

The role of the Members

Talent Education Trust

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1 Introduction and summary

- 1.1 The Members of an academy trust are sometimes referred to as 'the custodians of the constitution'.
- 1.2 Members have a similar governance role to that of shareholders in a commercial company. Unlike shareholders however, their role does not carry with it any prospect of distributions/dividends or self-gain from the Trust, nor can their membership be transferred or traded.
- 1.3 Members are often described as 'eyes on, hands off' in recognition that it is the Trustees who have responsibility for the running of the Trust (the day to day management of which is delegated to the Leadership Team).
- 1.4 Members do however have a number of statutory rights and rights set out in the Trust's Articles of Association (the **Articles**), all of which is detailed below.
- 1.5 The Members do not have any specific duties imposed on them by the Companies Act 2006 (the **Act**) but:
 - 1.5.1 recent case law has confirmed that as Members of a charity, they have a fiduciary duty to act in the best interests of the objects of the academy trust; and
 - 1.5.2 the Department for Education (**DfE**) expects them to play a key role in ensuring the effective governance of the academy trust.
- 1.6 Members are asked to provide a "guarantee" such that if the Trust were to be wound up and the assets did not meet all of its liabilities, they would be asked to contribute £10.

2 The composition of the Members

- 2.1 As prescribed by the Articles and other than those Members who were the 'first Members' or 'subscribers'¹ to the Trust, Members are appointed by a special resolution of the existing Members.
- 2.1 The DfE has certain key requirements which are reflected in the Articles:
 - 2.1.1 there must be a minimum of three Members (and the DfE has a preference for five); and
 - 2.1.2 an employee of the Trust cannot be a Member of the Trust

3 Members' statutory rights

3.1 The right to review and amend the Articles

- 3.1.1 The Members have the power to amend the Articles (by means of a special resolution, i.e. a 75% majority vote) subject to any consents required by third parties. For example:

¹ These are referred to as 'signatories to the Memorandum' in Article 12.

- (a) if amendments are proposed to the Trust's charitable purposes, its 'trustee benefit' provisions or its dissolution clause, it is likely that the consent of the Charity Commission will be required and
- (b) changes relating to the appointment and resignation / removal of Members and Trustees would need the consent of the Secretary of State for Education (via the Education and Skills Funding Agency (**ESFA**)).

3.1.2 It is also not permitted for amendments to be made to the Articles which would cause the Trust to cease being a charity.

3.2 The right to remove Trustees

3.2.1 The Members have the power to remove a Trustee (by means of an ordinary resolution, i.e. a majority vote) before the expiration of their term of office. This should be considered as a power of very last resort.

3.2.2 The Act contains a very detailed procedure that must be adhered to (including notice periods for meetings and the requirement that the Trustee be able to make representations) and we recommend taking legal advice before invoking this procedure.

3.3 The right to receive the annual accounts

3.3.1 Please note that this is a right for the Members to receive the annual accounts. It is for the Trustees of the Trust to approve the annual accounts once prepared.

3.3.2 The Trust's financial year end is 31 August and the accounts must be filed with Companies House by 31 May the following year. It is this date (31 May) by which the Members must receive the annual accounts although they may, of course, receive them earlier.

3.4 The right to appoint the auditors

3.4.1 In each financial year, there is a "period of appointing auditors" which is a 28 day period which starts to run from the date on which the audited accounts for the last financial year were circulated to the Members.

3.4.2 During this period, the Members may appoint or re-appoint an auditor. If this doesn't happen, the current auditor remains in office until the Members pass a resolution to re-appoint or remove them.

3.4.3 Pursuant to the requirements of the Academy Trust Handbook, the Members will receive a report from the Trustee committee responsible for audit which will include information relating to the external appointment and recommendations as to whether the external auditor should be reappointed.

3.4.4 Note that the Trust (ordinarily acting through its Trustees) should tender its external audit contract at least every five years and must consider the relevant points set out in the Academy Trust Handbook when evaluating.

4 Members' rights under the Articles

4.1 The appointment and removal of Members

4.1.1 Article 15A provides that the Members may pass a special resolution (i.e. a 75% majority vote) to appoint additional Members.

4.1.2 Article 16 provides that the Members may pass a special resolution to remove Members, provided that the number of Members remaining is not less than three. The Member whose proposed removal is the subject of the resolution shall not be entitled to vote on that resolution.

4.2 The appointment of Trustees

4.2.1 Articles 46a and 50 provide that the Members may appoint up to ten Trustees through such process as they determine. Such appointments would take place either at a meeting of the Members or by written resolution.

4.2.2 It is essential that the Board of Trustees has a proper mix of skills and experience. The Members and the Trustees must therefore be able to identify potential new Trustees in order to plan for succession which combines continuity of experience and expertise with new ideas and energy. Regard should be had to the DfE's Competency Framework.

