



Department
for Education

Prohibiting unsuitable individuals from managing independent schools

**Guidance for independent schools,
academies, free schools and local-
authority-maintained schools**

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Summary

This is guidance from the Department for Education (the “department”). The guidance sets out how, amongst other things, the Secretary of State intends to exercise his powers under section 128 of the Education and Skills Act 2008 (“Section 128” of the “2008 Act”).¹

Section 128 provides the Secretary of State with the power to issue a direction prohibiting an unsuitable individual from participating in the management of an “independent educational institution”.² The Independent Educational Provision in England (Prohibition on Participation in Management) Regulations 2014³ (the “2014 Regulations”) are made (principally) under Section 128 and Section 129 of the 2008 Act, and these prescribe the grounds and procedure for giving a Section 128 direction, as well as the grounds upon which a direction can be revoked or varied and contain provisions on appeals.

The prescribed grounds in 2014 Regulations for making a Section 128 direction are expressed by reference to a person being unsuitable to take part in the management of an “independent school”, which includes Academy schools and alternative provision Academies. By virtue of other legislation, a direction under section 128 also has the effect of disqualifying a person from being a governor of a maintained school.⁴

This guidance is non-statutory and helps decision makers decide whether to issue a direction under Section 128. It should also provide helpful information for any person(s) or organisation(s) who might wish to make a Section 128 referral to the department under

¹ Read [Section 128 of the Education and Skills Act 2008](https://www.legislation.gov.uk/ukpga/2008/25/contents) (https://www.legislation.gov.uk/ukpga/2008/25/contents).

² However, below we use the term “independent school” throughout as shorthand for all the institutions in relation to which the regime for making management prohibitions applies. These are independent schools (which includes Academy schools) as well as alternative provision Academies.

By way of explanation, section 128 of the Education and Skills Act 2008 gives the Secretary of State the power to direct that a person may not take part in the management of an “independent educational institution”. The definition of “independent educational institution” is to be found in section 92 of the Education and Skills Act 2008 (“the 2008 Act”) to cover two categories of institutions: (a) independent schools and (b) certain institutions providing part-time education. However, given how the 2008 Act has been commenced to date, the power to make directions under section 128 does not apply in relation to the second category of institution. In addition, the effect of section 93A of the 2008 Act is that it applies the 2008 Act (including section 128) so that it captures alternative provision Academies even if they are not independent schools. On the other hand, the Independent Educational Provision in England (Prohibition on Participation in Management) Regulations 2014 (“the 2014 Regulations”) use, instead, the term “independent school”. “Independent school” is defined in the 2014 Regulations to include those alternative provision Academies that are not independent schools. The effect of this definition is that the 2014 Regulations, in referring to “independent school”, encompass all those institutions that are also currently treated as “independent educational institutions” under section 128 – i.e. independent schools (including Academy schools) and alternative provision Academies.

³ The [Independent Educational Provision in England \(Prohibition on Participation in Management\) Regulations 2014](https://www.legislation.gov.uk/uksi/2014/1977/regulation/1/made) (https://www.legislation.gov.uk/uksi/2014/1977/regulation/1/made)

⁴ School Governance (Constitution) (England) Regs 2012 as amended by the School Governance (Constitution and Federations) England (Amendment) Regulations 2014.

the process set out under the 'How section 128 action is taken forward' section of our guidance.

Expiry or review date

The guidance will be kept under review and updated as necessary.

Who is this guidance for?

Although the Secretary of State may make a direction prohibiting any person from participating in the management of an independent school, we envisage that this guidance will be of particular relevance to:

- Proprietors, governing bodies, senior leaders, and school staff of independent schools (which includes academies, alternative provision academies, and free schools⁵). In the case of Academy schools, free schools and alternative provision Academies, the proprietor will be the academy trust.
- Individuals who have been issued with a notice that the Secretary of State is minded to issue, or who have been issued with, a direction under Section 128
- Governors of maintained schools, as an individual is disqualified from being a governor of a maintained school if they are subject to a Section 128 direction.
- Any person(s) or organisation(s) who would like to make a Section 128 referral to the department.

⁵ The term "academy trust" refers to the company limited by guarantee with charitable status established in accordance with section 12 of the Academies Act 2010. The directors of the company are commonly known as "academy trustees". In Church academies, however, they are referred to as "directors" and the term "trustees" is reserved for those on the board of the separate trust that owns the land.

Introduction

The department, on behalf of the Secretary of State, regulates, under the Education and Skills Act 2008, independent schools in England, which includes private schools, academies, and free schools. The department will take robust action to protect and create accountability in respect of the use of public funds and the provision of education in England's schools. A direction under Section 128 may be given in respect of a person only on one or more prescribed statutory grounds connected with the suitability of persons to take part in the management of an independent school.

This guidance provides information about section 128 and the associated 2014 Regulations, including which factors the Secretary of State may take into account when deciding whether an individual's conduct makes them unsuitable to take part in the management of an independent school. Whilst this guidance does not provide an exhaustive list of the types of conduct or offences that may lead to a section 128 direction, it should be a useful reference for:

- covering the types of conduct and offences that the Secretary of State may regard as rendering someone unsuitable to participate in the management of an independent school; and
- the process that the department will follow in order to decide whether to issue a direction.

