Dear Sir/Madam

The Independent Educational Provision in England (Prohibition on Participation in Management) Regulations 2014

I am writing in response to the letter the Committee received from the independent schools council (ISC) on the 28th July (attached to the email for your information).

We do not accept the criticism that the ISC suggestions have not been considered by the Department in the response to consultation. We also do not accept the broader criticisms of the drafting and we explain why in more detail below.

Attached for your information is a link to the Consultation Response. The first substantive issue the ISC raise is the ‘circular nature of the test’, which we address on pages 11-12. The second substantive issue the ISC raise is the ‘fully subjective framework’, this is addressed at various points in the response, most notably on pages 8-12. The third substantive issue raised by the ISC is the Statutory Instrument Practice Manual (SIPM), which is addressed on pages 9-10. Of course in a consultation response document the Department cannot go into great detail and address every single point made by every respondent. I do think however, that the Department has addressed the main thrust of the ISC concerns and in particular why the regulations in some instances remain unchanged following consultation.

We have made changes to other parts of the regulations based on respondents'
comments. Indeed regulation 2(5)(c) that the ISC quote in their letter has been amended to replace ‘so egregious’ to ‘so inappropriate’ based on comments from the ISC and other respondents.

I also want to make clear that I shared the ISC’s comments (and of course the comments of all respondents) with our Ministers following the consultation. As such Ministers were fully informed when determining which areas of the regulations would change and which would remain the same.

In summary I would say that the Department considered the ISC response in great detail and the regulations were changed to reflect various comments, not only from the ISC, but also from other respondents. However, changes were not made as a result of some ISC comments, either because we did not agree with them, or because having considered the arguments, we chose not to make changes. This is because we considered the original drafting better met our policy goal and at the same time the guidance of the SIPM.

For your information I have provided a summary of the Department’s arguments as to why the regulations haven’t changed with regards to the specific points that the ISC raise.

1. The circular nature of the test

Section 128 gives the Secretary of State power to direct that a person may not take part in the management of an independent school on grounds connected with their suitability. The regulations prescribe those grounds. They set out a two-stage test for the Secretary of State to apply in deciding whether to make such a direction. The first limb of the test is broadly objective, and applies where a person has been convicted of a “relevant offence”, (or caution or finding) or engaged in “relevant conduct”. The second limb is broadly subjective (whether in the opinion of the Secretary of State the person is “unsuitable to take part in the management of an independent school”).

The ISC appear to take issue with two elements of the two-stage test. Their first complaint is in relation to the definition of “relevant offence”. ISC complain that regulation 2(2) (“an offence is relevant if it is relevant to a person’s suitability to take part in the management of a school”) makes the first limb of the test
subjective. The second issue relates to regulation 2(5)(c), which contains one element of the definition of “relevant conduct” (“conduct which is so inappropriate that, in the opinion of the Secretary of State, it makes a person unsuitable to take part in the management of a school”). The Department doesn’t accept this criticism. In relation to the first point, it is correct that there is an element of subjectivity in determining whether an offence is “relevant”. This approach echoes that set out in section 141B of the Education Act 2002. In that provision Parliament gave the Secretary of State power to make a prohibition order in relation to teachers who have committed a “relevant offence”, which is defined as “a criminal offence other than one having no material relevance to the person’s fitness to be a teacher”. We do not consider that there is anything unlawful or otherwise unsatisfactory in these approaches.

In relation to the second point, the two-limbed test has both objective and subjective elements. First, the Secretary of State would have to consider whether a person had engaged in conduct which is so inappropriate that in the opinion of the Secretary of State it makes a person unsuitable to take part in the management of a school. Second, the Secretary of State would have to consider whether, because of that conduct, she considered that the person is unsuitable to take part in the management of a school. The regulation does give the Secretary of State a degree of discretion, but that discretion is confined. It would only be rational and proportionate for the Secretary of State to issue a direction on this basis in a very limited number of cases; and in any event, an individual would have the right to make representations seeking variation or revocation of a direction, and ultimately a right of appeal to the First-tier tribunal.

2. Fully subjective framework

The Department doesn’t accept this criticism. As I set out above the Department believes the first part of the test is a broadly objective one with the grounds set out in the regulations. We do accept that the grounds are broad. The regulations are drafted in this way to give the Secretary of State discretion to meet our policy goal of ensuring that unsuitable people cannot access management positions in independent schools. We address the technicalities of this point in bullet three below.
From a policy perspective the aim is to ensure the Secretary of State has sufficient powers whilst at the same time giving a good indication of the types of conduct that will lead to a bar. Based on past experience we expect the majority of cases will be covered by regulation 2(5)(a) and (b). However by providing the “so inappropriate” grounds at 2(5)(c) the regulations ensure that serious cases, that may present significant risk to children’s education and welfare, don’t slip through the barring regime because they don’t fall under one of the other more specific grounds. The regulations are deliberately not overly prescriptive when it comes to “relevant conduct”. If we issued a list of examples of “relevant conduct” there is a danger that this might be seen as exhaustive, or alternatively as automatically leading to a bar – in other words fettering discretion. The Department believes it is best for the Secretary of State to be able to consider each case on its merits and decide based on the evidence if a bar is a suitable and justifiable cause of action. The Secretary of State will of course exercise the s.128 powers in accordance with normal public law principles (including human rights law). There is also a clearly defined appeal process to the First-tier tribunal where the Secretary of State’s barring decisions will be held to account.

3. The SIPM

The Department doesn’t accept this criticism. Paragraph 2.15.2 of SIPM sets out the Joint Committee on Statutory Instruments’ view that “delegated legislation itself should be detailed, specific and self-explanatory and should not depend on the exercise of ministerial or departmental discretion unless provision to that effect is expressly contained in the enabling Statute”. In this case, the primary legislation (the enabling Statute) does envisage the Secretary of State exercising discretion when making a direction under s.128 otherwise s.128(2) would not allow her to prescribe the grounds. As Parliament recognises, it is not sensible to attempt to precisely set out in law all of the possible circumstances in which a person should be prohibited from taking part in the management of an independent school. It necessarily involves some degree of judgment depending on the context and particular circumstances.

In any event, the regulations are as specific as possible given the policy aims. They set out the several bases on which a direction may be made. Directions based on a simple list of offences / professional misconduct could lead to
arbitrary outcomes where the Secretary of State is pressured to make a direction barring people when, considering the facts of the individual case, a bar may not be appropriate. Alternatively, if the regulations provided that a person could be prohibited from managing an independent school if the Secretary of State thinks that a person is unsuitable to do so – that would arguably be vague/ unspecific. The Department believes it has struck the right balance between the two ends of this spectrum in the regulations. The First-tier tribunal provides a formal test on inappropriate use of the power.

4. Other disqualification powers

There are of course numerous disqualification powers in primary legislation and we considered a good many of them when drafting the regulations. We appreciate the suggestions that the ISC made with regards to how other legislative frameworks might help improve the regulations.

However, we have drafted the regulations to meet our specific policy goals and as set out above believe we have done this in a reasonable way that meets our policy objectives whilst ensuring the powers that are available to the Secretary of State are appropriate and meet the requirements of the SIPM.

I trust you will find this information helpful when considering the regulations in relation to the concerns raised by the ISC. Please don’t hesitate to contact me if you require any further clarification.

Yours faithfully

Peter Swift

[Signature]

Deputy Director
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