

<b>Contract Type</b>	HEI Condition of Funding Agreement
<b>Funding Period</b>	1 August 2018 to 31 July 2019
<b>Between</b>	the Secretary of State for Education (acting through the Education and Skills Funding Agency)
<b>And</b>	ProviderName
<b>Funding for</b>	Further Education and Training in Higher Education
<b>Contract Number</b>	ContractNumber

#### **ACCEPTANCE BY PROVIDER**

By accepting this Funding Agreement via the Skills Funding Service the person taking this action on behalf of the HEI represents and warrants that the HEI has read and understood this Funding Agreement, the HEI agrees to be bound by this Funding Agreement and that he/she is duly authorised to accept this Funding Agreement and legally bind the HEI.

This Funding Agreement is made on the date the Funding Agreement is digitally signed by the HEI on the Skills Funding Service.

#### **SIGNED FOR AND ON BEHALF OF THE SECRETARY OF STATE FOR EDUCATION**

acting through the Education and Skills Funding Agency  
by Eileen Milner, Chief Executive of the Education & Skills Funding Agency

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This Funding Agreement is made on the date the Funding Agreement is digitally signed by the HEI on the Skills Funding Service between:

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ProviderName2  
Address

SECRETARY OF STATE FOR  
EDUCATION  
ACTING THROUGH THE EDUCATION  
AND SKILLS FUNDING AGENCY  
CHEYLESMORE HOUSE  
QUINTON ROAD  
COVENTRY  
CV1 2WT

Hereinafter called  
the HEI

Hereinafter called  
the ESFA

## **Part One**

- 1 The ESFA is an executive agency of the Department for Education, exercising powers on behalf of the Secretary of State and is acting on behalf of the Crown.
- 2 As Accounting Officer, the Chief Executive of ESFA is accountable to Parliament for assuring the use of funds which the ESFA receives from the Secretary of State and that the use of funds is consistent with the Secretary of State's statutory remit and any conditions imposed by the Secretary of State. The ESFA is also responsible for the regularity and propriety of expenditure for the use of funds.
- 3 The ESFA's Conditions of Funding, including this Funding Agreement, therefore reflect the obligations and responsibilities of the ESFA for monitoring the use of funds allocated to HEIs. However, the ESFA's expectation is that, as independent corporate bodies (subject to their own statutory duties, other obligations and the ESFA's Conditions of Funding), HEIs will take full control of their own financial affairs.
- 2 The ESFA pays funding to only those HEI's which agree to comply with this Funding Agreement together with:
  - a. the Funding Guidance;  
<https://www.gov.uk/16-to-19-education-funding-guidance>
  - b. the Capital Transactions Guidance;

- c. the post-16 audit code of practice;  
<https://www.gov.uk/government/publications/post-16-audit-code-of-practice>
- d.the college accounts direction;  
<https://www.gov.uk/government/publications/college-accounts-direction>
- e. the Financial Planning Handbook;  
<https://www.gov.uk/government/publications/financial-planning-handbook>
- f. the Minimum Standards for 2018;  
<https://www.gov.uk/government/publications/16-to-18-minimum-standards/16-to-18-minimum-standards-for-2017>
- g. Specification of the Individualised Learner Record for 2018 to 2019;  
<https://www.gov.uk/government/publications/ilr-specification-validation-rules-and-appendices-2018-to-2019>
- h. Individualised Learner Record - Provider Support Manual;  
<https://www.gov.uk/government/publications/ilr-specification-validation-rules-and-appendices-2018-to-2019>
- i. Rigour and Responsiveness in Skills (April 2013, DfE/BIS publication);  
<https://www.gov.uk/government/publications/rigour-and-responsiveness-in-skills>
- j. Careers guidance for colleges;  
<https://www.gov.uk/government/publications/careers-guidance-for-colleges--2>
- k Traineeships;  
<https://www.gov.uk/delivering-traineeships-through-efa-funding>
- l. Sub-contracting;  
<https://www.gov.uk/government/publications/funding-guidance-for-young-people-sub-contracting-controls>
- m. Further Education Free Meals;  
<https://www.gov.uk/guidance/16-to-19-education-financial-support-for-students>
- n. Guidance published, from time to time, by the Secretary of State for Education which sets out the expectations in relation to safeguarding practice within further education institutions;  
<https://www.gov.uk/government/publications/keeping-children-safe-in-education--2>

<https://www.gov.uk/government/publications/working-together-to-safeguard-children--2>

o. Special educational needs and disability code of practice: 0 to 25 years;

<https://www.gov.uk/government/publications/send-code-of-practice-0-to-25>

p. National Minimum Standards for Residential Accommodation for children in Colleges (published under section 87C of the Children Act 1989);

<https://www.gov.uk/government/publications/residential-special-schools-national-minimum-standards>

q. Prevent Duty Guidance;

<https://www.gov.uk/government/publications/prevent-duty-guidance>

[and](#)

r. Industrial placements capacity and delivery fund for 2018/19

<https://www.gov.uk/guidance/work-placements-capacity-and-delivery-fund-from-april-2018-to-july-2019>

(together the "**Conditions of Funding**". These policies were correct at the Commencement Date, but may be updated from time to time.).

- 3 The Conditions of Funding shall take effect on and from 1 August 2018.
- 4 This Funding Agreement sets out the terms and conditions under which grant funding and annual allocation funding is provided to the HEI by the ESFA. The terms and conditions relating to annual allocation funding will be updated annually. The Services subject to the terms and conditions of the Conditions of Funding are in respect of the delivery of education provision for:
  - a. students aged 16 to 18, and
  - b. high needs students aged 16 to 18, or any young person aged 19 to 25 subject to an Education Health and Care Plan, who requires additional support costing over £6,000 (i.e. additional to education and support that is funded through the published 16-19 standard funding formula) and for whom the relevant local authority provides top-up funding (Element 3).
- 5.1 The HEI represents, warrants and undertakes to the ESFA that it has the necessary resources, skills and experience to carry out the HEI's obligations pursuant to the ESFA Conditions of Funding.
- 5.2 The HEI shall comply and shall ensure that the HEI Related Parties comply with the ESFA Conditions of Funding, all applicable Laws and the most recent policies which may from time to time be issued by the Department, the ESFA, Ofsted and awarding bodies of which the HEI is

made aware, including but not limited to, being published on the relevant bodies website.

- 5.3 The HEI shall ensure that all activities carried out pursuant to this Funding Agreement shall be documented in accordance with the requirements of the ESFA as notified to the HEI in writing from time to time and shall provide such documentation to the ESFA, as the ESFA shall request from time to time within any reasonable time period specified by the ESFA.
- 5.4 The HEI shall have in place its own quality assurance arrangements that demonstrate that it can comply with the ESFA Conditions of Funding and evidence these arrangements if required to do so in a form and subject to any other conditions, as from time to time the ESFA or the Department may specify.

#### **HEI Minimum standards**

- 5.5 The ESFA may, at any time during the Term, undertake an assessment of the quality and delivery of the Services which may include analysis of performance against the national minimum standards, as published by the Department [16 to 18 minimum standards for 2018 - GOV.UK](#). The ESFA will use data reported in the 2017 to 2018 year to measure performance against the national minimum standards for 2018 and will use this as an indicator of the quality and delivery of the Services by the HEI. Where the ESFA assesses that the Services, in whole or in part, fall below the required standards the ESFA may, in its absolute discretion take one or more of the following actions:

- 5.5.1 issue and publish a Notice to Improve; and/or
- 5.5.2 issue additional Conditions of Funding, relating to the improvement of the Services, which the HEI shall accept and comply with. These conditions will apply until the HEI can demonstrate the required improvement to the ESFA's absolute satisfaction; and/or
- 5.5.3 require the HEI to suspend the recruitment of Students to, and/or to cap any growth in, those Learning Programmes which are identified as below the required standards; and/or
- 5.5.4 give consideration to the Services which are below the required standards in its application of lagged learner funding when finalising the amount of funding in any subsequent Funding Agreements between the Parties; and/or
- 5.5.5 reduce, suspend or recover payment to the HEI in

respect of that part of the Services to which the failure to meet the required standards relate; and/or

5.5.6 terminate, in accordance with part two clause 18.2.

- 5.6 The failure of the HEI, as assessed by the ESFA, to comply with any requirements of 5.5.2 to 5.5.3 within such time as the ESFA may deem reasonable may lead to the ESFA taking such actions as it deems appropriate which may include, but is not limited to, terminating in accordance with Part Two clause 18.2 (Termination).

