

Regulatory case report for Raindance Educational Services Limited: OfS decisions to find a breach of condition F3 and impose a monetary penalty

Summary

This case report confirms that the Office for Students ('OfS') has found that Raindance Educational Services Limited ('the provider') has breached ongoing condition of registration F3 and that the OfS has decided to impose a monetary penalty on the provider. This report summarises the key aspects of this case.

The Higher Education and Research Act 2017 ('HERA') gives the OfS enforcement powers to use where the OfS determines that there is, or has been, a breach of one or more conditions of registration. These powers include imposing a monetary penalty – a fine under section 15 of HERA. Regulations made by the Secretary of State¹ set out the factors to which we must have regard when deciding whether to impose a monetary penalty and its amount. These regulations also set out the maximum penalty we can impose for each breach, which is the higher of two per cent of a provider's qualifying income² or £500,000. The OfS has published guidance about our approach to the calculation of a monetary penalty in Regulatory advice 19.³

On 20 March 2023, the OfS made a final decision that there had been a breach of ongoing condition F3 by the provider because it failed to meet the deadline of 8 June 2021 for submitting its signed audited financial statements for the year ending 31 October 2020 by just under 10 months, submitting its signed audited financial statements on 5 April 2022.

Ongoing condition F3 allows the OfS to compel the production of information on specific occasions and on an enduring basis. It requires providers registered with the OfS to 'Provide the OfS, or a person nominated by the OfS, with such information as the OfS specifies at the time and in the manner and form specified'. We specify the information to be provided in an 'F3 Notice' issued to providers. Ongoing condition F3 sets an absolute requirement for compliance – in other words, providers must meet the deadlines set out in an F3 Notice and it is not enough simply to attempt to do so or take reasonable steps to do so.

¹ See www.legislation.gov.uk/ukdsi/2019/9780111185353/contents.

² Qualifying income is defined in paragraph 3 of the Monetary Penalties Regulations as, broadly, the sum of all relevant fees paid to the provider for relevant courses and all grants made by the OfS under section 39 or 40 of HERA, in the 'relevant year'. The 'relevant year' means the 'business year' of a registered higher education provider which immediately precedes the date of the OfS notice [of the OfS's intention to impose a monetary penalty], 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:
<https://www.legislation.gov.uk/uksi/2019/1026/regulation/3/made>.

³ See www.officeforstudents.org.uk/publications/regulatory-advice-19-the-ofs-s-approach-to-determining-the-amount-of-a-monetary-penalty/.

This regulatory case concerns a requirement to provide the OfS with signed audited financial statements as part of its Annual Financial Return (AFR) 2020. This information assists the OfS with assessing a provider's financial viability and sustainability. Condition F3 is also often used by the OfS for other important purposes, for example to investigate or monitor a provider's compliance with other conditions of registration, such as quality, student protection and management and governance.

On 20 March 2023 the OfS also made a final decision to impose a monetary penalty on the provider to address the regulatory harm caused by this breach of condition F3 which arose as a result of its failure to provide audited financial statements by the applicable deadline.

We have imposed a penalty of £1,000. In this case, the final penalty amount imposed was significantly reduced to reflect our judgement that a higher penalty might have a disproportionately negative impact on students, in light of the resources reasonably available to the provider.

Rationale and further information

Reasons for imposing a monetary penalty

A finding of a breach of a condition of registration will not necessarily result in the OfS imposing a monetary penalty in all cases. In deciding whether to impose a monetary penalty as a result of this breach of condition F3, we considered a number of factors.

The OfS's regulatory framework⁴ has been designed to require timely submission of information that enables the OfS effectively and efficiently to regulate in the interests of students and taxpayers. This includes requiring relevant information from providers to monitor their financial viability and sustainability, including signed audited financial statements each year.

In this case, the breach of condition F3 related to a failure to provide signed audited financial statements which are externally verified. Audited financial statements provide the OfS with assurances that a provider's financial performance and position has been independently verified. The independent auditor is engaged to examine a provider's financial statements and give their professional opinion on whether they fairly reflect, in all material aspects, the provider's financial position over a given period(s) and financial position at a given date, as well as their ability to act as a going concern over the coming 12 months. The OfS's ability to assess a provider's financial viability and sustainability and to act to protect students' interests can be impeded when audited accounts are not provided in a timely manner. This means that the OfS's ability to anticipate financial risks and to act swiftly to protect students' interests (for example ensuring appropriate student protection measures are in place if there is a risk of market exit) can therefore be adversely impacted. This is considered a significant regulatory risk given the potential impact on students and the sector in the event of financial failure of a provider.

