

## **EXPLANATORY STATEMENT**

Issued by the authority of Minister for Education and Youth

### ***Education Services for Overseas Students Act 2000***

### ***Education Services for Overseas Students (Foundation Program Standards) Instrument 2021***

#### **AUTHORITY**

The *Education Services for Overseas Students (Foundation Program Standards) Instrument 2021* (the Foundation Program Standards) is made by the Minister under subsection 176C(1) of the *Education Services for Overseas Students Act 2000* (ESOS Act).

#### **PURPOSE AND OPERATION**

The Foundation Program Standards are a part of the legislative framework enabled by the ESOS Act. Providers who offer courses to overseas student must comply with the ESOS Act. The framework establishes requirements and standards for quality assurance of education services offered to overseas students. The framework, including the Foundation Program Standards, promotes the quality of Australian education offerings, supports the integrity of the student visa system and provides tuition fee protection for overseas students.

Foundation Programs are nationally recognised preparatory courses that provide overseas students with a strong academic foundation for entry into Australian higher education undergraduate study.

The Foundation Program Standards apply to providers who deliver Foundation Programs to overseas students. Providers must demonstrate compliance with these standards to achieve registration and renewal of registration as a Foundation Program on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS), and to have changes to registration approved.

The Standards set out requirements for Foundation Programs, teachers and providers to ensure Foundations Programs fulfil their proper function and are delivered to a high standard. This is achieved through requiring nationally consistent standards and procedures for registered providers and persons who deliver Foundation Program services on behalf of registered providers. The Foundation Program Standards enhance Australia's reputation as a quality international education provider in international education markets.

The ESOS agency for a person or entity that delivers a Foundation Program is required to assess applications and monitor compliance with the Standards. The ESOS agency for all current Foundation Programs is the Tertiary Education Quality and Standards Agency (TEQSA).

Subsection 14(2) of the *Legislation Act 2003* states that, unless the contrary intention appears, a legislative instrument may not make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time. Paragraph 176C(2)(b) of the ESOS Act provides authority for the Foundation Program Standards to apply, adopt or incorporate, with or without modification any matter contained in any other instrument or writing, as existing from time to time, despite subsection 14(2) of the *Legislation Act 2003*.

The Australian Qualifications Framework (AQF) has been incorporated in the Foundation Program Standards by reference at paragraph 6(2)(c). Paragraph 6(2)(c) clarifies that the Foundation Program Standards do not apply to the provider in the provision of a course which leads to a qualification recognised under the AQF. This is because courses recognised under the AQF must meet other applicable standards and need not also comply with the Foundation Program Standards.

The AQF, as it existed at the time this Instrument was made, can be found at <https://www.aqf.edu.au/aqf-second-edition-january-2013>.

The *National Code of Practice for Providers of Education and Training to Overseas Students* (the national code) also applies to registered Foundation Program providers. The purpose of the national code is to provide nationally consistent standards and procedures for registered providers and persons who deliver educational services on behalf of registered providers.

For clarity, the Foundation Program Standards refer to aspects of the national code as it exists from time to time. Paragraph 176C(2)(b) of the ESOS Act provides authority for the Foundation Program Standards to apply, adopt or incorporate, with or without modification any matter contained in any other instrument or writing, as existing from time to time, despite subsection 14(2) of the *Legislation Act 2003*.

The national code is a legislative instrument made under subsection 33(1) of the ESOS Act and is available on the Federal Register of Legislation at <https://www.legislation.gov.au/Details/F2017L01182>.

## **REGULATORY IMPACT**

The Office of Best Practice Regulation (OBPR) advises that a Regulatory Impact Statement (RIS) is not required and a letter certifying the instrument is operating effectively and efficiently should be sent to the OBPR in lieu of a RIS, as the changes are unlikely to have a more than minor regulatory impact. This letter has been sent to the OBPR for publication (OBPR reference number **44321**).

## **COMMENCEMENT**

The Instrument commences on the day after it is registered on the Federal Register of Legislation.

## **CONSULTATION**

In 2018, English Australia and the International Education Association of Australia (IEAA) conducted a survey with their members on behalf of the Department of Education, Skills and Employment (the department) regarding Foundation Programs. The results of this survey were used by the department as substantial input to a consultation paper.

