



## **The Corporation of Bishop Auckland College**

# **Code of Conduct for Governing Body Members**

Approved by Corporate Board on 10 July 2023

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### **1. Introduction**

- 1.1 This Code is intended as a guide, to indicate the standards of conduct and accountability which are expected of Governors, to enable them to understand their legal and ethical duties and to assist them both in carrying out those duties and in their relationship with the Governing Body and Principal as the Chief Executive. This Code therefore is aimed at promoting effective, well informed and accountable college governance, and is not intended to be a definitive or authoritative statement of the law or good practice.
- 1.2 In addition to this Code, Governors are recommended to familiarise themselves with the source documents listed in the Schedule.
- 1.3 This Code should not be read as an exhaustive statement of duties, powers or provisions and Governors should refer to the source documents listed in the Schedule. If a Governor is in doubt about the provisions of this Code or any of the source documents, the Clerk to the Corporate Board should be consulted and, if necessary, professional advice should be obtained. However, ultimate responsibility for the appropriateness of conduct as a Governor of the College and for any act or omission in that capacity rests with the individual Governor.
- 1.4 This Code applies to every committee or working party of the Governing Body and to every subsidiary company or joint venture of the College to which Governors may be appointed.
- 1.5 By accepting appointment to the Governing Body (the Corporation), each Governor agrees to accept the provisions of this Code.
- 1.6 Each Governor by accepting the provisions of this Code agrees that any breach of the Code by them may lead to the termination of their appointment as a Member in accordance with clause 9 of the Corporation's Instrument and Articles of Government.

### **2. Interpretation**

- 2.1 This document applies to and refers to the Corporation of Bishop Auckland College and its members. The terms Governor and Governing Body are used interchangeably with the words Member and Corporation.

2.2 For purposes of this Code words importing gender import any gender and all other definitions have the same meaning as given in the College's Instrument and Articles of Government. In this code:

'Code of Good Governance' means the English Colleges' Code of Good Governance issued by the Association of Colleges in March 2015 and updated versions following;

'DfE' means the Department for Education; and

'ESFA' means the Education and Skills Funding Agency or any successor body.

### 3. Aims and Values

3.1 Governors are expected to promote the core purposes and aims of the College as set out in the vision, mission and statement of values set out below.

**Mission** To provide outstanding learning and training for individuals, business and the community.

**Vision** To be recognised as a leading provider of Further and Higher Education, contributing to the social, economic and environmental wellbeing of the region. We will support individuals of all abilities and aspirations to fulfil their potential through learning, achievement and progression.

#### Values

As an employer and a learning organisation, we will: -

- celebrate achievement in learning of all kinds;
- act fairly, openly and transparently;
- achieve and maintain the highest standards in everything that we do;
- fulfil our commitment to equality and diversity and the rights of others;
- conduct our activities in a manner which makes a positive contribution to sustainability and the environment;
- support and work in partnership with those who share our Vision and these Values;
- recognise that we work in an increasingly global economy and reflect this in our curriculum;
- maintain a safe and inclusive environment in which students can learn, achieve and progress.

3.2 The Governing Body recognises its obligations to all those with whom it and/or the College have dealings, including students, employees, suppliers, agents, other educational institutions and the wider community. In particular, the Governing Body is committed to:

- having close regard to the voice of the learner;
- combating any discrimination within the College on the grounds of the characteristics protected by the Equality Act 2010 (“the 2010 Act”) and promoting equality in accordance with its duty under the 2010 Act;
- engaging with the community which the College serves in order to understand and meet its needs; and
- observing its duty under the Education (No.2) Act 1986 to take reasonable steps to ensure freedom of speech for members of the College community and visiting speakers and its duty under the Counter Terrorism and Security Act 2015 to have regard to the need, when exercising its functions, to prevent people from being drawn into terrorism.

3.3 The Governing Body is also committed to ensuring that it conducts its business in accordance with the highest ethical standards as set out in more detail in this Code.

3.4 Although further education corporations are classified as part of the private not for profit sector for government accounting purposes, they remain public bodies in many legal contexts. In particular, public service values are at the heart of the education service. High standards of personal and corporate conduct based on the principles set out in Appendices 1 and 2 of this Code, and the recognition that students and other users of the College’s services come first, are a requirement of being a Governor, and should underpin all decisions taken by the Governing Body.

## **4. Duties**

4.1 Governors are in the position of charity trustees and as such owe a fiduciary duty to the College. This means that they should show it the highest loyalty and act in good faith in its best interests. Each Governor should act honestly, diligently and (subject to the provisions appearing in paragraph 9 of this Code relating to collective responsibility) independently. The actions of Governors should promote and protect the good reputation of the College and the trust and confidence of those with whom it deals.

4.2 Decisions taken by Governors at meetings of the Corporation and its committees must not be for any improper purpose or personal motive. Decisions taken must always be for the benefit of the College, its students and staff and other users of the College and must be taken with a view to safeguarding public funds.

Accordingly, Governors must not be bound in their speaking and voting by mandates given to them by other bodies or persons (including the bodies that elected them).

- 4.3 Governors must observe the provisions of the College's Instrument and Articles of Government and in particular the duty to give immediate notice to the Clerk to the Corporate Board should they become disqualified from continuing to hold office and also the responsibilities given to the Governing Body by the College's Articles of Government. Those responsibilities, including a list of "reserved" responsibilities which are so important that they must not be delegated, are set out in Appendix 3.
- 4.4 Governors should comply with the Standing Orders and terms of reference of the Corporation and its committees to ensure that the Corporation conducts itself in an orderly, fair, open and transparent manner. Governors must keep those Standing Orders and terms of reference under periodic review.
- 4.5 Governors should also have regard to the different, but complementary, responsibilities given to the Principal as the College's Chief Executive. The responsibilities given to the Principal by the Articles of Government are set out at Appendix 4. Whereas it is the Governing Body's function to decide strategic policy and overall direction and to monitor the performance of the Principal and any other senior postholders, it is the Principal's role to implement the Corporation's decisions, and to manage the College's affairs within the budgets and framework fixed by the Corporation. Governors should work together so that the Corporation and the Principal as Chief Executive perform their respective roles effectively.
- 4.6 Governors should refer to the Corporation Clerk for advice relating to governance functions which are set out in Appendix 4 and have regards to the Corporation Clerk's independent advisory role.

