

Via email
17 December 2020

Dear Mr Jimale,

Draft non-statutory guidance on s128 of the Education and Skills Act 2008

On behalf of ICSA: The Chartered Governance Institute (the Institute) I am pleased to provide feedback on the draft guidance relating to the removal of managers in independent schools because of misconduct.

The Institute is the international professional body for governance, with more than 125 years' experience and with members in all sectors. Our purpose is defined in our Royal Charter as 'leadership in the effective governance and efficient administration of commerce, industry and public affairs' and we work with regulators and policy-makers to champion high standards of governance, providing qualifications, training and guidance.

We are the professional membership and qualifying body supporting chartered secretaries and governance, risk and compliance professionals in all sectors of the economy. Members are educated in a range of topics including finance, company law, administration and governance, which enables them to add value to any organisation.

The Institute has an extensive pedigree in the governance arena, advising governments and regulators on company law, charity law and governance issues. The breadth and experience of our membership enables the Institute to access a variety of applied experience in order to provide insights into effective practices across a range of organisations. Our members' wealth of expertise and experience has informed our response.

Specific questions raised in the consultation

Do you agree that this non-statutory guidance on Section 128 meets our aim of clarifying the considerations that apply in this area?

Are the examples of relevant offences and/or conduct given with the guidance clear and comprehensive?

For those in a position of authority within an educational institution, it is essential there is clear guidance as to the appropriate conduct and behaviours expected of them. The draft document provides a framework by which people may be removed from office in a range of situations.

We are concerned, however, around the application of the Secretary of State's powers in relation to individual(s) found to have fallen short of requirements within the Governance Handbook and the Academies Financial Handbook (section 3.1 pages 9 and 10) and how this sits with the accepted principle of collective responsibility. Does the guidance propose to remove *all* trustees and senior managers found to be wanting with regards to the aspects of observing specific requirements in



the two documents referenced due to the collective responsibility of the board? If not, what measures will be put in place to measure and assess the culpability of individual trustees in the failure to adhere to aspects of the Governance Handbook and the Academies Financial Handbook referenced in the draft guidance?

Where the courts have been asked to rule on similar matters in charities there is usually an understanding that those trustees who have, or hold themselves out as having, expert or professional experience and knowledge and (where applicable) those trustees who are remunerated, will be held to a higher standard than other volunteer lay trustees. If the Secretary of State is to exercise his powers in a similar fashion, the way that power is likely to be exercised should also be covered in the final guidance.

Do you think the process and procedures for issuing a direction as set out in the ‘How Section 128 action is taking forward’ section are sufficiently clear and comprehensive? If not, what do you think we should also include or amend?

Do you agree that the information about the appeal process is sufficiently clear and comprehensive?

Do you think the information about making an application to vary or revoke a direction is sufficiently clear and comprehensive?

The process seems clear and appropriate and provides an opportunity for an individual subject to a notice to lodge an appeal.

Do you have any other thoughts, suggestions and/or objections on the contents of the guidance and if so, what are they?

The Institute would like to raise the following points.

Members

Section 1.2 states that the guidance is for members and trustees however members are not included in section 2.1. The Institute encourages the Department to remove members from the scope of the guidance, or amend the guidance to portray their role more accurately, for several reasons:

- the role of the members in terms of leadership and management is limited within charities established as companies limited by guarantee (such as academy trusts). Their role is focused on providing oversight and as such they should not be involved in the management of an organisation;
- the power of removal proposed for members is not mirrored in the legislation governing companies limited by guarantee (charity and company law) and would represent a misstep with other regulatory frameworks for what is a voluntary position with limited power over the general management of an organisation. The Charity Commission has the power to remove a member for misconduct where that member is also a trustee (s19 Charities Act 2006), but this is a different situation and, given the Department’s stated desire to have little overlap between the membership and trustees of academy trusts, limiting this power to use in those situations where a trustee is also a member and found guilty of inappropriate conduct would seem a more appropriate solution; and
- the details relating to membership criteria, eligibility and removal are normally contained within the clauses of a charitable company’s articles of association and supporting documents. As such, we believe that the removal of members should remain controlled by the governing documents. However it may be advisable to amend the model articles published by the Department in order to reflect the appropriate conduct and behaviours expected of members and trustees. Recent case law may provide additional insight as to how best to proceed in this area given the judgment on the fiduciary duties of members of charitable companies.



Language used in the document

The language used in the guide refers to misconduct by those in the management of an independent school, including academy trusts. The role of trustees is to provide governance, leadership and oversight, it is explicitly not a management role. The trustee position is one of considerable influence and responsibility and as such should be included in the guidance, but we believe that the guidance should be clearer about the distinctive roles of senior managers, trustees and members (if retained) in order to reduce the likelihood of confusion and misunderstanding.

Nature of this guidance and its impact on other non-statutory guidance

The draft guidance clearly states it is non-statutory in nature and highlights a similar standing for both the Governance Handbook and the Academies Financial Handbook. While few academy trust boards are likely to contravene the requirements contained in these documents because compliance is required as part of their funding arrangements, the guidance relating to the application of section 128 could give the appearance that the status of the two handbooks is changed to become both statutory and mandatory. This should be clarified.

I trust the above comments help with the development of this guidance for those leading schools. Should you require any clarification or have questions, please do not hesitate to contact me directly.

Yours sincerely,

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