



Policy statement: prosecuting unregistered independent schools

Introduction

The Secretary of State for Education is the regulator of independent schools in England and maintains a register of these institutions. The registration procedure is set out in sections 98 and 99 of the Education and Skills Act 2008 ('ESA 2008'). Once a school is registered, the Secretary of State has a range of powers available to regulate the school.

An independent school is a school that provides full-time education for five or more pupils of compulsory school age, or for one or more pupils of that age who are looked after by a local authority or have a statement of SEN or an Education, Health and Care Plan, and which is not a maintained school or a non-maintained special school¹.

The legal definition of "independent school" in the Education Act 1996 refers to a school that is providing "full-time" education. Institutions that provide less than full-time education do not come under the definition. There is no legislative definition of "full-time education", but the independent school registration pack² provides information on relevant factors that are taken into account by the Department for Education (The Department) when reaching a view on whether "full-time" education is, in fact, being provided.

It is a criminal offence for a person to conduct an independent school that is not registered (see section 96(2) of the ESA 2008³). "Person", because of the Interpretation Act 1978, covers not only natural persons but also incorporated bodies (such as companies) and unincorporated bodies (for example, some trusts). Ofsted inspectors have powers under section 97 of the ESA 2008 to enter premises to investigate the offence in section 96(2) of the ESA 2008 and if on investigation Ofsted consider there is evidence that an offence has been committed it may refer the matter to the Crown Prosecution Service (CPS) for it to decide whether it will pursue a prosecution. The Secretary of State's consent is required before any prosecution may be initiated for it (see section 134 of the ESA 2008). This policy statement sets out (amongst other things) the Secretary of State's approach to taking decisions about whether to grant consent under section 134 to a prosecution for the offence of conducting an unregistered independent school, although each such decision will be considered on a case-by-case basis.

¹ The term "independent school" in the ESA 2008 has the same meaning as in the Education Act 1996 (see sections 92(1) and 168(2) and (3) of the ESA 2008 and sections 2 to 4 and 463 of the Education Act 1996

² <https://www.gov.uk/government/publications/independent-school-registration>

³ See also how section 92(1) of the ESA 2008 defines "independent educational institution" to include "independent school"

Procedures

The Department and Ofsted become aware of suspected unregistered independent schools in a number of ways, such as:

- Reports from the police;
- Reports from local authorities;
- Complaints from members of the public or other schools;
- Media (TV & newspaper articles, leaflets etc.); and
- Information arising out of Ofsted inspection activity.

For any possible unregistered independent school, either the Department and/or Ofsted will take immediate steps to look into or investigate whether the institution is operating unlawfully.

An inspector or inspectors from Ofsted may decide to make an unannounced inspection of premises under section 97 of the ESA 2008, in order to investigate whether an unregistered independent school is being conducted there and to establish the identity of those responsible. Information about how Ofsted inspectors conduct such inspections is set out in [Ofsted's Handbook for conducting inspections of unregistered schools](#).

If an Ofsted inspector has reasonable cause to believe in the course of such an inspection that an institution is being conducted unlawfully – i.e. it is an unregistered independent school, they will:

- issue a warning notice, which sets out that conducting an independent school is a criminal offence and that a criminal investigation is being undertaken by Ofsted. The notice will also state that inspector(s) from Ofsted may carry out further unannounced inspections and that the proprietor and/or the person responsible for the setting may be invited to attend a voluntary interview under caution;
- soon after, share information gathered in this investigation with the Department – to assist the Department in determining what action to take, if any, in relation to the setting such as that set out in para 9;
- if appropriate, notify the relevant local authority to enable it to consider and take what further action it considers appropriate in respect of children attending the setting, which could include following up on the safety and welfare of children, or helping to secure alternative full-time education⁴; and
- notify other relevant agencies as appropriate.

⁴ Ofsted will notify the relevant local authority of any safeguarding concerns identified during an inspection whether or not they consider the setting to be operating as an unregistered independent school

Following Ofsted notifying the Department that an inspector has concluded that there is reasonable cause to believe that an institution is an unregistered independent school, the Department normally will write to the proprietor (or someone else who appears responsible):

- explaining that it is a legal requirement to register as an independent school;
- referring them to the guidance on gov.uk⁵ on how registration applications can be made;
- asking them to confirm by a specified date whether any steps have or are being taken to modify the nature or extent of the education being provided by the institution premises; and
- warning that anyone who conducts an unregistered independent school commits an offence and is liable to prosecution.