## **5. Statutory Accountability**

- 5.1 Governors are collectively responsible for observing the duties set out in the Financial Memorandum and the Funding Agreement which the College has entered into with the ESFA as a condition of receiving public funds. A summary of some of the more important requirements of the Financial Memorandum and the Funding Agreement with the ESFA is set out in Appendix 5.
- 5.2 Although the ESFA is one of the main providers of funds to the College, Governors should note that they are also responsible for the proper use of income derived from other sources, such as the Higher Education Funding Council for England (HEFCE) and the European Union (EU) and for the control

and monitoring of expenditure of such income, in order to meet the requirements of the relevant funding body and public audit. Where funding is received directly from HEFCE the College will have a memorandum of assurance and accountability with HEFCE which sets out the basis on which such funding is provided. Where HEFCE funding is received indirectly via a collaboration with a HEFCE funded institution such funding will be subject to obligations contained in the memorandum of co-operation between the College and that institution.

- 5.3 As accounting officer for the ESFA, its Chief Executive is directly responsible and accountable to Parliament for ensuring that the uses to which the ESFA puts its funds are consistent with the purposes for which the funds were given and comply with the conditions attached to them. The Principal, as accounting officer for the College, is also directly responsible and accountable to Parliament, through the Committee of Public Accounts, for the effective stewardship by the College of public funds. The Principal may be required to appear before the Committee of Public Accounts, alongside the ESFA's Chief Executive, to give an account of the use made by the College of such funds. The Governing Body is accountable to Parliament for ensuring the financial health of the College, and to the Courts for ensuring that the College is conducted in accordance with the Education Acts and the general law.

## **6. Skill, Care and Diligence**

A Governor should in all his or her work for the College exercise such skill as he or she possesses and such care and diligence as would be expected from a reasonable person in the circumstances. This will be particularly relevant when Corporation Members act as agents of the College, for example, when functions are delegated to a committee of the Governing Body or to the Chair. Corporation Members should be careful to act within the terms of reference of any committees on which they serve.

## **7. Powers**

Governors are responsible for taking decisions which are within the powers given to the Corporation by Parliament under sections 18 and 19 of the Further and Higher Education Act 1992, as amended. A summary of those powers is set out in Appendix 6. If a Governor thinks that the Corporation is likely to exceed its powers by taking a particular decision, he or she should immediately refer the matter to the Clerk to the Corporate Board for advice.

## **8. Conflicts of Interest**

- 8.1 Like other persons who owe a fiduciary duty, Corporation Members should seek to avoid putting themselves in a position where there is a conflict (actual or potential) between their personal interests and their duties to the Governing

Body. They should not allow any conflict of interest to arise which might interfere with the exercise of their independent judgement.

8.2 Governors are reminded that under the College's Instrument of Government and its policy on Conflicts of Interest and the general law they must disclose to the Corporation any direct or indirect financial interest they have, or may have, in the supply of work to the College or the supply of goods for the purposes of the College, or in any contract or proposed contract concerning the College, or in any other matter relating to the College or any other interest of a type specified by the Corporation in any matter relating to the College, or any duty which is material and which conflicts or may conflict with the interests of the Governing Body.

8.3 If an interest of any kind (including an interest of a spouse / partner / business associate / close relative of the governor) is likely or would, if publicly known, be perceived as being likely to interfere with the exercise of a Governor's independent judgement, then:

8.3.1 the interest, financial or otherwise, should be reported to the Corporation Clerk;

8.3.2 the nature and extent of the interest should be fully disclosed to the Governing Body before the matter giving rise to the interest is considered;

8.3.3 if the Governor concerned is present at a meeting of the Corporation, or any of its committees, at which the supply, contract or other matter constituting the interest is to be considered, the Governor should:

- not take part in the consideration or vote on any question with respect to it and shall not be counted in the quorum for that meeting; and
- withdraw from that Corporation or committee meeting where required to do so by a majority of the members of the Corporation or committee present at the meeting.
- If, as a consequence of this provision, the meeting becomes inquorate, no decisions can be taken and the meeting can be advisory only.

8.4 For the purposes of clause 8.3 "close relative" includes but is not limited to a father, mother, brother, sister, child, grandchild and step-father / mother / brother / sister / child.

8.5 Where it is proposed that the Corporation should grant a member a financial interest (such as a contract for the supply of goods or services) the Corporation

must observe the requirements of the Charities Act 2011. The Corporation may wish to take legal advice before granting such an interest to a member.

- 8.6 Governors must not receive gifts, hospitality or benefits of any kind from a third party which might be in breach of the Bribery Act 2010 and the College's Anti-Bribery Policy or be seen to compromise their personal judgement or integrity. Any offer or receipt of such gifts, hospitality or benefits should immediately be reported to the Corporation Clerk.
- 8.7 The Clerk to the Corporate Board will maintain a Register of Governors' Interests which will be open for public inspection. Governors must disclose routinely to the Corporation all business interests, financial or otherwise, which they or persons associated with them may have, and the Clerk to the Corporate Board will enter such interests on the Register. Governors must give sufficient details to allow the nature of the interests to be understood by enquirers. Governors should inform the Clerk to the Corporate Board whenever their circumstances change and interests are acquired or lost. In deciding whether an interest should be disclosed, Governors should have regard to the meaning given to "interest" in paragraphs 8.3 and 8.5 of this Code.

## **9. Collective Responsibility**

- 9.1 The Governing Body operates by Governors taking majority decisions in a corporate manner at quorate meetings, including meetings held by video conferencing as provided for in the Instrument and Articles. Therefore, a decision of the Governing Body, even when it is not unanimous, is a decision taken by the Corporation members collectively and each individual Governor has a duty to stand by it, whether or not he or she was present at the meeting of the Governing Body when the decision was taken.
- 9.2 If a Governor disagrees with a decision taken by the Governing Body, his or her first duty is to have any disagreement discussed and minuted. If the Governor strongly disagrees, he or she should consult the Chair and, if necessary, then raise the matter with the Governing Body when it next meets. If no meeting is scheduled, the Governor should refer to the power of the Chair or any five Governors under the College's Instrument of Government to call a special meeting. If appropriate, this power should be exercised, requesting the Clerk to the Corporate Board to circulate the Governor's views in advance to the other Corporation Members. Alternatively, as a final resort, the Governor may decide, after consulting the Chair, to offer his or her resignation from office.