### **Ofsted Inspection**

- 5.7 When the HEI receives notification from Ofsted that the Activities are to be inspected, the HEI shall, upon request, provide the ESFA with a copy of its quality improvement activity, and any other relevant information in accordance with the required timescale of Ofsted. The HEI must notify the ESFA of the date of the meeting at which the Inspectorate give feedback on the inspection and allow the ESFA's nominated representative to attend the meeting. The HEI must confirm to the ESFA in writing the outcome of the inspection within 5 working days of receiving the feedback from Ofsted.
- 5.8 Ofsted may, at any time during the Term, undertake an inspection of the HEI. The ESFA will consider the outcome of any such inspection as follows:

### **Inadequate in part**

- 5.8.1 Where Ofsted has assessed the Services to be inadequate in any sector specific areas, the ESFA may, in its absolute discretion take one or more of the following actions:

5.8.1.1 issue and publish a Notice to Improve;

5.8.1.2 require the HEI to, and the HEI shall, accept and comply with additional Conditions of Funding relating to the improvement of the Services assessed as inadequate. These conditions will apply until the HEI can demonstrate the required improvement to the ESFA's absolute satisfaction; and/or

5.8.1.3 require the HEI to suspend the recruitment of Students to, and/or to cap any growth in, those Services which are assessed as inadequate; and/or

5.8.1.4 give consideration to the Services which are assessed as



inadequate in its application of lagged learner funding when finalising the amount of funding in any subsequent Funding Agreements between the Parties; and/or

5.8.1.5 reduce, suspend or recover payment to the HEI in respect of that part of the Services assessed as inadequate.

### **Inadequate overall**

5.8.2 Where the ESFA is made aware that Ofsted has provisionally assessed the Services to be inadequate overall, the ESFA may, in its absolute discretion take one or more of the following actions:

5.8.2.1 require the HEI to, and the HEI shall, accept and comply with temporary additional conditions of funding relating to the improvement of the overall Provision;

5.8.2.2 require the HEI to temporarily suspend the recruitment of Students and/or temporarily cap any growth in those Learning Programmes which are assessed as inadequate.

5.8.2.3 commence discussions with the HEI and the Local Authority within whose area the HEI is located, either with Ofsted or not, as part of considering what actions as specified in clause 5.8.3.3 – 5.8.3.4 inclusive may be taken.

5.8.3 Where Ofsted has assessed the Services to be inadequate overall, the ESFA may, in its absolute discretion take one or more of the following actions:

5.8.3.1 issue and publish a Notice to Improve; and/or

5.8.3.2 require the HEI to, and the HEI shall, accept and comply with additional Conditions of Funding relating to the improvement of the overall Services. These conditions will apply until the HEI can demonstrate the required improvement to the ESFA's absolute satisfaction; and/or

5.8.3.3 require the HEI to suspend the recruitment of Students to, and/or to cap any growth in, those Learning Programmes which are assessed as inadequate; and/or

5.8.3.4 give consideration to the assessment of inadequate in its application of lagged learner funding when finalising the amount of funding in any subsequent Funding Agreements between the Parties; and/or

5.8.3.5 reduce, suspend or recover payment to the HEI; and/or

5.8.3.6 terminate, in accordance with part two clause 18.2.

5.8.4 The failure of the HEI, as assessed by the ESFA, to comply with any requirements of 5.8.1.2 to 5.8.1.3, 5.8.2.1 or 5.8.3.2 to 5.8.3.3 within such time as the ESFA may deem reasonable may lead to the ESFA taking such actions as it deems appropriate which may include, but is not limited to, terminating in accordance with Part Two clause 18.2 (Termination).

5.9 The ESFA will take action based on Ofsted's provisional and confirmed outcomes as in clause 5.8 above. Where ESFA is made aware that the HEI has made a complaint about the graded outcome of the overall assessment by Ofsted, the ESFA will continue to progress action under clause 5.8 but will be mindful of the implications arising from the outcome of a complaint. The ESFA will review any decisions made at such time as outcomes of any complaint are made known.

### **Industrial Placement Capacity and Delivery Fund**

5.10 Where the HEI is in receipt of funding under the industrial placement capacity and delivery fund, if:

5.10.1 the ESFA issues a Notice to Improve under clause 5.5.1, 5.8.1.1 or 5.8.3.1, or

5.10.2 Ofsted has judged the Services inadequate in part or overall,

the ESFA may, in its absolute discretion, withhold any remaining profiled allocation payments of that fund, and may give consideration of any such matter when finalising the amount of funding to be provided in respect of the delivery of such placements in any subsequent Funding Agreements between the Parties.

## **6. Provision of Information**

6.1 In addition to the other requirements to provide information set out in this Agreement, the ESFA reserves the right to request information from the HEI in order to exercise its responsibilities and/or to fulfill requirements to provide information to the Secretary of State, to account to Parliament and to meet European funding requirements (where applicable). On occasion, the ESFA will require urgent information from the HEI.

6.2 The HEI shall provide the ESFA or agents acting on its behalf with the information it requires under clause 6.1 at the times and in the formats

specified. This information shall be of sufficient quality to meet the purposes for which it has been requested.

- 6.3. Failure to comply with any request for information under clause 6.1, at all or in the required timescales, will constitute a Minor / Serious Breach of this Agreement.

## **Part Two**

### **1. Introduction**

- 1.1 This Funding Agreement, including the Appendices, Annexes and any documents referred to therein, is for the period between 1 August 2018 and 31 July 2019 unless terminated earlier in accordance with part two clause 17 (Termination) (the "**Term**").

### **2. The HEI's Obligations**

- 2.1 The HEI shall provide the Services and shall allocate sufficient resources to the Services to enable it to comply with the ESFA Conditions of Funding.
- 2.2 The HEI will perform and will ensure that all HEI Related Parties perform the Services with reasonable skill, care and diligence in accordance with the ESFA Conditions of Funding.
- 2.3 The HEI shall be solely responsible for all acts and omissions of the HEI Related Parties and any persons employed or engaged by any Sub-HEI.
- 2.4 The HEI understands and agrees that the following costs are not Eligible Expenditure: - payments that support activity intended to influence or attempt to influence Parliament, government or political parties, or attempting to influence the awarding or renewal of contracts and grants, or attempting to influence legislative or regulatory action. The HEI's costs of memberships for their Associations are eligible expenditure.

### **3. Learning Programmes**

- 3.1 The HEI shall deliver each of the Learning Programmes as set out in the Appendices and Annexes of this Funding Agreement in accordance with the terms and conditions of this ESFA Conditions of Funding. The detailed requirements in respect of each Learning Programme are set out in the Funding Guidance, as amended and updated from time to time and which form part of the ESFA Conditions of Funding.
- 3.2 The Maximum Value for a Learning Programme must not be exceeded for any reason except by way of a revision to this Funding Agreement made in accordance with part two clause 20.4 (Revision). The ESFA will

not be liable to make any payment to the HEI where such payment would result in the total aggregate of payments made to the HEI in respect of the relevant Learning Programme exceeding the Maximum Value for that Learning Programme.

- 3.3 The HEI is not permitted to vire Funding between Learning Programmes except by way of a revision to this Funding Agreement made in accordance with part two clause 20.4 (Revision).
- 3.4 The HEI must use the Funding solely for the purpose of delivering the Services agreed in the Appendices and Annexes of this Funding Agreement, any tender documents submitted by the HEI, or any other requirements set out in this ESFA Conditions of Funding.
- 3.5 The HEI must meet the ESFA's reasonable requirements for the provision of information (in full or as a sample) and audit certificates pursuant to part two clause 15 (Access and Monitoring).

#### **4. Payment and Review of Performance**

- 4.1 In consideration of the HEI's performance of its obligations as set out in the ESFA Conditions of Funding , the ESFA shall pay to the HEI the Funds set out in Appendix 1, or otherwise as specified in the Appendices and Annexes of this Funding Agreement.
- 4.2 All payments by the ESFA will be made via BACS or CHAPS, unless otherwise notified, and will be made on or before the 20<sup>th</sup> of each month or the prior Working Day.
- 4.3 Payment by the ESFA shall be without prejudice to any claims or rights, which the ESFA may have against the HEI and shall not constitute any admission or acceptance by the ESFA as to the performance by the HEI of its obligations hereunder. Prior to making any such payment, the ESFA shall be entitled to make deductions or deferments in respect of any disputes or claims whatsoever with or against the HEI, arising from this Funding Agreement or any other Funding Agreement between the HEI and the ESFA or the Secretary of State.
- 4.4 The overriding principle shall be that lagged funding shall apply other than in exceptional circumstances described in Funding Guidance for young people 2018 to 2019 <https://www.gov.uk/16-to-19-education-funding-guidance> or as otherwise provided for in this Funding Agreement.
- 4.5 Where the ESFA or any other Crown Body acting on behalf of the Secretary of State carries out a review or audit pursuant to part two clause 15 (Access and Monitoring) , in accordance with the principles set out in the post-16 audit code of practice, of a sample of the evidence which the HEI is required to provide under this Funding Agreement to

support the payments made by the ESFA and identifies errors in that evidence resulting in over-claims and over-payments which it deems are material (as defined in the Funding Guidance for young people 2018 to 2019 <https://www.gov.uk/16-to-19-education-funding-guidance>, the ESFA shall be entitled to:

