

EXPLANATORY MEMORANDUM TO

THE INDEPENDENT EDUCATIONAL PROVISION IN ENGLAND (INSPECTION FEES) AND INDEPENDENT SCHOOL STANDARDS (AMENDMENT) REGULATIONS 2018

2018 No. 205

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Education and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments

2. Purpose of the instrument

- 2.1 These Regulations set out the fees that may be charged by Her Majesty's Chief Inspector of Education, Children's Services and Skills ('Ofsted') for the inspection of independent schools. They also make a minor amendment to the independent school standards which must be complied with by registered independent schools, in relation to the National Minimum Standards for Boarding.
- 2.2 In relation to inspection fees, these Regulations completely replace, subject to a saving provision, the existing Education (Independent Educational provision in England) (Inspection Fees) Regulations 2009¹. In relation to the independent school standards they make an updating amendment to the provisions in the Education (Independent School Standards) Regulations 2014² ('the 2014 Regulations') which specify which National Minimum Standards for Boarding apply in relation to independent schools.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This entire instrument applies only to England.
- 3.2 The fees for standard inspections are being increased above the rate of inflation as part of government policy that Ofsted fees should move towards full cost recovery for independent school inspections; but there has been no increase in these fees since 2009. It is planned that fee levels will be reviewed again for years from 2019 onwards.

Other matters of interest to the House of Commons

- 3.3 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

¹ (SI 2009/1607, as amended by SI 2010/1002)

² (SI 2014/3283)

4. Legislative Context

- 4.1 When the Chief Inspector³ has been notified that an institution has applied to be entered on to the register of independent educational institutions in England, under section 99 of the Education and Skills Act 2008 (c.25) ('the 2008 Act'), the Chief Inspector must inspect the institution and report to the Secretary of State. The Chief Inspector must also inspect a registered independent educational institution when directed to do so by the Secretary of State under section 109 of the 2008 Act. These Regulations set how fees are to be calculated, the fees payable and the period for which fees are payable in respect of a number of inspections. The increases in fees are in line with central government policy and reflected in the Spending Review 2015 settlement⁴.
- 4.2 The 2014 Regulations require the proprietor of a school which has boarding accommodation to have regard to the relevant National Minimum Standards for Boarding Schools, or National Minimum Standards for Residential Special Schools, or National Minimum Standards for Accommodation of Students under Eighteen by Further Education Colleges. These Standards are made under section 87C of the Children Act 1989 (c.41). Regulation 2 of the 2014 Regulations defines the National Minimum Standards by reference to the Standards published in 2012. The effect of the amendment is to update the references to the National Minimum Standards published in 2015; and to delete the reference to National Minimum Standards for Accommodation of Students under Eighteen by Further Education Colleges as the latter Standards are no longer applicable to any pupils in independent schools aged 16 plus: they are now all covered by the 2015 National Minimum Standards

5. Extent and Territorial Application

- 5.1 The extent of this instrument is England and Wales.
- 5.2 The territorial application of this instrument is England.

6. European Convention on Human Rights

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

- 7.1 Section 94 of the 2008 Act requires the Secretary of State for Education to make regulations prescribing independent school standards, which must be met by schools registered in accordance with s.95 of the 2008 Act. Under Section 109 of the 2008 Act, the Secretary of State may direct Ofsted to inspect such schools and report on the extent to which they are meeting the standards. At present such standard inspections are normally held every three years, or every two years for some schools in specified circumstances. Other types of inspection which may be directed under s.109 are

³ Chief Inspector means Her Majesty's Chief Inspector of Education, Children's Services and Skills.

⁴ See documents at <https://www.gov.uk/government/publications/spending-review-and-autumn-statement-2015-documents>

Copies in alternative formats can be obtained from Correspondence Team, HM Treasury, 1 Horse Guards Road London SW1A 2HQ.

emergency inspections, and progress monitoring inspections to check whether standards not previously met are now met. In addition, section 99 of the 2008 Act requires the Chief Inspector to inspect an establishment which has applied for registration as an independent school and report on whether it is likely to meet the standards once registered. Section 111 provides for regulations to be made specifying the fees payable by independent schools for such inspections. If such regulations are made, they must specify the fee to be paid and the time at which the fee is to be paid.

