

FINANCIAL NOTICE TO IMPROVE

1. Sue Baldwin's letter of 6 March 2015 issues a Financial Notice to Improve and requires an action plan to be sent to the EFA by DAT by March 31st 2015.
2. The Notice is served under 1.5.6 of the Academies Financial Handbook 2014. In consequence it is (as the name implies) about financial matters, not about other concerns that the EFA might have in respect of DAT.
3. Specifically, when 1.5.7 speaks of "financial management and/or governance" it means **the conduct of the financial affairs of DAT** by the managers or the governors of an academy (ie by the staff or the directors of DAT respectively). A FNtI does not impact on other management or governance aspects of DAT or on the staff or directors in any more general way. PLEASE NOTE THAT THE WORDING OF THE ACADEMIES FINANCIAL HANDBOOK HAS BEEN CHANGED NOW SUCH AS THAT IT MORE CLEARLY PURPORTS TO COVER WIDER GOVERNANCE ISSUES. HOWEVER IN THE LIGHT OF 7 BELOW THE EFFECT OF ANY FNtI IS UNDER CONTRACT RESTRICTED TO THE USE OF GRANT AID.
4. Like all powers of government, a FNtI must be used reasonably. It is a power given to correct error and wrongdoing, not a power to enforce decisions that the EFA would like but which are in point of law decisions for the DAT.
5. In this context the comment of the Under-Secretary of State for Education "I don't care what the Law is: I just want your clients to do what I tell them" is a very pertinent background factor. A FNtI is not an instrument to be used for making DAT "do what I tell them".
6. The FNtI has no effect on or power over DET. Hence demands made in a FNtI that require the consent of DET can only reasonably be couched in terms of DAT "using its best endeavours" to achieve the required outcome. Of course the outcome also has to be reasonable in itself.
7. It is also important to recognise that the AFH and hence the FNtI depend on cl 65 of the DAT Funding Agreement which states specifically that the requirements of the AFH are "in relation to the use of grant paid to the Academy Trust". This reinforces the financial focus of the Notice. It relates to the handling of EFA grant and to nothing else.
8. In consequence of the above, the areas that can be covered by a FNtI (even if validly served and reasonable) are very limited. A FNtI that went beyond those limits would be ineffective and any attempt to impose sanctions in consequence of non-compliance with such a Notice would be an unreasonable use of powers and probably an abuse of them. They would be challengeable by action in the courts and DAT should not hesitate so to challenge if it takes a view that there is genuine reason so to do.
9. Hence it is crucial to note that while the EFA at 1.5.8 explicitly includes reference to the handling of "connected party relationships" this is only in connection with the use of grant. A FNtI is not capable of having any effect on the handling of "connected party relationships" if they arise from the use of non-public funds. Those would be

governed by the Charity Commission and by the requirements of the Charities Act and of any relevant charity scheme – in this case the articles of DET.

