



Department  
for Education

# **Regulating independent educational institutions**

**Government consultation**

**Relaunch date 13 October 2020**

**Respond by 27 November 2020**

# Contents

Introduction	3
Who this is for	3
Issue date	3
Enquiries	3
Additional copies	4
The response	4
About this consultation	5
Respond online	5
Other ways to respond	5
Deadline	6
Background and context	7
Proposal: Widening the registration requirement	8
Background	8
Proposal	10
Technical detail of proposal	10
Proposal: Changing how some appeals against de-registration are determined	15
Background	15
Proposal	16
Technical detail of proposal	18
Proposal: Revision of the basis for consideration and approval of material changes to independent schools	20
Background	20
Proposal	21
Technical detail of proposal	21

## Introduction

The Department for Education (DfE) is consulting on a number of related proposals for legislation which would affect independent schools and also some education settings which are neither state-funded nor currently registered with the department as independent schools - although they are attended full-time by children of compulsory school age. This includes some religious settings as well as a large number of other settings. These proposals will help ensure requirements are consistent for all settings that children of compulsory school age attend full time in the school day (which prevents them securing an education elsewhere).

## Who this is for

- Independent school proprietors and senior leaders
- Organisations representing independent schools
- Alternative provision academies
- Other settings attended full-time by children of compulsory school age
- Local authorities
- Faith and other groups connected with schools or settings
- Other organisations concerned with education
- Parents and carers

## Issue date

The consultation was issued on 14 February 2020. Due to the Covid-19 Pandemic, the consultation was suspended in April 2020, and will now be relaunched on 13 October 2020.

## Enquiries

If your enquiry is related to the policy content of the consultation you can contact the team by email:

[IndependentSchools.CONULTATION@education.gov.uk](mailto:IndependentSchools.CONULTATION@education.gov.uk)

If your enquiry is related to the DfE e-consultation website or the consultation process in general, you can contact the DfE Ministerial and Public Communications Division by email: [Consultations.Coordinator@education.gov.uk](mailto:Consultations.Coordinator@education.gov.uk) or by telephone: 0370 000 2288 or via the [DfE Contact us page](#).

## **Additional copies**

Additional copies are available electronically and can be downloaded from [GOV.UK DfE consultations](#).

## **The response**

The results of the consultation and the department's response will be [published on GOV.UK](#) . However, the exact form of the response will depend on the timing of legislation if that goes ahead as proposed.

## About this consultation

This consultation document seeks views on a number of proposals for legislation. A commitment to consult on the first proposal was included in a statement by the Parliamentary Under-Secretary of State for the School System, Lord Agnew, in March 2018.

In summary, the proposals are:

- Expanding on the categories of full-time institutions that will be regulated in the same way that independent schools are currently regulated, and defining what is “full-time”;
- Changing the basis for how some appeals against enforcement action, under the Education and Skills Act 2008, are determined by the court;
- Revision of the system for making changes to the registered details of independent educational institutions.

The first part of the document sets out the background and the context for the consultation.

The subsequent parts of the document set out the details of each proposal, considerations which arise and the questions to which responses are sought.

The department would like to hear your views.

## Respond online

To help us analyse the responses please use the online system if possible. Visit [www.education.gov.uk/consultations](http://www.education.gov.uk/consultations) to submit your response, or direct to the consultation at:

<https://consult.education.gov.uk/school-frameworks/regulating-independent-education-institutions>

## Other ways to respond

If for exceptional reasons, you are unable to use the online system, for example because you use specialist accessibility software that is not compatible with the system, you may download a word document version of the form and email it or post it.

## **By email**

[IndependentSchools.CONULTATION@education.gov.uk](mailto:IndependentSchools.CONULTATION@education.gov.uk)

## **By post**

Regulating Independent Schools Consultation  
Independent Education and Boarding Team  
Department for Education  
Bishopsgate House  
Feethams  
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DL1 5QE

## **Deadline**

The relaunched consultation closes on 27 November 2020

## Background and context

1.1 The Secretary of State for Education is responsible for registering and regulating independent schools in England, and his functions here are carried out through the Department of Education. The relevant powers are to be found chiefly in the Education and Skills Act 2008<sup>1</sup> ('the 2008 Act'), although there are also provisions elsewhere which are particularly relevant to one of the proposals in this document. The department's guidance on the registration of independent schools is published at:

<https://www.gov.uk/government/publications/independent-school-registration>

1.2 The department has also published a policy statement on its regulatory and enforcement role. The annex to that document contains a description of the legal framework for those functions. The statement can be found at:

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

1.3 The department believes that by and large, the existing system works well in allowing registration only for those establishments likely to meet the standards, and for registered schools which at any point do not meet the standards, securing improvement in an appropriate timeframe.

