

**EXPLANATORY MEMORANDUM TO**  
**THE EDUCATION (NON-MAINTAINED SPECIAL SCHOOLS) (ENGLAND)**  
**(AMENDMENT) REGULATIONS 2007 No.1088**

**1** This explanatory memorandum has been prepared by the Department for Education and Skills and is laid before Parliament by Command of Her Majesty.

**2 Description**

2.1 These regulations amend the Education (Non-Maintained Special Schools) (England) Regulations 1999. Those regulations set out the requirements for approval of a non-maintained special school ('NMSS'). These regulations introduce a number of additional requirements in relation to new staff. They must meet specified requirements as to qualifications, health, physical capacity and the absence of any bar from working with children and young persons. It is also a requirement that they must, prior to their appointment be subject to an enhanced Criminal Records Bureau ('CRB') check. Similar requirements apply to supply staff. Certain persons are 'recognised' as being suitable to work in a NMSS provided they have not had a break in service of more than three months. The school must keep a register of the checks carried out.

**3 Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 None.

**4 Legislative Background**

4.1 The Secretary of State, in a statement to the House of Commons on 20 June (HC 20 June 2006 col 1191), made commitments in the light of the recommendations of an Ofsted survey of record keeping and recruitment processes. These included the requirement for schools to maintain a single central record of checks, as well as additional requirements in respect of checks on supply staff and staff who have lived overseas.

**5 Extent**

5.1 These regulations apply to England only.

**6 European Convention on Human Rights**

6.1 As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

## **7 Policy Background**

- 7.1 Following the murder of two schoolgirls in Soham in 2002 and the public outcry that followed, the Government appointed a commission of enquiry headed by Sir Michael Bichard. His report was published in June 2004 and its recommendations included significant strengthening of vetting procedures, compulsory enhanced CRB checks for teachers in schools and stronger guidance on safeguarding and recruitment procedures. The major legislative response has been the Safeguarding Vulnerable Groups Act 2006 which establishes a new vetting and barring scheme, independently administered, to improve the safeguarding of young people (and vulnerable adults). The provisions of the Act are intended to come into effect in 2008.
- 7.2 The government commissioned Ofsted to carry out a survey of recruitment processes and record keeping in schools and institutions, including the use of CRB disclosures, as strongly recommended in Department for Education and Skills (DfES) guidance. Their report, *Safeguarding Children: An Evaluation of Procedures for Checking Staff Appointed by Schools*, was published on 20 June 2006. Of the institutions surveyed, all had complied with guidance by seeking enhanced CRB disclosures for staff working in schools. However, there were inconsistencies in record-keeping.
- 7.3 Guidance previously issued by the DfES required staff in schools to have a range of checks, including enhanced CRB checks, prior to, or as soon as possible following, appointment. On 14 November 2006, the DfES launched revised and consolidated guidance for education institutions which sets out existing requirements and those that these new regulations will introduce. This guidance was published on 1 January 2007. These regulations which apply to the 72 NMSS currently operating are made in the light of the report mentioned at paragraph 7.1.
- 7.4 To date, obligations to execute CRB checks in relation to staff members of NMSSs have been subsumed within the fairly generally expressed duties to pursue arrangements for safeguarding and promoting the health, safety and welfare of the pupils. Guidance has also strongly recommended that they are carried out (see for example DfES Guidance *Safeguarding Children and Safer Recruitment in Education* (available for download from [www.everychildmatters.gov.uk](http://www.everychildmatters.gov.uk)). The importance of these checks and the need to keep a register of them is such that they should be a matter of obligation rather than option. Formal regulation of the requirements is therefore preferable to the exhortation and recommendation of guidance. The DfES believes the specific requirements ought to be described more explicitly so that the NMSSs obliged to meet them can identify them and comply with them. The DfES is of the view therefore that the policy intentions would most expediently be fulfilled by making amendments to the principal regulations governing NMSSs.