10. In the light of the above we consider the various requirements of the Notice issued by the EFA on March 6th.
11. DAT is accused of not managing conflicts of interest. However no evidence whatever is given to show that this relates to the use of grant (as is required for the Notice to be valid). Indeed it is evident that the actual conflicts relate to the use of the charitable non-public funds generated by DET. At least the nature of the related "requirements" lead to that conclusion. The EFA needs to explain what misuse of grant is complained of.
12. More specifically the notice complains of "the role of the Executive Headteacher in respect of his **former role** as director of DET." The EFA will need to show that grant was misused by Sir Greg in that role in order for the Notice to have effect.
13. Then it complains of his "ongoing role in managing the accommodation and leisure facilities". However these relate entirely to non-public monies and not at all to the use of grant. They consequently fall outside the ambit of the Notice.
14. The Notice says that DAT has "failed to ensure" that it has secure occupancy of the Hackford Rd site. This does in our view fall within the ambit of a FNtI but is easily responded to. (a) occupation by a school of a trustees' site without a written licence is a commonplace and not otherwise complained of by the EFA; (b) obtaining something further is a matter of negotiation as between DET and DAT and not something within DAT's power to enforce; (c) DET has offered a lease and the EFA has confirmed that it has had sight of a draft lease. Insofar as the complaint is reasonable therefore DAT has already reasonably complied so far as is within its power.
15. The Notice complains that DAT has not managed the potential (note not "actual") conflicts of interest alleged to be present because the consultant headteacher is also a trustee of DET and (as now structured) DET's trading company LHL. However (a) there is and can be no fundamental conflict of interest between DET and DAT. DET owns the site but holds it on trust for use by DAT. DET appoints and may remove directors of DAT. The actual conflicts of interest are not between DET and DAT but between DET and the EFA which is trying to force DET to hand over its assets to DAT. None of this relates to use of grant but wholly to DET's charitable property and charitable income. Consequently the FNtI does not bite.
16. The notice requires DAT to "ensure adequate oversight of the commercial activities of the executive headteacher and other employees". This visibly does not relate to use of grant but to the private business interests of employees. This is absolutely outside the remit of a FNtI and represents a gross intrusion into the private affairs of DET employees.
17. There is then a "catch-all" comment about ensuring adequate "financial oversight and financial management" of DAT and its assets. Of course this falls within the ambit of a FNtI – it is precisely what such a Notice is for. However the only evidence given is the engagement of a consultant for a project. This will only fall within the remit of the

FNtI if the funds used for this engagement were public funds. If so then there is a genuine potential criticism here.

18. Next some general questions are raised about increasing staff costs, "supply costs" (is this the cost of so-called "supply teachers?") and governance costs. No figures are given to show how serious these issues are. If they are serious then DAT should of course explain them and if necessary correct them.
19. Finally, an allegation is made of a "deterioration in DAT's overall financial performance". Of course this falls within the ambit of the FNtI if the deterioration is sufficiently serious reasonably to warrant such a Notice and if there is no simple explanation. Our understanding is that substantial sums are owed to DAT by the EFA and fully account for the overspend. Given DET's income, there is no question whatever but that DAT is entirely viable financially. No allegation is made of wrongful expenditure.
20. In summary, some complaints do not relate to the expenditure of public funds and are consequently ultra vires in respect of a FNtI: other complaints appear to lie within the ambit of such a notice but no evidence is provided to suggest that they are more than trivial in extent or show wrong-doing of any kind.
21. The mixture of allegations about connected persons with allegations relating to use of public funds is on the face of it mischievous – intended to hint that public funds are in some way being misused. But no evidence is provided for such and indeed when the allegations are separated out it is clear that no such allegation is actually being made.
22. The fundamentally inappropriate nature of the FNtI is shown even more clearly in the section setting out the requirements of the Notice.
23. Requirement (a) requires a fundamental review of the membership and governance of DAT. This is wholly outside the remit of a FNtI, which relates remember only to the management and governance impact on the use of grant. The EFA has no power to impose such a requirement via a FNtI.
24. Requirement (b) requires a regularisation of DAT's occupation of DET's property. We have already pointed out that there is nothing unusual about occupation without any documentation (indeed EFA land guidance in respect of academies leaves the issue very open). In practice the most common solution to academy occupation of trustee sites is by Supplemental Agreement (a form of licence or less). In fact DET has offered a lease modelled on those provided by some other site trustees. Any requirement for anything beyond this is unreasonable on the part of the EFA. Furthermore the Notice purports to require DAT to achieve something that is in point of law entirely in the gift of DET. The FNtI has no effect whatever on DET. Hence for the EFA to make the achievement of this outcome a condition of the Notice is utterly unreasonable. It is asking DAT to achieve something that the EFA well knows DAT has not the power to achieve. This is a covert way of the EFA attempting to put pressure on DET – which as a registered charity governed by charity law DET is bound to resist. For the EFA to act against DAT for non-compliance in this aspect of the Notice would be bound to be open to legal challenge.
25. Requirement (c) makes no sense as worded since it requires the charitable income of DET to be subject in some way to "the requirements of the funding agreement". The

