

EXPLANATORY MEMORANDUM TO

THE INDEPENDENT EDUCATIONAL PROVISION IN ENGLAND (PROVISION OF INFORMATION) AND NON-MAINTAINED SPECIAL SCHOOLS (ENGLAND) AND INDEPENDENT SCHOOL STANDARDS (AMENDMENT) REGULATIONS 2018

2018 No. 901

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Education and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 These Regulations replace, with a saving provision, the existing Education (Independent Educational Provision in England) (Provision of Information) Regulations 2010¹ (the 2010 Regulations). The Regulations set out the information which independent schools, or those persons wishing to register an independent school, must supply to the Secretary of State for Education at three specified points: in an application for registration of a school as an independent school, in an initial return normally made three months after such a school opens, and in an annual return. The Regulations impose new and updated provisions in respect of the information required.
- 2.2 The Regulations also make two further amendments. An amendment is made to the Non-Maintained Special Schools (England) Regulations 2015² (the 2015 Regulations) in respect of updating a reference to National Minimum Standards relating to residential special schools, and updates a reference to the Quality Standards that apply to such schools if they are also a children's home. Secondly, an amendment is made to the Education (Independent School Standards) Regulations 2014³ (the 2014 Regulations) in respect of the requirement for checks to be made for supply staff supplied by an employment business who are living or who have lived outside the United Kingdom.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

¹ S.I. 2010/2919 as amended by S.I. 2012/979 and S.I. 2014/2103

² S.I. 2015/728. Amendments were made to this S.I. but none are relevant.

³ SI 2014/3283. Amendments were made to this S.I. but none are relevant.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is England.

5. European Convention on Human Rights

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

6. Legislative Context

6.1 When the proprietor of an independent school applies for that school to be entered on the register of independent schools maintained by the Secretary of State under section 95 of the Education and Skills Act 2008 (c.25) ('the 2008 Act'), that proprietor must supply information prescribed by the Secretary of State under section 98 of that Act. These Regulations revise the information so prescribed.

6.2 The Secretary of State may request the proprietor of a registered independent school to provide particulars relating to that school under section 123 of the 2008 Act. Such information is requested at two points: in an initial return to be made by the proprietor of the school (usually three months after it opens); and in an annual return which takes the form of a census held annually, normally on the third Thursday of January. These Regulations revise the particulars so prescribed.

6.3 The 2015 Regulations make provision for the approval of non-maintained special schools and set out the requirements which must be met for a school to continue to be approved as a non-maintained special school. Paragraph 3 of the Schedule to the 2015 Regulations requires the Proprietor to have regard to, and paragraphs 4, 5 and 14 of that Schedule requires the Proprietor to comply with, the National Minimum Standards for residential special schools published under section 87C(1) of the Children Act 1989 (c.41) in November 2012, and if the school is also a children's home, with Quality Standards issued under the section 23 of the Care Standards Act 2000 in 2011. The effect of the amendments is to update these references so as to refer to the National Minimum Standards for residential special schools published in April 2015, and the Quality Standards made in April 2015.

6.4 The 2014 Regulations make provisions in respect of the standards that apply to independent schools. Part 4 of the 2014 Regulations set out the standards that have to be met in respect the checks carried out regarding the suitability of staff, supply staff, and members of proprietor bodies. The effect of the amendment is to have a new standard, which requires further checks to be undertaken in accordance with guidance issued by the Secretary of State where staff supplied to a school by an employment business is living or has lived outside the UK.

7. Policy background

What is being done and why?

7.1 These Regulations are in essence a consolidation with updating provisions and amendments to the 2010 Regulations and also make an amendment to the 2014 Regulations and an updating amendment to the 2015 Regulations. The provision in the 2010 Regulations governing the provision of information by schools are in essence being carried forward in these Regulations, with a few deletions from the

information required (for example, details in the school's annual return of a governing body which is not the proprietor body).

- 7.2 The main changes in respect of the information required to be supplied relate to the information required from proprietors of new independent schools seeking the registration of the school, or the proprietors of existing independent schools, at specified points. These include, in an application for a school to be registered, more details about members of the proprietor body such as their National Insurance numbers; and for an individual proprietor or chair of the proprietor body, an employment history and current photograph (Part 2 of the Schedule). The purpose of these requirements is to increase the efficacy of checks to be undertaken on these persons in considering whether the application should be approved. Other new requirements relating to applications include details of associated children's home registration, and contact details. Details of children's home registration, and contact details for the school are also now required in the annual return, as are National Insurance numbers for individual proprietors, and chairs or new members of the proprietor body (Part 4 of the Schedule). Updating provisions include a provision to clarify that applications can be made electronically (regulation 2). Although the regulations are to come into force on 1 September 2018, this will not have any immediate impact on schools since the regulations relate to information provided at points which differ throughout the year for each school, or is in January (for the annual census).
- 7.3 The two amendments being made to the 2014 Regulations and to the 2015 Regulations are included in these Regulations to avoid separate amending regulations. The Secretary of State makes Regulations under the Education Act 1996 setting out the conditions under which schools may be approved as Non-Maintained Special Schools. The 2015 Regulations require a proprietor to have regard to, in respect of approvals, and to continue to comply with, the National Minimum Standards for residential schools published in 2012 and where the school is also a children's home, the Quality Standards issued in 2011. Those two sets of standards have now been superseded, and the amendments contained in these Regulations update the references to National Minimum Standards⁴ and Quality Standards⁵ which were both issued in 2015. The purpose of this amendment is to update these references.
- 7.4 The 2014 Regulations prescribe standards that have to be met by independent schools. The current standards do not require that staff (teaching or non-teaching staff) supplied by employment businesses⁶ (such as an employment agency) to independent schools have additional checks undertaken if they are living or have lived outside the UK. Such staff that are employed directly by schools are already required to have further checks if the independent school standards are to be met. In such circumstances where staff have been supplied by an employment business, it may not be sufficient to rely on DBS checks and an enhanced criminal record certificate as the individual has spent time outside of the United Kingdom. The effect of the amendment is to ensure that additional checks by the employment business have been made, as appropriate, (in order to meet the standard) and the proprietor has received written notification from the employment business that such checks have been made,

