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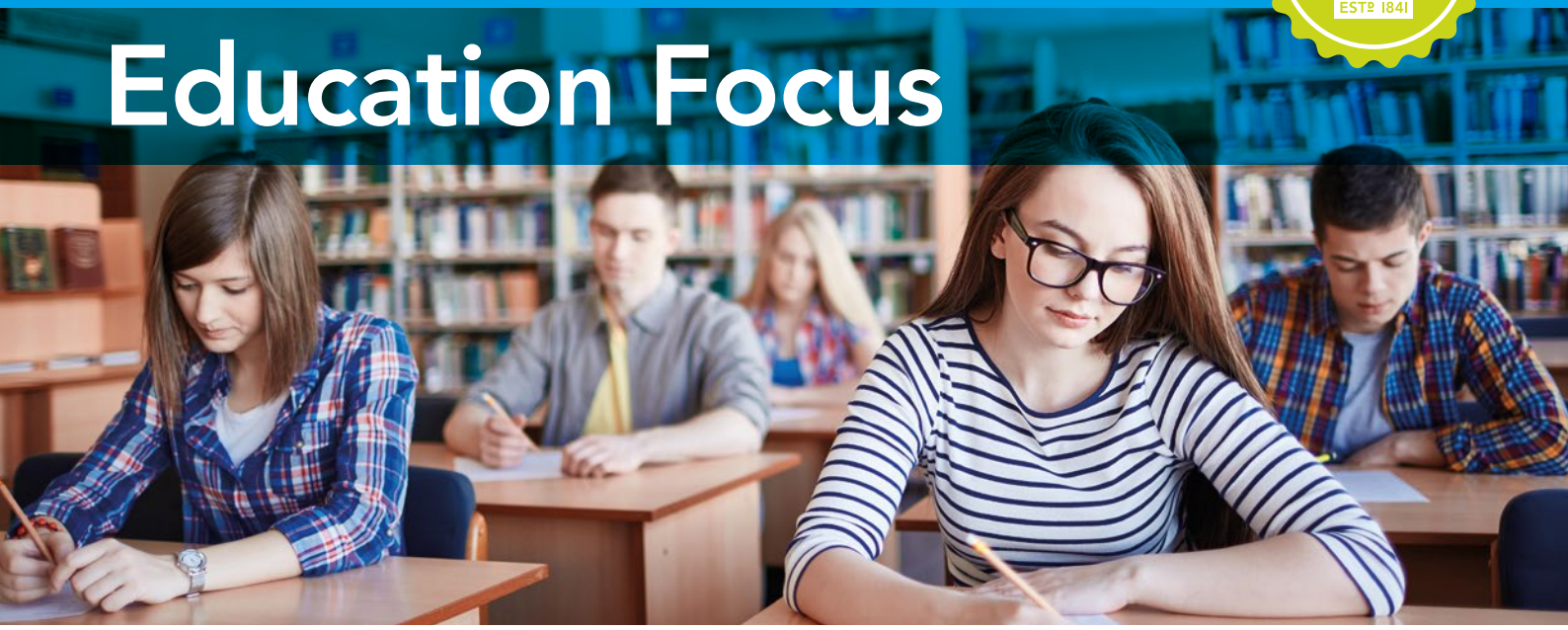
Education Focus



The only constant is… change?

No sector has had to manage change on a scale like the education sector. It is not only the magnitude of change, but the relentless pace, which has continued to put providers under pressure. And yet the sector carries on delivering its critical mission of increasing the life chances of those it supports.

In the first half of 2017 alone we are seeing, (for example) the long anticipated merger of two key agencies to form the Education & Skills Funding Agency; the completion of the last in the nationwide programme of Area Reviews; the passage through Parliament of both the Technical and Further Education Bill and the Higher Education and Research Bill; and the launch of the new apprenticeships regime. These four topics alone create a raft of issues, yet providers from schools to colleges, nurseries to universities, private providers to voluntary providers, will keep delivering. Sometimes assisted by Government policy, sometimes it feels like despite it.

Perhaps the only surprise arising from the merger of the funding agencies is that it has taken so long to get there, although the SFA and EFA have become ever closer since being led by the same (and soon to retire) Chief Executive Peter Lauener. There are concerns around what a change in such well established leadership may bring, including worries over how well voices within FE will be heard in a merged agency with schools facing their own funding crisis.

