

EDUCATION AND SKILLS ACT 2008

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Local education authority

Legal background

Part 4: Regulation and inspection of independent educational provision in England

Chapter 1: Independent educational institutions in England

112. The definition of “independent school” in section 463 of the 1996 Act applies for the purposes of this Chapter (see [section 168](#)). Under that definition an “independent school” means “any school at which full-time education is provided for (a) five or more pupils of compulsory school age, or (b) at least one pupil of that age for whom a statement is maintained under section 324, or who is looked after by a local authority (within the meaning of section 22 of the Children Act 1989), and which is not a school maintained by a local education authority or a special school not so maintained.”
113. [Sections 92](#) and [93](#) define the term “independent educational institution” and set out that Chapter 1 of Part 4 of this Act, which provides a revised framework for the registration, inspection and regulation of such institutions, applies in England only. Section 93 explains that the framework for the registration and regulation of independent schools in Wales continues to be set out in Chapter 1 of Part 10 of the Education Act 2002, which is amended by paragraphs 15 to 24 of Schedule 1 and Schedule 2 of this Act.
114. [Section 92](#) does not change the definition of an independent school set out in existing legislation. However, it introduces a new definition, that of an independent educational institution, which includes independent schools and other independent educational institutions that provide part-time education. The section also sets out the amount of part-time provision an institution must offer in order to fall within the scope of this new wider definition. The amount of part-time provision is defined by reference to the number of hours per week and the number of weeks per year offered to students of a particular age group. Regulations may amend the number of weeks per year which amounts to provision that falls within the definition and may specify that certain activities do not count as educational provision for the purposes of the definition. Further, regulations may specify that an institution that would otherwise qualify as an independent educational institution because of its provision of part-time education is not to be regarded as an independent educational institution for the purposes of this Chapter.
115. The new definition of independent educational institution covers settings which are the main provider of a child’s education and which otherwise would not be subject to any statutory framework.

Section 94: Standards

116. *Section 94* requires the Secretary of State to set standards for independent educational institutions in England. The section lists the heads under which standards must be set. It reproduces the existing heads for independent schools under section 157 of the 2002 Act. Those heads cover the quality of education; spiritual, moral, social and cultural development of students; welfare, health and safety; suitability of proprietors and staff; premises and accommodation; provision of information; and handling of complaints. The section imposes an additional head relating to the quality of leadership and management in an institution. The detailed standards are prescribed in regulations.
117. These standards do not apply to early years provision (for children under the age of three), which must provide the Early Years Foundation Stage as set out in section 39 of the Childcare Act 2006. Paragraphs 30 to 36 of Schedule 1 and Schedule 2 to the Act amend the Childcare Act 2006. The duty on local authorities to secure the provision of advice, training and assistance is extended to cover persons who provide childcare at independent educational institutions in the authority's area. The exemptions to the duties to register on the Early Years Register, the Later Years Register and the General Register (kept under Part 3 of the Childcare Act 2006) are extended so that they apply to all independent educational institutions (including the part-time institutions).
118. *Paragraph 9* of Schedule 1 to the Act amends section 548 of the 1996 Act so that there is no right to use corporal punishment in a part-time independent educational institution.

Sections 95 to 97: Requirement of registration

119. The Secretary of State must maintain and publish a register of independent educational institutions under *section 95*. *Section 140(1)* (transitional provisions) provides for the existing register of independent schools in England to become the new register of independent educational institutions. *Section 96* creates an offence of conducting an unregistered independent educational institution and sets out the penalty for doing so.
120. *Section 97* allows the Chief Inspector to enter any premises and carry out an inspection where he or she has reasonable cause to believe that an unregistered independent educational institution is being operated. He or she is able to inspect and copy any relevant records and documents, including computer records, except those which are subject to legal professional privilege or which fall within the categories of "excluded material" and "special procedure material". This section creates an offence for obstructing the Chief Inspector and sets out the penalty for doing so.