⁴ <https://www.gov.uk/government/publications/residential-special-schools-national-minimum-standards>

⁵ <https://www.gov.uk/government/publications/childrens-homes-regulations-including-quality-standards-guide>

⁶ 'employment business' has the meaning given section 13(3) of the Employment Agencies Act 1973.

having regard to any guidance issued by the Secretary of State. Such guidance has been issued by the Secretary of State.⁷

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

9.1 These Regulations are essentially a consolidation of the 2010 Regulations with amendments. The Regulations also make an amendment to the 2014 Regulations and to the 2015 Regulations in order to avoid making three separate statutory instruments. There are no immediate plans to consolidate the 2014 Regulations or the 2015 Regulations.

10. Consultation outcome

10.1 The Department for Education published a consultation on the draft Regulations on 14 March 2018, closing on 5 June 2018. That consultation on these Regulations was part of a wider consultation that included drafts of proposed documents to be published by the Department for Education: guidance on the independent school standards, and a statement of enforcement policy for independent schools. A total of 6,586 online responses was received to the overall consultation, together with at least 5,000 further responses by email and hard copy. However, the vast majority of these respondents were concerned only with the two draft documents referred to above and included in the consultation. Apart from one general objection to increased administration and one point raised by a representative body for schools regarding a cross reference error in the consultation draft of the Regulations, only one substantive response to the draft Regulations was received. This response proposed further categories of information for inclusion in the regulations. One substantive change was made following consideration of the consultation responses. The Regulations now include a provision to ensure that when a school has premises at more than one location, details are provided at both the initial return and annual return.

10.2 In relation to the proposed amendments to be made in respect of Non-Maintained Special Schools and the independent school standards, the great majority of respondents made no comment. A handful of respondents made comments on them which opposed further regulation of independent schools as a general principle. The department conducted a direct targeted consultation on the 59 schools in the Non-Maintained Special School sector, and also consulted their representative body, the National Association of Special Schools. Two responses were received, which were supportive of making the change in respect of those schools. No comments were received which necessitated any change to the proposed wording of these parts of the Regulations.

11. Guidance

11.1 No guidance is necessary in relation to these Regulations as a whole. Schools will be notified by letter from the Department for Education when the Regulations are made,

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/550511/Keeping_children_safe_in_education.pdf (paragraph 114 *et seq*)

and given an overview of their effect. The appropriate existing guidance documents for schools published by the department will be revised to take account of changes made in respect of the information requirements: guidance on registering an independent school⁸; the department's guidance letter accompanying the form used for an initial return; and the guidance notes published annually to schools for the School Level Annual School Census held each January (the annual return).

- 11.2 No guidance is necessary in relation to the change which updates the reference to National Minimum Standards for residential special schools. In due course, planned non-statutory guidance on the independent school standards will include the guidance on those standards related to suitability checks and will incorporate appropriate references to the amendment made in relation to overseas checks for staff supplied by employment businesses.

12. Impact

- 12.1 The Department for Education has self-certified that the impact on business, charities or voluntary bodies falls below the £5m threshold for which a full Impact Assessment is required.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 A full Impact Assessment has not been prepared for this instrument because of the very low level of impact per business or charity.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses but the impact on them of information requirements is smaller to the extent that they are likely to need to supply less information in an initial return and an annual return than a larger business because of the smaller number of staff employed; and small businesses recruit fewer staff so are less affected by the requirements relating to staff who have lived overseas.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is to rely on a review clause.
- 14.2 A review clause is contained in the Regulations and applies to that part of the Regulations governing the provision of information by schools. It requires that a Report as required by the Small Business, Enterprise and Employment Act 2015 be prepared and be published. The first report must be published before the end of the period of five years beginning with the commencement date of the Regulations, and further reports at five year intervals.

15. Contact

- 15.1 Stephen Bishop at the Department for Education, telephone 01325 340440 or email: registration.enquiries@education.gov.uk can answer any queries regarding the instrument.
- 15.2 Peter Swift at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.

⁸ <https://www.gov.uk/government/publications/independent-school-registration>

- 15.3 Lord Agnew at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.
- 15.4 All documents cited can be obtained in hard copy or alternative formats on request from Independent Education and Boarding Team, Department for Education, Bishopsgate House, Feethams, Darlington DL1 5QE, except that hard copies of the guide to the quality standards are obtainable from Markets and Commissioning, Children in Care and Permanence, Department for Education, 3rd Floor, 2 St Paul's Place, Sheffield, S1 2FJ.