It is useful to include the summary lists but we have made some suggested deletions and comments in the context of fee-charging schools below.

“Summary of Key points in section E (Setting and assessing the impact of charging fees)

(1) Charities can legitimately charge fees and, in some circumstances, can legitimately charge ‘high’ fees. Accepted

(2) ~~The Charity Commission does not specify whether fees should or should not be charged. Irrelevant and unhelpful~~

(3) It is for trustees to decide whether or not to charge fees and, if they do charge, at what level to set the fees for their charity's services or facilities. Accepted

(4) *In setting fees, trustees need to consider what impact the fee levels would have on who will have the opportunity to benefit.* Accepted

~~(5) Trustees' decisions must be consistent with the general legal framework. What does this mean? Does it add anything?~~

~~(6) There are many different ways in which trustees can ensure that those who cannot afford the fees have sufficient opportunity to benefit. Relevant to section F and G, not E~~

~~(7) Fee levels need to be considered in context. Doesn't add anything~~

(8) *In some cases, the availability of external funding might help reduce fee levels or help pay the fees of those who cannot afford them, or assist the financial viability of the school as a whole. (Accepted with tracked change)*

(9) *Charities providing services or facilities that require a high or long term financial commitment are likely to have to do more to ensure that sufficient opportunities to benefit are available to people who are unable to afford those fees, than charities providing a service that people are likely to use on an infrequent basis and whose fees are at a level that the vast majority could afford. Accepted but this is probably redundant as it would apply to all fee-charging schools that are charities.*

~~(10) Schemes that enable beneficiaries to spread the cost of fees might help provide opportunities to benefit but not if those payments are still unaffordable for many people. Is this relevant to fee paying schools?~~

(11) *In some cases it might be appropriate for a charity to use high fee levels in order to finance subsidies for people who cannot afford the full costs, but this will not be appropriate or feasible for every fee-charging charity. Accepted*

“Summary of key points in section F (Providing direct access to the service or facility that is charged for)

(1) *Where the provision of the service or facility that is charged for is one of the primary ~~aims~~ activities of a charity, the legal framework suggests that it is preferable for trustees to focus on enabling as many people as possible to have the opportunity to directly access that service or facility. Accepted but relax ‘aim’ with ‘activity’*

~~(2) An obvious (but not the only way) to enable more people to directly access the service or facility that is charged for is to offer free or subsidised access (through free places, subsidies, discounted fees or concessions).~~

~~(3) There is no general minimum number or percentage of free or subsidised tickets, places or services that have, as a legal requirement, to be offered.~~

~~(4) The Charity Commission cannot specify how much free or subsidised access should be offered. We have to consider what is reasonable and appropriate in each charity's circumstances.~~

(5) *Measures that are designed specifically to assist people who cannot afford the charges are likely to have greater impact on increasing the opportunities to directly access the service or facility that is charged for. Accepted*

~~(6) Trustees are encouraged to must be open and transparent about how their schemes to fund free or subsidised access operate and to take reasonable steps to advertise them widely and publicly. Accepted with tracked change~~

~~(7) Larger charities might have more flexibility to fund free or subsidised access than smaller charities.~~

~~(8) Trustees might want, or need, to fundraise to fund free or subsidised access than smaller charities.~~

~~(9) Trustees might want, or need, to fundraise to fund free or subsidised access.~~

~~(10) In some cases, free or subsidised access might be funded by another body, such as a local authority or grant making body. Trustees are encouraged to be informed about how other funders' schemes to fund free or subsidised access.~~

~~(11) Trustees who rely on external funding as a key way to enable people who cannot afford the full fees to have the opportunity to directly access the service or facility that is charged for, should monitor those funding streams. They will have to look for replacement funding, or find alternative ways for people who cannot afford the fees to directly access the service or facility, or have other opportunities to benefit, if that funding is withdrawn.~~

~~(12) Trustees who rely on the availability of insurance schemes as a way of providing direct access to the service or facility that is charged for to people who cannot afford the full fees will need to be able to demonstrate by evidence, that, in reality, those people are genuinely able to access the service or facility via such schemes.~~

(13) In some circumstances, it might be the case that providing other opportunities to benefit that are related to the charity's aims, but which do not provide direct access to the service or facility that is charged for, might provide greater benefit to the public generally." Accepted

"Summary of key points in section G (Providing other opportunities to benefit that are related to the charity's aims)

(1) There are many different ways in which charities can provide other opportunities to benefit that are related to the charity's aims. Accepted

(2) In practice, charities are likely to use a combination of different ways of providing other opportunities to benefit; some ways might not be sufficient on their own. Accepted

(3) What is most important is the impact those other opportunities to benefit have on who can benefit in what way. Accepted

(4) The other opportunities to benefit must not be minimal or tokenistic or happen by chance. Accepted

(5) If trustees decide to explore other opportunities to meet local needs, we recommend that they engage with their partners and local communities so they can properly and sufficiently discuss and evaluate what sort of services or facilities or collaboration to offer. Accepted

(6) Opportunities to benefit that are not related to a charity's aims will not be taken into account. Accepted"

Q22 Is there anything that you would have expected us to cover in this draft supplementary guidance that we have not included?

