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Leading learning and skills

Identifying and Managing Underperformance

Learning and Skills Council
Guidance on Identifying and
Managing Underperformance
and the Operation of Notices
to Improve Applying to the
2010/11 Academic Year

January 2010

Of interest to everyone involved in delivering
LSC-funded provision

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Introduction

1 This document sets out the Learning and Skills Council's (LSC) approach to identifying and managing underperformance in the 2009/10 academic year. The purpose of this guidance is to outline key changes to the approach since the previous year and to set out the transition arrangements that will apply as a result of the Machinery of Government changes.

2 As has been the case in previous years, this document sets out the four areas of performance that inform commissioning and intervention. These are:

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

3 The approach for 2009/10 is broadly one of **minimum change to the policy and no change to the thresholds that apply for MLP**. There are a number of contextual factors that underpin the rationale behind this.

- **The Machinery of Government changes.** The year 2009/10 is one of transition for the LSC, and the main transition will occur in early 2010 – at just the time when Notices to Improve will be issued and commissioning decisions made. In view of this, and in the context of significant change for the whole system, it was deemed advisable to have minimal change in MLP policy. Notices to Improve issued early in 2010 and applying to the 2010/11 academic year will transfer to the appropriate successor body in April 2010, and this guidance will continue to support the successor bodies in monitoring those Notices.
- **The introduction of demand-led funding.** The success rates for 2008/09 – the basis on which this year's MLP are calculated – are the first to have been affected by the changes to the funding methodology. In previous years, when the appropriate thresholds for MLP were determined, historical data was used to model the impact of applying different thresholds. The significant changes in the data mean that there is no comparable historical data to draw upon, which makes the outcomes of the modelling hard to predict and difficult to relate to previous years' performance.

- **The effect of the recession.** The LSC is aware that redundancies in certain sectors are likely to have a destabilising effect on some providers, and the LSC will, where appropriate, be flexible in the application of its policies.
- **The implementation of the Framework for Excellence (FfE).** FfE is central to the new performance-management arrangements proposed in *Raising Expectations: enabling the system to deliver* (published by the Department for Children, Schools and Families (DCSF) and the Department for Innovation, Universities and Skills (DIUS) in March 2008 and available at www.dius.gov.uk/~media/publications/R/Raising_Expectations). From 2009/10, the FfE applies to almost all providers of further education (FE). From 2010, it will be extended to include further education delivered by higher education institutions and school sixth forms. The detail of how FfE will operate in school sixth forms is under development, using a pilot exercise that began in September 2009. As the FfE becomes fully established, it will provide a clear set of national measures that will sit at the heart of the new Quality Assurance Framework.

Application of minimum levels of performance

- 4** The LSC will apply MLP in 2009/10, using the 2008/09 success rates to inform 2010/11 commissioning decisions. It will issue a Notice to Improve whenever the performance of an FE institution falls below the required threshold. An MLP for Train to Gain provision will also apply for the first time.
- 5** Although the approach in 2009/10 is one of minimum change, there are a number of issues that will shape the way MLP are applied.
- There will be a stronger focus on ensuring that funding supports the best provision. Given the current economic climate and the pressure on public funds, the LSC will redouble its efforts to ensure that it focuses investment on the highest-quality provision.

- There will be increased scrutiny of the accuracy and integrity of the data used to identify underperformance. In 2009, the LSC identified a need to clarify the guidance on data management and individualised learner record (ILR) completion. As well as clarifying the rules for ILR completion, the LSC has strengthened its audit arrangements. Should an audit reveal that a provider has not been recording data in good faith, appropriate sanctions will be applied.
- In anticipation of the Machinery of Government changes, the MLP reports on employer-responsive provision – both Apprenticeship and Train to Gain provision – will this year be at local authority level (based on delivery location), as well as at regional and national level, wherever relevant. Action will be taken at the regional level in the case of providers that deliver in more than one local authority area.
- Action will **not** be taken on the basis of data regarding the age split (16–18 and 19+), but the MLP reports will contain information about age, as in previous years. This information will help providers to identify where there needs to be improvement. The LSC will continue to act as a single commissioner, and success rates will continue to be calculated at an aggregated level, across all ages, for each provider.
- The LSC will exclude AS-level qualifications from the MLP calculation in 2009/10. Further details on this change are set out at paragraphs 85–88.

6 For the longer term – for 2010 and beyond – the current operation of MLP will be reviewed, as an integral part of any discussions about new quality-assurance arrangements. The new agencies and the sector will work together to shape quality-assurance arrangements in the future.

7 The policies that are set out in this document will apply until an updated version is issued. The Young People’s Learning Agency (YPLA), the Skills Funding Agency (SFA), the National Apprenticeships Service (NAS) and local authorities will work together with the DCSF and the Department for Business, Innovation and Skills (BIS) to agree jointly the arrangements that will apply in 2010/11 and beyond.

Equality impact assessment

8 In August 2008, the LSC commissioned the Office for Public Management to perform a full equality impact assessment of its policies as they relate to underperformance. A report on its findings is available at www.lsc.gov.uk/aboutus/quality.

The Machinery of Government changes

9 The planned changes set out in the Government’s 2008 White Paper *Raising Expectations: enabling the system to deliver* will result in a fundamental change in the structures that are concerned with the commissioning of 16–18 and 19+ adult and employer-focused provision.