1.4 However, it has also been apparent for some time that in a number of areas, improvements could be made if a legislative opportunity was to arise. The department is therefore consulting on three proposals for amendments to the 2008 Act to address the need for those improvements. Each of the following sections of this document sets out the reason why change is considered appropriate and the detailed issues involved.

1.5 When the consultation period has ended, responses will be considered and next steps set out in a published government response document, although the timescale for action - if it is decided to go ahead with legislation at all - will depend on when a legislative opportunity arises.

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<sup>1</sup> <http://www.legislation.gov.uk/ukpga/2008/25/contents>

# Proposal: Widening the registration requirement

## Background

2.1 Section 92 of the 2008 Act sets out two possible classes of institution which may be registered by the Secretary of State for the purposes of Part 1 of Chapter 4 of the Act and thereby fall into the regulatory scheme established under that legislation<sup>2</sup>: independent schools, and certain types of part-time settings - although the provisions in relation to part-time settings have not been brought into effect.

2.2 Currently there are around 2,340 registered independent schools in England, of a considerable diversity in terms of size, ethos, resources and aspirations. This number has tended to remain fairly constant in recent years: although some 80-100 new independent schools are registered each year, there is usually an equivalent number of closures – some of them for regulatory reasons, but often for financial ones. The department believes that by and large the current system serves pupils, parents and the wider education system well.

2.3. The definition of an independent school is set out in section 463 of the Education Act 1996<sup>3</sup> ('the 1996 Act'), and in, broad terms, is a school which provides full-time education for five or more pupils of compulsory school age<sup>4</sup>, or one or more such pupil who has an Education and Care Plan (EHC) or is 'looked after' by a local authority. Local authority maintained schools and Non-Maintained Special Schools approved under s.342 of the 1996 Act are excluded from this definition.

2.4 There are two conspicuous problems arising from this definition, and the proposal set out below aims to address both of them. Firstly, there is no statutory definition of 'full-time' for the purposes of section 463. This means that it is not always clear which institutions require to be registered as independent schools. How 'full-time' is currently

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<sup>2</sup> In addition, alternative provision academies, because of s.93A of the 2008 Act are registered and regulated in the same way. Independent post-16 colleges may also be regulated – but no regulations allowing for this have been made under section 132 of the 2008 Act.

<sup>3</sup> <http://www.legislation.gov.uk/ukpga/1996/56/contents>

<sup>4</sup> Compulsory school age is broadly speaking being aged between 5 and 16. There are detailed rules for determining whether a person is of compulsory school age in section 8 of the 1996 Act, and secondary legislation made under that section.



interpreted by the department is explained in more detail in the registration guidance issued by the department at the link below. It will be seen from this that the department has adopted criteria for registration related to, amongst other things, the number of hours of education provided per week and whether the education provided is the main source of education for the children involved.

<https://www.gov.uk/government/publications/independent-school-registration>

2.5 That guidance is based on the department's interpretation of the meaning of 'full-time'; there is no binding judgment on the meaning of 'full-time' and the guidance states that: "*Generally, we consider any institution that is operating during the day, for more than 18 hours per week, to be providing full-time education*". Even with this interpretation, there can be difficult cases.

2.6 It is therefore desirable to establish a clear definition of 'full-time' for the purposes of the regulatory regime, which can then be used as a basis for decisions on registration and other matters.

2.7 Second, the current definition of what constitutes an 'independent school' does not encompass settings which are providing education, which meets the test of being full-time, to children of compulsory school age but has a curriculum that is too narrow for the setting to constitute a 'school'. The consequence is that they cannot be registered (or regulated). To be an independent school, a setting must, first of all, be a school. A school is defined in section 4 of the 1996 Act as being an educational institution for providing either 'primary education' or 'secondary education', or both. Those terms are defined in section 2 of the 1996 Act as full-time education suitable to the requirements of children of the appropriate ages. It has been contended, and the department accepts, that the curriculum offered at settings which is a single discipline or is very narrow in nature, does not constitute education suitable to the requirements of children of compulsory school age. This means that the settings providing such a narrow education are not schools, and therefore cannot be registered or regulated. This is clearly not a problem if the setting operates out of normal school hours, in the evenings or at weekends – such as intensive sports training, or instrumental music tuition, or ballet, for example. It is possible that such provision may exceed the threshold of 18 hours per week; but the way it is organised does not prevent the child from also attending school. However, the situation is very different if the provision is organised during the normal school day and so prevents the child from attending school. The department is aware of some settings that provide only religious instruction and that do operate in this way.

