



Further Education Intervention Policy

Guidance

Date of issue: May 2017

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Audience Further Education Institutions, Colegau Cymru, and interested parties in the further education sector in Wales.

Overview This guidance sets out the Welsh Government's overall approach to addressing serious concerns identified in further education institutions, when intervention may be required, and how that intervention will operate in principle.

Action required No action – information purpose.

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Mae'r ddogfen yma hefyd ar gael yn Gymraeg.

This document is also available in Welsh.

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Further Education Intervention Policy

This paper sets out the Welsh Governments' overall approach to addressing serious concerns identified in further education institutions, when intervention may be required, and how that intervention will operate in principle.

Context

1. It relates to the exercise of the Welsh Ministers' powers of intervention in further education under section 57 of the Further and Higher Education Act 1992 (FHEA 1992) which applies to institutions operating in Wales within the further education sector as defined by the FHEA 1992. It does not apply to any other Welsh Government funded providers.
2. It sets out the Welsh Governments' approach and process for managing intervention in further education institutions (FEIs) in Wales. The extant policy focuses specifically on when intervention may be required and how that intervention will operate in principle. Normally, intervention will be considered only in the most serious cases of poor performance, where a lack of capacity to improve is evident, and/or where a serious risk to the delivery of education and training becomes apparent.

Policy Purpose and Principles

3. The following strategy describes the powers available to the Welsh Ministers to intervene where there are serious problems identified in the operation of FEIs in Wales, and outlines the approach and process attaching to consideration of whether the intervention powers should be used.
4. Welsh Government policies have been consistent in emphasising the importance of an ethos of continuous quality improvement; in particular highlighting the importance of effective leadership and management at both an institutional and a partnership level. This document is designed to support that rationale. The intervention process is one of a number of existing interrelated measures employed in the pursuit of continuous quality improvement. Quality assurance, audit and financial health monitoring form related elements of this strategy.
5. The purpose is to detail the circumstances in which the Welsh Ministers will operate to protect learners' interests, to safeguard the education of existing learners, and sustain high quality responsive local provision for the future. The operation of this intervention process will be underpinned by the following principles:

- Institutional performance will be regularly reviewed by the Welsh Government in order to identify areas of concern, with an open dialogue on any remedial action required;
 - the level of intervention will be proportionate to the risk to learners and public funding;
 - actions, as far as possible, will be agreed between the governing body, the Principal of the institution concerned, and the Welsh Government;
 - the institution will normally be given an appropriate period of time to improve; and,
 - The Welsh Ministers will exercise their powers of intervention as a last resort.
6. The approach to intervention has been set out in the form of a process framework, rather than as a series of procedures. This is because it is necessary to retain an element of discretion in managing intervention; each circumstance must be considered on a case-by-case basis.

Background

7. The Further and Higher Education (Governance and Information) (Wales) Act 2014 (the 2014 Act) received Royal Assent on the 27 January 2014. The provisions of the Act served to enhance the autonomy and decision making abilities of FEIs by removing and modifying existing legislative controls on them. The Welsh Government recognises the need to balance the increased autonomy provided by the 2014 Act with the need to safeguard public funds, the public interest and learners.

FEIs will continue to be accountable for the use of public funds and remain subject to robust scrutiny by the Welsh Government and Estyn¹ to ensure public investment benefits the learner.

8. FEIs will continue to be subject to:
- *The annual Grant funding allocation letter* – which sets out the terms and conditions which must be met to qualify for funding, and the triggers for the withdrawal of funding.
 - *The Quality and Effectiveness Framework*, which includes monitoring of learner outcomes against Welsh Government targets, and the requirements for annual self-assessment.
 - *Estyn inspections* and link inspector visits.
 - *The Financial Memorandum* – this places a requirement on the institution to prepare a financial strategy which underpins the Institutional Plan.

¹ Estyn is the office of Her Majesty's Chief Inspector of Education and Training in Wales which inspects quality and standards in education and training providers in Wales.