10 These changes will come into effect from April 2010, when responsibility for planning and funding 16–18 learning passes from the LSC to local authorities, supported by the YPLA. In the case of adult provision, a new dedicated single funding agency for skills, the SFA, will be established at the same time.

11 The Apprenticeships, Skills, Children and Learning Act 2009 contains provisions for the designation of sixth form colleges. This takes forward an undertaking in *Raising Expectations* (paragraphs 3.33–3.36) that, for the first time, the Government will identify sixth form colleges as a distinct legal category. Those colleges currently identified as sixth form colleges have been asked by the DCSF to indicate whether they wish to be included in the initial designation in the new legal category.

12 These changes mean that the successor bodies or the relevant local authority (as appropriate) will inherit and take forward Notices to Improve (and other conditions relating to individual provider improvement that originate with the LSC). The LSC will, therefore, work closely with local authorities, the Local Government Association, the Association of Directors of Children’s Services, the DCSF, the BIS, provider representative groups and other partners to develop the processes that need to be put in place in order to ensure effective transition.

13 The LSC will work with these partners to ensure that all bodies are fully aware of their roles and responsibilities both for transitional cases (for example, providers under Notice to Improve) and for the subsequent new arrangements. Table 7 below (at paragraph 140) sets out by provider type and successor body the transfer of responsibilities for Notices to Improve.

The Framework for Excellence and identifying underperformance

14 The implementation of the FfE reflects a desire to move increasingly towards a more comprehensive and unified approach to assessing performance across all post-16 FE providers. The FfE will continue to be developed and refined, and will be at the heart of the new commissioning and quality-assurance arrangements in the future.

15 The LSC has been commissioned by the DCSF and BIS to continue to develop the FfE, and it is being piloted in over 100 schools and 22 local authorities in the course of 2009/10. Work on this will include the development of new performance indicators (where necessary) and the adjustment of existing indicators to make them fit for purpose for schools. We will also ensure that the Framework is aligned with the 'School Report Card' – an initiative launched by the Secretary of State for Children, Schools and Families and designed to report on the performance of schools with students aged 11–16. The pilot work will help develop the detail of how the FfE will apply to school sixth forms from 2010 onwards.

A revised approach to inspections from September 2009

16 Following a public consultation (which concluded on 27 January 2009), the Office for Standards in Education, Children's Services and Skills (Ofsted) has now published its handbook for inspecting further education and skills providers. The handbook covers inspections from September 2009. It includes reference to the new Common Inspection Framework 2009 and contains new guidance on, for example, the inspection of **safeguarding** and **equality and diversity**. The handbook is available at www.ofsted.gov.uk/Ofsted-home/Forms-and-guidance/Browse-all-by/Other/General/Handbook-for-the-inspection-of-further-education-and-skills-from-September-2009.

17 Key changes include new judgements made for:

- equality and diversity;
- safeguarding;
- engaging with users; and
- value for money.

18 The equality and diversity grade will contribute to, and may limit, the grade for overall effectiveness.

19 Other key changes to the inspection process itself include:

- a significant increase in the involvement of learners and other users in inspections;
- a greater focus on evaluating the quality of teaching, learning and assessment;
- interviews with key managers; and
- sector subject areas graded on all full inspections.

Terminology

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

21 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 that will not be in receipt of funding through grant-in-aid arrangements set down in the financial memorandum. They include:

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

22 The term **providers** in this document refers to colleges and independent providers. It does not include school sixth forms. The policies in this document are applicable to school sixth forms when referred to specifically.

23 The term **quality** is used throughout this document in the widest sense; it covers equality and diversity, as well as learner health, safety and welfare.

The Annual Commissioning Dialogue

24 The LSC is responsible for making commissioning decisions for 2010/11 provision. It will issue contracts for 2010/11 provision by 31 March 2010. Those contracts will transfer to the LSC's successor bodies, as appropriate, on 1 April 2010.

25 In making commissioning decisions for 2010/11, the LSC will be mindful of the current economic climate and the pressure on public funds. Thus, it will be seeking to direct funding as swiftly as possible to the best-performing providers – namely, those providers judged best able to meet the needs of learners and employers. What that means is that, in the commissioning round for 2010/11, poorly performing provision is more likely to be removed than to be capped, and better-performing providers, with a record of strong performance, will be likely to receive growth – where the funds are available and the provision offered is identified as a priority.

Self-assessment

26 Providers are themselves responsible for the quality of the education and training that they offer learners and employers. Providers undertake self-assessment and internal quality assurance on an ongoing basis, in order to maintain and improve the quality of their provision. Alongside the provider's performance, these processes are fundamental to the annual commissioning dialogue and contract management.

27 The LSC has a legitimate interest in the process: self-assessment reports demonstrate the extent to which a provider has recognised any shortcomings and has taken steps to address them. It is a requirement of the funding contract that self-assessment reports are uploaded to the Provider Gateway annually, by the end of each calendar year.

28 Providers are expected to use FfE scores and other outputs as part of their evidence for self-assessment for the academic year 2008/09, and to refer explicitly to the FfE performance indicators in their self-assessment reports.

School sixth forms

29 Within a school, accountability for post-16 provision is rolled in with accountability for pre-16 provision. Local authorities and the DCSF (in the case of academies) 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.

30 The DCSF is concerned to ensure that this assurance is still carried out, and is currently considering the most appropriate way of achieving this in the light of the Machinery of Government changes.

