

**THE ELLIOT FOUNDATION ACADEMIES TRUST**  
**REPORT FOLLOWING GOVERNANCE REVIEW**

**OCTOBER 2014**

**INSTRUCTION**

Following a formal tender, Winckworth Sherwood LLP, a firm of solicitors specialising in advising schools and education providers, have been instructed to carry out a review of the governance structure of The Elliot Foundation Academies Trust (the "Trust") and to make written recommendations to the board of the Trust with reference in particular to the following:

- Compliance with the master funding agreement, articles of association and academies financial handbook;
- Payments made to directors;
- Management of conflicts of interest;
- Composition of the board of directors and the distinction between the sponsor and the Trust; and
- Compliance with HM treasury guidelines on all aspects of senior officer's pay.

The scope of this review has been agreed with the Education Funding Agency and the report will be shared with them. The Trust has a policy of full and open disclosure and this report will be made available for viewing from the Trust's website.

The report's author has been given full and unrestricted access to the Trust's files and has met with representatives of the Trust, who have been able to answer questions and provide clarification where sought.

Our key observations and conclusions are highlighted throughout the report and our recommendations summarised at the end for ease of reference.

**INTRODUCTION**

A central theme of the Department for Education's (DfE) policy since 2002 has been to recognise and encourage the involvement of businesses and other organisations in the establishing and running of academies. Sponsor organisations have been encouraged to participate fully in the affairs of the academy. In the approving of sponsors (including promoters of free schools) and the carrying out of checks to assess the suitability of potential sponsors, the DfE has looked for partners who can provide vision and support, which is meaningful and accountable. There is no requirement for sponsors to contribute financially to the academy trust by providing an endowment but sponsors are expected to provide time and resources. Sponsors may provide services, which are commercial in nature, but are not expected to profit from their involvement in the academy.

In establishing an academy trust, sponsors are expected to be involved in the governance of the trust, appointing members and trustees, and in appropriate cases sometimes acting themselves as a corporate member and/or trustee. It is not unusual for this involvement to be written into the constitution of the charity (the "Articles of Association") and the relationship recognised to ensure that the trust's mission and values are sympathetic to those of the sponsor. This is particularly important when the sponsor founder is another charity as the support to be provided must be appropriate in light of the objects of the sponsor charity. It is also common for the two organisations to have similar names in order to reinforce the connection and demonstrate public accountability.

With the approval of the Secretary of State for Education, The Elliot Foundation, a registered charity and referred to hereafter as the “Foundation”, is the sponsor and founder of the Trust, set up in 2012. The Foundation is a member of the Trust and, pursuant to the Trust’s Articles of Association, has the right to appoint (and remove) both a majority of the members and the directors/trustees of the Trust.

**In a very real sense the Trust is controlled by the Foundation.**

The Trust is an exempt charity whose principal regulator is the Secretary of State, from whom the Trust receives funding to operate the Academies pursuant to the funding agreements (i.e. “academy arrangements” as recognised by the Academies Act 2010). Whilst this means the activities of the Trust are primarily determined by the Department for Education with reference to the Education Funding Agency, nevertheless the Trust is subject to charity law and the intervention powers of the Charity Commission. As the Trust is a company then it will also be subject to company law.

**GOVERNANCE AND SUPPORT**

The people responsible for the general control of the management and administration of the Trust are its trustees (the “Trustees”), who will be registered as directors with Companies House. The members of the Trust (the “Members”) have no role in the management of the Trust but are there to ensure the charitable object is fulfilled. The Members have a reserve power under the Companies Act 2006 to appoint and remove Trustees, but would in normal circumstances rely on the express powers contained in the Articles of Association. Certainly we would expect the Foundation to use its rights under the Articles if it were to appoint or remove Trustees.

