



Guidance

ESFA oversight of Independent Training Providers: operational guidance

Updated 2 April 2019

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1. Summary

Independent Training Providers are a key part of the Further Education provider infrastructure, supporting learners and employers through the delivery of apprenticeships adult skills, education for young people and specialist provision. The Education and Skills Funding Agency (ESFA) contracts with a large number of Independent Training Providers, the majority of which provide good quality education and training in line with the requirements of the contract. In some cases however, delivery falls short of our requirements, resulting in learners not getting the training they need and public funds being put at risk.

In recent years we have generally taken action only when an Independent Training Provider has been judged to be inadequate by Ofsted or has failed to meet minimum standards or financial health requirements. We do not think that this approach provides the best protection for learners so we are making changes to ensure that we and providers take early actions to address the potential risk of failure. We want to do this in a way that is robust, consistent and transparent. This does not mean that there will no longer be financial failures, or failures on quality grounds, but we will be better prepared to ensure that learners are not disadvantaged and that public funds are not wasted.

The key measures we are introducing are:

- strengthened contract management, with requirements for further information and assurance where data and analysis suggest a risk to learners or public

funds

- enhanced assurance review, intervention and investigation arrangements, targeting specific areas of risk
- more proactive use of provisions in contracts to require specific actions to remedy breaches within defined timescales which will be closely monitored
- use of sanctions, such as suspension of recruitment or restricting growth, to mitigate the potential impact on learners while assurance is being gained or remedial actions undertaken

We will continue to terminate contracts early on the basis of, among other factors:

- the services in question being assessed by Ofsted as inadequate overall
- failure to meet minimum standards (where these apply)
- inadequate financial health
- where we identify a serious breach of the contract by the Independent Training Provider which cannot be remedied at all, or within the period specified

Where existing contracts allow for this approach it will be introduced from 1 April 2019. Where new contract terms are required these will be in place from 1 August 2019.

1.1 Status of this document

This guidance is non-statutory and does not form part of the contractual terms and conditions between ESFA (acting on behalf of the Secretary of State for Education) and providers of education and training.

1.2 Expiry or review date

This guidance will be updated to reflect any changes and will be reviewed before October 2020 at the latest.

If you have this guidance in a saved, offline or hard copy format, you are advised to check on GOV.UK to ensure that you are using the most up to date version of the publication.

1.3 Who is this publication for?

This publication provides operational guidance for Independent Training Providers (ITPs), which includes a range of different legal entities with which the ESFA contracts. In this document we use the terms “ITPs” or “providers” to mean:

- Independent Learning Providers
- Independent Specialist Providers
- Charitable and Commercial Providers
- Special post-16 institutions (note that in this case the term “contract” in this document refers to the grant funding agreement)
- Employer providers

2. Prevention

We expect providers to respond proactively to issues and areas for improvement, whether self-identified through use of the tools and information we provide, identified by us through assurance or compliance reviews, or identified by external regulators such as Ofsted. Where we think it is necessary, we will seek further information or assurance from a provider that issues are being addressed, and where we are not assured we will take action to enforce contractual requirements.

3. Assurance regime

We have an annual assurance programme of work, which comprises a range of assurance reviews, including funding compliance audits, new provider control reviews, targeted thematic funding assurance reviews, financial statement reviews and financial health checks.

We select a random sample of providers for our assurance reviews each year. In addition we target higher risk funding streams and those providers, considered to be higher risk providers.

Our assurance funding compliance audits and assurance reviews assess, inter alia, provider compliance with contractual obligations, verifying data with individualised learner records, to ensure that the correct funding has been claimed by providers. Where funding overclaims are identified and/or funding conditions have been breached we will recover overpayments from current and/or previous years.

Where significant issues or funding overclaims are identified we will impose additional contractual obligations as a condition of continued funding and/or apply appropriate sanctions or penalties commensurate with the seriousness of the breach.

Our assurance and accountability requirements for providers are set out in our [Audit Code of Practice](#). Our approach to the [assessment of financial health](#) is available on GOV.UK.

4. Funding rules monitoring

As part of our assurance work we monitor data from the individualised learner record (ILR) and other sources, such as the earnings adjustment statement (EAS), the Student Loans Company (SLC), the Apprenticeship Service (AS) and the Learning Records Service (LRS).

This desktop review of how the funding system and funding rules are operating allows us to identify possible errors in the funding claimed for apprenticeships and adult skills that require further investigation. Details of our [funding rules monitoring](#) is available on GOV.UK.

