



LSIS Brief Guide

The Learning and Skills Council's Statutory Intervention Policy

Introduction

1. This paper summarises the statutory intervention policy proposed by the Learning and Skills Council (LSC), which was published on October 17th, 2008 and came into effect from that date.

Background

2. The Learning and Skills Council was inaugurated in 2001, with the merger of the Further Education Funding Council (FEFCE), founded in 1992, and the Training and Enterprise Councils. The LSC is, according to its website, '*responsible for planning and funding high quality education and training for everyone in England other than those in universities*'. It is based in Coventry, and has nine regional offices.
3. In addition to its planning and funding powers, the LSC undertakes the performance management of the FE and skills system. This includes the power to intervene in the management and operations of individual providers. These powers stem from three Acts of Parliament: The Further and Higher Education Act 1992, the Learning and Skills Act 2000 and the Further Education and Training Act 2007 (which amended the 1992 act).
4. These acts require '*the LSC to prepare and publish a statement of its intervention policy with respect to the exercise of these powers and keep it under review. There is also a requirement placed on the LSC to consult and to take account of representations when preparing that policy*' (Consultation document, paragraph 2, p. 1). In January 2008, the LSC prepared a proposal for consultation¹, as required. The final policy was published in October 2008. The policy will remain in force for two years, unless the LSC chooses to amend it or the LSC is abolished before the end of the two-year period.

¹ See: <http://readingroom.lsc.gov.uk/lsc/National/nat-statutoryinterventionpolicy-consultationresponse-oct08.pdf>

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5. Under the machinery of government changes announced last spring², the LSC will be wound up in 2010, and its role will be transferred to two other agencies, the Young People's Learning Agency (YPLA), for pre-19 education and the Skills Funding Agency (SFA) for post-19 education. The Skills Funding Agency will retain performance-management responsibility for providers of post-19 education, including intervention powers. YPLA will not have these oversight powers; under the new arrangements, the local authorities will be responsible for commissioning education provision, and thus 14-19 providers will be regulated by the Department for Communities and Local Government (CLG) through the same national indicators used to measure the rest of local government. It is not clear if the SFA will carry forward this intervention policy.

When does the LSC intervene?

6. Section 56A of the Further and Higher Education Act 1992, as modified by the 2007 Further Education and Training Act, give the LSC the power to intervene *'if matters are'*:
 - *that the institution's affairs have been or are being mismanaged by the institution's governing body;*
 - *that the institution's governing body have failed to discharge any duty imposed on them by or for the purposes of any Act;*
 - *that the institution's governing body have acted or are proposing to act unreasonably with respect to the exercise of any power conferred or the performance of any duty imposed under any Act;*
 - *that the institution is performing significantly less well than it might in all the circumstances [it could] reasonably be expected to perform, or is failing or likely to fail to give an acceptable standard of education or training. (Intervention Policy, Annex B, p. 11)*
7. The LSC may exercise these powers whether or not anyone has made a complaint about underperformance or mismanagement.
8. The LSC has three principles that will govern when it intervenes in a provider's affairs:
 - *intervention will occur only when necessary (in accordance with section 56A of the 1992 Act) and the LSC will exercise any new powers only as a last resort;*
 - *the level of intervention will be proportionate to the risk to learners and public funding;*
 - *actions will be agreed, as far as possible, between the governing body, the principal, the LSC and any other appropriate bodies. (Intervention Policy³, paragraph 6, p 3).*
9. By *'appropriate bodies'*, the LSC means *'government departments and representative bodies, such as the Single Voice (for self-regulation for further education)'* (IP, paragraph 6, p. 3).

² <http://www.dfes.gov.uk/consultations/downloadableDocs/Raising%20Expectations%20pdf.pdf>

³ Hereafter cited as 'IP'.

