

 For information

>LSC

Leading learning and skills

Identifying and Managing Underperformance

LSC Guidance on Identifying and Managing Underperformance and the Operation of Notices to Improve Applying to the 2009/10 Academic Year

Reviewed by



December 2008

Of interest to everyone involved in delivering LSC-funded provision

Further information

For further information, please contact the appropriate Learning and Skills Council office. Contact details for each office can be found on the LSC website: www.lsc.gov.uk.

Learning and Skills Council **National Office**

Cheylesmore House
Quinton Road
Coventry CV1 2WT
T 0845 019 4170
F 024 7682 3675
www.lsc.gov.uk

This document has been previewed by the FE Communications Gateway Panel, an independent group of FE practitioners working to improve and streamline communications between DIUS, DCSF, LSC and FE providers.

The Panel advises the Government and its agencies on the best way to communicate with people working in the FE system. It also checks that individual publications are clear, timely, targeted and get the message across effectively.

Your feedback helps the Panel's work – let us know what you think of this document, or any other recent publication, by emailing the Chair, Sally Dicketts, at SDicketts@ocvc.ac.uk.

This document outlines the LSC's processes and policies for the identification and management of underperformance and the operation of Notices to Improve in the FE system in the 2008/09 academic year, and the application to the 2009/10 year.

Contents

	Paragraph number
Introduction	1
Equality impact assessment	4
Direction of travel	5
Terminology	13
The Annual Commissioning Dialogue	17
Self-assessment	22
The annual commissioning dialogue and school sixth forms	25
Identifying Underperformance	31
Quality improvement indicators	34
Equality and Diversity	37
Financial Health and Financial Management and Control	41
Identifying colleges in financial difficulties	43
Defining college financial underperformance	47
Managing financial underperformance	54
Possible actions in response to financial difficulties	55
Inspection	56
Colleges	60
Independent providers	67
School sixth forms	73
Providers graded satisfactory but not improving	75
Learner Health, Safety and Welfare	79
Minimum Levels of Performance	84
Provision in scope for the 2009/10 business cycle	87
Provision not in scope for the 2009/10 business cycle	91
Minimum levels of performance for the 2009/10 business cycle	97
Apprenticeship provision	99
Managing Apprenticeship performance against the minimum levels of performance	100
FE qualifications	125
Managing FE performance against the minimum levels of performance	131
Train to Gain	142
Minimum levels of performance reports and data	150
Minimum levels of performance: Ofsted and LSIS	157

Notices to Improve	159
Issuing Notices	162
Multiple triggers for a Notice to Improve	168
Monitoring a Notice to Improve	173
Compliance and the removal of a Notice to Improve	178
Failing to meet the conditions of a Notice to Improve	184
Public communication of Notices to Improve	192
Support for Quality Improvement	196
Supporting financial improvement	199
Supporting improvement in learner health, safety and welfare	201
Implications of Underperformance for Providers	202
Capital development	203
Reorganisations and mergers	207
Teacher training	210
Centres of vocational excellence and the Training Quality Standard	211
National skills academies	218
Complaints	221
Appendix A: Qualifications Reform	–
Appendix B: References and Related Policies	–

The annexes referred to in this document provide detailed technical information. They are available on the LSC website at www.lsc.gov.uk.

Introduction

1 The LSC remains committed to a staged approach to formal statutory intervention. Though this formal intervention applies only to colleges, the principle that intervention will typically occur at the end of a lengthy process of support and dialogue is also used in the case of independent providers. Accordingly, there is a series of stages leading to intervention. These are:

- the annual commissioning dialogue;
- identification of underperformance;
- support and challenge; and
- intervention (as a last resort).

2 This document outlines LSC criteria for both the identification of underperformance and the management of that underperformance, namely the actions that follow whenever underperformance is present. Thus, its focus is the policies supporting the three stages that precede intervention (detailed in the LSC's *Statutory Intervention Policy*).

3 The purpose of this updated guidance for 2009/10 is to build on and further clarify the existing arrangements, and to outline key changes that providers should consider and respond to as appropriate. Due to the nature of the policy focus, namely underperformance, and the possible legal implication of intervention (statutory or otherwise), this document is necessarily extensive and far ranging to ensure that providers are as fully informed as possible. The purpose of this action is to ensure that the LSC is fully transparent and that all relevant details of interest for providers are publicly available. As such, not all sections of this document will be relevant to all providers. The policies that are set out in this document will remain current until such time as an updated version is issued.

Equality impact assessment

4 Previously, the LSC indicated that it would commission an external evaluation of its activities in addressing underperformance. In August 2008, the LSC commissioned the Office for Public Management (OPM) to perform this work. The LSC will publish interim findings of the evaluation in August 2009 and a final report in July 2010. As part of the evaluation, the LSC has also commissioned the OPM to perform a full equality impact assessment of our policies as they relate to underperformance. A report of its findings will shortly be available at: www.lsc.gov.uk/aboutus/quality.

Direction of travel

5 The content of this document focuses on current arrangements for delivery within the present structure of the further education (FE) system. The following paragraphs set out, for context, some key policies that will affect these arrangements in the future.

The Machinery of Government changes

6 The planned changes set out in the Government's 2008 White Paper, *Raising Expectations: enabling the system to deliver*, will result in a fundamental alteration in the structures that are concerned with the commissioning of 16–19, adult and employer-focused provision.

7 These changes are planned to come into effect from 2010, when responsibility for planning and funding 16–19 learning will pass from the LSC to local authorities, supported by the new Young People's Learning Agency. For adult provision, a new dedicated single funding agency for skills, the Skills Funding Agency, will be established in the same year. It is also proposed that a new legally distinct sixth form college sector will be created, to clarify who each provider is ultimately accountable to. There will, in some cases, be a need to continue and complete Notices to Improve and other conditions that relate to individual provider improvement. The LSC will, therefore, continue to work closely with local authorities, the Local Government Association, the Association of Directors of Children's Services, the Department for Children, Schools and Families (DCSF), the Department for Innovation, Universities and Skills (DIUS), provider representative groups and other partners to develop the processes that need to be put in place in order to best facilitate effective transition. We will also work with the above partners to ensure that all bodies are fully aware of their roles and responsibilities both for transitional cases (for example, providers under Notice) and for the subsequent new arrangements.

The Framework for Excellence and identifying underperformance

8 The LSC indicated in previous versions of this guidance that the development and introduction of the Framework for Excellence, as a more comprehensive approach to assessing performance, would require further consideration of how minimum levels of performance are used to inform commissioning once the framework was operational.

9 There is a need to ensure that there are no conflicting means of assessing provider performance that sit outside the framework, and thus potentially undermine its role as a comprehensive approach to performance assessment. This is particularly important, since commissioning discussions with, and funding allocations to, providers will be predicated on common performance standards related to the Framework for Excellence. Minimum levels of performance have proved a highly effective tool for the LSC in driving up quality. As such, the LSC will integrate minimum levels of performance with the Framework for Excellence as part of the Framework for Excellence data set.

10 In order to promote the common assessment process, the LSC has been commissioned by DCSF and DIUS to further develop the Framework for Excellence, ready for piloting in schools from September 2009. Work on this will include the development of new performance indicators and the adjustment of existing indicators to make them fit for purpose. The initial phase of development work will be completed by March 2009. We will also ensure that the framework is aligned with the 'balanced scorecard' approach announced by the Secretary of State for Children, Schools and Families.

The Framework for Excellence as a tool for identifying underperformance

11 Work is continuing into how the framework will act as a tool for identifying underperformance, and how it will be used to inform intervention in the form of Notices to Improve and other serious actions. To this end, the next issue of *Identifying and Managing Underperformance* will set out the LSC's approach to responding to underperformance that is identified through assessment against the Framework for Excellence.

A Focus on Improvement: Proposals for FE and skills system inspections from September 2009

12 Until 27 January 2009, the Office for Standards in Education, Children's Services and Skills (Ofsted) will be consulting on its proposals for inspection of the FE and skills system. The consultation document includes a range of proposals, such as a revised Common Inspection Framework. This will be based on a common evaluation schedule developed for all Ofsted inspections. The document also includes proposals for a new inspection methodology. Any revision to Ofsted processes will become operational from September 2009. If the outcome of the consultation results in significant change, there may be a need to reconsider the LSC's definition of underperformance identified from inspection. If this should prove necessary, the intention is that any LSC change will occur concurrently with the Ofsted changes introduced in September 2009.

Terminology

13 A college is defined as any institution established under sections 15 or 16 of the Further and Higher Education Act 1992. Such colleges are in receipt of funding through grant-in-aid arrangements.

14 All other non-college providers within the FE system will be referred to as 'independent providers'. Independent providers are those non-college providers that hold contracts with the LSC and will not be in receipt of funding through grant-in-aid arrangements through the financial memorandum. They include:

- specialist providers for learners with learning difficulties and/or disabilities;
- adult learning providers (including local authorities, the former external institutions, specialist designated institutions, private providers, third sector/voluntary and community providers); and
- private training providers delivering Apprenticeship provision or Entry to Employment (e2e) (this includes colleges that hold contracts to deliver this provision).

15 The use of the term 'providers' in this document refers to both colleges and independent providers. It does not include school sixth forms. The policies in this document are applicable to school sixth forms when they are directly referenced.

16 A further clarification to terminology is to note that quality is viewed in the widest sense, and as such includes equality and diversity, and learner health, safety and welfare.

The Annual Commissioning Dialogue

17 The roles of the agencies in the post-16 quality landscape remain clear. The roles of Ofsted and the LSC are unchanged: Ofsted assesses provision, whereas the LSC, through its commissioning arrangements, assures itself that it is funding provision that, as a minimum, is both of at least satisfactory standard, and improving. The new sector-led organisation – the Learning and Skills Improvement Service (LSIS) – will continue to lead and further develop the work undertaken by its predecessor bodies (the Quality Improvement Agency and the Centre for Excellence in Leadership) in improvement support.

18 Providers are quite properly themselves responsible for the quality of the education and training that they offer learners and employers. This is realised through rigorous self-assessment and internal quality assurance arrangements, which in turn lead to continuous improvement. These processes, along with a provider's performance, are fundamental to the annual commissioning dialogue and contract management.

19 The dialogue acts as the key point in the LSC's business cycle of assuring itself that the quality of provision it is funding is at least of satisfactory standard and is improving. In order to satisfy itself of this, the LSC will evaluate the performance of the provider and, depending on what that evaluation reveals, will undertake an appropriate level of discussion, scrutiny and intervention. This will mean a lighter touch for high-performing providers and a greater focus on those about which there are performance concerns.

20 The dialogue further allows for robust discussion in relation to quality, which is proportionate to the volume of provision concerned, and also takes into account a range of intelligence and information. This information might include the extent to which a provider's self-assessment recognises, and seeks to identify and address, provision that is underperforming. In essence, the LSC can be assured of a provider's quality if there is evidence that it is improving, and if it demonstrates that it is actively managing any issues and bringing them under control.

21 Accordingly, serious concerns about quality (through the identification of underperformance, as defined in Table 1) and the subsequent actions will be limited to a minority of providers.

Self-assessment

22 Self-assessment is a process through which providers themselves have a responsibility to secure improvement. Nevertheless, the LSC has a legitimate interest in the process: self-assessment reports can clearly demonstrate the extent to which a provider has recognised any shortcomings and has taken steps to address them. The discussion about self-assessment and the part it plays in improvement is important, not least because it is a requirement of the funding contract to upload self-assessment reports to the Provider Gateway annually by a specified date (the current deadline is 31 December 2008). Ofsted inspection evidence also indicates that there are still a significant number of providers for whom the self-assessment process is not sufficiently robust or accurate.

23 To support improvement in self-assessment, the document *Self-assessment – Updated Guidance for the Further Education System* has been published. This guidance has been produced by the LSC and LSIS to build on earlier publications. It aims to locate self-assessment within the context of changing policy and practice, including planned changes to government arrangements affecting the FE system, the introduction of the Framework for Excellence and developments in inspection.