**It is clear from the Trust’s Articles of Association and the minutes of the Trustees’ meetings that the Foundation has played a very active and important role in supporting the Trust and driving educational improvements within the Academies for which the Trust has responsibility.**

Whilst we would expect the DfE/EFA to be interested in the principles and the outcomes of the work that the Foundation does in relation to the Trust, it is not anticipated that the Secretary of State would want to approve of the detail. That is a matter for the Trustees, who are accountable for the performance of the Academies and the viability of the Trust more generally, including the spending of public money. Equally the support and indeed challenge from the Foundation is a matter for the Trustees and the Foundation. There is no agreement between the Foundation and the Secretary of State and little guidance as to the practical role of the sponsor in this situation. Whilst this might be considered preferable as it supports the policy of independent and accountable trusts with minimal intervention by the Secretary of State, the lack of guidance and indeed understanding of the role of the sponsor may lead to confusion and a blurring of the distinction between the Foundation and the Trust. Indeed it would seem to also be part of the reason why concerns have been raised by the EFA as the Foundation is not accountable to the Secretary of State and therefore the EFA from a regulatory perspective.

**There is little formality other than the Articles between the Foundation and the Trust and whilst the strategic vision is clearly and appropriately shared, the lack of clarity as to the separate roles and responsibilities of the Foundation compared to the Trust (and the trustees of both organisations) has encouraged the practice of sharing Trustees. It has been unclear where and indeed who should be making decisions. The over reliance on “executive” Trustees and their oversight by the Foundation, particularly in relation to their remuneration has been a case in point. The duty of the Trustees to act in the best interests of the charity for which they are a trustee can be compromised without clear boundaries. This has been in part addressed now by the resignation of the executive or**

rather salaried directors and the appointment of new Trustees for the Trust. In addition we recommend that the DfE are asked to provide guidance on the role of sponsor trusts and whilst guidance is awaited the Foundation and the Trust agree and record how they should work together. As the relationship is more akin to trustee and beneficiary (if not charities operating within a group company structure) then we would recommend a “memorandum of understanding” rather than a formal contractual arrangement.

## DUTIES OF TRUSTEES

The Trustees have a fiduciary duty to act in good faith in the best interests of the charity. This duty includes a responsibility to do the following:

- To ensure compliance with any legal obligations;
- To report on the charity's activities (the Trust must prepare accounts in accordance with the Statement of Recommended Practice for Charities, the so called Charity SORP);
- To fulfil the charitable object of the Trust as set out in its constitution (the Articles of Association) and to act in a way which is compliant with the rules of the charity contained in the Articles;
- To act with integrity and to avoid any personal conflicts of interest and not to misuse any charity funds or assets;
- To act prudently in the financial management of the Trust, avoiding putting any assets, funds or reputation of the Trust at undue risk;
- To exercise reasonable care and skill, using personal knowledge and experience to ensure the Trust is well run and efficient;
- To act responsibly, getting advice from others, including professional advisors, where appropriate.

**It is clear from the minutes of Trustee meetings, that the Trustees are aware of their duties and do take advice from their professional advisers. The duties are clearly set out in the Directors' Code of Conduct adopted by the Trust and flowed down to governors serving on local governing bodies.**

As the Trustees are also company directors, there is an obligation under company law to exercise reasonable care, skill and diligence and to avoid conflicts of interest. Directors of companies are expected to act prudently and there are specific duties where the company is insolvent or there is a threat of insolvency.

Trustees must act independently and in the best interest of the Trust even if those interests conflict with those of the body or organisation that might have appointed or nominated such Trustees to serve on the Trustee board. Trustees may have a conflict of loyalty even if they do not have a conflict of interest (because they are not benefitting in any way from the arrangement or relationship).

