

Draft Regulations laid before Parliament under section 119(2) of the Higher Education and Research Act 2017, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2019 No. 0000

EDUCATION, ENGLAND

**The Higher Education (Monetary Penalties
and Refusal to Renew an Access and
Participation Plan) (England) Regulations 2019**

Made - - - - *******
Coming into force - - *1st August 2019*

The Secretary of State makes the following Regulations in exercise of the powers conferred by sections 15(2) and (3), 21(3) and (4) and 119(5) of the Higher Education and Research Act 2017⁽¹⁾. In accordance with section 119(2) of that Act, a draft of this instrument was laid before, and approved by a resolution of, each House of Parliament.

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Higher Education (Monetary Penalties and Refusal to Renew an Access and Participation Plan) (England) Regulations 2019 and come into force on 1st August 2019.

(2) In these Regulations—

“the Act” means the Higher Education and Research Act 2017;

“a decision under section 21(2) of the Act” means a decision of the OfS⁽²⁾ that, on the expiry of a plan in relation to a registered higher education provider⁽³⁾ which is currently in force, it will refuse to approve a new plan for a specified period;

“a plan” means an access and participation plan within the meaning of section 29(2) of the Act;

“the review body” means a person or panel of persons appointed by the Secretary of State in accordance with regulation 9(1);

“section 21(2) notification” means a notification under section 21(2) of the Act.

(1) [2017 c. 29](#).

(2) The OfS is how the Office for Students is referred to: see section 1(2) of the Act.

(3) “Registered higher education provider” is defined in section 3(10)(a) of the Act.

Monetary penalties: maximum amount

2. The amount of a penalty determined by the OfS under section 15(2) of the Act must not exceed the higher of—

- (a) 2% of the qualifying income of the registered higher education provider on whom the penalty is to be imposed; or
- (b) £500,000.

Monetary penalties: meaning of “qualifying income”

3.—(1) Where the relevant year of a registered higher education provider equals 12 months, the provider’s qualifying income is the provider’s relevant year income.

(2) Where the relevant year of a registered higher education provider does not equal 12 months, the provider’s qualifying income is the provider’s relevant year income divided by the number of days in the relevant year and multiplied by 365 or, if the relevant year includes 29th February, 366.

(3) In this regulation a registered higher education provider’s relevant year income is the sum of—

- (a) all relevant fees paid to the provider for relevant courses in the relevant year, and
- (b) all grants made to the provider in the relevant year by the OfS under section 39 or 40 of the Act.

(4) In this regulation—

“business year of a registered higher education provider” means a period of more than six months in respect of which the governing body of a provider publishes accounts or, if no such accounts have been published for the period, prepares accounts;

“date of the OfS notice” means the date on which the OfS notifies a registered higher education provider in accordance with paragraph 2(1) of Schedule 3 to the Act of its intention to impose a monetary penalty on that provider;

“relevant course” is a higher education course⁽⁴⁾ provided in England that leads to a taught award or a research award⁽⁵⁾;

“relevant fees” are fees⁽⁶⁾ paid to a registered higher education provider in connection with a person undertaking a relevant course, exclusive of any value added tax;

“the relevant year” means the business year of a registered higher education provider which immediately precedes the date of the OfS notice, or if no such business year exists, the 12 month period which ends on the last day of the month preceding the month in which the date of the OfS notice falls.

Monetary penalties: matters to which the OfS must have regard

4.—(1) In exercising its power to impose a monetary penalty on a registered higher education provider under section 15(1) of the Act, in addition to any other matters it considers appropriate, the OfS must have regard to—

- (a) the nature, seriousness, duration and impact of the relevant breach;
- (b) any financial or other gain made by the provider as a result of the relevant breach which benefits the provider;
- (c) any financial or other loss avoided as a result of the relevant breach which benefits the provider;

(4) “Higher education course” is defined in section 83(1) of the Act.

(5) “Taught award” and “research award” are defined in section 42(3) of the Act.

(6) “Fees” are defined in section 85(2) of the Act.

- (d) where any gain described in sub-paragraph (b) or avoided loss described in sub-paragraph (c) can be quantified, the amount of any such gain or avoided loss;
- (e) any previous breach of the provider’s ongoing registration conditions(7);
- (f) any steps taken by the provider following the relevant breach to avoid a breach in the future of its ongoing registration conditions;
- (g) the impact that imposing a monetary penalty on the provider is likely to have on—
 - (i) students on higher education courses at the provider,
 - (ii) students generally, or students of a particular description, on higher education courses provided by registered higher education providers.