We considered paragraph 167 of the OfS's regulatory framework.⁵ This paragraph sets out the intervention factors that the OfS will consider before deciding whether to intervene, and if so, the form that intervention should take. In deciding that we should intervene in this particular case, and

⁴ See www.officeforstudents.org.uk/publications/securing-student-success-regulatory-framework-for-higher-education-in-england/.

⁵ See www.officeforstudents.org.uk/publications/securing-student-success-regulatory-framework-for-higher-education-in-england/.

that it would be appropriate, having regard to reasonableness and proportionality that our intervention should take the form of a monetary penalty, we placed particular weight on the following factors:

- The breach had caused the regulatory harm described above, and this regulatory harm had an impact on students because it impeded the OfS's ability to effectively and efficiently regulate the provider's financial viability and sustainability in the interests of students.
- The serious nature of the breach given the duration that the breach was ongoing, a period of just under 10 months.
- Action taken by the OfS in previous similar cases – given that a penalty was imposed in a previous case involving the failure to submit audited accounts by the required F3 deadline taking action in this case demonstrates consistency in the OfS's regulatory activity.
- If the OfS were to not take regulatory action in this case, this could reduce confidence in the OfS and risk generating non-compliance issues with other providers in the sector.
- The impact of an intervention on students. We considered that any monetary penalty could, in principle, have a general negative impact on students, as it may divert funds that the provider may otherwise have invested into its provision. In this particular case we considered that given the resources reasonably available to the provider a more significant penalty might have a disproportionately negative impact on students, and as a result we reduced the penalty to £1,000.

We considered Regulation 4 of the Monetary Penalties Regulations,⁶ which sets out the matters to which the OfS must have regard when deciding whether or not to impose a monetary penalty. In particular, we placed weight on the nature, seriousness, duration and impact of the breach. These were considered serious due to the nature of regulatory harm caused (described above) and because the duration of just under 10 months was considered very significant. All these factors weighed in favour of imposing a monetary penalty. The OfS took into account the impact of a penalty could have on students given the resources reasonably available to the provider, and this was reflected in a reduction to the final penalty amount in this particular case.

We also considered that there was no evidence that the provider has benefited financially or otherwise, including avoiding financial or other loss, as a result of the breach. We also considered steps taken by the provider following the breach to avoid a breach in the future and the fact that there are no previous findings of a breach in relation to this provider to be neutral in terms of imposing a penalty.

We also considered the OfS's general duties (set out under section 2 of the Higher Education and Research Act 2017).⁷

The general duties considered particularly relevant were the principles of best regulatory practice, including the principles that regulatory activities should be transparent, accountable, proportionate and consistent, and targeted only at cases in which action is needed. Our conclusion was that

⁶ See www.legislation.gov.uk/ukxi/2019/1026/regulation/4/made.

⁷ See www.legislation.gov.uk/ukpga/2017/29/contents/enacted.

taking regulatory action in this case aligned with these principles. We considered that more significant sanctions, such as suspension or deregistration, would not be appropriate.

We also had regard to:

- the need to use the OfS's resources in an efficient, effective and economic way. If the requirement to provide audited financial statements on time is not met, gaining an equivalent level of assurance would require the OfS to undertake lengthy work to essentially duplicate the work the auditor is already required to carry out. We consider that sending a clear signal about our willingness to take action in these circumstances where a provider fails to comply with its conditions of registration will be effective in achieving greater compliance with condition F3, and other conditions in the future and reduce the OfS resources needed to pursue future compliance concerns of this type; and
- The need to promote value for money in the provision of higher education by English higher education providers. We considered whether the imposition of a monetary penalty in this case may divert funds that may have been used for the benefit of students. Although this consideration may weigh against imposing a monetary penalty, in this case the OfS has considered the need to balance the potential impact on students at the provider with the need for the OfS to take action to protect the wider interests of all students. We consider there is a student interest in the OfS taking regulatory action in this case.

