Department for Education

Independent Schools: Regulatory and Enforcement Action Policy Statement

April 2019

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Summary

This publication provides non-statutory guidance from the Department for Education. It has been produced to help proprietors of independent schools and others understand the way in which the Department for Education carries out its role of regulating independent schools in England.

A consultation on a draft version of the policy statement was held between 14 March and 5 June 2018. A government response document setting out details of consultation responses is being published at the same time as the statement.

Expiry or review date

This guidance will be reviewed before December 2020.

Who is this publication for?

This guidance is for:

- Independent school proprietors and senior leaders
- Local authorities
- School inspectorates
- Parents of pupils at independent schools

Enquiries

Enquiries about this document may be made to:

Registration.enquiries@education.gov.uk

Coverage of this statement

1. This statement is non-statutory, and is only intended to serve as a general guide to decision-making. Decisions will be taken in the light of the policy set out in this statement but they will be made on a case-by-case basis – i.e. taking into account the particular circumstances of each case. The policy set out here does not, therefore, automatically determine the outcome of decisions.

2. The statement sets out the Secretary of State's policy relating to the exercise of his powers under sections 114 to 118 of the Education and Skills Act 2008 ('the Act'). It does not, therefore, cover the Secretary of State's policy on action relating to unregistered independent schools, which is described in a separate document at:

https://www.gov.uk/government/publications/regulating-independent-schools

3. Nor does this statement, therefore, set out the Secretary of State's policy relating to other matters such as prosecutions for breaches of relevant restrictions, applications to a magistrates' court for an emergency order under section 120 of the Act (although section 120 is explained briefly in the Annex to this statement), or the removal of schools from the register under other powers - such as those relating to failing to pay inspection fees (see section 112 of the Act), the employment of barred persons (see section 119 of the Act), or failing to supply required information (see section 123 of the Act). A contact point for enquiries on these and other matters relating to independent schools is given at the end of this statement.

4. In addition, the policy here is not intended to apply in relation to academies and free schools. Whilst such schools are 'independent schools' and, therefore, the legal framework described below mostly applies to them, in practice the Secretary of State can normally regulate such schools most effectively through provisions in their funding agreements.

5. Finally, this statement replaces "Regulating independent schools" (Department for Education, January 2016) which is now withdrawn.

Background

6. The Department for Education (DfE) through the Secretary of State acts as the regulator for the independent schools in England. The department registers independent schools, sets independent school standards (ISS)[1] that those schools must meet, commissions inspections against those standards, and acts where schools fail to meet the standards[2]. The standards cover:

Quality of education;

Spiritual, moral, social and cultural development of pupils;

Welfare, health and safety of pupils;

Suitability of staff, supply staff, and proprietors;

Premises of and accommodation at schools;

Provision of information;

Manner in which complaints are handled; and

Quality of leadership in and management of schools.

7. The power to take enforcement action under section 116 of the Act may, in effect, only be exercised where a school has had an opportunity to improve. However, this does not mean that children are to remain for an extended period of time in schools which are inadequate because they are not meeting one or more of the ISS. The department's overall policy aim is that in order to safeguard the education and well-being of children, schools that do not meet the standards must improve rapidly or face enforcement action, which may result in closure. To achieve this, DfE can require schools not meeting the ISS to produce an action plan; if the school does not submit an action plan, or if the plan is rejected, or if the plan is not adequately implemented, DfE can take what is termed 'enforcement action'. This means either imposing a 'relevant restriction' on the proprietor of a school (see below) or removing the school from the register of independent schools. It is a criminal offence to operate an unregistered independent school (as well as for a proprietor to breach a relevant restriction), so removal from the register would force the school to close, although the proprietor does have a right of appeal. A proprietor can also appeal against imposition of a relevant restriction.

8. The legal framework for this regime is explained at the Annex.

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[1] http://www.legislation.gov.uk/uksi/2014/3283/schedule/made

[2] Regulatory and enforcement action may also be take in relation to breaches of the EYFS, when applicable to a school. Consequently, references in this document to "the ISS" or "the standards" (or similar) includes reference to the EYFS.