- *The Welsh Government Audit code of practice*, setting out mandatory requirements which link back to the conditions of funding and Financial Memorandum.
 - *Financial health and audit monitoring*.
9. Section 37 of the Learning and Skills Act 2000 allows the Welsh Ministers to develop schemes for assessing the performance of institutions providing post-16 education and to take these assessments into account when determining the level of funding to provide.
 10. In addition, under section 54 of the FHEA 1992, the Welsh Ministers can require local authorities and the governing bodies of institutions in the further education sector to provide them with such information as they may require for the purposes of the Welsh Ministers' exercise of any of their functions.
 11. Finance and funding are considered the critical areas which could impact on the day to day operation of an institution, but early warning of emerging issues may be picked up by the monitoring of other areas such as quality and breadth of provision. The existing performance framework including audit, quality assurance, and strategic planning should identify issues before they require intervention.
 12. A potential outcome of the early identification of institutional decline or failure is that the Welsh Ministers could offer support to assist institutions over the short term.
 13. The Welsh Government routinely evaluates the colleges' annual financial forecasts and returns and Welsh Government staff may visit a college to better understand the financial position to provide assurance to Ministers. Welsh Government officials also review the internal and external audit annual reports of a college alongside the Clerks' report to identify any issues with risk management, control or governance within an institution. Visits to a college to assess the internal control arrangements can take place if required.

The powers to intervene

14. The Welsh Ministers may intervene in the conduct of an FEI if they are satisfied that any one of the conditions listed in section 57 of the FHEA 1992 is met.
These conditions are:
 - that the institutions' affairs have been or are being mismanaged by its governing body;
 - that the institutions' governing body have failed to discharge any duty imposed on them by or for the purposes of any Act or any Measure of the National Assembly for Wales;
 - that the institutions' governing body have acted or are proposing to act unreasonably with respect to the exercise of any power conferred or the performance of any duty imposed by or under any Act or any Measure of the National Assembly for Wales;

- that the institution is performing significantly less well than it might in all the circumstances reasonably be expected to perform, or is failing or likely to fail to give an acceptable standard of education or training.
15. The Welsh Ministers have powers to intervene in the following ways:
 - removing all or any of the governors;
 - appointing new members to the governing body, if there are vacancies;
 - directing a governing body as to the exercise of their powers and performance of their duties. For example, a governing body could be directed to:
 - make collaboration arrangements with another FEI or school;
 - resolve that the FEI be dissolved².
 16. The power of direction does not include a power to direct a governing body to dismiss a member of staff but the Welsh Ministers may direct the governing body to carry out the relevant procedures relating to considering the dismissal of a member of staff.
 17. The governing body must comply with any direction given by the Welsh Ministers under section 57 as outlined in paragraph 15 above.
 18. Aside from section 57 of FHEA 1992, the Welsh Ministers may also decide to limit or cease funding, linked to the terms and conditions upon which funding is issued.

The Route to Intervention

19. A staged approach to intervention underpins the operation of the policy. It is therefore important to have a clear understanding of how decisions to intervene are achieved. Intervention will normally only take place following a lengthy process of support and dialogue. As such the stages are:
 - a. Dialogue and identification of shortcomings;
 - b. Support and change;
 - c. Welsh Government issue a 'minded to intervene' letter
 - d. Institution has 'right of appeal';
 - e. Intervention dependent on outcome

Stage A: Dialogue and Identification of shortcomings

20. An FEI is, through its senior management team and staff, responsible for the quality of education and training it offers to learners. The role of the governing body is also crucial, since it is responsible for determining the educational character and mission of the institution and maintaining an oversight of its activities. This is realised through rigorous self-assessment and quality assurance, which in turn leads to continuous improvement.

² If this happens the FE body will be treated as if they had followed the publication and consultation procedures set out in section 27 of the FHEA 1992 (as substituted by section 3 of the new Act).