Sections 98 to 100: Registration Procedure

121. An institution that wishes to register as an independent educational institution may apply to the Secretary of State under *section 98*, who must notify the Chief Inspector of any application received. The application must be made in a manner prescribed in regulations and contain certain information which is explained in this section and the detail of which is set out in regulations.
122. Where the Chief Inspector is notified of an application under *section 98(4)*, he or she is required by *section 99* to inspect an independent educational institution prior to registration and prepare a report for the Secretary of State detailing the extent to which it appears from the inspection that the institution is likely to meet the required standards. On the basis of the report and any other relevant evidence, the Secretary of State must decide whether the institution is likely to meet the required standards and, if it is, he must add the institution to the register along with the information referred to in *subsection (5)* ("the registered details"). The Secretary of State must inform the proprietor of the institution of his decision. If the Secretary of State decides to refuse registration where he considers that the institution is not likely to meet the required standards, the proprietor may appeal against this decision to the First-tier Tribunal.

123. If any establishment no longer meets the definition of an independent educational institution and is unlikely to do so within the next twelve months, [section 100](#) allows the Secretary of State to remove it from the register. The Secretary of State must inform the proprietor of this action, who may appeal to the First-tier Tribunal against the decision to deregister.

Sections 101 to 105: Approval of material changes to registered details

124. [Section 102](#) requires the proprietor of a registered independent educational institution to seek, in writing, prior approval from the Secretary of State for any change which is defined as a material change. [Section 101](#) defines a material change. The definition varies depending on the type of institution. Special institutions are those that are specially organised to make provision for students with special educational needs. For special institutions, a material change which requires prior approval is a change of proprietor, a change of address or any change in the institution's registered details. For any other institution, a material change is a change which results in either the introduction of boarding provision or the institution becoming a special institution.
125. In determining whether to approve the request for a material change, the Secretary of State may under [section 103](#) direct the Chief Inspector to inspect the institution and make a report on the extent to which any standards (which the Secretary of State or the Chief Inspector consider to be relevant) are likely to continue to be met if the change is made.
126. The Secretary of State will decide whether to approve a material change in light of all relevant evidence and on the basis of any report from the Chief Inspector setting out whether the standards are likely to continue to be met if the change is made. Where this is the case, the Secretary of State must approve the change. The proprietor will have a right to appeal where the Secretary of State refuses to approve the change ([section 104](#)).
127. An independent educational institution which makes an unapproved material change may be removed from the register by the Secretary of State. The Secretary of State must inform the proprietor, who has a right to appeal against de-registration ([section 105](#)).

Sections 106 and 107: Independent inspectorates

128. [Section 106](#) allows the Secretary of State to approve inspectorates (in addition to Ofsted) to undertake certain inspections of independent educational institutions. These inspectorates will be known as "independent inspectorates". The section also allows the Secretary of State to withdraw approval from such a body. The Secretary of State is given powers to specify in regulations criteria for the approval and withdrawal of approval of independent inspectorates.
129. [Section 107](#) allows for the quality assurance of independent inspectorates approved under section 106. It requires the Chief Inspector at least once a year to prepare a report for the Secretary of State about the independent inspectorates. In doing so, the Chief Inspector must have regard to any directions from the Secretary of State, which may cover matters to be taken into account in preparing a report and the manner in which the report is prepared.

Sections 108 to 113: Inspections and reports

130. [Section 108](#) requires the Chief Inspector to inspect independent educational institutions at regular intervals, to be prescribed in regulations. The purpose of this section is to ensure that there are regular inspections of independent educational institutions. The Chief Inspector is not required to inspect those institutions where the Secretary of State has notified him or her that they will be inspected by an independent inspectorate. The Chief Inspector must prepare a report on the extent to which any relevant standard is met and is likely to continue to be met. This section does not apply to Academies, city

technology colleges and city colleges for the technology of the arts, for which provision is already made (section 5 of the 2005 Act).