How regulatory action arises and is taken forward

9. Registered schools are inspected on a regular cycle by inspectors from Ofsted or the Independent Schools Inspectorate (ISI), that cycle being decided by DfE. Fees are payable by schools for such inspections. DfE can also commission additional inspections whenever needed, for example in responding to a complaint or notification of a serious incident at the school. Schools are also inspected when assessing whether a 'material change' at the school (for instance a higher pupil capacity) should be approved. Inspection reports are normally published, except for those of emergency inspections which find no unmet standards. Any of these inspections may result in a report that the school is not meeting standards. If the inspectorate intends to publish the report it will normally send a copy to the school and specify a date by which the school itself must publish the report as required by the independent school standards. It should be noted that even if a school is normally inspected by ISI, Ofsted may be commissioned to inspect instead. It is also possible in certain cases for the Secretary of State to conclude that there has been a breach of the standards, although there is no inspection (for example, through parents writing directly to be department about the way a school handles complaints and the school's responses about those allegations).

10. Under s.114 of the Act, it is for the Secretary of State to decide, taking account of any inspection evidence or any other evidence available (which may include material submitted by the school), whether the standards are met. Consequently, when this first step in regulatory action is taken, it may be based on a slightly different set of unmet standards to those listed in an inspection report. However, such cases are relatively uncommon and if they arise, the circumstances will be clearly explained to the school.

11. If the ISS are not met, the normal response will be for DfE to issue a statutory notice requiring the proprietor of the school to submit an action plan showing how the proprietor proposes to meet the unmet standards and within what timescale. Occasionally, however, the department may simply write requesting information from the proprietor of a school about the way in which it is intended to comply with any unmet standards; very exceptionally, the department may decide that no action is required in relation to a school at a particular point in time, eg where it would be too disruptive or is currently not feasible for the school to meet the standard and the department is satisfied that pupils' interests are not materially affected by the failure. The power to issue a notice is discretionary and even if the department decides on a course of action which does not involve issuing a statutory notice requiring an action plan, it will keep the position under review.

12. The statutory notice will list the relevant standards which must be met, and a covering letter may also explain particular concerns which the department has. The notice will require an action plan to be submitted by the proprietor within a specified time, normally a month. In urgent cases, a school's proprietor may be required to produce a plan in a shorter time, or to produce two plans to different timetables - for example if there are safeguarding or safety matters which need very prompt attention but also, in addition, other failures which it is considered may reasonably require more time to address. The

statutory notice is served on the proprietor by recorded delivery post, but will also be sent to the proprietor by email if an email address is available.

13. Detailed guidance from the department on action plans is available to schools[3]. Broadly, for every unmet standard the school must set out the steps the school proposes to take in order to meet that standard and by what date. The proprietor of a school is also asked to set out how it will demonstrate successful implementation of the action plan. Generally, the department will expect all the steps to be completed no longer than three months from the date of the notice requiring the action plan. In some cases a longer implementation period may be acceptable (for example if extensive training of staff is involved or if the plan includes building works). The department recognises that changes in teaching methods and curriculum may take a significant part of an academic year to implement effectively.

14. A school may request a longer time to produce an action plan than that specified in a notice, if specific circumstances make it difficult to produce a useful plan by the specified date. Such requests for a longer period will be considered and if the department is satisfied that there are good reasons for the request, are ordinarily granted with the department giving notice of an amended submission date. Holiday periods, especially longer ones in the summer, are not regarded by the department as a reason for ceasing work altogether on drafting an action plan, or putting in place measures to rectify the failings against the standards. In any case, a school which is aware from an inspection that there are unmet standards, should have begun to address these immediately, even before receiving a statutory notice requiring the submission of an action plan.

15. Once received by DfE, the action plan is sent on as soon as possible to the relevant inspectorate to evaluate. The inspectorate's evaluation and the department's subsequent assessment of an action plan look at matters such as completeness, the practicability of the timescales, and whether or not the actions proposed would actually result in the school being likely to meet the standards. An advice note or report is provided to DfE setting out the views of the inspectorate, normally within a month of receipt of a plan by the inspectorate but in a shorter time if the situation is urgent. In any event, as stated above, the school proprietor should not wait for a DfE decision on the plan before starting to take action to meet standards.