24 The focus of the guidance is on policy and the requirements for effective self-assessment (it is not intended to be a practitioners' guide: LSIS and the Single Voice will discuss the production of such a guide with the LSC and Ofsted in 2008/09). The guidance also recognises progress in the journey to self-regulation for the FE system. This has included the creation of the Single Voice, which has recently published its consultation, *Prospectus for Self Regulation*.

The annual commissioning dialogue and school sixth forms

25 At school level, accountability for post-16 provision in a school is integrated with accountability for pre-16 provision. Local authorities and DCSF (for academies) therefore retain their responsibilities for quality and outcomes in the sixth forms of the schools they maintain. Therefore, the LSC assures itself of the quality

of school sixth forms through accountability arrangements that differ from the rest of the post-16 sector.

26 This requirement has, during 2007/08, been delivered through the School Sixth Form Challenge and Support programme, under which a dialogue on school performance and quality improvement is held with local authorities. The outcome of the activity is a set of priorities agreed with the local authority for those sixth forms maintained by it. The local authority will then be able to use these priorities to define its work with schools, and to brief school improvement partners (SIPs) for their work with individual schools. As a result, there has been, for the first time, a joint and national recognition of underperformance issues. Local 14–19 partnerships will jointly monitor any actions to bring about improvement. We are continuing to work closely with DCSF to clarify accountability for school sixth forms and to strengthen performance management.

27 We are also supporting a more coherent approach to the quality assurance of school sixth forms. We shall build on the work undertaken to date as part of the School Sixth Form Challenge and Support programme, including reviewing targets and actions set in 2007/08 and agreeing further, more challenging targets. As part of this work, we have developed comparable data on achievement and retention for all post-16 provision. This data will be used to inform the joint LSC/local authority dialogue, and will assist local authorities in briefing their SIPs to help school self-assessment ensure the improvement of outcomes in school sixth forms.

28 The LSC is also working with DCSF regarding schools with sixth forms under National Challenge arrangements to ensure that actions are informed by regional and local knowledge.

29 In addition, the LSC is developing a comparable qualification success rate (QSR) methodology for LSC-funded school sixth form provision. This will enable provider-level success rates to be calculated. The methodology itself is nearing finalisation, and the next steps will be to consult appropriate stakeholders in order to gain agreement.

30 We are continuing to work closely with DCSF to clarify accountability for school sixth forms and to strengthen performance management. As part of this work, Jim Knight, Minister of State for Schools and Learners, recently commissioned the LSC to develop an intervention strategy for school sixth forms. This strategy will be applied during the lifetime of the LSC and provide an agreed framework for intervention by local authorities once responsibility for post-16 learning transfers to them in 2010. In developing the strategy,

the LSC will liaise closely with the Association of Directors of Children's Services and appropriate representative bodies. The strategy will be published in early spring 2009.

Identifying Underperformance

31 There are four areas of provider performance that inform decisions about commissioning or intervention. These are:

- analysis of success rates compared with minimum levels of performance;
- financial health and financial management and control;
- inspection outcomes; and
- learner health, safety and welfare arrangements.

32 When underperformance is identified via any of the four elements above, the LSC will expect the leaders and managers of the providers in question to recognise the issues and to take steps to address them. This will include agreeing improvement indicators with the LSC; in more serious cases, providers could lose funding or (where the policy applies) be subject to a Notice to Improve.

33 Table 1, below, indicates the extent of underperformance against each of the four categories that are used to analyse provider performance.

Table 1: Categories for analysis and extent of underperformance

	Category	Financial health and financial management and control	Inspection	Learner health safety and welfare	Minimum levels of performance
Extent of underperformance	Whole provider underperformance	In financial failure	Effectiveness of provision declared inadequate	Assessed as high risk	FE: 25% or more Apprenticeship provision: fails to meet the minimum level
	Significant provider underperformance	With emerging financial issues	Some sector subject areas or graded aspects judged inadequate	Assessed as medium risk	FE: 15% to 24% Apprenticeship provision: fails to meet the minimum level
	Provider self-improvement activity	The LSC has no or few financial concerns	All grades satisfactory or better	Assessed as low risk or better	FE: less than 15% – although this may include pockets of underperformance that require improvement indicators

Quality improvement indicators

34 Where underperformance is minimal, it is expected that the provider will determine its own quality improvement indicators as part of its self-assessment process, and with developing its quality improvement plan. Setting clear processes to enable monitoring – and to demonstrate improvement – allows the provider to produce evidence that its remedial actions are having a positive impact, and can reassure the LSC that it can continue to attract funding.

35 The LSC will still agree actions with providers (or, where necessary, set them) if there are concerns about performance. These improvement indicators will form part of the funding agreement or contract, and the timescales for achievement will be attainable and realistic. Failure to achieve them will result in serious repercussions – for example, the loss of funding for the specified provision. Clearly, not every provider will necessarily have contractually binding improvement indicators, though there will still be a dialogue regarding quality improvement.

36 If the LSC is confident that the provider's SAR, quality improvement plan and subsequent actions are sufficient, then few or no improvement indicators will be recorded or discussed. On occasion, however, the LSC may consider that it is insufficiently assured, and may seek to record additional indicators that are concerned with aspirational activity and/or general or specific quality improvement (this could, for example, include performance that is comparatively poor, but does meet the minimum levels). This type of improvement indicator will be recorded, but will not be contractually binding – i.e. if these improvement indicators are not achieved, funding will **not** be withdrawn.

Equality and Diversity

37 The LSC's *Single Equality Scheme* sets out our expectations for how providers should promote equality and diversity. As part of assuring ourselves that providers self-assess this important area and challenge themselves to undergo continuous improvement, provider dialogue is central. It offers the opportunity for the LSC to discuss a provider's progress on its equality and diversity impact measures and to continue to challenge providers to monitor their participation and success data by ethnicity, gender, learning difficulty and/or disability, and take positive action to address any gaps they identify.

38 In addition, we are reviewing our processes for intervening if Ofsted or the Equality and Human Rights Commission tell us that providers are performing poorly in relation to equality and diversity.

39 Should a provider be deemed inadequate by Ofsted in terms of its equality and diversity, this may lead to restrictions on the receipt of funding won through tendering and also on negotiated growth. Where there is non-compliance with equality legislation, these restrictions may be applied, and this is likely to lead to the removal of the provider from the Qualified Provider Framework.

40 The Ofsted plans for a new inspection methodology include the proposal that if the contributory grade for equality and diversity does not reach specific minimum standards, this will limit the overall grade for 'Leadership and management'. The LSC strongly endorses this proposal.

Financial Health and Financial Management and Control

41 The LSC introduced financial Notices to Improve in January 2008. These apply to colleges only and are issued on the basis of the LSC's review of colleges' financial returns (financial plans and audited accounts), LSC audit findings and other relevant information. The LSC will continue to annually assess the financial health of independent providers using audited accounts. The general principles and approach, however, can inform the LSC's relationship with the other providers that it funds.

42 The principles underlying the approach to identifying and managing underperformance in financial health and financial management and control are to align with:

- financial health assessment processes and financial health assessment grades (outstanding, good, satisfactory and inadequate);
- the existing approach to financial intervention, particularly in relation to the actions taken when colleges are identified as being in financial failure or demonstrate emerging financial issues; and
- the revised financial management and control assessment approach that has been developed to meet the requirements of the Framework for Excellence.

Identifying colleges in financial difficulties

43 The LSC, through its regional Provider Financial Management (PFM) and Provider Financial Assurance (PFA) teams, assesses the financial health of colleges and their financial management and control on a regular and consistent basis. Providers receive grades for both financial health and financial management and control.

44 The LSC assesses the financial health of colleges twice a year, using standard financial returns. The financial plan (covering the current year plus three future years) is due on 31 July each year, and the finance record (an electronic version of the audited

accounts) is due on 31 December. Each return generates an 'autograde' and includes a formal self-assessment of the college's financial health. The final grade may differ from the autograde, based on published criteria. The LSC subsequently confirms the college's financial health grouping through validation by PFM teams, using a consistent approach across regions.

45 Regional PFA teams carry out a cycle of college audits, and examine:

- financial management and governance (which are aligned with the inspection cycle); and
- the direct audit of LSC funding streams.

46 The outcome of each audit will be a detailed report, which may identify financial management and control issues, and may further outline recommendations for the college.

Defining college financial underperformance

47 Financial difficulties are usually symptomatic of wider business problems, and the underlying causes do vary. Wherever the LSC identifies financial difficulties, the whole college is assessed for financial health purposes. However, there are different degrees of financial failure or underperformance.

Whole provider underperformance

48 Whole provider underperformance is where a college is in **financial failure**; that is, it is graded inadequate in relation to its financial health and/or its financial management and control.

49 The LSC will issue a Notice to Improve to all colleges that are in financial failure. For the purposes of financial health, the college would be required to develop a strategic recovery plan (if it is sufficiently robust, the LSC can accept a strategic recovery plan as the basis on which to continue funding a provider that is in serious financial difficulties). If a plan is not sufficiently robust,

the LSC will work with the college to formulate a plan, with critical examination of alternatives to identify a way forward to recovery. However, if no way forward is identified, the LSC and/or the college would commission an independent organisation review and/or a strategic options review. For financial management and control, the college would be required to develop an effective action plan to address the weaknesses identified.

50 Unlike Notices triggered by inspection outcomes or minimum levels of performance (where improvement must be demonstrated within a period of 12 months), it is not expected that a college in weak financial health will improve from the inadequate financial category within 12 months. The LSC recognises that financial health recovery will typically take up to three years. Accordingly, in the case of Notices triggered by financial health only, the period in which improvement must be demonstrated will typically be longer. There will, however, be an examination of progress throughout the first 12 months of the Notice period (and each subsequent year), including set milestones that must be reached – otherwise the LSC will move to consider strategic options, as set out at paragraph 187. Colleges will be required to address financial management and control weaknesses within 12 months – or often sooner, depending on the nature of the issues.

Significant provider underperformance

51 Significant provider underperformance is defined as being when a college has **emerging financial issues**. In such a case, the college:

- would show signs of deteriorating financial health (an example might include two consecutive operating deficits), although it might still be in a reasonable financial position overall (this would be identified through early warning indicators);
- would be graded as satisfactory for its financial management and control following an audit by the LSC, but would have issues to be addressed as a matter of priority;
- might have persistently failed to address previous audit recommendations (this will be viewed as an indication that the college has emerging financial issues); and
- would not be expected to require any exceptional financial support.

52 A college that has emerging financial issues will not receive a Notice to Improve – unless, of course, it is also in financial failure. The college and the LSC would formally agree improvement indicators, as part of a

required strategic improvement plan that the LSC would monitor. If a college has persistently failed to address previous audit recommendations, it is expected that the improvement would have to be demonstrated within a relatively short period, as the provider will already have had time to implement improvement. It is anticipated that, if the college does not achieve the improvement indicators within the agreed timeframe, the LSC will issue a Notice to Improve.

53 The purpose of the increased focus on requiring improvements at an earlier stage from colleges that have emerging financial issues is to minimise the need for later exceptional financial support funding. The LSC can support improvement by working closely with the college and by carefully agreeing and monitoring targets and milestones with it.

Managing financial underperformance

54 The degree of financial intervention required for a particular college (and expressed in a Notice to Improve or agreed improvement indicators) will depend on the nature, scale and causes of the financial difficulties, and the stage at which they are identified. For this reason, the possible interventions available to the LSC are sufficiently varied to enable the best response to the specific circumstances, rather than a standard approach. It is critical that an appropriate financial intervention approach is developed and followed through in each case. Once the LSC identifies actual or emerging financial difficulties, non-intervention is not an acceptable response.

Possible actions in response to financial difficulties

55 As in all responses to the difficulties identified, the action taken will be proportionate to the college's circumstances. Possible actions available to the LSC include the following:

- Restricting receipt of invitations to tender.
- Withdrawing the general consents in the financial memorandum and requiring a college to seek formal consents instead, based on demonstrated business cases and, as necessary, giving consent for enough solvency-related borrowing to meet any foreseeable needs, provided the bank is content to offer facilities. This will reduce the impact on public funds.
- Copying all documents and correspondence to the chair of the governing body.
- Requiring the college to provide monthly management accounts.

