Department for Education

Guidance for Further Education Corporations

Process and criteria for a Further Education Corporation becoming a Higher Education Corporation under section 122ZA of the Education Reform Act 1988

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Contents

Introduction 3

Overview of requirements and process 4

- Step One: Further Education Corporation contacts DfE regarding their request 5
  - Initial discussion 5
  - Consultation 5
  - Opinion in principle 6
- Step Two: Further Education Corporation requests a section 122ZA order 7
- Step Three: DfE makes a section 78 request to the Office for Students to confirm that criteria met 8
- Step Four: DfE officials seek ministerial decision 8
- Step Five: Implementation 8

Outcomes and effects of becoming a Higher Education Corporation 10

Freedom Of Information 11

Introduction

1. This guidance aims to support Further Education Corporations in England that wish to become a Higher Education Corporation in England under section 122ZA of the Education Reform Act 1988.

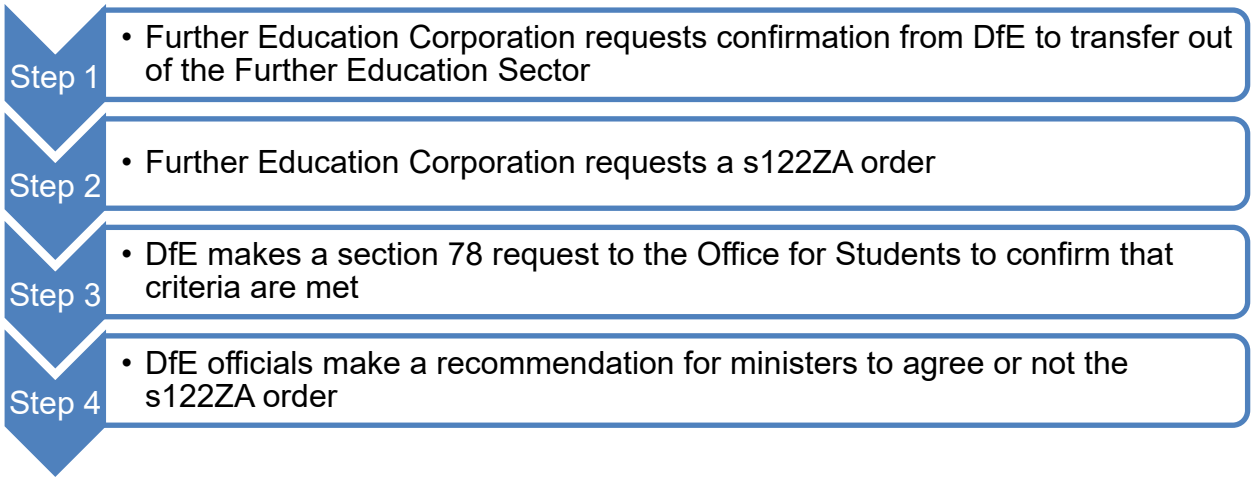
2. The effect of becoming a Higher Education Corporation will cause the Further Education Corporation to move out of the publicly funded Further Education Sector.

3. The reasons for the change are a matter for the Further Education Corporation, and it must take its own legal advice on the potential effects. For example, the Further Education Corporation may wish to change its corporate form to be eligible to apply for University Title.

4. It should be noted that the Higher Education and Research Act 2017 ('HERA') removed the previous effect of the section 122A power in the Education Reform Act 1988 ('ERA 1988'), together with other related provisions affecting Higher Education Corporations in England. As a result, the transition from a Further Education Corporation to a Higher Education Corporation no longer:
   - gives entry to the publicly funded higher education sector. The Further Education Corporation must already be registered with the Office for Students (OfS) and so already be within the publicly funded higher education sector;
   - requires that the Higher Education Corporation's governance arrangements receive approval by the Privy Council. This means changes to governance arrangements can be approved solely by internal process of the Higher Education Corporation's governing body. As best governance practice was previously assured by the Privy Council's scrutiny, this has now been replaced by the need for the Higher Education Corporation as a Registered Higher Education Provider to ensure it complies with its ongoing registration conditions in relation to the OfS's public interest governance principles; and
   - must have the appointment of the first members of the Higher Education Corporation's governing body made by the Secretary of State. This means that the appointment of the first members of the Higher Education Corporation's governing body is no longer appointed by the Secretary of State but rather can be through internal process by the Higher Education Corporation.

