

Education Focus



Education Act 2011 update

Greater autonomy in structures and administrative governance for Colleges

The Education Act 2011 ("the Act") contains provisions which, when brought into force, will give further education corporations ("Colleges") and sixth form colleges greater autonomy to amend their structures and instruments and articles of government.

Modification or replacement of instruments and articles of government

Colleges in England will be able to modify or replace their instruments and articles of government without having to involve the Secretary of State. This will make it quicker and easier to change administrative procedures and introduce time-saving powers in terms of decision making (e.g. ability for governors to pass written resolutions). As long as Colleges' instruments and articles of government comply with the minimum regulations set out in Part 2 of Schedule 4 of the Further and Higher Education Act 1992 (e.g. in terms of number of governors, procedures as to how governors are appointed etc) Colleges will be able to amend or modify them to make such other provisions as may be necessary or desirable.

We would recommend that Colleges review their instruments and articles of government to ensure that these will remain fit for purpose when the new provisions are brought into force. Whilst most instruments and articles should

remain adequate, some Colleges may wish to amend theirs to take full advantage of the greater autonomy which will be available under the Act.

Dissolution and merger

Colleges in England will have power to dissolve themselves by following the procedures to be contained in separate regulations made pursuant to the Act (including requirements to consult interested parties, take into account their views and to publish details of the dissolution proposals). This power was previously reserved to the Secretary of State or the local authority in the case of sixth form colleges. Colleges in England will also be given power at any time before the dissolution date to transfer their property, rights and liabilities to other persons or bodies for charitable educational purposes.

These new provisions are designed to give Colleges greater autonomy and powers to merge and re-structure.

Supplementary powers

The Act also amends section 19 of the Further and Higher Education Act 1992 which sets out Colleges' supplementary powers. The Act will give Colleges power to borrow without having to obtain the Skills Funding Agency's prior consent. The Act will also give Colleges power to form and/or invest in companies to provide publicly funded educational services without having to obtain the Skills Funding Agency's prior consent. Colleges will have

greater autonomy to convert their structures from statutory corporations to companies or other incorporated bodies or to form subsidiaries as part of a group structure to provide publicly funded educational services.

Comment

It is clear that when brought into force, the changes contained in the Act will give Colleges far greater autonomy with regard to their legal structures and systems of governance. These changes have their roots in the Department for Business Innovation and Skills consultation paper published in August 2011 and are designed to de-centralise powers and give Colleges greater flexibility to innovate.

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Outsourcing contracts and pensions

Pension issues will be key considerations for any further or higher education corporation looking at outsourcing services to private contractors. As scheme employers under the Local Government Pension Scheme (LGPS), these institutions will be subject to the government's Fair Deal policy. Essentially, this requires that transferring employees should have the right to join or remain as members of the LGPS, or should be given the right to join the contractor's own pension scheme, which must be certified (by the Government Actuary's Department) as being broadly comparable to the LGPS.



For a number of reasons, including cost and administrative burden, most contractors will want employees to remain with the LGPS. This means that they must enter into an admission agreement with the academic institution doing the outsourcing, and the appropriate local authority that administers the relevant section of the LGPS.

The Fair Deal provisions, although not strictly legally binding, in practice have the same effect and it is the responsibility of the educational institution to ensure that the contractor makes the relevant pension provision.

It is extremely important that the institution addresses the pensions issues at an early stage in any tendering process for the outsourcing of services. The process of entering into an admissions agreement is a lengthy one, and the administrative authority will need to conduct a valuation in relation to the transfer. In the past many institutions have been able to enter into admissions agreements after the date on which the employees delivering the outsourced services transferred to the new contractor either from the incumbent contractor or the institution itself. Back-dating of the admission agreement is in our experience no longer going to be allowed by administering authorities and this can create genuine time pressures in the contracting process.

The admissions agreement sets out the terms on which the contractor joins the

LGPS as an admitted body for the purposes of making contributions etc. However, the educational institution will want to include a schedule of provisions in their commercial agreement with the contractor, that sets out arrangements with regard to which party is to take the risk of e.g. pension contribution increases during the life of the contract and any deficits that arise in the LGPS during the contractor's participation.

The institution can ask that the contractor enters into a bond, which the administering authority is a party to (but the institution is not) to cover the risk of the contractor not meeting its pension contributions or any deficit payment it may be required to make. Provisions dealing with the implications surrounding the bond will also be needed in the main commercial agreement between the contractor and the educational institution and the contractor should be obliged to use its reasonable endeavours to procure that any sub-contractor or further transferee of the employees also makes suitable pension provision.

In our experience the pensions arrangements are now the subject of much greater negotiation than has been the case in the past and so any institution looking to outsource arrangements where pensions issues are a factor will need to be well-prepared with its arguments for the allocation of risk to the contractor.

Craig Engleman



Pensions issues for academies

One of the issues that a maintained school wishing to convert to academy status has is dealing with the transfer of staff to the academy, and in particular, their pension rights.

Academies are identified as "scheme employers" under the legislation relating to the Local Government Pension Scheme (LGPS) therefore all non-teaching staff employed by academies are automatically eligible for membership in the LGPS. Existing members in a former local authority maintained school retain eligibility in the LGPS when that school converts to an academy. This means that the academy will be required under the terms of the funding agreement that it enters into with central government to pay contributions in respect of all existing members of the LGPS that transfer, and any new staff that join following transfer.

As an academy becomes a separate scheme employer in relation to the LGPS, some LGPS administering authorities have set contribution levels, based on an actuarial assessment, for those academies at a level which is much higher than the local authority from which they transferred. However, the Department of Education has recently published a Note to state that it is the government's intention that academies should be able to 'pool' with the relevant local authority for the purposes of the LGPS, and therefore share the same contribution rates – as it was felt that an academy's overall costs should not increase.