- Closely monitoring college performance across all funding streams and non-LSC funded activity. This would be on a monthly or quarterly basis (or as appropriate), and would include face-to-face meetings with the principal, the senior management and, where necessary, the chair of the governing body.
- Requiring the college to provide an updated three-year financial plan and commentary, including full analysis of the reasons for any financial difficulties.
- Only funding a college to cover the next month's operating costs and to meet any creditor payment terms.
- Requiring the college to produce a strategic improvement and/or recovery plan.
- Commissioning an independent organisational review into the underlying causes of any financial difficulties, and the priorities for addressing these.
- Requiring a review of the senior management and/or governing body to take place, to determine whether a college has the appropriate leadership and management to achieve recovery (this can form part of an independent organisational review).
- Withdrawing funding (or an element of funding).
- Requesting that an LSC observer be allowed to attend meetings of the governing body.
- Providing interim cash-flow support for colleges while they are developing their recovery plans, with rigorous conditions attached (a college should make every effort to obtain this support from its bank – the LSC can give consent for solvency borrowing in excess of the limits set out in the financial memorandum where appropriate).
- Where appropriate, and subject to LSC resource constraints, agreeing exceptional financial support for a college, based on an accepted recovery plan, rigorous conditions and milestones.
- Where appropriate, taking the actions set out at paragraph 187.

Inspection

56 Underperformance identified through inspection is defined as a provider receiving an Ofsted judgement of inadequate for:

- overall effectiveness of provision; and/or
- one or more of the following graded aspects: 'Achievement and standards', 'Leadership and management' (if 'Quality of provision' is inadequate, overall effectiveness will also be inadequate); and/or
- one or more sector subject areas.

57 Table 1 at paragraph 33 sets out how inspection judgements relate to the extent of underperformance.

58 This definition applies equally to all LSC-funded provision – regardless of the funding route. The LSC's approach to addressing underperforming provision is consistent, but specific actions may differ according to the contracting relationship with the provider in question.

59 As noted at paragraph 12, Ofsted is currently consulting on the Common Inspection Framework. The resulting outcomes may change, and, if they do, the LSC reserves the right to revise the definition of underperformance identified through inspection.

Colleges

60 In all cases where Ofsted judges a college to be inadequate overall, the LSC will issue a Notice to

Improve. The processes associated with this action are set out in paragraphs 159 to 195.

61 Where a college has underperforming provision (where a graded aspect is inadequate and/or where one or more sector subject areas are inadequate) but is not inadequate overall, the LSC will not issue a Notice to Improve. However, there will be actions for both the college and the LSC. In such a case, the LSC and the college, as part of the post-inspection action plan, will agree robust improvement milestones. The plan must focus on the action to be taken by the college to address those aspects of provision identified in the section of the inspection report headed 'What should be improved', together with the areas for improvement listed for each sector subject area.

62 Where there is underperformance, the LSC may seek to limit or cap growth in LSC-funded learner numbers at that college and/or within a sector subject area. This approach seeks to protect the interests of learners and to reduce the number of learners entering inadequate provision where suitable alternative provision may be available. Even if, at re-inspection, Ofsted judges a college to be satisfactory, any growth in learner numbers and associated funding will be gradual, and relative to the risk to the local delivery of provision. This approach is to preserve a college's ability to continue to deliver quality provision. Table 2 outlines the actions taken, and growth restrictions applied, to a college by the LSC in relation to inspection outcomes.

Table 2: Actions taken and growth restrictions applied to a college resulting from inspection outcomes

Ofsted judgement	LSC action	Restrictions
Inadequate overall	Notice to Improve issued	If appropriate, limited or no growth at an institutional level. Receipt of invitations to tender may be restricted
Satisfactory overall, but inadequate against one or more of the key areas (including 'Leadership and management')	Contractually binding improvement indicators set	If appropriate, limited growth at an institutional level, or limited or no growth in learner numbers in particular sector subject areas. Receipt of invitations to tender may be restricted
Satisfactory overall, but one or more inadequate sector subject areas	Contractually binding improvement indicators set	Limited or no growth in learner numbers in that sector subject area. Receipt of invitations to tender may be restricted

63 The LSC recognises that inspection may occur at any point in the business cycle, and therefore it is not the intention to apply conditions retrospectively to previously agreed **final** funding allocations.

64 Any decision about the withdrawal of funding will result from the outcome of re-inspection. Where Ofsted judges a college to be inadequate overall for a second time following re-inspection, that college will have failed the basic condition of its Notice to Improve. This will require swift and robust intervention, and strategic options will be pursued. The strategic actions are set out in more detail in paragraph 187.

65 If, at re-inspection, Ofsted judges a sector subject area to be inadequate for a second time, in most circumstances, the LSC will cease funding that provision. To ensure minimum disruption to learners, this cessation will normally take effect from the end of the academic year. Where the LSC ceases to fund a sector subject area in a college, it will consider the impact on an area of any changes in delivery ambitions or organisational structures of colleges or independent providers. This will mean continuing to take an interest in the overall volume, pattern, quality and range of provision from which learners and employers can choose in each area, to ensure sufficient breadth, depth and responsiveness of provision.

66 In the extremely unusual circumstances where a college that is satisfactory overall (or better), but at re-inspection is declared inadequate against one or more of the graded aspects for a second time, significant actions will be taken. Though LSC actions will be determined on a case-by-case basis, it is anticipated that actions would be similar to those where a college has not met the conditions of a Notice to Improve.

Independent providers

67 The difference between colleges and independent providers in accountability arrangements is a result of their differing contractual relationships with the LSC. Accordingly, independent providers do not receive a Notice to Improve. The one exception where a Notice to Improve may be issued is in the case of specialist providers for learners with learning difficulties and/or disabilities. This is due to the vulnerability of the learner cohort, and to the fact that the contracts specify provision for individual learners.

68 Where Ofsted judges any independent provider to be inadequate overall, and the provider receives a grade 4 for 'Capacity to improve', the LSC reserves the right to cease providing funding for that provider without offering further opportunity to improve. It is, however, expected that this scenario will be extremely rare. Where contract termination is necessary, the LSC will proceed in line with the terms of the contract. The LSC and the provider will normally agree that funding will cease at the conclusion of the nearest term or, if appropriate, academic year (unless the contract termination relates to the learners' health, safety and welfare, where immediate cessation will occur if there is imminent risk to learners). The LSC also recognises that, in some circumstances, the provider itself may determine that it does not wish to continue delivering LSC-funded provision.

69 However, where Ofsted judges an independent provider to be inadequate overall, the LSC will normally continue to contract with that provider – presenting it with the opportunity to improve. In these cases, or where Ofsted judges an independent provider to be inadequate against any of the graded aspects and/or sector subject areas, an appropriate post-inspection action plan will be agreed and improvement indicators will be set. The LSC will formally outline the conditions and improvement indicators in a contractually binding letter to the provider. Table 3 outlines the restrictions that may be applied.

Table 3: Actions taken and growth restrictions applied to an independent provider resulting from inspection outcomes

Ofsted judgement	LSC action	Restrictions
Inadequate overall	Formal letter sent, outlining conditions and contractually binding improvement indicators Notice to Improve issued to specialist providers for learners with learning difficulties and/or disabilities only	The LSC will not contract for any new starters with the provider. Additionally, the provider will not be able to receive any invitations to tender until the provision is deemed satisfactory, or better, at re-inspection
Satisfactory overall, but inadequate against one or more of the key areas (including 'Leadership and management')	Formal letter sent, outlining conditions and contractually binding improvement indicators	The LSC will not contract for any new starters with the provider, or will cap recruitment to that provider at the levels present at inspection. Additionally, the provider will not be able to receive any invitations to tender until the provision is deemed satisfactory, or better, at re-inspection
Satisfactory overall, but one or more inadequate sector subject areas	Formal letter sent, outlining conditions and contractually binding improvement indicators	The LSC will not contract for any new starters in the inadequate sector subject areas, and the provider will not receive any invitations to tender relating to the inadequate sector subject areas until the provision is deemed satisfactory, or better, at re-inspection

70 If, at re-inspection, Ofsted judges any independent provider to be inadequate overall, in all cases the LSC will cease funding that provision. The same principle applies to a sector subject area that Ofsted has judged to be inadequate for a second time. The LSC will consider the impact on an area of any changes in delivery ambitions or organisational structures of colleges or providers. This will mean continuing to take an interest in the overall volume, pattern, quality and range of provision from which learners and employers can choose in each area, to ensure sufficient breadth, depth and responsiveness of provision.

71 In the extremely unusual circumstances where a provider that is satisfactory (or better) overall, but that is, at re-inspection, declared inadequate against one or more of the graded aspects for a second time, significant actions will be taken. Though LSC actions will be determined on a case-by-case basis, it is anticipated that the outcome will be a loss of funding.

72 When a contract is terminated with a specialist provider for learners with learning difficulties and/or disabilities, the LSC will work with Connexions and any other relevant agencies to secure new providers for those learners, to whom the LSC has a funding commitment beyond the date at which the contract will cease.

School sixth forms

73 The inspection cycle, procedure and reports for school sixth forms differ from those for the rest of the sector. Inspection of a school sixth form is part of the inspection of the whole school. Underperformance in this context is defined as an Ofsted judgement of inadequate for a school sixth form:

- for 'Effectiveness and efficiency'; or
- in one or more of the following key areas: 'Achievement and standards', 'Personal development and well-being', 'Curriculum and other activities', 'Care, guidance and support', 'Leadership and management' (while deemed satisfactory or better overall).

74 If Ofsted judges a school sixth form to be inadequate, the area director is alerted. It is expected that discussions will be held with the local authority and the 14–19 partnership to ensure that robust actions are in place to address the underperformance. If support is required, this should be determined through those discussions, bearing in mind that responsibility for action lies with the local authority and its school improvement partners. LSIS support is not available for schools.

Providers graded satisfactory but not improving

75 The definition of 'satisfactory but not improving' is set out in the Ofsted publication *Proportionate inspection of further education colleges*. It is 'overall effectiveness grade 3, "Capacity to improve" at grade 3 or 4'.

76 In addition, we may now potentially see the first instance of Ofsted identifying a provider as making 'insufficient' or 'no discernible' progress in a second monitoring visit report after inspection. If this occurs, the LSC cannot be assured that the provision is at least of a satisfactory standard and improving. Accordingly, if this situation arises, the LSC may take serious action to ensure that provision is improved. However, most providers that can be defined as satisfactory, but not improving, are unlikely to fall into this category.

77 The LSC remains committed to working with LSIS, Ofsted, DIUS and the representative bodies to develop actions to bring about improvement in these providers. The LSC considers that this joint work, to secure ownership by the sector of the solutions and actions to address provision that is satisfactory but not improving, will contribute to the development of self-regulation. As self-regulation is further developed, the LSC will work with the sector to enhance its capacity for self-improvement. In the interim period, the LSC (and its successor bodies) will support these agencies in finalising their strategies for this group of providers. Consequently, all those that are identified as satisfactory but not improving will continue to be directed to use LSIS improvement programmes.

78 The concept of 'satisfactory but not improving' applies only in relation to the quality of provision delivered. It is not applicable to financial health or financial management and control, where a description of 'satisfactory' cannot be further qualified.

Learner Health, Safety and Welfare

79 Health, safety and welfare are integral to the learner experience. As such, they form an essential element of assessment for raising standards and ensuring that the quality of education and training provision is maintained.

80 The LSC has clearly set out its risk-based approach, as detailed in the publication *Learner Health, Safety and Welfare: The Learning and Skills Council Approach*. Consideration has been given as to whether or not to issue a Notice to Improve if there are concerns about learner health, safety and welfare. It has been decided that the current arrangements undertaken by the LSC are sufficient. This is set out in the next paragraph.

