

PFI clauses: Supplemental mainstream funding agreement

Updated June 2022

# Summary

This publication replaces a previous publication titled PFI amends to Supplemental Funding Agreement mainstream – June 2014. It has been updated following the publication of model funding agreements in December 2020.

## Who is this publication for?

This guidance is for:

* Local authorities and academies

## Main points

Following publication of model funding agreements in 2020, some of the clause numbering within the PFI amends document were no longer in sync with the funding agreement. This has now been corrected.

There has been no change to the content of the document only the clause numbering.

## Amends to supplemental funding agreement – mainstream

**(December 2020 model funding agreement)**

**TO CATER FOR SCHEMES INVOLVING PFI**

**NOTE FOR READERS - this document is for intended use on PFI Academy conversions promoted by the DfE.  This is a model form only, provided for information purposes.  This document and associated documentation is subject to ongoing and regular review and updating by the DfE and its advisors, and readers should check with the relevant DfE project lead on the correct version of documentation to be deployed on individual schemes.  Please note that this document and associated documentation is not a replacement for independent, specialist advice and local authorities and academies should ensure that they take appropriate legal and other advice when using this document.  The DfE and its advisors accept no liability whatsoever for any expense, liability, loss, claim or proceedings arising from reliance placed on this model document.**

1. **Amend the summary sheet at the start of the document to include a new row as follows:**

|  |  |
| --- | --- |
| **Part of a PFI Scheme** |  |

1. **Add the following entries to the table of clause variations at the start of the document in numeric order**

1.J Only applies to academies which form part of a PFI arrangement

1.K Only applies to academies which form part of a PFI arrangement

3.L Only applies to academies which form part of a PFI arrangement

3.M Only applies to academies which form part of a PFI arrangement

3.N Only applies to academies which form part of a PFI arrangement

5B(f) – (l) Only applies to academies which form part of a PFI arrangement

5Z - 5LL Only applies to academies which form part of a PFI arrangement

1. **Add the following definitions to clause 1C in the appropriate order:**

**"Academy Trust Insolvency Notice"** – is the notice referred to in clause 5.CC;

**"Critical Years"** – is defined in clause 5.BB;

**"Current Funding"** – is defined in clause 5.BB;

**"Insolvency"** has the meaning given to it in section 123 of the Insolvency Act 1986;

**["Lease"** has the meaning given to it in clause 4 of this Agreement;[[1]](#footnote-1)]

**"Normal Payment Matters"** has the meaning given to it in the Principal Agreement.

**"PFI EAG Refusal"** – is defined in clause 5.BB;

**"Shortfall"** – has the meaning attributed to it in clause 5.FF.

**"PFI Contractor"** means [ ], the counterparty of the LA to the Project Agreement;

**"Principal Agreement"** means the principal agreement entered into by the Secretary of State, the Academy Trust and the LA in connection with the Academy and dated on or around the date of this Agreement;

**"Project Agreement"** means the PFI project agreement dated [ ] and entered into by the LA and PFI Contractor (as may be amended from time to time); and

**"School Agreement"** means the school agreement entered into by the LA and the Academy Trust relating to the provision of facilities and services to the Academy and dated on or around the date of this Agreement.

1. **Add new clause 1.J as follows:**

1.J The Academy Trust shall enter into the School Agreement, the Principal Agreement [and the Lease[[2]](#footnote-2)]

1. **Add new clause 1.K as follows:**

1.K The Academy Trust must conduct the Academy within the terms and requirements of the Principal Agreement, the School Agreement [and the Lease.[[3]](#footnote-3)]

1. **Add the following clauses after clause 3L:**

3.M The Academy Trust must use the GAG funding it receives prudently to cover the normal reasonable running costs of the Academy including payments which fall due pursuant to the School Agreement or the Principal Agreement and to make payments under the School Agreement which will in turn form a contribution to the LA's obligations to pay the unitary charge under the Project Agreement .

3.N If the Secretary of State makes a payment under the Principal Agreement the Secretary of State may, subject to clause 3.O, set off or abate an equivalent amount from any GAG payable to the Academy Trust pursuant to this Agreement in the following financial year.