- 4.5.1 recover, in accordance with clause 4.7, in full from the HEI the amount or value of all such errors;
  - 4.5.2 assume that the same percentage of monies overpaid have been made in respect of all payments to the HEI since the date of the last Audit or, if no Audit has been conducted previously, since the start of this Funding Agreement, to produce an aggregate value of monies overpaid (the "Aggregate Error Amount");
  - 4.5.3 recover, in accordance with clause 4.7, in full from the HEI a sum equal to the Aggregate Error Amount less the sum of any monies recovered by the ESFA pursuant to part two clause 4.5.1.
- 4.6 Where the HEI is in receipt of funding under the industrial placement capacity and delivery fund and fails to deliver a minimum number of industrial placements equivalent to 10% of the number of qualifying students on full time level 2 and/or level 3 vocational and technical programmes in 2015 to 2016 academic year with the allocated capacity delivery fund, the ESFA shall be entitled to:
- 4.6.1 reduce, suspend or recover, in accordance with clause 4.7, from the HEI a sum equal to the allocation for the number of industrial placements not delivered; and/or
  - 4.6.2 give consideration to the failure to meet the minimum number of industrial placements when finalising the amount of funding to be provided in respect of the delivery of such placements in any subsequent Funding Agreements between the Parties.
- 4.7 Any amounts including but not limited to those described at clause 4.5 and 4.6, recovered from the HEI will be recovered either by making deductions from future payments due to the HEI under this Funding Agreement or any other funding agreement between the Parties, or otherwise through the issue of an invoice. In all such reviews the decision of the ESFA is final.
- 4.8 Where the ESFA determines, as a result of an audit conducted pursuant to part two clause 15 (Access and Monitoring), that there has been an underpayment to the HEI, the ESFA shall be under no obligation to provide additional Funds to the HEI accordingly.
- 4.9 The ESFA shall perform a reconciliation at the end of the Term and shall notify the HEI of the actual number of Students delivered and the actual amount of money received in respect of the Learning Programmes

delivered and compare this to the total Funding paid under this Funding Agreement and to the overall maximum value specified in Appendix 1. Where the ESFA determines, as a result of such audit, that there has been an over-payment to the HEI, the ESFA may recover in full from the HEI the amount or value of all such errors and such sum shall be repayable by the HEI to the ESFA within 30 days of receiving an invoice for the same.

## **5. Information, Advice and Guidance**

- 5.1 As part of the delivery of the Services, the HEI will have to provide high quality, impartial and easily accessible information and advice in helping Students to understand the opportunities and support available to them about education, training or connected matters (including employment).
- 5.2 Where one of the main objectives of the Services to be provided under this Funding Agreement is to deliver information and advice, the HEI will have to have or attain the matrix Standard accreditation within six months of the Contract being awarded; and
- 5.3 If the information and advice is embedded as part of the delivery of the Services, the HEI should work towards achieving the matrix Standard Accreditation within a reasonable period.

## **6. Retention of Documents**

- 6.1 The HEI and HEI Related Parties shall maintain original invoices, management information returns and all other documents necessary to verify the Services provided by itself or by HEI Related Parties in relation to this Funding Agreement for six years from the end of the financial year in which the last payment by is made.

## **7 Public Reputations of the Parties**

- 7.1 Both Parties recognise their respective public reputations and legal responsibilities. Each Party shall use all reasonable endeavours not to harm or compromise these.

## **8. Freedom of Information and Confidentiality**

- 8.1 The Parties acknowledge that both are subject to the FOIA and shall comply with their respective obligations under the FOIA, which arise in connection with this Funding Agreement.
- 8.2 The provisions of part two clause 8 shall not apply to any information

which is or becomes public knowledge (other than by breach of this part two clause 8). This includes information published under part two clauses 8 and 10 (Consent to Publication) which;

8.2.1 was in the possession of the receiving party, without restriction as to its disclosure, before the date of receipt from the disclosing party;

8.2.2 must be disclosed pursuant to a statutory, legal or parliamentary obligation placed upon the party making the disclosure, including any requirements for disclosure under the Freedom of Information Act or the Environmental Information Regulations.

8.3 Nothing in this part two clause 8 shall be deemed or construed to prevent the ESFA from disclosing any Confidential Information obtained from the HEI:

8.3.1 to any other Crown Body, including but not limited to, non-departmental public bodies or quasi Government authorities or agencies; and/or,

8.3.2 to any consultant, contractor, college or other person engaged by the ESFA directly in connection with this Funding Agreement, provided that such information is treated as confidential by the receiving consultant, contractor, college or any other person.

8.4 In order to ensure that no unauthorised person gains access to any Confidential Information or data obtained and/or processed in the course of the delivery of the Services, the HEI undertakes to maintain adequate security arrangements that meet the requirements of professional standards and best practice in addition to those set out in part two clauses 11 and 12.

8.5 The HEI will notify the ESFA as soon as reasonably practicable (and in any event within 24 hours) of its discovery, of any breach of security in relation to Confidential Information and/or Personal Data obtained and/or processed in the course of the delivery of the Services. The HEI shall use all reasonable endeavours to mitigate the possible adverse impacts of any such breach of security including any intrusion into individuals' privacy. The HEI will keep a record of such breaches a copy of which shall be provided to the ESFA upon request. The HEI will use its best endeavours to recover such Confidential Information and/or Personal Data however it may be recorded. The HEI will co-operate with the ESFA in any investigation that the ESFA considers necessary to undertake as a result of any breach of security in relation to Confidential Information and/or Personal Data.

- 8.6 The HEI shall, at its own expense, alter any security systems and/or processes at any time during the Term at the ESFA's reasonable request if the ESFA reasonably believes the HEI has failed to comply with this part two clause 8.
- 8.7 The provisions of this part two clause 8 will apply for the duration of this Funding Agreement and after its termination.
- 8.8 The ESFA and the HEI acknowledge that, except for any information which is exempt from disclosure in accordance with the provisions of the FOIA, the content of this Funding Agreement is not Confidential Information.

## **9. Feedback and Complaints**

- 9.1 The HEI shall have primary responsibility for receiving feedback in respect of the Services and shall investigate any complaint in respect of the Services promptly and thoroughly. The HEI shall have procedures in place, which are acceptable to the ESFA, to gather and act upon feedback and complaints from Students and/or their representatives and employers and the wider community.
- 9.2 The Department may issue guidance to the HEI on dealing with feedback and handling complaints, and will set out the minimum standards expected of the HEI. Failure to comply with such guidance shall be deemed to be a Minor Breach.
- 9.3 The HEI shall be responsible for resolving complaints in accordance with its own procedures and any guidance issued by the ESFA pursuant to part two clause 9.2.

## **10. Consent to Publication**

- 10.1 The Government has set out the need for greater transparency of public data and its commitment to hold public bodies to account over the use of public funds
- 10.2 In compliance with the Cabinet Office's transparency agenda THE ESFA is required to publish information about any payments made to the HEI under this Funding Agreement. Published information shall specifically exclude publication of bank account number and sort code.
- 10.3 The HEI hereby gives its consent for the Department to publish this Funding Agreement in its entirety, including from time to time agreed changes to the allocation, any payments Funding Agreement, to the general public. The Department may consult with the HEI to inform its



decision regarding any redactions to this Funding Agreement but the Department shall have the final decision in its absolute discretion.

- 10.4 The HEI shall assist and cooperate with the Department to enable the Department to publish the allocation and any Funding paid or payable to the HEI under this Funding Agreement.
- 10.5 The Department reserves the right to share information about the HEI's performance with any other Crown Body.
- 10.6 The ESFA may disclose any information, including the Confidential Information of the HEI:
- (a) on a confidential basis to any Crown Body for any proper purpose of the ESFA or of the relevant Crown Body;
  - (b) to Parliament and Parliamentary Committees or if required by any Parliamentary reporting requirement;
  - (c) to the extent that the ESFA (acting reasonably) deems disclosure necessary or appropriate in the course of carrying out its public functions;
  - (d) on a confidential basis to a professional adviser, consultant, supplier or other person engaged by any of the entities described in Clause 10.6(a) (including any benchmarking organisation) for any purpose relating to or connected with this Funding Agreement;
  - (e) on a confidential basis for the purpose of the exercise [any](#) of its rights under this Agreement or
  - (f) on a confidential basis to any body to which the ESFA intends to assign, novate or dispose its rights, obligations or liabilities under this Funding Agreement in connection with any such assignment, novation or disposal,

and for the purposes of the foregoing, references to disclosure on a confidential basis shall mean disclosure subject to a confidentiality agreement or arrangement containing terms no less stringent than those placed on the ESFA under this clause 10.

## **11. Supply of Data**

- 11.1 THE HEI must supply to the Education and Skills Funding Agency (ESFA), data on each individual Student, in accordance with the data collections framework set out in the [Individualised Learner Record \(ILR\) Specification 2018 to 2019](#) as amended and updated.