Prohibiting unsuitable individuals from management roles

Under section 128, and the 2014 Regulations, the Secretary of State may issue a direction prohibiting a person from participating in the management of an independent school, where he or she considers that that person is unsuitable to do so. This could be as a consequence of being convicted of, or cautioned for, an offence; being subject to a relevant finding in respect of an offence; or having engaged in relevant conduct.⁶

A direction can prohibit an individual from taking any part in the management of an independent school or allow them to do so only in specified circumstances or subject to specified conditions.

There is no exhaustive list of roles that might be regarded as 'management' for the purpose of determining what constitutes management in independent schools. The department's view is that roles involving, or very likely involving, management of a school include (but are not limited to) headteachers, principals, deputy/assistant headteachers,

⁶ The grounds on which a section 128 direction may be given are set out in [How prohibitions directions are issued](#) of this guidance.

governors and trustees. It also covers those employed by independent schools in positions such as chief financial officers and chief operating officers. It is important to note that the person's job title is not the determining factor and whether other teaching posts with additional responsibilities count as 'taking part in management' will depend on the facts of the case.

It is the department's intention that a section 128 direction will ordinarily only be used in cases where the individual has worked in a management position or is likely to hold management positions in the future and has behaved in such a way as to undermine their suitability to be involved in the management of an independent school. There is no requirement that the conduct, offence, finding or caution in question must have occurred at an independent school for the Secretary of State to consider making a section 128 direction against an individual. It may take place or have taken place outside of this context if the effect of the conduct, offence, finding, or caution is such that trust, or confidence cannot be held in the individual's ability or propriety to manage an independent school.

A proprietor of an independent school will be in breach of the Education (Independent School Standards) Regulations 2014 (the "Independent Schools Standards")⁷ if, amongst others, a member of staff or they as an individual proprietor carries out work or intends to carry out work contrary to a section 128 direction⁸. A breach of the Independent School Standards means that the Secretary of State can take regulatory action against the proprietor. This might involve requiring an action plan from a proprietor setting out how the breach will be remedied, or enforcement action if the breach is not resolved.⁹ If a person subject to a section 128 direction carries out certain types of work contrary to the direction at an independent school, the Secretary of State may remove the school from the register of independent schools.¹⁰ In order to approve an independent school for registration, the Secretary of State needs to be satisfied that the Independent School Standards are likely to be met at the school. Therefore, where it appears unlikely that any of the requirements in the Independent School Standards related to staff, supply staff and

⁷ Read the [Education \(Independent School Standards\) Regulations 2014](https://legislation.gov.uk/uksi/2014/3283/schedule/made) (https://legislation.gov.uk/uksi/2014/3283/schedule/made).

⁸ Read paragraphs 18 to 20 of the [Schedule to the Education \(Independent School Standards\) Regulations 2014](https://www.legislation.gov.uk/uksi/2014/3283/schedule/made) (https://www.legislation.gov.uk/uksi/2014/3283/schedule/made).

⁹ Read paragraphs 18 to 20 of the Schedule to the [Education \(Independent School Standards\) Regulations 2014](https://www.legislation.gov.uk/uksi/2014/3283/schedule/made) (https://www.legislation.gov.uk/uksi/2014/3283/schedule/made). This is under sections 114-117 of the [Education and Skills Act 2008](https://www.legislation.gov.uk/ukpga/2008/25/contents) (https://www.legislation.gov.uk/ukpga/2008/25/contents).

¹⁰ This is by virtue of section 119 of the Education and Skills Act 2008 (https://www.legislation.gov.uk/ukpga/2008/25/section/119) and regulation 3(m) of the [Education \(Independent Educational Provision in England\) \(Unsuitable Persons\) Regulations 2009](https://www.legislation.gov.uk/uksi/2009/1633/regulation/3/made), (https://www.legislation.gov.uk/uksi/2009/1633/regulation/3/made).

proprietors not carrying out work in contravention of a section 128 direction will be met, an application for registration will not be granted.

Where it is appropriate, the department may also refer findings about an individual's conduct and suitability to other authorities and regulators, such as the Charity Commission and the Insolvency Service. The department and the Teaching Regulation Agency, an executive agency of the department, also work collaboratively when considering any individual for either a section 128 direction or for a teaching prohibition order.¹¹ While these are separate and distinct regimes, where one is concerned with regulating the conduct of those carrying out teaching work and the other with regulating those in management positions, there may be some instances where an individual is being considered under both regimes at the same time or consecutively, in relation to the same set of circumstances. The Secretary of State may also rely on evidence that is collected as part of a TRA investigation into misconduct when considering whether to issue a section 128 direction. This forms part of the department's robust and collaborative enforcement strategy.

¹¹ Read the [Teachers' Disciplinary \(England\) Regulations 2012](https://www.legislation.gov.uk/uksi/2012/560/contents/made) (<https://www.legislation.gov.uk/uksi/2012/560/contents/made>) and [Teacher misconduct: the prohibition of teachers guidance](https://www.gov.uk/government/publications/teacher-misconduct-the-prohibition-of-teachers--3) (<https://www.gov.uk/government/publications/teacher-misconduct-the-prohibition-of-teachers--3>).

