

Education Focus

Coming up...

The next edition of Education Focus will be published towards the end of the Summer Term and will feature articles on the legal protection afforded to playing fields and the impact of freedom of information on the sector.

For a sneak preview visit rollits.com

Courts remind education providers of their Tier 4 Highly Trusted Sponsor Status obligations

A recent Court Judgment arising out of an application for Judicial Review of a decision to suspend a college's Tier 4 Sponsor Licence has highlighted the responsibilities which education providers accept when they are granted a licence.

For overseas students who wish to study full-time in the UK, the primary route is via Tier 4 of the Points-Based Immigration System. To enter the UK via Tier 4, the student must be sponsored by an education provider that has a Sponsor Licence. By providing sponsorship, the education provider supplies evidence that the student in question will study for an approved qualification. It also places certain immigration law duties upon that education provider including keeping proper records relating to the sponsored student and doing all the education provider can to ensure that the student arrives to take up the course and sees the course through to completion.

Education providers holding a Tier 4 Sponsor Licence for around a year are usually awarded Highly Trusted Sponsor (HTS) status. HTS status is designed to recognise Sponsors who have shown a history of good compliance with their sponsorship duties and whose students comply with the terms of their visas. Once gained, the status as an HTS is one which an education provider will not wish to lose and so compliance is key.

The legitimacy of a number of education providers with HTS status has recently been called into question, stoked by a BBC Panorama documentary which looked into the facilitation of immigration fraud whereby some providers appeared to be granting sponsorship on a fraudulent basis. UK Visas and Immigration (UKVI) via the Secretary of State for the Home Department (SSH) has the ability to suspend a Licence in cases where they have reason to believe that a Sponsor is breaching its duties and/or poses a threat to immigration control. The suspension remains in force until further

inquiries are made and the Sponsor will not be able to assign new Certificates of Sponsorship (CoS) during this time. UKVI will not consider applications for leave to remain by students with a CoS issued by that education provider shortly before and during the period of suspension.

When faced with suspension of its Sponsor Licence, an education provider has recourse to challenge the decision by way of Judicial Review. The most recent example of this can be seen in the case of *London St. Andrews College v Secretary of State for the Home Department*.

London St. Andrews College was granted a Tier 4 Sponsor Licence in December 2009 and awarded HTS status in August 2009. On 24 June 2014 the SSHD suspended the College's Licence on the basis that the College had issued CoSs to students who had cheated in their exams undertaken with Education Testing Services.

Upholding the SSHD's decision to suspend the College's Licence, Mrs Justice McGowan concluded that **"it must be understood that the grant of HTS status is a fragile gift, constant vigilance about compliance is a minimum standard required of such colleges"**. Continuing, she explained that a Sponsor is expected to carry out its responsibilities with **"all the rigour and vigilance of the immigration control authorities"**. It therefore follows that there is a "heavy burden" on the Sponsor to ensure that students (as well as themselves) comply with all then necessary requirements of Tier 4. The College's application for Judicial Review was refused.

This case is by no means a landmark decision; in fact, it follows a line of reasoning applied in a number of similar Judicial Review challenges from the sector. The Courts are making it increasingly clear that a Sponsor's ability to grant a CoS should be held as a privilege carrying great responsibility. HTS status is not something that is just granted through the passage of time; it is recognition from UKVI that the education provider recognises the importance of immigration control and Tier 4.

With the most recent Tier 4 Guidance having been brought in at the end of November 2014 and further consultation with the sector already underway, it has never been more important for education providers with HTS status to keep in mind the stature that such status holds, the obligations it brings and the risks associated with revocation of a Licence.

Christina Sledmore

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Q&A

Immigration in education

Christina Sledmore, author of this edition's lead article, talks about her life as an immigration law advisor to the education sector.



What kind of regulatory work do you get involved in for the sector?

I predominantly advise education providers with regard to immigration issues surrounding both employees and students across Tiers 2 and 4 of the UK immigration system. A lot of my work relates to proactive compliance as well as helping providers to handle situations when things don't go to plan.

What developments have you seen in the sector when it comes to immigration issues?

I think we have all seen a clear reduction in the potential number of non-EEA students being able to study in the UK. This follows the reforms to Tier 4 in 2011 as well as those that followed in 2014, including the introduction of the Immigration Act 2014.

A BBC Panorama documentary aired last year looking into the alleged "student visa scandal" has very much put Tier 4 in the spotlight. The documentary investigated the "multimillion-pound trade in immigration visas" and identified that in return for cash, criminals were securing places at UK education providers by arranging fraudulent documents to satisfy Immigration Officers and facilitating fake students to sit Government-approved exams. On the back of that documentary, the Home Office took action against 3 universities and suspended the Tier 4 Sponsor Licences of 57 private colleges because they had reason to believe



that those providers were no longer fulfilling their obligations to take their immigration responsibilities seriously.