31 In addition, a comparable qualification success rate (QSR) methodology is under development for school sixth form provision and post-16 FE provision. The DCSF is working on this with a range of partners.

32 The application of a comparable QSR is being tested by the FfE pilot involving school sixth forms and local authorities.

Identifying Underperformance

33 Four areas of provider performance inform decisions about commissioning or intervention. These are:

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

34 When underperformance is identified in any of the four elements above, the LSC expects the leaders and managers of the providers in question to recognise the issues and to take steps to address them. This includes agreeing improvement indicators with the LSC. In more serious cases, providers could lose poorly performing provision and associated funding or (where the policy applies) be subject to a Notice to Improve.

35 Table 1 below indicates the extent of underperformance against each of the four categories 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	Learner-responsive provision: 25 per cent or more below MLP Employer-responsive 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	Learner-responsive provision: 15 per cent to 24 per cent below MLP Employer-responsive 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	Learner-responsive provision: less than 15 per cent below MLP; however, this may include pockets of underperformance that require improvement indicators. Employer-responsive providers will also be expected to address pockets of underperformance

Quality-improvement indicators

36 Where underperformance is minimal, it is expected that the provider will determine its own quality-improvement indicators within its self-assessment process and as part of 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.

37 The LSC will still agree actions with providers (or, where necessary, set improvement indicators) if there are concerns about performance. These improvement indicators will form part of the funding agreement or contract, and the timescales for their achievement will be realistic. Failure to achieve them could result in the loss of funding for the specified provision. Clearly, not every provider will necessarily have contractually binding improvement indicators, but quality improvement will be an integral part of the ongoing dialogue with every provider.

Financial Health and Financial Management and Control

38 The LSC introduced financial Notices to Improve in January 2008. These apply only to colleges and are issued on the basis of the LSC's review of a college's financial returns (financial plans and audited accounts), LSC audit findings and other relevant information. The LSC will continue to assess annually 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.

39 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 difficulty

40 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.

41 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 group through validation by its PFM teams, using a consistent approach across regions.

42 Regional PFA teams carry out a cycle of college audits, examining financial management and control (which are aligned with the inspection cycle) and undertaking a direct audit of LSC funding streams.

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

Defining college financial underperformance

44 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. However, there are different degrees of financial failure and underperformance.

45 Some colleges are in financial difficulty in 2009–10 because of the slowdown of the LSC capital programme. The LSC will be providing financial support for those colleges with the most severe problems, and will ensure that its intervention approach in 2009–10 takes account of the circumstances that have brought about the financial weakness. Given the pressures on future public spending, the overriding LSC interest is to ensure sustainable provision for the years to come.

Whole-provider underperformance

46 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.

47 The LSC will usually issue a Notice to Improve to every college that is in financial failure. For financial health, the college must develop a strategic recovery plan. If the strategic recovery plan is sufficiently robust, the LSC can accept it as the basis on which to continue funding a provider that is in serious financial difficulty. If a plan is **not** sufficiently robust, the LSC will work with the college to keep planning, critically examining the alternatives in order to identify a path to recovery. However, if no way forward is identified, the LSC and/or the college would commission an independent organisational 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.

48 In the case of Notices to Improve that are triggered by inspection outcomes or by minimum levels of performance, improvement must be demonstrated within 12 months. However, it is not anticipated that 12 months would be enough for a college in weak financial health to improve from the 'inadequate' financial category. The LSC recognises that financial health recovery will typically take up to three years. Accordingly, in the case of Notices to Improve that are triggered by financial health only, the period over which improvement must be demonstrated will typically be longer. There will, however, be an examination of progress throughout the first 12 months (and each subsequent year) of the Notice period, and there will be set milestones that must be reached. Colleges will be required to address financial management and control weaknesses within 12 months – or often sooner, depending on the nature of the issues.

49 A college may be in financial difficulty purely as a result of capital development expenditure (related to capital projects that may or may not proceed due to the slowdown in the LSC FE capital programme). The LSC will continue to support such a college over an appropriate period, ensuring that it is not classified as 'inadequate' for financial health. The LSC will not, therefore, issue a financial Notice to Improve for this matter alone.

Significant provider underperformance

50 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 'satisfactory' for its financial management and control, following audit by the LSC, but would have issues that must 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); or
- may have little freedom to deal with its internal financial weakness because of capital-related financial difficulties.

51 Colleges where significant provider underperformance is a consequence of capital issues related to the slowdown in the capital programme will not be subject to those sanctions set out below. In such cases, the LSC will work with the college to resolve its financial difficulties.

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 will formally agree improvement indicators, as part of a required strategic improvement plan that the LSC will monitor. It is expected that, if a college has persistently failed to address previous audit recommendations, improvement must be demonstrated within a relatively short period, since the provider will already have had time to implement the 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.

Managing financial underperformance

53 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 cause of the financial difficulties, and on 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

54 As in all responses to difficulties identified, the action taken will be proportionate to the college's circumstances, and will take account of the extent to which the financial weakness is solely explained by the slowdown in the capital programme (rather than having deeper-rooted causes). Possible actions available to the LSC include:

- restricting receipt of invitations to tender;
- withdrawing the general consents in the financial memorandum and requiring a college instead to seek formal consents, based on demonstrated business cases; 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 them;
- requiring a review of the senior management and/or governing body, to determine whether a college has the appropriate leadership and management to achieve recovery (this may 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).