How prohibition directions are issued

Grounds for issuing a direction

The grounds on which a section 128 direction may be given are set out in regulation 2(1) of the 2014 Regulations¹² and are that:

- a) the person:
 - i. has been convicted of a relevant offence;
 - ii. has been given a caution in respect of a relevant offence;
 - iii. is subject to a relevant finding in respect of a relevant offence; or
 - iv. has engaged in relevant conduct; and
- b) because of that conviction, caution, finding or conduct, the Secretary of State considers that the person is unsuitable to take part in the management of an independent school¹³.

The 2014 Regulations, in effect, set out a two-limb test to follow when deciding whether a ground has been met. The first limb is whether there has been a relevant conviction, caution, finding or conduct that may have occurred or been made. The second limb is whether the Secretary of State considers that, because of that conviction, caution, finding or conduct, the individual is unsuitable to take part in the management of an independent school¹⁴. The first conduct can have taken place before the 2014 regulations came into force.¹⁵

The assessment of suitability has a forward looking element in determining whether the individual is suitable to be involved in the management of independent schools. The Secretary of State will consider all the circumstances of the case. For example, the person's explanation for the conduct, the person's credibility, integrity and trustworthiness and information related to the person's understanding of the duties which apply to independent schools (both at the time of the conduct and in the response to the minded

¹² Regulation 2 of the [Independent Educational Provision in England \(Prohibition on Participation in Management\) Regulations 2014](https://www.legislation.gov.uk/uksi/2014/1977/regulation/2/made) (https://www.legislation.gov.uk/uksi/2014/1977/regulation/2/made).

¹³ As explained in footnote [3] above 4, "independent school" is defined in the 2014 Regulations to include those alternative provision Academies that are not independent schools. The effect of this definition is that the 2014 Regulations, in referring to "independent school", encompass all those institutions that are also currently treated as an "independent educational institutions" under section 128.

¹⁴ Regulation 2(1)(b) of the [Independent Educational Provision in England \(Prohibition on Participation in Management\) Regulations 2014](https://www.legislation.gov.uk/uksi/2014/1977/regulation/2/made) (https://www.legislation.gov.uk/uksi/2014/1977/regulation/2/made).

¹⁵ *Alam v Secretary of State for Education* 6 June 2017 [2015] 2553.INS at [227].

to bar notice). In addition, an assessment will be made of the future risk that the persons poses (including the risk the person might engage in further conduct), and the interests of children will be taken into account, as well as the consequences for the person's career prospects if they are barred from management of an independent school in whole or in part, any mitigating features or other matters raised by the person in response to the minded to bar notice.

Relevant offence

The 2014 Regulations define a relevant offence as an offence which is relevant to the person's suitability to take part in the management of an independent school. The issue of whether the individual has been convicted of or cautioned for an offence is a question of fact. Alongside establishing the fact of the conviction/ caution, the department will consider whether it is relevant to the person's suitability to take part in the management of an independent school. Non exhaustive examples of a relevant offence include sexual offences or dishonesty offences. A relevant offence can include offences which took place prior to a person becoming involved in the management of an independent school. If the department receives or becomes aware of information that would bring into question an individual's suitability, such as criminal convictions, as part of suitability checks, or through other means, the department will consider the appropriateness of taking section 128 action.

Factors which the department will take into account when considering whether an offence is relevant include: what the offence was; the facts and circumstances of the offence; when the offence was committed; when the individual was convicted; the nature of any sentence; and any sentencing remarks.

Subject to a relevant finding

A person is subject to a 'relevant finding', as set out in regulation 2(4), in respect of a relevant offence, if:

- a) the person has been found not guilty of the offence by reason of insanity;
- b) the person has been found to be under a disability and to have done the act charged against him or her in respect of the offence; or
- c) under the law in force in a country outside the United Kingdom, a court has made a finding equivalent to that described in sub-paragraph a) or b).¹⁶

¹⁶ Regulation 2(4) of the [Independent Educational Provision in England \(Prohibition on Participation in Management\) Regulations 2014](https://www.legislation.gov.uk/uksi/2014/1977/regulation/2/made) (<https://www.legislation.gov.uk/uksi/2014/1977/regulation/2/made>).

Relevant conduct

Regulation 2(5) defines 'relevant conduct' as conduct which:

- a) 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;
- b) has been found to be in breach of professional standards by a professional body;
or
- c) is so inappropriate that, in the opinion of the appropriate authority, it makes a person unsuitable to take part in the management of an independent school.¹⁷

An individual's conduct may constitute any one or more of the types of conduct set out in regulation 2(5). For example, it may be established that an individual has intended to undermine one or more of the fundamental British values and also that their conduct is so inappropriate that it makes them unsuitable etc. Nevertheless, any one of these types of conduct may be sufficient for the Secretary of State to issue a section 128 direction.

Conduct aimed at undermining fundamental British values

The department may issue a Section 128 direction to an individual if their conduct is found to undermine the fundamental British values of democracy, the rule of law, individual liberty and mutual respect and tolerance of those with different faiths and beliefs. The concept of fundamental British values is built into the Independent Schools legislative framework in paragraphs 2 and 5 of the Schedule to the Education (Independent School Standards) Regulations 2014¹⁸. There is published guidance from the Secretary of State regarding the obligations in these Regulations.¹⁹ Proprietors of independent schools are required (i) to ensure that the curriculum does not undermine fundamental British values and (ii) to actively promote fundamental British values as part of the spiritual, moral, social and cultural development of pupils.