## **10. Openness and Confidentiality**



- 10.1 Because of the Governing Body's public accountability and the importance of conducting its business openly and transparently, Governors should ensure that, as a general principle, students and staff of the College have free access to information about the proceedings of the Corporation. Accordingly, agendas, minutes and other papers relating to meetings of the Corporation are normally available for public inspection when they have been approved for publication by the Chair.
- 10.2 There will be occasions when the record of discussions and decisions will not be made available for public inspection; for example, when the Corporation considers sensitive issues or named individuals and for other good reasons. Such excluded items will be kept in confidential records by the Clerk to the Corporate Board, and will be circulated in confidence to Governors, save for those Governors who have a conflicting interest in the particular sensitive matter. Some confidential items are likely to be of a sensitive nature for a certain period of time only (for example information relating to a proposed commercial transaction or collaboration with another institution). The Governing Body should specify how long such items should be treated as confidential or, if this is not possible, such items should be regularly reviewed to consider whether the confidential status should be removed or whether the public interest in disclosure outweighs that confidential status and the item made available for public inspection. When considering such issues, the Governors must also consider the College's publication scheme issued under the Freedom of Information Act 2000.
- 10.3 However, staff and student Governors have no right of access to minutes dealing with matters in respect of which they are required to withdraw from meetings under the College's Instrument of Government.
- 10.4 It is important that the Governing Body and its committees have full and frank discussions in order to take decisions collectively. To do so, there must be trust between Governors with a shared corporate responsibility for decisions. Governors should keep confidential any matter which, by reason of its nature, the Chair or members of any committee of the Corporation are satisfied should be dealt with on a confidential basis.
- 10.5 Governors should not make statements to the press or media (including social media and networking platforms) or at any public meeting relating to the proceedings of the Governing Body or its committees without first having obtained the approval of the Chair or, in his or her absence, the Vice Chair. It is unethical for Governors publicly to criticise, canvass or reveal the views of other Governors which have been expressed at meetings of the Governing Body or its committees.

10.6 Governors should plan for the proper handling and disposal of board papers and it is recommended that printed papers are returned to the Clerk to the Corporate Board for secure shredding when no longer required. Board papers will be stored electronically for Governors to access before and after each meeting.

## 11. Complaints

11.1 Accountability is at the heart of public service bodies and it is important that the affairs of the College are conducted in an open and transparent manner. To this end governors should be aware of the systems in place to deal with employees' grievances and matters relating to their employment. Governors should also be aware of the College's complaints procedure, including the right of any complainant, who feels that a complaint has not been dealt with appropriately by the College to inform the Agency. Members' attention is also drawn to the College Public Interest Disclosure Procedure ('Whistleblowing') and the fact that an allegation of inappropriate behaviour by a governor may be dealt with under this procedure.

11.2 Under the ESFA's Financial Memorandum with colleges (Part 2, clause 19.4), students, employers and other third parties have a right to make a complaint to the ESFA in respect of their College or any of its decisions. Governors in particular are reminded that under the ESFA's procedure for dealing with complaints about Providers of Education and Training (October 2015) the ESFA:

- *can* investigate complaints about quality or management of learning provision, undue delay or non-compliance with published procedures, poor administration by the Provider, equality and diversity issues (except where there is a more appropriate mechanism for dealing with the matter through the court or tribunals or other organisations), health and safety concerns (unless these are matters for the Health & Safety Executive) and complaints made by learners following HE courses in FE colleges;
- *will* not investigate complaints about examination results or curriculum content where a more appropriate form of redress would be the examining body or Ofqual, individual employment issues, contractual disputes, or matters which are the subject of legal action or complaints about higher education courses in colleges (which should be referred to the Office of the Independent Adjudicator).

11.3 In accordance with the Consumer Rights Act 2015, the College has subscribed to the Office of the Independent Adjudicator, which hears complaints from college students on qualifying higher education courses, normally once they have exhausted the college's internal complaints procedures. The Office of the

Independent Adjudicator does not investigate complaints in relation to matters of academic judgement.

## **12. Attendance at Meetings**

A high level of attendance and adequate preparation for meetings of the Governing Body and its Committees is expected so that Governors can perform their functions properly.

## **13. Governance Development**

- 13.1 The Governing Body shall seek to ensure that all Governors are appointed on merit, in accordance with an open selection procedure carried out by the Corporation's Search Committee, and are drawn widely from the community which the College serves so as to be representative of that community. The Corporation should have regard to provisions relating to the membership of the Governing Body in the College's Instrument of Government, the need to combat discrimination and to promote equality, and the need to make available a range of necessary skills and experience to ensure that the Corporation carries out its functions under the College's Articles of Government.
- 13.2 Governors must obtain a thorough grounding in their duties and responsibilities by participating in the College's governance induction and training programmes, and taking other opportunities to extend their knowledge of the College and the education sector.
- 13.3 In order to promote more effective governance, Governors will carry out an annual review of the performance by the Governing Body of its duties and responsibilities, as part of a continuing and constructively critical process of self-evaluation. Governors are expected to participate in the Governors' annual performance appraisal scheme as agreed by the Board from time to time.

## **14. Review of Code**

This code shall be kept under review by the Clerk to the Corporate Board and referred to the governing body for amendment as required.