5. Data accuracy and reliability

It is important that we and our stakeholders such as Ofsted can have confidence in the data submitted to us. We expect providers to properly and accurately maintain individualised learner record (ILR) data and other learner documents and evidence, as required by our funding rules. Changes to the ILR, including learner withdrawals and breaks-in-learning must be recorded promptly and accurately, so that provider ILR data accurately reflects the providers' learner population at any point in time.

The funding rules monitoring processes set out above provide us with a view on the accuracy of data submitted to us, and we also expect providers to regularly review their own data for accuracy. We already have tools in place which we expect providers to use to test the credibility of their data, for example the [funding information system \(FIS\)](#) and [provider data self-assessment toolkit \(PDSAT\)](#). In addition to improving these tools we are:

- planning to produce ILR credibility reports which will be available to providers so that they can understand how we have assessed the quality of their data
- responding to feedback to make funding formula review products more timely
- considering adding a credibility rating to providers' qualification achievement rates (QAR), and producing more frequent reports for providers to address any credibility issues as they appear
- continuing to improve internal processes to better maintain the currency of the ILR and monitor the credibility and timeliness of providers' data

6. Risk-based contract management

We will take a risk-based approach to managing contracts. We will focus our resource on providers where their financial accounts, performance indicators or

other data sources suggest that there is a risk of failure. We will also consider the potential impact of failure on learners. This means that we will manage more closely those providers delivering to large numbers of learners, and providers where sudden market exit might lead to significant disadvantage to learners due to the characteristics of the learners or the specialist nature of the provision.

We will use specific triggers in our risk assessment to indicate where there may be areas of concern. While this will be predominantly data driven, contract managers will also consider intelligence gathered from day-to-day dialogue with providers and other relevant sources. The areas of concern may be adjusted over time however their initial focus is as follows:

- financial concerns, including a financial health assessment score that is only marginally above the threshold for inadequate, decline in financial health, cash flow issues, late submission of accounts, reliance on DfE funding coupled with significant change (increase or decrease) in DfE funding
- quality concerns based on progress judgements in published Ofsted Monitoring Visits or declining qualification achievement rates
- assurance and compliance concerns, including outcomes of audits and assurance reviews, outcomes of funding rules monitoring, data quality, complaints and whistleblowers, compliance with subcontracting requirements

Our contracts require providers to deliver value for money and financial probity, and whilst this is not expected to be a regular issue, contract managers will raise concerns if they have them in relation to a provider's delivery model or operations, where there is a concern about value for money.

We will not publish our risk assessments of providers however where providers are being managed more closely, contract managers will make the reasons for this clear.

7. Contract managers

The role of the contract manager is to act on behalf of ESFA to ensure effective use of public funds against the terms of the contract. The contract (and associated specific documentation for each funding stream) sets out the contractual obligations that must be adhered to. The contract and associated documentation also set out the available routes to remedy and mitigate risks and issues arising through delivery.

The contract manager will have regular dialogue with the provider to review performance and compliance. The contract manager role is not an audit function, however, the contract manager may seek assurance that audit, contract compliance and awarding organisation requirements are being met.

The identification of areas of concern will be used to prompt discussions with a

provider where the impact of failure is significant. The contract manager may request additional information under a range of different areas, including financial, qualitative, compliance and assurance for example. Such requests can be part of day-to-day contract management, however contract managers should have specific reasons for requesting additional information to ensure this is not unduly burdensome on a provider. Where there is a specific concern and the provider does not make information available the contract manager may make this a contractual obligation.

Additional contractual obligations will be deployed where the contract manager determines this is necessary based on risk assessment or other factors. The purpose of this contract management action is to minimise the risk to learners and employers of potential failure, by challenging the provider where appropriate, seeking additional information or assurance, and utilising specialist teams to support. This may include, but not exhaustively:

- regular contact, including as appropriate, face-to-face meetings to review contract performance, compliance, financial position, quality, capacity, or other risk factors
- consideration of risk mitigations that the provider has put in place or that the ESFA can deploy
- requirement to provide additional financial or other appropriate information which may include for example:
 - management accounts and/or rolling 12-month cash flow forecast,
 - in-year qualitative key performance indicators,
 - information to support contract performance in terms of learner profile of recruitment, in-learning, retention, progress and achievement,
 - actions taken in response to Ofsted Monitoring Visit findings,
 - evidence of audit or self-assessment findings including outcomes from regular PDSATs, feedback from learners, staff and/or employers.
- review of financial health (calling on specialists within the ESFA's Provider Market Oversight directorate), taking into account complex structural and ownership arrangements, including financing, subsidiary, parent or group company interactions, and venture capitalist or investor considerations
- requirement to provide third-party assurance that financial or quality issues are being addressed and/or that internal systems and controls are robust
- requirement to comply with a compliance or thematic audit or investigation

For large or complex cases there may be a number of ESFA teams involved with the provider but the contract manager will be the main point of contact.