- 7.2 One of the principles underpinning the budgetary settlement made for Ofsted in the Spending Review 2015 was that it should continue moving towards full cost recovery for inspection of institutions which are not publicly funded. However, it has historically been the case that fees charged for the inspection of schools are in many cases well below cost levels, especially for the smaller schools which form the majority of those inspected by Ofsted. At 2016-17 cost levels, for example, the fee charged was only 37% of costs for a standard inspection of a 50-pupil school. Inspection fees in those categories of inspection which are currently charged for (standard inspections, and first or second progress monitoring inspections) have not increased since 2009, and some categories of inspection (first standard inspections after registration, material change inspections, emergency inspections and pre-registration inspections) are not charged for at all, resulting in a situation where, overall, only around £0.8m of the £4.5m total costs incurred by Ofsted on the inspection of independent schools are being recovered at 2016-17 cost levels.
- 7.3 In the light of this, the government has proposed that the fees charged for standard (cyclical) inspections should be increased as part of the policy of moving toward full cost recovery. This was part of the assumptions within the 2015 Spending Review mentioned above. The increase in fees as provided for in these Regulations affect all sizes of school, but smaller schools would still pay a lower proportion of actual cost than would larger schools.
- 7.4 In addition, new charges are to be introduced for categories of inspection: pre-registration inspections conducted when an establishment applies for registration as an independent school. It is intended that during the first year the school is in operation, a standard inspection will now take place and therefore the fees relating to inspections and the rates respectively set out in regulations 2 and 3 of these Regulations will apply. In addition, if a progress monitoring inspection has to be held more than twice following a failure to meet the independent school standards, the third and subsequent inspections will now incur a fee on the same basis as the first two. The justification for this is that the school will have had ample time to remedy the failings against the standards and should meet some of the costs of any further inspection needed to determine whether this is so. The fee for first and second progress monitoring inspections is not being increased beyond the existing level. Emergency inspections directed by the Department for Education as a result of complaints or concerns about a school do not incur a charge, as a matter of policy; this will not change, and provision is made in the Regulations to exempt these inspections from charges.
- 7.5 The power in s.111 encompasses inspections in respect of education institutions carried out under Chapter 4 of the 2008 Act. The provisions relating to inspections conducted in relation to 'material changes' made to a school are provided for in Chapter 4. However, the relevant provisions in s.101-103 of the 2008 Act in relation to material change have not yet been commenced, and material changes to independent schools are still being considered under the relevant provisions of the

Education Act 2002 (2002 c. 32). There is no power to charge for an Ofsted inspection in connection with a material change to an independent school, even if one is held, under the Education Act 2002.

- 7.6 The full impact of the changes on Ofsted's budget will depend on the volume of inspections, but is unlikely to exceed £1m per annum, so there will continue to be a substantial shortfall in fee income relative to total costs. This is why a further review of fee levels from 2019 is intended to be undertaken in due course.
- 7.7 The Secretary of State for Education under s.94 of the 2008 Act makes regulations prescribing independent school standards, which must be met by registered schools. Under paragraph 8 of Part 3 of the Schedule to the 2014 Regulations, a proprietor of a registered school is required to have regard to the relevant National Minimum Standards for Boarding Schools, or National Minimum Standards for Residential Special Schools which were published in 2012 and the National Minimum Standards for Accommodation of Students under Eighteen by Further Education Colleges. The National Minimum Standards that were published in 2012 have been revised and republished in 2015⁵, and as a consequence the 2014 Regulations are being amended to update the references.

8. Consultation outcome

- 8.1 Following preparatory discussions with Ofsted, the Department for Education published a consultation on 12 October 2017, closing on 6 December 2017. A total of 60 responses were received, 58 of them from schools, with many respondents, although not all, objecting to higher fees for standard inspections; a small majority agreed with the introduction of new categories of fee. The only changes being made following consultation are deletion of the provision limiting Ofsted to the issue of one invoice for standard inspection fees every twelve months, and a change in name from 'follow-up inspection' to 'progress monitoring inspection'. The majority of responses supported the proposed amendment to the independent school standards relating to National Minimum Standards for Boarding. A separate Government Response document has been published which sets out details of the responses received. Copies of this are obtainable at the following link:

<https://www.gov.uk/government/consultations/independent-school-inspection-fees-and-standards>

and may be obtained in alternative formats from the same address as documents relating to the National Minimum Standards as given in the footnote.

9. Guidance

- 9.1 No guidance is necessary in relation to these Regulations. Schools will be notified by letter from the Department for Education when the Regulations are made and given an overview of their effect, together with a link to the electronic version. Thereafter, all invoicing and fee calculation matters will be dealt with by Ofsted in direct communication with schools. The amendment to the independent school standards updates a reference to the National Minimum Standards for Boarding only and is

⁵ See <https://www.gov.uk/government/publications/boarding-schools-national-minimum-standards>
<https://www.gov.uk/government/publications/residential-special-schools-national-minimum-standards>
Documents in alternative formats can be obtained from Independent Education and Boarding Team, Department for Education, Bishopsgate House, Feethams, Darlington DL1 5QE.

largely self-explanatory, but this will also be covered in the letter from the department.

10. Impact

- 10.1 The impact on business, charities or voluntary bodies falls below the £5m per annum threshold for which a full impact assessment is required.
- 10.2 The impact on the public sector arises only in relation to increased fee income accruing to Ofsted when the Regulations come into force
- 10.3 An Impact Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website.

11. Regulating small business

- 11.1 The legislation affects activities that are undertaken by small businesses.
- 11.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken has been to continue charging fees to smaller schools which are a smaller proportion of total costs than those charged to larger schools.

12. Monitoring & review

- 12.1 We consider a Review clause to be unnecessary. The level and scope of fees chargeable for independent school inspection will continue to be kept under review in the context of regular spending reviews, and amended Regulations brought forward if deemed necessary. The National Minimum Standards for Boarding are kept under review and should they be further amended from the 2015 version, the Independent School Standards Regulations will be updated.

13. Contact

- 13.1 Stephen Bishop at the Department for Education, telephone 01325 340440 or email: registration.enquiries@education.gov.uk can answer any queries regarding the instrument.