Rollits LLP

Education Focus

Summer Term 2018
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Welcome

to the Summer Term 2018 edition of Education Focus

It has been a busy few months for the education sector, with a particular focus on further education albeit with plenty to come for schools. There seems to be an increasing level of recognition in Government that the FE funding rate needs to be reviewed and if this can happen before the upturn in demographics takes hold then there may be reasons for increased hope that the sector may be slightly more appropriately funded.

At the other end of the scale, the Government continues to move towards the implementation of the college insolvency regime, having just issued its Response to the technical consultation which closed in February. No particular surprises have emerged from that, although the precise timing of it coming into force remains unclear. We are still leaning towards the end of March 2019, being the time when the Transactions Unit and Restructuring Facility close. We have been conducting a range of training sessions throughout the country and it seems that some of our thoughts are being echoed elsewhere, not least by the FE Commissioner who has been reported as suggesting that he feels that colleges will continue to need stop-gap funding when the Exceptional Financial Support regime falls away.

In the meantime the sector continues to march on, making the most of new opportunities including those who are pressing forward with T-Levels, others who have been successful in making it through to the next round to establish an Institute of Technology and some who will seek to utilise the Strategic College Improvement Fund. The new academic year promises to be another busy one.

Tom Morrison

Government response to college insolvency regime technical consultation

The Technical and Further Education Act 2017 ("the Act") created an insolvency regime for further education and sixth form colleges in England and Wales. The Act received Royal Assent on 27 April 2017, but the insolvency provisions are not yet in force. The Act's provisions subject colleges to the same insolvency regime that applies to companies, but in addition establish a special administration regime known as an education administration.

The results of a technical consultation on how the new regime should be implemented have just been published, with the Government providing its Response to stakeholders who engaged in the consultation.

The Consultation in context

The consultation process sought comments on the following:

- The insolvency provisions established by the Act
- How those provisions will be implemented
- The technical detail of the insolvency regime that will be included in secondary legislation
- Proposals as to how colleges at risk of, or in, insolvency will be dealt with in practice

Of the responses received, over 60% were from colleges and related organisations, 13% from legal and accountancy firms and only 6.7% from financial institutions.

Putting its Response into context, the Government estimates that more that 100 colleges 'need to familiarise themselves' with the new insolvency regime – not particularly cryptic code for colleges which the Government feels are at an elevated degree of risk. There are 283 colleges in England and Wales. Of the colleges in England, 37 have in place a published Notice to Improve for financial health. The Government estimates that over the next 10 years, 63 colleges could be given a Notice to Improve their financial health, in addition to the 37 subject to a Notice already.

Insolvency notices – when and who

The Act allows the Secretary of State to make secondary legislation which modifies the existing insolvency legislation to make it more appropriate for colleges. One of the areas highlighted in the consultation was the 14 day notice period which is required if anyone initiates an applicable insolvency procedure under the Insolvency Act 1986. The notice must be given to the appropriate national authority, which in the case of colleges in England is the Secretary of State. The Government has noted the concerns raised by those who took part in the consultation in relation to the length of the notice period, but indicated that as the notice period is set out in primary legislation there is no power to modify the provision.

The Government also asked who it is thought should be notified of an education administration application. Some respondents suggested the parties to be notified should be wider than under the Insolvency (England and

Wales) Rules 2016 ("Insolvency Rules"). The Government's response was that to widen the parties to be notified too much at an early stage '…would create unnecessary uncertainty and anxiety…' and that the parties to receive notice of an education administration should be consistent with the Insolvency Rules. It was however acknowledged that the additional prescribed parties to be notified of an education administrator's appointment would include the relevant local authority, combined authority and mayoral combined authority.

Guidance for governors

One area that does require particular consideration is the guidance that should be provided to governors. The Government acknowledges that the new rules could 'scare off college governors' but at the same time asserts if '… governors have adequately discharged their duties, then disqualification proceedings and wrongful trading claims would be very unlikely'. As a statement of fact this cannot be disputed. The problem is that in the first couple of years there will be uncertainty, creating a risk around recruitment and retention of precisely the types of governors who play an important role in good governance, offering challenge and support to providers who operate in a such a critical part of our country's education sector. The continued lack of formal guidance being published does nothing to ease that uncertainty.