Overview of requirements and process

5. The following key steps should be followed in sequence, leading up to final consideration for potential approval by the Secretary of State, through making a s122ZA order:



6. Before the Department for Education (DfE) can consider a request under s122ZA, certain prerequisites must be met.

The applicant must:

- be incorporated as a Further Education Corporation in England;
- be registered with the OfS and be fully compliant with its conditions of registration; and,
- have, or will have by the time the s122ZA order comes into force, full-time equivalent (FTE) higher education students equating to or exceeding 55% of the total number of FTE students. This is to ensure that providers in the publicly funded further education sector only move out of this sector and into a specifically higher education form of incorporation - that of a Higher Education Corporation, where the provider is primarily focussed on higher education (paragraphs 36 and 37 below provide additional context on this).

7. Before beginning the process, the Further Education Corporation should seek its own assurances by checking it is an English Further Education Corporation; is securely registered with the OfS and meeting the required conditions of registration; and, by making a calculation itself using the latest OfS calculation methodology, or checking with the OfS whether, upon approval, it will have at least 55% FTE higher education students.

8. A Further Education Corporation must also demonstrate, amongst other considerations, that:

- its transfer out of the publicly funded further education sector will be in the public interest;

- the public funding invested into the existing Further Education Corporation's assets is appropriately considered; and,
- the education offer to students will be sustained, where appropriate, and protected as necessary.

9. The applicant must provide evidence of these requirements. Discussion with DfE will determine the evidence needed (see paragraph 11).

10. DfE generally anticipates that the process under s122ZA will take approximately 12 months to complete, but this timeframe is subject to change depending on the individual circumstances of the Further Education Corporation. During the process, DfE will need to formally seek advice from the OfS in assuring the Further Education Corporation's suitability for exit out of the Further Education Sector as detailed in paragraph 6 above.

11. This timeframe will also be dependent on a number of factors including quality of the evidence provided by the Further Education Corporation, and the extent of any additional evidence required during the process. A Further Education Corporation may ask DfE about the progress of its application at any time.

Step One: Further Education Corporation contacts DfE regarding their request

Initial discussion

12. The Further Education Corporation should have an initial discussion with its regional improvement team, to set and agree requirements for evidence, before proceeding with its request. The evidence to be supplied to DfE will depend on the individual circumstances of the Further Education Corporation. The outcome of this discussion, and the agreed requirements, will inform the next step, consultation by the Further Education Corporation.

Consultation

13. The Further Education Corporation must undertake a consultation to inform itself and DfE of the suitability of its proposed exit from the further education sector.

14. One of the main purposes of the consultation should be to help assure protection of the public interest in the existing Further Education Corporation's further education provision to students after the Further Education Corporation has transferred out of the further education sector.

15. In all scenarios, the Further Education Corporation should consult widely and transparently on proposals with key stakeholders and local interested parties, taking account of the views of learners, employers, and the broader community. It must

consider the impact of this change on the local community and on the overall further education and training offer for learners and employers.

Opinion in principle

16. If the outcome of the consultation is supportive of the Further Education Corporation transferring out of the further education sector, the Further Education Corporation should then work towards an in-principle opinion by DfE that the transfer out is appropriate.

17. The evidence must meet all the requirements already set by and agreed with DfE before consultation and be submitted by the Further Education Corporation with its request to DfE. This should include:

- A letter from the Chair of the governing body stating that the Further Education Corporation considers that it is appropriate for it to transfer out of the further education sector, detailing the benefits the proposal is expected to achieve.
- The full case, with evidence, for transfer out of the further education sector.
- The evidence gathered through the consultation on the Further Education Corporation's proposal, including who has been consulted, a summary of the responses, the level of support and/or any concerns raised.

18. Where possible, Further Education Corporations are encouraged to use documentation that has been produced in the normal course of its business and ensure any Managing Public Money requirements are met as set out in the college financial handbook and its associated suite of documents. DfE may ask for further information if necessary.

19. If the evidence resulting from the consultation is not supportive of the Further Education Corporation transferring out of the further education sector, at that stage it is highly unlikely the Further Education Corporation will be able to transfer out and it should be discussed further with the relevant regional improvement team.

20. The responsibility for the content of and submission of the case for 'transfer out' rests wholly with the Further Education Corporation, but DfE may provide information to clarify criteria and suitability of evidence as required throughout the preparation of the case.

21. The Further Education Corporation must be prepared to engage with DfE during its assessment and to submit such other information as DfE may reasonably request in connection with the application.

22. Only on receiving an in-principle opinion from DfE confirming that DfE is content with the appropriateness of the Further Education Corporation transferring out of the

further education sector may the Further Education Corporation move to Step Two of the process, requesting that a s122ZA order be made by the Secretary of State.

23. At any time, the Further Education Corporation may withdraw its request.

Step Two: Further Education Corporation requests a section 122ZA order

24. A s122ZA order is a statutory instrument, which needs to be approved by the Secretary of State, to allow a Further Education Corporation to become a Higher Education Corporation. The Further Education Corporation will only be able to progress its request for the approval of a s122ZA Order (allowing it to become a Higher Education Corporation in England) if it has successfully completed step one and has had confirmation in-principle from DfE that the Further Education Corporation could transfer out of the further education sector.