### **Consultation**

- 7.5 The draft regulations were subject to a consultation between 11 January and 23 February 2006. The consultation gave support to the regulatory changes

and acknowledged that the proposed amendments establish, through regulations, what is already common practice in many independent schools.

## **8 Impact**

- 8.1 A Regulatory Impact Assessment has been prepared and is attached to this Explanatory Memorandum.

## **9 Contact**

- 9.1 Any enquiries about the contents of this memorandum should be addressed to: John Hodgson, Special Education Needs and Disability Division, Department for Education and Skills, email: [john.hodgson@dfes.gsi.gov.uk](mailto:john.hodgson@dfes.gsi.gov.uk), telephone: 01325 392 841.

## **Regulatory Impact Assessment on amendments to the Non- Maintained Special Schools (England) Regulations 1999**

### **Purpose and intended effect**

#### Objective

To strengthen the procedures that non-maintained special schools need to follow when recruiting staff, reducing the risk that unsuitable people gain access to children in the schools workforce, and so helping to reduce the risk of children suffering harm.

To also introduce new requirements for Criminal Records Bureau (CRB) checks to be undertaken by the Secretary of State on the relevant person. Where the 'relevant person' is the Governing Body, Trust or Company, only the Chair or equivalent will be required to submit a CRB disclosure form via the Department for Education and Skills. The Chair or equivalent will be responsible for ensuring that CRB checks on the remaining governors, trustees or directors are undertaken by the school, and when the school is inspected, a check will be made that appropriate CRB checks have been undertaken.

The disclosure of a criminal record, or other information, will not bar a person from becoming a relevant person of a non-maintained special school, unless the Secretary of State considers that the conviction renders them unsuitable. In making this decision, the Secretary of State will consider the nature of the offence, how long ago the offence was committed, the person's age when the offence was committed and other factors which may be relevant.

#### Background

Following the List 99 review earlier this year, Ofsted inspected the recruitment practices in a sample of schools. The resulting report, 'Safeguarding Children, an evaluation of procedures for checking staff appointed by schools' published in June 2006, highlighted a number of concerns around record keeping in schools and clarity of guidance. Following this report, the Government proposed to further strengthen the schools workforce recruitment and vetting arrangements.

The proposals covered by this RIA seek to reflect the commitments made by the Government to:

- amend regulations to remove the exemption from mandatory CRB checks for overseas staff recruited directly from abroad, so that CRB checks are mandatory for all new overseas staff;
- strengthen record keeping requirements through new legislation, to ensure that schools keep a record that the necessary pre employment checks have been carried out; and,
- make it a requirement for schools to obtain confirmation from supply agencies that CRB and other checks on suitability to work with children have been carried out, and to keep a record of receiving that confirmation.

To further strengthen the safeguards around supply teachers the proposals introduce new requirements that schools must ensure in their contractual relationship with supply agencies that they provide the confirmations above, and pass on details of supply staffs' CRB checks when supply staff are engaged by a school.

### Rationale for government intervention

To reduce the risk of unsuitable people gaining access to children through the school workforce by ensuring clear guidance exists that is underpinned by regulation where appropriate; and to help ensure all those that work in the schools workforce are clear about their responsibilities when recruiting staff. This will help to reduce the risk of children suffering harm; and the resultant costs- social and economic.

### **Consultation**

#### Within government

The proposals have received cross- government support, and wide-ranging discussions have been held with other relevant government departments and key stakeholders. The proposals have been well received.

#### Public Consultation

The proposals will be sent to key stakeholders, all non-maintained special schools, their representative body the National Association of Special Schools (NaSS), and, the Charity Commissioners.

### **Options**

#### Option 1: maintain the status quo

#### Option 2: voluntary approach through guidance

The Government could seek to implement the recommendations through a voluntary approach, by updating the guidance and strongly recommending that schools implement the revised guidance.

#### Option 3: introduce regulations and guidance to take forward the proposals

Introduce amending regulations as set out above, and reflect the regulatory changes in revised guidance.