131. The Secretary of State may direct the Chief Inspector to inspect an independent educational institution at any time (*section 109*). Where a direction is made, the Chief Inspector must report back to the Secretary of State on the extent to which relevant standards are being met. The Secretary of State may also at any time arrange for an independent inspectorate to inspect an independent educational institution in relation to which it is approved and report to him on the extent to which relevant standards are being met. In both cases, the Secretary of State may specify standards which must be considered, alongside any standards considered by the inspectorate to be relevant, during the inspection.
132. The Chief Inspector is permitted to enter any registered independent educational institution at any reasonable time, and to inspect and copy any relevant records and documents, including computer records, except those which are subject to legal professional privilege or which fall within the categories of “excluded material” and “special procedure material”. These rights of entry and inspection of records can only be exercised for the purposes of an inspection. *Section 110* creates an offence for obstructing the Chief Inspector and sets out the penalty for doing so.
133. *Section 111* allows the Secretary of State, in regulations, to require proprietors to pay fees for inspections carried out by the Chief Inspector under this Chapter and to set the amount payable. The regulations can provide for:
 - a) fees to be paid annually in advance of inspection;
 - b) fees to be determined by reference to circumstances which exist before the inspection takes place;
 - c) more than one fee to be paid in relation to a periodic inspection (for example, this will allow for an annual fee to be charged); and
 - d) a discretion to be granted to the registration authority, to determine which institutions qualify for reduced tariff inspections.
134. The regulations cannot require a fee to be paid to the Chief Inspector for a periodic inspection where an independent inspectorate is approved for the institution. Regulations can include a power to vary or waive a fee and may also provide for a fee not to be paid where an inspection does not take place (which is designed to address a case where an institution has paid a fee in advance of an inspection but closes before the periodic inspection takes place). *Section 140(2)* extends the power to waive inspection fees so that any fees charged under section 162B of the 2002 Act may be waived. *Subsection (5)* provides some flexibility so that different fees can be applied in different cases. Academies, city technology colleges and city colleges for the technology of the arts are not required to pay inspection fees.
135. If any proprietor of an independent educational institution does not pay the appropriate fee, the Secretary of State may remove the establishment from the register (*section 112*). The Secretary of State must inform the proprietor who may appeal against the decision.
136. The Chief Inspector must publish any report of an inspection which he or she has prepared when directed by the Secretary of State (*section 113*).

Sections 114 to 118: Failure to meet standards

137. Where the Secretary of State considers on the basis of relevant evidence that an independent educational institution is not meeting one or more of the required standards, *section 114* allows for a notice to be served on the proprietor of the institution requiring the proprietor to provide an action plan. The purpose of the action plan is to address the failure to meet the required standards. On receipt of a plan, the Secretary of State

may approve it, with or without modifications or reject it, in which case he can request a further action plan.

138. Where the Secretary of State concludes on the basis of relevant evidence that an institution is failing to meet the relevant standards, *section 115* sets out the conditions for taking enforcement action against the institution. The Secretary of State may take action where the proprietor has been required to provide an action plan within the last three years but has failed to provide an adequate plan or failed to comply with a plan that has been approved. Equally, where the Secretary of State is satisfied in the light of at least one inspection report that the institution has failed to meet the required standards for a continuous period of at least two years despite an action plan having been provided by the proprietor, he may take enforcement action.
139. *Section 116* sets out the alternative forms of enforcement action available to the Secretary of State. The Secretary of State may remove the institution from the register or impose a restriction as described in *section 117*. When the Secretary of State decides to take enforcement action he must inform the proprietor who has a right of appeal.
140. *Section 117* sets out the restrictions, short of de-registration, that can be imposed by the Secretary of State or, in relevant cases, by orders of a justice of the peace or the First-tier Tribunal. These are:
- a) ceasing to use part of the premises for all or for specified purposes;
 - b) closing part of the institution's operation; and/or
 - c) ceasing to admit new students or new students of a specified description.
141. *Section 118* creates an offence of failing to comply with a restriction imposed by the Secretary of State and sets out the penalty for doing so. It also allows the proprietor to apply to the Secretary of State to have the restriction lifted, in whole or in part. The Secretary of State must, on an application, vary or revoke a restriction where it is appropriate to do so because of a change in circumstances. The Secretary of State is required to notify the proprietor of his decision.

