Rollits LLP

Education Focus

Spring Term 2018
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Welcome

to the Spring Term 2018 edition of Education Focus…

In this edition we summarise key issues raised in a letter sent to academy trust Chairs by Lord Agnew; highlight a recent decision of the Advertising Standards Authority in relation to unproven claims made by universities in their advertising; take a look at the continuing impact of the Bribery Act on the education sector; and explain a revised Memorandum of Understanding which has been entered into between the Department for Education and the Charity Commission. To kick off, here are a few updates on the GDPR, the Apprenticeship Levy, the college insolvency regime and a recent study which considered the post 16 Area Review process.

GDPR

We have been working closely with a range of education providers to help them get ready for the General Data Protection Regulation, which comes into force on 25 May 2018. Much of that work revolves around auditing what information the provider has, why it has it, what is does with it, to whom it discloses the information, when that information is destroyed and – crucially – on what legal basis all this takes place. We then overlay that with the requirements of the GDPR to ascertain what changes need to be made to ensure compliance. Many providers are making good progress and we are supporting the sector with training events and publications. If you are not sure whether you are on top of this significant change in the law then please get in touch if you think you might need some help.

Apprenticeship Levy

The FE sector is continuing to adapt to the fundamental changes brought about last year with the introduction of the new apprenticeship levy regime. We have been supporting providers – principally colleges and charitable/independent training providers – in reviewing their contractual documentation and procedures as well as looking at how to try to get the most out of what remains a regime finding its feet. Following on from the publication of the results of the still controversial non-levy tender, the Government has recently announced that levy paying employers will be able to start trading some of their accumulated levy pot from April. There will need to be vigilance to ensure that providers do not get caught up in any abuse of the system, but this new option will undoubtedly lead to some new opportunities for those providers who are able to be more agile in responding to market need.

College Insolvency Regime

The long trailed insolvency regime for colleges is getting nearer. We have been delivering training sessions across the country to groups of Clerks, Governors, Finance Directors and individual College Boards to help facilitate the debate around the impact of the proposed regime and what colleges might need to do in order to prepare themselves. A further consultation setting out a little more detail was recently closed and we await the Government's response. It is expected that the regime will be in force towards the end of this year or the beginning of 2019. It would make some sense for the Government to link the coming into force of the regime with the closing of the Treasury's Restructuring Facility at the end of March 2019.

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Welcome (continued)

Area Reviews

The area review process may have officially concluded, but the implementation phase is ongoing and the effects of the process continue to be felt. The clock is ticking in terms of making applications for financial support from the Restructuring Facility – whether that be to support merger, Fresh Start, Stand Alone or some other significant change. A number of situations are emerging where recommendations coming out of Area Reviews may need to be revisited as some initial plans have not quite come to fruition. The FE Commissioner is busy conducting interventions where funds from the Restructuring Facility could make a difference. Unless something changes, the facility closes in March 2019. Given that the application and decision taking process can take a number of months to navigate, this means that there is not much time left.

The Area Review process itself has not been without criticism. Some of this has been captured in a recent evaluation exercise conducted on the first wave of reviews. All those who took part in Area Reviews are only too aware of the immense amount of energy and resource which was consumed by the process. In some cases this has undoubtedly supported genuinely positive change, but in others it has either been an unwelcome distraction or perhaps worse has hindered bringing about alternative solutions. The evaluation report is worth a read and is available on the GOV.UK website.

Tom Morrison

You may be "a top university" – but can you prove it?

With universities and colleges facing increasing competition between themselves to attract students, it is inevitable that when developing their marketing material providers will want to make a number of claims which make then stand out from their competitors to attract new students. For six universities, however, attempts to promote themselves in this way have landed them in hot water with the Advertising Standards Authority ("the ASA").

Claims such as "the UK's number 1 arts university", "Top university in England for long term graduate prospects" and "a top 1% world university" have all been considered by the ASA to be misleading and the universities concerned have been required to remove such statements from their promotional material. The ASA has made clear that all such statements must be supported by good evidence: providers must be able to objectively prove claims which are being made.

So what are the consequences of making potentially misleading statements? For the six universities who were subject to the recent complaints, they have had to remove claims from their current marketing material. Given the investment by universities and colleges in advertising, the ASA's decisions will inevitably have had a financial impact for the universities involved. There is also the risk of adverse publicity as a result of the investigation by the ASA.

Whilst some education providers may consider that the sanctions which the ASA are able to impose are limited, the same cannot be said of Trading Standards. Making misleading claims could result in investigation and prosecution by Trading Standards pursuant to the Consumer Protection from Unfair Trading Regulations ("the Consumer Protection Regulations"). If found guilty, education providers could be faced with a criminal conviction and/or a fine.

Furthermore, following amendments to the Consumer Protection Regulations, education providers could face civil claims being brought by students arising out of misleading advertising. We expect this to become an increasing risk given the escalation in student claims which we have seen generally and which are undoubtedly associated with increased expectations of students in the context of tuition fees.

