

# Education Focus



## FE Commissioner's initial findings made public

The Department for Business, Innovation and Skills has published summaries of the findings of FE Commissioner Dr David Collins following his first ten college interventions. Just over half a year into the job, the summaries highlight common themes amongst the colleges he has had occasion to visit. The issues have tended to centre around governance, leadership and management, finance and teaching. Some of his recommendations have been quite stark, proposing complete changes in Board composition and styles of management.

Governance is very much a recurring theme, and is one amongst others the FE Commissioner chose to highlight at the recent AoC/CFDG Finance Conference. In a frank but well received presentation, some of the key themes drawn out from these particular interventions included:

- Governing Bodies were often formed with more of an eye on community representation than on skills requirements.
- Some Governors had unusually long periods of service such that they had become entrenched and at risk of losing sight of their true oversight and accountability functions.
- Where corporations had opted for lean committee structures, they had stuck to this throughout rather than recognising that it would be useful to have differing structures over time to respond to the corporation's changing needs.
- The value of a good clerk which encourages well informed and trained

Governors and provides an interface between governance and management cannot be underestimated.

- Some Governing Bodies did not have a strong enough grasp of the data underlying the KPIs; access to Finance Directors was often too diluted and there was insufficient ownership of compliance with KPIs.
- Insufficient support was given to Principals and their Senior Management Teams, especially where they had come through an academic route.
- Repeated restructures were sometimes caused by not grasping the nettle early enough, with a consequent increased adverse impact on staff morale.

It could certainly be argued that many of these observations come with the benefit of hindsight, but one of the aims of the FE Commissioner in reporting publicly is to try to help colleges to spot the signs of trouble and deal with them before they turn into something more serious. There is in our view also a general

recognition that most colleges are very well run by hardworking senior teams with robust but supportive governance, and that they have had to manage change of an unprecedented nature and scope. It cannot be ignored, though, that the messages are coming across loud and clear that good governance and accountability is key in an era when providers are being given increased autonomy and responsibility for their own destinies.

*Tom Morrison*

### Also in this issue

[Q&A – Education in business](#)

[Confidentiality Agreements or Non-Disclosure Agreements](#)

[PFA common issues – no surprises](#)

[Information Commissioner's Office publishes data protection video for schools](#)

# Q&A

## Education in business

John Flanagan, corporate Partner in Rollits' Education Team, sets out a few of his thoughts on the life of a corporate lawyer for the sector.



**Why would a lawyer with corporate law expertise be a member of the Education Team?**

Our Education Team is made up of lawyers drawn from different practice areas, in order that together we can provide specialist and cohesive advice on any issues a client operating in the education sector may have. My focus is on corporate law, but I don't just act for large companies. A large amount of my work centres around providing corporate law advice to the education sector.

It might sound unusual to some, as typically people think of corporate law as being relevant only to companies, but education providers themselves are well aware that they are often as large and complex, if not more so, than most other businesses in their community. This is often in terms of staff, "customers" (students and employers), and any other gauge you may choose to apply such as financial turnover etc.

As a result our education clients have many of the same needs as a typical "corporate" client, for example in relation to needing advice on corporate structures, governance issues, and also mergers, acquisitions and disposals. However there are important differences when acting for clients in the sector, and part of the job I really enjoy is using my skills to help providers to engage their stakeholders and achieve their missions in a way that is often quite different to traditional corporate work.

**Tell us about one of the same interesting matters you have been involved with recently.**

We have been very busy over recent months and years and I am fortunate to have been involved in a number of transactions. For example we have been dealing with an academy conversion on behalf of a multi-academy trust we set up some time ago, and also with the transfer of two academies to a new sponsor. The matters are ongoing so I can't say too much, but they have been interesting for differing reasons. One has involved working alongside a sponsor with a huge amount of determination to make a difference by bringing a convertor academy on board. In that case there is an extraordinarily committed team which instinctively knows what is right for the school and what they need to do to get there, and a recognition by the sponsor that it has the capability to help the school get to where it needs to be for the benefit of its local community.

The other two academies have involved interesting construction issues where part of our role has been to work closely with our client to piece together what has been quite an incomplete picture in terms of where the academy current sits in the process which the original documentation had intended would be followed. In all cases, there is a strong sense that we are all working together to try to get the schools on a much firmer footing for the benefit of current and future pupils.

There are plenty of other examples, including college mergers, HE to FE transfers and training provider acquisitions. All have their own characteristics but "learner at the centre" is very much the common thread running throughout.

