

**EXPLANATORY MEMORANDUM TO**  
**THE NON-MAINTAINED SPECIAL SCHOOLS (ENGLAND) AND INDEPENDENT**  
**SCHOOL STANDARDS (AMENDMENT) REGULATIONS 2021**

**2021 No. 1124**

**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 This instrument is intended to allow for more flexibility in how certain checks are carried out for which the Secretary of State is responsible and which are related to the suitability of (a) chairs of the governing bodies of non-maintained special schools (NMSS), (b) individual proprietors of independent schools (including free schools and academies) and alternative provision academies, and (c) chairs of proprietor bodies of independent schools and alternative provision academies. This instrument does not change the checks which need to be carried out (enhanced criminal records checks and checks on identity and the right to work in the United Kingdom) but instead makes changes to how the Secretary of State for Education may arrange for these checks to be made.

**3. Matters of special interest to Parliament**

*Matters of special interest to the Joint Committee on Statutory Instruments*

- 3.1 None.

**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 The schedule to [the Education \(Independent School Standards\) Regulations 2014](#) sets out the independent school standards (“the School Standards”). Educational institutions must meet the School Standards as a condition of registration as an independent school or as an alternative provision academy.
- 6.2 The schedule to Non-Maintained Special Schools (England) Regulations 2015 (“the 2015 Regulations”) performs a broadly similar function in establishing the requirements an NMSS must comply with for approval under Section 342(1) of the Education Act 1996.
- 6.3 Part 4 of the School Standards are concerned with the suitability of staff, supply staff and proprietors or school leaders and Part 1, paragraph (6) of the schedule to the 2015

Regulations is concerned with the suitability of the chair of the governing body. Both parts require the Secretary of State to make certain specified checks.

- 6.4 In summer 2020 changes were made to the School Standards by the [Education \(Independent School Standards\) \(Coronavirus\) \(Amendment\) Regulations 2020](#). These changes included revising the process set out in the School Standards for making applications for enhanced criminal record checks on individual proprietors, or chairs of proprietor bodies, of independent schools and alternative provision academies – checks for which the Secretary of State is responsible. Prior to the changes being made, such applications needed to be countersigned by the Secretary of State. With the changes made in 2020 this is no longer mandatory (though it is an option). As an alternative such applications can now be processed through a Disclosure and Barring Service (“DBS”) registered body which is authorised by the DBS to transmit such applications electronically.
- 6.5 This instrument makes similar amendments to the 2015 Regulations. This will allow the Department for Education’s approved supplier (or another registered body) to also carry out the required enhanced criminal records check on prospective chairs of the governing body of an NMSS.
- 6.6 In relation to the requirements in both the 2015 Regulations and the School Standards regarding identity checks and the right to work in the UK, the legislation is currently expressed in terms that it is the Secretary of State who is to make the checks confirming the individual’s identity and their right to work in the United Kingdom. The amendments will mean that it is no longer mandatory for the Secretary of State to carry out the applicable checks himself. The Secretary of State will be able, instead, to request another person to make a check, but subsequent to such a request being made, evidence needs to be provided so as to satisfy the Secretary of State as to the individual’s identity and their right to work in the UK.

## **7. Policy background**

### *What is being done and why?*

- 7.1 As explained above, the schedule to [the Non-Maintained Special Schools \(England\) Regulations 2015](#) and the School Standards establish the requirements that non-maintained special schools, independent schools (including free schools and academies) and alternative provision academies must meet as a requirement of approval or registration.
- 7.2 Both sets of legislation contain provisions regarding the suitability of leaders of certain educational institutions – either the chairs of the governing bodies of NMSS, or individual proprietors and chairs of proprietor bodies of independent schools and alternative provision academies. Certain specified checks must be carried out on these leaders - either before an institution is registered or before, or as soon as reasonably practicable after, they take up their post.
- 7.3 Part 4 of the School Standards requires, amongst other things, that the Secretary of State makes an enhanced criminal records check and checks confirming the identity and the right to work in the UK of individual proprietors of independent schools and alternative provision academies and of chairs of proprietor bodies of such institutions. In the case of checks on an individual proprietor, these checks must be made before the institution is entered in the register or, in the case of a registered institution, before or as soon as practicable after the individual takes over as proprietor. As regards the

carrying out of these checks on the chair of a proprietor body, the checks are to be carried out before, or as soon as reasonably practicable after, the individual concerned becomes chair. Part 1(6) of the schedule to 2015 Regulations requires that the Secretary of State makes the same checks (an enhanced criminal records check, an identity check and a right-to-work check) before a person may be appointed as chair of the governing body of an NMSS.