2.8 The commitment to consult on changes to the 2008 Act (in Lord Agnew's March 2018 statement) provided the impetus for the department to consider how the lack of regulatory oversight for such settings could be addressed. In some local authority areas

hundreds of children (mostly boys, and mostly aged 13-16) attend such settings. The proposal set out below is designed to fulfil that commitment.

## Proposal

2.9 The basic proposal is to expand on and more clearly define what full-time institutions are to fall under the regulatory scheme in Chapter 1 of Part 4 of the 2008 Act.

2.10 The proposed changes would define the scope of settings in terms of the key criteria of numbers of children (though that will not change from the current threshold) and hours of attendance – the latter to address the issue of what constitutes ‘full-time’. It would also need to address the issue of the nature of the education provided, in order to overcome the problem described above relating to the registration requirement being linked to the definition of a school, which is in turn tied to the provision of primary and secondary education. It would also need to make provision for omitting settings which might otherwise be caught by the basic definition but public policy dictates should not be included.

## Technical detail of proposal

2.11 Such a provision could be drafted in a number of different ways, and the department has taken no final decision on that. At present, however, its intention is that any new legislation should be based on the following principles, to ensure that independent schools continue to be covered (which is not a matter for consultation) as well as ensuring that the problems identified above are addressed.

2.12 For an institution to be caught, education would need to be provided to the children in the setting for at least some of the time - because the department does not intend to regulate institutions that do not provide education at all. By simply having that proposition (i.e. simply that education is provided at the institution), and not specifying further something about the nature or extent of the education, the link between the definition of an independent educational institution and the definition of a school would be dispensed with. Furthermore, some institutions may have children attending but the time spent by the children may be wholly or largely occupied with self-study, albeit with the institutions providing some instructions or guidance about what is to be studied. The department intends to capture such institutions within the proposals and treat them as providing education, regardless of whether and by whom the study is supervised - because in the department’s view there is no difference in principle between education provided by teaching, and directed self-study, in these circumstances. Of course, there is no intention here to cover a parent simply supervising their own child’s study at home.

2.13 There is, in the department's view, no need to change the number of, or ages of, children stipulated as attending the setting in question, from that currently used for independent schools – that is, broadly speaking, five or more children of compulsory school age, or one or more of that age who has an Education and Health Care Plan or is “looked after” by a local authority. Although the number of five children is essentially arbitrary, it strikes a satisfactory balance – there is no policy need to capture provision made on an essentially *ad hoc* basis for a handful of children, but when a setting reaches a size which might be regarded as an enterprise with a distinct identity, it should have to register if meeting other relevant criteria. The requirement for registration to arise if there is one or more child with an EHC plan or who is “looked after” arises because of the additional vulnerability of such children. As to age, there is no policy reason to extend the registration scheme to younger children; and to attempt to extend it so that it could encompass settings (only with) with children above compulsory school age is likely to risk undue complication with other forms of setting, especially further education. So this consultation is not seeking views on how any new definition should cover this issue relating to the number and ages of children etc.

2.14 The proposed provision should contain a clear hours of attendance criterion. It is a question of judgement where the line should be drawn but in keeping with its current practice, the department believes that attendance for at least 18 hours during the course of a week (that being seven days starting on Mondays, not just Monday-Friday) justifies registration. That would be attendance and not necessarily have to involve tuition of any minimum time (though as explained above there must be some education provided during the attendance); such a minimum would be unnecessarily complicated because the principle is that if children are in full-time attendance there should be regulation. This is because attendance at such an institution precludes attendance at a normal school.

2.15. Therefore, in addition to hours of attendance there is a need to stipulate that at least some of that attendance is in usual school hours and to define what that term means. That would have the benefit of eliminating from registration at least some settings which do not provide the main part of a child's education or operate outside the school day. As noted above, some settings providing intensive sports training are examples of this. The department's proposal is to treat 'usual school hours' as being 9am to 3pm, Monday to Friday. So settings that only operate outside of these hours – for example in the evenings or at weekends – would not be covered by the registration requirement.