16. Taking account of the inspectorate advice, the Secretary of State then approves the action plan, approves it with modifications, or rejects it. It is not necessarily the case that his decision will be the same as the inspectorate's recommendation. This may arise, for example, if the department concludes that modifications recommended by an inspectorate do not give a sufficiently clear guide to a school about what action to take. Approval with modification is normally given only if there are only a few specific changes or additions that are needed, and DfE will set out in the approval letter those changes. The

[3] The guidance on action plans is under review as at April 2019. Until it is reissued, this policy statement takes precedence over any statements in the action plan guidance which may conflict with it.

school will need to carry out the modified plan, and if a progress monitoring inspection(PMI) then takes place, the inspectorate will check implementation against the plan including the modifications set out in the DfE letter. If a plan would require more extensive change to be acceptable, it is likely to be rejected. The school is given a copy of the inspectorate evaluation when the DfE decision on the action plan is notified, as this may assist the school in taking satisfactory action to meet the standards.

17. If the school's action plan is **approved, or approved with modifications**, the relevant inspectorate is then commissioned to undertake a PMI. This will be carried out after the date by which actions listed in the action plan are meant to be implemented but exact scheduling will be on a risk-based approach given the seriousness of the school's failings. There may be two separate PMIs if there have been two action plans required. The purpose of a PMI is to report on whether the school is at the time of the inspection meeting the standards in question – though the findings will also be relevant to the question of whether the action plan has been complied with. Inspectors may note new areas of serious non-compliance with the standards during a PMI, should any come to their attention. Compliance with the standards and compliance with an action plan are two separate issues, although closely connected. Whether or not an action plan has been complied with forms part of one of the tests for taking enforcement action (see below), but in practical terms, the extent to which the standards are now met will always be key to the Secretary of State's decision on taking enforcement action. In considering next steps following the PMI, the seriousness of any failings found to still exist, and the extent of improvement which the school had managed, will be considered alongside other matters such as the length of time the school has been under regulatory action, whether there has been a change in governance or leadership and so on.

18. In a small number of cases when an action plan is **rejected** but DfE concludes that it would help achieve improvement quickly, the proprietor of a school will be required to produce another action plan, usually to a short timescale. This in turn will be evaluated and either approved, approved with modifications or rejected. There is no obligation on the Secretary of State to allow a school a second chance to produce an action plan.

19. If an action plan is rejected, (or if a school has not submitted an action plan and the deadline for submission has passed) the legislation allows an immediate move to enforcement action (provided the Secretary of State is satisfied that the ISS are not being complied with), and the case for this will always be considered if there are very serious failings at the school. However, in the majority of cases when an action plan is rejected an early PMI is undertaken before a decision is taken on enforcement action. If there are significant improvements found at the school in that PMI, then it is likely (in most cases) that a further notice requiring an action plan will be served rather than enforcement action being taken; if significant improvements do not occur and the remaining failings are serious, enforcement action will ordinarily follow unless DfE is satisfied there are good reasons for not taking such action, although the principles and relevant factors for enforcement action set out below will always be taken into account in arriving at a decision.

20. In most cases where regulatory action is taken and the action plan has been approved, schools do show improvement at the first PMI, although it has in the past been common for the cycle of action plans and progress monitoring inspections to be repeated before the school is fully meeting the standards. There is no legal limit to the number of such cycles a school can go through. However, a school which continues not to meet the standards at first PMI, even if it has submitted an action plan which has been approved, can meet the preconditions for enforcement action. Enforcement action is likely to be taken if a school does not show significant improvement after the first progress monitoring inspection, and schools are unlikely to be afforded the further opportunity to put matters right by additional or subsequent action plans

Enforcement action

21. Enforcement action can be taken if a school has unmet standards, and provided one of two conditions is met that relate, amongst other things, to being required to produce an action plan, the rejection of an action plan or the failure to submit or comply with one, or an extended period of non-compliance with the standards (see Annex A for a detailed explanation of the conditions). Such action takes one of two forms: removal of the school from the register (which has the effect of requiring it to cease operating as an independent school); or imposing a 'relevant restriction' on the proprietor of the school. Such a restriction can, for example, require that part of the school's operation ceases (e.g. a sixth form where the quality of teaching in that part of the school is inadequate) or that part of its buildings cease to be used (for example, if it is unsafe). Alternatively, such a restriction can bar the admission of new pupils - either all such pupils or those of a specified description.

