

Appendix A: Explanatory notes for draft clauses on insolvency for Further Education Bodies:

As these draft clauses are still very much a work in progress and subject to change following the responses received from the consultation we have not prepared full Explanatory Notes. However, the following is intended to provide further clarity on the meaning and purpose of the draft clauses.

Overall, these provisions are intended to establish a clear insolvency framework for further education colleges and Sixth Form colleges (SFCs) which will focus on learner protection through continuity of provision, while recognising the interests of creditors and ensuring taxpayers do not provide indefinite financial support to failing colleges. The provisions are structured in four chapters:

1. Introduction;
2. Normal insolvency procedures;
3. Education administration; and
4. Restrictions on other dissolution procedures.

Chapter 1: Introduction.

Clauses 1-2: These clauses introduce the provisions and define what is meant by a 'further education body' to which the proposed insolvency regime will apply: further education colleges and sixth form colleges. The proposed regime will only apply to English colleges.

Chapter 2: Normal insolvency procedures.

This chapter applies normal insolvency procedures to further education colleges and sixth form colleges.

Clauses 3: Application of normal insolvency procedures.

This clause allows insolvent colleges to be treated in a similar way to insolvent companies under the Insolvency Act 1986, allowing specific insolvency procedures to apply. The specific procedures are as follows:

- Voluntary arrangements;
- Administration;
- Creditors' voluntary winding up; and
- Winding up by the court.

There is a power to modify the provisions in the Insolvency Act 1986 relating to the four specified insolvency procedures so that they work for a further education body (as opposed to a company registered under the Companies Acts). So, for instance the power can be used to “translate” references to “company” to “further education body” and references to “directors” to “members” (governors). The power can also be used to omit provisions relating to floating charges (which cannot be granted by a further education body) e.g. section 40 of the Insolvency Act 1986.

The clause also provides for the law relating to receivers and managers in Part 3 of the Insolvency Act 1986 to be applied to further education bodies (subject to modifications).

Clause 4: Application of other insolvency law.

This clause contains a power to modify insolvency legislation outside the Insolvency Act 1986 so that it applies to further education bodies.

Clause 5: Making of ordinary administration orders

This clause deals with the interaction of education administration orders and ordinary administration orders. An ordinary administration order cannot be made if an education administration order has been made. In addition, if an education administration order has not been made and someone wants to apply for an ordinary administration order, they must first give the Secretary of State 14 days’ notice so that he can apply for an education administration order (which will prevent the making of an ordinary administration order).

Clause 6: Administrator appointments by creditors

This clause deals with the interaction of education administration orders and the appointment of an ordinary administrator by creditors. An ordinary administrator cannot be appointed if an education administration order has been made or applied for. In addition, if an education administration order has not been made and someone wants to appoint an ordinary administrator, they must first give the Secretary of State 14 days’ notice so that he can apply for an education administration order (which will prevent the appointment of an ordinary administrator).

Clause 7: Winding up Order.

This clause deals with the interaction of education administration orders and petitions for winding up. The Secretary of State must be given 14 days' notice of a winding up petition so that he can apply for an education administration order.

Clause 8: Voluntary winding up order.

This clause deals with the interaction of education administration orders and voluntary winding up. The Secretary of State must be given 14 days' notice of an application for permission for the further education body to pass a resolution for voluntary winding up petition so that he can apply for an education administration order.

Clause 9: Interpretation of sections 5 to 8

This clause defines terms used in clauses 5 to 8.

Clause 10: enforcement of security

This clause provides for a moratorium on enforcement of security during the 14 day notice period to the Secretary of State.

Chapter 3: "Special education administration"

This chapter will include provisions for the creation of a special education administration that is a Special Administration Regime for further education and sixth form colleges in England.

It will allow an education administrator to be appointed by the court on the application of the Secretary of State in order to manage a college's affairs and protect existing students at the college while the administration process ensues. It sets out the objective of the administration, the grounds on which an education administration order can be made, and the process for doing so.

Clause 12: Objective of education administration

This clause is key for the education administration as it sets out the overarching objective for the education administrator to achieve when the administrator develops proposals. The objective of an education administration is to:

- avoid or minimise disruption to the studies of the existing students of the further education body as a whole, and
- ensure that it becomes unnecessary for the body to remain in education administration for that purpose. (That is because the administrator has achieved the first limb of the objective).

By existing students we mean a person who:

- is a student at the college when the administration order is made, or
- has accepted a place on a course at the college when the administration order is made.

The options for the education administrator to achieve that objective include:

- rescuing the further education body as a going concern,
- transferring some or all of its undertaking to another body,
- keeping it going until existing students have completed their studies, or
- making arrangements for existing students to complete their studies at another institution.

Clause 13: Education administration order

An education administration may only be commenced by an order of the court. Subsection (1) sets out the meaning of an education administration order. The order appoints a person (the “education administrator”) to manage the affairs, business and property of the education body for the duration of the education administration.

Clause 14: Application for education administration order

This measure ensures only the Secretary of State can apply for an education administration order and that they must notify the education body and any other person specified in rules. These might include a proposed education administrator and a supervisor of a voluntary arrangement relating to the further education body.