81 If a provider breaches (or is at risk of breaching) the learner health, safety and welfare conditions, the LSC will take the necessary steps to ensure compliance. This could include formally setting improvement indicators or, in the most serious cases, it could mean that the LSC ceases to fund the provider, or that part of the provision to which the breach relates. It may also potentially lead to no new starts on the affected provision, potentially restricted access to invitations to tender, and removal of the provider from the Qualified Provider Framework.

82 Specialist providers for learners with learning difficulties and/or disabilities may have the social care element of their offer inspected by the Commission for Social Care Inspection (CSCI) (and subsequently the Care Quality Commission (CQC) from April 2009), or by Ofsted (if the learners are aged 16–19 and fall under children's services arrangements). The LSC will take into account inspection judgements of social care when it assesses the learner health, safety and welfare of these providers. In certain circumstances, should the CSCI, CQC or Ofsted deem the social care to be inadequate, the LSC may cease contracting with the provider.

83 Failure to meet the required legislation (including child protection laws), or guidelines such as the Protection of Vulnerable Adults, may also lead to the withdrawal of a contract. Where necessary, other provider types delivering to vulnerable learners must also meet these requirements. Failure to do so may also lead to the withdrawal of funding or a contract.

Minimum Levels of Performance

84 Minimum levels of performance will be reviewed annually and, if necessary, raised and differentiated to reflect any improvements made by the sector. This will ensure that there is enough flexibility in the system to focus on underperformance and to ensure that the LSC can procure provision from the best available providers.

85 Minimum levels of performance represent the absolute minimum success rate performance, and the LSC expects providers to exceed them. Meeting the levels will not be enough to guarantee continued funding. The LSC may use wider performance evidence to inform commissioning decisions, such as volumes delivered, retention data, health and safety information, and inspection evidence. In addition, some high-performing providers may not secure funding for provision if there is low or no learner and employer demand, or if demand has been met by better-performing providers.

86 Minimum levels of performance are determined in relation to three factors, which are:

- national success rate performance – this is published in the March Statistical First Release and is based on full-year attainment figures for the whole FE system. It includes the success rates in all institutions by national level, broad qualification type, qualification length, age group and expected end year;
- the previous year's national performance against the minimum levels; and
- the projected impact upon the sector.

Provision in scope for the 2009/10 business cycle

87 The minimum levels of performance will continue to apply to general FE long qualifications (any qualification where the difference between the start date and the end date recorded against the individualised learner record (ILR) is 24 weeks or more) and short qualifications (any qualification where the difference between the start date and the end date recorded against the ILR is between 5 and 24 weeks) for provision offered by:

- FE colleges;
- sixth form colleges;

- colleges with subject-based specialisms, such as colleges of agriculture and colleges of art and design;
- higher education institutions that deliver FE provision and complete the ILR; and
- adult learning providers (including private providers).

88 FE colleges are expected, through contracting terms, to record all learners in the Learner Responsiveness data return, including those that are not publicly funded (except those learners on programmes for which the college in receipt of LSC Employer Responsive funding, who should be recorded on the corresponding ILR). A full record of learners is important as it impacts directly on success rate performance.

89 The minimum levels of performance will also continue to apply to Apprenticeship provision (irrespective of provider type) offered by:

- the colleges and adult learning providers identified at paragraph 87;
- employers; and
- private training providers.

90 Train to Gain (offered by any provider set out in paragraph 89) remains in scope for minimum levels of performance, under a second pilot year. More information on the arrangements is available in paragraphs 142 to 149.

Provision not in scope for the 2009/10 business cycle

91 Currently, all other provision is excluded from the analysis of success rates against the minimum levels of performance (this includes the new Diplomas). The bulk of this other provision seeks to engage learners (e.g. adult learning) and/or will likely draw from the Foundation Learning Tier and the Qualifications and Credit Framework. The success of qualifications from the Qualifications and Credit Framework, which are being delivered either as part of progression pathways or as part of the implementation of the Qualifications and Credit Framework, will be measured using the existing qualification success rate. The LSC plans to undertake in-depth modelling of how minimum levels

of performance would work for qualifications accredited within the Qualifications and Credit Framework and progression pathways. More detail on the Vocational Qualification Reform Programme and the Foundation Learning Tier is available at Appendix B.

92 In the previous issue of *Identifying and Managing Underperformance*, the LSC set out its intention to include key skills qualifications in the calculation of minimum levels of performance based on 2007/08 data return. Unfortunately, due to technical complications, this action is not possible for this data return. Standard FE qualification success rate reports will continue to detail key skills achievements separately. In 2009, we shall resolve the technical issue and key skills qualifications will be included in the calculation of minimum levels of performance based on the 2008/09 data return that will inform the 2009/10 commissioning round.

93 Any provision that is not currently subject to the minimum levels of performance is still inspected by Ofsted and will be quality-assured by the LSC through evaluation, the provider dialogue and the examination of wider performance data. For example, in e2e this might include the percentage of positive progressions.

Offender learning

94 We are committed to providers working within a framework that spreads success and eliminates failure with offender learning delivery. To deliver this commitment we are working with DIUS and the National Offender Management Service, through focused and shared priorities and targets, on the continuing refinement of the offender learning system to ensure that it best meets current and future needs.

95 The LSC continues to develop the most appropriate approach for the application of minimum levels of performance to success rates for providers delivering offender learning in a custodial setting. Evidently, this is extremely complex due to the range of settings and particular groups of learners, and, as such, will not be introduced this year as further development and testing is required.

96 However, this does not mean that offender learning will not be assessed, or that performance will not be managed accordingly. We are currently tendering contracts for the delivery of offender learning. The contracts awarded will specify minimum acceptable standards for offender engagement, qualification achievement, course completion and the development of employability-related skills. Failure to meet those minimum standards set out in the contract will result in the LSC ceasing to contract with that provider.

Minimum levels of performance for the 2009/10 business cycle

97 In 2008/09, consideration of provider performance against the minimum levels will use the most recent available success rate information from 2007/08. Table 4 outlines the minimum levels of performance for the 2009/10 commissioning round.

98 For FE, there is a minimum level of 60 per cent for data recorded as 'qualification level/sector subject area unknown'. The volume of learning aims recorded as 'unknown' has been reduced by the sector by 50 per cent over the past two years. The LSC would expect to see this trend continue. For Apprenticeship provision, any framework within sector subject area unknown will be assessed against the minimum level of 50 per cent.

Table 4: Minimum levels of performance for 2009/10

Programme/qualification type	Minimum level
FE long qualification Level 1	60%
FE long qualification Level 2	60%
FE long qualification Level 3	60%
A-levels	75%
FE long qualification Level 4 or higher	58%
FE short qualification (all levels/5 to 24 weeks)	62%
Apprenticeships (full framework)	50%
Advanced Apprenticeships (full framework)	50%
Train to Gain (development year)	65%

Apprenticeship provision

99 For Apprenticeship provision, the success rate methodology remains unchanged: it uses the overall QSR. Details of how the methodology will work are available at Annex B. Performance against the 'timely' QSR will continue to be used as complementary information, as part of the provider dialogue. It will not be used for minimum levels of performance. The assessment of underperformance will be derived from 2007/08 data.

Managing Apprenticeship performance against the minimum levels of performance

100 For 2009/10, minimum levels of performance will continue to be applied at a provider's completions at framework level. However, for this commissioning round, there is a change in the way that the LSC will determine its actions. The success rate for sector subject area will be the determining factor for LSC action, and analysis at framework level will be the combined framework success rate (i.e. the aggregated Apprenticeship and Advanced Apprenticeship performance).

101 To date, the application of minimum levels of performance has seen the LSC ceasing to fund the worst-performing provision. Now there is a need for this to continue to be applied, but in a more refined way. The changes introduced will allow the LSC to focus its attention increasingly on Apprenticeship performance in the wider context of the provider's success rate performance, and therefore to take into account the wider capacity and capability of the provider. This will also give providers an opportunity to improve, rather than have their funding withdrawn immediately.

102 However, unlike in previous years, where a provider has a sector subject area that falls below the minimum levels it will **not** have the opportunity to re-secure that provision through the forthcoming procurement round,

as the LSC will not re-purchase provision from providers from which it has just removed funding.

103 This change will support the transition to new arrangements next year (i.e. the provision commissioned in 2009/10 for 2010/11 delivery) with regard to the planned integration of minimum levels of performance with the Framework for Excellence. The LSC is currently examining the potential for a provider-level score (similar to the current FE model for minimum levels of performance). This sector subject area-based approach also links better to wider LSC activities, including sustainable relationships with providers to support capital investment in work-based learning (WBL) and multi-year contracting arrangements (see paragraphs 108 and 109).

104 The changes will also enable the LSC to take a proportionate approach to underperformance, ranging from the removal of provision and the setting of contractually binding performance indicators, through establishing expectations with providers themselves in order to address instances of poor performance, to self-assessment action plans in cases of less serious underperformance. Paragraphs 105 to 107 below and Tables 5 to 7 set out the approach in more detail.

The approach

105 In any sector subject area that exceeds the minimum level of 50 per cent but that contains frameworks that do not meet the minimum level, the funding for frameworks will be retained and the provision improved. Such an approach reduces micro-management and supports a more holistic view of provider performance. It should be noted, however, that regions may still withdraw funding for those frameworks based on other business decisions, such as learner/employer demand. There will be no requirement for contractually binding performance indicators for any poorly performing provision that is retained, but we would expect to see underperformance addressed as part of self-assessment. Table 5 provides an example of how this will operate.

Table 5: Sector subject area success rate above 50 per cent

Sector subject area (SSA)	Success rate	LSC action/implication
Engineering and manufacturing	62.9%	Provider retains funding for all frameworks within the SSA
Frameworks within SSA		
Industrial applications	64.9%	Provider retains provision
Vehicle maintenance	47.1%	Provider retains provision, but self-assessment action plan required to address poor performance. Starts on the framework cannot be grown beyond current levels
Automotive	35.7%	Provider retains provision, but self-assessment action plan required to address poor performance. Starts on the framework cannot be grown beyond current levels

106 In any sector subject area that fails to meet the minimum level of 50 per cent but that exceeds 45 per cent, all the frameworks within the sector subject area will be retained. Contractually binding improvement indicators for the poorly performing provision that is retained will form part of the continuing contract. It will be a requirement to undertake LSIS support. The extent of this support will be in proportion to the volume of funding and/or learners that have yet to complete their framework. Table 6 provides an example of how this will operate.

Table 6: Sector subject area success rate between 45 and 49.9 per cent

SSA	Success rate	LSC action/implication
Engineering and manufacturing	47.8%	Provider retains funding for all frameworks within the SSA, but with contractually binding performance indicators for frameworks below 50%
Frameworks within SSA		
Industrial applications	64.9%	Provider retains provision without conditions. Starts on the framework can be grown through negotiation
Vehicle maintenance	47.1%	Provider retains provision but with contractually binding improvement indicators. Starts on the framework cannot be grown beyond current levels
Automotive	35.7%	Provider retains provision but with contractually binding improvement indicators. Starts on the framework cannot be grown beyond current levels

107 For any sector subject area with a success rate of below 45 per cent, all funding for frameworks below the minimum level of 50 per cent will be withdrawn and/or moved to wind down contracts. Funding for frameworks that exceed the minimum level of 50 per cent in an underperforming sector subject area will be retained (although in practice this is likely to involve small volumes of provision). Where funding is to be withdrawn, providers should no longer recruit learners to the provision that has been identified as underperforming. Table 7 provides an example of how this will operate.

Table 7: Sector subject area success rate below 45 per cent

SSA	Success rate	LSC action/implication
Engineering and manufacturing	38.8%	All frameworks within the SSA with a success rate of below 50% are withdrawn/wound down
Frameworks within SSA		
Industrial applications	64.9%	Provider retains provision. Starts on the framework can be grown through negotiation
Vehicle maintenance	47.1%	Provision withdrawn
Automotive	35.7%	Provision withdrawn

Multi-year contracting and strategic commissioning

108 Multi-year contracting commenced in the 2008/09 contract year, when the LSC moved from an annual to a three-year contract arrangement with providers. The three-year commitment is subject to satisfactory delivery and quality requirements. It is not an absolute guarantee of a fixed or minimum level of funding.