2.16 The new provision is also likely to need to expressly exclude certain types of setting. Some of these are already excluded (eg local authority maintained schools cannot be 'independent schools' and certain categories of further education colleges are not “schools”) but there is a question as to whether other types of setting should be expressly excluded. Examples of these might well be institutions which operate only in

school holiday periods or those which, like outdoor centres, have children attending for a large part of the year - but there are different children attending from week to week, and the children concerned are usually on the roll of a registered or maintained school. . Settings that only operate in the school holiday period could be excluded by providing that settings that operate only during July and August, and for no more than a set number of weeks during the rest of the year would not be covered by the requirement to register. This could include school holidays such as Easter, Christmas, and half term breaks. There is a consultation question on settings which ought to be excluded on the face of any legislation.

2.17 The department is also considering, and would welcome views on, whether to include in legislation a power to change, by secondary legislation, the definition of some of the terms used in it to adjust to changing circumstances. Examples of these would be, the types of institutions carved out of the regulatory regime, the hours of attendance criterion, how institutions operating in 'holiday periods' are defined and what constitutes 'usual school hours'. Provisions such as these would allow the government to subsequently amend primary legislation through secondary legislation. The department would wish to gain as much information through this consultation as possible - so that the initial definitions used in primary legislation are as accurate as possible while anticipating possible changes in the way educational provision evolves. This would minimise the need to make changes in future years. However it is still considered necessary to have the powers of redefinition available, so that for example if other types of settings emerge which it becomes obvious should not be regulated, if it emerges that the specified number of hours is inappropriate, or the legislation is being misused. We are envisaging that any such regulations that widened the scope of the registration requirement, so capturing settings that would not otherwise be covered by the requirement, would always be subject to debate and votes in Parliament.

As noted above, the registration requirement would not apply to a parent providing home education to his or her children. Nor would it apply to provision that was solely on-line. The Government is currently consulting on propositions to establish a voluntary, non-statutory, scheme to accredit on-line schools; the proposals in this paper about a registration requirement does not apply to such provision.

#### Effect of the proposal

2.18 If legislation was to be enacted on the basis of the principles outlined above, it would have no effect on the great majority of the independent sector. Those settings which are independent schools and are registered as such would fall into the new definition of an independent educational institution (as they do at present, as specified in s.92), because they would meet the stipulated criteria, and their registration by the department would continue in existence. The main practical impact would be three-fold:

a. as explained above, a clear hours of attendance criterion would make it easier to decide whether the operating hours of a setting bring it within the scope of registration. For most settings, which have proprietors who wish to comply with the regulatory framework and gain the advantages associated with that, this would be advantageous in that one area of doubt would be removed. The same argument applies to those settings which are clearly part-time and wish to remain so.

b. for that minority of settings which seek to evade regulation by maintaining an unclear and often shifting basis of operation on the borderlines of legality, the new provision would make it less easy in at least two respects for them to do so. One would be in respect of hours of attendance as it would draw a clear line for registration (though proprietors could continue to deliberately organised provision to fall just below the threshold); the other would be through making irrelevant the arguments relating to the narrowness of their curriculum which some full-time alternative provision settings currently advance against registration;

c. the new provision would clearly require the registration (and regulation) of those settings which offer an intensive religious-only education (or other narrow education) to children of compulsory school age. The department is aware of the difficulty they would have in meeting the current independent school standards. Meeting those standards is essential to continued registration as explained in the policy statement mentioned in the Background section. Ministers currently take the view that all such settings, operating full time, during the school day, for compulsory school age children, should register and meet applicable independent school standards so that children of that age receive a suitable education if that is conducted entirely in an educational setting or the hours of operation of such settings make home education effectively impossible.