22.1 We would like to see a sample public benefit reporting form and/or the guidelines for valuation of public benefit opportunities and provision. (See Appendices 2 and 3)

Q23 Do you have any comments on specific points made in this draft supplementary guidance that are not covered by the other consultation questions?

23.1 We have no further comments.

Q24 What do you think of the overall clarity, style, format and language used in this draft supplementary guidance

24.1 The guidance is clear but rather long and repetitive.

Appendix 1

Research Evidence

1. Edwards, T., Fitz, J. and Whitty, G. 1989. *The State and Private Education: An evaluation of the Assisted Places Scheme*. London: The Falmer Press.
2. Fitz, J., Edwards, A., and Whitty, G. 1989. 'The Assisted Places Scheme: An ambiguous case of privatization', *British Journal of educational Studies*, 37.
3. Power, S., Edwards, T., Whitty, G. and Wigfall, V. 2003. *Education and the Middle Class*. Buckingham: Open University Press.
4. Power, S., Whitty, G. and Wisby, E. 2006. *The Educational and Career Trajectories of assisted Place Holders*. London: The Sutton Trust.
5. Whitty, G., Power, S., and Edwards, T. 1998. 'The Assisted Places Scheme: its impact and its role in privatization and marketization', *Journal of Education Policy*, 13 (2), 237-250.
6. The Changing economic returns to Private Education by Francis Green, Stephen Machin, Richard Murphy, Yu Zhu 28.12.07
7. Competition for Private and State School Teachers by Francis Green, Stephen Machin, Richard Murphy and Yu Zhu, London School of Economics, Centre for Economics of Education, Discussion Paper
8. The Educational Backgrounds of Leading Journalists by the Sutton Trust. June 2006.
<http://www.suttontrust.com/reports/Journalists-backgrounds-final-report.pdf>
9. The Educational Backgrounds of Members of the House of Commons and House of Lords. The Sutton Trust. December 2005.
http://www.suttontrust.com/reports/PoliticiansBackgrounds_09-Dec-05.pdf
10. The Educational Backgrounds of The UK's Top Solicitors, Barristers and Judges. The Sutton Trust. June 2005.
http://www.suttontrust.com/reports/Comparison_educational_backgrounds.pdf

Appendix 2

Introduction

This Appendix provides suggestions for methods of quantifying the benefits derived by beneficiaries of a fee-charging school. Parts 1 and 2 give two different treatments. Part 2 is taken directly from our First Response. We believe that Part 2 would give a truer statement of the benefits derived from a fee-charging school as a basis for reporting on public benefit, but if it were to be carried through into formal accounts it would require a fundamental re-thinking of the charity accounting principles set out in SORP. It is based on the system used in the public sector. And although it would provide a truer result, in practice, at present, auditable figures may not be readily available to facilitate it. We recommend, however, that the Charity Commission look at the principles in Part 2 when and if they follow our recommendation to provide guidance dedicated specifically to fee-charging schools as an annex to the Education supplementary guidance.

Part 1 recognises the difficulty of valuing benefit derives from unmortgaged fixed assets, such as the ‘heritage’ assets which make up the property portfolio of some of the older fee-charging schools. It therefore uses a model based on the amount a school spends on its beneficiaries in educating them (the costs), for which figures are readily available from the school’s accounts. Costs are therefore used as a direct measure of the benefits provided by a school to different classes of beneficiary. This enables comparisons to be made within a school between fee-paying and other beneficiaries. These are, of course, relative figures because the full extent of the benefits derived from fixed assets and investments are not taken into account as they are in Part 2.

