

Education Focus



Creating Excellence in College Governance: the AoC's Report

The Association of Colleges (AoC) recently published its Report *Creating Excellence in College Governance* to address uncertainty over college governance in a period of rapidly evolving Government policies. The Report includes case studies as to how some colleges have used the new freedoms introduced by the Education Act 2011 to amend their Instrument and Articles in order to adjust the size and composition of their governing bodies and their ways of working.

The Report examines governance challenges created by the current environment. It highlights the issues and challenges most described by governors and senior staff, including difficulty in interpreting a fast changing, politically driven policy environment and concerns raised by governors and senior leaders about the boundaries between governance and management.

Part 2 of the Report focuses on existing governance structures and areas for improvement and includes some helpful case studies. The Report emphasises the variety of models available now that governing bodies have the freedom to re-structure their membership as they see fit to enable the college to fulfil its educational aims (provided it has at least one student governor and one staff governor). The Report emphasises that different structures and ways in working have their merits and governors should clearly decide why and what they want before initiating any changes and considering alternative structures.

The Report also underlines that governance is the act of governing and not managing, i.e. that governors are to provide strategic leadership and direction to an organisation. A definition of good governance is offered; the three different primary purposes of governance being to ensure maximisation of performance and success, representativeness and democracy and

accountability and compliance. Colleges are also referred to the *Good Governance Standards for Public Services Guide*, which identified the following six principles of good governance applicable to colleges:

- focusing on the organisation's purpose and on outcomes for communities and learners;
- the board performing effectively both as individuals and as a team with defined roles and responsibilities;
- promoting values for the whole organisation and behaving with integrity;
- taking informed, transparent decisions and managing risk;
- developing the capacity and capability of the board to be effective; and
- engaging stakeholders and making accountability real.

The Report refers to the Voluntary English Colleges Foundation Code of Governance ("the Code") produced by the AoC Governors' Council which aims to encourage reflection and debate around what good governance means in the context of individual colleges' missions and business situations. The Code sets out standards of good governance practice expected of all governing bodies in the English further education college sector and recommends that each college which has adopted the Code should state this in its corporate governance statement within its annual

audited financial statement. To encourage colleges to comply with the Code, it recommends that where a college's practices are not consistent with any particular provision of the Code it should publish in its corporate governance statement an explanation for that inconsistency.

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Q&A



Minimising the risks of disputes

Caroline Hardcastle heads up the Education Team's contentious work. In this Q&A session she looks at some of the issues which education providers are increasingly having to deal with in an effort to prevent legal proceedings.



As a Dispute Resolution Lawyer, do you find that the education sector is particularly prone to disputes?

I do not think the education sector is necessarily different from any other sector in that regard. Education providers frequently contract with other organisations, whether in procuring goods or services or sub-contracting education provision. It is inevitable that there will be occasions when parties fall out. We are regularly approached by clients to advise them in relation to contracts or specific circumstances which they consider may result in a dispute if not handled correctly at an early stage. I strongly believe that part of my role as a dispute resolution lawyer is to help clients in managing contracts to ensure that they do not end up in the position whereby they are faced with a claim by or against another party. Our cross-disciplinary Education Team consciously works together to join up the strategic and drafting expertise with our previous experience of dealing with education clients' disputes for that very reason.

It is always preferable to try to head off the potential for escalating disputes by enhancing the drafting and processes behind contracts, although of course it is not always possible to prevent a dispute arising. When that does occur, my role in particular is to guide the client through the various options which are available to them to resolve the dispute in the most efficient and effective way possible whilst achieving the outcome the client is looking for.

Is there any way in which education disputes differ from disputes between commercial organisations?

I think it would be wrong to consider that an education provider is not a commercial

organisation in many respects, and most providers are well aware of their position as substantial business albeit an education business with a range of drivers. Whilst some education providers have very different goals to, say, some of our corporate clients, it has to be remembered that many education providers are running extremely successful education businesses, whether they be a college, university or school, with a significant turnover and a substantial body of staff.

Interestingly, clients operating in the education sector often place a different weighting to certain aims when attempting to resolve disputes. A provider's reputation is key to its continued success, perhaps even more so than organisations operating in some other sectors. Add to that the fact that providers such as colleges are exempt charities which therefore have to comply with charity law, and that members of the Governing Body and the Executive Team are often key figures within their communities, and you get a different dynamic when compared with disputes in other sectors. Getting a resolution with the right financial outcome is clearly a high priority, but so is preserving the name of the provider and the satisfaction of a wide set of stakeholders including students, parents and the wider community.