**Your recently attended the Association of Colleges/CFDG Finance Conference in Birmingham – how did it go?**

As a firm we have attended this annual Conference for a number of years now. We enjoy going and do so very much from a learning perspective. We want to make sure that we keep the Team up to date on developments in funding and the issues being faced by our clients. Learning alongside them means that we can better understand the issues in context. The quiz after the dinner is also always chance for a good laugh!

This year we were very happy to have been asked to co-present one of the breakout sessions. We wanted to make a contribution to the learning and we wanted to do something on topic that we thought would be interesting. Having given some thought to the types of transactions where we have seen recent activity, we felt it might be helpful (and hopefully interesting) for the delegates if we focused the session on issues around the acquisition of training providers. The session was an opportunity to set out the main elements of an acquisition, and also was a chance to give views on where the common delays and issues arise and to offer tips as to how these might be avoided.

The plan was to co-deliver it with the CFDG Chair and Leeds College of Building Executive Director David Pullein, but he got a call from Ofsted at the last minute saying they were paying the College a visit! The session still seemed to go well, and certainly it was a great opportunity for us all to learn from each other when talking about our common experiences.

# Confidentiality Agreements or Non-Disclosure Agreements

Recognising some of the consolidation that has been occurring in the sector, we have in recent editions of Education Focus been running a series of articles on the various stages in a typical sector merger or acquisition. In this latest article we consider the need for a confidentiality agreement or non-disclosure agreement (“NDA”).

At or before the stage of agreeing heads of terms, it is usual for some information to have been disclosed upon which a buyer bases its offer. This might be in a formal information memorandum or it might be the release of information in a more informal manner. It is therefore prudent to enter into an NDA at an early stage. The due diligence phase which is a process for the examination of information and verification of data is usually the stage at which most information is disclosed and at that time an NDA is absolutely essential to govern the basis upon which information is shared.

The basic obligation in an NDA requires certain information to be kept secret and not used for any other purpose. In many cases, particularly in the due diligence phase, commercially sensitive information is disclosed which the discloser wants to ensure remains secure should the transaction not proceed to completion. If you are a buyer it is important you don't fall into the trap of thinking that you are not also disclosing sensitive information; it is usually advisable that any NDA entered into has mutual obligations. The mutual disclosure of sensitive information is particularly common when it is intended that the management team of the seller will play a role in the merged business. As part of the discussions, the buyer discloses information about its business and its future strategy.

If a transaction gets to the stage of heads of terms there is a good chance it will proceed to completion, but a substantial minority do not. If the transaction does not proceed, possibly because the due diligence process reveals unexpected liabilities or simply it is decided there is no 'cultural fit', sensitive information will have been disclosed which could be used by the recipient in the future. It is for this reason that an NDA is important.

However, the disclosing party needs to be aware that an NDA has its limitations. Occasionally the recipient of the information may have no intention of complying with it and, of course, simply having the information may affect the way a recipient conducts its business.

## Practical Steps

It is important to take some practical steps to try and limit the impact of disclosure in the following ways:

- only disclose information that is necessary;
- disclose the most commercially sensitive information as late as possible in the process when it is clearer whether or not a transaction will proceed;
- provide controlled hard copies where appropriate; and
- where you are the recipient, be clear about the type of information you are content to receive, so that you don't become “poisoned” with information that you never asked for and do not wish to keep secret.

It is also important to be aware that some information may still be at risk of future disclosure – this may be for regulatory reasons including the Freedom of Information Act 2000 and the Data Protection Act 1998, although exemptions exist which can help to restrict disclosure depending on the circumstances.

## So what are some of the key terms in any NDA?

### The definition of Confidential Information

– The temptation in any NDA is to define all information disclosed as confidential. However if the definition is too wide there is a risk that the courts will not enforce the obligations. The definition of Confidential Information should therefore be limited to genuinely sensitive and confidential information.

**Remedies for breach** – This is a technical issue but often affects whether injunctive relief (trying to prevent disclosure) or simply damages are available for breach. In simple terms once “the cat is out of the bag” the ability to obtain injunctive relief is limited. A usual remedy in such cases is damages.

**Who do the obligations bind?** – In a group situation it is important to ensure that all relevant parties are bound by the terms of the NDA.

**How is information accessed?** – It is important that there is a clear procedure for any buyer to obtain information from



a seller. This is usually through a named individual. Some first draft NDAs try to give a buyer full access to the seller and its business but clearly that is inappropriate if confidentiality is to be maintained.

### To whom can the information be disclosed?

– It is common to require that any information disclosed pursuant to the NDA is only made available to a small number of the management team of the buyer and its advisers.

