

## Consultation on draft non-statutory guidance on Section 128 of the Education and Skills Act 2008

### Response of the Association of School and College Leaders

#### A. Introduction

1. The Association of School and College Leaders (ASCL) represents over 20,000 education system leaders, heads, principals, deputies, vice-principals, assistant heads, business managers and other senior staff of state-funded and independent schools and colleges throughout the UK. ASCL members are responsible for the education of more than four million young people in more than 90 per cent of the secondary and tertiary phases, and in an increasing proportion of the primary phase. This places the association in a strong position to consider this issue from the viewpoint of the leaders of schools and colleges of all types.
2. ASCL welcomes the opportunity to contribute to this consultation.

#### B. Key points

3. The Consultation document on draft non-statutory guidance on Section 128 of the Education and Skills Act 2008 considers the following:

*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 school. The Independent Educational Provision in England (Prohibition on Participation in Management) Regulations 20142 (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, varied or appealed.*

*Independent schools include academies and free schools and a direction under section 128 also has the effect of disqualifying a person from being a governor of a maintained school.*

*This guidance is non-statutory and is intended to provide helpful information for individuals who might become involved or who are currently involved in the management of independent schools.*

*The department is proposing to introduce non-statutory guidance setting out the types of conduct which might indicate that an individual is unsuitable and the factors which the Secretary of State will take into account when considering whether to issue a Section 128 direction.*

*This consultation refers specifically to the draft non-statutory guidance, rather than the legislation that provides for Section 128 directions. We are seeking views on the clarity*

*of the guidance in explaining the factors that may be taken into account when the Secretary of State is considering issuing a Section 128 direction including in relation to financial and governance mismanagement in academy trusts.*

### **C. Answers to specific questions**

4. ASCL offers the following in response to the specific questions asked in the consultation:

**Question 1:** *Do you agree that this non-statutory guidance on Section 128 meets our aim of clarifying the considerations that apply in this area?*

Although the guidance does clarify the considerations that need to be taken, we feel that the cover/title could be clearer to indicate that academies are included, and that governors of maintained schools are.

**Question 2:** *Are the examples of relevant offences and / or conduct given with the guidance clear and comprehensible?*

Again, although the examples may be clear, we have some concerns around this section. Firstly, we believe that it could be inferred that all of the examples *must* lead to a Section 128 direction, rather than *may* lead to one, as detailed in section 2.

Additionally, we do not agree with the inclusion of 'dishonest conduct' under **Conduct 'so inappropriate'**. This is too broad and far too subjective, minor or trivial instances could be used where it would be unfair to do so.

Furthermore, of the items listed as failures need to be considered in the context of the event, there cannot be a broad-brush approach without looking at the individual circumstances.

One that we have concerns about is 'failure to follow a direction or request from the Secretary of State'. Again, this needs to be in context. School leaders and governing/trust boards could receive legal advice on a serious or urgent situation which may cause them to not follow this, and this may well be deemed as the most appropriate and safest action. They should not be penalised in these circumstances.

Amendments need to be made to the guidance to address these issues.

**Question 3:** *Do you think the process and procedures for issuing a direction as set out in the 'How Section 128 action is taken forward' section are sufficiently clear and comprehensive? If not, what do you think we should also include or amend?*

We think that the section stating that an individual has three months to appeal would benefit from being made to stand out by boldening it.

**Question 4:** *Do you agree that the information about the appeal process is sufficiently clear and comprehensive?*

Firstly, the appeals process should be signposted in the section where it is stated that the individual will be informed of their right to appeal in section 4.

We also believe that the appeal should consider any new evidence which was not available to the Secretary of State.

Again, the information on a further appeal should be specifically signposted, rather than simply stating that an individual *should consult the HM Courts & Tribunals Service website*.

**Question 5:** *Do you think the information about making an application to vary or revoke a direction is sufficiently clear and comprehensive?*

Yes, we think this section is sufficiently clear and comprehensive.

**Question 6:** *Do you have any other thoughts, suggestions and / or objections on the contents of the guidance and if so, what are they?*

We have included all our concerns or objections in our answers to the questions above. We are content for this guidance being published subject to the points we have raised being addressed.

#### **D. Conclusion**

5. We believe that the guidance will be strengthened by the suggestions we have made.
6. I hope that this response is of value to your consultation. ASCL is willing to be further consulted and to assist in any way that it can.

Louise Hatswell  
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