Inspection

55 Underperformance identified through inspection is defined as a provider receiving an Ofsted judgement of 'inadequate' for any of the following:

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

56 Table 1 at paragraph 35 sets out how inspection judgements relate to the extent of underperformance.

57 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.

Colleges

58 In all cases where Ofsted judges a college to be 'inadequate' overall, the LSC will issue a Notice to Improve.

59 Where a college has underperforming provision (where a graded aspect is 'inadequate' or where at least one sector subject area is 'inadequate') but is not graded as '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.

60 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, or else to withdraw the contract and move provision to a better-performing provider. 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, on re-inspection, Ofsted judges a college to be 'satisfactory', any growth in learner numbers and associated funding will be gradual and proportionate to the risk to the local delivery of provision. Table 2 outlines the actions taken and the growth restrictions applied to a college by the LSC, in response to the outcomes of inspection.

Table 2: Actions taken and growth restrictions applied to a college as a result of 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')	Binding improvement indicators set as part of conditions of funding	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	Binding improvement indicators set as part of conditions of funding	Limited or no growth in learner numbers in that sector subject area. Receipt of invitations to tender may be restricted

61 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.

62 Any decision about the withdrawal of funding will depend on the outcome of re-inspection. If, on re-inspection, Ofsted judges a college to be overall 'inadequate' for a second time, 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.

63 If, on re-inspection, Ofsted judges a sector subject area to be 'inadequate' for a second time, in most cases 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 the 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, in order to ensure sufficient breadth, depth and responsiveness of provision.

64 In the extremely unlikely event of a college that is overall 'satisfactory' (or better) being, on re-inspection, graded 'inadequate' against one or more of the aspects for a second time, significant action 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 taken when a college does not meet the conditions of a Notice to Improve, and could lead to withdrawal of funding.

Independent providers

65 The difference between colleges and independent providers in terms of the accountability arrangements is a result of their different contractual relationships with the LSC. Accordingly, independent providers do not receive a Notice to Improve. Underperformance will be dealt with in accordance with the terms of the contract.

School sixth forms

66 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 'Effectiveness and efficiency' of the sixth form; or
- in at least one 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 overall 'satisfactory' or better).

Providers graded 'satisfactory but not improving'

67 The definition of 'satisfactory but not improving' is set out in the Ofsted publication *Proportionate inspection of further education colleges* (May 2007, 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/). The definition is: 'overall effectiveness grade 3, capacity to improve to grade 3 or 4'. All those identified as 'satisfactory but not improving' will continue to be directed to use appropriate Learning and Skills Improvement Service (LSIS) improvement programmes. The LSC and its successors will continue to work with these providers to bring about improvement.

68 The concept of 'satisfactory but not improving' applies only 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

69 Health, safety and welfare form an essential element of assessment in the drive to raise standards and ensure the quality of education and training provision.

70 The LSC has clearly set out its risk-based approach, as detailed in *Learner Health, Safety and Welfare: The Learning and Skills Council Approach* (November 2006 (valid until March 2010), available at <http://readingroom.lsc.gov.uk/lsc/National/nat-learnerhealthsafetyandwelfarelscapproach-ps-27022007-v4-0.pdf>). In addition, the LSC has produced *Learner Health, Safety and Welfare: Safe Learner Blueprint* (September 2007, available at www.safelearner.info/downloads/LSCHealthSafety%204-10-07.pdf). This blueprint is a template to assist funded organisations in developing safe learners, and its principles will be carried through to subsequent funding arrangements. The LSC recognises that one rule does not fit all: each organisation is expected to customise the blueprint to meet the needs of learners, the learning activities and the environment.

71 Specialist providers for learners with learning difficulties and/or disabilities may have the social care element of their offer inspected by the Care Quality Commission (CQC), or by Ofsted (if the learners are aged 16–19 and fall under the arrangements for children’s services). 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 CQC or Ofsted deem the social care to be inadequate, the LSC may cease to contract with the provider.

72 Failure to meet the required legislation (including child protection laws) or guidelines (such as those on protection of vulnerable adults) may also lead to withdrawal of a contract. Where necessary, other provider types that deliver learning to vulnerable learners must also meet these requirements. Failure to do so may also lead to the withdrawal of funding or a contract. Failure on inspection to meet the requirements of safeguarding is now a factor that limits the grade for overall effectiveness, and may also lead to withdrawal of funding.

Supporting improvement in learner health, safety and welfare

73 The LSC 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.

Minimum Levels of Performance

74 The minimum levels of performance have been reviewed annually and have been raised and differentiated whenever improvements made by the sector have rendered such a move appropriate. As stated in paragraph 3 and set out in Table 3 below at paragraph 91, the levels remain unchanged in 2009/10.

75 Minimum levels of performance represent the absolute minimum success-rate performance, and the LSC expects providers to exceed them. Meeting the levels is not necessarily enough to guarantee continued funding. The LSC will 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, or if the provision is considered to be a low priority.

Provision in scope for the 2010/11 business cycle

76 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 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 or colleges of art and design);
- higher education institutions that deliver FE provision and complete the ILR; and
- adult learning providers.

77 FE colleges must record all learners in the learner- or employer-responsiveness data returns (as appropriate), including those learners not publicly funded. This requirement is mandatory.

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

- colleges and adult learning providers;
- employers; and
- private training providers.

79 Following two pilot years, this year, for the first time, Train to Gain provision will be in scope for the application of minimum levels of performance. The way in which minimum levels of performance will apply to employer-responsive provision (including Train to Gain provision) is detailed in paragraphs 93–108.