Part 1

Accounting Principles and Public Benefit Reporting

1. The Charity Commission has developed useful draft guidance for trustees of fee- charging schools which identifies how the trustees need to apply the basic principles of public benefit in the context of their school and the matters they need to consider. But no guidance is given on how they should report on the public benefit their charity delivers. This contrasts with the very detailed and prescriptive requirements of the charities’ SORP 2005 with which all registered charities are required to comply. It also contrasts with the disclosure requirements of the Annual Return and the SIR. Both of these reports require completion of a standard form, for the purposes of transparency and comparison. The public benefit requirement, made an explicit requirement by the Charities Act 2006, should be treated no less rigorously. Indeed there is an argument that it should have greater importance than the Standard Information Return (SIR) for example, which is not a statutory requirement, merely the result of Charity Commission policy.

2. Further, the protection and proper application of a charity's assets is the paramount concern for trustees of a charity under charity law. Intention and motive considerations are secondary. Public benefit reporting should reflect this principle, particularly in the case of fee-charging charities, where the public benefit may be restricted because the charitable services are charged for.
3. We have considered the task of reporting public benefit and set out below firstly some accounting principles, then a draft 'Public Benefit Statement of Account Working Sheet' with sample figures to illustrate the principles we are advocating.
4. In relation to the 'Public Benefit Statement of Account', we are not suggesting that this would be the only information taken into account for a charitable school's public benefit provision, but that it is a necessary component of the overall report which a school should provide.

Public Benefit Accounting Considerations

5. All registered charities are required to account under the charities SORP 2005 and to use a Statement of Financial Activities - SOFA.
6. Public benefit reporting should, in accounting terms, involve valuation and disclosure.
7. It is difficult to quantify value delivered, especially if it is intended to move beyond immediate outputs (exam passes) to a comparison of different outputs (exam passes and choral opportunities, for example). It is even more difficult if long term benefits (outcomes) are to be measured – for example economic success in later life (for services of a school). There is a debate in the charity sector about how to address these issues, but currently charities are only required to report in a consistent and auditable manner on income and inputs (ie costs).
8. Public benefit needs to be seen in the context, inter alia, of the scale of what is given, relative to the size of the donor entity. Income and assets of charities are not necessarily completely reflected in the accounts, and so it may not be possible to compare the absolute public benefit given by different institutions. However, the proportion of public benefit compared to private benefit for any one institution could, we consider, be arrived at so long as any costs not included in the accounts are excluded both from a calculation of the public and private benefit. Examples of costs that are often excluded are:
 - 8.1 not all 'in kind' contributions are reflected in the SOFA such as volunteer services, certain commercial discounts. In any event the SORP rules restrict what can be considered as valid 'in kind' contributions. For

instance staff time in excess of their contracted hours should not be included in the SOFA;

- 8.2 the value of infrastructural assets eg land, buildings, furniture and equipment are not reflected in the accounts of many fee-charging charitable schools;
 - 8.3 the financial effect of charities related to a fee-charging school may not be adequately accounted for. If several charities operate as one entity, or as a closed community, a school (or schools) and related support organisations, there is an argument for considering them as a whole. This would then affect the question of the relative scale of public benefit support the 'group' is giving.
9. We therefore suggest that it is the costs of charitable delivery which will provide a more practical, reliable and comparable measure, for preparation of the 'Public benefit statement of account', particularly if the statement is to be set in the context of the size of the charity. This will enable an assessment to be made of the proportion of an institution's activity which is charitable in the post Charities Act 2006 era. And it will form an essential component of the fee-paying charitable school's public benefit report.

The 'Public Benefit Statement of Account'

10. This would be a stand alone statement separate from but based upon the information in the annual accounts for the fee-charging charitable school. Methods of apportioning costs could be quite straightforward – they could be based on use of the school's (teaching and caretaking) staff time for example. As a matter of principle, if a school could not translate the value of an activity into costs it could not be counted as public benefit for the purpose of the 'public benefit statement of account'. As the value of a school's buildings would not be counted as a cost, nor conversely could any part of it be credited as a public benefit.
11. If the trustees of a fee-charging school wished to claim the use of its premises for the local community or by a state school, then they would have to decide whether to either include no notional costs or claim these but they would also then have to declare the notional costs for their whole functional (ie use for educational delivery) property portfolio.
12. For a qualifying bursary (see paragraph 1.3.1 earlier), the costs and income foregone (or contributed by charitable or public sector 3rd parties) would be added together to arrive at a public benefit contribution. We consider that this mixture of income and costs is reasonable because it would be difficult to apportion the costs of delivery of education to bursary children, but would

operate on the assumption that the income would be likely, if anything, to be less than the relevant cost.