Conduct aimed at undermining fundamental British values might take a number of different forms and is not limited only to conduct within the school setting or conduct which occurs during the management of an independent school. Conduct outside of the school setting, or outside the context of school management, may be aimed at

¹⁷ Regulation 2(5) of the [Independent Educational Provision in England \(Prohibition on Participation in Management\) Regulations 2014](https://www.legislation.gov.uk/ukSI/2014/1977/regulation/2/made) (https://www.legislation.gov.uk/ukSI/2014/1977/regulation/2/made)

¹⁸ Paragraphs 2(1)(b)(ii) and 5 of the Schedule to the [Education \(Independent School Standards\) Regulations 2014](https://www.legislation.gov.uk/ukSI/2014/3283/made) (https://www.legislation.gov.uk/ukSI/2014/3283/made).

¹⁹ Read 2.4, 2.34, 3.3-3.7 of the [independent school standards guidance](https://www.gov.uk/government/publications/regulating-independent-schools) (https://www.gov.uk/government/publications/regulating-independent-schools).

undermining fundamental British values. The Secretary of State may make a direction if that conduct is connected with the suitability of that person to take part in the management of independent schools.

In considering whether to make a section 128 direction the Secretary of State will consider:

- the conduct of the individual
 - what they have done or omitted to do; and
 - whether that conduct was “aimed at” undermining any or several of the listed fundamental British values (i.e. the state of mind of the person)
- how that conduct relates to the suitability of the person to take part in the management of independent schools, and
- whether, in the judgment of the Secretary of State that person is suitable to be involved in the management of independent schools.

If determining whether the individual is suitable to be involved in the management of independent schools the Secretary of State will consider all the evidenced circumstances including, the person’s explanation for the conduct, the person’s credibility, integrity and trustworthiness, the person’s understanding of the duties which apply to Independent Schools in relation to fundamental British values, the Secretary of State’s assessment of their future risk (including the risk the person might undermine fundamental British values in future), the interests of children, the consequences for the person’s career prospects if they are barred from management of an independent school in whole or in part, any other mitigating features or matters raised by the person in response to the minded to bar notice.

Conduct found to be in breach of professional standards by a professional body

Before issuing a direction on the above relevant conduct ground, the department will normally approach the relevant professional body for evidence relating to the conduct which it has found to be in breach of its professional standards. Such professional bodies could include the Institute of Chartered Accountants in England and Wales, the Financial Conduct Authority, the Solicitors Regulation Authority, or the Teaching Regulation Agency.²⁰ The department will only be able to act on the above basis once the professional body has made a formal decision that a breach of professional standards

²⁰ For example, findings of misconduct made by a professional conduct panel convened by the Teaching Regulation Agency.

has occurred, or if the decision maker concludes that conduct under one of the other provisions of regulation 2(5) has occurred.

Conduct ‘so inappropriate’

This involves an assessment by the department on the balance of probabilities, whether the conduct in question occurred and if so, whether it amounts to conduct so inappropriate that, in the opinion of the Secretary of State, it makes a person unsuitable to take part in the management of an independent school.

This assessment will involve considering the actions and inactions of the person and that person’s state of mind. The Secretary of State does not only consider conduct that is “intentional” to make a person unsuitable. A person might be unsuitable where they have been reckless or did not care to what the relevant requirements are, where they have been negligent and, in some circumstances, if they were not aware, when they ought to have been. The Secretary of State expects those involved in the management of independent schools actively to seek out and to ensure that they understand and keep up to date with all relevant regulations, guidance, standards and requirements.

The Secretary of State also expects a person involved in the management of an independent school to understand what their role is and what their responsibilities are in relation to others.

Conduct that the Secretary of State may consider to be “conduct so inappropriate” includes, but is not limited to:

General conduct:

- dishonest conduct
- conduct which demonstrates that the person lacks integrity. Non-exhaustive examples of this include misapplication of public funds, use of positions to the benefit of related parties or themselves and being untruthful in communications with the department.
- abuse of position and power, non-exhaustive examples include exerting undue control over others and circumventing the procedures which are, or should be/have been, in place to ensure proper governance of the trust
- failure to follow a direction
- failure to follow a request for information by the Secretary of State pursuant to his or her powers within a reasonable time.
- a breach of equality law
- failure to adhere to company director duties under the Companies Act 2006, obligations under charity law or other statutory obligations, fiduciary duties, or public sector duties laid out in the Seven Principles for Public Life (the Nolan principles)

- a pattern of or repetition of behaviours that individually do not amount to serious inappropriate conduct, but when considered together, highlight the person's unsuitability to take part in the management of an independent school
- failure to co-operate with, or obstructing, the inspection of an independent school
- putting pupils at risk of exposure to or influence by extremist actors or radicalisation

Financial and governance mismanagement:

- conduct by those involved in budgeting or expenditure which is reckless to the extent of that expenditure
- conduct which undermines the Secretary of State's trust in the person's ability to ensure that the independent school is managed in compliance with the Independent School Standards and, if it is an academy, with the Governance Handbook and Academies Financial Handbook
- responsibility for the absence of an internal control, risk management or assurance process as required by 2.6 of the Academies Financial Handbook
- serious, deliberate, or repeated breaches of the Academies Financial Handbook that undermine the financial and governance management of an academy trust
- serious, deliberate, or repeated breaches of the Governance Handbook
- serious, deliberate, or repeated breaches of the school's Master Funding Agreement
- grossly negligent conduct in the management of an independent school which either did, or was likely to have led to the misuse of public funds
- failure to report financial irregularities to the Chair of the academy trust, to auditors, ESFA or any relevant bodies