This is a matter which should be discussed with the local authority, and is another factor that schools thinking of converting to an academy will need to continue to bear in mind for the foreseeable future.

Craig Engleman

Property implications of academy conversions

Converting to academy status is not always a straightforward process and one key factor for schools to consider when contemplating the move will be the property implications. The property arrangements for maintained schools vary depending on the category of the school and always need to be carefully considered before entering into negotiations with the existing land owner (whether that is the local authority, governing body or some other party) to transfer an interest in the land to the new academy.

In most instances the academy will have a long leasehold interest as opposed to a freehold interest and it will be vital for the academy's governing body to have an accurate and detailed report on the lease and any other title issues drawn up. In particular, any rights which benefit or burden the land such as rights of way across the land along with any issues arising from search results should be highlighted and addressed prior to completing the transfer.

Whilst such detailed scrutiny of the transfer arrangements can seem like an unnecessary extra step in the conversion process it may well highlight previously overlooked issues and it is important that such problems are brought into the open and dealt with at the outset to minimise future difficulties. To help speed the process up the Department for Education has drafted a model report on title and lease to aid legal advisors; the government believes that most schools will be able to convert as they are with as little disturbance as possible to existing arrangements.

Neil Franklin



Academies – understanding the Commercial Transfer Agreement

To properly document the transfer of a school to an academy a number of agreements need to be entered into between the new Academy Trust and the relevant local authority (and in some cases the old school governing body). To assist with the transfer process, and to try and keep costs down, the Department for Education has published model agreements and guidance, which provide a starting point for negotiations between an Academy Trust and the local authority.

The Commercial Transfer Agreement ("CTA") is one such model agreement and a crucial document in the process. The CTA formally documents the transfer from the local authority to the new academy, and includes provisions relating to, amongst other things:

- transferring assets;
- records relating to the operation and running of the school;
- transferring staff; and
- assets which are not to pass to the Academy Trust (often freehold interests in the academy premises).

To ensure that an Academy Trust obtains all of the information, rights and assets necessary to enable it to properly run the new academy as well as ensuring that no unknown liabilities are assumed (which is just as crucial), it is important that particular care is taken in relation to the CTA during negotiations with the local authority.

John Flanagan



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The Paper states: "...many Colleges and training providers are now considering alternative business and collaborative models to meet the diverse needs of their learners and to achieve further efficiencies. These models include partnerships with Academies, development of sector-focused campuses, and different types of partnerships between Colleges and businesses."

The intention is to reduce bureaucracy and to give Colleges: "...the space to operate in a market environment and respond more effectively to the needs of their customers".

In short, the intention is to make Colleges more accountable to their students and the local communities within which they operate as opposed to central government. Rises in tuition fees also mean that the focus on students as "customers" or "consumers" will make students more discerning or demanding in the educational services offered. Colleges will therefore have greater freedom to decide what structure is appropriate for them and will enable them to most effectively and efficiently deliver the educational services required by their students in the communities in which they operate. The changes will make it easier for Colleges to form group structures which may consist of further education colleges, academies delivering specialist and/or primary and secondary education and to simplify or modernise their governance arrangements.

New structures bring with them new, and sometimes less familiar, legislation such as the need for compliance with company law and knowledge of how this interacts with the need to comply with charity and education law. There will be no "one size fits all" and what will be appropriate for one College may not be suitable for another. Principals, Senior Leadership Teams and Governors will be in the best position to judge what is best for their students.

Gerry Morrison

Goodbye YPLA

The Young People's Learning Agency will be replaced with the Education Funding Agency on 1 April 2012. The Education Funding Agency will take over responsibility for the direct funding of young people's education and training (including the growing number of academies). The Education Funding Agency will fund the education system for 3-19 year olds, including the funding of 16-19 provision in Colleges, sixth form colleges and independent provision.

It's good to sweat the College's assets, but tread carefully

With the constant need to maximise income streams and minimise wastage it is tempting for Estates Managers to allow third parties to use empty space in College buildings and as a result utilise property resources as fully as possible.



Any delay in putting these arrangements into place can be frustrating and put the opportunity at risk, but it is important to always properly document the basis of the occupation. Simple, temporary arrangements can easily become more complex and often what is anticipated to be a short term arrangement for a specific purpose can change into a longer term agreement covering other purposes.

It is relatively easy for a third party to inadvertently obtain legal rights to remain in occupation of a space (known as security of tenure) even when such security was never anticipated by the College or the third party. As a result it is sensible to ensure the nature and details of the occupation are fully discussed and documented prior to the occupation beginning.

It is important to make sure that the issue of contributions toward expenses of the whole building by the third party, for example costs of heating, security and maintenance, are addressed at the outset. It will also be necessary to ensure that the provision of space to the third party does not fall foul of any lease under which the College itself may occupy the larger building/campus. The documents required to deal with these issues do not have to be the length of War and Peace but a little time spent on them at an early stage can ensure lengthy disputes are avoided in the future.

Chris Crystal



The Tigers Trust Enterprise Academy

Many of our lawyers are either trustees of educational charities and governors of colleges and schools or provide a range of mentoring opportunities to children and young people. As part of our ongoing commitment to the sector we have recently provided sponsorship to, and become involved in the delivery of, The Tigers Trust Enterprise Academy. The Academy works with local schools and colleges with the aim of inspiring and challenging young people to consider a career in business, using our client Hull City football club as an example to which they can relate.

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, Wilberforce Court, High Street, Hull, HU1 1YJ.

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