One factor which differentiates education disputes from a lot of our other commercial disputes is the number of parties who may be involved, not necessarily directly in the dispute but on the periphery. A good example of this is in relation to the sub-contracting of teaching which many colleges undertake. If there is a dispute between a college and its partner provider for education services, not only may this have an impact upon the college and

the partner provider, it can also have implications for the funding body and most importantly, the learners who may find themselves in a position where their work has not been assessed and they have not received their certificates for work which has been carried out. It is often therefore a balancing act between trying to ensure that the learners are protected, but at the same time ensuring that the college does not suffer as a result.

Do you get many disputes with sub-contracting of education in the FE sector?

At one time, our college clients in particular had a number of disputes with their education providers. Whilst there are some outstanding private training providers serving learners well, it seemed that there was a stage when there was a prevalence of small businesses setting up as training providers with little or no experience of the education sector and little consideration for the education of its learners. Their primary goal appeared to be that of making money. Fortunately, those types of disputes seemed to have eased off. However, I believe that colleges may still have a difficult time in front of them in terms of managing their partners due to the changes introduced by the SFA with regard to the information that must be disclosed in relation to their partner provision. In particular, I am thinking of the requirement to disclose management fees and the effect this may have upon colleges' partners if they are charging different management fees for different partners. This is not going to result in particularly easy conversations for some colleges and how a college handles these conversations could well determine whether or not the relationship with their partner runs smoothly.

Academies: consultation on pooling arrangements

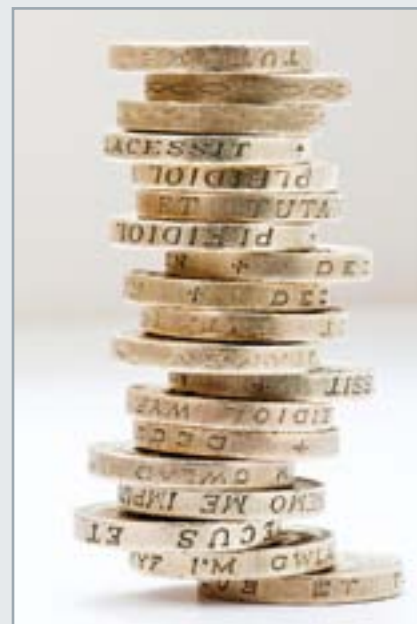
All non-teaching staff employed by academies are automatically eligible to join or remain members of the Local Government Pension Scheme (LGPS) when a former local authority maintained school converts to an academy. Each academy is a separate scheme employer within the LGPS, and is set an individual contribution rate in respect of all existing members of the LGPS that transfer, and any new staff that join following transfer.

This contribution rate can be set at a higher or lower level to that of the local authority from which they transferred, the higher level reflecting the fact that the LGPS may consider academies to be higher risks, since they no longer have the financial backing of the local authority. This can in some cases act as a barrier to converting to an academy.

Because of the perceived higher risk, the Government has provided a guarantee to scheme administering authorities that it will meet any pension liabilities of any academy (or academy trust) that should close. The Department for Communities and Local Government (DCLG) has now also published a consultation on potential pooling arrangements for academies and administering authorities within the LGPS.

Pooling is a mechanism for sharing actuarial assumptions and is aimed at reducing the risk of factors such as early retirement and funding issues, which might have a more significant effect in a relatively small employer such as an academy, and to reduce the potential volatility of contribution rates.

Although pooling arrangements are not specifically provided for in the LGPS Regulations, the consultation is looking at various options for achieving stability of academy employer contribution rates by pooling, including requiring pooling arrangements between academies and the local authority with or without the choice of the parties, or alternatively for academies only to be pooled together, or for all



employers within the schools sector, ie academies and local authority maintained schools, to be pooled together.

Craig Engleman

You have talked about disputes between your clients and other businesses which they contract with, but do you have any many issues with the students themselves?

I believe that students are becoming increasingly vocal in a number of ways. One of the issues that we are seeing on a regular basis is in relation to internal policies and particularly uniform policies. Some students (and their parents) are wishing to express their own personality despite this being contrary to a school's guidance. As a result, schools are facing a number of challenges to their policies. As a general rule, provided that the policy that has been put in place is reasonable and appropriate, the school will be able to support its position. Some schools are changing their policies to reflect the rising cost of uniforms and I think continually reviewing schools' policies in this way ensures that they are reasonable and appropriate. By way of example, I know one school that, in an effort to improve school standards, has provided each

child with the basic uniform. It may well be that such approaches become more commonplace as schools try to target such issues in relation to acceptable uniform policies and ensuring parents can meet the costs of the same.