TEQSA, as the ESOS agency for Foundation Programs, was consulted by the department for advice on the development of both the consultation paper and the Foundation Program Standards.

In July 2021, the consultation paper was used as part of a public consultation undertaken by the department over a two-week period. Thirty-two submissions were received from education providers, peak bodies and government departments. These submissions were broadly supportive of the proposed changes to the Foundation Program Standards as outlined in the paper, particularly in the areas of ensuring students' academic preparedness for higher education, quality assurance and student support, and consistency within the ESOS legislative framework.

The department used the submissions and additional TEQSA consultation to develop these Foundation Program Standards.

## STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### Education Services for Overseas Students (Foundation Program Standards) Instrument 2021

*The Education Services for Overseas Students (Foundation Program Standards)*

*Instrument 2021* (the Foundation Program Standards) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Legislative Instrument**

The Foundation Program Standards are a part of the legislative framework enabled by the ESOS Act. Providers who offer courses to overseas student must comply with the ESOS Act. The framework establishes requirements and standards for quality assurance of education services offered to overseas students. The framework, including the Foundation Program Standards, promotes the quality of Australian education offerings, supports the integrity of the student visa system and provides tuition fee protection for overseas students.

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The ESOS agency for a person or entity that delivers a Foundation Program is required to assess applications and monitor compliance with the Standards. The ESOS agency for all current Foundation Programs is the Tertiary Education Quality and Standards Agency (TEQSA).

## Human rights implications

The Instrument engages the following rights:

- the right to education – Article 13 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), and Article 28 of the *Convention on the Rights of the Child* (UNCRC);
- the right to work and right to just and favourable condition of work – Articles 6(1) and 7 of the ICESCR; and
- the rights of the child – as contained in the UNCRC.

### Right to education

Article 13(1) of the ICESCR recognises each person’s right to education, and that education is important to “*the full development of the human personality*”, and enables “*all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups*”.

Similarly, Article 28(1) of the UNCRC recognises the “*right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity*”.

The ESOS Act and the Foundation Program Standards apply to providers in the delivery of Foundation Programs to overseas students. The Foundation Program Standards protect the integrity of Australia’s international education sector by ensuring that providers who provide Foundation Programs to overseas students have an appropriate level of Australian Government regulation and oversight.

The Foundation Program Standards may limit the right to education by restricting those who are able to be admitted to a Foundation Program. For example, there is a restriction on admission to Foundation Programs according to a student’s English language proficiency or level of academic achievement. This limitation is proportional and protects both the education sector as a whole and individual students, by ensuring students undertaking an educational program have the necessary capability to complete the program. This protects students from investing in programs that are unsuitable for their needs and circumstances.

### Right to work and right to just and favourable conditions of work

The Foundation Program Standards also engage the right to work and rights at work contained in Articles 6(1) and 7 of the ICESCR. Article 6(1) recognises the right to work, which includes the right of everyone to the opportunity to gain their living by work which they freely choose or accept, and recognises that states will take appropriate steps to safeguard this right. Article 7 recognises the right of everyone to the enjoyment of just and favourable conditions of work, including fair wages, safe and healthy working conditions and equal opportunity for advancement.

The Foundation Program Standards promote the right to work and rights at work by requiring relevant providers to offer learning environments that are safe and promote student wellbeing. Providers are required to have corporate and academic governance structures and policies that ensure the academic and operational integrity of its activities.

The right to work may be limited by requirements on qualifications and teaching experience for teachers of Foundation Programs. These restrictions are limited and proportional and are essential to ensure consistency across providers and to maintain high quality educational standards for Foundation Programs, promoting the students' right to education.

#### Rights of the child

The Foundation Program Standards engage the rights of the child contained in the UNCRC, since a significant proportion of students undertaking Foundation Programs are under the age of 18. The Foundation Program Standards are compatible with the rights of the child.

In particular, the Foundation Program Standards include additional requirements on providers for students under the age of 18, including requiring providers to adhere to applicable child and young person protection legislation in their state or territory jurisdiction, and comply with the Commonwealth child protection legislation and child safety requirements. The Foundation Program Standards require Foundation Programs to be appropriate to the age of the students, where the student is under the age of 18, for example ensuring facilities, processes and teaching are appropriate for younger students.