22. A relevant restriction can in effect serve either of two purposes. It can bear directly on a failing at a school, and the first two examples above are instances of this. Alternatively, it can be imposed where the judgement is made that whilst de-registration is not appropriate, formal action is appropriate to impress the proprietor with the seriousness of the school's position, and exert a significant pressure to achieve compliance with the ISS. It is also inappropriate for a school which is continuing to fail to meet relevant standards to continue as normal by the admission of further pupils, who will then also be exposed to the school's failings. So it can often be appropriate to stop the school admitting new pupils, whilst the school concentrates on improving the standard of education provided to those it has.

How enforcement decisions are reached

23. Enforcement action is the strongest step the department can take, being capable of disrupting pupils, affecting parents of pupils, staff and the business of proprietors – even if it is taken in the long-term interest of pupils. It must therefore be considered carefully, and written records relating to the department's decision-taking are kept and will often be available to the proprietor of a school should there be an appeal to the First-Tier Tribunal against the Secretary of State's decision.

24. Set out below are four principles that the department follows in relation to decision on enforcement action, as well as a list of the main factors it considers support taking enforcement action in relation to a school. The list of factors is not exhaustive – either in terms of those that weigh in favour or against enforcement action.

25. Each case has to be considered on the basis of the circumstances arising in that case, and therefore, the approach set out below is only a guide. In particular, these principles and factors need to be read alongside what is said in the section above about the department's approach to the approval or rejection of action plans.

Principles and relevant factors

26. In deciding whether to take enforcement action and which sort is appropriate, the department follows four principles, which are explained below:

a. **Proportionality**. In making the decision to take enforcement action consideration will be given to whether it is the most appropriate and proportionate remedy available to secure the overall policy aim, (please refer to paragraph 7 above). It is less likely that enforcement action would be a proportionate response if a school had only minor failings remaining after the initial progress monitoring inspection, or was demonstrating fast, significant and continuing progress being made towards meeting all of the standards, and outstanding issues did not merit it;

b. **Targetting**. This means that a risk-based approach is taken, and enforcement action will be taken most quickly where the greatest risks arise. Examples of this are schools where pupils are particularly vulnerable (for example, they have significant special educational needs, or are 'looked after' children), or if a school has no governing body to exert a check on senior leaders, or where pupils' educational progress, safeguarding and future well-being appear not to be the primary focus of a school's leadership or parental community. However, these are illustrative only and rapid enforcement action may be taken in any circumstances where the Secretary of State concludes that it is appropriate;

c. **Consistency**. This means that although every school's situation is different, the department aims for an approach to enforcement which so far as possible results in similar actions for similar situations. So for example, faith schools should not be treated differently from others in a similar situation and those situated in various parts of the country should not be treated differently simply on that account;

d. **Transparency**. This means that proprietors should have an understanding of the reasons for enforcement action, and also be clear about the process which has preceded it. Therefore, the breaches of the ISS upon which a decision to take enforcement action is based are referred to in summary in correspondence informing the proprietor of the decision, and are listed in terms of the wording of the standards in an annex - not least so that any appeal can proceed on the basis of a mutual understanding of which failures led to enforcement action. Transparency is also assisted by proprietors receiving draft inspection reports and being able to supply comments on the factual accuracy of any report before they are finalised - this is important since such reports are normally the basis of both regulatory and enforcement action. Therefore, this is something that inspectorates have agreed to facilitate.

27. Taking account of those principles, the factors listed below will be the main factors that point towards taking enforcement action. Potential enforcement cases will involve any number of these main factors – or indeed their absence. The factors will not be considered in isolation from one another, and the importance of each factor will vary from case to case depending on the particular facts.