As governors cannot benefit financially, it may be argued that even if any form of financial penalty is inappropriate disqualification remains an appropriate sanction. The Government's Response to many of the queries raised was to rely on the effectiveness of the Insolvency Act 1986 and the Insolvency Rules. Both are seen to be 'tried and tested'. It is not at all clear that this conclusion translates across to the education sector.

It seems that the Government is aiming introduce secondary legislation, when the Parliamentary timetable allows, so that the new insolvency regime is in force in late 2018. With the impact of Brexit it is possible that the Parliamentary timetable may not allow, but (irrespective of the merits of the proposed regime) there is some logic in the regime coming into force at the end of March 2019, when the Transaction Unit and the associated Restructuring Facility closes.

Richard Field

Automatic disqualification

guidance for governors and senior managers

Current rules

There are currently rules which automatically disqualify someone from acting as a charity trustee unless they have been granted a waiver by The Charity Commission. These rules apply to charitable education providers (e.g. anyone acting as a trustee of an Academy Trust, a Governor of a College or trustee of a charitable independent school).

New rules

Under the current rules anyone who is an undischarged bankrupt or who has unspent convictions for crimes relating to dishonesty or deception cannot act as a charity trustee without a waiver. From 1 August 2018 the rules which automatically disqualify someone from acting as a governor/charity trustee of a charitable education provider will change as follows:

- The circumstances disqualifying someone from acting as a governor/charity trustee will increase. This includes being on the Sex Offenders' Register and unspent convictions including specified terrorism or money laundering offences. The Charity Commission has published a table setting out the current legal disqualifying reasons and the new reasons which will apply from 1 August.
- Individuals who are disqualified from acting as a charity trustee will **also** be disqualified from holding certain **senior manager** positions at a charity. Relevant senior manager positions are chief executive (or equivalent) and chief finance officer (or equivalent).

Senior manager positions

The Charity Commission has issued detailed guidance and has provided a "quick check" explanation of what a "senior manager" position affected by the new rules is. In summary a Chief Executive (or equivalent) position is one which (a) carries overall responsibility for the day-to-day management and control of the charity and (b) is accountable only to the charity trustees (so often the Principal or Chief Executive in the case of a college). A Chief Finance Officer (or equivalent) position is in one which (a) is accountable only to the chief executive or the trustees and (b) is responsible for overall management and control of the charity's finances.

The Charity Commission's guidance states that senior or other staff or voluntary positions with financial responsibility are not restricted by the new regime when they carry budgetary authority, or authority for handling, transacting or accounting for the charity's money, but do not carry responsibility for overall management and control of the charity's finances.

The job title of a person is irrelevant in determining whether they hold a restricted position; what matters is the responsibility that someone has and who they are accountable to. For most charitable education providers it should be clear who occupies these roles. It is also worth noting that the rules do not take into account a charity's size, or the number of its staff or volunteers (i.e. the new rules apply to all charities, which therefore includes all charitable education providers).

Criminal offence to act while disqualified

It is usually a criminal offence for a person to act as charity trustee whilst they are disqualified. The same principle will apply to anyone who also acts as a senior manager of a charity while disqualified after 1 August this year. Conviction of acting as a charity trustee or senior manager of a charity while disqualified may lead to a fine, imprisonment or both for the individual. It can also lead to embarrassment and reputational damage for the charitable education provider concerned. The Charity Commission also emphasises that if someone acts whilst disqualified they may also have to repay any money received from the charity during this period – such as their salary.

Waiver

Most people who will become disqualified when the automatic disqualification rules change on 1 August this year can choose to apply for a waiver of their disqualification before then. There are some circumstances in which someone cannot get a waiver (e.g. if the charity's governing document prevents a person from acting as a charity trustee in those circumstances then a waiver cannot override that or if other legal rules apply which would disqualify someone from acting).

If someone applies for a waiver before 1 August, their disqualification under the new rules will not apply until they receive a decision from The Charity Commission, and any appeal against a decision has been decided. However, it is vital that anyone who will be disqualified from acting as a governor/charity trustee or senior manager of a charitable education provider on 1 August this year applies for a waiver before 1 August if they are to continue to act.