3.O Before making any set off or abatement pursuant to clause 3.N above, the Secretary of State shall:

3.O.1 notify the Academy Trust of the payment under the Principal Agreement;

3.O.2 take into account (acting reasonably) any representations made by the Academy Trust providing reasons why the relevant liabilities were not settled;

3.O.3 take into account (acting reasonably) any representations made by the Academy Trust as to the nature of the liabilities under consideration.

1. **Where Version 1 of the land clauses are included, amend as follows:**

**4.B - Add the following wording to the start of the clause**: "Save to the extent that any of the Academy Trust's obligations are the responsibility of the PFI Contractor (whereupon the Academy Trust must use reasonable endeavours to procure the PFI Contractor’s compliance with its obligations under the Project Agreement),”

1. **Where Version 2 of the land clauses are included, amend as follows:**

**4.B - Add the following wording to the start of the clause** "Save to the extent that any of the Academy Trust's obligations are the responsibility of the PFI Contractor (whereupon the Academy Trust must use reasonable endeavours to procure the PFI Contractor’s compliance with its obligations under the Project Agreement),"

1. **Where Version 5 of the land clauses are included, amend as follows:**

**4.C(b) Add the following wording to the start of the clause** "Save to the extent that any of the Academy Trust's obligations are the responsibility of the PFI Contractor (whereupon the Academy Trust must use reasonable endeavours to procure the PFI Contractor’s compliance with its obligations under the Project Agreement),"

1. **At clause 5.B, after (e) replace the full stop with ’; or’ and add the following wording after (e)**

f) the Secretary of State is obliged to make a payment under the Principal Agreement; or

**(Select one of g) below)**

g) [the Secretary of State considers that in the immediately preceding 12 month period, the aggregate of payments made by the Academy Trust to the LA under the Principal Agreement has reached a level which the Secretary of State considers to be excessive and which may (assessed objectively) cause the Academy Trust material financial difficulties[[4]](#footnote-4)]; or

**OR**

1. [in the immediately preceding 12 month period, the aggregate of the payments made by the Academy Trust to the LA under the Principal Agreement has reached more than 5% of GAG]; or

**(Select one of h) below)**

h) [the Secretary of State considers (acting reasonably) that the Academy Trust's compliance with the School Agreement or the Principal Agreement is such that claims or disputes are of a number or nature likely to materially and adversely impact on the provision of educational services at the Academy][[5]](#footnote-5); or

**OR**

1. [the Secretary of State considers (acting reasonably) that there has been a Persistent Breach of the School Agreement or the Principal Agreement likely to materially and adversely impact on the provision of educational services at the Academy, and for the purposes of this clause 5.B(h), "Persistent Breach" means: (i) a particular breach which has recurred three (3) or more times in any rolling six (6) month period; or (ii) the occurrence of five (5) or more different breaches in any rolling six (6) month period];

**AND**

i) the Academy Trust has committed a material breach of the School Agreement or the Principal Agreement;

j) the Secretary of State has received a notice from the LA informing it of instances of breaches or non-compliance by the Academy Trust with the School Agreement or Principal Agreement that may have the consequence of causing the LA to be in breach or default of the Project Agreement;

k) the Academy Trust has failed to take the action referred to in clause 5.C by the date specified in clause 5.C; or

l) the circumstances envisaged by clauses 5.II and 5.JJ of this Agreement in respect of EAG funding are applicable

Each of a) to l) (inclusive) above is a default event for the purposes of this Agreement.

**k) Amend clauses 5.R et seq as follows:**

Add the following words to the beginning of clause 5.R: "The provisions of this clause 5R and of clauses 5.S to 5.Y (inclusive) shall apply when the Project Agreement has expired or been terminated".

**Add the following new clauses as new clauses 5.Z to 5.LL (and renumber existing clauses 5Z - 5EE and update the cross referencing in those clauses throughout):**

5.Z The provisions of this clause 5.Z and of clauses 5.AA to 5.LL (inclusive) shall apply when the Project Agreement is subsisting.

5AA The Secretary of State will, before the start of each Academy Financial Year, provide the Academy Trust with a final allocation indicating the level of GAG and EAG to be provided in the next following Academy Financial Year (the "Indicative Funding").