109 A multi-year contract is effectively a licence to deliver. It is intended to strengthen our relationship with the provider base and to give providers a greater assurance of the LSC's commitment over that period. The three-year period is extendable to five years, also subject to satisfactory delivery and performance.

National providers

110 From 2008/09, the LSC introduced national contract arrangements for the nine largest cross-regional WBL providers. Our rationale for this action is based on the significant risks to public funding for, and the delivery of, provision delivered through independent providers with the largest contracts (based on 2007/08 WBL allocations).

111 With the roll-out of minimum levels of performance and other key triggers for open and competitive tendering of provision, it is more apparent that there is an increased risk to delivery of learning, in that withdrawal of LSC funding on the basis of poor performance could lead to potential financial problems for large providers (whose primary source of income is from the LSC). This in turn may affect their ability to continue to deliver to those learners in the remaining, better-performing provision. For example, a decision taken in one region to withdraw funding can affect a provider's financial and operational capacity to deliver

in other regions. The recent experience of Carter and Carter plc, now in administration, has also highlighted that there can be significant risks to public funding for provision delivered through large independent providers.

112 As such, the national contract arrangements set out below will act as a pilot to further develop and inform the roll-out of single provider contracting to other large (in terms of learner and funded volumes) independent cross-regional providers.

113 The national contract arrangements will be in respect of employer-responsive provision (Apprenticeship and Train to Gain provision). Contracts in respect of adult learner-responsive provision such as e2e and European Social Fund provision will continue to be held locally. The nine providers to come within these arrangements, together with the designated lead region for management of the contract, are set out in Table 8 below.

114 Under this arrangement, the National Director for Funding, Planning and Performance is designated as the senior responsible officer for these providers, but with day-to-day contract management delegated to a named director in the region nominated as lead as per Table 8.

115 A key part of the move to a single national contract is that the nominated lead for each of the nine regions will have responsibility for managing the entire national employer-responsive contract. This is a significant change from the 'lead and feed' arrangements that operated in previous years, in that all funding, budgetary and contractual discussions and decisions will rest with the identified lead for these providers' employer-responsive provision.

Table 8: The nine largest cross-regional WBL providers and the designated lead region for contract management

Provider	Lead region
CITB	National Employer Service
Economic Solutions	North West
JHP	West Midlands
JTL	National Employer Service
NACRO	North East
Protocol Skills	West Midlands
Rathbone Training	North West
VT Training	South East
YMCA	South East

116 For these nine providers, the national lead has the authority to agree a variation in the apportionment of delivery between regions, but should consult with other regions where the provider is delivering to ensure that local and regional needs are met.

117 The minimum level of performance policy, however, will continue to be applied at local and regional level to protect the interests of learners. This means that success rates will be analysed and measured at a local level and, where it is below the minimum level, the provision may no longer be funded in that locality. As set out in paragraph 106, provision that is above 45 per cent, but below the minimum level, can be retained with a contractual requirement for improvement within a 12-month period. Failure to improve will result in funding being withdrawn. For national providers of this kind, it will be important to demonstrate that the minimum level of performance policy has been applied consistently across the country, and local and regional cases for exception will be subject to moderation.

118 Providers other than the top nine will continue to operate under 'lead and feed' arrangements. Commissioning decisions are taken at the local level. Even if a provider has acceptable levels of performance at the regional or national level, this does not automatically ensure continued funding within LSC areas. Accordingly, 'lead and feed' providers will experience different discussions in each regional and local area, depending on their performance. This will be reflected in their final contracts. In addition, following significant internal consultation, the LSC may take the strategic decision, on grounds of medium- to long-term quality or financial health concerns, to stop contracting with that provider altogether.

119 For training providers that hold contracts with the National Employer Service, identification and consideration of underperformance will take place, wherever the data is available, at a regional level. Where the data is not available, identification and consideration will necessarily take place at the national level instead. Providers that are not meeting the standards will have their contracts for the underperforming provision terminated or run down.

Employers

120 Some national employers hold contracts to deliver training to their own staff, but it is not possible for the LSC to open up this provision to competition – only employers themselves can do that. Therefore, where there is a direct funding contract with a poorly performing employer, the LSC will not terminate it in the same way as it would for other independent providers.

121 The LSC will hold challenging discussions with employers about how to bring about improvement, and will agree clear improvement actions. These could include a requirement for employers to make significant changes to their internal management and delivery arrangements, or to re-tender the provision (if there is sub-contracted delivery). The National Employer Service has communicated to employers its intention to withdraw funding and contracts if there is not enough improvement against the targets and deadlines set. The LSC will apply the same policy wherever it holds direct contracts with employers at a regional level.

Sub-contracted provision

122 Wherever a provider has large volumes of sub-contracted delivery (including consortia), there are clear provisions governing sub-contracting in the contract with the lead provider. These provisions allow the LSC to require contract leads to identify:

- the providers that make up the delivery;
- what they are delivering; and
- the contribution and performance of each sub-contractor to the total.

123 As part of the provider dialogue, if a partnership team has concerns regarding quality, it will seek, via the lead provider, assurance of how it monitors the quality of all the sub-contractors. All LSC-funded providers should be able to produce information on their sub-contracting arrangements as a matter of course. This should provide the LSC with sufficient assurance that the existing arrangements can deliver provision to the appropriate standard.

124 In the longer term, the LSC will be examining its relationship with consortia to better understand provider relationships, particularly where a consortium sub-contractor may also have a direct contracting relationship with the LSC.

FE qualifications

125 For FE qualifications, the methodology remains unchanged: underperformance is calculated using aggregated guided learning hours for qualifications and weighted success rates within qualification aims. Details of the methodology are available at Annex A. Identification is by qualification level and by sector subject area. Assessment of underperformance will use 2007/08 data.

FE long qualifications

126 While the methodology for calculating FE long qualifications remains unchanged, there are now differential levels to form part of the analysis.

127 A-levels remain distinct from FE Level 3 long qualifications. As was the case last year, performance against the minimum level for A-levels will not, on its own, attract a separate Notice to Improve – but the performance of A-level provision against the 75 per cent minimum level will contribute to the calculation for a Notice to Improve in the total long-course offer. The overall performance calculation methodology is unchanged: the LSC will look at the proportion of provision that is below the minimum level, and will draw from all of the long qualifications to determine the overall performance calculation.

128 Furthermore, it should be noted that there is a continuing and vital role for FE colleges in delivering A-level provision. Moreover, unless it was a pre-planned activity, colleges should not simply be acting to remove individual A-level subjects that fail to meet 75 per cent – doing so could compromise the mix and balance of provision or the colleges' ability to meet local need. The expectation is improvement, not withdrawal.

FE short qualifications

129 In modelling previous years' levels, it became apparent that combining underperformance of short and long qualifications to create a single institutional performance score masked underperformance in long qualifications. Accordingly, a single institutional performance score will not be introduced this year. The separation of short and long qualification performance will be re-examined in the future, when the LSC reports against the three funding streams.

130 FE very short qualifications (any qualification that is recorded against the ILR as less than five weeks) are not currently included in the LSC's calculation of underperformance in FE. The LSC will continue to publish minimum levels of performance for these qualifications, in order to provide a clear signal about expectations. However, they will remain outside the discussions about performance. The indicative minimum level for very short course provision remains at 85 per cent.

Managing FE performance against the minimum levels of performance

131 The LSC will analyse the volume of an institution's underperforming provision separately for short and long qualification provision and, where emerging performance issues are evident, will discuss the reports on minimum levels of performance as part of the provider dialogue. The extent of any underperformance will determine the scale of the LSC's actions. These actions are set out below.

132 In the majority of FE providers, relatively small amounts of provision or numbers of sector areas will be underperforming. Where underperforming provision is less than 15 per cent of the total volume of a provider's long and/or short qualification provision, the range of success rate-related improvement indicators agreed with the LSC will vary according to the percentage of underperformance.

133 For example, where underperformance is between 5 and 15 per cent, the LSC will discuss with the provider how it will improve performance and further agree relevant improvement indicators. For some providers, these improvement indicators will form part of the funding agreement. In contrast, where underperformance is 5 per cent or lower, the provider will typically determine its own improvement indicators. The provider will inform the LSC through the institution's quality improvement plan, self-assessment report or strategic business plan.

134 In cases where there is more significant concern (where the volume of provision that is underperforming is in the range of 15 to 24 per cent), a formal Notice to Improve will be issued. The LSC will issue the Notice to Improve in the form of a letter setting out the conditions that must be met if the provider is to secure continued funding, and the timeframe within which improvement should be demonstrated (usually 12 months). In most circumstances, the LSC will ask LSIS to source support; working with the LSC and the provider, LSIS will identify the appropriate level and type of support required.

135 Where cases of serious concern arise and whole provider underperformance (25 per cent or more of a provider's total volume of long and/or short qualifications) is identified, the Notice to Improve will be issued to both the college principal and the governing body (or their equivalents in adult learning providers).

136 Where the LSC issues a Notice to Improve to a provider based on performance against the minimum levels of performance, it may restrict the growth of LSC-funded learners with that provider. This is consistent with the LSC's approach to a Notice to Improve that is issued following an inspection assessment of inadequate. The table below outlines the anticipated restrictions.

Table 9: Actions taken and growth restrictions applied to a provider resulting from poor performance against the minimum levels of performance

Effectiveness calculation against the minimum levels of performance	LSC action	Restrictions
25% or more	Notice to Improve issued	If appropriate, limited or no growth at an institutional level
15 to 24%	Notice to Improve issued	If appropriate, limited growth at an institutional level, or limited or no growth in learner numbers in particular sector subject areas
Up to 14%	In some circumstances, and if appropriate (for example, where a sector subject area is significantly poor), improvement indicators set	In some circumstances, limited or no growth in learner numbers in that sector subject area

137 In very rare cases, where success rates are considerably lower than the minimum levels of performance and a college's capacity to improve is weak, immediate consideration of the strategic options for restructuring provision may be required. This would probably occur when the provision in question is not likely to improve – or is not demonstrating progress towards improving – to at least the current minimum levels within the maximum 12-month Notice to Improve period. This extremely serious level of underperformance represents a significant risk to learners, employers and the public purse.

138 The LSC will consider issuing a Notice to Improve under exceptional circumstances. This would likely be when underperforming provision is less than 15 per cent of an institution's total provision, but still represents a significant volume of the total provision offered or of the total funding from the LSC, and the volume of underperformance represents a poor return on significant investment by LSC, or a significant risk to learner achievement.

139 The LSC review of the strategic role of local adult learning providers is nearing completion, and emerging findings suggest that this group of providers has responded well to LSC priorities over recent years. Local adult learning providers, however, will remain in scope for minimum levels of performance in 2009/10 for long and short FE provision, and current arrangements will apply.

140 The LSC is committed to ensuring that this part of the sector has reasonable budgetary stability to maintain its contribution. However, this commitment remains subject to it reaching the appropriate quality thresholds. It remains the expectation that those providers that are subject to a Notice to Improve will

still meet its conditions and, as was indicated in the section on inspection, any provider that fails re-inspection will lose the funding associated with the inadequate provision. This approach, pending the review, offers the right balance between budgetary stability and securing high-quality provision for learners.

141 The recommendations arising from the review of local adult learning providers will be published shortly. It will set out how the LSC should address the performance of these providers in the future.

Train to Gain

142 In 2007, the LSC introduced a new refined success rate for Train to Gain, which is broadly similar to the measure used for Apprenticeships and is consistent with other success rates. This new and comparable success rate replaced the success rate used in contracts awarded in the first year of operation of Train to Gain, which was originally designed for the employer training pilots. The LSC uses this success rate both for minimum levels of performance and for cases in which the LSC officially reports on qualification success rates. A definition of the methodology and an example report are available at Annex C.

