

Assessing Public Benefit The Charity Commission's approach to Schools

The Charity Commission has just published the results of its first assessments of whether charities in England and Wales meet the public benefit test. The Commission's reports into the twelve selected charities provide a useful insight into the way in which the public benefit test will be applied.

The charities involved included five schools. The reports attracted a great deal of media attention because of the finding that two of the five schools do not meet the public benefit test. Charity trustees responsible for schools will need to give careful thought to the way in which they ensure that their services are accessible to people on lower incomes.

This reflects two related principles which underlie the Charity Commission's approach to assessing public benefit:

- (a) the opportunity to benefit from their services is not unreasonably restricted by ability to pay any fees charged
- (b) people in poverty must not be excluded from the opportunity to benefit

The assessment reports also highlight a range of other issues, including the need for charity trustees to:

- avoid 'mission drift' – the situation where a charity's activities differ from the legal objects set out in its constitution
- ensure that the charity's policy on assistance with fees is clear, open and transparent
- establish a funding strategy (for example, through the setting of fees, use of reserves or fundraising, or a combination of some or all of these) so that the charity can demonstrate that it has a system for ensuring that its benefits are accessible to those who cannot afford its fees, including those in poverty
- make available - and appropriately publicise - information about the possibility of assistance with fees
- periodically review the number of people with subsidised places

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School governors will need to give some thought to how they would respond to a public benefit assessment. In preparing for the possibility, they will need to:

- identify specific examples of things the school has done which show the frequency, regularity and extent of the charity's activities
- consider whether there are recent regulatory reports which will support the charity's position
- establish a protocol for broadening access
- review the content of the school's web-site to ensure that it accurately reflects the charity's work and identify issues which are likely to prompt queries from the Commission – a review of a charity's on-line profile forms a key part of the desk-based research which the Commission carries out as part of an assessment
- present information clearly

The Commission takes a proportionate, risk-based, evidence-based approach to regulation. As such, the onus is on the trustees to demonstrate evidence of public benefit.

The legal approach taken by the Commission has been controversial and it may be appropriate to examine the basis for the school's approach in detail.

Having considered the issues above, trustees should ensure that the Trustees' Annual Report includes appropriate reference to the work done in order to support the charity's position in any assessment.

The assessment reports also reinforce the need for charity trustees to consider how any conflicts of interest will be managed where, for example, trustees have relatives who are receiving care from the charity. Specifically, the Charity Commission says:

"It is important for charity trustees to familiarise themselves with the terms of their charity's governing document regarding the payment of trustees and other conflict of interest provisions."

In our experience, many schools and other educational charities have not reviewed their governing documents for some time. As a result, there are likely to be areas in which the governing document is no longer consistent with the law or is misleading.

One particular difficulty relates to charities established as companies. This arises from the directors' duty to avoid conflict of interest under the Companies Act 2006. The duty is very broad and extends to 'conflicts of loyalty' arising where a director/charity trustee is also on the board of another organisation. It is likely to be necessary to amend the memorandum and articles to make clear that the directors may authorise such conflicts. It may also be appropriate to pass an ordinary resolution authorising any past breaches of the duty. In addition, both the Charities Act and the Companies Act provide opportunities to streamline administration.

A constitutional review offers the opportunity to take a broader view and make other changes to ensure that the governing document continues to provide the best possible support to the governance of the school.

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