If a Trustee is in any way, directly or indirectly, interested in a proposed transaction or arrangement he or she must declare the nature and extent of that interest to the other Trustees. Under the Companies Act 2006, a failure to declare an interest is a criminal offence and a Trustee who authorises a transaction or arrangement in which he or she is conflicted is personally liable to account to the Trust for any gain he or she has made directly or indirectly from the transaction and must indemnify the Trust for any loss or damage suffered resulting from

the transaction. Whilst the Trustees are likely to be insured against any personal liability, because of the fiduciary nature of insurance, a Trustee who benefits in any way from the matter giving rise to the indemnity claim is likely to find that insurance cover for such loss is refused on the basis that the claimant has been at least reckless if not fraudulent.

Trustees should be made aware of the Charity's Commission guidance on managing a conflict of interest which can be downloaded from the following link:

<https://www.gov.uk/manage-a-conflict-of-interest-in-your-charity>

**Whilst the Directors' Code of Conduct expressly notes the duty to avoid a conflict of interest, the Trust has no formal Conflict of Interest policy. We recommend one is adopted and we attach a suggested draft for this purpose. The policy should acknowledge the importance of the relationship with the Foundation and the impact on all actions of the Trust and whilst this in itself will not prevent any conflict of interest or loyalty arising, the management of that conflict should take into account the role of the Foundation as member and sponsor of the Trust helping the Trustees to move forward without the need to sever the link with the Foundation.**

## **TRUSTEE BENEFITS**

The concept of unpaid trusteeship has been one of the defining characteristics of the charity sector, and in the words of the Charity Commission "contributing greatly to public confidence in charities". This does not mean however that a Trustee can never receive any payment or benefit from the Trust as there are sometimes good reasons why it can be in the Trust's interest to make such payment. The best example of this is the paid employment of a "Chief Executive Officer" or in this case the Managing Director, who is by virtue of the Articles is an ex officio Trustee i.e. a Trustee by virtue of the post held.

**The Articles do not allow Trustees to be paid simply because they are a Trustee but there is no evidence that this has occurred. All Trustees who had received (or indeed still do receive) remuneration or had been providing consultancy services to the Trust were employed to undertake specific functions such as management, finance and HR.**

The law states that the Trustees cannot receive any benefit from the Trust in return for services provided to the Trust unless there is express authority to do so. This authority will be derived from either the Articles of Association or from the courts or the DfE (who will consult with the Charity Commission). In the words of the Charity Commission:

*"The rule that a trustee cannot receive any benefit from his or her charity without explicit authority is based on the principle that trustees should not be in a position where their personal interests and their duty to the charity conflict, unless the possibility of personal benefit from which the conflict of interest arises is transparent. Transparency is achieved by requiring explicit authorisation of the benefit, and by ensuring that any particular conflict of interest is properly and openly managed. It is the potential, rather than the actual, benefit from which the conflict of interest arises which requires authority. In order to avoid a breach of trust and to ensure transparency, authority is required where there is a possibility of benefit. This will avoid accusations of impropriety, which could in turn have a damaging effect on the charity's reputation."*

This is echoed in the Companies Act 2006 section 175 of which states that the "duty [to avoid conflicts of interest] is not infringed (a) if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or (b) if the matter has been authorised by the directors".

A Trustee will be considered to be receiving a benefit if he or she is either being paid directly for services provided or is receiving an indirect benefit because, for example, he is a director,

shareholder, consultant or employee of a company that is providing the service or a close family member is in such a position.

Trustees appointed or nominated by another organisation (including the Foundation and any associated undertaking) have exactly the same duties and responsibilities as other Trustees. They must act independently of the organisation which appointed or nominated them and in the best interests of the Trust, even where this might conflict with the interests of the organisation which appointed them. As a general rule, nominated or representative Trustees will not be conflicted in relation to any matter concerning the organisation that appointed them simply by virtue of the appointment (and the fact that with appointment comes the power of removal), but this is not an absolute rule and the specific circumstances may need to be looked at. Any improper threats of removal will prejudice the ability of the Trustee to act independently and if there is any doubt about a Trustee's position in relation to a specific matter or decision, then it is better to treat such a Trustee as having a conflict of interest (or as is more likely the case a conflict of loyalty). It is an obvious point but Trustees who are conflicted in relation to one matter are not conflicted for all matters.