Provision not in scope for the 2010/11 business cycle

80 All other provision is currently 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 – for young people this is likely to be part of Foundation Learning (the national suite of learning for 14- to 19-year-old learners working mainly at Entry Level or Level 1). For adults it will include Adult Safeguarded Learning and units and qualifications within the Qualifications and Credit Framework – the new way of recognising achievement through the award of credit for units and qualifications.

Key skills and functional skills

81 In the previous issue of *Identifying and Managing Underperformance*, the LSC set out its intention of including key skills qualifications in the calculation of minimum levels of performance based on the 2008/09 data return. However, since key skills will shortly be phased out and replaced by functional skills, it is not considered appropriate to include key skills qualifications in the last cycle of MLP overseen by the LSC.

82 Functional skills delivered as standalone qualifications will also be excluded from MLP calculations. This is because they are currently delivered as pilot qualifications. It is anticipated that they will become the mainstream replacement for key skills in 2010/11, at which point they will be included in the performance-assessment calculations that are undertaken at that time.

83 Where functional skills are delivered as part of an Apprenticeship framework, that framework will remain in scope for MLP; the relevant sector skills council will have satisfied itself that the functional skills qualification is appropriate for the framework, and it cannot be regarded as a pilot in such instances.

84 Standard FE qualification success-rate reports will detail key skills and functional skills achievements separately, and both qualifications will be included in the scope of discussions about performance.

AS-levels

85 This year, AS-levels will be excluded from the MLP calculation. This is largely due to the instability of the completion records and the data-collection arrangement for these qualifications across the system. The different arrangements and approaches to 'cashing in' AS-levels across the system have also led the LSC to conclude that, for this year, the fairest option is to exclude them from MLP.

86 Since AS-levels are primarily undertaken with the intention of progressing to A2, measurement of the A2 qualification only will be undertaken this year.

87 The LSC and its successor agencies will work with the DCSF and BIS to consider the proper approach to measuring AS-level performance in the longer term.

88 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 by means of evaluation, provider dialogue and examination of wider performance data. For example, in Entry to Employment, this might include the percentage of positive progressions.

Offender learning

89 We are committed to having providers work within a framework that offers high-quality learning opportunities for offenders. To deliver this commitment, we are working with the BIS and the National Offender Management Service on the continuing refinement of the offender learning system, to ensure that it best meets current and future needs. The LSC awarded contracts for the delivery of Offender Learning and Skills Service (OLASS) phase 3 offender learning in August 2009.

90 The LSC has considered the practicalities of applying MLP to provision delivered in a custodial setting. It has concluded that MLP would not be an effective measure in this context. Offender learning is assessed in other (more appropriate) ways, and performance is managed by reference to requirements set out in provider contracts.

Minimum levels of performance for the 2010/11 business cycle

91 In 2009/10, consideration of provider performance against the minimum levels will use the most recent available success-rate information from 2008/09. Table 3 outlines the minimum levels of performance for the 2010/11 commissioning round.

Table 3: Minimum levels of performance – 2008/09 success rates for 2010/11 commissioning

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

92 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 significantly by the sector in recent years. For Apprenticeship provision, any framework within 'sector subject area unknown' will be assessed against the minimum level of 50 per cent.

Minimum levels of performance for employer-responsive provision

93 This section applies to providers of employer-responsive provision – both Apprenticeship provision and Train to Gain provision. Paragraphs 105–106 apply to employers who manage their own Apprenticeship provision. For both Apprenticeship and Train to Gain provision, the success-rate methodology remains unchanged: it uses the overall qualification success rate (QSR). Details of the methodology are available in the associated technical document (available at www.lsc.gov.uk/aboutus/quality/intervention). 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.

Application of minimum levels of performance by level of provision

Provision level for Apprenticeships (MLP threshold to apply this year = 50 per cent)

94 The MLP reports for Apprenticeships show performance at an overall headline success-rate level; at national, regional and local authority level; and by sector subject area (SSA) and sector framework code (SFC). Cells are shaded red where provision is below the MLP threshold of 50 per cent, and green where performance is above that threshold. The reports also show performance by age 16–18, 19–24 and 25+. This is provided for information only: **MLP applies at the overall age level**. A copy of the report format can be found in the associated technical document.

95 In keeping with previous years, MLP for Apprenticeship provision will be applied at the SFC level, informed by performance at the SSA level. Where performance at the SSA level exceeds the threshold of 50 per cent, all provision within that SSA may be retained (with pockets of poor performance subject to improvement indicators as part of the conditions of funding). Where performance at the SSA level is below 50 per cent, all frameworks will be removed, save for any that are above the threshold (in practice, the volumes are likely to be small).

Application of MLP by provision level for Train to Gain (MLP threshold to apply this year = 65 per cent)

96 For Train to Gain, the MLP reports will be produced nationally, regionally and locally. Provision will be shown by SSA tier 1 and SSA tier 2 on the vertical axis, and by level of learning on the horizontal axis. There is no analysis by age. An example of the report format can be found in the associated technical document.

97 For Train to Gain, MLP will be applied at the SSA tier 2 level, by combined level of learning. Application at tier 2 will be informed by performance at the SSA tier 1 level. Where performance at SSA is below 65 per cent, all provision at tier 2 will be removed, save for any that is above the threshold at the aggregated level of learning (in practice, the volumes are likely to be small).