This aims to ensure the welfare, safety, and educational experience of students under the age of 18.

#### **Conclusion**

The Instrument is compatible with human rights because it promotes the right to education by protecting students, including younger students, and the investment they make in their education. It promotes students' capacity to engage further in their education by increasing their skills. In turn, increased access to education promotes the right to work by increasing students' capacity and ability to engage in employment. To the extent that the Standards may limit human rights, such as excluding unqualified teachers from delivering Foundation courses, those limitations are reasonable, necessary and proportionate.

**Minister for Education and Youth**

**Education Services for Overseas Students (Foundation Program Standards)  
Instrument 2021**

**EXPLANATION OF PROVISIONS**

**PART 1—PRELIMINARY**

**Section 1: Name**

1. This section specifies the name of the instrument as the *Education Services for Overseas Students (Foundation Program Standards) Instrument 2021* (Foundation Program Standards).

**Section 2: Commencement**

2. This section specifies that the Foundation Program Standards commence on the day after registration on the Federal Register of Legislation.

**Section 3: Authority**

3. The Foundation Program Standards are made by the Minister under section 176C of the *Education Services for Overseas Students Act 2000* (ESOS Act).

**Section 4: Schedules**

4. This section simply clarifies that the Schedules are effective on their terms (that is, to impose savings and transitional provisions and to repeal the old Foundation Program Standards).

**Section 5: Outline**

5. This section makes clear that the standards set out in the instrument are the Foundation Program Standards for the purposes of subsection 176C(1) of the ESOS Act.

**Section 6: Application to providers**

6. This section specifies when the Foundation Program Standards apply to a provider.
7. Subsection (1) states that the standards apply to a provider in the delivery of a Foundation Program, regardless of whether the program is delivered in Australia or overseas. Where a provider has an arrangement with a third party to deliver any part of a Foundation Program, the standards still apply to the provider in the provision of that part of the program. A provider cannot avoid the application of the standards by

entering an arrangement with a party to whom the standards would not directly apply.

8. Subsection (2) provides for certain exemptions to the application of the standards to providers. The standards do not apply to provider if the course or program is a:
- course of education at a level that, under section 15 of the *Australian Education Act 2013*, constitutes primary education or secondary education;
  - an ELICOS;
  - a course which leads to a qualification recognised under the Australian Qualifications Framework (AQF); or
  - an undergraduate preparatory program delivered exclusively to non-student visa holders.

### **Section 7: Definitions**

9. Section 7 defines terms used in the Foundation Program Standards and specifies which key terms, as used in this instrument, are defined in the ESOS Act.
10. An example of a 'streamed program' is a physics Foundation Program. Such a program would include physics and associated mathematic subjects to prepare the student to undertake a degree in physics at an Australian university.
11. The four compulsory study areas for a generalist program are specified in subsection 11(5).

## **PART 2—STANDARDS**

### **Section 8: Basic Requirements (Standard 1)**

12. Section 8 outlines the basic requirements which apply to providers in the provision of a Foundation Program.
13. Paragraphs (a) and (b) state that a Foundation Program must either be a standard or extended program and be delivered by a CRICOS registered provider. A provider that is not registered and delivers a Foundation Program would not be complying with the standards.
14. Paragraph (c) specifies that a Foundation Program must provide an academic entry pathway to first year undergraduate study. First year undergraduate study is specified in this requirement to clarify that, while Foundation Programs are designed to provide a pathway to higher education, they are not designed to provide entry to post-graduate study. Foundation Programs should only provide a pathway to first year undergraduate study. Whether a Foundation Program provides a pathway to first year undergraduate study can be evidenced by compliance with Standard 5 at section 13.



15. Paragraph (d) states that a Foundation Program must be delivered in one or more full-time study periods. This means that all Foundation Programs must have at least 20 hours of scheduled course contact hours per teaching week and each study period must not exceed 6 months.
16. At a minimum, there must be a holiday break of at least one week between each study period. Additional breaks during each study period, such as mid-term breaks, are not teaching weeks and do not need to comply with the 20-hour requirement.