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Automatic disqualification – guidance for governors and senior managers (continued)

Declarations for governors/charity trustees and senior managers

It is important that all charitable education providers ensure that their trustees and senior managers will remain eligible to act when the new rules come into effect. The Charity Commission has published sample declarations for senior charity manager positions and charity trustee positions. Existing governors/trustees and senior managers should be asked to read and sign the declarations to confirm that they will remain eligible to act on 1 August and these should be filed in the provider's records as evidence that action was taken to confirm their eligibility.

Eligibility declarations for new governors/trustees and senior managers of charities appointed after 1 August should be updated to include the new circumstances for automatic disqualification. Charitable education providers should ensure that they have appropriate systems in place for identifying trustees and senior managers who subsequently become disqualified after they have been appointed, as well as reviewing pre-appointment processes.

Of course, for charitable education providers working with children, young people and vulnerable adults other systems are also required to check that governors/trustees and staff are eligible to act – including Disclosure and Barring Service checks – if the individual is engaged in regulated activity and the role is eligible.

The full impact of the new regime is yet to be felt, although we can envisage some difficult scenarios where senior managers may have a disqualification issue and the education provider is left either encouraging the individual to apply for a waiver because of their importance to the organisation, or having to navigate a difficult employment situation. There are a range of options available in those scenarios and so it is important to seek early advice if needed.

Gerry Morrison

Keeping children safe
new guidance published

Following a 10 week public consultation in May, the revised *Keeping Children Safe in Education Statutory Guidance* has now been published. Overall the new guidance has been welcomed with additional advice being provided on how to support children with allegations of child on child sexual violence and sexual harassment and updated guidance on the need to act immediately where there are concerns about a child's welfare.

The statutory guidance should be read and followed by governing bodies of maintained schools and colleges, proprietors of independent schools and non-maintained special schools and management committees of Pupil Referral Units. Furthermore, these bodies should ensure that **all staff** in their school or college read at least Part 1 of the guidance.

All schools and colleges in England must have regard to the guidance when carrying out their duties to safeguard and promote the welfare of the children. The new guidance makes clear that governing bodies and proprietors should ensure that an appropriate senior member of staff from the School or College Leadership Team is appointed to the role of Designated Safeguarding Lead. That person should take lead responsibility for safeguarding and child protection and this should be explicit within the role holder's job description.

The guidance has been particularly welcomed in the changes to reflect concerns about a child's welfare being acted upon immediately. It has been updated to reflect the importance of speaking to the Designated Safeguarding Lead and following the local Child Protection Policy whilst also clarifying the options available to staff who have concerns. The guidance makes clear that all staff have a responsibility to provide a safe environment in which children can learn and that all staff should be prepared to identify children who may benefit from early help, providing support as soon as a problem emerges. If staff have any concerns they should act on them immediately following, so far as possible, their own organisation's Child Protection Policy and speak to the Designated Safeguarding Lead. Where the Designated Safeguarding Lead or deputy is not available, staff members should not delay taking appropriate action – they should consider speaking to a member of the Senior Leadership Team and/or take advice from the local Children's Social Care. A helpful flowchart setting out the process which staff should follow is included within the guidance.

The revised guidance comes into effect on 1 September 2018. Schools and colleges should be taking steps now to not only ensure that their Child Protection Policy is reviewed and updated where necessary to meet the requirements set out in the new guidance, but that all staff have read and familiarised themselves with it.

Caroline Hardcastle

Property and planning tips

common issues arising from due diligence

When carrying out property due diligence for education providers – whether on a merger, academy conversion, or discrete property transaction – one of the things which we find has often been overlooked by the provider is the obtaining of initial consents. These include the need for planning permission, building regulations approval, warranties and consents for any works carried out at a property, including the construction of any buildings and any additions or alterations to a building. There is sometimes also evidence to suggest that insufficient importance has been placed on complying with the conditions attached to any planning permission, which may subsequently create risk which could have been avoided.

Planning permission

Planning permission is required for the carrying out of any "development" on land, which is defined in the relevant legislation as the "carrying out of building, engineering, mining or other operations in, on, over or under the land or the making of any material change in the use of any buildings or other land". There are permitted development rights which grant deemed planning permission for specified classes of works and changes of use. Each permitted development right has conditions and limitations attached, and the works must fall within these limitations and comply with the conditions, for planning consent to be deemed granted.