(2) In this regulation “relevant breach” means a breach of one or more of a registered higher education provider’s ongoing registration conditions in respect of which the OfS is considering the imposition of a monetary penalty.

Notification of refusal to renew a plan: matters to which the OfS must have regard

5.—(1) In deciding whether to give the governing body of a registered higher education provider a section 21(2) notification, in addition to any other matters it considers appropriate, the OfS must have regard to—

- (a) where it appears to the OfS that there is or has been a failure by the governing body to comply with the fee limit condition(8) which is one of its ongoing conditions, the nature, seriousness, duration and impact of that failure;
- (b) where it appears to the OfS that there is or has been a failure by the governing body to comply with the relevant requirement, the nature, seriousness, duration and impact of that failure;
- (c) any financial or other gain as a result of the failure to comply with the fee limit condition or relevant requirement (as the case may be) which benefits the provider;
- (d) any financial or other loss avoided as a result of the failure to comply with the fee limit condition or relevant requirement (as the case may be) which benefits the provider;
- (e) where any gain described in sub-paragraph (c) or avoided loss described in sub-paragraph (d) can be quantified, the amount of any such gain or avoided loss;
- (f) any previous failure by the governing body to comply with the fee limit condition or the relevant requirement;
- (g) any steps taken by the governing body following its failure to comply with the fee limit condition or the relevant requirement (as the case may be) to avoid a failure in the future to comply with one or both of those conditions;
- (h) the impact that a decision under section 21(2) of the Act is likely to have on—
 - (i) students or prospective students on higher education courses at the provider,
 - (ii) students generally, or students of a particular description, on higher education courses provided by registered higher education providers.

(2) In this regulation “relevant requirement” means the requirement of an access and participation plan condition(9) mentioned in sections 12(3)(b) and 21(1)(b)(i) of the Act.

(7) The OfS determines and publishes general ongoing registration conditions in accordance with section 5 of the Act. It may also provide that any of those conditions does not apply to a registered higher education provider in accordance with that section. The OfS may determine and impose a specific ongoing registration condition on a registered higher education provider in accordance with section 6 of the Act.

(8) “Fee limit condition” is defined in section 85(1) of the Act.

(9) “An access and participation plan condition” is defined in section 12(3) of the Act.

Notification of refusal to renew a plan: procedure

6.—(1) Where the OfS proposes to give a section 21(2) notification to the governing body of a registered higher education provider it must first inform the governing body that it is minded to do so and give reasons.

(2) Where the OfS has informed the governing body under paragraph (1), it must give the governing body a reasonable time within which the governing body may make representations about the proposal.

(3) Where the governing body makes representations within the time given by the OfS, the OfS must consider those representations in deciding whether to give the governing body a section 21(2) notification.

(4) If after the expiry of the time given by the OfS for representations and the consideration of any such representations, the OfS decides that it will not give the governing body a section 21(2) notification, it must inform the governing body of the provider accordingly.

(5) Regulations 7 and 8 apply where the OfS decides that it will give the governing body a section 21(2) notification.

Notification of refusal to renew a plan: content of a section 21(2) notification

7. A section 21(2) notification must specify information about the decision under section 21(2) of the Act to which it relates including—

- (a) the period during which the OfS will refuse to approve a new plan in relation to the registered higher education provider;
- (b) the expiry date of a plan in relation to the provider where that plan remains in force;
- (c) the reasons for making the decision;
- (d) whether the decision has effect as a provisional or final decision.

Notification of refusal to renew a plan: effect of section 21(2) notification and review of decision

8.—(1) A decision under section 21(2) of the Act that is specified in a section 21(2) notification given to the governing body of a registered higher education provider has effect in the first instance as a provisional decision.

(2) The governing body of a registered higher education provider affected by a provisional decision may apply to the review body for a review of that decision within the period of 28 days beginning with the date on which the provider receives the section 21(2) notification specifying that decision (“the specified period”).

(3) A section 21(2) notification specifying a provisional decision must contain or be accompanied by information on the right of the governing body to apply for a review of that decision in accordance with paragraph (2) and a statement that the application for a review must be made within the specified period.

(4) The grounds on which the governing body may apply for a review are that the governing body—

- (a) presents a material factor for consideration which for good reason it had not previously drawn to the attention of the OfS;
- (b) considers that the OfS had disregarded a material factor which it should have considered;
or
- (c) considers that the provisional decision is disproportionate in view of all the relevant facts which were considered by the OfS.