### **Section 9: Curriculum and pedagogy (Standard 2)**

17. Subsections (1) to (7) set out the requirements for the substance of a Foundation Program's curriculum, as well as the process a provider must follow when changes are made to the curriculum.
18. Paragraph (6)(a) clarifies that a provider cannot submit multiple small changes to the provider's Academic Board under subsection (7) to avoid seeking approval from the ESOS agency under subsection (5).
19. For example, a provider has made a number of minor changes to the Foundation Program over time and has received approval by the Academic Board for each change. The provider plans to make a further change and that change will result in an accumulative 25% change to the course units or subjects since the provider last received approval from the ESOS agency. In this case, the provider must submit the changes approved by the Academic Board, as well as the proposed further change, to the ESOS agency for approval. The provider must not implement the further change without approval from the ESOS agency.
20. Subsection (8) concerns the pedagogy of a Foundation Program and contains a list of areas that must be explicitly addressed during the program.
21. Practical work relevant to the subject area in paragraph (8)(j) includes laboratory work, field work, music practice and any other practical activity or investigation relevant to the subject area.
22. Subsection (9) sets out a list of resources, support and equipment that providers must make available to students at no additional cost. Where a student is enrolled online, providers are to provide all listed resources, support and equipment as is reasonably practicable.

### **Section 10: Admission (Standard 3)**

23. This section sets out the requirements prospective students must meet to be admitted to a standard or extended Foundation Program and requires providers to communicate and assess admission eligibility in line with a documented process.
24. Requiring providers to have and implement a documented process provides flexibility to providers in how they assess prospective students, while ensuring such assessment is conducted fairly across applicants to each provider.

25. For a provider to enrol a student in a Foundation Program, the student must have completed Australian Year 11 or a comparable education level. Examples of comparable educational levels from other countries are Senior Year 2 or Senior Year 3 in China and completion of the Bachillerato in Mexico.
26. Admission to Foundation Programs is restricted based on a student's English language proficiency or level of academic achievement. This limitation aims to protect both the education sector and individual students, by ensuring students undertaking an educational program have the necessary capability to complete the program.
27. English language proficiency requirements are lower for extended Foundation Programs in subsection (2) in recognition of the additional English language learning that will be provided in those programs.
28. Subsection (4) clarifies that a provider may be granted an exemption to enrol students under the age of 17 in Foundation Programs offered by provider. This exemption does not apply to individual students but applies to a provider more broadly.
29. An exemption is granted for the period of the provider's CRICOS registration and may be granted part way through that period. This means that where an exemption is granted after the provider's CRICOS registration has been renewed, the exemption will be valid until the end of the period of the provider's CRICOS registration. A provider would need to apply for a new exemption when they apply for renewal of their CRICOS registration.
30. Subsection (6) requires providers to base their assessment of whether educational levels or English language proficiency attained in other countries are comparable to Australian Year 11 or IELTS on robust advice or research. The purpose of this section is to ensure providers have carefully considered comparability and can provide a reasonable justification for the conclusion, to ensure that enrolled students have the necessary English language skills to complete the program.

#### **Section 11: Subjects (Standard 4)**

31. This section sets out the requirements for determining and providing information on subjects within a Foundation Program.
32. Subsection (3) provides that there are two types of subjects within a Foundation Program: discipline-based subjects and English language subjects. An example of discipline-based subjects are Mathematics and Technologies. English language subjects are dealt with in more detail at section 12.
33. Subsection (4) requires each study period to include at least three discipline-based subjects. This does not preclude providers from offering additional subjects in a study period.
34. Subsection (5) clarifies that, for a generalist program, providers must deliver at least one subject in Mathematics, one subject in the Arts and one subject in Humanities

and Social Sciences. Providers must also deliver a subject in either Science or Technology. This requirement applies to the Foundation Program as a whole, not to individual study periods.