The Area Review programme is completing, but its effects will be felt for many years. An enormous amount of energy was necessarily spent working through the programme; some positive change will no doubt have been supported, if not necessarily caused, by Area Reviews, but many providers feel that for them the exercise has cost more in time and effort than the associated benefit (if any) merited. Time will tell, and whilst a number of mergers are due to complete this Summer a fair few will take much longer; some may never happen. Implementation guidance is still developing and we continue to see innovative collaborative arrangements coming to the fore, so perhaps it is too early to judge.

At the same time as the programme was getting underway the Government announced that it would propose an insolvency regime for colleges akin to that in place for companies, but with the inclusion of the concept of a Special Administrator as we see in the health and social housing sectors. This edition of Education Focus features a Q&A on the topic with Education Team Partner and banking and insolvency specialist Richard Field, with a pensions perspective from Craig Engleman. We will cover the Higher Education and Research Bill in a later edition, considering both the threats and opportunities posed by the deregulation the Bill proposes to bring about.

At the time of writing we are a month away from the introduction of the new apprenticeships regime. Controversy continues to abound, the latest issues relating to the process for getting on the Register of Apprenticeship Training Providers and the swift introduction of a new round of applications to give those providers who appear to have failed the grade for very minor reasons being given a chance to get back on board quickly. Providers are putting plans in place to make the most of the opportunities arising from the creation of what should theoretically be a more buoyant market for apprentices, with many still running hard to try to put themselves in the best position by presenting offerings involving increasingly innovative (but importantly still funding rules compliant) commercial arrangements with the intention of making them more attractive to apprentices and employers. 2017 already has the makings of another interesting year.

Tom Morrison

Q&A College Insolvency Regime

The Technical and Further Education Bill 2016/17 is still making its way through the final stages of parliamentary process, but all signs are that the insolvency regime for colleges proposed by the Government will be passed. Richard Field, Corporate and Banking Partner in Rollits' Education Team, shares some of his thoughts.

In brief terms what does the Bill cover?

The Bill is about to have its Third Reading at the House of Lords. It has been reported that by the end of March 2017 that College "bailouts" will have cost £140 million. This is money that it is argued should be spent on "education and training priorities". The Bill is intended to reform technical education by addressing skill shortages and to introduce a new insolvency regime. The technical education measures support the Post-16 Skills Plan which was based upon the recommendations made by Lord Sainsbury. The area getting a lot of attention from external stakeholders is the introduction of an insolvency regime.

Focussing then on the insolvency regime, what changes are proposed?

The proposals are similar to those which apply to companies under the provisions of the Insolvency Act 1986. The reason the legislation is needed is that it us unclear whether or not further education and sixth form colleges fall within the definition of an "unregistered company" under Section 220 Insolvency Act 1986. The proposed regime includes company voluntary arrangement, administration, compulsory liquidation and creditors voluntary liquidation. Of these arrangements only an administration allows a college to continue provision of learning. The others essentially allow for an orderly distribution of assets to a college's creditors.

In addition to the existing procedures for companies, there is a Special Administration Regime ("SAR"). The SAR would be used if a college becomes insolvent and the Secretary of State deems it appropriate to apply for a SAR to protect learning provision. This seems to have some similarities with the Trust Special Administrator in the Health Sector if the Secretary of State considers it "appropriate in the interests of healthcare". It is very difficult to see when the SAR would not be used at least initially.

Why do you think the Government is doing this?

There is a lack of certainty about what would happen if a college was technically insolvent; clearly we collectively have a vested interest in ensuring the sector succeeds in its critical mission for the good of the economy and society as a whole. The uncertainty since the Education Act 2011 has left a number of stakeholders, not least banks, in an unclear position. Government officials have also perhaps ill advisedly spoken about a perceived need to cut off funds from the "Bank of Mum and Dad" which ignores how the sector's finances generally have come to be so tight and, added to that, is in the middle of profound change. This change is making it difficult to forecast and budget effectively.

If there are willing parties, the Further and Higher Education Act 1992 allows a college to transfer "property, assets and liabilities" to another college. That Act does not deal with the situation where there in no party willing to accept a transfer and does not cater for a formal process to wind up an insolvent college.

What could these changes mean for colleges?

It is clear that if support akin to Exceptional Financial Support is needed the Government will in the future require more significant changes within a college than has perhaps historically been the case. The proposals will also inevitably lead to some uncertainty within the sector as an adjustment takes place. This uncertainty is already beginning to have an effect on banks that are active in the sector. Some banks are effectively exiting the sector (probably as much for mercurial strategic reasons) but it leaves fewer banks and a less competitive market for the colleges.