Section 119: Unsuitable persons

142. The purpose of this section is to prevent unsuitable people from working with children and to enable action to be taken against those institutions that allow this to happen. *Section 119* permits the Secretary of State to deregister an independent educational institution which allows a person who is subject to relevant barring or disqualifying orders (which will be described in regulations) to carry out certain activities in relation to the institution. The activities include acting as a proprietor, acting on a body of persons named as proprietor or carrying out work that will be described in regulations. It introduces a new right of appeal against deregistration for employing a barred person.

Sections 120 to 122: Emergencies

143. *Section 120* enables the Secretary of State to apply to a justice of the peace for an emergency order imposing an immediate restriction on, or deregistering, an independent educational institution, where a student at the institution is suffering or is at risk of suffering significant harm. An order may be made without notice to the proprietor but must be made in writing. A copy of the order must be served on the proprietor, together with a copy of any written statement provided in support of the application for the order and a notice explaining the proprietor's right of appeal, as soon as reasonably practicable after the order is made (sections 120 and 122). It is an offence to fail to comply with a restriction imposed by a justice of the peace and *section 121* sets out the penalty for doing so.
144. Where the institution concerned is specially organised to make special educational provision for students with special educational needs, section 122 requires the Secretary

of State to inform all relevant local education authorities of the order (so that they may take any action they deem necessary).

Section 123: Provision of information by proprietors

145. This section creates a power to require the proprietor of an independent educational institution to provide to the Secretary of State, on request, information relating to the institution. The section provides that sanctions for non-supply of information can be included in regulations, which may include a criminal sanction. Removal of the institution from the register is a further possible sanction. If an institution is deregistered by the Secretary of State there is a right of appeal to the First-tier Tribunal.
146. **Paragraph 8** of Schedule 1 inserts a new section 537AA into the 1996 Act. Section 537AA applies to part-time independent educational institutions the existing sections 537 and 537A of that Act (which contain powers to require independent schools to provide certain information, including individual pupil information, to the Secretary of State or other relevant prescribed person).

Sections 124 to 127: Appeals

147. **Section 124** sets out the circumstances and timescales in which the proprietor of an independent educational institution may appeal to the First-tier Tribunal against decisions made by the Secretary of State to deregister an independent educational institution. A proprietor may appeal where an institution has been deregistered for:
- a) no longer meeting the definition of an independent educational institution;
 - b) a failure to meet standards, provide information, or pay inspection fees;
 - c) making an unapproved material change;
 - d) employment of unsuitable persons.
148. A proprietor may also appeal the following decisions made by the Secretary of State under **section 125**:
- a) conclusion that the standards are unlikely to be met on registration leading to a refusal of registration;
 - b) refusal to approve a material change;
 - c) imposition of a restriction on the proprietor;
 - d) refusal to vary or revoke a relevant restriction.
149. Appeals to the First-tier Tribunal must be filed within 28 days of the proprietor receiving notice of the decision in question. There are various powers available to the Tribunal in determining such appeals, according to the circumstances under which the appeal is brought.
150. **Section 126** allows the proprietor to appeal to the First-tier Tribunal against an emergency order made by a justice of the peace and sets out the powers available to the Tribunal in determining such appeals. Where the Tribunal overturns any order made by a justice of the peace that an institution is removed from the register, this section explains that the institution must be treated as if it had never been deregistered. This removes the possibility of proceedings being brought against the person conducting the institution for an offence under section 96.
151. **Section 127** creates an offence of failing to comply with a restriction imposed by the Tribunal and sets out the penalty for doing so. It also allows the proprietor to apply to the Tribunal to have the restriction lifted, in whole or in part. The Tribunal must vary or revoke a restriction where it is appropriate to do so because of a change in circumstances.