One of the other issues with students, and we may start to see it more and more with the introduction and increase in tuition fees, is handling perceptions around value for money. If students do not consider that they are benefiting from appropriate teaching, then providers may face claims in relation to the quality of education being provided.

With this in mind, I think it is important that education providers be careful as to what they promise their students. There are cases where providers have promised students that they will obtain employment or receive an apprenticeship or other form of work placement after they have completed their course. I can see that if a student does not obtain a job or receive

similar work placement, then there is a potential for claims to be made. With competition for students being stronger than ever, it is extremely important that education providers do not over promise.

Are there any issues which education providers should look out for in the next six months?

It is not uncommon for some providers to prevent their students from enrolling onto the next academic year's course or from graduating if the student owes monies which relate to non-academic debt; the usual being accommodation fees. However, the Office of Fair Trading has recently opened an investigation to consider some of the terms and conditions used by universities and whether they breach Consumer Protection legislation. The outcome of that investigation could result in further action being taken by students who may, in the past, have been prevented from graduating or progressing to the next academic year.

Creating Excellence in College Governance: the AoC's Report continued from cover...

To ensure that good governance is taking place the Code recommends that governing bodies should be periodically assessed for their effectiveness, with the results being published. Such assessment should include consideration of:

- the performance of the college as a whole in meeting its strategic objectives, using appropriate key performance indicators to benchmark performance against comparable colleges wherever possible;

- the reputation of the college and the views of stakeholders; and
- the performance of the Chair and other governors holding office or undertaking defined roles within the governance structure.

We are seeing a significantly increased interest amongst college governing bodies to better understand the flexibility available to ensure that their colleges are operated

in a manner that works best for them. There is a lot that colleges are now able to do with their structures if they wish; our advice always begins with an analysis of what it is the college is wanting to achieve. Change for the sake of change is rarely productive, but change to facilitate defined objectives can create genuine opportunities in a rapidly evolving sector.

Gerry Morrison

DfE advice on charging for school activities

Extra curricular activities have long been a key part of a school's offering, but these usually come at some financial cost. In order to help provide schools with certainty as to what may and may not be charged for, DfE has published advice for schools (including academies) on charging for school activities in compliance with sections 449-462 of the Education Act 1996.

As well as reminding schools what must not be charged for, there is useful guidance on "optional extras" that can be charged for in some circumstances. These include board and lodging for a pupil on a residential visit and the provision of education outside of school time so long as it is not part of the national curriculum, not part of a syllabus for a prescribed public examination that the pupil is being prepared for at the school, and not part of religious education.

Any charge must not exceed the actual cost of providing the optional extra activity, divided equally by the number of pupils participating. It cannot therefore include an element of subsidy for any other pupils wishing to participate in the activity whose parents are unwilling or unable to pay the full charge and cannot incorporate the cost of supply teachers required to cover teachers who are absent. If any activity cannot be funded without voluntary contributions, the school should make this clear to parents at the outset whilst making the point that there is no obligation to make any contribution.

Tom Morrison



Acquisitions

cultural fit versus strategic fit

In the previous edition of Education Focus we explained that we would be running a series of articles covering the acquisition and disposal process in typical education sector transactions. The first in this series takes a step back from the process and looks at the wider issues around cultural and strategic fit.



In many acquisitions there is a focus on financial due diligence and financial modelling which shows the impact on the enlarged group after the acquisition. There is also careful consideration of the strategic fit: what will the enlarged group be able to do that it could not do before? This is prudent and the right thing to do (along with other due diligence) but it is not the whole story.

There is a powerful force which is often ignored and which can undermine the success of an acquisition. This force is culture. Edgar Schein, in *Organisational Culture and Leadership* (2004), said that, 'Culture is an abstraction... If we don't understand the operation of these forces, we become a victim of them.'

But what is culture? Martin Bower of McKinsey defined culture as, 'the way we do things around here'. It is the result of and affected by a number of factors including history, goals, environment and, most importantly, people. It is shared assumptions, norms, values and beliefs. Culture is sometimes for this reason called the 'normative environment'. It is not static but it is slow to change.

There are often deeply held beliefs about the way work should be organised within education providers, the way authority should be exercised, people rewarded and people controlled. What combination of obedience and initiative is looked for? What hours of work are expected? How are people expected to dress?

Different parts of the same provider might have different cultures. Charles Handy in *Understanding Organisations* (1999) broke organisational culture into four main types: power, role, task and person.