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The staged approach to intervention

10. The LSC will maintain a '*staged approach to intervention*', specifically of four stages, with the last being intervention. These are:
 - *the annual commissioning dialogue;*
 - *identification of underperformance;*
 - *support and challenge; and*
 - *(as a last resort) intervention. (IP, paragraph 8, p. 3)*
11. The first three stages are detailed in *Identifying and Managing Underperformance*, a document published by the LSC in January 2007⁴ (paragraph 8-9, p. 3), which also gives the LSC's definition of underperformance.
12. To be placed on the 'staged approach to intervention', a provider must first receive a Notice to Improve. This is '*a letter that sets out the conditions for continued funding and the timeframe by which we expect improvement to have occurred, usually within a maximum period of 12 months*' (*Identifying and Managing Underperformance*, paragraph 40, p. 8). Until the Framework for Excellence is in place, the LSC will measure underperformance through inspection outcomes, assessments of a provider's financial health, or '*analysis of success rates against minimum levels of performance*' (*IMU*, paragraph 21, p. 5).
13. Once this happens, the provider proceeds to the first stage of the intervention process, where the college can '*make representations about the conditions proposed in the Notice to Improve during the commissioning discussions*' (*Identifying and Managing Underperformance*⁵, paragraph 51, p. 10). From there, the LSC moves on to the next two stages, in which it attempts to steer the provider back on course without resort to direct intervention.
14. When deciding whether to go to the fourth stage, intervention, and use its statutory powers, the LSC policy document states that there are two '*triggers*' that must be pulled. The first trigger comes after the first three stages have been exhausted, '*and is an occasion where a college has not met the conditions of the Notice to Improve and the LSC and the governing body cannot agree a way forward*', because the governing body has failed to provide '*the necessary leadership to take action*' or because it is being uncooperative or obstructive (*IP*, paragraph 16, p. 5).
15. The second trigger '*falls under the broad heading of exceptional circumstances*'. This is when there '*is an immediate, serious, and exceptional risk to learners and to public funding, and urgent action is required, and the LSC may wish to intervene more immediately than a staged approach allows*' (*IP*, paragraph 20, p. 5). These circumstances include :
 - *where the college is underperforming ... and it can be reasonably demonstrated that all measures that would be put in place if it were to receive a Notice to Improve have already occurred, i.e., that the college has already had opportunities to improve and has failed to do so and could not improve further, and that an appropriate course of action cannot be agreed, either directly or with support through mediation*';

⁴ See: http://readingroom.lsc.gov.uk/lsc/National/nat-identifyingmanagingunderperformance_pt1-jan07.pdf

⁵ Hereafter '*IMU*'.

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- *evidence of serious misuse of public funds, fraud or deception;*
 - *failures in management which result in immediate and serious risk to learner health, safety and welfare; or*
 - *evidence of a serious breakdown in employee relations within the institution, caused by an action taken by a principal (or by a senior member of staff) or governing body outside the corporation's instruments and articles or its agreed policies and procedures, and which threatens the college's ability to deliver education and training (IP, paragraph 20, p. 5).*
16. This would force *'an urgent and direct dialogue with the governing body and senior managers of the college to determine the nature and extent of any necessary action'*. If the governing body is not able to address the concerns raised by the LSC, intervention may follow (IP, paragraph 21-22, p. 5).

Intervention

The procedure

17. The initial decision about whether to begin an intervention lies with the LSC regional director in whose jurisdiction the underperforming provider falls. Once he or she decides that the LSC should intervene, the regional director meets with the LSC chief executive and the council's solicitor and presents evidence that a case for intervention is justified under one of the two triggers (IP, paragraph 24-25, p. 6).
18. *'Upon confirmation that there is a sound legal basis for action and sufficient evidence, the Chief Executive will then write to the Secretary of State for Innovation, Universities and Skills to say that the LSC is considering the potential use of the powers of intervention'*. If learners aged 16 to 19 are involved, the LSC chief executive will also write to the secretary of state for Children, Schools and Families. *'Neither Secretary of State will be active in this process'*, but by informing them, the LSC ensures that the intervention process is not used arbitrarily (IP, paragraph 26-27, p. 6). Furthermore, the secretary of state for DIUS can order the LSC to intervene, and also issue guidance to the council on the use of its interventional powers (IP, Annex C, p. 13). Before either secretary of state is involved, *'departmental officials will have been regularly briefed about the situation'* (IP, paragraph 27, p. 6).
19. Once the LSC has approved an intervention, the regional director will write a letter to the governing body of the affected provider, including:
- *details of the action it is minded to take;*
 - *the rationale for being minded to exercise its statutory powers under 56A, including its reasons why any previous plans or responses by the college are not considered to be sufficient;*
 - *the relevant evidence; and*
 - *key dates and timescales (IP, paragraph 28, p. 6).*

