

# Briefing note: Response to disruption caused by industrial action

## Purpose

The purpose of this note is to set out the Office for Students' (OfS's) approach to disruption caused by future industrial action at registered providers. It does not impose new requirements beyond those set in the regulatory framework<sup>1</sup> but provides further explanation of how existing requirements might apply in these particular circumstances.

This document is designed to help providers to understand how the OfS will approach the protection of students' interests and the upholding of standards. In addition, in the event of significant industrial action, the OfS will be engaging with students through a variety of channels to inform them of their rights and the options available to them to resolve any issues that occur.

## The registration conditions and industrial action

As of 1 August 2019, the OfS's regulatory framework and our enforcement powers are now fully in force. A number of the conditions of registration may be particularly relevant to providers when considering their response to any industrial action.

**B2:** The provider must provide all students, from admission through to completion, with the support that they need to succeed in and benefit from higher education.

**B4:** The provider must ensure that qualifications awarded to students hold their value at the point of qualification and over time, in line with sector recognised standards.

**B5:** The provider must deliver courses that meet the academic standards as they are described in the Framework for Higher Education Qualification (FHEQ) at Level 4 or higher.

**C1:** The provider must demonstrate that in developing and implementing its policies, procedures and terms and conditions it has given due regard to relevant guidance about how to comply with consumer protection law.

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<sup>1</sup> See [www.officeforstudents.org.uk/advice-and-guidance/regulation/the-regulatory-framework-for-higher-education-in-england/](http://www.officeforstudents.org.uk/advice-and-guidance/regulation/the-regulatory-framework-for-higher-education-in-england/)

**C2:** The provider must:

- cooperate with the requirements of the student complaints scheme run by the Office of the Independent Adjudicator for Higher Education (OIA), including the subscription requirements
- make students aware of their ability to use the scheme.

**C3:** The provider must:

- have in force and publish a student protection plan which has been approved by the OfS as appropriate for its assessment of the regulatory risk presented by the provider and for the risk to continuation of study for all of its students
- take all reasonable steps to implement the provisions of the plan if the events set out in the plan take place
- inform the OfS of events, except for the closure of an individual course, that require the implementation of the provisions of the plan.

**E2:** The provider must have in place adequate and effective management and governance arrangements to:

- operate in accordance with its governing documents
- deliver, in practice, the public interest governance principles that are applicable to it
- provide and fully deliver the higher education courses advertised
- continue to comply with all conditions of its registration.

Our role is not to take sides in any industrial dispute, nor comment on the merit of any of the arguments. Our approach remains the same as our general approach to regulation, with our focus being on maintaining student outcomes. As such, we wish to remind providers that all conditions of registration continue to apply throughout any period of disruption, and we will seek to use our powers to monitor compliance and investigate any potential breaches.

## Identifying and investigating concerns

As set out in the regulatory framework, we will monitor providers' ongoing compliance with the conditions of registration through lead data indicators and other sources of intelligence. This could include students and others raising concerns about systemic issues around quality, standards or value for money. We will also be exchanging information with other organisations, such as the OIA, to identify where systemic breaches of conditions may occur.

We also expect providers to inform us of any reportable events, under ongoing condition of registration F3(i). Reportable events are 'any event or circumstance that, in the judgement of the OfS, materially affects or could materially affect the provider's ... willingness or ability to comply

with its conditions of registration'.<sup>2</sup> This could include disruption resulting from industrial action where there is a significant possibility of a breach of any ongoing conditions of registration. The OfS recognises that the materiality of an event may depend on a number of factors, including the size and complexity of a provider, and expects the provider to make a reasonable judgement in relation to reporting.

The OfS may also ask providers to submit information about the impact of industrial action and their response to enable us to take a view of the potential risks to the student interest.

Where concerns are identified, the OfS may undertake further investigation. In doing so, we may consider or take into account:

- whether the provider can demonstrate that effective arrangements were in place to oversee and manage the impact of industrial action
- what efforts the provider has made to engage with students and communicate with them around any disruption, including where any particular groups of students may be more affected (such as international students whose visa conditions could be impacted)
- what mitigation the provider has put in place to minimise the impact on student experience, what the student could reasonably expect, and what the provider originally promised
- where delivery did not meet promised standards or reasonable expectations, what alternative action the provider has taken to remedy this
- whether the provider can demonstrate that they have followed their own processes and procedures around maintaining academic standards
- whether the provider made relevant provision in their student protection plan and, if so, whether this provision has been implemented.