## Schedule to Code of Conduct

### List of Source Documents

1. the College's Instrument and Articles of Government;
2. the Standing Orders and Conflicts of Interest Policy;
3. the Committee Terms of Reference;
4. the Financial Memorandum and Funding Agreement entered into by the College with the ESFA;
5. the College's Mission Statement and Corporate Objectives;
6. the College's Strategic Plan;
7. the College's policies that extend to Corporation members, including the College's policies on equal opportunities, the anti-bribery policy as required by the Bribery Act 2010, the College's policy on receiving gifts and hospitality, the College's policies on safeguarding learners and the College's policy on preventing people being drawn into terrorism.
8. the principles laid down by the Committee on Standards in Public Life (Nolan Committee) for those holding public office, namely:
  - selflessness;
  - integrity;
  - objectivity;
  - accountability;
  - openness;
  - honesty; and
  - leadership.An extract from the report of the Nolan Committee setting out these Principles in more detail is set out at Appendix 1;
9. the Audit Code of Practice issued by the ESFA;
10. the Association of Colleges' Code of Good Governance;
11. the Good Governance Standard for Public Services published by the Independent Commission on Good Governance in Public Services (Good Governance Standard); An extract from the Good Governance Standard setting out the six core principles of good governance is set out at Appendix 2; Appendices 1 (the Seven Principles of Public Life), 2 (Six Core Principles of Good Governance), 3 (Responsibilities of Governors), 4 (Responsibilities of the Principal and Clerk), 5 (Financial Memorandum of the SFA) and 6 (Powers of the Governing Body) are attached to this Code for reference.

## **Appendix 1**

### **The Seven Principles of Public Life**

The following is an extract from the Second Report of the Nolan Committee on Standards in Public Life, May 1996

#### **Selflessness**

Holders of public office should take decisions solely in terms of public interest and not in the interests of themselves their family or their friends.

#### **Integrity**

Holders of public office should not place themselves under any obligation to a third party which might influence them in the performance of their public duties.

#### **Objectivity**

All decisions involving awarding contracts, benefits or rewards should be made on merit.

#### **Accountability**

Holders of public office are accountable to the public for their actions and should submit themselves to the appropriate authority.

#### **Openness**

All decisions taken should be as open as possible.

#### **Honesty**

Holders of public office have a duty to declare any private interests relating to their public duty and resolve conflicts so as to protect the public interest.

#### **Leadership**

Holders of public office should promote and support these principles by leadership and example.

## Appendix 2

### Six Core Principles of Good Governance

The following is an extract from the Good Governance Standard for Public Services published by the Independent Commission on Good Governance in Public Services, January 2005

- 1. Good governance means focusing on the organisation's purposes and on outcomes for citizens and service users**
  - 1.1 Being clear about the organisation's purposes and its intended outcomes for citizens and service users;
  - 1.2 Making sure that users receive a high-quality service;
  - 1.3 Making sure that taxpayers receive value for money.
  
- 2. Good governance means performing effectively in clearly defined functions and roles**
  - 2.1 Being clear about the functions of the governing body;
  - 2.2 Being clear about the responsibilities of the non-executives and the executive, and making sure that those responsibilities are carried out;
  - 2.3 Being clear about relationships between the governors and the public.
  
- 3. Good governance means promoting values for the whole organisation and demonstrating the values of good governance through behaviour**
  - 3.1 Putting organisational values into practice;
  - 3.2 Individual governors behaving in ways that uphold and exemplify effective governance.
  
- 4. Good Governance means taking informed, transparent decisions and managing risk**
  - 4.1 Being rigorous and transparent about how decisions are taken;
  - 4.2 Having and using good quality information, advice and support;
  - 4.3 Making sure that an effective risk management system is in operation.
  
- 5. Good governance means developing the capacity and capability of the governing body to be effective**
  - 5.1 Making sure that appointed and elected governors have the skills, knowledge and experience they need to perform well;
  - 5.2 Developing the capability of people with governance responsibilities and evaluating their performance, as individuals and as a group;
  - 5.3 Striking a balance, in the membership of the governing body, between continuity and renewal.

- 6. Good governance means engaging stakeholders and making accountability real**
  - 6.1 Understanding formal and informal accountability relationships;
  - 6.2 Taking an active and planned approach to dialogue with accountability to the public;
  - 6.3 Taking an active and planned approach to responsibility to staff;
  - 6.4 Engaging effectively with institutional stakeholders.

## **Appendix 3**

### **Summary of Main Responsibilities of Governors under the Articles**

Under the College's Articles of Government, the Governing Body shall be responsible for the following functions: -

1. the determination and periodic review of the educational character and mission of the institution and the oversight of its activities;
2. approving the quality strategy of the institution;
3. the effective and efficient use of resources, the solvency of the institution and the Corporation and for safeguarding their assets;
4. approving annual estimates of income and expenditure;
5. the appointment, grading, suspension, dismissal and determination of the pay and conditions of service of the holders of senior posts and the Clerk;
6. setting a framework for the pay and conditions of service of all other staff;
7. setting the policy by which the tuition and other fees payable to it are determined (subject to any terms and conditions attached to grants, loans or other payments paid or made by the ESFA).

"Senior Post" means the post of Principal/Chief Executive and such other senior posts as the Governors may determine for the purposes of the Articles.

#### **Responsibilities which must not be delegated**

The Articles of Government prohibit the Governing Body from delegating the following:

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1. the determination of the educational character and mission of the institution;
2. the approval of the annual estimates of income and expenditure;
3. the responsibility for ensuring the solvency of the institution and the Corporation and the safeguarding of their assets;
4. the appointment of the Principal/Chief Executive or holder of a senior post;
5. the appointment of the Clerk to the Governing Body;



6. the modification or revocation of these Articles of Government;
7. the consideration of the case for dismissal of the Principal/Chief Executive, the Clerk or the holder of a senior post, other than to a committee of members of the Corporation;
8. the power to determine an appeal in connection with the dismissal of the Principal/Chief Executive, the Clerk or the holder of a senior post, other than to a committee of members of the Corporation.

The Governing Body may, from time to time, resolve to add other functions which must not be delegated to this list of 'reserved' responsibilities.

## **Appendix 4**

### **Summary of Main Responsibilities of the Principal/Chief Executive under the Articles of Government**

Under the College's Articles of Government, the Principal shall be the Chief Executive of the College and shall be responsible for:

1. making proposals to the Governing Body about the educational character and mission of the institution, and for implementing the decisions of the Governing Body;
2. the determination of the institution's academic and other activities
3. preparing annual estimates of income and expenditure for consideration and approval by the Governing Body, and for the management of budget and resources within the estimates approved by the Governing Body;
4. the organisation, direction and management of the institution and leadership of the staff;
5. the appointment, assignment, grading, appraisal, suspension, dismissal, and determination, within the framework set by the Governing Body, of the pay and conditions of service of staff, other than the holders of senior posts or the Clerk, where the Clerk is also a member of the staff; and
6. maintaining student discipline and, within the rules and procedures provided for within the Articles, suspending or expelling students on disciplinary grounds and expelling students for academic reasons.