Risking the health, safety and welfare of pupils and staff:

- conduct which demonstrates the individual poses a risk to children
- grossly negligent conduct in the management of a school which either did, or was likely to:
 - expose children to serious harm (including exploitation, trafficking, abuse, grooming, radicalisation, or criminality); or
 - expose staff to serious harm, staff intimidation, harassment or bullying
- failing to report safeguarding concerns to other relevant agencies (Local Authority Designated Officer, Disclosure and Barring Service etc)
- failure to take reasonable steps to ensure the Health and Safety of children and staff is adequately maintained

- failure to put in place, manage and/or enforce safeguarding measures in line with statutory guidance

Suitability

Once it has been established that there has been a relevant conviction, caution, finding or conduct, the Secretary of State will consider whether the individual is, as a result, unsuitable to take part in the management of an independent school.

Key to this assessment is whether, in the light of the conduct or offence in question, the Secretary of State believes that the individual can be trusted to comply or ensure compliance with the expected standards and requirements in the future. When making any assessment of an individual's suitability to be involved in the management of an independent school the Secretary of State will have regard to the expected standards and requirements which must be met as part of carrying out any such management role. This includes but is not limited to those set out in the documents, guidance and legislation listed in Annex A.

The Secretary of State will consider all the relevant evidenced circumstances including, the person's explanation for the conduct, the person's credibility, integrity and trustworthiness, the person's understanding of the duties which apply to Independent Schools both at the time of the conduct and in the response to the minded to bar notice, the Secretary of State's assessment of their future risk (including the risk the person might engage in further conduct), the interests of children, the consequences for the person's career prospects if they are barred from management of an independent school in whole or in part, any other mitigating features or matters raised by the person in response to the minded to bar notice.

How section 128 action is taken forward

The department may become aware of information, complaints or allegations against individuals that are a cause for concern in several ways, including:

- the Education and Skills Funding Agency's routine monitoring and investigations
- reports from the police
- reports / information from local authorities
- complaints from members of the public, other members of the school community, or other schools – this includes whistleblowing complaints
- media (TV and newspaper articles)
- findings of tribunals and public inquiries
- information from Ofsted or other regulatory bodies, such as the Teaching Regulation Agency, Charity Commission and Disclosure and Barring Services, Auditors and / or
- referral from a proprietor or governing body of a school.

Such information, complaints or allegations will be considered and, where appropriate, investigated by the department. The department takes seriously any allegations or complaints regarding conduct that may mean that a person is unsuitable to be involved in the management of an independent school and will conduct appropriate investigations into any allegation received. In many instances, concerns about an individual's role in a school will be managed appropriately by the relevant school without action being required by the department.

The department works closely with other regulators and, where appropriate, make referrals so that those regulators can consider exercising their powers. The department welcomes referrals from other organisations, and individuals where they have concerns about an individual's suitability to be involved in the management of an independent school.

For those who wish to make a referral to the department or send in any section 128 related questions, we would direct you to the [online contact form](#) and select the "Disclosure in the public interest (including whistleblowing)" option.

Where the Secretary of State considers that it is appropriate to give a section 128 direction, the department will inform the individual concerned by letter that the Secretary of State is minded to prohibit them from participating in the management of an independent school, setting out the reasons and information supporting the proposed decision, known as a 'minded to bar' notice. A 'minded to bar' notice is given to fulfil the Secretary of State's obligations in regulation 3(1) to (3) of the 2014 Regulations to afford

an opportunity, by notice to the affected person, to make representations before a direction is given. However, if the department does not know and cannot reasonably ascertain the individual's whereabouts, this obligation does not apply.²¹ A minded to bar notice will provide the necessary details for providing written representations to the department including where to send these to.

The individual has a period of two months from the date the "minded to bar" notice is sent in which to make written representations as to why the proposed direction should not be given. To be clear, the time limit runs from the date of posting the notice.

The written representations do not need to take any specific form and there are no restrictions on what an individual can provide, but we would encourage individuals to respond to the allegations set out in the minded to bar notice and provide any evidence to support their response. If an individual does not provide information at this time, they will not be able to rely on it in an appeal without the consent of the Department²².

The individual may ask for an extension during the two-month period to make representations or may ask to make representations after the two-month period has expired but (in both cases) will need to satisfy to the department that there are good reasons as to why they cannot, or could not, provide representations within the two-month period.

The department will conduct a detailed review of the representations received, considering the information/evidence provided before the Secretary of State makes a decision about whether to issue a direction. There is no fixed timescale for reviewing the representations and the time taken will depend on the complexities and facts of the case. The department will however endeavour to provide a decision as quickly as possible.

The individual will be issued with a letter notifying them of the Secretary of State's decision and reason for making that decision and a notice of the decision will be published on GOV.UK shortly after. The individual issued with a direction has **three months** from the date the section 128 direction letter is sent to them to lodge an appeal in the First-tier Tribunal ("FTT"), should they wish to do so. Read the 'Appeal process' section for further information on the appeal process.