1. Power Culture: based upon power and frequently found in small entrepreneurial organisations. Power and influence spreads out from a central figure. They have an ability to make decisions and move quickly. They judge by results. There is little or no bureaucracy.

2. Role Culture: this is a deliberate bureaucracy. Each role is clearly defined. There are procedures for communication and the settlement of disputes. The role is more important than the person who fulfils it. They offer security and predictability.

3. Task Culture: is job or project orientated. Influence is based upon expertise not on position. Top management will exercise control by the allocation of projects. It is typical in a business which operates in fast moving and competitive markets.

4. Person Culture: the individual is the central point. Structure is minimal. Individuals are difficult to manage.

There needs to be a fit between culture and strategy. Very often the culture and normative environment is not recognised or well articulated. For example if the culture and strategy of a particular private training provider is profit maximisation and individualism, but the strategy and culture of an acquiring college requires teamwork and investment then the chances of the acquisition being a long term success is greatly reduced.

It may be possible to mould and craft culture but how far this is done will depend upon a number of factors. In addition, if there is an earn-out (where the sellers are paid additional sums upon the achievement of certain post-completion financial targets) there may be tension with the seller wanting to maximise earnings and the college thinking beyond the earn-out period. We will consider the area of earn-outs in more depth in a later article.

So be aware of the culture of your organisation and that of any target. What may appear to be a good strategic fit may have other hurdles to overcome. Changing the culture of an organisation takes time: it can be far more entrenched and far more powerful than any of us might think.

Richard Field and John Flanagan

Hackett v Information Commissioner: Curtailling the Freedom of Information Act 2000 for education providers?



The Freedom of Information Act 2000 ("FOIA") provides the public with an opportunity to scrutinise decisions of public authorities such as schools, colleges and universities and generally hold such public authorities to account. The Government made the scope of FOIA intentionally broad and since 2005 the public has had the right to access information held by or on behalf of all public authorities, subject to various exemptions.

Complications may arise as to whether or not a body is a "public authority" for the purposes of FOIA. Schools (including academies), colleges and universities are automatically classified as public authorities, but complex corporate

structures may make it more difficult to determine whether other organisations involved in the delivery of education fall within the remit of FOIA. Such confusion was clear in the recent case of *Hackett v Information Commissioner*.

In *Hackett*, the Appellant requested information about the employment packages relating to United Learning Trust's Chief Executive and senior management team. United Learning Trust ("ULT") received Government grants to run 21 academies. Part of the grant money was paid to United Church School Trust ("UCST"), a third party private company, under the terms of a service agreement between ULT and UCST.

Both ULT and UCST are subsidiaries of United Church Schools. Under the services agreement, ULT's Chief Executive and senior management team were paid by UCST. ULT stated that it did not hold the information requested as it was held by a party which was not subject to FOIA.

The Appellant raised a complaint with the Information Commissioner, who found in favour of ULT on the basis that the costs for the Chief Executive and senior management team were met by UCST, which was not publicly-funded and not subject to FOIA. The Appellant then appealed the decision to First-tier Tribunal arguing that as ULT and UCST are subsidiaries of United Church Schools they are, in effect, both part of one company and so both ought to be treated as being caught by FOIA. Furthermore, the funding passed to UCST by ULT under the services agreement came from the Government and so ULT should account for those funds publicly. To do otherwise and prevent Government spending from being open and transparent would, it was argued, lead to public mistrust.

The First-tier Tribunal dismissed the appeal and upheld the decision of the Information Commissioner. In addition, the Tribunal confirmed that there was complete corporate separation between ULT and UCST dismissing the Appellant's argument that they were both part of one company. It should be noted that the Tribunal made clear that its decision in this case was partly based on the fact that the corporate structure was something which the DfE had urged on ULT. This may well be of interest to academies formed under the Academies Act 2010 who, whilst themselves a public authority for the purposes of FOIA, may (depending on their structure) be able to use the decision in *Hackett* to resist certain freedom of information requests.

Tom Morrison

Fair Deal 2013 (see our website)

The government has published its updated Fair Deal policy, which is a non-statutory policy that sets out how pensions issues are to be dealt with when staff are compulsorily transferred from the public sector to independent providers delivering public services. The previous Fair Deal policy provided that members of public sector pension schemes that are transferred out to a contractor are offered a broadly comparable scheme to their existing public service scheme by the contractor, and required that their accrued benefits be protected by means of a bulk transfer to the new scheme. Fair Deal 2013 makes some significant changes, relating to what happens on the first such transfer and HM Treasury is currently consulting on the application of the Fair Deal for members of TPS employed in higher and further education before finalising the regulations governing the scheme and the options for protecting members' pensions. Visit our website if you would like to see our summary of the key changes.