- 11.2 THE HEI shall transmit data for each part of the Activities, electronically in a batch file as specified in the [Individualised Learner Record \(ILR\) Specification 2018 to 2019](#).
- 11.3 Data collected must be transmitted to the ESFA's secure online portal: [The Hub](#). The Hub is restricted and THE HEI confirms it has agreed to comply with the conditions of use regarding the supply of data to the ESFA.
- 11.4 THE HEI must ensure that data is received by the ESFA in accordance with the data collection timetable. THE HEI should refer to the ESFA's [ILR webpage](#) for additional data guidance and information.
- 11.5 The ESFA reserves the right to require THE HEI, at its own cost, to carry out such work as the ESFA deems necessary to make a material improvement to the quality of data.
- 11.6 The ESFA reserves the right to suspend payments to THE HEI under the Agreement where data quality gives rise to a material impact (in the view of the ESFA) upon the accuracy of the data provided by THE HEI.
- 11.7 THE HEI shall register with [UKRLP](#) and maintain contact details on an on-going basis.
- 11.8 At times, the ESFA will need to share information with THE HEI. The ESFA will do this securely via The HUB. By accessing and using this system THE HEI agrees to the terms and conditions detailed at the site governing how it accesses and use the portal. THE HEI will need to ensure that it has the right hardware, operating system and browser.
- 11.9 THE HEI must submit data in accordance with the requirements for HEIs detailed in the [ILR 2018 to 2019 guidance](#): HEIs who receive funding from the ESFA should return data about these learners in their Higher Education Statistics Agency (HESA) Student Record and follow HESA's requirements for the Student Record. For apprenticeships, HEIs must following the ESFA's requirements for the ILR. THE HEI must not submit any individual instance of study on both ILR and Student Record returns except to meet the data requirements for apprenticeships detailed in the [ILR 2018 to 2019 guidance](#).
- 11.10 The HEI shall provide the ESFA on request with a copy of any Asset Deed held in respect of the Premises.

## **12. Data Protection and Protection of Personal Data**

- 12.1 In this clause 12, the following words and expressions shall be defined

as follows:

**Law:** means any law, subordinate legislation within the meaning of Section 21(1) of the Interpretation Act 1978, bye-law, enforceable right within the meaning of Section 2 of the European Communities Act 1972, regulation, order, regulatory policy, mandatory guidance or code of practice, judgment of a relevant court of law, or directives or requirements with which the Processor is bound to comply.

**Processor Personnel:** means all directors, officers, employees, agents, consultants and contractors of the Processor and/or of any Sub-Processor engaged in the performance of its obligations under this Funding Agreement.

**Data Protection Legislation** (i) the GDPR, the LED and any applicable national implementing Laws as amended from time to time (ii) the DPA 2018 to the extent that it relates to processing of personal data and privacy; (iii) all applicable Law about the processing of personal data and privacy.

**Data Protection Impact Assessment:** an assessment by the Controller of the impact of the envisaged processing on the protection of Personal Data.

**Controller, Processor, Data Subject, Personal Data, Personal Data Breach, Data Protection Officer** take the meaning given in the GDPR.

**Data Loss Event:** any event that results, or may result, in unauthorised access to Personal Data held by the Processor under this Funding Agreement, and/or actual or potential loss and/or destruction of Personal Data in breach of this Funding Agreement, including any Personal Data Breach.

**Data Subject Request:** a request made by, or on behalf of, a Data Subject in accordance with rights granted pursuant to the Data Protection Legislation to access their Personal Data.

**DPA 2018:** Data Protection Act 2018.

**GDPR:** the General Data Protection Regulation (*Regulation (EU) 2016/679*).

**LED:** Law Enforcement Directive (*Directive (EU) 2016/680*).

**Protective Measures:** appropriate technical and organisational measures which may include: pseudonymising and encrypting Personal Data, ensuring confidentiality, integrity, availability and resilience of systems and services, ensuring that availability of and access to

Personal Data can be restored in a timely manner after an incident, and regularly assessing and evaluating the effectiveness of the such measures adopted by it including those outlined in the Terms and Conditions of the Funding Agreement.

**Sub-processor:** any third Party appointed to process Personal Data on behalf of that Processor related to this Funding Agreement.

- 12.2 The Parties acknowledge that for the purposes of the Data Protection Legislation, the ESFA on behalf of the Secretary of State for Education is the Controller and the HEI is the Processor only for the processing set out in Appendix 4. Any other processing of Personal Data undertaken by the HEI will be as a Data Controller and not on behalf of the ESFA. Clauses 12.3 to 12.15 below apply only in relation to the processing of Personal Data on behalf of the ESFA as set out in Appendix 4, and the only processing that the Processor is authorised to do on behalf of the ESFA is listed in Appendix 4 by the ESFA and may not be determined by the Processor.
- 12.3 The Processor shall notify the Controller immediately if it considers that any of the Controller's instructions infringe the Data Protection Legislation.
- 12.4 The Processor shall provide all reasonable assistance to the Controller in the preparation of any Data Protection Impact Assessment prior to commencing any processing. Such assistance may, at the discretion of the Controller, include:
- (a) a systematic description of the envisaged processing operations and the purpose of the processing;
  - (b) an assessment of the necessity and proportionality of the processing operations in relation to the Services;
  - (c) an assessment of the risks to the rights and freedoms of Data Subjects; and
  - (d) the measures envisaged to address the risks, including safeguards, security measures and mechanisms to ensure the protection of Personal Data.
- 12.5 The Processor shall, in relation to any Personal Data processed in connection with its obligations under this Funding Agreement:
- (a) process that Personal Data only in accordance with Appendix 4, unless the Processor is required to do otherwise by Law. If it is so required the Processor shall promptly notify the Controller before processing the Personal Data unless prohibited by Law;

- (b) ensure that it has in place Protective Measures, which are appropriate to protect against a Data Loss Event, which the Controller may reasonably reject (but failure to reject shall not amount to approval by the Controller of the adequacy of the Protective Measures), having taken account of the:
  - (i) nature of the data to be protected;
  - (ii) harm that might result from a Data Loss Event;
  - (iii) state of technological development; and
  - (iv) cost of implementing any measures;
  
- (c) ensure that:
  - (i) the Processor Personnel do not process Personal Data except in accordance with this Funding Agreement (and in particular Appendix 4);
  - (ii) it takes all reasonable steps to ensure the reliability and integrity of any Processor Personnel who have access to the Personal Data and ensure that they:
    - (A) are aware of and comply with the Processor's duties under this clause;
    - (B) are subject to appropriate confidentiality undertakings with the Processor or any Sub-processor;
    - (C) are informed of the confidential nature of the Personal Data and do not publish, disclose or divulge any of the Personal Data to any third Party unless directed in writing to do so by the Controller or as otherwise permitted by this Funding Agreement; and
    - (D) have undergone adequate training in the use, care, protection and handling of Personal Data; and
  
- (d) not transfer Personal Data outside of the EU unless the prior written consent of the Controller has been obtained and the following conditions are fulfilled:
  - (i) the Controller or the Processor has provided appropriate safeguards in relation to the transfer (whether in accordance with GDPR Article 46 or LED Article 37) as determined by the Controller;

- (ii) the Data Subject has enforceable rights and effective legal remedies;
  - (iii) the Processor complies with its obligations under the Data Protection Legislation by providing an adequate level of protection to any Personal Data that is transferred (or, if it is not so bound, uses its best endeavours to assist the Controller in meeting its obligations); and
  - (iv) the Processor complies with any reasonable instructions notified to it in advance by the Controller with respect to the processing of the Personal Data;
- (e) at the written direction of the Controller, delete or return Personal Data (and any copies of it) to the Controller on termination of the Funding Agreement unless the Processor is required by Law to retain the Personal Data.

12.6 Subject to clause 12.7, the Processor shall notify the Controller immediately if it:

- (a) receives a Data Subject Request (or purported Data Subject Request) in relation to processing their data under this Funding Agreement;
- (b) receives a request to rectify, block or erase any Personal Data. Notification in such cases should be given via the ILR;
- (c) receives any other request, complaint or communication relating to either Party's obligations under the Data Protection Legislation;
- (d) receives any communication from the Information Commissioner or any other regulatory authority in connection with Personal Data processed under this Funding Agreement;
- (e) receives a request from any third Party for disclosure of Personal Data where compliance with such request is required or purported to be required by Law; or
- (f) becomes aware of a Data Loss Event.

12.7 The Processor's obligation to notify under clause 12.6 shall include the provision of further information to the Controller in phases, as details become available.