If, on review of the individual's representations, the Secretary of State is satisfied that the explanation and information provided sufficiently addresses the allegations put forth in

²¹ Regulation 3 of [The Independent Educational Provision in England \(Prohibition on Participation in Management\) Regulations 2014](https://www.legislation.gov.uk/uksi/2014/1977/regulation/3/made) (https://www.legislation.gov.uk/uksi/2014/1977/regulation/3/made).

²² Regulation 7 of [Independent Educational Provision in England \(Prohibition on Participation in Management\) Regulations 2014](https://www.legislation.gov.uk/uksi/2014/1977/regulation/7/made) (https://www.legislation.gov.uk/uksi/2014/1977/regulation/7/made).

the minded to bar notice, the department will not issue a direction and will notify the individual that the “minded to bar” notice has been withdrawn.

Setting conditions and specifying circumstances

The Secretary of State may make a direction that does not prohibit an individual from all participation in school management but permits them to be involved in specified circumstances or subject to specified conditions.

For example, where the inappropriate conduct includes conduct of a financial nature, but this is not sufficiently serious to warrant a total prohibition under section 128 the Secretary of State may simply restrict the individual's involvement in the management of schools to those roles that do not have any financial management functions.

Alternatively, where the inappropriate conduct relates to a specific role in the management of a school, the Secretary of State may allow the individual to take part in the management of a school if certain conditions are satisfied. In these circumstances it may be appropriate to prohibit an individual from holding certain roles in the future, rather than barring them from taking part in any management roles at all.²³

²³ Read section 128 1a to 1c of the [Education and Skills Act 2008](https://www.legislation.gov.uk/ukpga/2008/25/section/128) (<https://www.legislation.gov.uk/ukpga/2008/25/section/128>).

Appeal process

An individual in respect of whom a section 128 direction has been given, or who has had an application to vary or revoke a direction refused, may appeal against the decision to the FTT under s129 of the 2008 Act.²⁴ The individual has three months in which to bring an appeal against the decision. The time limit runs from the date the decision notice was sent to the affected individual. A direction remains in place while any appeal is in progress.

The FTT's function is limited to considering whether the decision being appealed is "not appropriate".²⁵ Unless agreed by the parties to an appeal, the FTT will not consider any information relevant to the decision to give a direction, or evidence of a material change in circumstances, which the Secretary of State did not have at the time of making the decision.²⁶

There is also a right of appeal against a decision of the FTT to the Upper Tribunal with the permission of the FTT or the Upper Tribunal, on a point of law.

If an individual wishes to lodge an appeal, they should consult the HM Courts & Tribunals Service website found here [HM Courts & Tribunals Service](#) and should also consider seeking independent legal advice if they have not already done so. A direction remains in place until it is either revoked by the department or is successfully appealed.

²⁴ S129 of the [Education and Skills 2008 Act](#) (<https://www.legislation.gov.uk/ukpga/2008/25/section/129>).

²⁵ Regulation 7 1b of the [Independent Educational Provision in England \(Prohibition on Participation in Management\) Regulations 2014](#) (<https://www.legislation.gov.uk/uksi/2014/1977/regulation/7/made>).

²⁶ Regulation 7 3a of the [Independent Educational Provision in England \(Prohibition on Participation in Management\) Regulations 2014](#) (<https://www.legislation.gov.uk/uksi/2014/1977/regulation/7/made>).

Application to vary or revoke a direction

Under regulation 4 of the 2014 Regulations, it is possible for the Secretary of State to vary or revoke a section 128 direction.²⁷

The Secretary of State can vary or revoke a section 128 direction where:

- a) the person in respect of whom the direction was given has sought to have it revoked or varied on one of the grounds set out in regulation 5(1);
- b) he/she is in possession of information relevant to the decision to give the direction which he did not have at the time that the decision was made; or
- c) he/she is in possession of evidence of a material change of circumstances of the person in respect of whom the direction was given, occurring since the direction was given;

and the appropriate authority (Secretary of State) considers that it is appropriate to vary or revoke the direction.

The grounds on which variation or revocation of a section 128 direction may be sought under regulation 5(1) are as follows:

- a) a conviction, caution, or finding on the grounds of which the direction was given has been quashed;
- b) a conviction or caution on the grounds of which the direction was given has, since the giving of the direction, become spent within the meaning of the Rehabilitation of Offenders Act 1974²⁸;
- c) a conviction or caution on the grounds of which the direction was given has, since the giving of the direction, become a protected conviction or protected caution within the meaning of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975(1);
- d) in the case of a direction given on the grounds of a relevant finding, at least five years have passed since the finding was made;

²⁷ Regulation 4 of the [Independent Educational Provision in England \(Prohibition on Participation in Management\) Regulations 2014](https://www.legislation.gov.uk/uksi/2014/1977/regulation/4/made) (https://www.legislation.gov.uk/uksi/2014/1977/regulation/4/made).

²⁸ Convictions can become spent or protected under the provisions of the Rehabilitation of Offenders Act 1974.

- e) the person in respect of whom the direction was given is able to provide information relevant to the decision to give the earlier direction which the appropriate authority did not have at the time that the decision was made; or
- f) the person in respect of whom the direction was given is able to provide evidence of a material change of circumstances occurring since the direction was given.

The individual should make a written application to the Secretary of State to amend or revoke the direction, citing the grounds on which the application is made and including supporting evidence and/or representations.