### **Summary of Main Responsibilities of the Clerk under the articles of Government**

Under the College's Articles of Government, the Clerk shall be responsible for advising the Corporation with regard to:

1. the operation of its powers;
2. procedural matters;
3. the conduct of its business; and 4. matters of governance practice.

## **Appendix 5**

### **Summary of Main Provisions of the Financial Memorandum with the Education and Skills Funding Agency**

*Following reclassification of colleges into the central government sector by the Office for National Statistics (ONS) in November 2022, colleges continue to be self-governing charities regulated by the Secretary of State for Education, but are now subject to the framework of financial management set out in Managing Public Money (MPM) – see Annexes A and B to Appendix 5)*

#### **Purpose**

The ESFA has issued a Financial Memorandum for further education colleges, together with a version for sixth form colleges that recruit adult students. The ESFA also issues a Conditional Funding Agreement for further education colleges that provide funded education for those under 19. These documents are updated periodically and are designed to ensure that both general FE and sixth form colleges have proper lines of financial accountability.

The Financial Memorandum records the agreement between Secretary of State, acting through the ESFA, and the college concerning the amount of funding that will be paid to the college. As a result of the Deregulation Act 2015 the references to the Chief Executive of Skills Funding have been removed as the statutory powers of the holder of that post have been transferred to the Secretary of State. The SFA is now combined with the EFA and ESFA is an agency within the DfE.

The conditions set out in the Financial Memorandum are intended to enable the Secretary of State to carry out his/her functions under the Apprenticeships, Skills, Children and Learning Act 2009 (ASCLA). The Secretary of State has responsibilities as accounting officer to his/her department for ensuring that the use of funds which he/she receives is consistent with his/her statutory remit and any conditions imposed by the Treasury.

#### **Format**

The form of the documentation varies because of the different legal basis on which the ESFA fund provision. The ESFA provides funding under the Apprenticeships, Skills, Children and Learning Act 2009 on the basis of grant – in aid. Such grants are provided subject to conditions set out in the Financial Memorandum. Funding under the Education Act 2002 is not limited to provision by grant – in aid so the appropriate document is a Funding Agreement which is contractual in nature. The Funding Agreements which ESFA provide to colleges are broadly similar in nature to those that it enters into with academy schools.

The Financial Memorandum applies to all ESFA funded FE colleges, with only the financial annexes differing between institutions, unless there is a particular need for special provisions specific to a particular institution.

The ESFA Funding Agreements are structured in two parts. In the version for general FE and specialist colleges, some material is omitted, since ESFA will take assurance from the equivalent provisions in these colleges' Financial Memoranda.

For the same reason, the version of the Financial Memorandum which is now provided by the ESFA to sixth form colleges omits those provisions which are central to the financial accountability arrangements, those setting out the responsibilities of the governing body and of the accounting officer, the requirement to provide information, and the requirements in relation to financial reporting and audit. This is because the ESFA will rely on equivalent provisions in the sixth form colleges' Funding Agreement. If a college gets into serious financial or quality difficulties under either funding stream regulatory action will be taken by the ESFA.

There follows a commentary on the main provisions of the ESFA Financial Memorandum for further education colleges.

## **Definitions**

It should be noted that references to public funds include funds provided by HEFCE as well as those provided by the ESFA.

## **Responsibilities of the Governing Body and the accounting officer**

The Financial Memorandum recognises that a Corporation is an independent body responsible for managing the college and ensuring its financial viability. However, the Corporation must inform the ESFA of any transaction that could jeopardise the college's financial viability and must also be able to demonstrate that all transactions achieve value for money for funds provided under the financial memorandum.

The governing body must appoint an accounting officer (expected to be the chief executive/principal of the college). There must be an accounting officer in place at all the times and the ESFA must be informed of the accounting officer's name and position and who will discharge their various responsibilities if they are absent from the college for an extended period.

The accounting officer takes personal responsibility, which is not delegable, to ensure compliance with the Financial Memorandum and conditions of funding. The accounting officer may be required to appear before the Public Accounts Committee on matters relating to the Corporation's use of funds.

The accounting officer must advise the governing body if at any time in his/her opinion any action under consideration by the governing body is incompatible with the Financial Memorandum. If the governing body resolves to continue with such action the accounting officer must inform the ESFA.

### **Allocation of funds**

The ESFA will allocate funds to the Corporation annually provided that it is satisfied that the Corporation is financially viable and able to deliver education of a reasonable quality meeting the needs of learners and employers and the Corporation has met the previous year's conditions of funding. The Corporation is free to spend its funding as it sees fit provided it fulfils the conditions of funding but funds must not be used to deliver provision in respect of which the Corporation has already received other funding, public or otherwise, unless agreed by the ESFA. The ESFA can require assurance that delivery of provision complies with the Financial Memorandum and can require, at the College's cost, evidence to support payment claims.

### **Capital transactions**

The Corporation must manage its property with regard to good practice guidance in the FE sector. It is no longer necessary to obtain approval of the ESFA to the disposal of land or buildings which had been acquired or developed with the help of capital grants from the ESFA or previous associated bodies, but the ESFA must be notified in writing of such transactions and reserves the right to require repayment of some or all of the associated grant.

### **Financial reporting**

The ESFA specifies the information to be contained in the Corporation's financial statements. Audited financial statements must be provided to the ESFA within five months of the Corporation's year end. The Corporation must have an effective policy on risk management. The Corporation must notify the ESFA in writing if at any time there is a risk to the college's solvency and viability.

### **Audit**

The Corporation must appoint an audit committee and arrange to provide internal and financial statements audit, including regularity audit, in accordance with the Audit Code of Practice.

The Corporation must investigate and report to the ESFA all significant cases of fraud or suspected fraud.