### **Questions for consultation**

**1. Do you agree that any full-time setting providing education to children ought to be regulated and that what is “full-time” ought to be defined more clearly? [facility for comments]**

**2. Do you think that the department’s suggestion of 18 hours is the appropriate threshold for registration (and therefore regulation)? If not, what number of hours should be used or should there be no specified threshold? [facility for comments]**

**3. Do you agree that any hours threshold should be linked to attendance rather than a minimum amount of time spent on tuition (education would have to be provided for at least some of the time attended)? [facility for comments]**

- 4. Do you think that registration should only be required if the provision takes place at least partially in usual school hours? [facility for comment]**
- 5. If a 'usual school hours' criterion were to be used, what hours do you think should be defined as being 'usual school hours' – as proposed above or a different set of times?**
- 6. Do you agree that the registration requirement should encompass any setting providing education and/or instruction to children of the specified age, and operating full time and during the specified hours, irrespective of the subject matter of what is taught? [facility for comment]**
- 7. Which settings do you think should be expressly excluded on the face of any legislation from the scope of the revised registration requirement for independent educational institutions?[facility for comment]**
- 8. Do you agree that any revised version of the registration requirement in primary legislation should contain power for subsequent changes to definitions in that version to be made by secondary legislation? If so, which definitions? [facility for comment]**

# Proposal: Changing how some appeals against de-registration are determined

## Background

3.1 As explained in the policy statement on regulatory and enforcement action mentioned in the earlier section on the background to these proposals, proprietors of independent schools have a right of appeal against decisions made by the Secretary of State to take enforcement action under s.116 of the 2008 Act. Those decisions follow an earlier phase of regulatory action in which a school will have been required to produce an action plan showing how it will meet independent school standards which it has failed to meet. As the policy statement explains, if the action plan is not submitted, is rejected or if the school has not complied with its action plan, then it becomes a candidate for possible enforcement action if it is continuing to fail to meet the standards.

3.2 Enforcement decisions are of two different types:

a. the Secretary of State may decide to impose one or more 'relevant restrictions' on a school's proprietor. Such restrictions are of three types:

i. a restriction requiring that a specified part of a school's operation be closed (for example boarding provision);

ii. a restriction requiring that part of a school's premises cease to be used (for example, an unsafe sports hall);

iii. a restriction which bars the proprietor from admitting new pupils, either entirely or of a specified kind (for example a restriction might bar admission of secondary age pupils but not those of primary age).

b. the Secretary of State may decide to remove the school from the register of schools which he is required to maintain (under s.95 of the 2008 Act). Because operating an unregistered independent school is a criminal offence under s.96 of the 2008 Act, this is in effect a closure decision.

3.3 A decision to de-register a school may be taken in isolation or may follow an earlier decision to impose a relevant restriction which has not resulted in adequate improvement.

3.4 Under sections 124 (de-registration appeals) and 125 (relevant restriction appeals) of the 2008 Act, a school proprietor may appeal against these decisions by the Secretary of State. Such appeals are made to the First-Tier Tribunal<sup>5</sup>.

3.5 Given the serious effect of an enforcement decision upon a school, it is very common for school proprietors to appeal – although in some cases they withdraw their appeal if a further inspection shows that little progress has been made in meeting the standards and, therefore, an appeal is likely to be lost. For its part, the department ordinarily withdraws from defending appeals if re-inspection finds that significant progress has been made. The overall aim of the regulatory and enforcement regime is to secure improvement to schools so that they are meeting the standards; not to close them down.

3.6 However, in the past few years a number of schools have shown a tendency to fail inspections, be made the subject of enforcement action, improve sufficiently to make it likely that an appeal will succeed and therefore the department concedes on the appeal, but the school then deteriorates again over time. Such deterioration is usually due to a lack of competent leadership, although it may also be linked to other issues such as lack of resources. This is very damaging to the interests of pupils, some of whom may be attending such schools for many years while the department's efforts to secure improvement have only temporary effect as the school goes through repeated cycles of improvement and deterioration.

3.7 The department believes that in order to tackle this phenomenon at its root by deterring schools from going through such repeated cycles of failure, the basis of how the Tribunal determines appeals against decisions to de-register a school, should be altered so that proprietors are less likely to be able to succeed on appeal simply because they have brought about what subsequently transpires to be another temporary improvement.

## Proposal<sup>6</sup>

3.8 The basis of the proposal arises from the way in which the First Tier Tribunal hears appeals against enforcement decisions. At present these hearings are held on what is known as a 'full merits' basis. This means that the Tribunal takes its own view as to whether enforcement action is appropriate (and therefore, whether the Secretary of

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<sup>5</sup> Under the The First-tier Tribunal and Upper Tribunal (Chambers) Order 2010 appeals by independent school proprietors are allocated to the Health, Education and Social Care Chamber; the Care Standards Tribunal is part of that Chamber and hears such appeals.