### Return of all information provided

– Controlled hard copies are often issued where information is particularly valuable. These copies should be returned where requested. It is usual for there to be an obligation not to make any copies of the documents that have been provided. Increasingly electronic data rooms are used for the due diligence process and the obligation to destroy any electronic and physical copies of documents is an essential part of the NDA.

### How long do the obligations apply for?

– In the past, time limits on obligations were not particularly common. However increasingly and, in particular in the private equity sector, it is common to have a relatively short period in which the limitations apply. Sometimes the period is as little as 12 months, but we feel that this period is rather too short and ideally the period from a discloser's point of view should be at least 24 months if not indefinite.

**Other provisions** – Because the buyer is often given access to the seller and some of its key employees it is usual to have a non-solicitation of employees provision in the NDA. The idea behind this is to try and protect the seller should the transaction not proceed and the seller tries to solicit or poach key members of staff rather than buying the business.

So, in summary, it is nearly always advisable to put an NDA in place as soon as possible. The NDA itself need not be a long or complex document and should, if the advisers on both sides are experienced, be a relatively simple document to agree.

*Richard Field and John Flanagan*

# PFA common issues – no surprises

As a member of the Education Team dealing with disputes, a significant proportion of my work involves considering information which has been produced and collated by education providers to enable the drawdown of funding. Has everything been completed correctly? Has it been completed on time?



Many will have seen Chris Griffin of the Skills Funding Agency presenting at the recent AoC/CFDG Finance Conference on the findings from the Financial Assurance Audits 2012/2013. It did not come as a surprise to me that many of the common issues identified during the PFA audits reflected my own findings in working with clients.

The SFA published a Summary of Common Issues in March 2014. Some of the key areas identified included:

- instances where full funding had been claimed where the co-funding rate was applicable;
- inaccurate and untimely recording of learner withdrawals together with insufficient evidence that learners had started programmes of learning;

- instances where the achievement date recorded on the ILR did not correlate with the achievement evidence – in some instances, the achievement claim having not been made and/or the supporting confirmation of achievement not being held;
- failures to record appropriate or sufficient evidence to demonstrate learner eligibility – in particular, there were omissions within the Learning Agreements and/or Enrolment Forms in relation to eligibility criteria and information in relation to prior learning; and
- subcontractor issues.

In relation to this last point, a number of issues were highlighted with regard to subcontracted provision and in particular, the element of control which the provider had in relation to their subcontractors. These included a failure to record on the ILR that provision was being delivered by subcontractors, a failure to notify the agency of subcontracted provision on the College & Training Organisation Declaration of Subcontractors form and a failure to ensure that mandatory terms for inclusion in the lead provider's contract with its subcontractor, as required in the Funding Rules, had been implemented.

As a lawyer, I am always conscious of the fact that it is extremely easy for me to sit at a meeting asking why forms haven't been completed correctly or on time, or why evidence has not

been obtained to satisfy funding requirements. With the increased financial pressure on colleges (and with more to come) it is not surprising that many college teams are becoming increasingly stretched when it comes to completion of paperwork and collating the appropriate evidence. However, the SFA's Summary of Common Issues does make interesting reading and hopefully assists providers in avoiding many of the issues being encountered during PFA audits.

On a final note, Chris Griffin did mention that during the audit for the 2013/2014, the SFA will be looking to focus their reviews upon the new funding methodologies, an increased emphasis on withdrawal dates and issues surrounding 16-19 programs. So plenty to focus on then!

*Caroline Hardcastle*

## 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](mailto: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 10 July 2014.

**Hull Office**  
Wilberforce Court, High Street,  
Hull HU1 1YJ  
Tel +44 (0)1482 323239

**York Office**  
Rowntree Wharf, Navigation Road,  
York YO1 9WE  
Tel +44 (0)1904 625790

[www.rollits.com](http://www.rollits.com)

Authorised and Regulated by the Solicitors Regulation Authority under number 524629

Rollits is a trading name of Rollits LLP. Rollits LLP is a limited liability partnership, registered in England and Wales, registered number OC 348965, registered office Wilberforce Court, High Street, Hull HU1 1YJ.

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

## Information Commissioner's Office publishes data protection video for schools

The ICO has published a new training video to help schools look after the information they hold on pupils and staff. The idea is to help schools to understand in a concise way how the Data Protection Act 1998 and Freedom of Information Act 2000 impacts on them. It covers a range of topics including data sharing, information security and responding to FOI requests. Although focussed on schools, it is relevant to most education providers and well worth a watch if you want the headline points in a few minutes. The video is available on the ICO's website and YouTube.

*Tom Morrison*