(5) If the governing body informs the OfS that it accepts the provisional decision or does not apply for a review within the specified period, the OfS must as soon as practicable give the governing body a section 21(2) notification specifying that decision in accordance with paragraph (8).

(6) Where the governing body applies for a review of a provisional decision—

(a) the review body must complete the review within a reasonable time and issue any recommendation upon completion of the review;

(b) the OfS must reconsider its provisional decision having regard to any such recommendation and must withdraw the provisional decision or make a final decision under section 21(2) of the Act within a reasonable time.

(7) Where, following the review, the OfS makes a final decision under section 21(2) of the Act, it must as soon as practicable after making that decision give the governing body of the provider a section 21(2) notification specifying that decision in accordance with paragraph (8).

(8) A section 21(2) notification given in accordance with paragraph (5) or (7) must specify that the decision to which it relates has effect as a final decision.

(9) Where, following the review, the OfS withdraws its provisional decision, it must inform the governing body of the provider accordingly.

(10) Where a provisional decision is withdrawn or becomes final, the section 21(2) notification in which the provisional decision is specified is withdrawn.

Notification of refusal to renew a plan: review body

9.—(1) The Secretary of State must appoint a person or a panel of persons to review provisional decisions.

(2) In doing so the Secretary of State must act in accordance with the principles set out in the Governance Code on Public Appointments issued by the Minister for the Cabinet Office in December 2016.

(3) The Secretary of State may pay remuneration and allowances to any person appointed under paragraph (1).

Date

Name
Minister of State
Department for Education

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations are the first ones made under sections 15 and 21 of the Higher Education and Research Act 2017 (“the Act”).

Under section 15(1) of the Act the Office for Students (“OfS”) may impose a monetary penalty on a registered higher education provider (as defined in section 3(10)(a) of the Act) for breach of one of its ongoing registration conditions. These conditions are imposed on a registered higher education provider in accordance with section 5 or section 6 of the Act. Regulations 2 to 4 of these Regulations make further provision in relation to monetary penalties.

Regulation 2 provides for the maximum monetary penalty that the OfS can determine under section 15(2) of the Act. Regulation 3 sets out how the qualifying income of a registered higher education provider is determined as this in turn determines the maximum monetary penalty for some providers.

Regulation 4 sets out the factors to which the OfS must have regard when it exercises its power under section 15(1) of the Act to impose a monetary penalty.

Regulations 5 to 9 of these Regulations relate to an OfS refusal to renew an access and participation plan, as defined in section 29(2) of the Act. The Higher Education (Access and Participation Plans) (England) Regulations 2018 (S.I. 2018/470) make various provisions relating to access and participation plans.

Where a registered higher education provider that is subject to a mandatory fee limit condition under section 10 of the Act has an access and participation plan approved by the OfS under section 29 of the Act, that provider may charge fees at the higher limit. This higher limit is determined and prescribed in accordance with paragraph 2 of Schedule 2 to the Act. Section 12 of the Act requires the OfS to impose a registration condition on providers wishing to charge fees at the higher limits under paragraph 2 of Schedule 2, requiring those providers to have in force and to comply with an access and participation plan approved by the OfS. Sections 15 to 21 of the Act make provision regarding enforcement powers available to the OfS where such a registration condition is breached. These include powers in section 21 for the OfS to refuse to renew an access and participation plan.

Regulation 5 sets out the matters to which the OfS must have regard when deciding whether to notify the governing body of a registered higher education provider in accordance with section 21(2) of the Act that it will refuse to renew an access and participation plan. Regulation 6 sets out the procedure when the OfS intends to give such a notification. Regulation 7 sets out what a notification given in accordance with section 21(2) of the Act must contain. Regulation 8 provides for the OfS’s notification of a refusal to renew an access and participation plan to be treated as a provisional decision in the first instance and the procedure for the review of that decision. It also provides for the procedure when the OfS’s decision becomes final. Regulation 9 provides for the appointment of a person or panel to carry out a review.

A full impact assessment has not been produced for this instrument as no, or no significant, impact on the private, voluntary or public sectors is foreseen.

The Governance Code on Public Appointments referred to in regulation 9(2) is published electronically and may be obtained from the website of the Commissioner for Public Appointments: <https://publicappointmentscommissioner.independent.gov.uk/regulating-appointments/governance-code/>.

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Draft Legislation: This is a draft item of legislation. This draft has since been made as a UK Statutory Instrument: *The Higher Education (Monetary Penalties and Refusal to Renew an Access and Participation Plan) (England) Regulations 2019 No. 1026*