8. Contract enforcement action

Additional contractual obligations may be used to ensure the provider makes

specified information available within required timeframes. Additional contractual obligations may also be used to require improvement actions and will set out the required improvement, the specified timeframe, and appropriate evidence to support this, which may include third-party assurance.

Where a provider does not comply with contractual obligations this would be considered a breach of the contract and the provider would have an opportunity to remedy the breach in line with the contract. If the breach cannot be remedied we would consider early termination of the contract.

In addition, the contract identifies specific circumstances that would be considered to be breaches and which may result in early termination of a contract.

9. Sanctions

We may initiate sanctions through the contract where this is necessary to protect public funds or learners and employers. Depending on the nature of the breach, these sanctions include but are not limited to recovery of funds, restrictions on recruitment of learners, restrictions on increases to contract values, or withholding payments. In most cases, we expect to be able to lift sanctions once the associated conditions of funding have been met and/or a breach has been remedied.

10. Minimum Standards

The policy and related intervention trigger for Minimum Standards has been in place for over a decade and is ripe for review. We will cease taking intervention action on the basis of the 16 to 19 and 19+ education measures under the current policy after the application this year to 2017 to 2018 data. Instead we will use all education performance data available to us earlier in our overall risk assessments. Reformed apprenticeship measures, however, require a more fundamental review as we move from frameworks to standards. We will apply the current Minimum Standards policy to apprenticeship provision (all ages) in 2020 (academic year 2019 to 2020), based on 2018 to 2019 data, for one final year.

Further information on the apprenticeship threshold for 2020 and how provider performance in apprenticeship delivery beyond 2020 will be considered will be published later in the year.

11. Market exit and learner protection

We will continue to implement the intervention policy set out in [Rigour and Responsiveness in Skills](#). This means that where independent training providers are judged 'inadequate' for overall effectiveness by Ofsted, or fail on minimum standards (where these apply) or financial requirements, they can expect to have their contracts terminated early, subject to protecting the interests of learners.

Where we have evidence that learners' interests would be best served by maintaining the contract we will only do so under strict conditions with rigorous monitoring, and we will seek to terminate the contract immediately if the provider fails to improve.

As set out above, failure to comply with additional contractual obligations and/or remedy a serious breach may also lead to early termination of the contract.

Providers may also choose to exit the market based on their own business decisions, or may exit as a result of financial failure and entering administration or insolvency proceedings.

From the 2019 to 2020 contracting year, providers will be required to produce an Exit Plan setting out how the provider will ensure it performs its obligations to assist in the orderly transition of the Services from the Contractor to the Department and/or any Replacement Supplier in the event of termination (including partial termination) or expiry of the Contract. The Exit Plan will cover the areas of learners, data, and evidence (including for sub-contracted delivery). We expect that those providers that take the welfare of learners seriously will produce a comprehensive Exit Plan and ensure it is regularly updated.

12. New providers

We recognise that new providers remain a potentially higher risk due to lack of familiarity with our requirements. Contract managers will therefore closely monitor performance and delivery, and may visit new providers within the first six months of them starting delivery to consider premises, resources, systems and processes in relation to the funding.

13. Complaints / Dispute Resolution

Any contractual dispute arising from this approach to oversight of Independent Training Providers should be resolved through the dispute resolution clauses within the contract.

14. Day-to-day queries

important that providers continue to use the [enquiry service](#) for day-to-day funding and data queries, and issues regarding access to providers' ESFA contracts and agreements on [manage your education and skills funding](#) (MYESF). The contract manager will refer a provider back to the enquiries service if this is the most appropriate avenue to resolve a query.

The enquiry service support includes:

- data return queries and issues / ILR completion support
- funding reports
- system issues
- funding rules
- grant funding claims
- Learning Aims Reference Service
- freedom of information requests
- payments / reconciliation
- allocations
- bursary and high needs

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