5 The conduct of meetings

5.1 Members' business is conducted at Members' meetings (which are "General Meetings"), or by written resolution. Typically, Members will meet less frequently than the Trustees but are required to meet at least once a year at the Annual General Meeting (**AGM**).

6 Members' fiduciary duties

6.1 The matter of Members' duties has received considerable attention over the last couple of years:

6.1.1 The Charity Commission has for some time confirmed that "*members have an obligation to use their rights and exercise their vote in the best interest of the charity for which they are a member*" in its guidance.

6.1.2 The question was then tested in the courts and was subject to a decision of the Supreme Court in July 2020 in a case often referred to as the Children's Investment Fund Foundation or ("**CIFF**") case.

6.1.3 The Supreme Court concluded that the Members of a company limited by guarantee (such as an academy trust) owe a fiduciary duty to exercise the powers they hold as Members in what they decide (in good faith) would be most likely to further the purposes of the company limited by guarantee.

6.2 The Supreme Court declined to provide guidance on some of the practical implications of this decision, but did emphasise that the duty to act in the best interests of the purposes of the charity is subjective, in that it is for the relevant Members, acting properly and in good faith, to form their own subjective view of the matter. It is also likely that the duty will affect whether Members can take part in member decisions in which they have a conflict of interests and it is hoped that the Charity Commission will provide further guidance on the implications and management of the duty in due course.

7 DfE's expectations of Members

7.1 DfE policy is contained in a raft of documentation, including (but not limited to) (1) The Academy Trust Handbook; (2) the Governance Handbook and Competency Framework; and (3) Academy Trust Governance - Structures and Roles Descriptors. We have highlighted the DfE's main policy points in the following paragraphs.

7.2 The DfE has for some time now considered the role of the Members to be critical in ensuring robust and effective governance. This has culminated in their policy that employees must not be Members (nor occupy staff establishment roles on an unpaid voluntary basis) and that a majority of the Members must not be Trustees, so as to ensure separation and independence of the Members such that they can step in if adverse issues arise.

7.3 The DfE's view is that:

"Members play a limited but crucial role in safeguarding academy trust governance. While they must ensure they do not stray into undertaking the ... Trustees' role, they should assure themselves that the governance of the trust is effective, that the ... Trustees are acting in accordance with the trust's charitable object(s) and that they, the Members, use their powers to step in if governance is failing.

Members should not be involved in the day-to-day business of the academy trust and must ensure they do not assume the powers of the ... Trustees. However, they do have an important role in an academy trust, based on a number of key powers set out in the department's model articles of association and in company law."

7.4 The DfE states that its guidance in relation to the roles of the members and the trustees within an academy trust is most clearly articulated in its 'Academy Trust Governance - Structures and Roles Descriptors' publication.

7.5 There is a clear distinction between the DfE's description of the role of the Trustees (perhaps best characterised as responsibility for the management and control of the academy trust) and the role of the Members (perhaps best characterised as oversight over the governance of the academy trust).

7.6 In respect of the relationship between the Members and the Trustees, the DfE has stated that *"as the responsibility to conduct the academy trust's business sits with the ... Trustees, it is important Members do not overstep their powers or undermine the [Trustees'] discretion when exercising its responsibilities."*

7.7 **What does this mean in practice?**

7.7.1 This means that whilst the strategic and operational business of the Trust sits with the Trustees, if the governance of the Trust becomes dysfunctional, the Members will have a strong interest in ensuring the Board has plans to address the issues, or otherwise to remove the Board or individual Trustees and re-appoint Trustees with the skills necessary for effective governance.

7.7.2 Members must be kept informed by Trustees about the Trust's business, so they can be assured that the Board is exercising effective governance; this must include providing the Members with the Trust's audited annual report and accounts. We consider this further in section 9 below.

8 **Members' liability**

8.1 The Academy Trust is a 'company limited by guarantee' which means that the Members have no liability in respect of third party claims beyond the amount of the nominal amount of the guarantee they agree to give when they become Members, (which under the DfE Articles is £10).

8.2 The position as regards liability to the Trust itself has been complicated by the CIFF case referred to above and the conclusion that the Members owe a fiduciary duty to exercise the

powers they hold as Members in what they decide (in good faith) would be most likely to further the purposes of the company limited by guarantee.

8.3 However, our view is that because:

8.3.1 the fiduciary duty should be interpreted in context (in line with the Supreme Court's decision) and the role of the Members is clearly more limited than that of the Trustees; and

8.3.2 deciding what is most likely to further an academy trust's purposes is a subjective decision for the Members to take,

the threshold for a successful claim to be brought against the Members of an academy trust in respect of breach of their duty is likely to be high, provided it is clear that they are acting in good faith in making their decisions.