**Trustees appointed by the Foundation who are also connected to the Foundation because, say, they are employed by the Foundation or are trustees/directors of the Foundation will have a conflict of interest in relation to any matter concerning the Foundation. Whilst there is no direct benefit to the Foundation as no services are being provided by the Foundation, care must be taken to avoid conflicts of loyalty and extra steps taken to demonstrate that the decision making of the Trustees has not been unduly influenced. We recommend that the Trustees are regularly reminded of their duty to act in the best interest of the Trust. We also recommend greater separation between the Foundation and the Trust by reducing the number of people who are trustees of both the Foundation and the Trust. Whilst this has already occurred to some extent we recommend going a little further and perhaps inviting Sue Nath and David Gallie to step down as trustees of the Foundation.**

A balance needs to be struck between the genuine need of the Foundation to ensure that the Trust works in harmony with the Foundation's ideals (given the commitments made by the Foundation to the DfE and the need for accountability) and to enable the Trust to evolve and from time to time challenge that partnership to demonstrate objectivity and secure the long term success of the Trust.

## **AUTHORISATION AND THE NEED FOR TRANSPARENCY**

Whilst there is a statutory power for Trustees to pay for services provided by another Trustee (section 185 Charities Act 2011), where there is also an express power in the Articles, even where this is less restrictive than the statutory power, then the Trustees are entitled to rely on the power in the Articles.

The Trust's Articles provide for both direct benefit (a director/trustee providing paid for services) and indirect benefit (where a conflict of interest exists) and require the Trustee to disclose the connection and absent himself from discussions (see Articles 6, 98 and 99). As noted above, the entering into of a contract with an entity in relation to which some of the Trustees have a conflict of interest is not in itself unlawful provided the conflict is identified at the outset and is properly managed when the contract is entered into and during the term of the contract.

As a matter of good practice (if not strict legal necessity) the following conditions should be met before payment to a Trustee (or an organisation in which a Trustee is involved) is made:

- There is a written agreement outlining the service to be provided and the payment to be made;

- The agreement sets out the exact or maximum amount to be paid;
- The Trustee who is connected (conflicted) must not take part in any decision to put in place the agreement and having excluded such person or persons, there is a sufficient number of (unconflicted) Trustees able to make the decision for the decision to be quorum;\*
- The payment is reasonable for the service provided;\*
- The Trustees are satisfied that the payment is in the best interests of the Trust;\*
- The Trustees adopt a duty of care when considering the matter, applying the fundamental principles governing a Trustee's actions (see "Duties of Trustees" above);\*
- The total number of Trustees who are receiving any kind of benefit (including employment and indirect benefits) from the Trust are in a minority;\*
- There is no specific prohibition in the Articles from making the payment.

Those conditions asterisked are also conditions in the Articles together with a requirement that any decision to make a payment to a Trustee in the circumstances outlined above is minuted.

**It is clear from the minutes of the Trustee meetings that Trustees who may benefit for any matter to be discussed are asked to declare any interest at the start of meetings and this is recorded. We recommend in addition that a formal Register of Interests is maintained by the Trust which can be regularly referred to and which can help to inform the Trustees on how to manage conflicts which regularly arise. Additional steps can then be taken to avoid harm or the perception of impropriety, including seeking professional advice and referring or consulting on specific decisions to a working party the members of which have no interest in the matter.**

The duty to act in the best interest of the Trust applies to all those involved in the governance of the Trust and the Academies, i.e. including governors serving on any local governing body, even though the general view is that they are not legally trustees under charity law.