a. **The seriousness and number of failings against the ISS**. There are over seventy requirements in the ISS specified in regulations, but not all of them are necessarily of the same importance – for example, a serious breach of the general welfare standard involving a failure to deal properly with abuse of pupils is much more significant than a failure to provide certain information to parents. Enforcement action will not normally occur if there are only one or two unmet requirements from the standards[4], although the judgement on this will take into account the severity of the breaches, including the extent to which the failings put children's safety at risk;

b. **The length of time over which the school has not met the ISS and its progress in addressing the failings**. Enforcement action is more likely to be taken if a school has made little discernible progress, or very slow progress, towards meeting the ISS. It is also more likely to be taken if a school has shown a pattern of improving somewhat, perhaps even to the extent of meeting the standards at some point, but then relapses - because this suggests that more radical change is needed to secure a lasting improvement and commitment to meet the standards in full;

c. **A refusal to accept that the standards must all be met**. A clear refusal by a proprietor to meet one or more requirements of the standards despite regulatory action having been taken will increase the likelihood of enforcement action being taken. This might, for example, arise because a school is unwilling to spend the money necessary to improve unsafe buildings or move to suitable premises. Conversely, if a proprietor has shown a willingness, and the capability and capacity, to work on actions designed to secure improvement, and accepts their importance, this will reduce the likelihood of enforcement action being taken;

d. **The impact which enforcement action would have on pupils, parents staff and the proprietor.** The consequences for those affected if enforcement action is taken are relevant. If de-registration or a bar on new pupil admissions, for example, are contemplated, then information which the department has about the availability and type of alternative school places will be taken into account – but ordinarily, DfE will attach less weight to the potential disruption caused to pupils and their families, the more serious it considers the nature and extent of the

[4] And that would exclude failings on the leadership and management standard if that is unmet only due to other standards being unmet.

breaches of the ISS - because in the longer term, most pupils' interests will be best served by the enforcement action despite any short-term disruption. If a school has a significant proportion of special needs pupils that would be a consideration as to the type of enforcement action that was appropriate. Enforcement action may well also impact on the livelihood of staff at the school and/or the proprietor and this will be brought to the attention of the decision-taker; but it would not outweigh the overall policy aim of securing the best outcome for pupils.

Which form of enforcement action?

28. In line with the department's principle of proportionality, the starting point for consideration will be the overall policy aim that in order to safeguard the education and well-being of children, schools that do not meet the standards must improve rapidly or face enforcement action, which may result in closure. Removing a school from the register is however very much a last resort, when the department considers that no other form of enforcement would meet the concerns. When a decision is being made about whether to take enforcement action, consideration will need to be given to which type of enforcement action is appropriate given the particular circumstances of the case. The factors listed in the previous paragraph will influence which type of enforcement action is taken. When a school has serious failings and is considered unlikely to put them right promptly, or has failed to meet the standards for a sustained period it is more likely that removal from the register will be seen as the appropriate course of action. The less serious the failings are considered to be, then factors pointing against taking enforcement action will carry a greater weight in deciding whether the imposition of a relevant restriction is the more appropriate of action.

29. If the proprietor of a school is already subject to a relevant restriction, the position at the school will still be kept under review. A PMI may be commissioned and if it is evident from a PMI that there has been little or no discernible improvement then it is highly likely that further enforcement action, usually through de-registration, would result.

30. In emergencies it is open to the Secretary of State, if he considers that one or more pupils or students at an institution is suffering or is likely to suffer significant harm, to apply to a magistrate for an order imposing a relevant restriction or removing the school from the register under s.120 Education and Skills Act 2008. Unlike other decisions, a decision by a magistrate to grant an order this takes effect when the order is served, and is not automatically suspended pending appeal. Annex A has more details.

Enforcement action – process

31. Decisions are taken by departmental officials consulting ministers as appropriate. Whomever is the specific decision-maker, and irrespective of the type of decision being taken, the public sector equality duty will be complied with (see s.149 of the Equality Act 2010). Decision-making will also, more generally, need to be compatible with Convention rights (see sections 1 and 6 of the Human Rights Act 1998).

32. When an enforcement decision is taken it will normally be communicated to the proprietor by a letter (together with an accompanying notice of the decision) from the department sent by special delivery. In addition, an email giving notice of the decision will be sent if an email address is available for the proprietor. The letter sent by post will describe what decision has been taken and refer (or cross-refer) to the standards which the Secretary of State is satisfied are not met in relation to the school. The letter will also mention the proprietor's right to appeal against the decision to the First-Tier Tribunal ['the Tribunal'] with contact details for the Tribunal.