12.8 Taking into account the nature of the processing, the Processor shall provide the Controller with full assistance in relation to either Party's obligations under Data Protection Legislation and any complaint,

communication or request made under clause 12.6 (and insofar as possible within the timescales reasonably required by the Controller) including by promptly providing:

- (a) the Controller with full details and copies of the complaint, communication or request;
- (b) such assistance as is reasonably requested by the Controller to enable the Controller to comply with a Data Subject Request within the relevant timescales set out in the Data Protection Legislation;
- (c) the Controller, at its request, with any Personal Data it holds in relation to a Data Subject;
- (d) assistance as requested by the Controller following any Data Loss Event;
- (e) assistance as requested by the Controller with respect to any request from the Information Commissioner's Office, or any consultation by the Controller with the Information Commissioner's Office.

12.9 The Processor shall maintain complete and accurate records and information to demonstrate its compliance with this clause. This requirement does not apply where the Processor employs fewer than 250 staff, unless:

- (a) the Controller determines that the processing is not occasional;
- (b) the Controller determines the processing includes special categories of data as referred to in Article 9(1) of the GDPR or Personal Data relating to criminal convictions and offences referred to in Article 10 of the GDPR; or
- (c) the Controller determines that the processing is likely to result in a risk to the rights and freedoms of Data Subjects.

12.10 The Processor shall allow for audits of its Data Processing activity by the Controller or the Controller's designated auditor.

12.11 Each Party shall designate its own data protection officer if required by the Data Protection Legislation.

12.12 Before allowing any Sub-processor to process any Personal Data related to this Funding Agreement, the Processor must:

- (a) notify the Controller in writing of the intended Sub-processor and processing;
- (b) obtain the written consent of the Controller;
- (c) enter into a written agreement with the Sub-processor which give effect to the terms set out in this Clause 12 such that they apply to the Sub-processor; and
- (d) provide the Controller with such information regarding the Sub-processor as the Controller may reasonably require.

12.13 The Processor shall remain fully liable for all acts or omissions of any of its Sub-processors.

12.14 The Controller may, at any time on not less than 30 Working Days' notice, revise this clause by replacing it with any applicable controller to processor standard clauses or similar terms forming part of an applicable certification scheme (which shall apply when incorporated by attachment to this Funding Agreement).

12.15 The Parties agree to take account of any guidance issued by the Information Commissioner's Office. The Controller may on not less than 30 Working Days' notice to the Processor amend this Funding Agreement to ensure that it complies with any guidance issued by the Information Commissioner's Office.

### **13. Student Health and Safety and Welfare**

13.1 The HEI shall comply with all relevant health and safety legislation and Health and Safety Executive working regulations and good practice and shall ensure that learning takes place in safe, healthy and supportive environments, which meet the needs of Students. Failure to do so may constitute a Serious Breach of this Funding Agreement.

13.2 The HEI shall make arrangements for ensuring that the Services are provided with a view to safeguarding and promoting the welfare of children receiving education or training at their institution. In doing so, the HEI shall have regard to any guidance published, from time to time, by the Secretary of State for Education which sets out the expectations in relation to safeguarding practice within further education institutions. References to 'must' in any such guidance shall be treated as 'should' for the purposes of this Funding Agreement, save for any references to legal requirements arising from the Safeguarding Vulnerable Groups Act 2006 in respect of referrals to the Disclosure and Barring Service. Failure to do so may constitute a Serious Breach of this Funding Agreement.



- 13.3 The HEI shall make arrangements for ensuring that the Services are provided with a view to safeguarding and promoting the welfare of High Needs Students aged 18 to 25 receiving education or training at their institution. In doing so, the HEI shall make those arrangements as if such Students were children and will have regard to any guidance published, from time to time, by the Secretary of State for Education which sets out the expectations in relation to safeguarding practice within further education institutions as if it applied to those Students as if they were children. References to 'must' in any such guidance shall be treated as 'should' for the purposes of this Funding Agreement, save for any references to legal requirements arising from the Safeguarding Vulnerable Groups Act 2006 in respect of referrals to the Disclosure and Barring Service. Failure to do so may constitute a Serious Breach of this Funding Agreement.
- 13.4 In providing the Services, the HEI must ensure it actively promotes the fundamental British values of democracy, the rule of law, individual liberty, and mutual respect and tolerance of those with different faiths and beliefs, and promote principles that support equality of opportunity for all.
- 13.5 In providing the Services the HEI must comply with the general duty on specified authorities in section 26 of the Counter-Terrorism and Security Act 2015 (the Prevent duty) and must have regard to statutory guidance issued under section 29 of the Counter-Terrorism and Security Act 2015. Failure to do so may constitute a Serious Breach of this Funding Agreement.
- 13.6 In providing the Services, the HEI must comply with the duty on partners of a panel in section 38 of the Counter-Terrorism and Security Act 2015 (the Channel co-operation duty). Failure to do so may constitute a Serious Breach of this Funding Agreement.
- 13.7 Where the HEI provides residential accommodation for Students, the HEI shall inform the ESFA of the provision of such residential accommodation, shall record this information on Edubase and shall comply with the requirements of the national minimum standards for residential accommodation for children in Colleges published from time to time by the Secretary of State under section 87C of the Children Act 1989 as if the HEI were a College (as defined by section 87(10) of the Children Act 1989). Failure to do so may constitute a Serious Breach of this Funding Agreement.
- 13.8 The HEI shall not employ or engage, or continue to employ or engage, any person who is subject to a prohibition order made under section 141B of the Education Act 2002, or an interim prohibition order made under regulation 14 of the Teachers' Disciplinary (England) Regulations 2012, to carry out teaching work (as defined in regulation 3 of the Teachers' Disciplinary (England) Regulations 2012) in respect of any Students under the age of 19 and High Needs Students aged 19 to 25

(as if those Students were pupils for the purposes of the definition of teaching work in regulation 3 of the Teachers' Disciplinary (England) Regulations 2012).

- 13.9 Before employing or engaging a person to carry out teaching work in respect of any Students under the age of 19 and High Needs Students aged 19 to 25 (as if those Students were pupils for the purposes of the definition of teaching work in regulation 3 of the Teachers' Disciplinary (England) Regulations 2012), the HEI shall take reasonable steps to ascertain whether that person is subject to a prohibition order made under section 141B of the Education Act 2002, or an interim prohibition order made under regulation 14 of the Teachers' Disciplinary (England) Regulations 2012.
- 13.10 The HEI and/or the HEI Related Parties must be able to demonstrate that they have robust record-keeping procedures in respect of health, safety and safeguarding through checks on record keeping undertaken. Failure to do so will constitute a Serious Breach.
- 13.11 Where THE HEI or one of its subcontractors refer:
- a. a safeguarding concern related to sexual violence to Local Authority children's social care/adult social care and/or the police, or
  - b. an allegation of abuse made against a teacher or other member of staff to the designated officer(s) (at the local authority),

THE HEI must, as soon as practicable, inform the ESFA via email to [Enquiries.EFA@education.gov.uk](mailto:Enquiries.EFA@education.gov.uk). Such notification must include the name of the institution, a high level summary of the nature of the incident (without sharing personal information about victims or alleged perpetrators) and confirmation of whether it is, or is scheduled to be, investigated by the Local Authority and/or the police.

- 13.12 Where the HEI makes a referral of an individual Student for the purposes of determining whether that Student should be referred to a panel for the carrying out of an assessment under section 36 of the Counter-Terrorism and Security Act 2015 of the extent to which that individual is vulnerable to being drawn into terrorism, the HEI shall ensure it notifies the ESFA that a referral has been made.
- 13.13 Where the HEI has made a referral or provided information to the Disclosure and Barring Service in compliance with any duties of the HEI under the Safeguarding Vulnerable Groups Act 2006 in respect of serious safeguarding concerns, the HEI shall ensure that it informs the ESFA that a referral has been made / information has been provided.

## **14. Sub Contracting**

- 14.1 Where the HEI fails to apply the necessary management, monitoring and control over sub-contracted delivery, or fails to seek the necessary approval from ESFA in advance in respect of whole programmes of study delivered at distance, as set out in the sub-contracting control regulations <https://www.gov.uk/government/publications/funding-guidance-for-young-people-sub-contracting-controls> the ESFA may move the student numbers and associated funding away from the directly funded institution and/or also require the institution to discontinue the sub-contracting arrangement either with immediate effect or from the end of the current funding year. The ESFA may also take this action in respect of other subcontracting arrangements that the HEI has in place.
- 14.2 Where the HEI has sub-contracted any duties or obligations arising out of this Funding Agreement, the HEI shall send copies of the sub-contract to the ESFA if requested in writing to do so. Where the HEI enters into a sub-contract for the purpose of performing all or part of the obligations under this Funding Agreement, the HEI shall cause a term to be included in such sub-contract which requires payment to be made to the supplier or the HEI within a specified period not exceeding 30 days from receipt of a valid invoice as defined by the sub-contract requirements.
- 14.3 The ESFA may at any time assign, transfer, charge, subcontract or deal in any other manner with all or any of its rights under this Funding Agreement and may subcontract or delegate in any manner any or all of its obligations under this Funding Agreement to any third party or agent.

