

INDEPENDENT COMPLAINTS ADJUDICATION SERVICE FOR OFSTED (ICASO)

REPORT OF INDEPENDENT ADJUDICATOR

Complainant: Pete Talbot

Type of provider: Primary School

Date of referral to Ofsted Adjudication Service: 31 January 2022

Adjudicator: Tony Cole FCI Arb

Date of this report: 28 March 2022

1. Background

- 1.1. This report follows my appointment as independent adjudicator under the Independent Complaints Adjudication Service for Ofsted (ICASO) by the Centre for Effective Dispute Resolution (CEDR) on 31 January 2022.
- 1.2. This adjudication relates to a complaint made by the Complainant with reference to an inspection undertaken on 12-13 October 2021.
- 1.3. This adjudication has been conducted because the Complainant has exhausted the Ofsted internal complaints procedure, and remains dissatisfied with Ofsted's response to their complaint.
- 1.4. As the adjudicator, my role is to investigate the manner in which Ofsted has dealt with the complaint by reference to its published complaint handling procedure; and where possible, to provide recommendations to improve Ofsted's processes and practices for dealing with complaints. The ICASO is entirely independent of Ofsted.
- 1.5. I am limited under the ICASO as to what I can do and what I can investigate. For example, whilst I am able to review Ofsted's handling of any complaints about failure to follow procedures; failure to respond in a timely manner; alleged discrimination; alleged discourtesy; failure to apologise or accept mistakes; and the behaviour of Ofsted staff or contractors, I am not able to investigate complaints into issues relating to government policy or legislation; and issues where there are clear rights of appeal through a Court or Tribunal.
- 1.6. In addition, and importantly, I cannot overturn the Ofsted inspectors' judgements nor award any financial damages or compensation.
- 1.7. My recommendations may include methods for addressing failings both specific to a complaint or generally to improve inspection and complaint handling procedures. They are not binding on Ofsted, but if Ofsted decides not to act on my recommendations then they must publicly state their reasons for not doing so.

2. The complaint

2.1. The Complainant's application to the ICASO is dated 31 January 2022. On 10 February 2022, I received Ofsted's summary in respect of this complaint.

2.2. I have considered all of the documents sent to me by the Complainant and Ofsted in full.

2.3. The Complainant submits that:

- a) The school received a judgement of "Requires Improvement" after the inspection.
- b) While he was unhappy with a number of aspects of the inspection, his complaint to ICASO relates to the identity of the lead inspector appointed by Ofsted.
- c) The lead inspector is the CEO of a trust that includes a neighbouring school.
- d) This does not conform to Ofsted guidance that an inspector must "declare all actual and perceived conflicts of interest and have no real or perceived connection with the provider that could undermine the objectivity of the inspection".
- e) He believes that the lead inspector declared his connection with the school to Ofsted, but that it was judged to be acceptable.
- f) He was unaware of the connection at the time of the inspection.
- g) His concerns have not been properly addressed during Ofsted's complaint process.
- h) He requests a recommendation that the setting be re-inspected.

2.4. Ofsted submits that:

- a) The concerns raised by the Complainant were addressed during Ofsted's complaint process, including the concern regarding the identity of the lead inspector.
- b) The inspection judgements were reviewed and were found to meet Ofsted's quality standards and to be based on an accurate interpretation of the evidence.
- c) The lead inspector had reported to Ofsted his potential conflict of interest.
- d) The neighbouring school referenced by the Complainant had joined the trust of which the lead inspector is CEO in September 2021.
- e) The lead inspector confirmed to Ofsted that he had no links with the Complainant's schools or the staff therein.
- f) A Senior Her Majesty's Inspector on duty that day, after conferring with another senior colleague, confirmed that there was no conflict of interest and the inspection could go ahead, as the lead inspector had little local knowledge and no previous connections with the schools in the area.
- g) The lead inspector asked the Complainant prior to the inspection if he believed there was a conflict of interest, and he confirmed that he did not believe that one existed.
- h) There is currently no legislation in relation to Ofsted's conflict of interest guidance, including the areas in which inspectors can and cannot inspect.