5.BB For the purpose of clauses 5.BB to 5.LL:

"**Critical Years**" means the current financial year and, if an annual letter of funding or its equivalent has been received for the following financial year, that financial year;

"**Current Funding**" means the funding specified in the annual letters of funding (or their equivalent) for the Critical Years and all other resources available and likely to be available to the Academy Trust, including funds detailed in the Master Agreement;

A "**PFI EAG Refusal**" occurs where:

(a) the Academy Trust has made a request for EAG funding in connection with its obligations or discharging its liabilities under the School Agreement or the Principal Agreement; and

(b) the Secretary of State has not agreed, in accordance with clauses 3.16 and 3.17 of the Master Agreement, to provide such EAG funding to the Academy Trust.

5.CC Within 30 days of being notified by the Secretary of State of a PFI EAG Refusal, the Academy Trust may provide written notice that it considers that, after taking into account its Current Funding, it is likely that the running costs during the Critical Years would cause the Academy Trust to go into Insolvency ("Academy Trust Insolvency Notice").

5.DD Any Academy Trust Insolvency Notice must specify:

5.DD.1 the grounds upon which the Academy Trust's opinion is based, including:

(i) evidence of those grounds;

(ii) any professional accounting advice, upon which the Academy Trust's opinion is based;

(iii) a detailed statement of steps which the Academy Trust proposes to take to ensure that as soon as reasonably practicable the running costs are reduced sufficiently in the Critical Years to ensure that such costs are less than its Current Funding and the period of time within which such steps will be taken;

(iv) the shortfall in the Critical Years between the Current Funding expected to be available to the Academy Trust to cover the running costs and the projected expenditure of the Academy Trust; and

(v) a detailed budget of income and expenditure for the Academy during the Critical Years. ]

5.EE Within 15 days of the provision of the Academy Trust Insolvency Notice, both parties shall discuss and if possible (using reasonable endeavours) agree whether or not it is likely that the running costs during the Critical Years would cause the Academy Trust to go into Insolvency and such Insolvency could not be avoided through prudent financial management (including, by using GAG funding prudently). Both parties recognise that they will need to engage in a constructive dialogue at the time about how best to provide education for the pupils at the Academy and agree to use their reasonable endeavours to agree a practical solution to the problem.

5.FF If no agreement is reached in accordance with clause 5.EE within 15 days of the Academy Trust Insolvency Notice being served, then the following questions shall be referred to an independent expert (the "Expert") for determination:

5.FF.1 whether, on the basis of the Current Funding, it is likely that the running costs during the Critical Years would cause the Academy Trust to go into Insolvency;

5.FF.2 whether the Academy Trust is using the funds provided under this Agreement and the Master Agreement prudently; and

5.FF.3 whether the Academy Trust is using the funds provided under this Agreement and the Master Agreement in accordance with the requirements of this Agreement and the Master Agreement.

The Expert's determination shall be final and binding on both parties. The Expert shall be requested to specify in his determination:

(a) the amount of the shortfall (if any) in funding between the running costs and the Current Funding during the Critical Years (the "Shortfall"); and

(b) (if appropriate) recommendations as to future spending and the running costs.

The Expert will be an insolvency practitioner with significant professional experience of educational institutions or academies. If the parties fail to agree upon the appointment of the Expert then the Expert shall be appointed by the President of the Institute of Chartered Accountants in England and Wales.

5.GG The parties shall procure that the Expert (together with any educational specialist appointed pursuant to this clause) will act promptly in determining the matters referred to him. The Expert will be required to take account of advice from an educational specialist who is professionally familiar with the issues arising from the budget management of schools. If the parties fail to agree upon the appointment of the educational specialist then the educational specialist shall be appointed by the Chairman of the Specialist Schools and Academies Trust.

5.HH The Expert's and the educational specialist's fees shall be borne equally between the parties.