143 Last year, discussions regarding performance (using the comparable success rate) against the minimum level in respect of Train to Gain was treated as a pilot, with an indicative success rate threshold of 65 per cent. If performance fell below this percentage, that did **not** provide an automatic trigger for the LSC to cease funding and commission replacement provision for the 2008/09 academic year. The rationale for having a pilot year was in recognition of the relatively recent change to the success rate calculation, and the incomplete data set in respect of Train to Gain success rates at the time

that the policy was being set. The absence of a full year's data at that time made it difficult for the LSC to predict, with full confidence, the likely end-of-year success rate, which informs the setting of an appropriate minimum level of performance threshold.

144 Train to Gain has now completed a second full year of operation and is starting to build a performance history. However, it is recognised that Train to Gain is still in its infancy when compared with FE and Apprenticeship provision. It is also recognised that, in many instances, the Train to Gain service is delivered by new providers with no previous experience of the data requirements of the LSC. In view of the relative immaturity of Train to Gain, then, it is proposed that for 2009/10, Train to Gain success rates will again be analysed against a pilot minimum level of performance, in order to allow providers more time to become familiar with the success rate methodology, and to build a more robust performance history.

145 A second pilot year will allow the LSC to undertake a range of activity through its national and regional teams to ensure that Train to Gain providers are supported, and to ensure that they understand the success rate definition and how success rates are used:

- in contract performance management;
- to inform funding and contracting decisions through assessment against minimum levels of performance thresholds; and
- to indicate which providers might require improvement support from an outside agency.

146 The second pilot year will also allow the LSC to satisfy itself that providers have a robust understanding of the success rate definition. This additional year will also allow us to perform further modelling and trend identification with two complete data sets and emerging 2008/09 data.

147 Further piloting will also enable discussions to take place with providers to highlight and emphasise the importance of predicting, with some accuracy, the expected end date for each learner. In offering a good quality of provision to all learners, a provider should undertake a robust initial assessment, which will enable a realistic end date to be set. This is important, because inaccurate end dates have a direct impact on the success rates.

148 Reports for Train to Gain will be similar to other reports on minimum levels of performance, and will show an analysis by sector subject area and qualification level.

149 Minimum levels of performance apply only to qualification success rates. As such, brokerage performance will not be included within the arrangements dealing with minimum levels of performance. Where appropriate, however, the LSC will cease contracting with brokers who are unable to meet LSC expectations. These expectations will form part of the contract terms and conditions.

Minimum levels of performance reports and data

150 Providers will be able to access their reports via the Provider Gateway.

151 In June 2008, the Information Authority informed the sector that the final closing date for the FE ILR (F05) was to be brought forward from 30 March 2009 to 6 February 2009. This decision was taken in order to:

- enable final qualification success rates to be calculated earlier;
- enable the LSC to use a consistent data set for all its business processes, including allocations, minimum levels of performance and the Framework for Excellence;
- enable consistency with the information that is sent to Ofsted by the LSC and used for inspections; and
- assist with the alignment of allocations for different areas of LSC-funded provision.

152 Providers will be unable to make any further returns after this date, and all published information will be based on what was submitted by the revised closing date of 6 February 2009. This cannot be changed at a local/regional level.

153 The 6 February date for FE data returns will apply in future years, though it should be noted that there will be investigations and consultation during the development of the 2009/10 ILR specification to ascertain if it is possible to bring the closing date even further forward from 2008/09 onwards. The WBL ILR closing date is unchanged.

154 Provider-level FE reports will be generated at three key points. Apprenticeship reports for period 15 of 2007/08 and Train to Gain 2007/08 reports will be available from the week commencing 8 December 2008. The table below sets out the key dates for all reports. They will be available via the Provider Gateway only.

Table 10: Reporting timetable

Type	Data source	Availability of the reports
Apprenticeships	2007/08 Period 15 data	w/c 8 December 2008
Train to Gain	2007/08 Period 15 data	w/c 8 December 2008
FE Report 1	F05 data – 10 December 2008	w/c 15 December 2008
FE Report 2	F05 data – 9 January 2009	w/c 12 January 2009
FE Final Report	F05 data close – 6 February 2009	w/c 8 February 2009

155 The accuracy of data returns is vital; a provider's data return cannot be revised once the WBL and FE ILRs have closed.

156 The LSC will continue to present success rate performance against minimum levels at provider level (the established format). However, it will also present the data by age. This is to allow providers to see a clear presentation of their performance by age groups, and to act as a transition to reporting by individual funding streams, in order to meet the needs of the LSC's successor bodies. Action will not be taken by age groups this year.

Minimum levels of performance: Ofsted and LSIS

157 Ofsted will receive copies of all final reports from the LSC through the Provider Gateway. These will enable it to plan inspections and to contribute to the pre-inspection provider performance report.

158 LSIS will also receive, from the LSC, copies of the LSC final minimum level performance reports. LSIS will use the information to fulfil its role in providing support to improve provision, usually through the Improvement Advisor Service (IAS) and associated improvement programmes.

Notices to Improve

159 Notices to Improve are a vehicle for driving up performance. They outline the conditions that a college must adhere to in order to secure continued funding in its current configuration, and with its existing provision. The LSC issues Notices to Improve to colleges identified as underperforming where:

- a college receives an Ofsted inspection judgement of inadequate for 'Effectiveness of provision';
- a college is in financial failure; or
- 15 per cent or more of short and/or long qualification provision falls below the minimum levels.

160 There are two situations where providers other than colleges may receive a Notice to Improve. The first is when Ofsted judges specialist providers for learners with learning difficulties and/or disabilities as inadequate overall – as explained in paragraph 67. Second, FE providers other than colleges will also receive a Notice to Improve if they fail to meet the minimum levels. Many of the outcomes of the Notice to Improve process described in this document are applicable to these providers. The table below sets out how Notices will apply to each provider type.

Table 11: Actions taken and growth restrictions applied to a provider resulting from poor performance against the minimum levels of performance

Provider type	Inspection: Does the LSC issue a Notice to Improve?	Minimum levels of performance (FE): Does the LSC issue a Notice to Improve?	Financial health and financial management and control: Does the LSC issue a Notice to Improve?
FE colleges	Yes	Yes	Yes
Adult learning providers	No	Yes	No
Private training providers	No	Yes	No
Specialist providers for learners with learning difficulties and/or disabilities	Yes	N/A	No
School sixth forms	No	No	No

161 While the triggers for taking action are absolute, the conditions associated with improvement will be reasonable and proportionate to the risk to learners, employers or the LSC's funds. The conditions take account of the local and regional context (or national context, in the case of some specialist providers for learners with learning difficulties and/or disabilities), particularly where there is a limited supply of alternative provision.

Issuing Notices

162 In all circumstances, the provider should have self-assessed and recognised its weaknesses in both quality and financial terms, and so the receipt of a Notice should not be unexpected. Additionally, in the case of Notices triggered by minimum levels of performance, if a college is in scope at either of the points when the

first two FE reports are generated, there will be dialogue to discuss the issues and (if appropriate) to accelerate a full and accurate data return. The dialogue will also enable the LSC to gather any additional evidence to support its decision to issue a Notice.

Financial health and/or financial management and control

163 The basis for issuing Notices to Improve in relation to financial health and financial management and control is set out earlier in this document. A Notice triggered by inadequate financial health will be issued within three months of receipt of the financial health returns. This period allows sufficient time for the LSC to perform the assessments and for regional moderation. A Notice triggered by inadequate financial management and control will be issued four weeks after the final

audit report has been sent to the college. A Notice based on either financial health or financial management and control may be issued at any point after relevant information becomes available, if the LSC determines that the college is in financial failure.

Inspection

164 Notices to Improve that are the result of an inspection outcome of inadequate will be issued to the provider within 10 working days of publication of the inspection report on the Ofsted website. The 12-month period of the Notice will begin 12 weeks after the issue date, rather than on the date of the inspection. This is to allow a post-inspection action plan to be produced and LSIS support to be secured. The college will usually have up to 12 months from the start of the Notice period in which to meet the conditions of the Notice to Improve. The conditions will seek to address the weaknesses identified within the inspection report. The process for assessing whether or not a Notice triggered by inspection has been met is set out at paragraph 179.

Minimum levels of performance

165 The LSC will issue a Notice to Improve triggered by an analysis of success rates against the minimum levels within six weeks of the close of the ILR. If, before the close of the ILR, 15 per cent or more of short and/or long qualification provision falls below the minimum levels of performance, the LSC will discuss with the provider (its principal and key staff in the first instance) the implications of the initial performance data as it becomes available. This may include the implications and possible conditions of a potential Notice to Improve. This discussion is intended to:

- enable colleges to secure robust and final data earlier, to inform any discussion and ascertain the extent of underperformance;
- determine whether a college has the capacity to improve within the 12-month period;
- determine further options for a college and its learners, taking into account the range of provision involved, the extent of underperformance and any available alternative providers;
- determine what provision is underperforming and whether an institution wishes to continue delivering that provision; and
- enable the LSC to review the evidence to support its decision.

166 The LSC will not issue a Notice if the volume of the short and/or long qualification provision that falls below the minimum levels of performance is under 15 per cent by the close of the ILR.

167 The discussion will also enable the LSC to determine whether it is appropriate to issue a Notice to Improve to a provider where 15 per cent or more of short qualification provision falls below the minimum levels. For example, this discussion will determine if the provider will still be delivering the underperforming provision in the future. The LSC will issue Notices to Improve proportionately, reflecting the volume of learners affected and the level of funding.

Multiple triggers for a Notice to Improve

168 There are Notices to Improve for long and short qualifications, inspection, financial health, and financial management and control. It is therefore possible that a small number of FE and sixth form colleges could be subject to a Notice to Improve for more than one area of underperformance.

169 In cases of multiple triggers, the Notice issued will result from the first trigger; where a college underperforms in more than one area, there will be additional schedules attached to that Notice, for which compliance points may vary in nature and timing. This recognises that actions regarding financial health, financial management and control, the analysis against the minimum levels of performance, and inspection, all take place at different times.

170 The LSC has decided to adopt this approach, as it seeks to address underperformance at an institutional level. Many providers that have poor success rates will likely also have financial issues and poor inspection grades. Where a college is under Notice for all of the triggers, the LSC will be extremely concerned about its long-term ability to attract funds.

171 There are a number of different scenarios in which a college that is already subject to a Notice to Improve could then be made subject to a second one. Providers that are continually underperforming and only meeting the minimum levels will remain subject to the Notice to Improve. This reinforces the message that it is not acceptable simply to meet the minimum standard, and that the LSC is serious about eliminating underperformance.

172 Failing to meet the conditions of an initial Notice to Improve that was triggered by failure to reach the minimum levels of performance will not result in a second Notice. Only failure to meet the new minimum levels will do so. If a college consistently fails to meet the minimum levels, the LSC will consider for how long it is appropriate for that college to be subject to a Notice to Improve. The LSC will also take more robust action if a college fails to meet the minimum levels of performance for more than three consecutive cycles.

Monitoring a Notice to Improve

173 After a Notice to Improve is issued, support is secured through LSIS. The provider will develop an improvement plan to address the type of underperformance, composed of:

- a financial recovery plan for financial health and/or an action plan to address financial management and control issues (these will usually need to address underlying causes of concern in relation to wider college business activities, such as quality of provision);
- a post-inspection action plan for inspection; and
- an LSIS improvement action plan for minimum levels of performance.

174 The provider will relate these to its own improvement plans and self-assessment reports.

175 Where a Notice to Improve that is issued to a college consists of several schedules for different areas of underperformance, the various improvement plans should be brought together to form a comprehensive strategic plan to meet the needs of the college and of all the agencies involved. This should assist governors in discharging their responsibilities to monitor progress and take the college forward. It should be noted that a strategic recovery plan required to address inadequate financial health must always encompass all issues for the college.

176 If a provider is subject to a Notice to Improve for having 25 per cent or more of its long qualification provision below the minimum levels of performance, it may become evident, through discussion and monitoring, that it is not complying with the conditions attached to its Notice. In these cases, the LSC may invite Ofsted to undertake either an enhanced monitoring visit or a full inspection of that provider.