In the current market, it is becoming increasingly important for education providers to distinguish themselves from other providers. It is essential that any claims which are made are truthful, honest and fair and can be supported by objective evidence.

Caroline Hardcastle

Lord Agnew writes to Academy Trust Chairs

Lord Theodore Agnew, Parliamentary Under-Secretary of State for the School System, recently wrote to all Chairs of academy trusts in England thanking them for their crucial work and inviting them to join him in strengthening the network of Chairs across England.

In the letter Lord Agnew states that he wants to "reassure" Chairs that if their academy trust is achieving its goals to provide "a good education for children, with secure and robust organisational financial management" then there should be few occasions where the DfE will intervene. It also affirms his belief in an "autonomous school system".

Lord Agnew is encouraging the Regional Schools Commissioners, their teams and the ESFA to involve Chairs and non-executive board members when they meet. The letter states that having a direct relationship with the RSCs, including during annual MAT reviews, will enable Chairs to talk about their academies' performance and strategic direction.

The letter also emphasises that "financial health and sustainability" of academy trusts is a "key priority" and attaches an annex with links to further information which Chairs might find useful. This includes national procurement deals available on items bought regularly such as energy, water, printers and photocopiers. Other links include "The top ten planning checks for governors" – a summary on managing resources effectively and "Inspiring Governance" which focusses on finding people with specific skills in special geographical areas.

The letter references the new National Funding Formula for schools which was finalised in September 2017 and is intended to reflect the individual needs and characteristics of schools across the country. It states that local authorities will continue to set local funding formulae to determine final budgets in 2018-19 and 2019-20 and that "these will determine the extent to which and how quickly individual schools move towards their NFF allocations".

Finally, the letter emphasises' Chairs' and board's duties to "manage budgets effectively and deliver best value for money". It references a recent letter from Eileen Milner, the new Chief Executive of the ESFA, to single academy trusts where the remuneration of a trust employee exceeds £150,000. A similar letter is also to follow to multi academy trusts where this also applies. Lord Agnew's belief is that "not all boards are being rigorous enough on this issue" and that he does not expect a CEO's pay or the pay of other non-teaching staff to increase faster than

the pay award for teachers. His view is also that there should be a reduction in CEO pay where the "educational performance of the schools in the trust declines over several years". There does not, however, seem to be express recognition that the roles of members of senior leadership teams in academy trusts can expand quite significantly as academy trusts grow, in a way which can be quite different to some teaching staff.

All of the above emphasises Chairs' and trustees' collective duties to oversee the effective management of their academy trust's finances and resources and overall financial health to enable it to meet its educational objectives. Resourcing Chairs and trustees to discharge their legal duties is imperative and training, accessing and distributing information including in the links provided in Lord Agnew's letter and having robust governance and induction processes have never been more important.

Gerry Morrison

The Bribery Act 2010 and the education sector

The Bribery Act 2010 has been in force for almost seven years and, although there have only been a small number of prosecutions, the penalties are serious – with individuals who accept or give a bribe potentially facing a ten year prison sentence and fines for the organisation. The offence of bribery can consist of "active bribery" which covers the offering, promising or giving of a bribe or "passive bribery" which covers the requesting, agreeing to receive or accepting a bribe.

The Bribery Act applies to both corporate bodies and the individuals who work for them. Despite providers being exposed to a range of situations where bribery risks exist, it is still something that not all providers have fully considered and protected themselves against.

Have you ever considered the number and value of gifts a teacher receives at Easter, Christmas or the end of the academic year? Do you often get invited and accept invitations to corporate hospitality events? Have you just signed a new IT deal with a provider with the added bonus of free equipment? These may seem like kind and generous acts, and very often are just that, but they could all potentially be seen as you accepting a bribe and so a sensible and proportionate approach to considering the impact of the Bribery Act ought to be adopted. Did that parent expect or push for a better grade for their child as they presented a luxurious present? Was the free equipment the deciding factor for selecting the specific IT Company? Was the corporate hospitality lavish and provided in connection with the renewal of a contract?

Practical steps

Some key steps providers can take to protect themselves:

- Have an anti-bribery policy
- Maintain a record of any gifts or hospitality
- Ensure that all staff are aware of, and understand, the anti-bribery policy
- Identify an individual to take responsibility for reviewing and implementing the policy.

Donna Barnett

There is a defence for organisations under the Bribery Act of adopting "adequate procedures" – which is why it is important that all education providers recognise the potential risks for bribery and put in place adequate policies and procedures to mitigate the risk of prosecution under the Bribery Act 2010. The Government has set out the following six principles that organisations should implement to ensure compliance:

1. Clear, practical and accessible procedures

The provider should ensure that it has an anti-bribery policy in place which is clear, practical, accessible, effectively implemented and in force. It should also ensure that all staff have read and understand this policy.