FA has no impact whatever on DET's charitable income. However DET has several times indicated its commitment to the boarding project and (as everybody knows) the bulk of DET's profits are currently taken up with making the final payments for the purchase of the St Cuthman's site. We note that this requirement is on the face of it absolutely contradicted by the Charity's Commission's provisional view (NOW SOMEWHAT MODIFIED) that DET has no power to use its charitable income to purchase St Cuthman's. The EFA and the Charity Commission need to consider this impasse. The Commission has been able to provide no legal basis for its assertion, which would of course fundamentally undermine the legal position of all 7,500 or so site trustees in the country. In the meantime DAT simply has no locus standi in the matter at all and cannot be criticised for not making DET's income available for specific purposes. Action on the part of the EFA on this ground would also be challengeable legally and is manifestly unreasonable.

26. Requirement (d) requires DAT to interfere in the private commercial interests of its employees. This relates in no way to the use of grant and is entirely outside the powers of the EFA through a FNtI. It too would be challengeable in law. The further requirement for DAT to manage alleged conflicts relating to the contracts between DET/LHL and GMG is also wholly outside the powers of DAT and similarly does not relate to the use of grant. The FNtI is entirely ineffective in regard to these transactions and any action taken in consequence of non-compliance by DET would be challengeable in law.
27. Requirement (e) is outrageous in that it requires DET to dismiss its consultant headteacher if he remains as a trustee of DET. The EFA must surely realise that such a dismissal would be actionable and that DAT could suffer severe consequent losses. Nor does this relate to the use of grant – indeed precisely the opposite: it is all about the use and control of DET's charitable income. Here too we advise that any action taken by the EFA in consequence of non-compliance would be actionable. This is utterly outside the remit of the FNtI.
28. Requirement (f) requires a finance committee. We understand that (in consequence of the very small size of the DAT board of governors) the board itself acts as the finance committee. There is no requirement in the funding agreement for a finance committee (indeed the FA has very little in the way of such requirements). The AFH also contains no such requirement. Hence everything depends on whether the EFA can demonstrate that it is unreasonable or patently ineffective for the governing body to retain this role for itself. It has provided no such evidence nor any evidence of ineffective financial systems.
29. Requirement (g) requires the appointment of a "business manager" or "chief financial officer". This requirement can only relate to the use of public grant and would need to be justified in relation to failures in the use of public grant. No such justification is provided and hence the requirement is prima facie unreasonable.
30. Requirement (h) appears not to belong in this Notice at all but is surely a consequence of the EFA's separate view that the present accounting officer is not a suitable person. That in turn appears to be based on the assertions made (after an anonymous complaint) in relation to the London Coterie. We advise that the EFA be asked to

provide its reasons for requiring a different accounting officer and that those reasons must be such as would fall within the remit of the FNtI for this Notice to be effective. If the EFA is relying entirely on the Coterie connection for this requirement than we advise that patently this has nothing to do with the use of public funds and that in consequence this Notice is ineffective in respect of it.

In consequence of the above analysis we take the view that the FNtI is effective only in respect of some of the concerns and in respect of very few of the requirements. It appears to be a most unreasonable use of a contractual tool in order not to remedy the kinds of matters for which the tool is designed but matters that fall entirely outside its remit. Insofar as it makes requirements that DAT does not have the power to fulfil it is unreasonable and actions taken in consequence of non-compliance would be challengeable. Insofar as it seeks to put pressure on third parties (whether DET or various individuals) it amounts to an abuse of a power given to the EFA and individual EFA officials may be at risk if they persist in action on the basis of it. DAT and DET should reserve to themselves all legal options by way of stay or recompense.

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