177 This could happen at any point during the Notice period, subject to circumstances. The LSC will then use that Ofsted report to inform its decisions about the need for further action. Ofsted will continue to undertake its own planned programme of inspections, including any monitoring visits to a college that it has declared to be inadequate.

Compliance and the removal of a Notice to Improve

178 Compliance with a Notice that has been triggered by financial health and/or financial management and control problems is demonstrated when the detailed conditions outlined in that Notice have been met and the associated actions have been fully implemented.

179 Compliance with a Notice that has been triggered by inspection is demonstrated if Ofsted judges the college to be satisfactory (or better) on re-inspection. A judgement of inadequate on re-inspection will mean that the provider has failed to meet the requirements of the Notice to Improve.

180 Compliance with a Notice that has been triggered by success rate performance against minimum levels of performance is demonstrated when a provider's provision is below the 15 per cent threshold when its success rates for the Notice year are examined. This action is only taken on the basis of final validated ILR returns, and not using a provider's own data.

181 It is acknowledged that a provider may be able to demonstrate that it has met the conditions of a Notice to Improve applying to the 2009/10 academic year using its 2008/09 data. Where this occurs, the LSC, in recognition of the improvements demonstrated, will lift the Notice and the associated sanctions it has imposed, and they will no longer apply. This will occur at the close of the FE ILR, or earlier if the provider concerned confirms, in writing, that no further data will be returned.

182 There remains a need to monitor these cases, as the Notice is in relation to the 2009/10 academic year. The provider must still deliver success rate data for the 2009/10 academic year demonstrating that the improvement achieved to date has continued. Where improvement has not been sustained, a new Notice to Improve will be issued and the appropriate policies set out in paragraphs 165 to 167 will be followed.

183 In all cases, the formal removal of a Notice to Improve will occur when the college receives a letter from the LSC indicating that the Notice conditions have been met.

Failing to meet the conditions of a Notice to Improve

184 At the conclusion of any type of Notice to Improve, the majority of colleges will have addressed the underperformance and the conditions set. However, there may be some colleges where insufficient progress has been made and the conditions of the Notice have not been complied with. These colleges pose a significant risk to the quality of learners' experience, and to public funding.

185 Where it is evident that the college is unlikely to achieve the conditions of the Notice, the LSC, within the Notice period and usually after the Ofsted monitoring visit, will begin to consider and explore the possible strategic options available. This is to minimise any adverse impact on learners and employers.

186 If a college fails to meet the conditions of a Notice that has been issued in relation to inspection or minimum levels, the LSC will simply cease funding the underperforming provision. The LSC will not intervene further, unless the viability of a college is compromised by the withdrawal of funding. In that case, the LSC is likely to have already been in discussion with the college and the governing body to discuss the financial health and long-term role of the college.

187 An appropriate course of action will be agreed, taking into account all the available information, including Ofsted judgements, the reports from the LSIS adviser, the college's history of addressing improvement, and the robustness of its approach to self-assessment. The LSC will pursue one or more of the following options:

- Varying the conditions of funding to meet specific requirements.
- Re-profiling funding.
- Subjecting colleges to funding audit and reconciliation for underperformance on 16–18 provision.
- Taking the actions outlined in paragraph 55 (actions in response to financial difficulties).
- Under the Learning and Skills Act 2000, appointing two members to the governing body.
- Adding LSC observers to the governing body.
- Commissioning a strategic options review to consider choices for the future of the provision and the college (the college itself may already have instigated this action). This will cover potential options for reconfiguration of provision to deliver the desired quality improvement. This will need to take account of all the possible approaches and models set out in *Further Education Colleges: Models for Success*. There should not be an automatic assumption of the need to pursue a merger.
- Escalating matters to use the powers of intervention conferred on the LSC under the Further Education and Training Act 2007 to:
 - direct changes to strengthen leadership and management, including considering the possibility of dismissing the principal or senior post-holders (a power that is designated under the college's articles of government);
 - direct the governing body in the exercise of its powers and the performance of its duties;
 - remove some or all of the members of the governing body; and
 - direct changes to put collaboration arrangements in place.

188 The college and its governing body should drive the implementation of the adopted strategic option (though in some circumstances it may be the LSC). The college will manage the transitional period via a short-term post-Notice to Improve record of actions, which the LSC will agree. The governing body, in partnership with the LSC, will lead any related actions during this period.

189 Where a college is subject to a Notice to Improve with multiple schedules, if the conditions of any schedule have not been met, the LSC will manage this non-compliance by pursuing one of the courses of action set out in paragraph 187. Meeting the conditions of one schedule will not diminish the importance of the remaining conditions or lead to the lifting of other schedules. Correspondingly, if a college fails to meet the conditions of a Notice schedule, this will lead to the consideration of strategic options. The college will not have the opportunity to demonstrate improvement against the remaining Notice to Improve schedules.

190 If a college has not met the conditions of the Notice to Improve, there may be rare cases when the LSC and the governing body cannot agree a way forward, and they have exhausted all approaches to instigating change. When this occurs, the LSC may seek to use the powers of intervention conferred under the Further Education and Training Act 2007.

191 The Act received Royal Assent in October 2007. The provision in the Act requires the LSC to prepare and publish a statement of its intervention policy. This document was published on 17 October 2008, and is available at: www.lsc.gov.uk/aboutus/quality.

Public communication of Notices to Improve

192 Currently, the LSC does not publish Notices to Improve. However, in its Annual Report it will include the number of Notices issued. Nevertheless, further consideration is also being given to the formal annual publication of those providers under Notice.

193 The LSC does, however, inform DIUS/DCSF of providers that are in receipt of a Notice. The Minister of State for DIUS subsequently writes, in confidence, to inform all MPs whose constituencies are covered by a college, but only if there is whole provider underperformance. There are two purposes for this action. Firstly, to allow the MPs, if they so wish, to discuss with the Minister of State the implications for the college, and secondly, to encourage them to support the institution in whatever way they can in order to improve it. DCSF may choose to share this information with the relevant directors of children's services.

194 In the interests of transparency, the LSC informs provider representative bodies of those of its members that are under Notice for minimum levels of performance and financial health and financial management and control.

195 While the LSC does not publish Notices to Improve, if a specific request for information relating to a Notice is received under the Freedom of Information Act 2000, then, under the provision of the Act, the LSC may be required to disclose the Notice and the associated conditions.

Support for Quality Improvement

196 When a provider is issued with a Notice to Improve, or is identified as underperforming, the LSC will ask LSIS to source support, normally through the IAS. This support for colleges and providers is currently free of charge. LSIS, working with the LSC and the provider, will identify the appropriate level of support required – this will depend on the extent of underperformance. An improvement adviser or team of advisers will usually be allocated to the provider, or other appropriate support packages will be used that may draw on other improvement services, such as the Skills for Life Improvement Programme. The quantity of support is negotiated and reviewed regularly, as there is no standard allocation. The full programme of support will reflect need and availability of resources.

197 LSIS support is not just for providers that are underperforming. Providers that are identified as satisfactory or better are also able to access support from the IAS, and can self-refer or be referred by the LSC. The LSIS IAS application form is available at: www.qia.org.uk/programmesandservices/uploads/1IASApplicationForm.doc.

198 If a provider is underperforming in a specific area, LSIS can deliver other forms of support. A list of the available services can be found at: www.qia.org.uk/programmesandservices/uploads/Programme_Matrix_EXTERNAL_COPY.xls.

Supporting financial improvement

199 Financial improvement support rests with the LSC, not with LSIS. LSIS does not have a remit to provide improvement support in relation to resolving financial difficulties. However, where financial difficulties also reflect a range of performance and quality issues, LSIS and the LSC will pool their improvement resources to support recovery.

200 If a college needs support for financial improvement, it is expected to purchase and openly secure that support through its own procurement processes. Where appropriate, the LSC can help the college to secure the best available support by providing advice on any tenders submitted. The LSC can provide exceptional financial support to colleges, or secure that financial improvement support itself, but would aim to do so only as a last resort, and this action would be subject to resource constraints.

Supporting improvement in learner health, safety and welfare

201 The LSC has clearly set out its approach to raising standards in *Learner Health, Safety and Welfare: The Learning and Skills Council Approach*. It is expected that providers will fund their own improvement support for learner health, safety and welfare. The LSC is not empowered to provide LSC-funded organisations with advice and assistance on health and safety legislation. This role must be fulfilled by the person deemed to be 'health and safety competent' within the funded organisation (competent advice as required by the Management of Health and Safety at Work Regulations 1999), or through external channels of advice. It should also be noted that LSIS does not currently provide support for this expert area of work.

Implications of Underperformance for Providers

202 If a provider is underperforming, this will clearly have an impact on a number of activities and opportunities. As outlined above, continued underperformance will usually result in a loss of funding. However, prior to any cessation of funding, the LSC may seek to minimise the impact on learners and public funding. As outlined in other sections of this document, this may include limiting the number of LSC-funded learners. There is a range of other restrictions that may also be implemented and other activities that may be affected. These relate to:

- capital developments;
- reorganisations and mergers;
- teacher training; and
- Centres of vocational excellence (CoVEs) and the Training Quality Standard.

Capital development

203 In itself, a Notice to Improve is not a reason to stop a college making, and progressing with, a capital application. However, as indicated in Annex A of the *LSC Capital Handbook*, a provider must be able to demonstrate that it meets the appropriate quality threshold. Where whole provider underperformance is evident, the provider in question would **not** be expected to meet this criterion. It is, however, anticipated that some providers that are subject to a Notice to Improve might be able to demonstrate enough improvement in quality (which would be confirmed by success rate data or inspection) to meet the threshold.

204 However, where a provider has only been issued with a financial Notice to Improve for financial health, a capital scheme could form a fundamental part of the college's strategic recovery plan. In such circumstances, the provider would not be able to achieve its strategic recovery unless it successfully delivers the capital project. Where this occurs, judgement on the progression on a capital bid would be on a case-by-case basis.

205 As the capital proposal progresses, it is likely that these colleges' Notices to Improve would be successfully met. If an application progresses (where the conditions of a Notice to Improve have not already been met), final approval and the transfer of any funds would be subject to the conditions of the Notice to Improve being met, or to improved inspection outcomes on re-inspection. All parties (the LSC, Ofsted and LSIS) would have to agree that there has been sufficient improvement.

206 Where there is significant underperformance, a provider can still apply for monies, as part of a current property strategy, for capital developments to support delivery in sector subject areas that are not underperforming (as the provider would be likely to meet the quality threshold). Where inadequate leadership and management are evident, the LSC is unlikely to agree to fund any capital development.

Reorganisations and mergers

207 If a college is under a Notice to Improve prior to its decision to proceed with a merger proposal, appropriate action to address the underperformance will need to be clearly reflected in the implementation plans for the merger. If the LSC issues the Notice after the colleges have taken the decision to merge, there will need to be clear evaluation of its impact on the proposal, as the LSC will need to ensure that the proposed merger will continue to meet its objectives and will deliver quality provision to local communities.

208 Where a college under Notice is dissolved as a result of a merger proposal, the Notice is not automatically transferred to the 'receiving' college or new college. However, the receiving/new college will be expected to address any area of underperforming provision that is retained. This process is likely to include new improvement indicators for the college, based on those in the original Notice. The LSC and the college will agree appropriate timescales for these improvement indicators to be met.

209 If a college under Notice is undergoing a merger, but will not dissolve (i.e. is the receiving partner), there will normally be no change to the Notice and the LSC expectation that the conditions will be met. If the Notice has been triggered by provision that will no longer be delivered following the merger, the conditions of the Notice will be reconsidered.

Teacher training

210 On 1 September 2008, DCSF introduced revised regulations on induction arrangements for newly qualified teachers (NQTs) in England, and updated the *Statutory Guidance on Induction for Newly Qualified Teachers in England*. The revised regulations for the first time enable FE institutions, from 1 September 2008, to host induction for NQTs if they wish, as long as they comply with the regulations and guidance. The statutory guidance explains when and how induction can take place in FE institutions; paragraphs 2.8–2.10 cover this in detail. Paragraphs 2.11 and 2.15 also give guidance on when offering statutory induction to NQTs is prohibited, and action to be taken when an NQT is already undertaking induction in an FE institution that receives an inadequate judgement following an Ofsted inspection.