3. My observations

- 3.1. Ofsted's Guidance on "Conduct during Ofsted inspections" states explicitly that "inspectors will...have no real or perceived connection with the provider that could undermine the objectivity of the inspection".
- 3.2. The incorporation into this Guidance of "perceived" connections recognises the importance to the credibility of Ofsted inspections that inspectors not only be objective in their work, but that they have no connections with the setting being inspected that would bring into question that objectivity. In this respect Ofsted's guidance reflects the classic statement by the English courts, in a different but related context, that "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." R v Sussex Justices, ex parte McCarthy, 1 KB 256 (1924), at 259; see also the more recent decision by Supreme Court of the United Kingdom in Halliburton Co v Chubb Bermuda Insurance Ltd, [2020] UKSC 48 ("A judge or arbitrator, who is not in fact subject to any bias, must also not give the appearance of bias: justice must be seen to be done.").
- 3.3. The Complainant argues that the inspection did not adhere to this applicable Ofsted Guidance, as the lead inspector was the CEO of a trust that included a neighbouring school. Ofsted acknowledges this connection, but emphasises that the lead inspector properly reported this connection, and that it was judged not to be sufficient to justify the replacement of the lead inspector.
- 3.4. If "Conduct during Ofsted inspections" required only that inspectors have no "real" connection with the settings being inspected, then a conclusion that the lead inspector was not subject to a conflict of interest would have been justified, as the neighbouring school only entered the lead inspector's trust shortly before the inspection, and there is no evidence that the lead inspector himself had prior connections to the Complainant's school or to the area in which it is located.
- 3.5. However, as already noted, "Conduct during Ofsted inspections" requires not only that "real" conflicts of interest be avoided, but that "perceived" connections be avoid if they "could" undermine the "objectivity of the inspection". Importantly, the requirement is not that the perceived connection "would" or "would more likely than not" undermine the "objectivity of the inspection", but only that it "could". This is a generous standard reflecting the importance of Ofsted's inspections being seen to be fair.
- 3.6. While Ofsted confirms that the judgement to allow the inspection to proceed was taken by a senior inspector in consultation with another senior colleague, it is difficult to see how the context of the inspection is consistent with the obligation to ensure that no "perceived" connection existed that "could" undermine the "objectivity of the inspection". Regardless of the actual integrity of any inspector, it is clear that inspecting a school that is a direct comparator to a school over which the inspector has responsibility "could" undermine the "objectivity of the inspection". At the simplest level, a glowing report of the school being inspected will be used to draw negative comparisons with the school under the inspector's responsibility, and where

both schools share a catchment area, as the Claimant has stated is the case here, could also draw stronger students away.

- 3.7. To be clear, I make no finding that there is any indication of actual wrongdoing by the inspector, or that an inspection under a different lead inspector would have produced a different outcome. However, such a conclusion is simply unnecessary under the standards laid out in “Conduct during Ofsted inspections”, and I find that Ofsted manifestly failed to properly address the question of the lead inspector’s potential conflict of interest in both the Step Two and Step Three responses to the Complainant’s complaint, neither of which attempted to properly explain how a “perceived” connection of the type referenced in “Conduct during Ofsted inspections” did not exist.
- 3.8. Moreover, in its Step Two and Step Three responses, and in its response to the Complainant’s complaint to ICASO, Ofsted has failed to identify any concrete standards or procedures that are applied when examining the existence of a potential conflict of interest of an inspector. Instead, Ofsted’s account of the review of the potential conflict of interest in the present case is that it was examined by the senior inspector who happened to be on duty when the potential conflict was reported, in consultation with another senior colleague they chose to contact. It is, though, inherent to such an informal approach that different conclusions might be reached, depending on which senior inspector happens to be on duty when a conflict is reported and who they happen to confer with. For that reason, an informal review process of this nature cannot be sufficient to ensure reliable adherence to the standards laid out in “Conduct during Ofsted inspections”.
- 3.9. The Complainant has requested that the setting be re-inspected, and given the seriousness of the importance of the requirement that “inspectors will...have no real or perceived connection with the provider that could undermine the objectivity of the inspection”, I find that such a recommendation is appropriate. A re-inspection may or may not change the judgements given, but will provide the assurance of the fair inspection process that “Conduct during Ofsted inspections” promises to provide.
- 3.10. In addition, the current weaknesses in Ofsted’s approach to ensuring that inspectors do not have “real or perceived” conflicts of interest, as discussed above, justify additional recommendations relating to Ofsted’s processes for review of potential conflicts of interest.

4. Conclusion and recommendations

- 4.1. Accordingly, my recommendations are:
- Ofsted should re-inspect the setting, with a new lead inspector
 - Ofsted should review its approach to ensuring that “inspectors will...have no real or perceived connection with the provider that could undermine the objectivity of the inspection”, with a goal of putting in place a formalised process of review that is appropriately designed for delivering consistent decisions across a range of cases

- Ofsted should produce publicly-available guidance, providing examples of types of connections that would and would not meet the requirements of “Conduct during Ofsted inspections” with respect to conflicts of interest of inspectors.

Tony Cole

Tony Cole FCI Arb
28 March 2022