Craig Engleman

Beware payment fraud

The Skills Funding Agency issued a warning at the end of October that providers are increasingly being targeted by fraudsters seeking to divert funds destined for legitimate suppliers. A particular scam involves the fraudster contacting the provider posing as an existing supplier and asking that the provider update the bank details to which payments are to be made. The sums of money involved have on occasion reached into hundreds of thousands of pounds. Some of our education clients have also contacted us when they have realised that something is not quite right with their subcontractors. We have seen a number of cases where the subcontractor provider has notified our

client of new bank details, dressing it up as a mere administrative change when the truth is that the identity of the legal entity behind the subcontractor has changed. Following a flurry of fraud cases linked to Train to Gain in particular, our experience is that providers are more alert than they have ever been to ensuring that robust due diligence checks are carried out before engaging with subcontractors. It is our view that it is vital that these checks are replicated periodically, especially if a subcontractor attempts to make any changes to their details such as a change of account details, change of correspondence address or change of name.

Caroline Hardcastle

In brief

The
**LEGAL
500**

Rollits recommended by Legal 500 for education

Rollits' Education Team is proud to have been recommended for its work in the education sector for the third year running by the independent directory Legal 500. The directory, which is regarded as one of the key publications for assessing the legal profession in the UK, is put together by an independent editorial team which researches firms and speaks directly with clients, competitors and other key figures in the sector. We are very grateful for the support shown to us by the sector, without which this recommendation would not have been made.

National Student Survey confirms that most UK students are satisfied with courses

This year's national student survey reported satisfaction scores in several areas which were an improvement on 2012. The National Student Survey found that 85% of final year students were happy with their courses. The ratings come in a year where the highest ever response rate has been achieved, with students from 319 colleges and universities taking part.

New Law Journal article on data protection and FOI issues for the education sector

Rollits has for several years written New Law Journal's specialist column on data protection and freedom of information. New Law Journal is produced by one of the world's largest legal publishers, and is read by lawyers to help keep themselves up to speed. We used our experience in the education sector to put together a piece on the impact of these two increasingly important areas of regulation on the sector. Please see our website or get in touch with us if you would like a copy.

HEC Report claims university regulation is inadequate, whilst OFT calls for information on competition

A report by the Higher Education Commission articulates its fears that a lack of regulation of English universities means that students are at risk of attending failing institutions, and that an institution failing would damage both students and the wider brand of UK higher education. The HEC believes that current checks are not adequate for a sector which now has a new funding system in the wake of higher tuition fees introduced last year.

The ability of Higher Education Funding Council for England ("HEFCE") to regulate universities has been diminished and there are particular concerns around the fact that there are more providers entering the market, particularly with an online offering.

The Report comments that "New market entrants are not facing the scrutiny they should, takeovers and complex corporate structures are being used to evade fundamental protections for students, and institutions are facing more pressure than ever to recruit students and crucially, therefore, bring in funding."

The HEC is calling on the Government to bring about legislation to tackle the problems. It proposes the creation of an overarching regulatory body (the Council for Higher Education) incorporating HEFCE, the Office for Fair Access, the Student Loans Company and a new organisation called the Office for Competition and Institutional Diversity. It also suggests that an insurance scheme should be put in place, paid into by every relevant provider, to safeguard students in the event that an institution or course fails.

At the same time, the OFT has launched a call for information on the provision of undergraduate higher education in England. The OFT wants to understand

whether universities are able to compete effectively and respond to students' needs. It also wants to analyse whether students are able to make well-informed decisions, which helps to drive competition. The OFT is particularly keen on receiving information about how universities compete, the impact regulation has on them and students' experience of the current system.

Tom Morrison

Information

If you have any queries on any issues raised in this newsletter, or any education matters in general please contact Tom Morrison on 01482 337310 or email tom.morrison@rollits.com

This newsletter is for the use of clients and will be supplied to others on request. It is for general guidance only. It provides useful information in a concise form. Action should not be taken without obtaining specific advice.

We hope you have found this newsletter useful. If, however, you do not wish to receive further mailings from us, please write to Pat Coyle, Rollits, Wilberforce Court, High Street, Hull, HU1 1YJ.

The law is stated as at 15 November 2013.

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A list of members' names is available for inspection at our offices. We use the term 'partner' to denote members of Rollits LLP.