<sup>6</sup> The document refers for ease of reference below to "schools" but any changes would be equally applicable to any institutions covered by the statutory regime, including alternative provision Academies and any new institutions caught by the first proposal above



State's decision should be confirmed, or set aside, or a relevant restriction imposed instead), based on evidence presented at the hearing relating to the situation at the time of the hearing or at least very shortly before. This approach maximises the likelihood that a school will be able to convince the Tribunal that it has improved and is meeting the standards - or at least is very close to doing so.

3.9 The department is therefore proposing that the appeals regime is amended so that in specified circumstances, appeals against de-registration decisions are no longer heard as full merits appeals but rather that the First-Tier Tribunal would decide them on the same basis as an application for judicial review of a decision by the Secretary of State. There are appeals in other statutory provisions in which the Tribunal hears cases on a similar basis.

3.10 The key difference this would make is that the court would simply decide whether the original decision was made lawfully according to the principles of administrative law. For example, a decision to take enforcement action would not be made lawfully if:

- a. it was made outside the powers available - for example, if the Secretary of State took enforcement action even though none of the pre-conditions for doing so specified in s.115 of the 2008 Act were met;
- b. it was made in breach of a statutory duty – for example, if the public sector equality duty contained in section 149 of the Equality Act 2010 was not complied with;
- c. it was procedurally unfair – for example, if a promise had been made to consult with the proprietor of the school before taking enforcement action and there was not a proper justification to resile from that promise;
- d. it was irrational, that is to say it was unreasonable and unsustainable having regard to the facts, or was one no reasonable Secretary of State would have reached – for example, by failing to take into account the department's policy statement on how enforcement decisions would be taken; or
- e. it was incompatible with a right under the European Convention on Human Rights (for example, because the decision-maker had decided to de-register a school on the basis of the faith of the proprietor, which would be a breach of Article 14 of the Convention).

3.11 Having carried out a judicial review, if the court quashes the decision it does not substitute its decision for that of the decision-maker but leaves it for the decision-maker to reconsider what decision to make.

## Technical detail of proposal

3.12 At present, it is the intention of the department that the legislation should be based on the approach that an appeal against de-registration (not appeals against the imposition of a relevant restriction) would be heard on the basis of a judicial review of the original decision in those cases where the school (a) has undergone three inspections, (b) had action plans required by statutory notice after the first two inspections and (c) at all three inspections had been found not to be meeting one or more of a defined subset of the independent school standards.

3.13. This subset of standards would be specified in regulations, under a new power to be provided in the amended primary legislation. That is more appropriate than specifying the standards on the face of the primary legislation - as the standards themselves are in regulations and may change in future years. There is an issue as to whether the power to specify the relevant standards should be unlimited or whether it should be confined by the primary legislation to certain types of standard (such as by specific reference to the types of standards as covered in s.94(1) of the 2008 Act eg. quality of education; or pupil welfare, health and safety). Taking the latter course would protect schools from the new provision being applied in cases where the standards being met were not those central to pupils' education or wellbeing.

3.14 It is also proposed that the legislation would specify that if a school came into this category because it met the criteria specified above, the amended basis for hearing the appeal would only apply if the Secretary of State had first warned the proprietor of the school and given him or her an opportunity to make written representations as to why the Secretary of State should not take a decision to remove the school from the register. If this was not done, any subsequent appeal against de-registration would be heard by the First Tier Tribunal on the normal full merits basis.

### Effect of the proposal

3.15 It is not possible to say with any certainty how many schools would be affected in any one year by this proposal. If the legislation were to be amended as proposed, there should in any case be a deterrent effect and a consequent reduction in de-registration decisions in due course.

## Questions for consultation

**9. Do you agree that in specified circumstances the hearing of an appeal against de-registration should be on the basis of judicial review principles rather than by way of a full merits review? [facility for comment]**

**10. If the way a court is to determine an appeal were to be modified as proposed, do you agree that the criterion relating to inspection cycles should be based on three inspections? [facility for comment]**

**11. Do you believe that the power to specify in regulations the particular standards used in applying the criteria should be unconfined, or instead be restricted to certain specific standards, or specific groups of the standards as specified in section 94(1) of the 2008 Act? If the latter, which categories? [facility for comment]**

**12. Do you agree that it is sufficient to give the proprietor an opportunity to make written representations, or do you believe that some further pre-decision requirement should be imposed to adequately protect the proprietor's rights (in addition to the actual appeal process)? [facility for comment]**

**13. Do you think there is any possible different way in which appeals should be determined against deregistration, which would achieve the same policy aim? [facility for comment]**

**14. Do you have any further comments on the general issue of appeal rights in relation to enforcement decisions?**

# Proposal: Revision of the basis for consideration and approval of material changes to independent schools

## Background

4.1 Independent schools do not stand still. They need to change to reflect changing circumstances around them – demographic, economic, educational and other changes. Some of these can be made by the school in isolation without any likelihood of adverse effects on their pupils.