We also considered the public sector equality duty (under section 149 of the Equality Act 2010). We did not consider that the imposition of a monetary penalty would have a particular or materially adverse impact on a particular group of people with protected characteristics. Our view is that the need for the OfS to take action to protect the wider interests of all students includes those students with protected characteristics.

We also had regard to all relevant guidance from the Secretary of State.

How the amount of the penalty was calculated

As set out in Regulatory advice 19, the OfS takes a five-step approach to determining the amount of any monetary penalty. Our considerations in this case at each of these five steps are set out below:

Step 1: The following factors were taken into account in determining the 'baseline' penalty:

- The significance of the breach given the regulatory harm established in this case.
- We considered that imposing a penalty against a provider that failed to submit information requested by the OfS by the required deadline to be in the wider interests of students at this provider, and all students, as it acts as a regulatory incentive for providers to avoid similar non-compliant behaviour in the future. We considered that the general impact on students need to be weighed against the need for the OfS to take action to protect the wider interests of all students.⁸

⁸ We did take into account representations made by the provider in relation to the impact of the penalty on students in step 5 of the calculation of the penalty.

- We considered that a monetary penalty would be the most effective intervention as it reflects the seriousness of the breach and the regulatory harm that arises.
- We did not have any information that suggested that the provider made any gain or avoided loss as a result of the breach; therefore this was considered to be a neutral factor.
- We were not aware of other regulators having a regulatory interest in the provider's submission of audited financial statements. We did not place any weight on this factor.
- As we are not aware that the breach has yet created a lack of confidence in the sector we did not place weight on this as a factor in calculating the penalty.

Based on these considerations, we set the baseline penalty at **£20,000**.

Step 2: The baseline amount was then adjusted in light of aggravating factors in this case. The following were considered to be neutral factors in this particular case:

- The fact that whilst the provider did not notify the OfS that it would be unable to meet the submission deadline for its audited financial statements, the OfS is able to easily discover this type of non-compliance.
- The OfS did not have sufficient information to assess whether the breach was likely to have been deliberate, reckless or involved dishonesty.
- Whilst the provider took some steps to remedy the breach, they were taken after the provider's deadline and it still took the provider a further four months from this point to submit its audited accounts.
- The provider's responsiveness to OfS communications. Whilst it was often unresponsive, we did not consider the provider to be fully unresponsive.
- The provider's behaviour since the breach.⁹

The duration of the breach was considered significant and was considered an aggravating factor. The OfS increased the penalty by £2,000 to **£22,000** as a result of this aggravating factor.

Step 3: We considered the provider's formal track record of compliance (for example, whether there have been multiple breaches of the same or different conditions) and the likelihood that a breach would happen again.

The OfS considered that this would be the first finding of a breach of registration for this provider. Given that the provider is still relatively new to the OfS Register, having been registered in October 2020, there is limited time over which a track record can be determined. As a result, no adjustment to the penalty was made under step 3 in this particular case.

⁹ Its behaviour in relation to subsequent submission of audited financial statements was reflected in a reduction to the penalty under step 4.

Step 4: Other relevant factors

The OfS considered the fact that the provider submitted its audited accounts required for its AFR 2021 submission by its deadline. In this instance, the OfS considered that this warranted a reduction. The OfS reduced the penalty by £2,000 to reflect this.

The penalty was then further reduced to reflect the fact that this is one of the first times that the OfS has imposed a monetary penalty on any higher education provider for a breach of any condition of registration. A reduction of £4,000 was made to reflect this factor in this particular case.

Under step 4 the penalty amount was therefore set at **£16,000**.

Step 5: Determine the appropriate monetary penalty

Step 5 requires the OfS to consider the impact that the imposition of a monetary penalty would have on the financial viability and sustainability of the provider. Step 5 also sets out that we will consider the impact of a penalty on staff or students where such an impact is apparent from the provider's context or circumstances.

On the facts of this particular case, the OfS decided to reduce the penalty to take into account the potential disproportionate impact on students if the penalty was higher given the resources reasonably available to the provider. The OfS reduced the penalty to **£1,000** and this was the final amount imposed on the provider.

For the avoidance of doubt, the fact that the OfS determined the penalty to be £1000 in this particular case should not be taken as an indication that we will (or are required to) follow a similar approach in other cases. The OfS approach to determining the amount of monetary penalties is set out in Regulatory advice 19 and each case depends on its facts.