Treatment of contributions from third parties

13. Funding for or subsidy of school places by a local authority would count as public benefit because the donor is a public body and therefore it can be assumed that it is using its funds for the public benefit.
14. Funding for or subsidy of school places by a charitable trust which is controlled by the trustees of the school may (if qualifying in accordance with paragraph 1.3.1 earlier) be treated as contributing to the school's public benefit requirement.
15. Funding for or subsidy of school places by a charitable trust which is controlled by a different group of trustees than the school trustees (even if there is some overlap) may (if qualifying in accordance with paragraph 1.3.1 earlier) qualify for public benefit but only if the trustees with the responsibility for the administration and management of that fund have taken their decision in accordance with charity law principles. The application of the funds of their trust must satisfy their public benefit obligations and their decision-making must not be fettered. The discretion of the trustees of the separate charitable trust cannot be fettered by operation of a policy which, in effect, is a mandatory requirement to apply their charity's funds for another charity (the school) on the grounds that without the funding the school could not meet its public benefit requirement. The donor trustees must apply their funds for charitable purposes. They would be in breach of trust if they applied funds to a school that was not established and operating for the public benefit.

The Statement of Account Working Sheet follows on the next page

Sample Public Benefit Statement of Account working sheet

ACCOUNTS

	Statement of Financial Activities			ref	Notes element that is of public benefit	less internal contra	net benefit	Commentary
	Unrest	Rest	Total					
INCOMING RESOURCES								
School fees			10,000,000					
Gross fees			10,000,000					
less bursaries grants scholarships	-	1,500,000	- 1,500,000	a	300,000	- 150,000	150,000	some funded from school's restricted funds
			<u>8,500,000</u>					
add back bursaries etc from restricted funds		200,000	200,000	b	150,000	- 150,000	-	all would be included in a above
			<u>8,700,000</u>					
Other educational income		500,000	500,000					
Other trading income		300,000	300,000					
donations			200,000					
fundraising income		250,000	250,000					
Investment income etc		80,000	80,000					
			<u>9,830,000</u>					
		200,000	<u>10,030,000</u>					
OUTGOING RESOURCES								
fundraising costs		200,000	200,000					
Schooling		9,000,000	9,000,000	c			50,000	Based on apportioned and direct costs - see below
grant making			220,000	d	180,000	- 150,000	30,000	excl element inc in a and b above
Governance		40,000	40,000					
			<u>9,240,000</u>					
		220,000	<u>9,460,000</u>					
NET MOVEMENT OF FUNDS								
		590,000	- 20,000					
			<u>570,000</u>					

>>>> PUBLIC BENEFIT GIVEN

Value ratio 230,000 2.43% dependent on legal basis of PB calculations

WORKINGS - re item c above

	Total schooling	direct costs		overheads	disallow	Total claim	Ratio of teaching and caretaking staff hours		
		non staff	staff				total	directly on activity	ratio
Costs	9,000,000	700,000	6,000,000	2,300,000		50,000	210,000		
outreach teaching		1,000	25,000	21,850	-	47,850		2,000	0.95% direct cost = paid staff, and materials
swimming pool use			1,000	1,150	-	2,150		100	0.05%
Sunday school		500	1,000	1,150	- 2,650	-		100	0.05% an example of a disallowed item

Appendix 2

Part 2

EXTRACTS FROM A RESPONSE BY ANNE MOUNTFIELD TO THE CHARITY COMMISSION'S CONSULTATION DOCUMENT April 24 2007

The Application and use of charitable lands and assets

1. There is one very important omission in the Commission's document – the use and value of the charitable assets enjoyed by fee-charging school charities, assets which either were part of the original charitable endowment or which have been provided by subsequent charitable donation, much of it tax-relieved.
2. Section J5 of the consultation document sets out some of the financial benefits conferred by charitable status. But this excludes one of the primary benefits in the case of the ancient independent schools, and of a number of other prestigious schools: the charitable assets which they utilise. These may include all, or a proportion of:
 - a) the land, buildings, teaching equipment and facilities used by the school
 - b) the estates and financial assets all of whose income is available to the school, not merely the tax relief on them.
3. The [Charities] Act [2006] allows the Commission to deal with any unwillingness by charity trustees to apply charity property for its intended purposes.
4. Major charitable assets are made available to independent school charities through their original charitable foundation, or through the establishment of subsequent charitable appeals, trusts, capital and other trust and company donations, or by means of individual legacies and gifts (often tax-relieved). At present, the free use of these assets in effect subsidises the cost of school services. It is these benefits, as well as the tax and business rates relief, which I believe must be satisfactorily accounted for. To give a hypothetical example, if the land and buildings of a school had a current valuation of £10 million, this might be regarded as conferring a subsidy of (say) £700,000 per annum to what the running costs of the school would be if it were trading on a commercial, non-charitable basis; and if it also had income from financial and other assets of (say) another £300,000, the total subsidy might be of the order of £1 million.