4.2 However, certain types of change are recognised in law as being significant enough to be termed ‘material changes’, which before being made should be notified to the Secretary of State and receive approval from him, so as to safeguard the interests of pupils and parents. The process for this is currently set out in the Education Act 2002 (‘the 2002 Act’); although the 2008 Act contains replacement provisions, these have never been fully commenced.

4.3 The changes in question are as follows:

- a. a change in proprietor or proprietor body (a change in the chair of an existing proprietor body is not a material change although the individual concerned would be subject to checks by the Secretary of State);
- b. a change of address (this does not include acquiring additional locations, though that might lead to a different type of material change from amongst those listed below);
- c. a change in the age range of the school’s pupils;
- d. a change in the maximum number of pupils at the school;
- e. whether the school is co-educational, or for girls or boys only;
- f. whether the school has boarding accommodation (a change in the number of boarders accommodated is not a material change in itself, although if it resulted in increased total pupil numbers, that would be a material change as at (d) above);
- g. whether pupils with special educational needs are admitted.

4.4 If a school makes an unapproved material change, that is grounds for removing the school from the register, but this has never been done. There is no current right of appeal against such a decision (the right of appeal in the 2008 Act has never been commenced because the material change regime is still operated under the Education Act 2002 – and the 2002 Act makes no provision for such appeals).

4.5 At present, there is no lesser regulatory measure than deregistration which can be deployed to deal directly with such unapproved material changes. It is however open to the department to commission an inspection and take regulatory action (and perhaps subsequently enforcement action) if it is found that the changes have resulted in any of the independent school standards not being met (for example, an expansion of pupil numbers has led to some premises standards not being met).

## Proposal<sup>7</sup>

4.6 The department's experience in operating the approval process in recent years has suggested that a number of changes need to be made, and this could be done by amending the primary legislation to make changes which meet current needs.

4.7 The department therefore proposes to legislate through amendments which will retain much of the substance of the current regime but give additional flexibility and clarity. The department wishes to consult on the changes described in the sub-paragraphs in section 4.8 below. At least one other change may be made (giving the Secretary of State specific power to commission independent inspectorates to undertake material change inspections, in addition to the current power to commission Ofsted) but this is not being consulted upon - as it is considered unnecessary to do so.

## Technical detail of proposal

4.8 The proposed provisions would need to achieve the following alterations in the legislation.

a. for special educational needs, it is proposed that it should be a material change to organise an institution to cater specifically for pupils with special educational needs of one or more defined categories (which would be specified in regulations), or to cease to do so. It would also be a material change to add to or subtract from serving those defined categories in the organisation of the setting;

b. the provisions above would be the only ones specifically covering SEN and therefore, it would no longer be a material change (as it currently is under the 2002 Act) to simply admit or cease to admit, one or more pupils with SEN. The policy motivation with regard to SEN is to impose external control on schools wishing to change the types of SEN which they cater for (because failure to do

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<sup>7</sup> This document refers for ease of reference below to "schools" but any changes would be equally applicable to any institutions covered by the statutory regime, including alternative provision Academies and any new institutions caught by the first proposal above.

this properly can lead to significant deficiencies in provision), but to no longer regulate the simple admission of pupils with SEN – given that around 15% of all pupils in England have some special educational needs, this is not considered desirable or practicable;

c. whilst retaining the de-registration option for unapproved material changes, give a more flexible way of dealing with these. In addition to the existing de-registration option, it is therefore proposed that a relevant restriction<sup>8</sup> could be imposed if an unapproved material change is made. So for example, a school which had increased its size without approval could be barred from admitting new pupils until it had reduced to its lawful size; or a school which had added a sixth form could be required to cease operating that sixth form after its current pupils had left;

d. make it possible for approval of a material change to be refused even if relevant standards are likely to be met after the change is made (for example, on the basis of other evidence about the school or proprietor). Under the current regime (and under the 2008 Act), if the Secretary of State is satisfied that all relevant independent schools standards (or relevant requirements from the Early Years Foundation Stage) are likely to continue to be met once the change is made, he must grant approval. Under this proposal there would be discretion as to whether to do so. An example of relevant standards would be the premises standards if a school was expanding in size with no change in age range. The current right of appeal to the First Tier Tribunal in relation to the Secretary of State's decisions to refuse material change approval (both in the 2002 Act and the 2008 Act) would safeguard schools against abuse of this power.