8.4 It is not yet clear whether the consequences of a breach of the fiduciary duty owed by the Members is insurable, in the same way as breaches of duty by Trustees.

8.5 The most likely consequences of the Members of the Academy Trust not fulfilling the DfE's expectations (if any) would be regulatory action against the Academy Trust itself, for example, a Notice to Improve being issued to the Academy Trust under the Academy Trust Handbook.

9 Information and oversight - striking the balance

9.1 Anecdotally, academy trusts have responded to the DfE's expectations and the Cliff case by implementing changes in how the Members carry out their role, but there is no universal practice and each Trust will be at its own stage in the development of this role.

9.2 There is a range of information that could potentially be supplied with a corresponding range of activity the Members could carry out as part of their oversight function. This should be agreed between Members and Trustees.

9.3 At one extreme, the Members could decide to do no more than meet once a year at the AGM to receive and review the Trust's annual report and accounts (which will contain a great deal of information prescribed by the accounting requirements in relation to academy trusts, including information in relation to educational attainment, Ofsted judgements etc.). This approach would reflect the DfE guidance to the effect that, in order to keep the Members informed, "*this must include providing the Members with the academy trust's audited annual report and accounts*".

9.4 At the other extreme, it would in principle be possible for the Members to design and agree with the Trustees a more detailed and formal structure for providing information, which could include:

9.4.1 regular reporting (e.g. quarterly or six-monthly) by the Trustees to the Members in writing and/or in person on a range of agreed issues;

9.4.2 regular meetings for the Members to consider the reporting by the Trustees;

9.4.3 ad hoc reporting by the Trustees on an agreed number of material issues e.g. an adverse Ofsted inspection, breach of the Academy Trust Handbook, serious disciplinary issues involving the senior executive team, serious fraud etc.);

9.4.4 receipt of the annual report and accounts; and

- 9.4.5 additional meetings attended by the Members and some or all Trustees at which any concerns can be discussed.
- 9.5 The National Governors' Association (the "**NGA**") has set out its position in its guidance entitled '*Academy Trusts: the role of Members*' (latest edition, May 2021). They comment that:
- Unfortunately some trusts have interpreted current DfE guidance as an instruction for members to get more involved in the work of the trustees...Instead, members should be provided at the AGM with a report on the quality of governance, but this is still not common practice.*
- We suggest no more than a second meeting of members during the year unless there is a problem or there are identified weaknesses within the board of trustees.*
- 9.6 The NGA's guidance develops the basis for the governance report, which is based on the Trustees' own review of governance.
- 9.7 In our view, the Members are likely to want to strike a balance between the two extremes outlined above in order to meet the DfE's expectations, but also to ensure that the Members are well placed to take action for the Trust's benefit if serious issues arise.

10 **Administration**

- 10.1 The Handbook requires the appointment or resignation / removal of Members to be notified to the ESFA (via **DfE Sign-in**) within 14 days of the appointment.
- 10.2 The appointment and resignation / removal of Members may impact the Academy Trust's "persons of significant control".
- 10.3 The appointment and resignation / removal of Members does not need to be notified to Companies House unless this changes the academy trust's "persons of significant control" position.
- 10.4 The Trust's statutory books / registers should include a register of Members and a register of "persons of significant control" which should be kept up-to-date particularly on appointment and removal / resignation.

Appendix 1 - Consent to be a Member

Talent Education Trust (trading as Anglo-Portuguese School of London) (**Company**)

I hereby consent to being a Member of the Company.

As a Member of the Company, I hereby:

- undertake to contribute to:
 - the assets of the Company in the event of it being wound up whilst I am a Member or within one year after I cease to be a Member;
 - payment of the debts and liabilities of the Company contracted before I cease to be a Member and of the costs, charges and expenses of winding up; and
 - the adjustment of the rights of the contributories among themselves, such amount as may be required;

provided that such amount does not exceed £10;
- undertake to not do anything or take any action which would cause the Company to contravene its Objects, and shall act in a way, in good faith, that will further the Objects of the Company;
- consent to my full name being disclosed to the Department for Education / Education and Skills Funding Agency / the Secretary of State for Education for any reason as required under the Articles of Association for the Company or the Academy Trust Handbook or the Governance Handbook (as amended from time to time); and
- confirm that there are no circumstances pursuant to Article 15 which would disqualify me from holding office as a Member.

Signed

Full name

Address

.....

.....

Date

Please sign and retain the additional copy of this document with your records.

Talent Education Trust: a company limited by guarantee

Company registration number: 10036154

Registered office: C/O Mlg Education Services Limited Unit 7 Home Farm Courtyard, Meriden Road, Coventry, England, CV7 7SH