Drawing up a statement of public benefit

5. The Consultation Document proposes, rightly, that public benefits must be identifiable (Principle 1); and that in assessing public benefit and accounting for it in their Annual Report, the trustees should report on how a charity meets the public benefit requirement. At Section J5 (page 39) the Consultation Document proposes;
“for example, for high fee-charging charities where the public benefit may not be immediately obvious, given the high level of fees charged, one way in which they might quantify their charity’s public benefits would be to assess and report the (financial, social or other) value of the benefits they provide, alongside the value of the tax breaks, or other benefits, they receive”.
6. However, this proposes setting the claimed benefits against only the value of the ‘tax breaks or other benefits they receive’. It does not propose taking into account the value of the use of charitable assets, as described above. Yet this is likely, at least in the case of the ancient independent schools, to be the greater part of the benefit conferred by charitable status. (It should be remembered that if such an institution were found, in an extreme case, not to be providing sufficient public benefit, it would not be open to the school to ‘opt out’ of charitable status and take the assets with it: once charitable, always charitable. Instead the assets would have to be transferred to another charitable user with similar purposes.)
7. For this approach to have the desired effect of focusing trustees’ attention on the need to devote their charitable resources and the benefit of charitable status to public, not private, benefit, the Commission should consider inviting (or requiring) trustees to present a statement identifying each aspect of claimed public benefit, with a financial value attached. This would allow scrutiny and questioning on an item-by-item basis, as to whether each item does indeed constitute public rather than private benefit. It would assist the Commission to encourage trustees progressively to ensure, and where necessary redirect, the allocation of all their charitable resources to identifiable and specific forms of public benefit. This would also identify and quantify any necessary increase in fees for those who could afford them, to cover the full cost of the educational provision, including that part at present provided by the use of foundation assets.
8. Requiring school charities, like others, to include the name and registration number of the charity in all publications might help increase awareness of this distinction among the general public.

Itemised reporting on public benefit

9. This proposal for an itemised statement of public benefit is based on a theoretical distinction between:

- a) the charity, which owns the assets, receives any tax and related benefits, and funds all public benefit activities provided by the school to any of its own students who are eligible, or to others in the wider community; and
 - b) the school as a trading enterprise which must notionally ‘pay’ the charity for the use of its assets.
10. The proposed statement is not intended to replace statutory accounts, but to be used to fulfil the requirement proposed in Section J5 of the Consultation Document for a statement in the trustees’ Annual Report on how their charity ‘meets the public benefit requirement’.
 11. The purpose of this apparently theoretical presentation is to identify clearly what are the benefits of charitable status, and how they are directed. This should include the extent (if any) to which the charitable assets and other benefits of charitable status are used for the (private) benefit of fee-paying parents not falling into the definitions of low income in Section G1 of the Consultation Document.
 12. A careful separation of ‘School’ and ‘Foundation’ accounts is not a new concept; indeed some bursars ‘of the old school’ have stressed to me the moral importance of this conceptual separation, even where the legal format of the school does not formally distinguish in this way.
 13. Conceptual accounting also has a well-established precedent in the public sector’s ‘Memorandum Trading Accounts’ [see Background note which follows] , where the cost of capital and other costs are assigned to a trading operation, even though not borne in cash terms, in order to show the commercial viability of the operation. In the case of a charitable foundation and its associated school, this might take something like the form set out schematically in the Annex to this note.

Annex

Possible form of reporting on public benefit

A THE FOUNDATION

Income

- Tax, business rates and similar benefits
- Donations and appeal income
- Actual income from financial and other assets
- ‘Receipts’ from the School for use of land, buildings, teaching facilities etc

Expenditure

- Bursaries, scholarships etc for low-income pupils
- ‘Subsidy’ to the School to provide ‘wider access’ educational benefits to local schools etc
- ‘Subsidy’ to the School to promote verified educational innovation and excellence, including merit-based scholarships etc (where permissible)
- Implied subsidy to the School for fee-paying pupils (free use of land, buildings, teaching facilities etc) – ‘incidental private benefit’.