The impact of May's General Election will remain to be seen but I wouldn't be surprised to see more reforms in the not too distant future bearing in mind the amount of debate currently taking place in relation to immigration in the UK. It is perhaps unfortunate that some of the benefits of non-EEA students to the UK and education providers are being lost in the debate.

If you had one piece of advice you would give to providers when it comes to dealing with immigration issues what would it be?

A lot of the issues I deal with relate to non-compliance with UKVI Guidance and the Immigration Rules. This can be, for example, where a provider has been sanctioned by UKVI for non-compliance or, where an application has been delayed due to non-compliance. In these circumstances, the mistake made can be something as trivial as an administrative error or more serious such as where a provider has failed to monitor, record and comply with substantive obligations. Whilst an administrative error might not seem that significant, UKVI are stringent in their approach. If Guidance and/or the Immigration Rules are not met, UKVI are more than willing to deny applications or hinder their progress.

In respect of general non-compliance, the article on the front page of Education Focus highlights that UKVI are moving towards a position whereby providers act as another 'checkpoint' in immigration control. My top piece of advice to education providers would therefore be to have a good and thorough understanding of the relevant and applicable UKVI Guidance and Immigration Rules. Making this investment will hopefully help to ensure that pitfalls are avoided and, where despite a provider's best efforts things still go wrong, be able to spot that this is the case and act quickly to minimise any adverse impact.

What issues can you see coming on the horizon?

In brief, UKVI putting more responsibility on education providers to take an even more active role in immigration control. In the past few months UKVI have taken to consulting with education sector stakeholder groups and representative bodies regarding proposed changes to the Tier 4 Guidance; in particular, with reference to branch and partnership status. Their aim of the proposed amendments to the Guidance? To ensure that providers sponsoring students are being effectively held to account. I can only see this going in one direction.

Government tightens up on alternative providers in HE

Part of the Government's policy "**Making the Higher Education System More Efficient and Diverse**" is to ensure that higher education institutions provide innovative, high quality learning. This includes making institutions compete to attract students and the funding they bring with them.

As part of that policy, the Government has recently announced new plans to help boost the quality of the alternative providers. In

particular, there are changes to tighten standards, measures to give students greater protection and plans to bring alternative providers' quality assurance requirements in line with universities. We will wait to see what impact this may have upon the quality of alternative providers' provision, but no doubt in the meantime traditional HE providers will consider this a welcome move for the sector to ensure standards are maintained.

Caroline Hardcastle



Due diligence

In this latest in a series of articles on a typical sector merger or acquisition, we are looking at the role which due diligence has to play. Once a decision has been made to acquire a business or a company, due diligence should always be undertaken not only to check out that what the sellers are saying is accurate, but equally importantly to try to ensure that the transaction will be a success for all involved. Essentially, due diligence is designed to establish that the transaction is a sound commercial investment. The focus of this particular article is the decision to acquire; we will look at issues surrounding the future integration of the target later in the series.

Due diligence is not a substitute for contractual protection. However, it may give some guidance as to what protection should be added to a contract in the form of indemnities etc. The due diligence exercise will cover three basic areas: legal, financial and commercial. There will often be overlap between these areas, but a well managed due diligence process will seek to avoid this as far as is possible. The exercise should enable a buyer or merger partner to make a final decision about whether to proceed and, indeed, at what price.

Legal due diligence

In the case of a purchase such as the acquisition of a training provider legal due diligence is usually initiated by the lawyers acting for the buyer. In sector mergers due diligence is typically carried out on behalf of both merger partners.

Lawyers carrying out due diligence will produce a questionnaire asking for information about certain key areas of the business or company which is being acquired. The specific areas are likely to include legal ownership of key assets, major contracts, disputes and litigation, employees, intellectual property and pensions. One of the other most obvious areas will be due diligence on any freehold or leasehold property owned by the target.

The lawyers will usually produce a due diligence report and, in the case of mergers or acquisitions involving

providers with governing bodies, a presentation or series of updates to the governing body. The alternative is simply to pass through information to the buyer for its own analysis, but this is not the norm for education sector transactions save for discrete areas where bulk source data is to be analysed in-house.

Financial due diligence

This can take the form of a long form or short form report. It is not an audit. Accountants acting for the buyer/merger partner will consider particular risks and review the information upon which the decision to buy or merge is based. It is extremely important that any initial offer that is made sets out the key assumptions upon which any offer is based. This is so that if any of the assumptions do not stand up to scrutiny, a buyer can quite legitimately revisit the price or certain other terms of the transaction.

Commercial due diligence

Commercial due diligence is the consideration of the market in which the business is operating. It is a high level strategic review. The buyer will want to know what is happening in the market. Is it shrinking, growing or changing shape? How will the acquisition enable them to obtain a larger share of the market? What is the target's position in the market? Few markets have undergone as much change as education in recent years and so this type of analysis, in-house and/or using external experts, will be key.