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<sup>8</sup> The intention is that “relevant restriction” would be defined, for these purposes, in the same way as in section 117 of the 2008 Act.

## Questions for consultation

**15. Do you agree with the changes proposed for approval of material changes relating to provisions for pupils with SEN? [facility for comment]**

**16. Do you agree that the Secretary of State should be able to impose a relevant restriction for an unapproved material change? [facility for comment]**

**17. Do you agree that it should be possible for the Secretary of State to refuse approval for a material change, on the basis of other evidence about the school or proprietor, even if relevant standards are likely to be met by the school after the change is made? [facility for comment]**

## Other matters

5.1 An equalities log, preliminary UNCRC assessment and family test document are being published alongside this consultation paper.

### Questions for consultation

**18. Do you have any comments on the conclusions set out in the published equalities log, preliminary UNCRC assessment and family test document?**



**Full list of consultation questions (nb. questions on the on-line survey allow for comments and selection of options, please use that for response if possible)**

**1. Do you agree that any full-time setting providing education to children ought to be regulated and that what is “full-time” ought to be defined more clearly?  
[facility for comments]**

**2. Do you think that the department’s suggestion of 18 hours is the appropriate threshold for registration (and therefore regulation)? If not, what number of hours should be used or should there be no specified threshold? [facility for comments]**

**3. Do you agree that any hours threshold should be linked to attendance rather than a minimum amount of time spent on tuition (education would have to be provided for at least some of the time attended)? [facility for comments]**

**4. Do you think that registration should only be required if the provision takes place at least partially in usual school hours? [facility for comment]**

**5. If a ‘usual school hours’ criterion were to be used, what hours do you think should be defined as being ‘usual school hours’ – as proposed above or a different set of times?**

**6. Do you agree that the registration requirement should encompass any setting providing education and/or instruction to children of the specified age, and operating full time and during the specified hours, irrespective of the subject matter of what is taught? [facility for comment]**

**7. Which settings do you think should be expressly excluded on the face of any legislation from the scope of the revised registration requirement for independent educational institutions?[facility for comment]**

**8. Do you agree that any revised version of the registration requirement in primary legislation should contain power for subsequent changes to definitions in that version to be made by secondary legislation? If so, which definitions?  
[facility for comment]**

**9. Do you agree that in specified circumstances the hearing of an appeal against de-registration should be on the basis of judicial review principles rather than by way of a full merits review? [facility for comment]**

**10. If the way a court is to determine an appeal were to be modified as proposed, do you agree that the criterion relating to inspection cycles should be based on three inspections? [facility for comment]**

**11. Do you believe that the power to specify in regulations the particular standards used in applying the criteria should be unconfined, or instead be**

**restricted to certain of the categories (such as one or more of the types of standards specified in section 94(1) of the 2008 Act? If the latter, which categories? [facility for comment]**

**12. Do you agree that it is sufficient to give the proprietor an opportunity to make written representations, or do you believe that some further pre-decision requirement should be imposed to adequately protect the proprietor's rights (in addition to the actual appeal process)? [facility for comment]**

**13. Do you think there is any possible different way in which appeals should be determined against deregistration, which would achieve the same policy aim? [facility for comment]**

**14. Do you have any further comments on the general issue of appeal rights in relation to enforcement decisions?**

**15. Do you agree with the changes proposed for approval of material changes relating to provisions for pupils with SEN? [facility for comment]**

**16. Do you agree that the Secretary of State should be able to impose a relevant restriction for an unapproved material change? [facility for comment]**

**17. Do you agree that it should be possible for the Secretary of State to refuse approval for a material change, on the basis of other evidence about the school or proprietor, even if relevant standards are likely to be met by the school after the change is made? [facility for comment]**

**18. Do you have any comments on the conclusions set out in the published equalities log, UNCRC assessment and family test document?**



Department  
for Education

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