Ofsted will be responsible for carrying out the investigation of cases about unregistered independent schools, which may also include further inspections, but will ordinarily consult with the Department after any initial inspection under section 97 of the ESA 2008 in relation to an institution, on whether to proceed further with a view to preparing a case for prosecution in relation to that institution. In addition, Ofsted's decisions on whether cases are to be referred to the CPS for a charging decision will ordinarily be made after consultation with the Department.

Where Ofsted refer a case to the CPS and the CPS decides it is appropriate to charge a person with the offence under section 96(2) of the ESA 2008, the case will then be referred to the Secretary of State to consider whether to grant consent, under section 134 of that Act, to a prosecution. The CPS will only decide that it is appropriate to charge if satisfied, in accordance with the [Full Code Test for Crown Prosecutors](#), that there is sufficient evidence to provide a realistic prospect of conviction and that a prosecution is required in the public interest.

Factors to be considered

The Secretary of State's consideration of whether to grant consent to a prosecution for the offence under section 96(2) of the ESA 2008 will depend on the particular circumstances of each case. However, in each case, the Secretary of State will not grant consent unless he also has concluded that the evidence is sufficient and that a prosecution is in the public interest.

Public interest considerations include, but are not limited to:

- The level of risk to the welfare of children; the greater the risk, the swifter the need to investigate and take action which could include prosecuting. Welfare considerations include not only the safety and physical wellbeing of children, but also whether they are, or at risk of, being exposed to extremism, including conduct which is aimed at undermining the fundamental British values of democracy, the rule of law, individual liberty, and mutual respect and tolerance of those with different faiths and beliefs;

⁵ <https://www.gov.uk/independent-school-registration>

- Evidence that the proprietor (or other person who appears responsible) is aware of the regulatory requirements⁶ but has sought to avoid them or ignore them. For example, if a setting continues to operate as an independent school following either a warning notice from Ofsted (see paragraph 8 above) or a letter of the type described above in paragraph 9);
- The nature of the engagement of the proprietor (or others involved in the school) with the Department over registering the school in question;
- Whether the Department has any concerns about the suitability of the proprietor or staff to be involved in providing education; and
- Whether the setting was previously registered but has continued to operate or started to operate again after being subject to enforcement action taking it off the register.

Action that might be taken by other agencies in respect of unregistered independent schools

Although the Secretary of State is the regulator of independent schools and has the power to decide, in effect, whether a prosecution for the offence under section 96(2) of the ESA 2008 may be initiated, other regulatory agencies may also have a role to play. In some cases, it might be possible for other agencies to take action to stop an unregistered independent school from operating or disrupt its operation and the Department or Ofsted will liaise with other agencies as appropriate. For example, where there are child protection concerns, the local authority (child protection services) may have a role to play in respect of individual pupils and their families; if there are serious fire or health and safety hazards, a fire and rescue authority or the Health and Safety Executive can be asked to inspect; or the Charity Commission may have a role if the setting is a registered charity. The proprietor(s) or others might also be referred to the Disclosure and Barring Service to consider whether they should be prevented from working with children in the future. Even if action by other agencies has the effect of shutting down an unregistered independent school, it may still be appropriate to pursue a prosecution under section 96(2) of the ESA 2008.

Equality considerations

In the exercise of his regulatory powers concerning independent schools, the Secretary of State must (under section 149 of the Equality Act 2010) have due regard to the need to:

- eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010;

⁶ In addition, complying with the standards set out in the Education (Independent School Standards) (England) Regulations 2014 (SI 2014/3283) is a condition of registration and failure to comply with those standards can result in deregistration of an independent school. Before a school is de-registered, inspectors from Ofsted will have inspected the school against the standards and a report supplied to the proprietor. Similarly, an inspection is carried out relating to the standards and a report supplied to the proprietor in connection to an application to register a school. If a school remains open despite a decision to deregister it or is opened despite a decision not to register it, then this will be in circumstances where the standards have not been complied with but the choice has been made by the proprietor to open it or keep it open

- advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
- foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Therefore, the Secretary of State's decision-making about whether to grant consent under section 134 of the ESA 2008 to a prosecution will consider those matters, if they are engaged in a particular case, amongst other factors, when reaching a decision.