33. An appeal by a proprietor against an enforcement decision must be made to the Tribunal, within 28 days of the date on which the notice of the decision is served on the proprietor. If the decision is to de-register a school (and no appeal is made within the 28-day period), the school will normally be removed from the register by the department immediately after the expiry of the 28-day period within which to appeal. Similarly, when the decision is to impose a relevant restriction, the restriction will apply immediately after the appeal period has expired, unless a later date for compliance with the restriction was decided upon and notified (for example the end of a school term). However, if an appeal is made to the Tribunal within the 28 day period, then the enforcement decision will be of no effect until the appeal has been determined by the Tribunal, withdrawn or otherwise disposed of. An institution must not continue to operate as an independent school once it has been removed from the register because conducting an unregistered independent school is a criminal offence. Breach of a relevant restriction is also a criminal offence.

34. This statement does not set out full details of the way in which appeals are dealt with by the Tribunal. Neither does it address the considerations which inform the department's response to appeals. Any queries on these matters may be made to the email address at the end of this statement. However, the general process for appeals is as follows:

a. the proprietor or representing solicitor makes an application to appeal (which is to include the grounds of appeal) within the 28 day limit using procedures and forms explained on the Tribunal's website at:

https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service

b. the Secretary of State provides a response, through the department's legal advisors - normally the Government Legal Department;

c. a case management hearing is held, usually by telephone, after which the Tribunal judge will make directions relating to such matters as the date of any

hearing and the timetable for the exchange and agreement of documents, the date by which witness statements need to be served on the other party, or by when the parties need to agree a document setting out the main points in issue between them. A further inspection will normally be commissioned to inform the evidence to be given by the DfE at an appeal hearing;

d. if the case reaches an oral hearing then both parties (the proprietor on the one hand and DfE on the other) present evidence to the Tribunal and there is the opportunity for cross-examination of witnesses. The inspectorate concerned will also normally present evidence. The Tribunal will take into account the situation at the school at the time of the hearing, and will reach its own view on the basis of the evidence made available to it: it does not simply rule on whether the original enforcement decision was lawful.

e. in the case of an appeal against a decision to de-register a school, the Tribunal can decide that the decision should be confirmed, be of no effect or instead be replaced by a relevant restriction. The date of de-registration may be something that the Tribunal to determines, although the department may suggest an appropriate date having regard to term dates and other relevant factors to minimise disruption to pupils and their families. In the case of an appeal against the imposition of a relevant restriction, the Tribunal can decide to confirm the restriction, or that it is to cease to have effect, or it can substitute a different relevant restriction.

'Minded to' letters

35. On rare occasions, instead of proceeding directly with a decision on whether to take enforcement action, the department may write to a school proprietor indicating that the Secretary of State is 'minded' to take enforcement action. This could be in circumstances where it was considered that more information was needed from the proprietor before a decision is to be taken. A decision to adopt this approach would be taken as part of the examination of options available, if it appears to be potentially appropriate in a particular case. The department would consider any response made to such a letter, and if the response was not satisfactory or not forthcoming, enforcement action would proceed if the circumstances justified it.

Unapproved material change

36. Various types of change which are made in relation to a school (for example, an increase in registered capacity or change of age-range, or a change of proprietor) are termed 'material changes' and under s.162 of the Education Act 2002 require approval by the Secretary of State. If a material change is made without prior approval, this is grounds for removal of the school from the register under section 162(1) of the 2002 Act.

37. It sometimes happens that a school proposes to make, or has made, such a change and seeks approval for the change, and may be meeting standards relevant to that change (for example in relation to premises accommodating a higher number of pupils) but it is also under regulatory action for other, unmet, standards. The department had previously taken the view that in such circumstances, the material change could not be approved. It took the view that approval could only be given where a school is meeting all the independent school standards. However, following a reconsideration of the terms of the relevant legislation (see sections 162(6) and 162(7) of the Act), the department now takes the view that material changes may be approved, even if a school is not meeting all the independent school standards. Approval should be given where the department is satisfied that such of the standards that are relevant to the material change in question will be likely to be met. So, for example, a material change for increased capacity could be approved if the only standards not likely to be met relate to the provision of information by the school. On the other hand such a material change would not be approved if there are unmet premises standards because the buildings are not suitable for the increased capacity.