## **Payment to employees on termination of employment**

The Corporation must demonstrate that any payments made to employees on the termination of their employment are regular, secure value for money and avoid spending funds on settlements where disciplinary action would have been more appropriate. Where employment claims are brought by a senior post holder it should take appropriate professional advice on any proposed settlement and the terms of the final agreement should be agreed by the governing body and brought to the attention of the financial statements auditors.

## **Provision of data on learners and staff and of information**

A college must supply learner data in accordance with ESFA requirements. A recent requirement is the need to provide data about staff teaching GCSE English and Maths. The ESFA reserves the right to request information from the Corporation in order to exercise his responsibilities. The Corporation must inform the ESFA in writing of the vacating or filling of the positions of Chair of the governing body, Principal and Clerk. The ESFA has the right to share information provided by the college, for example with Parliamentary bodies.

## **Conditions of funding**

The detailed requirements in relation to each learning programme are set out in the ESFA Funding Rules. The maximum value of funds for each learning programme are set out in Appendix 1 to the Financial Memorandum. The ESFA reserves the right to reduce the overall maximum value for each learning programme by giving three months' notice. This can be done without the need to give a reason, although if the ESFA did so it would lay itself open to a legal challenge based on the argument that it had done so unreasonably. A recent condition is that a college must provide evidence that it has worked in partnership with the LEP to ensure its provision takes account of the LEP's priorities. The ESFA reserves the right to impose additional conditions where it is considered necessary to secure the delivery of education and training of a reasonable quality or to require the Corporation to address concerns about its financial viability.

## **Sub-contracted provision**

ESFA considers extensive sub-contracting of provision to be a significant risk factor for colleges. It requires colleges to make a Declaration of Subcontractors bi-annually and comply with requirements set out in the Funding Rules. These include requirements in relation to the form of the legally binding sub-contract which must be put in place. Where a college has sub-contracts in aggregate worth more than £100,000 per year it must obtain an annual report from its external auditors providing assurance on its arrangements for managing the sub-contractors and provide ESFA

with an auditor's certificate that a report confirming satisfactory assurance has been received.

### **Repayment of funds**

In the case of a breach of the conditions of funding the ESFA reserves the right to require repayment of all or part of the funds.

### **Raising Standards, Feedback and Complaints**

The college must deliver the funded provision to an acceptable standard of quality and comply with the Performance Management Rules published by the ESFA. There is a set procedure for dealing with inadequate provision which may lead to issue of a Notice of Concern or ultimately a Notice of Withdrawal of Funding. The college must inform the ESFA if it is sanctioned by an awarding body. It must also notify the ESFA of the date of the feedback meeting following an inspection by Ofsted so that ESFA can send a representative to the meeting. If a Notice of Concern is issued the college's ability to start new learners on a programme may be suspended. The ESFA may invite a college to discuss with it if considers that there is a significant risk that a college may become financially inadequate over a three-year period. If the college's response is inadequate the ESFA may ask the college to undertake a financial or structural review. Such a "request" may be made a condition of funding. If it is made a condition and the condition is not complied with the ESFA may issue a Notice of Concern or of Withdrawal of Funding.

Colleges are expected to have acceptable procedures for gathering and acting upon feedback and complaints from learners and/or their representatives and employers and the wider community. These must be made available to those who may wish to complain. Where a complaint is not resolved satisfactorily the complainant must be informed of their right to complain to the ESFA.

### **Additional matters**

The Financial Memorandum incorporates a number of other clauses on compliance matters such as health and safety, equal opportunities, data protection and freedom of information, and State Aid.

### **Interpretation**

Nothing in the Financial Memorandum shall require the Corporation to act in a manner which would cause the Corporation to cease to be a charity.

Colleges need to familiarise themselves with the detailed content of the new financial memorandum and funding agreement in the versions applicable to their type of college. However, despite the presentational differences in the documentation,

colleges will find that the substance of the requirements that they need to meet is largely unchanged.



## **Annex 5A – Financial transactions**

### **a. Management of surpluses**

The default MPM position is that, for grant-funded government bodies, any unspent grant will be clawed back by the funding body at year-end. However, it is essential that longer term financial planning is the cornerstone of the sector's financial sustainability, and so colleges will be able to carry forward any surpluses at year end without limit, including for investment in capital assets. This agreement may require us to collect additional information from you and we will be in touch about this in due course. Colleges' freedom to carry forward surpluses does not alter existing arrangements for recovering funding due to ineligibility or under-delivery.

### **b. Asset disposals**

Colleges will continue to be able to manage their assets, including their estate, and to retain the proceeds of disposals. However, colleges will be required to ringfence the proceeds for reinvestment in capital assets. We will keep this approach in place until the end of the current Spending Review period (31 March 2025), when it will be reviewed. We may also need to collect additional information from you about your disposals.

### **C. Special severance payments**

Special severance payments are payments that are discretionary and additional to those arising from statutory and contractual redundancy or severance terms. MPM's position is that making such payments on top of the normal entitlements does not usually provide good value for money or offer fairness to the taxpayers who fund them. Special severance payments should therefore only be considered in exceptional cases.

However, special severance payments can be an important mechanism to allow employers to reform and react to new circumstances in the workplace. Accordingly, such payments may be permitted when there is a clear, evidenced justification for doing so and when all relevant internal policies and procedures have been followed, and all alternative actions have been fully explored and documented.

Colleges will have delegated authority to make individual severance payments, provided any non-statutory/non-contractual element is under £50k or under 3 months' salary, whichever is the lower. Beyond this, DfE approval will be required. Furthermore, any proposed payments of whatever value that are linked to a non-disclosure agreement will also require DfE approval and, where supported, we will refer them to HMT for final consent.

Additionally, in accordance with current Guidance on Public Sector Exit Payments, colleges must obtain prior DfE approval before making a special staff severance payment where:

- an exit package which includes a special severance payment is at, or above, £100,000, and/or
- the employee earns over £150,000.

Regardless of the above delegations, any special severance payment which is novel, contentious or repercussive, of whatever value, must be referred to DfE for approval and, where supported, we will refer to HMT for final consent.