## **15. Access and Monitoring**

- 15.1 The ESFA shall give the HEI or HEI Related Parties reasonable advance notice in writing of proposed visits to the HEI or the HEI Related Parties, to observe the delivery of the Services, by any person, representing the ESFA or acting on behalf of the Secretary of State, who has taken or will take no direct part in the conduct or content of the Services.
- 15.2 For audit, monitoring and evaluation purposes, the ESFA, any person acting on behalf of the Secretary of State, the Department, the Department for Work and Pensions, the National Audit Office, Representatives of the European Commission and the European Court of Auditors (where applicable), its appointed representatives and/or the Inspectorates shall have the right to visit all or any site from which the Services are provided and view operations relating to the Services and to inspect relevant documents and interview Students and the HEI's staff during these visits.

- 15.3 The HEI shall ensure that its HEI Related Parties, shall, on reasonable advance notice in writing permit access at any reasonable time to any of the representatives listed at part two clause 15.2 in order to:
- 15.3.1 examine, audit or take copies of any original or copy documentation, accounts, books and records of the HEI and its HEI Related Parties that relate to this Funding Agreement;
  - 15.3.2 visit, view or assess the design, management and delivery relating to this Funding Agreement at any sites where those operations are carried out (including those of the HEI Related Parties) and conduct relevant interviews, including interviews with Students, during these visits at any reasonable time; and/or
  - 15.3.3 carry out examinations into the economy, efficiency and effectiveness with which the HEI has used the Secretary of State's resources in the performance of this Funding Agreement.
- 15.4 Where reasonably required, the HEI and its HEI Related Parties shall provide copies of any relevant documents required by any of the representatives listed at part two clause 15.2.
- 15.5 The HEI shall, if required by any of the representatives stated at part two clause 15.2 provide appropriate oral or written explanations.
- 15.6 The ESFA reserves the right, at any reasonable time, and as it may deem necessary to require the HEI at its own cost to:
- 15.6.1 provide evidence of financial resources and the level of turnover sufficient to enable it to continue to perform in accordance with the ESFA Conditions of Funding;
  - 15.6.2 obtain a report by an independent accountant of the ESFA's choice on the financial systems and controls operated by the HEI in respect of payments claimed or received under this Funding Agreement. The HEI must agree the instructions for the work with the ESFA and this may include the ESFA discussing the terms of reference directly with the independent accountant where necessary. The report and the work required in order to produce the report shall be carried out to the satisfaction of the ESFA, and the ESFA must be able to place reliance on it. The HEI shall provide a copy of any draft report at all stages of reporting and the final report to the ESFA as soon as they are available. The ESFA reserves the right to require the HEI to publish the final report;
  - 15.6.3 provide a copy of the HEI's latest audited Accounts;

- 15.6.4 submit any claim for payment, or management information provided to support a claim for payment, to be audited by an independent auditor chosen by the ESFA;
- 15.6.5 provide any additional evidence to support payments made under this Funding Agreement, as the ESFA shall reasonably require.
- 15.7 Where the ESFA has undertaken an investigation or received a report from an independent accountant or otherwise, in relation to the HEI, it may, as a consequence of that investigation or report, impose additional conditions of funding upon the HEI.
- 15.8 The HEI must comply with any additional conditions of funding imposed under clause 15.7.
- 15.9 If the ESFA assesses that the HEI has failed to comply with any additional conditions of funding imposed under clause 15.7 within such time as the ESFA deems reasonable, the ESFA may take such actions as it deems appropriate which may include, but is not limited to, under Clause 17.3-17.4 Minor Breach or Clause 17.5-17.6 Serious Breach.

## **16. Additional Conditions of Funding**

- 16.1 The ESFA reserves the right to impose additional conditions of funding where it considers it is necessary to do so to secure the delivery of education and training of a reasonable quality by the College, or to ensure that the resources provided by the ESFA are being used effectively and efficiently or to require the College to address concerns about its financial viability.

## **17 Breach**

- 17.1 For the purpose of this clause, the following definitions shall have the meanings set out below:
  - 17.1.1 "Minor Breach" shall mean a delay or non-performance by either Party, including any HEI Related Parties, of its obligations, in part or in full, under this Funding Agreement which does not materially, adversely or substantially affect the performance or delivery of the Services, in part or in full, or the provision of a safe, healthy and supportive learning environment; and
  - 17.1.2 "Serious Breach" shall mean any breach which adversely, materially and substantially affects the performance or delivery of the Services, in part or in full, or the provision of a safe, healthy and supportive learning environment. Serious breach includes but is not limited to:

17.1.2.1 a breach of security that adversely affects the Personal Data or privacy of an individual;

17.1.2.2 failure to comply with Law, or acts or omissions by the HEI that endanger the health or safety of Students;

17.2 For the avoidance of doubt:

17.2.1 neither Party shall be liable for any Minor Breach or Serious Breach under this Clause, which occurs as a direct result of any act or omission by the other Party, its staff or agents; and

17.2.2 in the event of a breach the Party not in breach may enforce the clauses in this Funding Agreement relating to breach even if it has not done so in the event of earlier breaches.

### **Minor Breach**

17.3 Without prejudice to any other remedy, in the event of a Minor Breach, the Party not in breach shall be entitled to serve written notice on the Party in breach, giving full details of the breach and requiring the other Party to remedy the breach within a specified period.

17.4 If the Party in breach fails to remedy the Minor Breach within the time specified in notice served under part two clause 17.3, or such other period as may subsequently be agreed in writing between the Parties, it shall constitute a Serious Breach by the Party in breach.

### **Serious Breach**

17.5 Without prejudice to any other remedy, in the event of a Serious Breach, which in the view of the ESFA is capable of remedy, the Parties shall adopt the following procedure:

17.5.1 The Party not in breach shall be entitled to serve written notice on the other Party giving full details of the breach and requiring the Party in breach to remedy the breach within a specified time period.

17.5.2 In the event that a Serious Breach of this Funding Agreement by the HEI is in the view of the ESFA not, or cannot be, remedied within the period specified in the notice served under part two clause 16.5.1, or such other period as may subsequently be agreed in writing between the Parties, the ESFA may:

17.5.2.1 require the HEI to suspend recruitment of Students, and cap growth of learning programmes in future years, to the Services to which the Serious Breach relates;

- 17.5.2.1 give consideration to the Serious Breach in its application of lagged learner funding when finalising the amount of funding in any subsequent Funding Agreement(s) between the Parties;
  - 17.5.2.3 reduce, suspend or recover payment to the HEI in respect of that part of the Services to which the Serious Breach relates;
  - 17.5.2.4 terminate, in accordance with part two clause 18 (Termination), in full or in respect of that part of the Services to which the Serious Breach relates.
- 17.6 In the event that any Serious Breach cannot be remedied at all or within the period specified in the notice served in accordance with part two clause 17.5.1 or such other period as may be agreed in writing between the Parties, the Party not in breach may at its sole discretion terminate this Funding Agreement or that part of the Services to which the breach relates with immediate effect on notice in writing to the other Party.

## **18. Termination**

- 18.1 Without prejudice to any other remedy, on the occurrence of a Serious Breach that is not capable of being remedied the ESFA shall be entitled to terminate this Funding Agreement, in respect of that part of the Services to which the Serious Breach relates, by notice to the HEI with immediate effect.
- 18.2 The ESFA shall be entitled to terminate this Funding Agreement on written notice in the circumstances as detailed in Part One clause 5 above (Quality Assurance). The period of notice shall be that which, in all the circumstances, the ESFA deems reasonable.
- 18.3 The ESFA shall be entitled to terminate this Funding Agreement on written notice in case of the insolvency, liquidation or dissolution of the HEI.
- 18.4 The ESFA shall be entitled to terminate this Funding Agreement on written notice if the HEI does not recruit or data returns reveal that no Students have been enrolled for the academic year to which this Funding Agreement relates. Where the ESFA terminates the Funding Agreement under this clause 18.4, the ESFA will withdraw the allocation of Funding for the academic year and will take action to recover Funds where payments have already occurred.
- 18.5 In addition to the rights of termination under any other clauses of this Funding Agreement, either party shall be entitled to terminate this Funding Agreement in respect of all or part of the Services delivered under this Funding Agreement by giving to the other not less than three months' notice, in writing, to that effect without the need to give a reason

for termination. Where this right is exercised by the HEI it shall be implemented at no cost to the ESFA.

- 18.6 Termination under this part two clause 18 shall not prejudice or affect any right of action or remedy, which shall have accrued or shall thereupon accrue to the Parties under this Funding Agreement.
- 18.7 On termination or expiry of this Funding Agreement for any reason, the HEI shall do its utmost to minimise disruption caused to Students and to assist the implementation of any contingency plan proposed by the ESFA either prior to or after the termination or expiry of this Funding Agreement, to deal with the effects of such termination or expiry in so far as it is practicable to do so. The ESFA will not be liable for any costs incurred by the HEI in complying with this clause 18.7.
- 18.8 The HEI shall, within 2 Working Days of termination of this Funding Agreement cease using any marks of the ESFA and deliver up to the ESFA all correspondence, documents, learner data relevant to continuation of the Services, specification papers and other property belonging to the ESFA, which may be in its possession or under its control.
- 18.9 On termination of this Funding Agreement (however arising) the accrued rights and liabilities of the Parties at termination shall survive and continue in full force.