Application of minimum levels of performance by level of geography

98 This year, for both Apprenticeship and Train to Gain provision, MLP will be applied at a regional level of geography (for those providers that deliver in more than one local authority area).

Minimum levels of performance reports for employer-responsive provision

99 In previous years, MLP reports set out performance at the level of the 47 local LSC areas, and the policy was applied at that level. Where a provider delivered in more than one of the 47 areas, performance was analysed, and MLP applied, for each local LSC area of delivery, without aggregation to regional or national level.

100 Again in previous years, providers completed ILR field L25 to record the LSC area in which the provision was taking place. The information in this field was used to generate the reports by the 47 LSC areas. The move to single contracting now means that L25 records the lead LSC area, irrespective of where the provision is actually taking place.

101 This year, both the QSR and the MLP reports are constructed at the local authority level (regionally and nationally aggregated, where appropriate), and they use ILR field A23 (delivery location).

102 This means that a large national provider can have up to 152 local authority-level MLP reports, for both Apprenticeship and Train to Gain provision, and aggregated reports at regional and national levels. The reports for Apprenticeship delivery show success rates at SSA and SFC level. For Train to Gain, they show performance at SSA tier 1 and tier 2.

103 Although the reports go down to local authority level, this year **MLP will be applied at the regional level of performance for those providers that deliver in more than one local authority area.** For large national providers that deliver provision across more than one region, MLP will also apply at the regional level. To apply MLP at a national level might mean that pockets of poor provision continue unchecked.

104 Although MLP will be applied at the regional level, this does not mean that poor performance at the local authority level will not be addressed as part of the normal contract management arrangements. The reports at local authority level will enable the LSC to see where there is significant underperformance at that level.

Employers

105 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.

106 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 for the provision (if there is sub-contracted delivery). The National Employer Service has communicated to employers its intention of withdrawing 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

107 Where a provider has large volumes of sub-contracted delivery (including consortia), the contract with the lead provider contains clear provisions governing sub-contracting. 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.

108 The LSC may seek assurance from the lead provider that it monitors the quality of all its sub-contractors effectively. All LSC-funded providers should be able to produce information on their sub-contracting arrangements as a matter of course. The LSC will apply the MLP policy at contract holder level.

Minimum levels of performance for learner-responsive provision

109 For FE qualifications funded through learner-responsive channels, the methodology remains unchanged: underperformance is calculated using aggregated guided learning hours (glh) for qualifications and weighted success rates within qualification aims. Identification is by qualification level and by sector subject area. Assessment of underperformance will use 2008/09 data.

Learner-responsive long qualifications

110 The methodology for calculating MLP for learner-responsive long qualifications remains unchanged; differential levels form part of the analysis.

111 As paragraphs 85–88 indicate, AS-levels will not be included in the MLP calculation this year. A2 qualifications, however, remain in scope. 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 on all of the long qualifications to determine the overall performance calculation.

Learner-responsive short qualifications

112 The LSC will continue to assess performance, and to apply MLP separately for short qualifications – that is, for provision of between 5 and 24 weeks' duration.

113 Very short qualifications (any qualification that is recorded against the ILR as less than five weeks) are not included in the LSC's calculation of underperformance in learner-responsive provision. The LSC will continue to publish minimum levels of performance for these qualifications. However, they will remain outside the discussions about performance. The indicative minimum level for very short-course provision remains at 85 per cent.

Application of minimum levels of performance for learner-responsive provision

114 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 MLP 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 and summarised in Table 4 at paragraph 119.

115 For 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.

116 For example, where underperformance is between 5 and 15 per cent, the LSC will discuss with the provider how to improve performance and will agree relevant improvement indicators. For some providers, these improvement indicators will form part of the funding agreement. Where underperformance is 5 per cent or less, the provider will typically determine its own improvement indicators, and will inform the LSC through its quality-improvement plan, self-assessment report or strategic business plan.

117 In cases where there is more significant concern (where the volume of provision that is underperforming is in the range of 15–24 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 cases, 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.

118 Where there is serious cause for concern, and where 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).

119 Where the LSC issues a provider with a Notice to Improve because of the provider's performance against the MLP, it may restrict the growth of LSC-funded learners with that provider, or else withdraw funding. This is consistent with the LSC's approach to a Notice that is issued following an inspection assessment of 'inadequate'. Table 4 below outlines the anticipated restrictions.

120 In very rare cases, where success rates are considerably lower than the minimum levels of performance and where a college's capacity to improve is weak, immediate consideration of the strategic options for restructuring that 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 period under the Notice to Improve. This extremely serious level of underperformance represents a significant risk to learners, employers and the public purse.

Minimum levels of performance reports and data

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

122 In December 2008, the Information Authority informed the sector that it should plan on the basis that the final closing date for the FE ILR (F05) was to be brought forward from early February 2010 to 15 January 2010. This change was confirmed at a board meeting on 10 June 2009 and was communicated to the sector on 26 June 2009.

Table 4: 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 per cent or more	Notice to Improve issued	If appropriate, limited or no growth at an institutional level, or removal of funding
15 to 24 per cent	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
0 to 14 per cent	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

123 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 15 January 2010. This cannot be changed at a local, regional or national level.

124 The Information Authority board agreed at its meeting on 10 June 2009 that, from 2009/10 onwards, the final closing date for learner-responsive returns would be the fourth Monday in November. The work-based learning ILR closing date remains unchanged.