**This is helpfully reinforced in the Governors Code of Conduct adopted by the Trust and applied within the Academies. We recommend that any specific proposal by a local governing body to contract with any governor or any organisation that a governor is involved with or connected to is referred to the Trustees.**

## **ACADEMIES FINANCIAL HANDBOOK**

The Trustees are reminded of the extensive provisions in the Academies Financial Handbook regarding the proper use of public funds. The Academies Financial Handbook highlights both the unique circumstances where a sponsor is involved and the potential issues which might arise when the Trust is making payments to either a Trustee or a Member.

Sections 3.2.1 – 3.2.7 of the Handbook note that any contracts for services provided by members/trustees where there is "control" which will include sponsors or bodies related to sponsors (and therefore the Foundation) must be properly procured in an open and transparent way and represent value for money. The Handbook formally reiterates the principle that no element of profit is included in the cost to be recovered from the Trust. There is no limit on the nature of the costs to be recovered. Further, any such individual or organisation must provide a "statement of assurance" confirming that any charges do not exceed the costs and must be prepared to supply relevant accounts and information in an "open book" way to demonstrate this.

**There is an approval process for specific contracts and arrangements that might cause concern, indeed echoing the same approach now being taken by the Charity Commission in relation to conflicts of interest but we do not feel this is necessary for the Trust in the current circumstances.**

Whilst contracts of employment are excluded from these provisions, the Trust is nevertheless obliged to have regard to value for money and appropriateness in relation to the employment of any Trustee and/or Member (permission for the latter now being refused by the DfE).

**It is clear from the minutes of relevant Trustee meetings that no employed Trustee or Trustee who was paid for services provided took part in any decision regarding their employment or remuneration.**

A question has been raised by the EFA about the remuneration of the “executive” Trustees and in particular the over use of consultants, including consultants who whilst now not in the role of a Trustee have served in such a capacity in the past. Whilst the Trust will have received revenue funding as soon as the first school joined the Trust, increasing as each school joins, this funding is primarily dedicated to the meeting expenditure within the relevant Academy. It is common practice for multi academy trusts to levy a certain percentage of income to be used for shared costs and the level of this clearly depends on the extent to which there are shared costs and resources. It is likely for a group of primary academies that there will be more shared costs as it is likely to make more economic sense to employ resources across a number of schools. This is clearly a decision for the Trustees.

The need to manage the budgets at every level of the organisation is an important duty and a key requirement of the Funding Agreement. Achieving a critical mass of Academies to support an effective management is crucial to the growth of a multi academy trust and for a primary academy group this number is likely to be greater than say a mixed group made up of predominantly secondary schools. Meeting the need for growth (without compromising the quality of the education to be delivered across the group) can also be challenging and it is crucial for the organisation that the board of Trustees has high calibre individuals serving on it. Equally the Trust needs to employ suitable resources at management level without over extending itself. Achieving an effective balance between employing individuals and relying on consultants is difficult and the business case will need to be continually reviewed. It is clear that the long term preference will be for employed committed management resources, with some flexibility on deployment, over more temporary consultant led support.

**Both the Trustees and the Foundation have demonstrated an acute awareness of this challenge and have sought regularly to review the suitability of its resources and the cost of these. There has been an attempt to move closer to building a stable management resource whilst at the same time contracting for focussed services which builds capacity and secures additional skills. The cost of both types of resource appears also to have been carefully considered by reference to market conditions and the external benchmarking of costs. There is no evidence to suggest that the Trust has been paying salaries or rates out of step with the market or not in accordance with guidelines applicable to academies.**

**We recommend the Trustees continue to review this position and formulate an appropriate pay and performance policy having regard to the requirements of academy trusts set out in the Academies Financial Handbook.**

## **MANAGING A CONFLICT OF INTEREST**

It is worth repeating again that the perception of unfairness is potentially more damaging than the reality and the Trust would be well advised to go to extra lengths to demonstrate both the value of the relationship with the Foundation and the steps that are being taken to ensure there is no

undue influence or preferential treatment (particularly as it is quite likely that the real benefit is to the Trust rather than the Foundation given the nature of the support being provided by the Foundation). The Trustees should keep at the forefront of their minds the reputational risk of a suggestion that there is impropriety in the relationships that the Trust has.