Pensions and the college insolvency regime

One area of concern for colleges arising out of the proposals for the new insolvency regime set out in the Technical and Further Education Bill ("the Bill") relates to pensions, and specifically, participation in the Local Government Pension Scheme ("LGPS") for non-teaching staff at colleges. One effect of instituting insolvency procedures for colleges similar to existing procedures in respect of companies is that in the event of a college insolvency, the particular fund of the LGPS to which the college contributes would be an unsecured creditor in the insolvency.

This would mean that any shortfall in funding would have to be met by the other employers in the fund. This obviously has cost implications for the other employers within the fund, as they would need to increase their contributions to make up the shortfall.

It also has implications from the fund's perspective. The obvious way for the fund to protect against the insolvency of a college is to take security in relation to a college's obligations to contribute in respect of its employees who are members of the LGPS. The usual form of security would be a charge over the College's assets, especially land. However, this may not always be possible, given that the value of land owned by a college may be limited, and it may already be subject to charge to financial institutions – and some colleges do not own the land on which they operate.

Another theoretical albeit usually unattractive possibility would be to offer cash to the fund to be deposited in an escrow account. However, a college may well be limited in the cash it has available; alternatively if cash is available, the college could instead increase its contributions to the fund.

Some LGPS funds have already been viewing the regime as increasing the perceived risk to the fund, and therefore are looking at reviewing the funding assessment of colleges. This may well result in funds seeking higher upfront contributions and/or shortening deficit recovery periods, which have been in the order of ten years or more.

The Special Administration Regime proposed in the Bill is meant to protect learners from failing colleges. One of the means of achieving this would be for the failing college to transfer or merge with another provider. Unless the new provider takes on all past liabilities, a crystallisation event would occur and a (presumably) large deficit payment would become due.

The Government's consultation response has suggested that such a crystallisation event would not occur in most cases, where the new provider was a member of the LGPS scheme, as that provider would be able to assume all liabilities of the failing college.

The Bill may therefore provide more certainty for colleges in respect of insolvency, but it also raises a number of concerns, both for colleges and for pension funds.

Craig Engleman

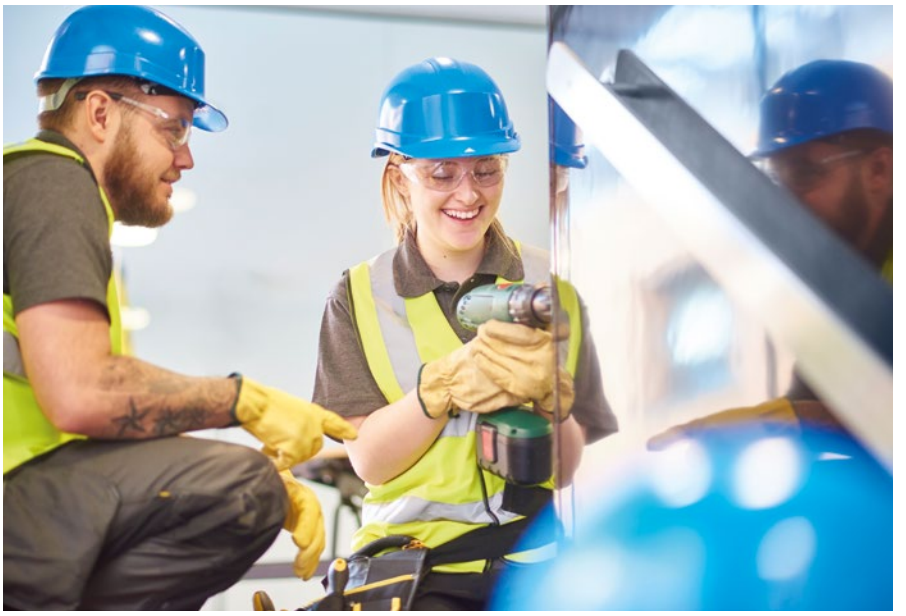
What would be your key pieces of advice for college leaders and governors?

In the debate about the Bill in the House of Commons Robert Halfon said that colleges should have "as much financial expertise as possible", and "when there is real financial leadership, those colleges will always be in good financial health whatever the funding pressures." It was interesting to note that as part of the programme of Area Reviews it was signalled that going forwards only colleges that ensure they are financially sustainable and can deliver good quality provision for learners will receive public funding.