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20. Once the governing body receives the letter, it has 30 working days to *'make representations'* (the letter will include the beginning and end dates of this period). Once these representations have been made, the LSC regional director, with advice from the LSC solicitor, makes decision whether to continue with the intervention. Even then, the governing body is given another 30 days to make further representations (IP, paragraphs 31-33, p. 6-7).
21. The final decision to intervene is taken by the LSC's national council. If the provider has not made representations, this decision is taken within 20 days of the receipt of the original letter from the LSC. If representations are made, then the final decision occurs within 10 days of the end of the representation period. The council *'will consider a recommendation from the Chief Executive and the Council solicitor, any representations made by the institution and any other relevant evidence when reaching its decision'* (IP, paragraphs 34-37, p. 7).
22. If the national council decides to intervene, a notice is issued to secretary of state for DIUS (and, if 16-19 provision is involved, to the DCSF secretary as well). This notice states:
 - *the matter or matters listed in section 56A (2) as to which the National Council is satisfied;*
 - *the reasons why the National Council is satisfied;*
 - *the actions that the National Council proposes to take; and*
 - *the reasons why the National Council proposes to take those actions* (IP, paragraph 40, p. 7).
23. The DIUS secretary will be required to respond to the LSC national council chair within 10 working days to say *'if there are any concerns with regard to the intended use of the powers'*, on his or her part or on the part of the DCSF secretary (IP, paragraph 41, p. 7). *'If the Secretary of State raises concerns about the LSC's use of the powers, the matter will be referred back to the National Council for further consideration'* (IP, paragraph 43, p. 7).
24. If the secretaries do not raise concern, a notice goes out to the governing body of the provider now subject to intervention, stating the same findings and actions that the council proposed to the secretary of state.

The measures

25. Under the 1992 and 2007 acts, the LSC can do any of the following when intervening in a provider's management and operations:
 - *remove all or any of the members of the institution's governing body;*
 - *appoint new members of that body if there are any vacancies (however arising);*
 - *give to that body such directions as it thinks expedient as to the exercise of their powers and performance of their duties* (IP, Annex B, p. 11).
26. These directions may include *'a direction requiring a governing body to make collaboration arrangements (within the meaning of section 166 of the Education and Inspections Act 2006) with such bodies and on such terms as may be specified in the direction'* (Ibid.)

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27. Under the Learning and Skills Act 2000, the LSC has the additional power to appoint up to two persons to the board of an FE institution (Ibid.)
28. The LSC *'may not direct a governing body ... to dismiss a member of staff'*. However, this *'does not prevent the council, where it considers that it may be appropriate to dismiss a member of staff whom the governing body have the power ... to dismiss, from giving the governing body such directions under this section as are necessary to secure that the procedures applicable to the consideration of the case for dismissal of that member of staff are given effect to in relation to that member of staff'* (Ibid.)
29. A corporation may appeal the LSC's decisions to the Parliamentary Ombudsman, or to the courts (IP, Annex C, p. 13).

Conclusions

30. The statutory intervention policy is a straightforward document, and needs relatively little detailed interpretation. It sets out in considerable detail what colleges and other providers can expect in the event of underperformance and mismanagement. The main theme that emerges from the document is the LSC's desire to work with providers to avoid intervention, indicating a desire to improve management capacity and develop more sustainable and less disruptive solutions to poor performance than the blunt instrument of intervention.
31. This reluctance to go straight to intervention creates a space for the FE and skills sector as it moves towards self-regulation. It may perhaps allow the sector to develop its own support and development processes that can help head off intervention and tackle underperformance.
32. The LSC will be divided in 2010 into pre-19 and post-19 funding agencies, meaning that this iteration of the intervention policy is likely to be the last published under the auspices of the LSC. The pre-19 agency, the Young People's Learning Agency (YPLA), will not have performance-management responsibilities, but the post-19 agency, the Skills Funding Agency (SFA), will. It is not yet clear whether the SFA's intervention policy will follow the broad guidelines developed in this final LSC intervention document. As it stands, the existing policy will lapse with the LSC's dissolution.

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