2. Top level commitment

The guidance for the Bribery Act makes it clear that, in the case of a college or academy trust for example, responsibility for compliance ultimately falls to the governing body so it is important to ensure that the governing body devotes some time and attention to ensuring that the anti-bribery policies in place are adequate relative to the size and resources of the college or trust and that it actively demonstrates that bribery is unacceptable within the organisation.

3. Risk assessment

The provider should undertake a risk assessment of any potential internal and external risks of bribery and document these risks. This should include an assessment of staff knowledge and the clarity of the provider's bribery policy. This risk assessment should be reviewed and updated on a regular basis and the procedure for reviewing the risks should also be documented.

4. Due diligence

Providers should ensure that they carry out due diligence on any persons who perform services on behalf of the organisation or any service providers. Colleges may, for example, need to look at their subcontractor relationships to ascertain whether subcontractors' procedures are adequate.

5. Communication, training and implementation

There should be a strategy and procedure in place setting out who is responsible for implementing the anti-bribery policy and how this policy will be communicated to staff. It is important to ensure that staff understand the policy and how it affects them.

6. Monitoring and review

Providers should monitor and review their anti-bribery policy to prevent any potential bribery and consider whether to implement a system of recording any gifts or hospitality with regard to the level of potential risk.

Memorandum of understanding for the Department of Education and the Charity Commission

Many education providers – including academies and colleges – are exempt charities that have charitable status, but are not required to register with the Charity Commission. Exempt charities still have to comply with charity law. They are subject to reduced regulation by the Commission and instead have principal regulators appointed to oversee their compliance with charity law. In the case of education providers, the principal regulator is the Department for Education.

The Commission and the DfE maintain a Memorandum of Understanding ("MoU") between them and this has recently been the subject of a review. The MoU covers the relationship between the Commission and the DfE particularly in relation to the governing bodies of foundation and voluntary schools, academy trusts, sixth form colleges, further education corporations and relevant associated charities. It seeks to bring consistency between the Commission and DfE by creating a structure to work together effectively and to ultimately increase public trust and confidence in the system.

As principal regulator, the DfE must take every reasonable step to ensure charity trustees (i.e. governors) are compliant with charity law in managing the administration of the charity. The DfE as principal regulator has a "compliance objective" and, if it identifies a concern about a charity, it may invite the Commission to use its powers of investigation and intervention under the Charities Act 2011. This does not affect the use by the DfE of its own regulatory powers.

A notification to the Commission by the DfE may invite the Commission to use any of its regulatory powers, such as the power to open a statutory enquiry, immediately or the DfE may indicate that those powers may be required at some stage during the conduct of a case. Where either the Commission or the DfE identifies potentially serious concerns about the administration of a relevant exempt charity, it must notify the other in writing as soon as possible, setting out any charity law issues it has identified.

The Commission has powers to intervene where it identifies a significant and urgent risk to a charity's property, beneficiaries and/or representation, but must consult the DfE before exercising its regulatory powers. Charities can also themselves ask the Commission to exercise its support powers such as providing advice on charity law issues, although in practice the Commission is increasingly less able to do so in the context of its restricted resources. Sometimes charity trustees find themselves in situations where if they proceed with doing something it is not clear whether they risk breaching

charity law, but the need to do that thing will serve the charity's needs. The Commission can choose to authorise charities trustees to proceed in such situations, but it will not authorise a relevant exempt charity to act contrary to education legislation. The Commission also has powers to remove trustees, officers, agents or employees, and to disqualify trustees – which the DfE largely does not.

In addition to its role as principal regulator, the DfE may itself exercise certain statutory powers to take action which impacts on the operation of charities where it is not acting in its role as the principal regulator. For example, the intervention power in section 56A of the Further and Higher Education Act 1992 covers designated institutions, which are currently all registered charities. Furthermore, as a regulatory authority for independent schools in England, the DfE is legally obliged to prescribe standards made under section 94 of the Education and Skills Act 2008 that independent schools must comply with (the Independent School Standards), albeit the DfE may work with the Commission if it has any

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Memorandum of understanding for the Department of Education and the Charity Commission (continued)

concerns relating to an independent school charity. The DfE has agreed to keep the Commission informed of any regulatory or enforcement action which is being taken against any school charity, including where an independent school is not meeting the Independent School Standards, so that the Commission can consider the implications of that for assessing compliance with charity law.

The MoU affirms the DfE's commitment to promoting good governance and ensuring that exempt charities providing education observe best practice and charity law requirements. It is clearly in everybody's interest to try to avoid circumstances arising which could lead to damaging news stories (e.g. about mismanagement of conflicts of interest) as these can discredit education providers and destroy public confidence in education policy.

Good governance is at the core of all successful education providers. Effective trustee training for Governors is essential to ensure that those occupying the role understand their legal duties and responsibilities and how to effectively discharge these. Education providers which make high quality training available for Governors, invest in good Clerks and seek advice when unsure of how to handle a situation are far less likely to find themselves on the wrong end of an investigation or regulatory action.

Gerry 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.

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, Citadel House, 58 High Street, Hull HU1 1QE.

The law is stated as at 5 March 2018.

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