21. Ongoing dialogue between further education institutions and the Welsh Government is fundamental. This dialogue allows the Welsh Government to discuss any concerns with the institution as they emerge, and the institution to show evidence of improvement and demonstrate that any issues are being actively managed and are under control.
22. Ultimately, the responsibility for ensuring good financial health, raising the quality of provision by challenging poor performance, and the success of a college in fulfilling its mission, rests with the governing body.
23. Concerns will normally be identified by:
 - the Welsh Government through the monitoring of learner outcomes;
 - Estyn through the inspection process; the award of judgements for standards and/or leadership and management below an 'adequate' level at any inspection or re-inspection;
 - the Welsh Government in relation to financial health and control, and
 - the Welsh Government in relation to the health and safety monitoring of work based learning provision.
24. Where concerns are identified, the Welsh Government will expect the governing body and the senior management of the institution to act to address the situation. An **Improvement Plan** will be drawn up by the institution and agreed with the Welsh Government, and the institution will be expected to meet the Plans' milestones within a set timescale, usually 12 months.
25. In cases where concerns are identified by means of an Estyn inspection, FEIs are required to produce an action plan within two months of the publication of reports. The action plan must be approved by Estyn. Re-inspection normally takes place between 12 – 18 months from the original inspection.
26. If an institution is assessed as Category D under the financial health monitoring procedures of the Welsh Government, i.e. "*The institutions' financial position is weak and does not support its financial strategy or the institutional plan*", then the Welsh Government will require the institution to prepare a recovery plan. The Welsh Government will also require the institution to submit both management accounts and a monthly report to the Governing Body commenting on the progress against this plan, and submit a copy of these documents to its officials. If no positive progress has been made against the recovery plan in 12 months then intervention will be triggered, with the issue of a 'minded to intervene' letter (para.19 (c)).
27. If the FE annual returns or a 'reportable event' linked to audit requirements, identify a significant weakness in the colleges' risk management control and governance arrangements then this would trigger the issue of a 'minded to intervene' letter by the Welsh Government. If the audit opinion is qualified then Welsh Government officials would discuss the reason for the qualification with the Governing Body and senior management team to determine the nature of the qualification. The outcome of these discussions would determine whether intervention would be immediate, e.g. as outlined in para.39 below in

cases where evidence of serious misuse of public funds, fraud or deception is proven, or if recovery or improvement plans were appropriate.

28. In addition, where Health and Safety Executive (HSE) inspectors, or their representatives, identify concerns with an institution and issue improvement or prohibition notices, issue formal cautions etc., the Welsh Government will support the HSE or enforcing authority to ensure learner health and safety is not compromised.

Stage B: Support and change

29. Where concerns are identified, relevant and appropriate support will, as far as possible, be identified to help the institution make the necessary improvements. This will be done on a case by case basis to draw on other services and facilities as agreed between the institution and the Welsh Government. Where there are financial concerns, the Welsh Government may provide specific expertise and guidance to assist the institution. Where appropriate, with quality issues, the Welsh Government and the institution will engage closely with Estyn in the operation of the improvement support.
30. An agreed 'improvement period', (where the institution will be expected to meet the Plans' milestones within a set timescale, usually 12 months), alongside offering the institutions' senior management an appropriate level of support, will allow the opportunity to identify and resolve problems within a reasonable period of time as agreed with the governing body, without the need for the Welsh Ministers to intervene. The institution remains in control of its future, and the governing body retains responsibility for the institutions' affairs, meeting their statutory responsibilities and improving the institutions' performance.

Stage C: Welsh Government 'minded to intervene'

31. It is the expectation that, at the conclusion of the 'improvement' period allowed for fulfilling the **Improvement Plan**, the majority of institutions will have addressed the concerns identified. Exceptionally, however, an institution may fail to demonstrate that progress is being made by not reaching the set milestones, or not having the capacity and capability to deliver its **Improvement Plan**. This would demonstrate a significant risk to learners and to public funding.
32. Where the institution has not met the milestones set out in the agreed **Improvement Plan**, the governing body and the Welsh Government will agree, where possible, an appropriate course of action. (The outcome, for example, might include the institution seeking to formally collaborate or merge; this would be a decision for the institution). The transitional period in such a case will be managed by the institution through a short-term notice agreed with the Welsh Government. This period and any related actions will be led by the governing body, working closely with the Welsh Government.

33. Before exercising their powers to intervene, other than in exceptional cases where immediate intervention is deemed necessary, (as described in para.39) the Welsh Ministers will formally write to the governing body notifying them of their concerns, and stating that they are minded to intervene by exercising their statutory powers under section 57(4) of FHEA 1992.