5.II For the purpose of clauses 5.JJ and 5.LL, "Insolvency Decision" means either:

5.II.1 in accordance with clause 5.EE, the Secretary of State agrees with the Academy Trust that on the basis of the Current Funding it is likely that the running costs during the Critical Years would cause the Academy Trust to go into Insolvency which could not be avoided through prudent financial management (including, using GAG funding prudently); or

5.II.2 an Expert determines in accordance with clause 5.FF that on the basis of the Current Funding it is likely that the running costs during the Critical Years would cause the Academy Trust to go into Insolvency or that the Academy Trust is not using the funds provided under this Agreement and the Master Agreement prudently and in accordance with the requirements of this Agreement and the Master Agreement.

5.JJ Within 10 Business Days of an Insolvency Decision, the Secretary of State may either at its option:

5.JJ.1 withdraw the PFI EAG Refusal and promptly pay to the Academy Trust the amount of requested EAG funding or such other sum as shall be appropriate; or

5.JJ.2 terminate this Agreement on not less than 20 Business Days notice to the Academy Trust.

5.KK In the event that the Secretary of State provides additional EAG funding in accordance with clause 5.JJ, the Secretary of State may within 12 months of paying the additional EAG funding, terminate this Agreement at any time.

5.LL In the event that there is no Insolvency Decision, this Agreement shall continue and the Secretary of State shall not be obliged to pay to the Academy Trust the requested EAG funding.

1. **For schools which have not got a signed project agreement, add the following clauses to clause 5 (and renumber and update the cross referencing in the clauses that follow):**

5.MM Notwithstanding the provisions of clause 7 of the Master Agreement and clauses 5.A to 5.LL of this Agreement, the Secretary of State may at any time on or after [*insert date*] and by written notice served on the Academy Trust, terminate this Agreement either with immediate effect or from the end of the financial year in which such notice is served, as the Secretary of State may, in his absolute discretion decide, if the following condition has not been met:

5.MM.1 the Academy Trust has not on or before [*insert date*], entered into legal agreements between itself, the Secretary of State and [*insert name of LA*] providing for the Academy's buildings to be procured by [*insert name of LA*] through a private finance initiative, those agreements to be in such form and containing such terms as those parties may, in their absolute discretion, mutually agree; [or

5.MM.2 the Academy Trust has not on or before [*insert date*] and as at the date of serving of any such notice by the Secretary of State, varied this Agreement and the Master Funding Agreement to provide for consequential amendments, in a form agreed between the Secretary of State and the Academy Trust, to enable and support the procurement of the Academy's buildings through a private finance initiative.]

1. **For schools where the construction has not completed and an acceptance certificate been issued, add the following clause** (and renumber and update the cross referencing in the clauses that follow):

[5.NN][[6]](#footnote-6) The Parties acknowledge that pursuant to the School Agreement, in the event that the Acceptance Certificate (as defined in the School Agreement) has not been issued by the Longstop Date (as defined in the School Agreement)[[7]](#footnote-7), the Academy Trust is entitled to terminate the School Agreement in accordance with its terms. Where such entitlement has arisen, the Secretary of State and the Academy Trust shall liaise and use reasonable endeavours to agree a solution which would result in the provision of alternative accommodation for the Academy that meets the educational needs of pupils of the Academy. In the event that the Parties are unable to agree such a solution and the School Agreement has terminated pursuant to clauses 40.3 or 40.4[[8]](#footnote-8) thereof, the Secretary of State may at any time and by written notice served on the Academy Trust, terminate this Agreement with immediate effect.



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1. Delete if not relevant [↑](#footnote-ref-1)
2. Delete if not relevant [↑](#footnote-ref-2)
3. Delete if not relevant [↑](#footnote-ref-3)
4. For limb (g), two alternative forms of words have been offered. The Academy Trust lawyers should pick the option that they prefer and delete the alternative. [↑](#footnote-ref-4)
5. For limb (h), two alternative forms of words have been offered. The Academy Trust lawyers should pick the option that they prefer and delete the alternative. [↑](#footnote-ref-5)
6. Number this clause as clause 5.28 if clause 5.28 above is not applicable but this clause does apply. [↑](#footnote-ref-6)
7. Check that terms referred to as being defined in the School Agreement are the correct ones by reference to the Development and School Agreement. [↑](#footnote-ref-7)
8. Cross references to the School Agreement are to the model Development and School Agreement - the cross references should be checked against the worked up version of that document for the scheme in question. [↑](#footnote-ref-8)