35. For example, a provider may offer a subject in Mathematics and a subject in Humanities and Social Sciences, plus one other discipline-based subject in the first study period. In the second study period, the provider may then offer a subject in the Arts and a subject in Science, plus one other discipline-based subject. This example does not preclude a provider from offering more than three subjects per study period.
36. Subsection (6) sets out the requirements for discipline-based subjects in streamed program. Subjects offered throughout a streamed Foundation Program must be relevant to the proposed area of higher education study or be from one or more of the areas listed in paragraphs (a) to (e). For example, a biology subject would be relevant to a streamed Foundation Program aimed at preparing students for a Bachelor of Science.

## **Section 12: English language subject (Standard 5)**

37. This section provides for the English language learning requirements, which are to be delivered through an English language subject.
38. The minimum hours of English language learning and formal class contact time for a standard Foundation Program, as set out at subsection (1), remain the same regardless of the number of scheduled course contact hours in the program. For example, a standard program of 720 has the same minimum requirements as a standard program of 750 hours.
39. The minimum hour requirements at subsection (2) are not fixed for extended Foundation Programs. Rather, minimum English requirements are 28 per cent of total scheduled course contact hours and increase as the number of scheduled course contact hours increase.
40. Subsection (2) increases the number of English language learning hours required for an extended Foundation Program by a fraction of a per cent. Under the previous standards, 27.7778 per cent of total scheduled course contact hours were required to be English language learning. While 28 per cent is a minor increase in required English language learning hours, simplifying and clarifying this requirement is designed to provide an overall benefit to providers and ESOS agencies.
41. Subsection (3) clarifies that English language learning must not be undertaken in a block of full-time study. In practice, English language subjects should be delivered in the same format as discipline-based subjects, which means that they will be delivered alongside other subjects. For example, one day per week of English language subjects would not be considered a full-time block of study. However, one week or more of scheduled course contact hours dedicated to the English language subject would be a block of full-time study.

42. For paragraph (4)(a), examples of supervised self-directed study of English include language laboratory or self-access work and computer-based study.
43. Subsection (6) has been included at the request of TEQSA and requires providers to put formal measures in place to ensure that assessment outcomes are comparable to other criteria used for admission to higher education pathways available upon completion of the Foundation Program, or for admission to other similar courses of study. For example, explicit external benchmarking of assessment inputs and outputs, benchmarking to validated language proficiency frameworks, tracer studies of student cohorts or sample cohort external testing.

### **Section 13: Pathways (Standard 6)**

44. Subsections (1) and (2) outline the standards that providers must meet in identifying available higher education pathways for students who successfully complete specific Foundation Programs.
45. Paragraph (1)(a) is a new requirement for providers to give assurance to prospective higher education providers that students who complete Foundation Programs will demonstrate overall readiness to enter higher education.
46. The purpose of this requirement is to ensure providers carefully consider whether a Foundation Program equips students with the skills and knowledge to successfully commence higher education study. Additionally, providers should carefully monitor the progress of individual students and, if the provider considers that the student may not demonstrate overall readiness to enter higher education by completion of the program, provide additional support or advice on alternate pathways.
47. Subsections (3) to (6) outline the standards that providers must meet in communicating with prospective students about the higher education pathways available upon completion of a Foundation Program.
48. Subsection (7) provides a definition for 'stated goal' for the purposes of subsection (6).

### **Section 14: Assessment (Standard 7)**

49. Subsections (1) to (3) outline the requirements for assessment methods and record keeping.
50. Paragraph (1)(d) allows providers to adopt a more flexible oversight or moderation policy for assessment. What is appropriate, and the necessary level of independence in oversight or moderation, will vary depending on certain factors, including:
  - the weighting of each assessment;
  - whether a subject is being delivered for the first time;
  - when a subject or course was last moderated or reviewed; and
  - whether there have been any concerns or complaints raised concerning the delivery or integrity of a subject, teacher or provider.