Centres of vocational excellence and the Training Quality Standard

211 The LSC will deem the provider to have failed to meet the CoVE performance criteria if either or both of the following occur:

- If a provider is assessed by Ofsted as being inadequate in terms of leadership and management, overall effectiveness, and/or in the sector subject area of the CoVE;
- If a provider fails to meet the minimum levels of performance in the sector subject area of the CoVE.

212 In these circumstances, the LSC will suspend the provider's CoVE status (including suspending the payment of CoVE funding) until the underperformance is addressed and either the provider receives an improved Ofsted inspection grade or the relevant qualification success rates are shown to be improving.

213 A similar process applies to the Training Quality Standard. If a provider holds an Ofsted (and formerly Adult Learning Inspectorate) assessment of grade 4 for overall effectiveness, this will preclude it from applying for the Training Quality Standard.

214 If a college is subject to a Notice to Improve (based on underperformance of between 15 per cent and 25 per cent), this will preclude it from accreditation under parts A and B of the Training Quality Standard.

215 If a college or private training provider falls below the minimum levels of performance in any sector, this will preclude it from accreditation under part B of the Training Quality Standard for the relevant underperforming sector.

216 If, at any point, a provider that has achieved the Training Quality Standard is identified as having whole provider underperformance or is inadequate in relation to a sector, it will lose LSC funding for the associated provision and Training Quality Standard accreditation status will be suspended until:

- an improved Ofsted grade is achieved; or
- success rates within the relevant sector can be shown to have improved beyond minimum levels.

217 It should further be noted that if a provider that has achieved the Training Quality Standard merges with another provider (without the Training Quality Standard) it may need to undergo re-assessment as a merged institution.

National skills academies

218 National skills academies (NSAs) operate through networks of high-quality specialist providers to deliver employer-led and employer-responsive provision. LSC-funded NSA provision is subject to the same minimum levels of performance. However, each NSA has its own measure of quality that is required for it to become part of its network, which is aligned to and, in most cases, exceeds achievement of the Training Quality Standard.

219 Each NSA will have its own strategy for responding to those providers delivering NSA provision that fall below minimum levels of performance (in the relevant curriculum area(s)) or are issued with Notices to Improve. This may include additional support for the provider to improve success rates or grades, or withdrawal of the provision from the provider.

220 In such cases, however, it will be guided by the actions placed upon the provider by the LSC. NSAs will need to work with relevant regions to understand the restrictions/conditions placed on those providers and address how this may affect NSA delivery. They will also need to have a strategy in place to ensure that they are able to continue providing high-quality provision, which, in some cases, may mean moving provision to other providers with no performance issues.

Complaints

221 If a provider wishes to dispute, or intends to make representations about, the LSC's decision to issue a Notice to Improve, or to withdraw funding as a result of failure to meet the minimum levels of performance or as a result of Ofsted inspection judgements, it should not seek to follow the contract section outlining the operation of dispute resolution. The provider should follow the published procedure for making complaints about the Council's administration. This is available within Appendix B of this document.

Appendix A: Qualifications Reform

Vocational Qualification Reform programme (including implementation of the Qualifications and Credit Framework)

1 The LSC is a key partner in the reform of vocational qualifications. The Vocational Qualifications Reform (VQR) programme covers all four UK nations, and its broad scope is to bring about the reform of vocational qualifications across all of them. As part of the VQR programme, England, Wales and Northern Ireland will implement a revised unit- and credit-based qualification framework. The key areas of work across the programme are the reform and rationalisation of sector qualifications and other learning provision, the development and implementation of the Qualifications and Credit Framework (QCF) and ensuring that planning, funding and performance (across the three countries) aligns with and fully supports the QCF. By 2010, it is expected that the QCF will be fully functional; the LSC has already signalled its intention of beginning to focus funding and performance on QCF qualifications from August 2009. Over 2008/09 and 2009/10, we will undertake work to see how data systems, funding approaches, performance measures and government targets – and, in particular, priorities – can be fully aligned to deliver the full flexibility of the QCF by 2010.

2 During 2008/09, the LSC will be taking forward trials of unit-based funding in the QCF, as well as monitoring and evaluating the introduction of a definition of full Level 2 (and full Level 3) in the context of the QCF. Alongside the work on unit-based funding, the LSC will be trialling a Credit Success Rate indicator, which takes account of the volume and levels of credits planned and achieved. What this will mean for minimum levels of performance will also be considered. Therefore, in 2009/10, although current qualification success rates will continue to apply to QCF provision for the purposes of minimum levels of performance, the introduction of a Credit Success Rate will begin to enable us to positively track and monitor the accumulation of credit across learners and providers. From August 2009, we will begin to embed the QCF more fully across the Framework for Excellence. Further information about how performance is to be aligned with the QCF in 2010/11 will follow in autumn 2009.

Foundation Learning Tier (FLT)

3 The LSC and the QCA are working together to reform provision below Level 2. By 2010, a revised set of credit-based units and high-quality qualifications will be in place, with clear progression routes through Entry Level and Level 1 to Level 2. These aim to increase participation and achievement among learners and help them to progress through work and life. This programme of work is known as the FLT, a term that is also used to describe qualifications at Entry Level and Level 1 within the QCF. It covers both in part of the wider 14–19 and adult-focused VQR programme.

4 In 2009/10, as part of the second year of phased implementation, progression pathways (made up of qualifications at Entry Level and Level 1 of the QCF) will continue to become part of mainstream provision, building on the experience of the first-stage developmental and small-scale delivery during 2008/09. Progression pathways within the FLT will eventually replace current arrangements in terms of programmes such as e2e, Foundation Learning in FE (to include provision for those with learning difficulties and/or disabilities below Level 2) and some aspects of First Steps learning, as well as the Key Stage 4 Engagement programme.

5 During 2008/09, we will explore success measures relating to anticipated participation, achievement and progression for progression pathways, and how these will inform minimum levels of performance. This will also involve the inclusion of provision at Entry Level and Level 1 of the QCF in the work around unit funding, and the trialling of the Credit Success Rate. As with wider QCF development, this work will help to establish how we embed the FLT – and progression pathways, in particular – in the Framework for Excellence.

Appendix B:

References and Related Policies

DCSF (2008) *Statutory Guidance on Induction for Newly Qualified Teachers in England*. London, DCSF. Available at: www.teachernet.gov.uk/_doc/12703/080623%20Induction%20Statutory%20Guidance.pdf

DCSF and DIUS (2008) *Raising Expectations: enabling the system to deliver* (2008). London, DCSF/DIUS. Available at: www.dcsf.gov.uk/14-19/documents/raising%5Fexpectations%5Fenabling%5Fthe%5Fsystem%5F080317.pdf

DfES (2006) *Further Education: Raising Skills, Improving Life Chances*. London, DCSF. Available at: www.dcsf.gov.uk/publications/furthereducation/docs/6514-FE%20White%20Paper.pdf

DIUS (2008) *Further Education Colleges – Models for Success*. London, DIUS. Available at: www.dcsf.gov.uk/furthereducation/index.cfm?fuseaction=content.view&CategoryID=35

HM Government (1992) *The Further and Higher Education Act 1992*. London, HM Government. Available at: www.opsi.gov.uk/ACTS/acts1992/Ukpga_19920013_en_1.htm

HM Government (2000) *The Learning and Skills Act 2000*. London, HM Government. Available at: www.opsi.gov.uk/Acts/acts2000/ukpga_20000021_en_1

HM Government (2007) *The Further Education and Training Act 2007*. London, HM Government. Available at: www.opsi.gov.uk/acts/acts2007/ukpga_20070025_en_1

Ofsted (2007) *Proportionate inspection of further education colleges*. London, Ofsted. Available at: [www.ofsted.gov.uk/Ofsted-home/Publications-and-research/Browse-all-by/Post-16-learning-and-skills/Read-about-this-new-section/Colleges/Proportionate-inspection-of-further-education-colleges/\(language\)/eng-GB](http://www.ofsted.gov.uk/Ofsted-home/Publications-and-research/Browse-all-by/Post-16-learning-and-skills/Read-about-this-new-section/Colleges/Proportionate-inspection-of-further-education-colleges/(language)/eng-GB)

Ofsted (2008) *A focus on improvement: proposals for further education and skills system inspections from September 2009*. London, Ofsted. Available at: www.ofsted.gov.uk/Ofsted-home/Publications-and-research/Browse-all-by/Documents-by-type/Consultations/A-focus-on-improvement-proposals-for-further-education-and-skills-system-inspections-from-September-2009

LSC (2005) *Procedure for dealing with complaints about the Learning and Skills Council*. Coventry, LSC. Available at: <http://readingroom.lsc.gov.uk/Lsc/2005/externalrelations/complaintlsc/procedure-for-dealing-with-complaints-about-the-lsc.pdf>

LSC (2006a) *Learner Health, Safety and Welfare: The Learning and Skills Council Approach*. Coventry, LSC. Available at: <http://readingroom.lsc.gov.uk/lsc/National/nat-learnerhealthsafetyandwelfarelscapproach-ps-27022007-v4-0.pdf>

LSC (2006b) *LSC Capital Handbook*. Coventry, LSC. Available at: http://readingroom.lsc.gov.uk/lsc/National/LSC_Capital_Handbook.pdf

LSC (2007a) *Identifying and Managing Underperformance*. Coventry, LSC. Available at: http://readingroom.lsc.gov.uk/lsc/National/nat-identifyingmanagingunderperformance_pt1-jan07.pdf

LSC (2007b) *Identifying and Managing Underperformance – Technical Support Annexes*. Coventry, LSC. Available at: http://readingroom.lsc.gov.uk/lsc/National/nat-identifyingmanagingunderperformance_pt2-jan07.pdf

LSC (2007c) *Single Equality Scheme: Our Strategy for Equality and Diversity*. Coventry, LSC. Available at: <http://readingroom.lsc.gov.uk/Lsc/National/nat-singleequalityscheme-30apr07.pdf>

LSC (2008a) *Government Investment Strategy 2009–10, LSC Grant Letter and LSC Statement of Priorities – Investing in our future through learning and skills*. Coventry, LSC. Available at:

<http://readingroom.lsc.gov.uk/lsc/National/nat-statementofpriorities200910-nov08.pdf>

LSC (2008b) *Identifying and Managing Underperformance*. Coventry, LSC. Available at:

http://readingroom.lsc.gov.uk/lsc/National/nat-identifyingmanagingunderperformance_yr2_pt1-jan08.pdf

LSC (2008c) *Identifying and Managing Underperformance – Technical Annexes*. Coventry, LSC. Available at:

http://readingroom.lsc.gov.uk/lsc/National/nat-identifyingmanagingunderperformance_yr2_pt2-jan08.pdf

LSC (2008d) *The Learning and Skills Council's Statutory Intervention Policy*. Coventry, LSC. Available at:

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

LSC and LSIS (2008) *Self-assessment: Updated Guidance for the Further Education System*. Coventry, LSC. Available at: <http://readingroom.lsc.gov.uk/lsc/National/nat-selfassessmentguidancefe-oct08.pdf>

The Single Voice (2008) *Consultation Prospectus for Self Regulation*. London, The Single Voice. Available at:

www.feselfregulation.org.uk/pdfs/SV_081024%20Consultation%20Prospectus.pdf

Learning and Skills Council
National Office

Cheylesmore House
Quinton Road
Coventry CV1 2WT
T 0845 019 4170
F 024 7682 3675
www.lsc.gov.uk

© LSC December 2008
Published by the Learning and Skills Council

Extracts from this publication may be reproduced for non-commercial educational or training purposes on condition that the source is acknowledged and the findings are not misrepresented.

This publication is available in electronic form on the Learning and Skills Council website:
www.lsc.gov.uk.

If you require this publication in an alternative format or language, please contact the LSC Help Desk: 0870 900 6800

Publication reference: LSC-P-NAT-080185A