Net Surplus/Deficit

B THE SCHOOL

Income

- Fees actually received
- ‘Subsidy’ from the Foundation and all other charities and donors providing grant income, appeal income for bursaries, innovation and excellence or prize funds.
- Bursary or scholarship grants etc to the School from the Foundation for the benefit of eligible low-income pupils
- ‘Subsidy’ from the Foundation for ‘wider access’ etc
- ‘Subsidy’ from the Foundation for the promotion of educational innovation and excellence
- Implied subsidy from the Foundation for fee-paying pupils (free use of land, buildings, teaching facilities etc) – ‘incidental private benefit’.

Expenditure

- ‘Payments’ to the Foundation for use of land and buildings etc, on full-cost basis without tax or business rate benefits
- Normal running costs of School

Net break even

**Background briefing note
(not included as part of the original submission)**

Memorandum Trading Accounts in the public sector

Memorandum Trading Accounts are used in the public sector (and required in Treasury guidance) to determine the right level of charges made by public sector bodies for their services; and also where a public body has to defend itself against accusations of unfair competition with the private sector, to demonstrate that it is not being subsidised. They also have the effect of making public sector bodies recognise the full costs of their operations (especially the ‘free’ use of capital) in the interests of efficiency, to avoid wrong allocation of resources. They therefore require recognition of capital costs (eg a rate of return on capital employed, depreciation) and also of costs borne by a parent Department or another public sector body but not paid for in cash (eg personnel services). Memorandum Trading Accounts are not used in place of statutory accounts

The analogy for fee-charging charities lies especially in recognising the ‘free’ use of charitable assets – whether the use of buildings, land etc used by a school, or the return on invested capital or landed estates which provide an income. Treating the school as separate from the Foundation, and requiring it to recognise the benefit it receives from the Foundation from free use of assets etc, would help to identify the extent to which fees are ‘subsidised’ from charitable resources. A Memorandum Trading Account for fee-charging schools would thus help the Charity Commission to identify the full extent of charitable resources available to a school, and then to analyse and scrutinise the charitable uses to which they are put.

HM Treasury’s Fees and Charges Guide definitions [here summarised]

- ‘Memorandum trading account’ (MTA):
“... an informal working document, prepared before the start of the financial year in the form of a forecast to determine the appropriate level of fees and charges for a service...”
- ‘Non-cash’ costs....
- ‘Full cost’ ...

Extract from ‘Government Accounting’ (H M Treasury) [which includes]

“...An MTA will be as simple or as sophisticated as the nature of the service dictates. However, it should always include the total cost of all the resources used in supplying the service, both cash and non-cash....”

Appendix 3

Protocols for public benefit reporting by trustees

1. In the Group's view, before one attempts to structure the reporting framework for public benefit, it is crucial to set out an assessment mechanism which is objective and which calls on appropriate tools and expertise. Charitable fee paying schools receive valuable tax breaks and therefore a wider group should input into the assessment procedures. We would be happy to contribute or make suggestions in this regard.
2. Relevant objective research relating to the social and educational context in which fee-paying and state schools operate should be reviewed and considered by those members of the Charity Commission carrying out the public benefit assessment of fee-paying schools. The Research Evidence in Appendix 1 is a start but none of this was commissioned in the context of public benefit and fee-charging schools with a claim to charitable status.
3. There is a strong argument that the Charity Commission is not best qualified to quantify the public benefit provided by any charitable fee-charging school. The Charity Commission should seek expert assistance which might involve such bodies such as Ofsted, the Audit Commission, management consultants such as PwC (who have reported on the Academy programme) or similar, to assist with devising (1) the questions to be included in a reporting form for trustees to complete about their school's public benefit, and (2) analysing the completed reports to enable conclusions to be drawn by the Charity Commission in the light of the requirements of charity law. Assistance for (1) would be on a one-off basis. Assistance for (2) would be necessary at the beginning for complex cases but may become unnecessary in the future as the Charity Commission develops its policies and gains experience.
4. In certain cases, it may be relevant that the findings of a public benefit assessment of a fee-charging school should be considered by a local panel comprising representatives from the educational community in which the fee-charging school is situated before the final report is approved and published. Such representatives might include the Director of Education and Children's Services or equivalent for the relevant local authority area, a local state school head teacher and local parents. It is important that the panel should be representative of the public experience of education both nationally and within the particular area of a fee-charging school.
5. Those persons (ie any expert, the Charity Commission and the local panel) reviewing public benefit in relation to a fee-charging school should have access to all relevant documentation. Such documentation might include: the most recent annual accounts for the school and any associated charitable foundations

and trusts; the most recent inspection report; the school prospectus; and all promotional literature produced by the school. Also, a school's annual review prepared for parents at the event which some schools name as 'prize giving' can be a useful guide to the various activities which have, in practice, been major priorities and achievements for the school but which may go unreported elsewhere. Examples would be an annual careers or universities fair attended by representatives of major commercial enterprises and/or elite universities, providing significant benefit to the fee-paying pupils.