51. For example, where a course has been successfully delivered over a number of years and features multiple assessments, none of which are weighted at over forty percent of the overall grade, periodic review of assessment outcomes by a teacher not delivering the course may constitute an appropriate level of independent oversight or moderation.
52. Conversely, where a provider is delivering a course or subject for the first time, or concerns have been raised around the delivery of a subject, independent moderation from an appropriately experienced individual not usually employed by the provider may be appropriate.
53. Subsection (2) clarifies that there is a requirement on providers to include at least two assessment processes per subject. The purpose of this requirement is to ensure a student's grade for a subject is not based on a single piece of formally assessed coursework or a single examination. The assessment processes may be all formally assessed coursework, all examinations, or a mixture of both. This subsection is a limitation on the minimum number of assessment processes and does not preclude a provider from including more than two assessment processes per subject.
54. In addition to subsection (3), record keeping requirements applicable to providers are set out in ESOS Act.
55. Subsections (4) to (12) closely mirror former Standard 5.4 in the old Standards and outline the requirements for communicating, reporting and monitoring the assessment process and students' assessment results.
56. However, Subsections (7) and (9) increase the requirements of former Standard 5.4 by requiring providers to make reports available to students in an online format.
57. Subsection (13) states that a provider must also comply with the requirements in the national code to identify, notify and assist an overseas student who is at risk of not achieving adequate assessment results. This is not an additional regulatory burden on providers, as the requirements in the national code already apply to providers who offer Foundation Programs to international students.

### **Section 15: Teacher requirements (Standard 8)**

58. Subsections (1) to (3) set out the qualification and experience requirements for Foundation Program teachers.
59. Examples of ESL/EFL teaching experience for the purposes of paragraph 16(2)(c) are senior secondary, vocational education and training college, ELICOS provider and university teaching experience.
60. Subsection (4) requires providers to keep a copy of the Curriculum Vitae and certified copies of degrees and qualifications of all teachers currently employed to teach on a Foundation Program.
61. Subsections (5) and (6) set out the standards that a provider must meet in relation to recruitment, inductions, and ongoing provision development of teachers.

62. Subsection (7) makes it a standard for all teachers employed to teach on a Foundation Program to comply with applicable state, territory and Commonwealth child protection legislation and child safety requirements.

### **Section 16: Marketing of Foundation Programs (Standard 9)**

63. This section sets out the standards and requirements on providers when marketing or advertising Foundation Programs.
64. Subsection (1) specifies that only Foundation Program which comply with these standards may use the word 'Foundation' in the title of the program. Subsection (2) then states that Foundation Programs which comply with the standards must use the word 'Foundation' in the title of the program.
65. Subsection (3) requires extended Foundation Programs which comply with the standards to also use the word 'extended' in the title of the program. For example, a compliant extended Foundation Program should have the words 'extended' and 'Foundation' in the title of the program.

### **Section 17: Younger students (Standard 10)**

66. This section requires the operations of a provider, where they enrol students under the age of 18, to be appropriate for those student's needs and includes a direct reference to the obligations imposed by the national code.
67. The requirements for facilities and operations for students under the age of 18 are that providers structure courses appropriately for students of different levels of age, maturity and English language proficiency. This ensures that the requirements for facilities and operations for under 18 students are appropriate for students' individual circumstances and aims to maximise the overall educational experience for all students.
68. Subsection (2) sets out a non-exhaustive list of operations of a provider that would be appropriate for the age, maturity and English language proficiency of the students.
69. Subsection (3) provides that, to comply with the Foundation Program Standards, a provider must also comply with any other child protection and safety laws of a state, territory and the Commonwealth that apply to the provider.

## **SCHEDULE 1—SAVING AND TRANSITIONAL**

### **Item 1: Saving and Transitional**

70. This item provides transitional and savings provisions consequential to the repeal and replacement of the *Foundation Program Standards (19/06/2011)* (F2011L01247).

71. These provisions ensure the continuity of the following actions initiated or lodged under the terms of the previous Foundation Program Standards:
- existing applications for registration, renewal or changes to registration;
  - enforcement actions initiated by an ESOS agency before commencement of this instrument which have not yet come to completion; and
  - monitoring and searching actions commenced by an ESOS agency before commencement of this instrument which have not yet come to completion.

## **SCHEDULE 2—REPEALS**

### **Item 1: The whole of the instrument**

72. This item repeals the *Foundation Program Standards (19/06/2011)*, which is the legislative instrument that previously gave effect to the old Foundation Program Standards.
73. The *Foundation Program Standards (19/06/2011)* is repealed and replaced with this instrument so that standards remain in place for the provision of Foundation Programs.