## **19. Dispute Resolution**

- 19.1 Any dispute, difference or question arising between the Parties either during the term of this Funding Agreement or afterwards shall be referred to the relevant ESFA Territorial team who will nominate a member of staff to lead discussion and review with a nominated representative of the HEI in order to try to resolve the same.
- 19.2 In the event that the nominated representatives are unable to resolve the dispute, difference or question, either of the Parties may (subject to part two clause 19.4 below), by written notice to the other party, refer the matter to a Dispute Resolution Panel (“the Panel”) to attempt to reach a mutually acceptable resolution. The Panel shall be made up of one of the ESFA’s Territorial Directors and a senior representative (it is envisaged that this would be the Principal, acting Principal or member of the Senior Management Team) from the HEI. The date of reference to the Panel will be agreed by the Panel themselves. The Panel shall meet within 14 days of the date of reference to them and the Panel shall use best endeavours to identify a mutually acceptable resolution.
- 19.3 In the event of the Dispute Resolution Panel failing to identify a mutually acceptable resolution within 28 days of the date of reference, then any dispute, difference or question arising out of or in connection with this



Funding Agreement including any question regarding its existence, validity or termination, save for any matter or thing as to which the decision of the ESFA is under this Funding Agreement deemed to be final and conclusive, shall be referred to and settled as far as possible by mediation in accordance with the Centre for Effective Dispute Resolution (CEDR) Model Mediation Procedure.

- 19.4 If the Parties agree in writing, the dispute, difference or question that the nominated representatives were unable to resolve may be referred to directly to mediation, in accordance with part two clause 19.3 above, without reference to the Panel.
- 19.5 No party may commence any court proceedings/arbitration in relation to any dispute arising out of this Funding Agreement until they have attempted to settle it by mediation, but any such mediation may be terminated by either party at any time of such party wishing to commence court proceedings/arbitration.
- 19.6 If Mediation does not reach a conclusion satisfactory to the Parties the dispute, difference or question shall be referred to and finally resolved by arbitration and the provisions of the Arbitration Act 1996 (or any statutory modification or re-enactment thereof) shall apply to such arbitration.
- 19.7 The arbitration will be conducted by a sole arbitrator, jointly agreed by the HEI and the ESFA. In the event of the Parties being unable to agree the identity of the arbitrator within 14 days of the service of the Notice of Arbitration, either the HEI or the ESFA may request the Chairman of the Chartered Institute of Arbitrators to make the appointment.
- 19.8 The place of arbitration shall be London, England.

## **20. Revisions**

- 20.1 The ESFA may from time to time revise, revoke or add to this Funding Agreement in whole or in part. The HEI may propose changes to this Funding Agreement but the ESFA shall not be obliged to accept any such changes.
- 20.2 Revisions made by the ESFA to this Funding Agreement pursuant to part two clause 20.1 above, shall be confirmed in writing. The HEI shall confirm its acceptance by adding their electronic signature and returning from the signatories' business email to the ESFA email box stated on the variation.
- 20.3 The HEI may itself make proposals to the ESFA for such changes. These should be addressed in writing to:

ESFA Contracts Team,

CHEYLESMORE HOUSE  
QUINTON ROAD  
COVENTRY  
CV1 2WT

- 20.4 In response to proposals received the ESFA shall either:
- 20.4.1 amend the Funding Agreement by way of a variation in accordance with part two clauses 20.1 and 20.2. The revision will apply to all HEI's;
  - 20.4.2 consult on the proposal with consideration to amending Funding Agreements for all HEI's in 2018 to 2019 and/or subsequent years; or
  - 20.4.3 confirm that no amendment will be made to the conditions set out in this ESFA Conditions of Funding.
- 20.5 Revisions made by the ESFA to the Appendices and Annexes that form part of this Funding Agreement shall be confirmed in writing. The HEI shall confirm its acceptance by signing and returning a hardcopy to the address at part two clause 20.3. Failure to do so may result in non-payment of any increase in funding described in the revision.
- 20.6 The HEI may itself make proposals to the ESFA for changes to the Services set out in the Appendices and Annexes that form part of this Funding Agreement. These should be addressed in writing to the relevant ESFA Young People's Territorial Delivery team.

## **21. The Contract (Rights of Third Parties) Act 1999**

- 21.1 A person who is not a Party to this Funding Agreement shall have no right to enforce any of its provisions which, expressly or by implication, confer a benefit on that person, without the prior written agreement of both Parties. This clause does not affect any right or remedy of any person which exists or is available apart from the Contract (Rights of Third Parties) Act 1999 and does not apply to the Crown.

## **22. Governing Law and Jurisdiction**

- 22.1 This Funding Agreement shall be governed by and interpreted in accordance with English law and the Parties agree to submit to the exclusive jurisdiction of the English courts.

## **23. Entire Agreement**

- 23.1 This Agreement constitutes the entire Agreement between the Parties and shall not be varied except by an instrument signed by the parties or accepted electronically via the Skills Funding Service (SFS).
- 23.2 By accepting this Funding Agreement via the Skills Funding Service (SFS) the person taking this action on behalf of the HEI represents and warrants that the HEI has read and understood this Funding Agreement, the HEI agrees to be bound by this Funding Agreement and that he/she is duly authorised to accept this Funding Agreement and legally bind the HEI.

Please note that the Contract **must be:**  
**accepted by a member of staff that is authorised to legally bind the HEI;**

**Contract acceptance via SFS shall bind the HEI as set out in sub-clauses 23.1 and 23.2.**

#### **Appendices and Annexes** (included as appropriate)

- Appendix 1 – Payment Schedule
- Appendix 2 – Definitions and interpretation
- Appendix 3 – Changes to be implemented
  - Study Programmes, incorporating Traineeships
  - 14-16 full-time provision
- Appendix 4 – Processing, Personal Data and Data Subjects
  - Annex 1 – 16 to 18 Residential Bursaries
  - Annex 2 – PE and Sports Grant
  - Annex 3 – Army Cadets
  - Annex 4 – Specialist Provision and High Need Students
  - Annex 5 – Closing Schools
  - Annex 6 – Bursary Fund and Free Meals in FE
  - Annex 7 – Residential Support Scheme

## Appendix 2

### Definitions and Interpretation

1.1 For the purposes of this Funding Agreement:

**"Accounts Direction"** means

<https://www.gov.uk/government/publications/sfa-financial-management-how-to-prepare-colleges-annual-financial-statements>

**"Asset Deed"** means the deed or deeds through which the HEI holds a valid and current estate in land together with the details and up to date official copy entries for any Land Registry title number under which the deed or deeds are held;

**"Child"** means a person under the age of 18;

**"Commencement Date"** means 1 August 2018;

**"Confidential Information"** means any information which has been designated as confidential by either Party in writing or that ought reasonably to be considered as confidential (however it is conveyed or on whatever media it is stored) and any other information clearly designated as being confidential (whether or not it is marked as "confidential") or which ought reasonably to be considered to be confidential;

**"Conditions of Funding"** has the meaning given in recital part 1 clause 2.

**"Crown"** means the government of the United Kingdom (including Northern Ireland Assembly and the Executive Committee, the Scottish Government and the Welsh Assembly Government);

**"Crown Body"** means any department, office or agency of the Crown, including OFSTED, the Care Quality Commission, the Charity Commission, any and all Local Authority or Combined Authority bodies;

**"Department"** means the Department for Education which incorporates its Executive Agency, the ESFA;

**"DPA"** means the Data Protection Act 2018 and any subordinate legislation made under such Act from time to time together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Crown Body in relation to such legislation;

**"Eligible Expenditure"** means expenditure solely for the purpose of delivering the Services agreed and set out in the Appendices and Annexes of this Funding Agreement;

"**ESFA**" means the Education and Skills Funding Agency, an Executive Agency of the Department for Education;

"**Exempt Information**" means any information or class of information (including but not limited to any document, report, Funding Agreement or other material containing information) relating to this Funding Agreement or otherwise relating to the HEI, which potentially falls within an exemption to FOIA (as set out therein);

"**Financial Planning Handbook**" means the ESFA's financial planning requirements published at <https://www.gov.uk/government/publications/financial-planning-handbook>

"**FOIA**" means the Freedom of Information Act 2000 and all regulations made there under from time to time or any superseding or amending enactment and regulations, and words and expressions defined in the FOIA shall have the same meaning in this Funding Agreement;

"**Funds**" means the monies paid by the ESFA to the HEI pursuant to this Funding Agreement and "**Funding**" shall have the same meaning;