The first issue was seemingly financial sustainability, not delivery of learning provision. This is moving the financial health of a college ahead of the technical skills agenda. It means the right level of financial expertise at officer, governor and audit level is now judged paramount by Government. As well as high quality financial information, people with the skill set to scrutinise and challenge the financial information are needed. As the nature of funding is complex and changing these people are going to be in short supply. Those who are passionate about the skills agenda won't be pleased to hear that the first item on any Governors' meeting agenda, if it was not before, should now to some extent be financial performance – although clearly a financially sound organisation has always been a pre-requisite to the long term sustainability of high quality provision.

SFA apprenticeship funding rules update

Whilst it has taken them a little longer than originally planned, the SFA ("Skills Funding Agency" – as it was still called at the time of publication) has eventually released its 'final' funding rules that will apply to the new apprenticeship regime coming in May 2017.



In recent issues of Education Focus we have focused on the key changes that will be introduced – namely, that UK employers with an annual pay bill in excess of £3 million will pay a levy of 0.5% on their pay bill, which can (in addition to a 10% Government top-up) be used to pay for the training and assessment of apprentices in England, with all other UK employers receiving 90% Government co-investment for such costs.

Unfortunately the SFA has not published anything which specifically identifies what changes have been made to the funding rules since the corresponding drafts were published back in October 2016. However, the good news is that the final funding rules do not include any dramatic departures from those earlier draft rules, meaning that the fundamental principles set out in those drafts regarding the payment arrangements and incentive criteria remain very much 'as they were'.

The majority of the updates to the funding rules essentially provide added clarity in certain areas – for example, more expansive explanations as to the meaning of the terms "genuine job" and "off-the-job training", a more detailed list of which costs can and cannot be paid for out of levy or co-investment funds, and a prescribed formula to use when extending the duration of the apprenticeship in circumstances where the learner is working below the required minimum 30 hours per week.

The updated rules also make specific reference to zero-hours contracts, and now include a table of required actions to follow in various changes in circumstances affecting the learner, employer or provider (similar incarnations of which were contained in funding rules for the old regime but had not, until now, made their way into the post-levy rules).

It goes without saying that providers will need to familiarise themselves with the updated rules in advance of the commencement of the new apprenticeship regime to ensure they can comply. Employers will likewise have to familiarise themselves and comply with the SFA's new employer-specific funding rules, in addition to levy-paying employers having to also understand and comply with the newly introduced employer agreement that they will be required to enter into directly with the SFA – both of which are comprehensive in their own right. For both providers and employers, non-compliance will put future SFA funding at risk and potentially lead to the SFA exercising rights of clawback.

James Peel

Employment Tribunal decisions now online

Employment Tribunal decisions for all employers are now available online at the gov.uk website. The new online database is introduced as part of the Government's "open justice" initiative which applies to courts and tribunals in England and Wales.

Employment Tribunal judgments and written reasons were previously a matter of public record, however until now the Register for England and Wales could only be searched and accessed by attending the Employment Tribunal judgment register office at Bury St Edmunds. Copies of judgments could be obtained by making an application to the Tribunal accompanied by a fee. The online database launched in February greatly simplifies the process. The database includes a search function allowing the user to search for an employer's name and also specific words or phrases e.g. "sex discrimination" or "unfair dismissal".

From a legal perspective, these first-instance decisions are not binding on subsequent cases, however, the judgments can also provide helpful examples of how tribunals deal with legal issues and matters of fact. Patterns may also emerge in respect of how judges deal with particular issues.

The practical effect of this online database is that Employment Tribunal judgments will be readily available to a wide audience which will include not only the parties and their representatives, but also the media, staff members, job applicants and students. These judgments often provide a detailed account of the facts in a case, conclusions on whose evidence is preferred and can be critical of positions taken by parties.