Clause 15: Grounds for making an education administration order

An education administration order can only be made if the court is satisfied that the further education body is either unable or likely to be unable to pay its debts (within the meaning of section 123 of the Insolvency Act 1986). An education administration order cannot be made if the further education body has already entered into ordinary administration or has gone into liquidation.

Clause 16: Powers of the court on hearing an application

This clause lists the powers of the court on hearing the education administration application, which include granting or dismissing the application.

Clause 17: Appointment of two or more education administrators

This clause provides for the respective functions of each administrator if there is more than one.

Clause 18: Duty to dismiss ordinary administration application

If the court makes an education administration order, it must dismiss any outstanding application for ordinary administration.

Clause 19: Status of education administrator

The education administrator is an officer of the court. In carrying out functions in relation to a further education body the education administrator acts as its agent.

Clause 20: General functions of education administrator

The education body's affairs, business and property will be managed by the education administrator. They will carry out their functions with the aim of achieving the education objective (if possible). The education administrator must, so far as is consistent with that objective, carry out his or her functions in a way that achieves the best result for the further education body's creditors as a whole.

Clause 21: Transfer schemes

This clause (and Schedule 1) gives the education administrator the power to make transfer schemes by which the property, rights and liabilities of a further education body can be transferred to another education body. These schemes can be used to override some third party rights to secure a transfer of assets and liabilities to another education body.

Clause 22: Conduct of administration

This clause (and Schedule 2) applies provisions of the Insolvency Act 1986 which apply to ordinary administrations to education administrations (with some modifications).

Financial support for bodies in education administration

Clause 23: Grants and loans where education administration order is made

The Secretary of State has the power to make grants or loans to the education body for the purposes of the education administration.

Clause 24: Indemnities where education administration order is made

This section applies if an education administration order has been made in relation to an education body. It enables the Secretary of State to indemnify the education administrator and certain related persons and bodies in respect of liabilities incurred or loss or damage sustained in connection with the exercise of the education administrator's powers and duties. The Secretary of State must lay a statement of the agreement to grant the indemnity before Parliament as soon as possible after agreeing to grant it.

Clause 25: Indemnities: repayment by further education bodies etc

This clause lays out what happens if the Secretary of State makes a payment under an indemnity. The Secretary of State can require the further education body to repay that sum to him. The Secretary of State must lay a statement before Parliament relating to any payment made by him under an indemnity as soon as practicable after the end of the financial year in which the sum is paid out; and, where there is an obligation on the further education body to

repay the relevant sums, after the end of each subsequent financial year until the further education body has discharged the liability (including interest).

Clause 26: Guarantees where education administration order is made

This section enables the Secretary of State to give guarantees in relation to the borrowings of a further education body in education administration. The Secretary of State may guarantee while an education administration order is in force the repayment of any sum borrowed as well as interest or any other financial obligation in relation to the sum. The Secretary of State must lay a statement of the guarantee before Parliament as soon as possible after giving it.

Clause 27: Guarantees: repayment by further education body etc

If sums are paid out by the Secretary of State under a guarantee as outlined in clause 26, this clause requires that the further education body must pay the Secretary of State:

- such amounts in or towards the repayment to the Secretary of State of those sums as the Secretary of State may direct; and
- interest on amounts outstanding at such rates as the Secretary of State may direct.

The Secretary of State must lay a statement relating to that sum before Parliament as soon as possible after the end of the financial year in which the sum is paid out; and after the end of each subsequent financial year until the education body has discharged the liability (including interest).

Supplementary

Clause 28: Education administration rules

This clause applies the power to make rules under section 411 of the Insolvency Act 1986 to any proposed legislation so that detailed procedural rules for an education administration can be made in the same way that they are for ordinary administration.

Clause 29: Application of other insolvency law

This clause would allow the Secretary of State to apply legislation relating to insolvency to a further education body in education administration.

Clause 30: Modification of this Chapter under the Enterprise Act 2002

The Enterprise Act 2002 amends the Insolvency Act 1986 and otherwise changes the law. It contains powers to make consequential amendments to other legislation. This clause extends the scope of those powers to making amendments to Chapter 3 should that be necessary.

Clause 31: Interpretation of Chapter

This clause contains definitions of terms used in Chapter 3 and other interpretation provisions.

Chapter 4: Restrictions on other dissolution procedures.

These provisions prevent the solvent dissolution procedures under the Further and Higher Education Act 1992 applying to both Further Education Colleges and Sixth Form Colleges that are already in normal insolvency or education administration procedures or where steps have been taken to initiate those procedures.

Part 2: Supplementary

Clause 34: Regulations: general

Regulations under this proposed legislation would be made by statutory instrument. Such Regulations may make consequential, supplementary, incidental, transitional or saving provision and different provision for different purposes.

Clause 35: Affirmative and negative resolution procedures

This clause defines what is meant by these procedures:

- A negative resolution procedure means the statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament.
- Where regulations under this proposed legislation are subject to “the affirmative resolution procedure” the regulations may not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House of Parliament.