There is also no set form for making an application to vary or revoke a direction. If the individual wishes to make an application, they should send this to the department setting out the grounds on which they believe a direction should either be set aside or revoked, alongside any supporting evidence. The individual is encouraged particularly, where making an application to vary or revoke a direction under ground e) or f), to include witness statement(s) signed with a statement of truth to support their application. Where individuals are making an application to vary or revoke a direction, they can seek confirmation of any part of the process, including where to send their application to, by contacting the section 128 referral mailbox.

The Secretary of State will consider the application and supporting materials and decide whether the application should be granted. When the department is considering an application to vary or revoke a direction, the department in some cases may as part of any assessment, seek additional views / information from interested parties. As explained above, an individual may appeal a decision not to revoke or vary a direction.

Regulatory action outside of the department

There are also actions that can be taken by other organisations that have the effect of preventing individuals (or restricting them) from being involved in schools. These include the Disclosure and Barring Service's power to bar an individual from working in regulated activity with children²⁹, the Charity Commission's enforcement powers which include suspension or removal of a trustee³⁰, and the Insolvency Service's power to apply to the court for an order disqualifying an individual from being a company director.³¹

The Department may consider making a referral to another regulator, such as the Charity Commission or Insolvency Service. This could be where there is evidence of non-compliance with the duties and responsibilities of a charity trustee under charity law and/or where it appears that conduct is such that it may be appropriate for a company director disqualification order to be sought. Furthermore, before taking action against an individual who is involved in the leadership and management of an independent school which is run by a registered charity³², the department may engage with the Charity Commission about its intention to do so and work with them to agree the appropriate regulatory action to take.³³ In certain cases, the department may also make referrals to other agencies like the police for example where criminal conduct has possibly occurred.

²⁹ The [Disclosure and Barring Service's referral guidance](http://www.gov.uk/guidance/making-barring-referrals-to-the-dbs#what-is-a-referral) (<http://www.gov.uk/guidance/making-barring-referrals-to-the-dbs#what-is-a-referral>).

³⁰ The [Charity Commission's enforcement action guidance](http://www.gov.uk/government/publications/where-the-charity-commission-takes-enforcement-action) (<http://www.gov.uk/government/publications/where-the-charity-commission-takes-enforcement-action>).

³¹ The [Insolvency Services' director disqualification guidance](http://www.gov.uk/company-director-disqualification) (<http://www.gov.uk/company-director-disqualification>).

³² Other than an academy or free school since these are exempt charities, and therefore do not fall under the purview of the Charity Commission.

³³ For more information about the respective roles of the Secretary of State, the Charity Commission and the Insolvency Service, read the department's [Memorandum of understanding with the Charity Commission and Insolvency Service](https://www.gov.uk/government/publications/memorandum-of-understanding-charity-commission-and-the-department-for-education) (<https://www.gov.uk/government/publications/memorandum-of-understanding-charity-commission-and-the-department-for-education>) and the [Memorandum of understanding with the Insolvency Service](https://www.gov.uk/government/publications/memorandum-of-understanding-dfe-and-the-insolvency-service) (<https://www.gov.uk/government/publications/memorandum-of-understanding-dfe-and-the-insolvency-service>).

Annex A: Key documents

To make a decision about whether to issue a section 128 direction, an assessment may be made of relevant conduct an individual has engaged in. As part of this assessment, it may be appropriate to consider whether the individual's conduct amounts to a breach of a regulatory framework in place for schools. This may include consideration of whether the following statutory and non-statutory guidance, or regulatory requirements, have been followed.

Academies Financial Handbook³⁴

This describes the financial responsibilities of academy trusts, reflecting their status as companies limited by guarantee, exempt charities, and public bodies. Academies must comply with this handbook as a condition of their funding agreements. This handbook sets out the intervention powers the Education and Skills Funding Agency has in relation to academy trusts where there are concerns about financial management or governance.

The Education (Independent School Standards) Regulations 2014 and Statutory framework for the early years foundation stage

This first of these documents set out the minimum standards which proprietors of independent schools must meet. The regulations prescribe these standards across 8 areas.³⁵ The second of these documents sets out the framework that all early years providers including educational institutions must meet to ensure that children learn and develop well, that children are kept healthy and safe, and that children have the knowledge and skills they need to start school. ³⁶

³⁴ Read the [Academies Financial Handbook](https://www.gov.uk/guidance/academies-financial-handbook) (https://www.gov.uk/guidance/academies-financial-handbook).

³⁵ Read the [Education \(Independent School Standards\) Regulations 2014](https://www.legislation.gov.uk/uksi/2014/3283/contents/made) (https://www.legislation.gov.uk/uksi/2014/3283/contents/made).

³⁶ Read the [Early Years Foundation Stage Framework](https://www.gov.uk/government/publications/early-years-foundation-stage-framework--2) (https://www.gov.uk/government/publications/early-years-foundation-stage-framework--2).