125 Provider-level FE reports will be generated at three key points. Apprenticeship reports for period 15 of 2008/09 and Train to Gain 2008/09 reports have been available from the week commencing 7 December 2009. Table 5 below sets out the key dates for all reports. They will be available via the Provider Gateway only.

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

127 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 will allow providers to see clearly their performance by age, and will also serve as a transition to reporting by individual funding streams, in order to meet the needs of the LSC's successor bodies. Action will **not**, however, be taken this year on the basis of age.

Minimum levels of performance: Ofsted and LSIS

128 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.

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

Table 5: Reporting timetable

Type	Data source	Availability of the reports
Apprenticeships	2008/09 Period 15 data	w/c 7 December 2009
Train to Gain	2008/09 Period 15 data	w/c 7 December 2009
Learner-responsive initial report	F05 data – 10 December 2009	w/c 14 December 2009
Learner-responsive final report	F05 data close – 15 January 2010	w/c 25 January 2010

Notices to Improve

130 Notices to Improve outline the conditions that a provider 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 providers identified as underperforming, where:

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

131 Table 6 below sets out how Notices will apply to each provider type.

132 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.

Financial health and/or financial management and control

133 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 that is triggered by 'inadequate' financial health will be issued within three months of receipt of the financial health returns. This 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

134 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.

Table 6: 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	No	No
Specialist providers for learners with learning difficulties and/or disabilities	No	n/a	No
School sixth forms	No	No	No

Minimum levels of performance

135 The LSC will issue a Notice to Improve in 2009/10 triggered by an analysis of 2008/09 success rates against the minimum levels. If, before the close of the ILR, 15 per cent or more of short- and/or long-qualification learner-responsive 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:

- determine whether a provider has the capacity to improve within the 12-month period;
- determine further options for a provider 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.

Multiple triggers for a Notice to Improve

136 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 that relates to more than one area of underperformance.

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

138 There may be instances when a college that is already subject to a Notice to Improve receives a second notice. Providers that are continually underperforming and not meeting the minimum levels will remain subject to the Notice to Improve. It is not acceptable simply to meet the minimum standard.

139 If a college has met the conditions laid out in the Notice and has reached the appropriate historic MLP against which the Notice was issued, that Notice will be lifted. However, if the college falls below the MLP threshold that is set (if it is higher) in the subsequent year, it could still face a new Notice. Thus, it is possible to have a Notice lifted and a Notice issued in the same year.

Table 7: Responsibility for monitoring Notices to Improve after April 2010

Provider type	Notices relating to inspection	Notices relating to minimum levels of performance (FE)	Notices relating to financial health and financial management and control
FE colleges	SFA	SFA	SFA
Sixth form colleges	Home local authority	Home local authority	Home local authority
Adult learning providers	n/a	SFA	n/a
Private training providers	n/a	n/a	n/a
Specialist providers for learners with learning difficulties and/or disabilities	n/a	n/a	n/a
School sixth forms	n/a	n/a	n/a

Monitoring a Notice to Improve

Transition to the new arrangements

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

- 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; or
- an LSIS improvement action plan for minimum levels of performance.

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

142 Where a college is issued with a Notice to Improve that 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 that face the college.

143 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, Ofsted may be invited to undertake either an enhanced monitoring visit or a full inspection of that provider.

144 This could happen at any point during the Notice period, depending on circumstances. The Ofsted report will be used 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 removal of a Notice to Improve

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

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

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

148 It is acknowledged that a provider may be able to demonstrate, using its 2009/10 data, that it has met the conditions of a Notice to Improve that applies to the 2010/11 academic year. If the appropriate successor body is satisfied that the necessary improvement has been demonstrated, it may lift the Notice. 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.

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

Failing to meet the conditions of a Notice to Improve

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

151 Where it is evident that the college is unlikely to fulfil the conditions of the Notice, the appropriate successor body, within the Notice period (and usually after the Ofsted monitoring visit, if the Notice relates to inspection), will begin to consider and explore the strategic options available. This is to minimise any adverse impact on learners and employers.

152 If a college fails to meet the conditions of a Notice that has been issued in relation to inspection or minimum levels, the successor body may cease funding the underperforming provision. The SFA/local authority may not intervene further, unless the viability of a college is compromised by the withdrawal of funding.

153 Should a college be subject to a Notice to Improve with multiple schedules, 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.

154 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 feel they have exhausted all approaches to instigating change. Should this occur, the LSC may seek to use the powers of intervention conferred under the Further Education and Training Act 2007.

155 The Further Education and Training Act required 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

156 The LSC does not publish Notices to Improve. However, in its Annual Report it will include the number of Notices issued.

157 The LSC does, however, inform the BIS, DCSF and the Local Government Association of providers that are in receipt of a Notice. This year it will also inform relevant local authorities, in confidence, of any Notices issued to providers for which they are the identified lead. The Minister of State for BIS will subsequently write, in confidence, to inform all MPs whose constituencies are covered by an underperforming college – but only if there is whole-provider underperformance (where underperformance against the MLP threshold exceeds 25 per cent or where a college is judged to be 'inadequate' on inspection). There are two reasons for this: first, to allow the MPs, if they so wish, to discuss with the Minister of State the implications for the college; and second, to encourage them to support the institution to improve, in whatever way they can. The DCSF may choose to share this information with the relevant directors of children's services. The Minister of State for BIS will also write to the appropriate constituency MP once a provider meets the conditions and the Notice is lifted.