Depending upon the nature of the acquisition there may also be specific areas which require particular attention depending on perceived risks. These areas could include information technology and environmental issues.

In relation to due diligence generally, it is important to recognise that the process can be time consuming, for all parties concerned. Inexperienced sellers will sometimes not understand the time it will take to source and provide due diligence information. If they have a small management team the pressures of producing due diligence information whilst continuing to run the business can be extremely difficult. It is also important to understand that due diligence is not the same as "disclosure" which takes place later in the process and will be covered in a subsequent article in this series. However, if the process is well managed the work undertaken in due diligence will be helpful for the disclosure process.

Whilst due diligence can pose its challenges and sometimes requires significant time investment, a well executed process can greatly improve the prospects of a successful transaction which contributes positively to the education provider's mission going forwards.

Richard Field and John Flanagan

Rollits' Education Team recognised in national rankings

The Education Team at Rollits has recently been recognised in a national category by independent law firm directory Chambers & Partners, being noted as "active and accomplished" for our work with further and higher education providers. This follows on from another key ratings directory Legal 500, which ranks firms for education on a regional basis, again recommending Rollits for its work in the sector. The Team is passionate about the sector; we look forward coming to work

every day to use our skills with the aim of helping providers better achieve their mission of providing outstanding education and experiences to the learners they serve. It has given us all an extra boost to know that our clients have helped the directories in conducting their research, leading to this latest rankings success. We are, as ever, immensely grateful for that support and for the work of the sector in nurturing and developing the skills which will enable our communities to thrive.



RPA introduces new guidance on risk management

On 1 September 2014, the Risk Protection Arrangement ("RPA") was introduced for academy trusts as an alternative to traditional insurance. Studies undertaken by the Government identified that significant cost savings could be had by academies if the risks were covered by the Government rather than the academies having to go to the open market. Under the RPA losses are covered by UK Government funds rather than being underwritten by commercial insurance companies.

The RPA will cover the majority of the mainstream risks and these are set out in the Membership Rules. For those risks not covered, to assist academies the Government has provided a route to the commercial insurance market through Crescent Purchasing Consortium or Crown Commercial Services.



The Government states that there is no premium to join the RPA. However, £25 per pupil will be deducted at source by the EFA from the academy's general annual grant and therefore there is a "cost" to the scheme. The Government has stated that the £25 will apply for the first two years. It has not stated what will happen after that period other than the amount will be reviewed but "it is not expected to increase".

One of the benefits to the scheme is the Risk Management element. As part of the scheme the Department for Education (DfE) has contracted with risk adviser Willis to provide risk management advice, including trading and best practice guidance. On 31 December 2014, the DfE updated its general risk management guidance and its plans to carry out a more in-depth review. The DfE is looking to select a sample of

academy trusts, from high performing to those requiring additional support, for a full risk management audit. Armed with the results, it is intended that a training programme will be developed to cover the risks identified during the audit as requiring more help and guidance. A risk management portal is also due to be made available shortly to all RPA members. This will include a number of guidance documents in key areas including handling asbestos risks, stress and accident investigations, together with best practice examples and details of training events.

For those schools which have already converted to an academy or those considering academy status, the RPA represents an alternative to the commercial insurance market. Whether the RPA is right for an individual academy will be dependent upon all the circumstances but it is likely to be an option at least worth considering.

Caroline Hardcastle

Skills Funding Agency publishes new guidance on the role of LEPs

Just as this edition of Education Focus was about to go to print the Skills Funding Agency (SFA) issued new guidance titled **Local Enterprise Partnerships (LEPs): increasing their influence on skills budgets**. The guidance is borne out of the Government's desire to ensure that education provision meets local priorities, to explain how the SFA will support this and to set out the role of LEPs.

The message to education providers is clear: be ready to be placed under a contractual commitment to demonstrate the relationship you have with your LEP and expect LEPs to become more involved in the decision making around allocations. One difficulty being faced by many providers is that they are not just dealing with one LEP, and the approach and degree of organisation varies greatly amongst LEPs nationwide. Providers did not need guidance to tell them they need to engage with their LEPs; they are doing it already, but with varying degrees of success. Those which have been less successful have sometimes found it hard to engage due to lack of interest on the part of their dancing partner. Those which



have succeeded have invariably worked together with more fully engaged and well organised LEPs. It is just not possible to form a partnership on one's own.

Despite the drive for localism, the Government is seemingly attempting to put a universal requirement on providers through new obligations to be included in SFA funding contracts, without there being a reciprocal universal structure which all LEPs are required to adopt. Providers and stakeholder bodies such as the Association of Colleges will continue to press for more consistency of approach but whilst no provider is awash with excess cash to fund an army of lobbyists, providers will no doubt need to keep deploying their resources if they are to make the most of the new regime and maximise opportunities through ever closer engagement with the LEPs.

Tom 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 or email 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.

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