"**Funding Agreement**" means this document as amended from time to time in accordance with part two 20 (Revisions) including the Conditions of Funding, all schedules and appendices, and any other documents expressly incorporated by reference in this document; "Funding Guidance for Young People" means titled Funding guidance for young people 2018 to 2019 <https://www.gov.uk/16-to-19-education-funding-guidance> as amended from time to time by the ESFA;

"**HEI Related Parties**" means any employee, officer, consultant, agent or any other person whatsoever acting for or on behalf of the HEI or otherwise under the HEI's control and direction (including but not limited to sub-HEIs);

"**High Needs Student**" means a student aged 16 to 18, or any young person aged 19 to 25 subject to an Education Health and Care Plan, who requires additional support costing over £6,000 (i.e. additional to education and support that is funded through the published 16-19 standard funding formula) and for whom the relevant local authority provides top-up funding (Element 3);

"**Inspectorates**" means one, any or all of the inspectorates: Office for Standards in Education, Children's Services and Skills (Ofsted), Her Majesty's Inspectorate for Education and Training in Wales (Estyn) and the Care Quality Commission (CQC);

**"Law"** means any Act of Parliament, subordinate legislation within the meaning of Section 21(1) of the Interpretation Act 1978, exercise of royal prerogative, enforceable community right within the meaning of Section 2 of the European Communities Act 1972, regulatory policy, guidance or industry code, judgment of a relevant court of law, or directives or requirements of any Regulatory Body of which the HEI is bound to comply;

**"Maximum Value"** means the maximum value of the relevant Learning Programme and which is set out, in respect of each Learning Programme to be delivered by the HEI under this Funding Agreement, in Appendix 1;

**"Minimum Levels of Performance and Notices to Improve"** means - <https://www.gov.uk/government/publications/interim-ks5-minimum-standards> as amended from time to time by the Department;

**"Minor Breach"** has the meaning given in part two 17.1.1 (Breach);

**"Notice to Improve"** The ESFA may issue a Notice to Improve to the Body in those instances where the Body is judged to be inadequate by Ofsted in whole or part, or where the Body fails to meet any minimum standard performance measure set by the Department for Education. The notice will set out the additional conditions of funding that the Body will be required to fulfil within a set time period in order to make the required improvements and be compliant;

**"Ofsted"** means the Office for Standards in Education, Children's Services and Skills;

**"Parties"** means the ESFA, on behalf of the Secretary of State, and the HEI;

**"Personal Data"** shall have the same meaning as set out in the DPA;

**"Premises"** means the location/s where the Services are to be performed, as detailed in this Funding Agreement;

**"Processing"** has the meaning given to it under the DPA but, for the purposes of this Funding Agreement, it shall include both manual and automatic processing;

**"Regulatory Bodies"** means those government departments and regulatory, statutory and other entities, committees, ombudsmen and bodies which, pursuant to Law, are entitled to regulate, investigate or influence the matters dealt with in this Funding Agreement or any other affairs of the ESFA and **"Regulatory Body"** shall have the same meaning;

**"Secretary of State"** means the Secretary of State for Education;

**"Serious Breach"** has the meaning given in part two clause 17.1.2 (Breach);

**"Services"** means the services to be supplied by the HEI as set out in this Funding Agreement and the HEI's obligations under this Funding Agreement and the Conditions of Funding;

**"Student"** means any persons to whom the HEI is required to deliver any of the Services. This term may be used interchangeably with the term "learner" in this Conditions of Funding (part one, clause 2);

**"Term"** has the meaning given in part two clause 1.1 (Term); and

**"Working Day"** means any day (other than a Saturday or Sunday) on which banks in England are open for business.

- 1.2 The interpretation and construction of this Funding Agreement shall be subject to the following provisions:
- 1.2.1 reference to any person includes natural persons, partnerships, firms and other incorporated bodies and all other legal persons of whatever kind and however constituted and their successors and permitted assigns or transferees;
  - 1.2.2 the appendices and annexes form part of this Funding Agreement and shall have effect as if set out in full in the body of this Funding Agreement;
  - 1.2.3 words in the singular shall include the plural and vice versa;
  - 1.2.4 words importing the masculine include the feminine and the neuter;
  - 1.2.5 a reference to a statute, enactment, order, regulation or other similar instrument shall be construed as a reference to the statute, enactment, order, regulation or instrument as amended by any subsequent enactment, modification, order, regulation or instrument as subsequently amended or re-enacted;
  - 1.2.6 a reference to a clause is to the whole of that clause unless stated otherwise; and
  - 1.2.7 where the words "include", "including" or "in particular" are used in this Funding Agreement, they are deemed to have the words without limitation following them. Where the context permits, the words "other" and "otherwise" are illustrative and shall not limit the sense of the words preceding them.

- 1.3 Any obligation in this Funding Agreement on a person not to do something includes an obligation not to agree, allow, permit or acquiesce to that thing being done.
- 1.4 Headings are included in this Funding Agreement for ease of reference only and shall not affect the interpretation or construction of this document.



## Appendix 3

### Study Programmes, incorporating Traineeships

To improve the quality of vocational education provision for post-16 students, Professor Alison Wolf recommended that study programmes be introduced to offer students breadth and depth and without limiting their options for future study or work.

From September 2013, new 16 to 19 study programmes were introduced, supported by changes to post-16 funding. All students in full or part-time education aged 16 to 19 are expected to follow a study programme tailored to their individual needs, education and employment goals, including students with learning difficulties and/or disabilities.

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/493452/16\\_to\\_19\\_study\\_programmes\\_departmental\\_advice\\_Jan\\_2016\\_update.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/493452/16_to_19_study_programmes_departmental_advice_Jan_2016_update.pdf)

For specific detail on Traineeships (Framework for Delivery):

<https://www.gov.uk/government/publications/supporting-young-people-to-develop-the-skills-for-apprenticeships-and-sustainable-employment-framework-for-delivery>

<https://www.gov.uk/delivering-traineeships-through-efa-funding>

### Raising Participation Age

The participation age was raised in 2013 and young people are now required to continue in education or training until at least their 18<sup>th</sup> birthday. Young people can choose to participate through full-time education, a job or volunteering combined with part-time study, or by undertaking an apprenticeship or traineeship.

For further information on Raising the Participation Age (RPA) please see the statutory guidance for local authorities:

[www.gov.uk/government/publications/participation-of-young-people-education-employment-and-training](http://www.gov.uk/government/publications/participation-of-young-people-education-employment-and-training) - Annex 1 is of particular interest as it provides further detail on the different routes young people can take to meet their duty to participate.

## Appendix 4 Processing, Personal Data and Data Subjects

Description	Details
Subject matter of the Processing	<p>The subject matter is the personal data of Students on education or training programmes administered by the ESFA that are subject to this Funding Agreement as defined in the ESFA privacy notice and ILR specification and its appendices.</p> <p><a href="https://www.gov.uk/government/publications/esfa-privacy-notice">https://www.gov.uk/government/publications/esfa-privacy-notice</a></p> <p><a href="https://www.gov.uk/government/collections/individualised-learner-record-ilr">https://www.gov.uk/government/collections/individualised-learner-record-ilr</a></p>
Duration of the Processing	<p>The duration of the Processing covers the academic year data returns to the ESFA as defined in Appendix A of the ILR specification to enable funding and audit of the learning programmes defined in this Funding Agreement.</p> <p><a href="https://www.gov.uk/government/collections/individualised-learner-record-ilr">https://www.gov.uk/government/collections/individualised-learner-record-ilr</a></p>
Nature and purposes of the Processing	<p>The nature and purposes of the processing is defined in the ESFA privacy notice.</p> <p><a href="https://www.gov.uk/government/publications/esfa-privacy-notice">https://www.gov.uk/government/publications/esfa-privacy-notice</a></p> <p>The HEI will be required to submit the data to the ESFA as set out in Part 2 Clause 11 Supply of Data of this Funding Agreement.</p>
Type of personal data	<p>The personal data to be processed is defined in the ILR specification.</p> <p><a href="https://www.gov.uk/government/collections/individualised-learner-record-ilr">https://www.gov.uk/government/collections/individualised-learner-record-ilr</a></p>
Categories of data subject	<p>The data subjects are Students on education or training programmes administered by the ESFA that are subject to this Funding Agreement.</p>

Description	Details
<p>Retention and destruction of the data once the processing is complete UNLESS requirement under union or member state law to preserve that type of data</p>	<p>Information on how the data must be supplied to the ESFA is detailed in the ILR specification and its appendices.</p> <p><a href="https://www.gov.uk/government/collections/individualised-learner-record-ils">https://www.gov.uk/government/collections/individualised-learner-record-ils</a></p> <p>For the purposes of the DfE as a data controller of the data, the HEI is required to retain the data for the funding and audit purposes set out in this Funding Agreement for 6 years from the end of the financial year in which the last payment is made under this Funding Agreement.</p> <p>The HEI (and any other data controller) is responsible for determining any further need to process the data, including its retention, prior to secure destruction.</p>