Sections 128 to 131: Prohibition on participation in management of independent educational institutions

152. The Secretary of State (or another specified public authority) may make directions prohibiting or restricting the participation of unsuitable persons in the management of an independent educational institution. The grounds and procedure for making such directions will be set out in regulations. *Section 128* also provides for a direction to be lifted, in whole or in part, in certain cases. Under *section 129a* a person can appeal to the First-tier Tribunal against such a direction or against a decision not to lift or alter such a direction. Details relating to the Tribunal's jurisdiction on hearing such appeals can be set out in regulations.
153. *Section 130* enables the sharing of information - between the Secretary of State, the Chief Inspector, the Welsh Ministers, any other applicable direction making authority, the Independent Barring Board and the General Teaching Councils of England and Wales - which is held about persons in connection with their statutory functions and is relevant to the direction making powers contained in section 128.
154. *Section 131* requires the English authority which makes a direction prohibiting or restricting the participation of unsuitable persons in the management of an independent educational institution to notify other specified persons (e.g. the Secretary of State where relevant, the Welsh Ministers and, where different, the direction making authority in Wales).
155. There is no provision requiring persons to comply with a direction made under section 128. A direction made under section 128 could be enforced under section 119 (power to remove an institution from the register where an unsuitable person is the proprietor or carries out work of a prescribed kind) or by way of the standards to be prescribed under section 94(1)(d) (the suitability of the proprietors of or staff at an independent educational institution).
156. *Section 141* (transitional provisions) allows regulations to be made which will allow persons who are subject to a direction under section 142 of the 2002 Act to be treated for certain purposes as if they were subject to a direction made under section 128 of this Act. The regulations may also make provision to convert any existing appeal rights to appeal rights under section 129 of this Act.

Sections 132 and 133: Providers of independent education or training for 16 to 18 year olds

157. *Section 132* enables regulations to be made allowing for any part of this Chapter to apply to this particular group of learning providers. They are not independent or maintained schools. They do not receive any state funding from the LSC. They do provide education or training through which young people may meet their duty to participate under section 2. Section 132 will enable the Government, for example, to safeguard the health, safety and welfare of young people being educated in these establishments as part of that new duty.
158. *Section 133* stipulates that any regulations that are made must include rights of appeal against decisions of the Secretary of State as set out in this Chapter in sections 124 and 125. It also compels the Secretary of State to consult the Chief Inspector and other appropriate people before the laying of any regulations before Parliament. Such regulations will be subject to the affirmative resolution procedure.

Sections 134 to 138: Supplementary

159. *Section 134* requires proceedings for criminal offences to be commenced by, or with the consent of, the Secretary of State.
160. *Section 135* enables certain individuals to be prosecuted in limited circumstances where offences are committed by bodies corporate.

161. *Section 136* provides that where an offence has been committed by an unincorporated body, proceedings for offences should be brought in the name of the body and not its members. Any fine imposed should also be paid out of the funds of the body. In limited circumstances, proceedings for offences may also be brought against individuals associated with the body in question.
162. *Section 137* makes provision about how the Secretary of State may serve notices on the proprietor of an independent educational institution. Such notices may be served by delivering it to the registered address of the institution in question.

Sections 139, 140 and 141: Transitional provisions

163. These sections make transitional provisions in relation to independent educational institutions in Chapter 1 of Part 4. *Section 139* allows for the continuity of law between existing and new provisions, so that regulatory functions and enforcement action can be carried out without a break. *Section 140* provides for the existing register of independent schools for England (kept under section 158 of the 2002 Act) to become the new register of independent educational institutions. It creates a power to waive fees payable to the Chief Inspector in relation to inspections. Section 141 reproduces for England the transitional provisions enacted in section 171 of the 2006 Act, which cover the transition from barring directions in relation to the participation in the management of independent schools currently made under section 142 of the 2002 Act to the powers of direction which are now re-enacted in section 128 of the Act (see paragraph 155 above).