In line with our general approach, the OfS will focus on the outcomes for students and will not dictate how providers should respond. Our general expectation, however, is that providers should take reasonable steps to avoid or limit disruption and do everything possible to minimise or make up for its impact.

We refer providers to recent case studies released by the OIA in February and May 2019, setting out their expectations with respect to the complaints of individual students. Providers should bear these precedents in mind when designing mitigations in the event of disruption, and we will consider the upholding of multiple student complaints to the OIA as indicative of possible breaches of the above conditions of registration.

## **Providers' obligations under consumer law**

In addition to the OfS's regulatory requirements, providers are also subject to obligations under consumer law. The OfS does not make judgements on legal rights and responsibilities in the same way as a court or an enforcement body such as Trading Standards. However, the OfS can consider whether a provider has had regard to advice about complying with consumer law in

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<sup>2</sup> Regulatory framework for higher education in England, page 128, paragraph 494:  
[www.officeforstudents.org.uk/publications/securing-student-success-regulatory-framework-for-higher-education-in-england/](http://www.officeforstudents.org.uk/publications/securing-student-success-regulatory-framework-for-higher-education-in-england/)

developing and implementing their policies and processes. We have previously published advice about consumer rights for providers and students affected by industrial action.<sup>3</sup>

Many providers include force majeure clauses in their terms and conditions. These clauses aim to limit legal liability in cases of disruption as a result of events out of the provider's control. As part of the requirement to have due regard to guidance about consumer law, providers should consider the appropriateness of the use of such clauses in the light of the need to ensure that terms and conditions between providers and students are fair. A term is unfair if it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.

Regardless of whether force majeure clauses are legally enforceable, these do not limit providers' regulatory responsibilities or the OfS's ability to act where conditions have been or are at risk of being breached. The OIA has also commented on the suitability of broad force majeure clauses where they have been relied on in previous student complaints.<sup>4</sup>

## How to report concerns

### Providers

We expect providers to comply with any additional requests for information received and to inform us promptly of any reportable events that may be relevant by contacting [regulation@officeforstudents.org.uk](mailto:regulation@officeforstudents.org.uk). We will also be continuing to monitor providers in the usual ways via the available data and information shared with partner organisations.

Staff at registered providers are also able to inform us in confidence of possible breaches of conditions, using the email address below for third party notifications.

### Students and third parties

We do not have a direct role in dealing with individual disputes between students and higher education providers. Students with individual complaints should first work with their institution to try and resolve their issues directly. If students have exhausted the internal complaints procedures at their provider, they can then take up their issue with the OIA<sup>5</sup> if they feel it has not been resolved. There is further information on this in our published guidance for students affected by industrial action.<sup>6</sup> We exchange information with the OIA that will help us identify providers where systemic breaches are likely to occur.

Where there is evidence of systematic failure at a registered provider that risks breaching our conditions of registration as outlined above, students, student bodies and third parties are able to notify us directly by contacting [notifications@officeforstudents.org.uk](mailto:notifications@officeforstudents.org.uk). We may ask you or the provider for more information and will decide whether any mitigations are necessary.

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<sup>3</sup> See [www.officeforstudents.org.uk/for-students/guidance-for-students-affected-by-recent-industrial-action-in-relation-to-the-uss-pension-scheme-dispute/](http://www.officeforstudents.org.uk/for-students/guidance-for-students-affected-by-recent-industrial-action-in-relation-to-the-uss-pension-scheme-dispute/)

<sup>4</sup> See <https://www.oiahe.org.uk/resources-and-publications/latest-news-and-updates/complaints-about-industrial-action-some-emerging-themes/>  
<https://www.oiahe.org.uk/resources-and-publications/latest-news-and-updates/oia-briefing-note-complaints-arising-from-strike-action/>

<sup>5</sup> See <https://www.oiahe.org.uk/>

<sup>6</sup> See [www.officeforstudents.org.uk/for-students/guidance-for-students-affected-by-industrial-action/](http://www.officeforstudents.org.uk/for-students/guidance-for-students-affected-by-industrial-action/)