158 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 for financial health and financial management and control.

159 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 provisions of that Act, the LSC may be required to disclose the Notice and the associated conditions.

160 LSIS support for quality improvement covers all categories of provision, and its support is available to various groups of providers.

- **Providers deemed 'inadequate' on the basis of inspection or who fall below minimum levels of performance.** When a provider is identified as underperforming or is issued with a Notice to Improve, the LSC will ask LSIS to source support through the IAS. This service for colleges and providers is free of charge until spring 2010, when there will be a review of the cost of providing the service. Support for referred cases is usually initiated on the basis of an initial case conference with the LSC or another funding body, LSIS and senior provider representatives. Support will normally involve an IAS adviser or team of advisers. In addition, and depending on the nature of the support needed, help may be drawn from the portfolio of other LSIS programmes, particularly the Skills for Life Improvement Programme or the Beacon Programme.
- **Providers identified as 'satisfactory but not improving' or as 'good' and that want to aspire to excellence.** The IAS is not just for providers that are underperforming. Those that are identified as 'satisfactory' or better are also able to access its support. Providers can self-refer or be referred by the LSC or another funding body. Support for these cases is usually triggered by an initial scoping visit carried out by a member of the IAS management team. Further detail about the LSIS IAS is available at www.lsis.org.uk/Servicesandsupport.aspx?id=816E87DF-792C-4859-BABC-FC4881B191A7.
- **Providers that are underperforming in a specific curriculum area/aspect/theme.** If a provider is underperforming in a specific curriculum area/organisational aspect or theme, IAS support may be provided. As with the previous category, providers can self-refer or be referred by the LSC, and support is usually triggered via an initial scoping meeting.

161 It should be noted that there is no set allocation of resources for any of the three categories. The allocation depends entirely on the support needs, which are reviewed on a regular basis. In all cases, the support needs will be identified at the outset, by means of a scoping visit or case conference, and the most appropriate source of support is determined. This means that the support package can (and often does) include support drawn from the LSIS portfolio of programmes. A full list of LSIS programmes can be found at www.lsis.org.uk/Servicesandsupport.aspx. Providers may also be advised to initiate change at their own expense or to commission additional support using their own funding.

Implications of Underperformance for Providers

162 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, before any cessation of funding, the LSC may seek to minimise the impact on learners and the public purse. As outlined in other sections of this document, this may include limiting the number of LSC-funded learners. There are various other restrictions that may be implemented and 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

163 In itself, a Notice to Improve is not a reason to stop a college from making, and proceeding with, a capital application. However, as indicated in Annex A of the LSC Capital Handbook (November 2006, available at http://readingroom.lsc.gov.uk/lsc/National/LSC_Capital_Handbook.pdf), 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.

164 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 of a capital bid would be on a case-by-case basis.

165 As the capital proposal progresses, it is likely that those colleges' Notices to Improve would be successfully met. If an application progresses and 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.

166 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).

Reorganisations and mergers

167 If a college is under a Notice to Improve before it takes a 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. As is set out in *Further Education Colleges: Models for Success* (DIUS, August 2008, available at www.dius.gov.uk/further_education/fe_improvement/fe_models_for_success), merger should be considered only in exceptional circumstances, once a wide range of options have been considered. 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 continues to meet its objectives and to deliver quality provision to local communities.

168 When a college under Notice is dissolved as a result of a merger, the Notice is not automatically transferred to the 'receiving' college or the 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.

169 If a college under Notice is undergoing a merger, but will not be dissolved (i.e. it is the 'receiving' partner), there will normally be no change to the Notice or to the LSC expectation that the conditions will be met. If the Notice was triggered by provision that will no longer be delivered after the merger, the conditions of the Notice will be reconsidered.

Teacher training

170 On 1 September 2008, the DCSF introduced revised regulations on induction arrangements for newly qualified teachers in England, and updated the *Statutory Guidance on Induction for Newly Qualified Teachers in England*. The revised regulations enable FE institutions, for the first time, from 1 September 2008, to host induction for newly qualified teachers (NQTs) if they wish, so 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 provide guidance on when offering statutory induction to NQTs is prohibited, and the action to be taken when an NQT is already undertaking induction in an FE institution that receives an 'inadequate' judgement following an Ofsted inspection.

Training Quality Standard

171 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.

172 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.

173 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.

174 If, at any point, a provider that has achieved the Training Quality Standard is identified as suffering from 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.

175 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 reassessment as a merged institution.

National skills academies

176 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, which it needs in order to be part of the network, and which is aligned to (and in most cases exceeds) achievement of the Training Quality Standard.

177 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 that are issued with Notices to Improve. This may include additional support for the provider to improve its success rates or grades, or withdrawal of provision from the provider.

178 In such cases, however, it will be guided by the actions placed upon the provider by the LSC. NSAs will need to work with the relevant regions to understand the restrictions/conditions placed on those providers and decide 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; in some cases, this may mean moving provision to other providers that have no performance issues.

Complaints

179 If a provider should wish to challenge (or to make representations about) the LSC's decision to issue a Notice to Improve or to withdraw funding either as a result of the provider's failure to meet the minimum levels of performance or as a result of Ofsted inspection judgements, that provider should not seek to follow the section of the contract dealing with dispute resolution. Instead, it should follow the published procedure for making complaints about the LSC's administration.