It will be important that in those cases where approval is required that colleges refrain from entering into legally binding agreements until that approval has been obtained.

#### **d. Compensation payments**

Compensation payments provide redress for loss or injury, for example personal injuries, traffic accidents or damage to property. If a college is considering a compensation payment, it must base its decision on a careful appraisal, including legal advice where relevant, and ensure value for money.

If a college concludes that a compensation payment should be made, it has delegated authority to approve individual payments provided any non-statutory/non-contractual element is under £50k. Where the college is considering a non-statutory/non-contractual payment of £50k or more, DfE's prior approval must be obtained.

#### **e. Ex gratia payments**

Ex gratia payments are another type of transaction going beyond statutory or contractual cover, or administrative rules. This could include payments to meet hardship caused by official failure or delay, and to avoid legal action due to official inadequacy. Ex gratia transactions must always be referred to DfE for prior approval, whatever the amount.

#### **f. Write-offs**

We recognise that most sums written off by colleges are likely to be relatively small. Consequently, DfE consent to a write-off will only be required if the individual loss/write-off exceeds 1% of annual income or £45k individually (whichever is smaller), or 5% of annual income cumulatively (subject to a £250k cumulative ceiling).

#### **g. Indemnities, guarantees and letters of comfort**

Central government bodies should not be entering into liabilities without explicit parliamentary authority, other than those arising in the normal course of business. We recognise that many commercial contracts will, in the normal course of business, include indemnity clauses; these will not be restricted and DfE consent will not be required.

6 Beyond this, DfE consent will be required in respect of indemnities beyond the normal course of business, guarantees and letters of comfort in excess of:

- 1% of annual income or £45k (whichever is smaller); or
- 5% of annual income cumulatively (subject to a cumulative capping of £250k).

## **h. Finance leases**

As you may know, there are two types of lease: operating leases and finance leases. Whilst finance leases constitute a form of borrowing, colleges will be able to continue with any existing finance leases until they come to the end of their term and will also be able to enter into new finance leases.

## **i. Senior pay controls**

Colleges remain responsible for setting the pay of their workforce. However, reclassification means that they will fall within the scope of HMT's senior pay controls. We will update our existing guidance on senior pay to reflect the principles set out in HMT's guidance, and work with the sector to make sure that colleges are able to seek approval for any new or amended reward packages that fall within scope of the controls.

## **j. Insurance**

Central government organisations should not generally take out commercial insurance because it is better value for money for the taxpayer to cover its own risks. However, there are some circumstances where commercial insurance is appropriate.

We are exploring an alternative to commercial insurance for colleges with the Department's Risk Protection Arrangement scheme. For the moment, colleges can continue with their existing insurance arrangements, and can renew or take out new commercial insurance.

## **k. Commercial operations and subsidiaries**

Colleges will remain free to conduct commercial operations, including through subsidiary companies. However, all subsidiary companies will be subject to the same MPM-based controls outlined in this letter as their parent college. If the purpose of any such subsidiary could be deemed to be novel, contentious or

repercussive then the acquisition or establishment of such a subsidiary will also require prior DfE approval.

## **I. Novel, contentious and repercussive transactions**

Novel transactions are those of which your college has no experience or are outside its range of normal business. Contentious transactions are those that might cause criticism of the corporation by Parliament, the public or the media. Repercussive transactions are those likely to cause pressure on other colleges or other parts of the public sector to take a similar approach and hence have wider financial implications.

Transactions by colleges or their subsidiaries that may be considered novel, contentious and/or repercussive must always be referred to DfE for prior approval. If supported, DfE will refer to HMT for final consent.

## **Annex 5B - Borrowing**

### **a. Private sector borrowing**

Private sector borrowing refers to any borrowing from commercial lenders but also loans from local authorities and any other non-public sector organisations. Existing and future lending from DfE to colleges is excluded.

MPM is clear that from the date of reclassification colleges, as public sector organisations, may borrow from private sector sources only if the transaction delivers better value for money for the Exchequer. Because non-government lenders face higher financing costs, in practice it is very unlikely that colleges will be able to satisfy this condition for future private sector borrowing.

To ensure adherence to MPM by colleges post-reclassification, a consent process by DfE for college requests relating to future borrowing and amendments to existing agreements as detailed below will be implemented. College DfE learner funding agreements will be updated in December 2022 to reflect this consent process as a new condition of funding.

The main commercial lenders to the sector will be made aware of this new consent requirement.

It is recognised that any restriction due to MPM on the availability of borrowing facilities to colleges following reclassification presents challenges to colleges both in respect of existing and future debt funding. New DfE initiatives relating to the learner funding profile and new DfE capital funding are being introduced to the sector to assist with funding areas previously provided by the private sector.

Further guidance on these areas is set out below.

#### College requests submission

As detailed below, both for existing borrowing and future borrowing, colleges may need to make requests to the DfE. If so, colleges should use the excel form 'College borrowing requests' attached.

The declaration, lender contact details and the appropriate request tab should be fully completed by the college and this, together with the supporting documents as detailed on the relevant request tab, should be submitted by email to the DfE at: [PMO.Reclassification@education.gov.uk](mailto:PMO.Reclassification@education.gov.uk).

Guidance on completion is provided in the first tab in the excel file. Please ensure this is followed to avoid delays in dealing with any request. In particular, separate excel files should be submitted for each request, in the event any college has multiple requests to submit at the same time.

#### **b. Existing borrowing**

Existing borrowing is any debt taken out and utilised (drawn down for loans) by the college or a related-subsiary up to 29 November 2022 in the form of a facilities agreement, senior debt finance agreement, working capital facility, term-loan, overdrafts, revolving credit facility, PFI property finance agreement

(whether recognised on the balance sheet or not) and any other financing agreement.

The consent process will **not apply to existing debt balances** at the point of reclassification. Colleges should continue to repay such debt under the agreement terms to maturity. We expect that colleges will be able to ensure that any balances on variable type facilities (overdrafts and revolving credit facilities (RCFs)) are worked down to nil or repaid in full at maturity of the facilities.

#### Term loan balloon payments (at maturity)

Colleges may have existing term debt with outstanding balances remaining at maturity. If this residual debt cannot be refinanced by a commercial lender compliant with MPM and a college does not have sufficient cash reserves to meet in full, then DfE will consider a request for financial assistance from a college at the relevant time.