The limitations of the accounts and the inspection report should, however, be recognised. In the case of accounts that have been prepared before the new public benefit guidance and assessment regime has come into force, further work will be needed to ensure that the appropriate financial records are provided. This documentation should take account of all associated charities making donations to the school or pupils, even if they do not legally form part of the foundation, as proposed in Appendix 2. In the case of inspection reports, it should be noted that they are likely to have been produced by inspectors drawn from the fee-charging sector, rather than Ofsted inspectors familiar with the state sector. In general, the larger fee-charging schools are not inspected by Ofsted. HMC schools are inspected by the Independent Schools Inspectorate and not Ofsted. The Charity Commission needs to satisfy itself that the inspection reports a school provides as evidence in relation to compliance with the public benefit requirement are sufficiently objective.

- 6 The reporting of any negative effects of a fee-charging school on its local educational community is likely to be problematic. Here, more than anywhere, some objectivity will be required. We recommend that the Charity Commission gives public notice, both general (eg in the national press at the outset of the whole process as part of the implementation of the Charities Act 2006) and local (targeted at the state school sector in relation to a particular fee-charging school claiming public benefit in its annual report or subject to a public benefit pilot review) of its role in relation to assessing public benefit. Locally, state school governing bodies, Head Teachers and parents might be interested in making representations and the Commission should target its notice accordingly and take any representations into account. Any such representations should form part of the public benefit assessment of a particular fee-charging school. The Charity Commission is accustomed to publishing notices of schemes and changes to charities' objects - inviting representation from the public. This would be an appropriate method of seeking feedback on any negative effects of a fee-charging school on the local schools or community of which the fee-charging school itself may not be aware.
- 7 Rules of engagement should be established in relation to assessing activity or collaboration of a fee-charging school with state schools. These rules of engagement would enable the expert, Charity Commission or panel to judge in any case whether such activity or collaboration is meaningful, effective and

lasting. An important underlying principle should be that interactions between state and fee-charging schools should preferably be mutual. In addition, rules of engagement are required to assess whether, in any particular case, the activity or collaboration carried out has the effect of exacerbating the position of state schools. For example, certain types of activity might have the effect of emphasising the differences in pupils' home backgrounds, create a sense of envy or cause undue dissatisfaction with state provision – all of which can be counterproductive.

8. The voluntary sector as a whole is familiar with principles of transparency and accountability. For example, any charity that receives a grant from public funds such as the Big Lottery or European funds will have to account for the same. We would like to see the same principles of transparency and accountability become fundamental to the due diligence of fee-charging schools. For example, some fee-paying schools do not provide their prospectus without the applicant filling in a form with details of the child and its year of entry. This means that a member of the public cannot readily see how a fee-charging school presents itself to parents. For example, there might be a disjunction between its stated claim that it provides wider public benefit and the way it markets and advertises itself to parents. We would expect that any member of the public should be able to access information as to how the school meets its public benefit test requirements.
9. Any charitable fee-charging school which does not comply with the publicity requirements of charity law should be rebuked by the Charity Commission. This would include all fee-charging schools which do not display the fact that they are a charity and their charity registration number or that of their foundation, as appropriate, on all official printed documentation and all advertising and promotional materials for example in 'good school' guides. We believe that the requirement is widely ignored. Further, we believe that today the term 'public school' as applied to a fee-charging school has become misleading and should not be used by schools that are not open to the public generally.
10. Fee-charging schools should have to complete a public benefit reporting form with standard questions so that the appropriate and standardised information is given by all fee-charging schools in the same way. They should also be required to complete a 'Public Benefit Statement of Account' in a standardised form (see Appendix 2). This would be additional to the SORP requirements and the annual report but could be part of the annual report. The report should also set out the schools' reserves policy which should follow standard charity guidance. These requirements should be imposed on all fee-charging schools irrespective of the level of their annual income.
11. Governors and foundation trustees of fee-charging schools should be inducted and trained on public benefit and trustees' duties and liabilities. This should be reported in the annual report. The annual report should also identify any

significant powers of appointment of governors. Some fee-charging schools may, for example, have governors appointed by Oxford or Cambridge Universities. This might be perceived as a significant private benefit by local state schools competing for places at such universities and needs to be reported.