25. Once the Further Education Corporation has had confirmation in-principle from DfE that the Further Education Corporation may transfer out of the further education sector, the Chair of the Further Education Corporation should write by formal letter to DfE HE inbox: highereducation.governanceteam@education.gov.uk, confirming that the Further Education Corporation meets the following criteria:

- it is a Further Education Corporation in England;
- it is registered with the OfS and is complying fully with its conditions of registration; and,
- it has, or will have by the time the s122ZA order comes into force, FTE higher education students equating to or exceeding 55% of the total number of FTE students.

26. This is because for an English Further Education Corporation to be eligible for Higher Education Corporation status, it must meet the higher education student ratio criteria, whereby the FTE enrolment number of students for higher education courses1 must equate to or exceed 55% of the total FTE enrolment number. The current calculation methodology, developed by the OfS and also to be used in University Title applications, is applied to higher education providers in England. In particular, it reflects the wide variety of part-time and distance-learning pathways and the existence of

[1] Higher education courses are programmes leading to qualifications, or credits which can be counted towards qualifications, which are above the standard of GCE A-levels or other Level 3 qualifications. They include degree courses, postgraduate courses and sub-degree courses such as those leading to HNCs or HNDs. For the full details of courses of higher education please refer to section 235(2)(e) of and Schedule 6 to the Education Reform Act 1988.

accelerated degrees and so calculates the study time by students in a way that more accurately reflects their actual activity during the year.

Step Three: DfE makes a section 78 request to the Office for Students to confirm that criteria met

27. Section 78 of HERA ('s78') allows DfE to formally request information from the OfS. Once DfE has received the letter from the chair of the Further Education Corporation, it will then seek assurance from the OfS on the three criteria set out in Step Two above.

28. We estimate that a reply from the OfS might be possible within a month, although it may take longer.

Step Four: DfE officials seek ministerial decision

29. Upon receipt of the OfS's advice following the above s78 request, DfE officials will then review the evidence provided by the Further Education Corporation alongside the OfS advice, against the s122ZA criteria set out in Step Two.

30. If, having considered all the evidence and the OfS's advice, there are any concerns about the Further Education Corporation's application, DfE officials (regional improvement team) will inform the Further Education Corporation of the outcome of the assessment and give them an opportunity to provide further clarification and explanation before advice is submitted to the Secretary of State and a final decision is made.

31. Following detailed consideration of the Further Education Corporation's request, DfE will submit its formal advice and recommendations on all aspects of the application to the Secretary of State for a decision.

32. If the Secretary of State considers that the criteria for becoming a Higher Education Corporation have been met and approves the request, DfE officials at the HE Governance Team will write to the Further Education Corporation confirming this.

33. If the Secretary of State does not approve the request, DfE will write to the Further Education Corporation to confirm the decision and set out the reasons for it.

Step Five: Implementation

34. If the application has been approved, the Secretary of State will lay an order before Parliament which will usually come into force 21 days after that date. It is only at this point that becoming a Higher Education Corporation takes legal effect. The decision

letter will confirm the process and timing for laying the order, but this will have been discussed with the Further Education Corporation during the s122ZA process.

35. Upon the order coming into force, s122ZA of ERA 1988 provides for a Further Education Corporation in England to become a Higher Education Corporation.
36. On that date, the first members of the Higher Education Corporation will be appointed by the governing body of the Further Education Corporation. Any member of the Further Education Corporation who is not re-appointed by the governing body as a member of the Higher Education Corporation ceases to hold office.

Outcomes and effects of becoming a Higher Education Corporation

37. Where a Further Education Corporation has become a Higher Education Corporation and so is no longer part of the statutory further education sector, the Higher Education Corporation may, assuming it meets the other necessary eligibilty criteria, apply for University or University College status.
38. As Further Education Corporations are part of the statutory further education sector (as defined at section 91(3) FHEA 1992), they are not eligible to receive University or University College status. This is because Further Education Corporations and the institutions they conduct are principally concerned with the delivery of further education, whereas universities are primarily providers of higher education.
39. Although Further Education Corporations can provide some higher education provision and may do so, it would be misleading if a Further Education Corporation that delivers mainly further education were to be given a status that suggested that the majority of their courses are higher education.

Freedom Of Information

40. DfE is subject to freedom of information and data protection legislation. Should DfE receive a request for information under the Freedom of Information Act 2000 ('FOIA') which relates to the Further Education Corporation's application then it may provide this to the requester, unless an exemption under the FOIA applies. If necessary and appropriate, DfE may discuss the request with the Further Education Corporation.

Department for Education

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