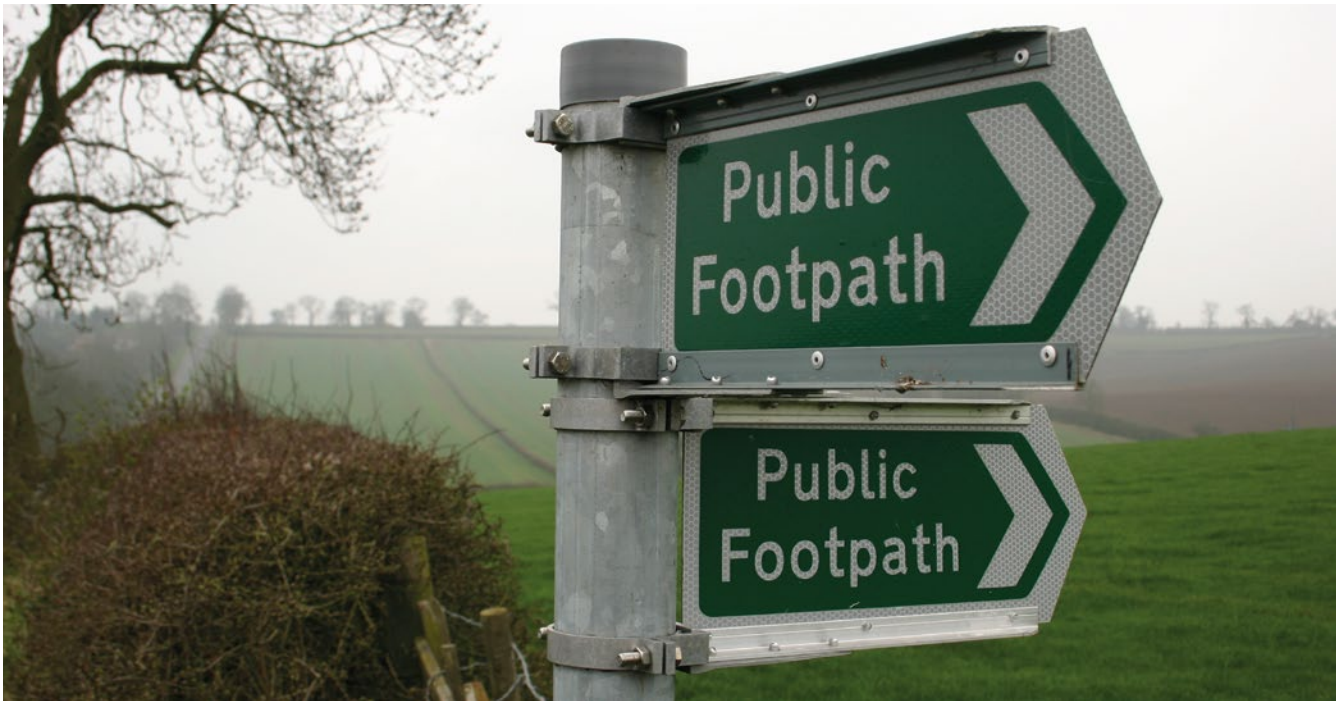
The existence of this database should give providers food for thought and, if engaged in Tribunal proceedings, it may well further incentivise parties to settle rather than face the increased risk of bad publicity. Whilst access to justice is essential for the public, the potential for reputational damage is great and it is now more crucial than ever for providers to perfect their employment practices to ensure that Employment Tribunals are avoided.

Ed Jenneson

New series on property and estate management

Part 1 Rights of way

Over the next four issues of Education Focus, we will be discussing some of the major property issues which come to light when advising education providers on property matters including academy conversions, mergers, the sale of land and the potential for development of a property. We will also highlight practical pre-emptive action which can be taken to deal with each of these issues in order to prevent the issue having any major implications on the provider.



One of the biggest issues which comes to light when advising an education provider on property matters is the potential for a claim for a public or private right of way, which could have disproportionally severe consequences. Firstly, this could have safeguarding implications for the provider. Secondly, a right of way could impact upon a proposed sale or development of a property, as it could make a property less attractive if the right could restrict development. Thirdly, there are administrative burdens in trying to monitor and deal with the right.

A public right of way can be created when a road or footpath is used by the public continuously and without interruption, as of right (i.e. without secrecy, without force and without permission), for a period of more than twenty years. Private rights of way can be created if a right of way is exercised over a property by an adjoining landowner for over 20 years; again, the right must have been exercised as of right and continuously without interruption.

Rights of way, once created, exist indefinitely unless they cease to exist, are closed by a statutory procedure (which can be time-consuming and costly) or, in the case of private rights only, are extinguished with the agreement of the beneficiary of the right (which again can be time-consuming and costly).

It is extremely important for providers to actively monitor their property to ensure no persons are accessing the property without consent and to ensure action is taken to prevent any new rights of way coming into existence.