12. Fee-charging schools should adopt the principles of good governance as set out in the Good Governance Code for the Voluntary and Community Sector. In particular fee-charging schools should meet the requirement for a balanced board. If all, or a very large majority, of the governors of a fee-paying school are the parents of children at the school or were also educated at fee-paying schools, this suggests that the Board does not have sufficient diversity. The trustee board of each school should have representatives from the local state sector and individuals from the local community, otherwise the governance of the school cannot be sufficiently disinterested. Independent trustees from the local community would also be a good way of ensuring that the public benefit was meaningful. Fee-charging schools should follow best practice and advertise for trustees to fill vacant positions. Another way of addressing this would be for the trustees to set up an advisory panel with representatives from the local community. However, proper representation on the Board would be preferable.
13. We are aware that some fee-charging schools may say that it is not possible to quantify public benefit and/or that it is too difficult or expensive to try. Management consultants and accountants such as PwC could surely manage to make appropriate assessments and calculations. The government is using such consultants to assess in very sophisticated ways the success or otherwise of their policies such as performance of Academies, identifying in detail the different social contexts and levels of deprivation and educational attainment or underachievement. The same could be done of wealth and benefits in relation to fee-charging schools. The removal of the presumption of public benefit requires exactly this sort of assessment to be made and prevents the Charity Commission from waiving the requirement in any case. The fact that this sort of assessment has not been a legal requirement before does not mean that it cannot be done. It is simply not an option for charitable fee-charging schools to fail to provide sufficient evidence. It is for the schools themselves to both finance and present the necessary evidence and, in individual cases where it is absent, the Charity Commission has no option but to draw the conclusion that there is insufficient public benefit, with the associated consequences.
14. A parallel here can be drawn with the position prior to the Charities Act 2006 of '4th head charities'. Prior to the Charities Act 2006, the Charity Commission rigorously challenged applicant charities with '4th head' objects (ie not education, poverty or religious charities) to demonstrate public benefit with sufficient evidence. The Charity Commission often resisted first registration until such evidence was presented to their satisfaction. And if, in their view, sufficient evidence was not presented, the Commission refused to register the applicant organisation.

15. State schools are made rigorously and publicly accountable for their performance, which is reported in terms of achievement and attainment of pupils and the value the school has added to the educational progress and attainment of those pupils. Any fee-charging school, which claims as part of its public benefit provision to be assisting pupils in the state sector with a primary purpose activity, should be accountable for its contribution in no less a rigorous manner. 'Value added' assessments are made of state schools. The effect of the involvement of a fee-charging school on state schools that the fee-charging school claims to work with could also be done if the fee-charging school was serious in its attempt to benefit a class of beneficiaries wider than those who pay fees.
16. The Group supports the approach adopted by the Charity Commission to cases where a public benefit assessment of a fee-charging school reveals too little evidence of public benefit. In such cases, the Charity Commission must act as it would in the case of any charity within its jurisdiction. The Charity Commission must use its powers to protect charitable assets. This would involve working with the trustees and using whatever powers are necessary to enable the school's public benefit requirement to be met. Amending the school's purposes may be appropriate in certain cases. In extreme cases the Charity Commission should use its regulatory powers to appoint new trustees

Appendix 4 – Signatories

Conor Gearty	Professor of Human Rights Law, LSE and barrister, Matrix Chambers
Professor Peter Mortimore	Former Director of the Institute of Education, University of London
Julian Le Grand	Professor of Social Policy, LSE
Francis Green	Professor of Economics, University of Kent
Peter Taylor-Gooby	Professor of Social Policy, University of Kent
Fiona Millar	Writer and former Special Advisor, School Governor
Anne Mountfield	Former Assistant Director of the Directory of Social Change
Peter Gotham	Charity accountant, in a personal capacity
Tony Mitchell	National Executive member of the Campaign for State Education and SEA, former teacher in state schools between 1953 and 1987
Margaret Lloyd	Former Chair of trustees, Directory of Social Change
Melissa Benn	Writer
Margaret Tulloch	Secretary of Comprehensive Future and school governor, in a personal capacity
Bryony Pawinska	Chief Executive, the College of Optometrists, formerly CEO of the Institute of Career Guidance and two Educational Business Partnerships, former school governor and member of the Black Country Learning and Skills Council
Rosamund McCarthy	Solicitor, in a personal capacity
Mary Groom	Solicitor, in a personal capacity
Auriol Stevens	Former Editor Times Higher Education Supplement