38. Where an unapproved material change has been made this will be an aggravating factor, if enforcement action is being considered anyway because of unmet standards. If an unapproved material change has been made which it is considered has contributed to a failure to meet the ISS (for example, a building is over-crowded because a school is operating over its registered capacity and this has impacted on a school's ability to meet standards relating to its premises or accommodation) then this consideration is likely to increase the chances of enforcement action being taken for not meeting the standards.

Annex

The legal framework for regulatory and enforcement action

1. All proprietors of registered independent schools must meet the independent school standards ("the ISS") made in regulations under section 94 of the Education and Skills Act 2008 ('the Act'). The standards cover eight aspects of school operation: the quality of education; pupils' spiritual, moral, social and cultural development; the welfare, health and safety of pupils; the suitability of staff and proprietors; premises and accommodation; the provision of information (mainly to parents); the school's complaints procedures; and the quality of the school's leadership and management. They do not directly address admission policies, exclusions, fee levels or employment of staff, or require that proprietors enter into contracts on particular terms (eg, about periods of notice for parents' withdrawing a pupil). The current ISS may be found at:

http://www.legislation.gov.uk/uksi/2014/3283/contents/made

2. In addition, by virtue of section 94 of the Act, where there are pupils of relevant ages, the Early Years Foundation Stage (EYFS)[5] must be met although under certain circumstances schools are not required to meet the learning and development requirements of EYFS if they are exempted in accordance with the provisions explained at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/621771/Guidance_on_exemptions_for_Early_Years_providers.pdf

3. Proprietors should ensure a school continues to meet all the ISS once a school is registered, at all times. If they do not, sections 114 to 118 of the Act provide the basis for regulatory action, including enforcement action. The standards are applied differently to state-funded academy schools, which though technically independent schools, are largely regulated by their funding agreements and operate in the state system.

4. Section 114 of the Act provides that when the Secretary of State is satisfied that any of the ISS are not being met in relation to a school, he may issue a notice under s.114(5) to the proprietor of the school requiring the production of an action plan. This is a plan showing what steps will be taken to meet the standards in question and the timescales for taking these steps. This power is discretionary, and in some cases when a breach of the standards is minor the issue may be resolved informally between the department and

[5] https://www.gov.uk/early-years-foundation-stage

the proprietor of a school. In a very few cases the department may take the view that although a school is in breach of the standards, action to ensure compliance is not appropriate and the discretion will be exercised to note the breach but not take any action to require a remedy; but this is very unusual.

5. The time within which an action plan must be submitted by a proprietor, and the timescales the plan should cover for the taking of remedial action, are not specified in the Act. However, normally DfE requires a plan to be submitted within no more than one month and the expectation is that most remedial action can be completed within a maximum of three months from the date notice requiring an action plan is served. In especially urgent cases, a proprietor may be required to produce two action plans - one to be submitted in less than a month addressing urgently certain failures and the other to be submitted later addressing remaining failures.

6. Section 114 makes provision for an action plan submitted by a proprietor to be approved, or approved with modifications, or rejected, by the Secretary of State. If an action plan has been rejected, or is not submitted and the time to submit has passed, one of the conditions for taking enforcement action may be fulfilled (see below). Submitting an action plan late risks enforcement action being taken.

7. If an action plan is rejected, s.114 (7) gives the Secretary of State the power to require the proprietor to produce another action plan. If this occurs the status of the second action plan is the same as the first, in terms of the approval and rejection options available to the Secretary of State.

8. Sections 115 and 116 set out the bases for enforcement action – either the imposition of a relevant restriction on the proprietor or the deregistration of a school. Section 115 of the Act provides that when the Secretary of State is satisfied that one or more of the ISS is not being met, enforcement action may be taken if one of a number of specified conditions is met.

9. These conditions are as follows:

> a. an action plan has been required under s.114(5) of the 2008 Act within the past three years, but has not been submitted and the time specified by the Secretary of State for submission has passed; or
>
> b. an action plan was so required within the past three years and was submitted but was rejected by the Secretary of State; or
>
> c. an action plan was so required with the past three years and was submitted, but was not complied with (and this means, for example, that any of steps set out in the plan were not taken or the timetable in the action plan was not followed - not that the standards in question have not been met); or
>
> d. an action plan was required at least two years beforehand, at least one inspection by an inspectorate has taken place since the action plan was required,

but at no time since the action plan was required has the Secretary of State been satisfied that all the ISS have been met in relation to the school

10. Enforcement action is discretionary; there is no duty on the Secretary of State to take it simply because the conditions in the Act permitting enforcement action are met.