It is possible to submit a notice to the Council which specifies whether or not any public rights of way exist over a property and this notice will then be kept on a public register for a period of 20 years. During this period of time, no new public rights of way will be able to come into existence. Examples of other practical steps which can be taken to prevent a right of way being created are:

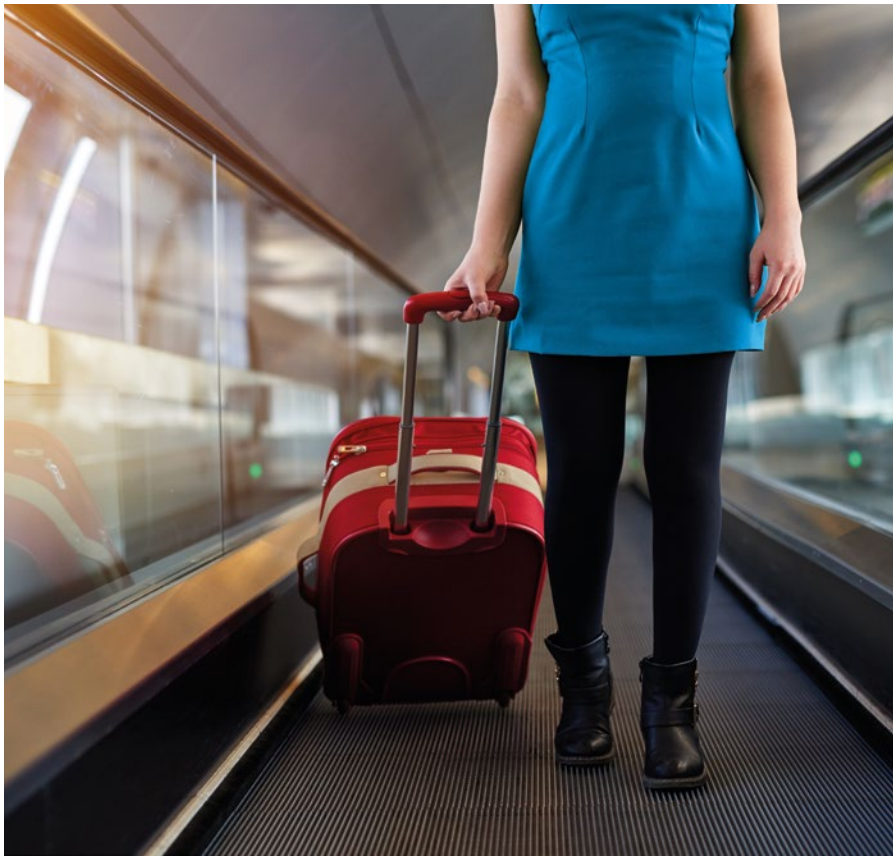
- Ensure the property is adequately fenced and gated, and all gates are locked at all times;
- Erect signs and replace any signs which are damaged or destroyed;
- Politely request that any persons on the property without permission leave;
- Consider whether it would be appropriate to take legal advice if person(s) persistently access the property without permission;
- Record who is accessing the property without permission, when and any steps taken to prevent such access; and
- If any persons access the property with permission, grant a Licence to prevent such persons gaining a legal right over the property.

Libby Clarkson

Update to Visit Guidance

New study concession for long-term visit visas

A recent update to the Home Office's Visit Guidance has introduced a concession for those wishing to study whilst on long-term, multi-entry visitor visas.



Prior to 5 January 2017, if an individual's main purpose of coming to the UK was to study, that individual would require a study-based visa. This was even the case if that individual already had a long-term visitor visa. This was because an individual could not have two types of concurrent leave to enter the UK. That individual would either have to have a visitor visa, or a study visa, not both.

Now, however, it is possible for an individual to hold a long-term visitor visa to visit the UK and study without having to cancel one visa, to get another. Of course, there are rules to accompany this new concession.

Specifically:

- The course of study in question must not exceed 30 days at any one time (unless it is a recreational course);
- The long-term visit visa holder must only, occasionally, come to the UK for the sole purpose of taking a course of study;
- The course of study must take place at an accredited institution; and
- The main purpose of the individual's long-term visitor visa must continue to be to undertake visitor activities as defined by the Immigration Rules i.e. mainly activities other than study.

This new concession does not apply to individuals who hold a single-entry visitor visa or to non-visa nationals applying for leave to enter as a visitor at a UK border. In those cases, study must not be the main or sole purpose of their visit.

In summary, therefore, provided that an individual meets the relevant criteria, it is now possible for providers to accept individuals with long-term, multi-visit visas on to courses of study without a study-based visa.

Whilst there are no sponsor reporting duties in these circumstances, a provider who takes on students in these circumstances would be best placed to undertake the usual monitoring processes of sponsor reporting, to ensure that the individuals concerned are not attempting to use this concession inappropriately to engage in long-term study.

Christina Sledmore

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 6 April 2017.

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