As noted earlier the key to successfully managing any potential conflict is to be open and transparent. Whilst charity law does not have the same concept of the authorisation of director benefits (which removes the conflict) as company law does, having a clear policy dealing with known and potential conflicts will go a long way to removing the potential for harm which the statutory provisions are designed to protect against. The following are important aspects of that policy:

- The relationship is in the best interests of the Trust;
- The Trust and the Foundation acknowledge a commitment to each other to act at all times in good faith;
- Any services to be provided are paid for without charging any element of profit;
- The commitments being made to each other are expressed in writing and that there is clarity and accountability in relation to any contracted support, which addresses performance and provides for review and termination in the event of a failure to honour commitments and meet expectations;
- The Trustees recognise the potential for conflicts of interest and that the risks of conflicts are clearly communicated to those considering taking up the post of Trustee, whether that person may be a connected Trustee or not;
- All Trustees with any kind of connection to the Foundation are clearly noted in a register of interests and that the Trustees have taken advice on the nature of any potential conflict of interests (specific and general) and how best to manage it;
- Any discussion of the relationship and the mutual support to be provided including any decision to formally receive services to be paid for or which might involve any of the Trustees receiving any kind of financial benefit is led by and made by a quorum of Trustees (in the Articles three or a third) who themselves receive no financial benefit from the Trust (this excludes employee Trustees but can include those appointed by the Foundation provided those appointed are not also directors, trustees or employees of the Foundation);
- Any committee (at Trustee level and/or Academy level) which may be given delegated responsibility to oversee the delivery of any contracted services or in some cases authority to make decisions about the services (including termination of any contract) themselves should be made aware of the potential for conflicts of interest of any of the Trustees (external advice might also be sought to support the continual review of contracted services whilst internal capacity and expertise is being developed);
- The accounts of the Trust make explicit reference to the relationship with the Trust and the nature of the relationship including the detail of any mutual support and/or contracted services provided by the Foundation; and
- Any formal contract for services complies with any other statutory or legal obligation, such as the Public Contracts Regulations 2006.

## CONCLUSION

Whilst Trustees are not expected to benefit from the activities of the Trust, the receipt of benefits is not prohibited if the resulting conflict of interest (or loyalty) is properly and transparently managed. The significance and the value of the relationship between the Foundation and the Trust must be acknowledged. We have recommended a number of steps and arrangements to help the Trustees move forward and these are summarised as follows:

1. Ensure there is greater clarity between the Foundation and the Trust as to the nature of the relationship and the roles and responsibilities of each. This could be reflected in a short "memorandum of understanding".
2. Adopt a formal Conflict of Interest Policy (see attached for a suggestion).
3. Ensure there is greater separation between the Foundation and the Trust by having fewer common trustees. This can be achieved by Sue Nath and David Gallie stepping down as trustees of the Foundation. The Foundation should rely on its power to appoint (and remove) Trustees of the Trust in order to ensure the common vision is fulfilled.
4. Compile a Register of Director Interests (see attached for a suggestion).
5. Amend the Governor Code of Conduct to refer all Academy decisions involving benefits to governors to the Trust Board (this would include Principal pay and contracts for services entered into with organisations where a governor or any staff member derives a benefit).
6. Ensure there is a suitable pay and performance policy for all management and leadership staff, whether employees or consultants, taking advice on the appropriateness of industry benchmarks where appropriate.

For more information or to discuss any aspect of this report, please contact:

**Andrea Squires**  
**Partner**  
**Winckworth Sherwood LLP**  
**Direct Line 020 7593 5039**  
**Email [asquires@wslaw.co.uk](mailto:asquires@wslaw.co.uk)**

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