Unless deemed planning permission is granted, specific planning permission must be obtained for any development as defined above. If planning permission is not obtained for any works or any change of use then the local planning authority has 10 years to take enforcement action for any change of use, or 4 years to take enforcement action for any works carried out, running from the date the change of use commenced or the date the building works were completed (as appropriate). If enforcement action is taken the local planning authority could require that the new use is stopped or the property is reinstated or could require a retrospective planning application be submitted.

More often than not, a planning permission will have conditions attached and these could include pre-commencement or pre-occupation conditions and ongoing conditions. Pre-commencement and pre-occupation conditions are requirements which must be discharged before the works are commenced or the property is occupied. An example of a pre-commencement condition is a requirement to obtain an archaeological report. It is important to ensure that any such conditions are formerly discharged with the local planning authority before the works commence, or the property is occupied, and once a condition has been discharged the local planning authority

will provide a discharge of condition notice evidencing compliance. Ongoing conditions, for example a condition limiting the hours of use of a building, are conditions which must be complied with continuously and it is important to monitor compliance with any ongoing conditions on a continuous basis. School sports facilities are offered subject to such conditions.

If any condition in a planning permission is breached, then the local planning authority may take enforcement action for up to ten years from the date that the breach first commenced, to secure compliance with the breached condition. For a breach of a pre-commencement or pre-occupation condition, the local planning authority may argue that the planning permission has not been implemented and accordingly the property has been built without the benefit of planning permission. The local planning authority could then take enforcement action and stop the use or remove the works in breach of planning or require a revised planning application to be submitted.

Building regulations

Building regulations approval is required for any building works carried out at a property to ensure the health and safety of people. Building works include extensions and alterations to a building, but also include electrical works, the installation of a boiler and double-glazing. If building regulations approval is not obtained when required then the local planning authority has the power to take enforcement action for one year from the date that the works were completed. After one year, the only power the local planning authority has is to apply to the Court for an injunction; this power is used rarely, unless there is a danger to public health and safety.

Warranties

If any works are completed and the education provider is not a party to the contract of employment of a contractor or consultant, it is critical to ensure that collateral warranties are obtained. A warranty is a contract whereby a contractor or consultant warrants to a third party (including a funder, buyer or tenant) that it has complied with its contract of employment. If any loss is then suffered due to the design or construction of the build, the third party can take action against the party at fault. If a warranty is not obtained and the education provider is not a party to the contract of employment, then the education provider will have no claim against the contractor or consultant.

Other consents

It is also important to ensure that any other consents which are needed for any works are obtained; for example the Landlord's consent if the property is leasehold; a lender's consent if the property is charged; or any other third party's consent, for example an adjoining landowner who has the benefit of a restrictive covenant on the title or the Department for Education. When carrying out building works at a property we would always advise that appropriate advice is obtained regarding what permissions, approvals and consents are required to ensure that any works are not open to challenge. If providers can address these issues proactively in advance, it may well help to avoid unnecessary delay in a future transaction as a result of them being raised as issues as part of a due diligence exercise.

Libby Clarkson

University fined for serious data protection breach

In the final months before the General Data Protection Regulation ("GDPR") came into force, University of Greenwich became the first university to be fined under the Data Protection Act 1998. Nearly 20,000 people were affected and the fine was set at £120,000.

A member of staff and a student created a microsite to facilitate a conference over a decade ago, but they had omitted to shut the site down afterwards and it was subsequently hacked, allowing access to other areas of the related web server. The result was that the contact details of nearly 20,000 students, staff and alumni were compromised. Of these, three and a half thousand records also included sensitive data, such as details of learning difficulties and sickness absence.

As part of their preparations for the coming into force of the GDPR and the Data Protection Act 2018, education providers should hopefully have already conducted an audit of what information they hold and where. It will have perhaps been easy, however, to have missed a long forgotten database such as in the Greenwich case. The Information Commissioner will not have any sympathy for information being outdated – indeed will likely take a harsher view if the information should have long been archived or deleted. That fact, coupled with the new breach notification regime now being in force, means that there has never been a more compelling time for education providers to make sure their information assets are identified, cleansed if needed and properly secured.

Tom Morrison

Information

If you have any queries on any issues raised in this newsletter, or any education matters in general please contact:

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The law is stated as at 2 July 2018.

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