11. Section 116 provides for two types of enforcement action: removal of the school from the register, or imposition of a 'relevant restriction'. If the decision is taken to remove a school from the register, this is in effect a decision that the school is to cease operating as such, since conducting an unregistered independent school is an offence - under s.96(2) of the Act.

12. A 'relevant restriction' (see s.117 of the Act for details) is one or more of the following types of requirement imposed on a proprietor:

a. a requirement to cease using part of the school's premises for all purposes or a specified purpose. This might be used when a school building is dangerous or has defects which render it unsuitable (e.g. a sports hall), but the proprietor has refused to take it out of use
b. a requirement to close any part of a school's operation. This might, for example, consist in requiring that the sixth form of a school is closed because the education of pupils of the relevant age group is grossly inadequate and they would be better off in other schools, or to close boarding facilities because of failures in the way that provision is made
c. a requirement to cease to admit new pupils, or new pupils of a specified description. A general restriction preventing any new admissions is the most common form of relevant restriction that the Secretary of State has imposed to date; a restriction with more limited application might for example bar new admissions to a school at primary level but not secondary-age pupils, if the provision for primary pupils is the principal problem at an all-through school

13. It is an offence for a proprietor to fail to comply with a relevant restriction relating to a school of which he, she or it is the proprietor – see section 118(2) of the Act.

14. Finally, section 120 of the Act allows the Secretary of State to make an application to a justice of the peace ("JP")) for an order, which (once served on the proprietor) would have the effect of requiring the immediate removal of a school from the register, or compliance by the proprietor with a relevant restriction. Failure to cease operating an independent school (which has been de-registered) or to comply with a relevant restriction is an offence and, unlike in the case of enforcement action under section 116 of the Act, an order is not held in abeyance during the period for a proprietor to make an appeal or where one is made, pending its determination. An appeal, however, may be made to the First-Tier Tribunal by the proprietor and an appeal would normally be dealt with on an expedited basis under a Memorandum of Understanding between DfE and HM Courts and Tribunals Service.

15. To grant an order under section 120, a JP must be satisfied that a pupil at the school is suffering or is likely to suffer significant harm. Therefore, unlike in the case of the other powers referred to above, there is no need for there to be a breach of the ISS for action to be taken or indeed for an action plan to have been required. Therefore, an application under section 120 can be an alternative or in addition to enforcement action under section 116 of the Act.

16. 'Significant harm' is defined in accordance with the Children Act 1989 (see section 120(7) of the Education and Skills Act 2008 and section 31(9) and (10) of the Children Act 1989). In addition, because a JP must be satisfied that a pupil is suffering or is likely to suffer significant harm, the harm cannot be purely historic.

17. The Children Act 1989 also contains the following definitions:

- "harm" means ill-treatment or the impairment of health or development [including, for example, impairment suffered from seeing or hearing the ill-treatment of another];
- "development" means physical, intellectual, emotional, social or behavioural development;
- "health" means physical or mental health; and
- "ill-treatment" includes sexual abuse and forms of ill-treatment which are not physical.

In addition, it specifies that " where the question of whether harm suffered by a child is significant turns on the child's health or development, his health or development shall be compared with that which could reasonably be expected of a similar child."

18. In considering whether to seek an s.120 order, a range of information may be considered (including inspection reports and information made available by the local authority concerned). If an order is applied for, the proprietor of the school will be informed of the application (unless it is undesirable, or impossible to do so) and in that case will have the opportunity to appear before the magistrates' court to present arguments against the granting of an order. But in some cases no notice may be given – although it would be open to the magistrate to adjourn the hearing in such circumstances to allow the proprietor to be present.

19. If an order is granted by a JP, it will be served by the department as soon as is reasonably practicable, and must be complied with immediately after it is served on the proprietor. For example, notice of an order to remove a school from the register may be served on the same day as the order is made, with the school removed from the register immediately thereafter. In such circumstances, it would be necessary to cease operating the institution in question as an independent school that day - otherwise the offence under section 96(2) of the Act would be committed.

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Ref: DfE-00087-2019

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