If a college has a balance remaining on the loan at maturity - balloon payment due to a lender (at any time in the future) please notify us by email [PMO.Reclassification@education.gov.uk](mailto:PMO.Reclassification@education.gov.uk) subject header '[College name] - Balloon payment due' to provide initial notification to us of the lender, the balloon payment value and the maturity date as soon as possible.

A formal request (Tab: Request 4) for any financial assistance by affected colleges will need to be made at least 6 months before maturity (or immediately for relevant loans maturing in the period to 31 May 2023), using the college requests submission procedure set out above.

Any funding, if approved following a review process, will be made available under a standard DfE repayable loan agreement which will be interest-bearing and potentially secured.

#### Amendments to existing facility agreements

The college must obtain the written consent of the DfE before entering into any amendment to arrangements for existing borrowing within the scope of MPM and provide evidence how the change meets MPM rules.

Amendments which may be within the scope of MPM include, but are not limited to, changes relating to the term of a loan, repayment profile change, interest rate change outside of the existing agreement terms (including any move between a variable and a fixed interest rate) and providing additional security. If in doubt as to whether within scope or not, please submit a consent request.

The college is required to:

- Submit a formal request (Tab: Request 1) for consent using the college requests procedure set out above.
- Receive written confirmation from DfE of consent.
- As a condition of any consent, supply a copy of the executed new agreement / modification by email (as above) within 2 weeks of completion.

Amendments and other colleges actions related to facilities which are not within the scope of MPM and therefore do not require the written consent of the DfE include:

- Providing periodic standard written representations to lenders.
- Changes to financial and non-financial covenants.
- Changes to standard clauses following underlying legislation changes or other reasons which are not within the scope of MPM as defined above.

### **c. Future borrowing**

New borrowing refers to any new debt or refinancing of the above existing borrowing types of debt and any new drawdown of existing borrowing facilities from 29 November 2022 onwards.

#### New borrowing

New finance arrangements or drawdown of funds post-reclassification under existing finance arrangements will be subject to MPM rules and colleges will be required to obtain the written consent of DfE in advance of committing to any new financing arrangements or actioning any new drawdowns of overdrafts, RCFs or loans.

#### New finance arrangements

The college is required to:

- Submit a formal request (Tab: Request 3) for consent using the college requests procedure set out above.
- Receive written confirmation from DfE of consent.
- As a condition of any consent, if given, supply a copy of the executed new agreement by email (as above) within 2 weeks of completion.

#### Unutilised borrowing facilities (including undrawn term loans)

Any additional usage of existing overdraft, RCFs or drawdowns of existing term loans, limited to essential operational needs, above levels at the point of reclassification, will be subject to a consent process. The consent will be time

limited to the earlier of maturity or 20 months to 1 August 2024 for overdraft and RCFs.

This is to allow time for the following to take effect: a proposed smoothing of the learner funding profile to improve a college's working capital position; and for new DfE capital funding initiatives to be introduced to minimise disruption to capital projects in progress.

The college is required to:

- Submit a formal request (Tab: Request 2a or 2b) for consent using the college requests procedure set out above no later than December 2022.
- Receive written confirmation from DfE of consent for usage in the consent period, if given.

At the end of the consent period for overdrafts and RCFs, we expect that colleges will be able to ensure that such variable working capital facilities and other facilities are worked down to nil or repaid in full at the earlier of the end of the consent period or maturity of the facilities.

Any residual balances remaining on overdraft and RCFs, not able to be repaid by colleges, will need to be the subject of a request to DfE for financial assistance from a college. The college will be required to submit a formal request (Tab: Request 5) for financial assistance using the college requests procedure set out above. A formal request for any financial assistance by affected colleges will need to be made at least 6 months before maturity of the facilities (or immediately for relevant facilities maturing in the period to 31 May 2023)

## **Appendix 6**

### **Summary of the Statutory Powers of the Governing Body**

#### **Principal Powers**

Under section 18(1) of the Further and Higher Education Act 1992 a further education corporation may: -



1. provide further and higher education;
2. provide secondary education suitable to the requirements of persons who have attained the age of 14 years, or provide secondary education or participate in the provision of secondary education at a school (subject to the consultation with the appropriate local education authority); and
3. supply goods or services in connection with their provision of education.

These powers are known as the Corporation's "principal powers".

### **Supplementary Powers**

Under section 19 of the 1992 Act the Corporation may do anything which appears to it to be necessary or expedient for the purpose of or in connection with the exercise of any of the principal powers conferred by section 18 of the Act, including in particular the following powers: -

1. to acquire and dispose of land and other property;
2. the power to enter into contracts, including in particular:
  - contracts for the employment of teachers and other staff for the purposes of or in connection with carrying on any activities undertaken in the exercise of the Corporation's principal powers; and
  - contracts with respect to the carrying on by the Corporation of any such activities;
3. to form, participate in forming or invest in a company or become a member of a charitable incorporated organisation; to borrow such sums as the Corporation thinks fit for the purposes of carrying on any activities it has power to carry on or to meet any liability transferred to it under sections 23 to 27 of the 1992 Act (i.e. when the College achieved its corporate independence on 1st April 1993) and, in connection with such borrowing, the power to grant any mortgage charge or other security in respect of any land or other property of the Corporation.
4. to invest any sums not immediately required for the purposes of carrying on any activities the Corporation has power to carry on;
5. to accept gifts of money, land or other property and apply it, or hold and administer it on trust for, any of those purposes;
6. to do anything incidental to the conduct of an educational institution providing further or higher education, including founding scholarships or exhibitions, making grants and giving prizes; and

7. to provide advice or assistance to any other person where it appears to the Corporation to be appropriate for them to do so for the purpose of or in connection with the provision of education by the other person.

The Corporation may also provide facilities of any description (including boarding accommodation and recreational facilities for students and staff and facilities to meet the needs of students having learning difficulties) which appear to be necessary or desirable for the purposes of or in connection with the carrying on of the principal powers.

The powers conferred by section 19 of the 1992 Act are known as “supplementary powers”.