The notification will set out:

- the requirement for an action plan with realistic timescales to be drawn up and put in place to avoid the need for intervention;
- the rationale for being minded to exercise their statutory powers under section 57(5), including the reasons why any previous plans or responses by the institution are not considered to be sufficient; and
- relevant supporting evidence.

Stage D: Right of Appeal

34. The governing body will have the right to appeal the 'minded to intervene' notification. If, after considering the governing body's response, the Welsh Ministers are still minded to proceed with intervention they will set out the reasons in writing and allow the governing body a further opportunity to respond. This exchange may go through at least two iterations during the allotted time period (i.e. 30 working days in total from the notification).
35. Within 10 working days of the conclusion of the period of representations, the Welsh Ministers will consider the evidence presented to them and duly inform the governing body of their decision.
36. The Welsh Ministers' preferred option will be to not exercise their powers unless absolutely necessary, and where it has not been possible to resolve issues by working in partnership with the institution. However, the more serious the perceived risk to learners, the more robust the intervention is likely to be.

Stage E: Intervention

37. However, while it is anticipated that this will be the exception, there may be occasions where an institution has not met the milestones set out in the agreed **Improvement Plan** and the Welsh Government cannot agree an appropriate course of action with the governing body. This could be the result, for example, of the governing body not providing the necessary leadership to take action. Where this occurs and it is considered that all the possible alternative approaches to instigating change are exhausted, the Welsh Ministers may exercise their statutory powers of intervention.
38. Where intervention is deemed the appropriate course of action, the FEI is likely to have demonstrated one or more of the following characteristics:

- poor financial health or breach of Financial Memorandum requirements and little or no evidence that its' governing body and/or senior management team are able to secure improvement within a reasonable period of time;
- the award of grades for standards and/or leadership and management that fall below the quality threshold in an Estyn re-inspection;
- serious and immediate risk to learner health and safety;
- serious and systemic failures in governance resulting in flawed decision making and/or breaches of the instrument and articles of governance;
- failure to address audit recommendations; and
- significant failure to deliver adequate quality of provision and little or no evidence that the governing body and/or senior management team is able to secure sufficient improvement within a reasonable period of time.

This is not an exhaustive list, and is included for illustration purpose only.

Immediate Intervention

39. In exceptional circumstances, where there is an immediate serious and exceptional risk to learners or to public funding, and urgent action is required, the Welsh Ministers may wish to intervene with more urgency than a staged approach would allow. These circumstances may include:
- evidence of serious misuse of public funds, fraud or deception;
 - failures in management which result in immediate serious risk to learners;
 - a reportable event linked to a serious breach of health and safety guidelines;
 - serious breaches of the Financial Memorandum; or
 - serious breaches of the Articles and Instrument of Government.
40. Under these circumstances there will be a requirement for an urgent and direct dialogue with the governing body and senior managers of the institution to determine the scope and nature of any necessary action. Any intervention deemed to be necessary by the Welsh Ministers will be communicated in a formal notification (an order under section 57(4) of the Further and Higher Education Act 1992), detailing the immediate action to be taken.
41. The Welsh Ministers may exercise their statutory powers of intervention after following the process outlined in paragraphs 37 – 39.

Checks and Balances

42. There are a range of safeguards already in place to prevent the arbitrary use of any Intervention powers by the Welsh Ministers. These include:
- the Welsh Ministers must act within their powers;
 - Welsh Government officials must adhere to the civil service code and its core values of integrity, honesty, objectivity and impartiality; and

- the corporation is the employer of staff in an FE institution, and the Welsh Government must have regard to the corporations' obligations under employment and equal opportunities legislation in the exercise of the power to give direction to the governing body to give effect to procedures for the consideration of the case for dismissal of members of staff.
43. The Welsh Ministers consulted with the sector in the development of the dissolution policy during the making of the Further and Higher Education (Governance and Information) (Wales) Act 2014, ensuring that stakeholders' views were reflected, and that appropriate processes which have the support of the sector are in place.
 44. Governing bodies can challenge the decisions through the Welsh Governments' published complaints procedure.
(<http://gov.wales/docs/caecd/publications/151027complaintseng.pdf>).
 45. Governing bodies could also seek a Judicial Review of the decision.

The Route to Intervention