National Minimum Standards for boarding schools and National minimum standards for residential special schools

These two documents contain statements of the statutory national minimum standards to safeguard and promote the welfare of children for whom residential accommodation is provided. One set is for boarding schools³⁷ and the other for residential special schools.³⁸

Keeping Children Safe in Education guidance³⁹

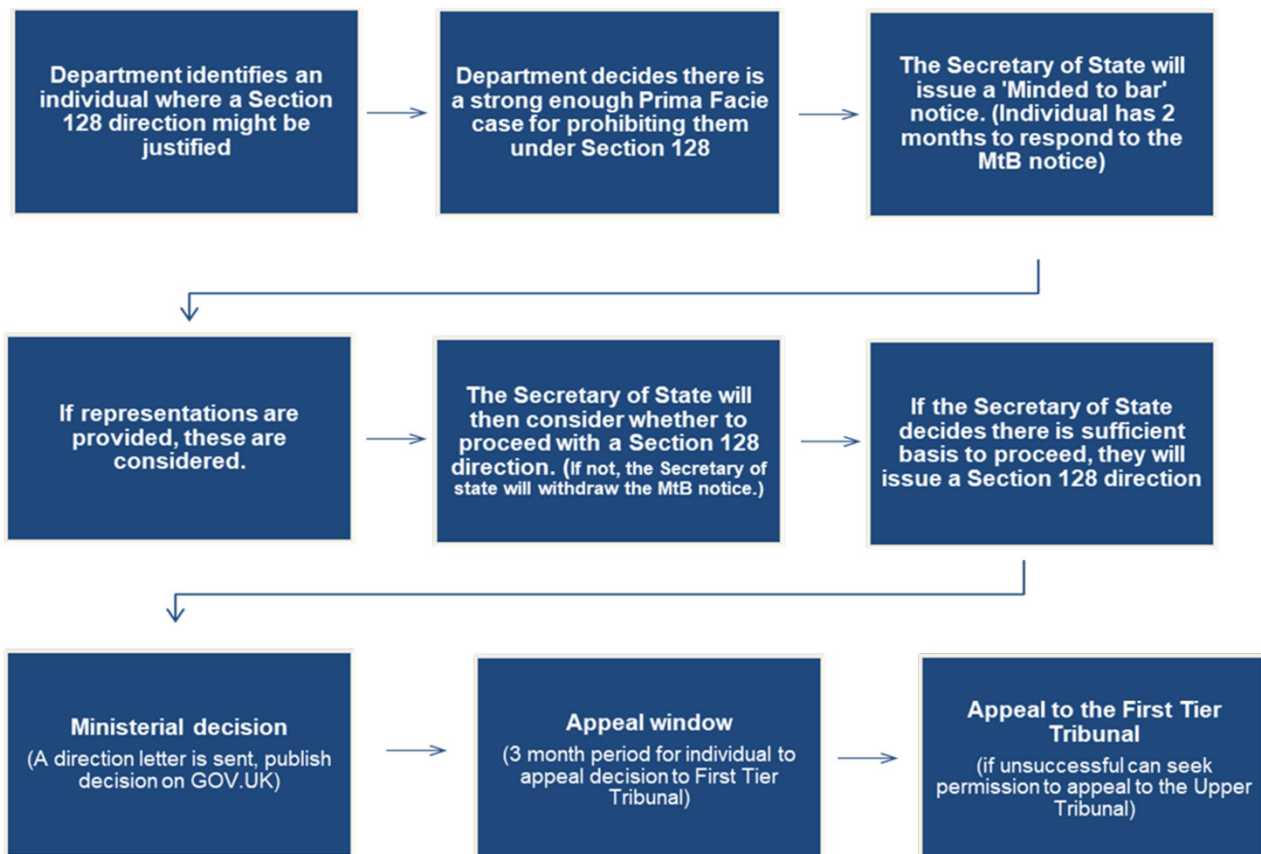
This gives guidance for all schools on the recruitment and vetting of individuals, management of allegations, and on the legal duty on schools to refer to the Disclosure and Barring Service anyone that has harmed (or is likely to harm) a child; or if a person otherwise poses a risk of harm to a child.

³⁷ [Boarding schools: national minimum standards guidance](https://www.gov.uk/government/publications/boarding-schools-national-minimum-standards)
(<https://www.gov.uk/government/publications/boarding-schools-national-minimum-standards>)

³⁸ [Residential special schools: national minimum standards guidance](https://www.gov.uk/government/publications/residential-special-schools-national-minimum-standards)
(<https://www.gov.uk/government/publications/residential-special-schools-national-minimum-standards>).

³⁹ Read [Keeping Children Safe in Education guidance](https://www.gov.uk/government/publications/keeping-children-safe-in-education--2)
(<https://www.gov.uk/government/publications/keeping-children-safe-in-education--2>).

Annex B: Section 128 process map



1. Department identifies an individual where a Section 128 direction might be justified
2. Department decides there is a strong enough Prima Facie case for prohibiting them under Section 128
3. The Secretary of State will issue a 'Minded to bar' notice. (Individual has 2 months to respond to the MtB notice)
4. If representations are provided, these are considered.
5. The Secretary of State will then consider whether to proceed with a Section 128 direction. (If not, the Secretary of state will withdraw the MtB notice.)
6. If the Secretary of State decides there is sufficient basis to proceed, they will issue a Section 128 direction
7. Ministerial decision (A direction letter is sent, publish decision on GOV.UK)
8. Appeal window (3 month period for individual to appeal decision to First Tier Tribunal)
9. Appeal to the First Tier Tribunal (if unsuccessful can seek permission to appeal to the Upper Tribunal)



Department
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