- 7.4 Both sets of legislation require that an application for an enhanced criminal record certificate is made relating to the individual proprietor or chair (as the case may be). The changes made in summer 2020, through the Education (Independent School Standards) (Coronavirus) (Amendment) Regulations 2020, (see paragraph 6.4 above) have allowed a new process to be followed by the Department when making the specified enhanced criminal records check on individual proprietors or chairs of proprietor bodies of independent schools (including free schools and academies) and alternative provision academies. Since summer 2020 all DBS checks related to these types of institution have been conducted through the Department for Education's approved third-party supplier. This supplier is a "registered body" of the DBS, meaning the service they offer and the process they follow meets the DBS's standards and requirements.
- 7.5 These changes were not made at the same to the identical provision in [the Non-Maintained Special Schools \(England\) Regulations 2015](#) meaning that applications for appointment to the chair of the governing body of these settings must still be made by the Secretary of State counter-signing with a 'wet ink' signature each hard-copy application form. The Department for Education is therefore operating two different processes to make enhanced criminal records checks. This is inefficient, and this amendment will allow a consistent approach to conducting the required check to be adopted across the Department for Education. There are fewer than 60 NMSS schools in England so the anticipated number of individuals impacted this change will be very small.
- 7.6 Further, both the School Standards and the 2015 Regulations have requirements related to checks confirming the identity of an individual proprietor or a chair of a proprietor body or a governing body (as the case may be). Currently, under both sets of legislation, these checks are required to be made by the Secretary of State. The amendments make provisions which allow the checks to be made by another person following a request by the Secretary of State – though where another person makes the check, evidence then needs to be provided to the Secretary of State to satisfy him that the identity of the individual has been verified. The Secretary of State will then need to notify the proprietor of the affected institution, that he is satisfied that their identity has been confirmed to a requisite standard. This change will allow the Department to introduce greater flexibility in the process followed to confirm the identity of individual proprietors and chairs, for instance by permitting the Department to engage with a professional third-party supplier to conduct these checks on its behalf.
- 7.7 Finally, checks are also required under both the Schools Standards and the 2015 Regulations to confirm that an individual has the right to work in the UK. As with the changes related to how the Department conducts identity checks, these amendments will allow these checks to be made by another person instead of by the Secretary of State (though the changes retain this option). Where these checks are carried out by another person, evidence again will need to be provided to the Secretary of State that

satisfies him that the individual concerned has the right to work in the United Kingdom and the Secretary of State to provide a notification of this.

- 7.8 These amendments will have the effect of introducing greater flexibility in how the Secretary of State may establish the right to work in the UK for individual proprietors and chairs.

## **8. European Union Withdrawal and Future Relationship**

- 8.1 This instrument does not relate to withdrawal from the European Union or trigger the statement requirements under the European Union (Withdrawal) Act

## **9. Consolidation**

- 9.1 There are no current plans to consolidate this legislation.

## **10. Consultation outcome**

- 10.1 These are technical amendments intended to change how the Department goes about fulfilling existing requirements. There will be minimal noticeable impact, and no additional burdens on those currently subject to the required checks. For that reason, no consultation was conducted.

## **11. Guidance**

- 11.1 Non-statutory guidance is already made available to prospective leaders of independent schools to assist them in understanding the process that should be followed to enable the enhanced criminal records checks and identity checks to be carried out. Once this amendment is made and the same process for conducting criminal records checks can be followed by chairs of NMSS governing bodies this guidance will also be shared with them.

## **12. Impact**

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies. Non-maintained special schools are usually run by charities. There are fewer than 60 such schools in England. Prospective chairs of the governing bodies of these schools will be the only group impacted by changes as to how the Department may conduct enhanced criminal records checks.
- 12.2 The practical impact on this group will be that the process followed by this cohort for the purpose of conducting the required enhanced criminal records check will be different than at present. Instead of using a hard-copy application form to conduct the required DBS check these individuals will be contacted by the Department's professional, third-party supplier and guided through that company's process.
- 12.3 The changes as to how the Department conducts identity checks and right-to-work checks will have no impact on the process followed by proprietors of independent schools and alternative provision academies or the chairs of the governing body of an NMSS.
- 12.4 There is no, or no significant, impact on the public sector.
- 12.5 A full Impact Assessment has not been prepared for this instrument because these changes are technical in nature and introduce no new obligations on any identified groups, beyond the small number of prospective chairs of governing bodies of NMSS

who will experience a different process for having the same check made on them. A full impact assessment would therefore be disproportionate.

**13. Regulating small business**

- 13.1 Some independent schools and non-maintained special schools will be small businesses, but it is anticipated that there will be no significant impact on these businesses.

**14. Monitoring & review**

- 14.1 These are technical amendments intended to facilitate how the Department carries out existing regulatory functions. No review of these is therefore planned. A wider review of the School Standards, including the checks carried out in relation to independent school proprietors, is planned.
- 14.2 The instrument does not include a statutory review clause.

**15. Contact**

- 15.1 Eliot Barrass at the Department for Education Telephone: 0191 820 1301 or email: [eliot.barrass@education.gov.uk](mailto:eliot.barrass@education.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Peter Swift, Deputy Director for Independent Education and Boarding Team at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Baroness Barran at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.