### **Costs and Benefits**

#### Sectors and groups affected

The proposals will affect all non-maintained schools; and, teacher and other supply businesses that provide staff to schools and local authorities.

## Benefits

### *Option 1: maintain the status quo*

Allows schools to continue as present. However, this will allow inconsistent practice to continue. The Government has concluded that the system does need to be strengthened in advance of the vetting and barring scheme scheduled to be introduced in 2008, and that leaving the current system untouched is not an option. The Government considers that implementing these commitments would help to strengthen the existing system, further help to safeguard children from harm and help to maintain public confidence in the system.

### *Option 2: voluntary approach through guidance*

While a voluntary approach could go some way to further strengthen the existing system, it may lead to inconsistent practice across the workforce, with the result that some schools do not carry out the necessary checks and keep the necessary records to ensure that they are taking every reasonable step to safeguard their children from harm. It is the Government's view that effective systems must be used by every school to ensure that all children are safeguarded from harm and that public confidence is maintained, and that clarity and consistency of approach is needed.

### *Option 3: introduce regulations and guidance to take forward the proposals*

This option strengthens existing regulation, and supports this with guidance at minimal cost and effort and offers greatest consistency across the workforce, helping to ensure that schools and educational establishments are using good practice recruitment processes to help minimise the risk of harm to children. This is the Government's preferred option, and should help to provide the public with reassurance that robust measures are in place to help protect children from harm. It reduces the risk of children suffering harm and reduces the associated social and economic costs.

## Costs

### *Option 1: maintain the status quo*

Doing nothing will have no additional costs, although there may be social and economic costs if any child is harmed as a result of leaving the system as it is.

### *Option 2: voluntary approach through guidance*

The Government would strongly recommend that schools follow these procedures, and the vast majority of schools will do so; the costs would be approximately the same as for a regulatory response.

### *Option 3: introduce regulations and guidance to take forward the proposals*

The fee for a CRB check is paid by the individual applying for a check not the employer. Some employers choose to pay the fee on behalf of the employee, but it is

at their discretion. Therefore, the need to conduct CRB checks on all teachers recruited from overseas does not necessarily represent an added financial burden on schools. The costs associated with processing the forms do not represent a new burden on schools as this has been a long standing requirement in relation to staff appointments, with the exception of those recruited direct from overseas, for which costs can be met from within existing resources.

The proposed regulation requiring schools to obtain evidence from supply agencies ensuring the necessary checks have been undertaken on all supply staff are based on good practice as a result of the strong guidance that has been issued by the Department for Education and Skills over a number of years. The Government does not expect there to be significant additional costs.

Requiring schools to keep records that the necessary checks on staff have been carried out extends and clarifies the existing strong guidance. While it is the Government's view that schools should have been keeping records, Ofsted's findings suggest that many are not. The additional burden on schools of maintaining a single central record of checks, once it is created, will be small. It is expected that keeping this record up to date will usually be no more than two days of an administrative staff's time spread over the year, depending on the size of the school, the number of teachers and the frequency with which supply staff are used. The Department for Education and Skills is providing advice and guidance to schools on record keeping.

The Government recognises that, while this one-off exercise of creating the record is not a large one, it will involve a certain amount of work for school administrative staff as well as oversight from the school's senior management. The Government is working closely with a group of stakeholders, including the Implementation Review Unit, to ensure that the Department for Education and Skill's guidance for schools is as clear as possible and that the process is managed so as to keep burdens to a minimum.

### **Small Firms Impact Test**

Some supply agencies will be small firms. Supply agencies should already have been supplying relevant information to schools. Where they are not, the additional cost borne by them to conform to the new regulations is likely to be minimal.

The number of staff recruited from overseas by small firms is likely to be small, so the additional cost of carrying out the additional checks on overseas staff is likely to be minimal; however, supply agencies are able to decide whether or not to reimburse the supply teacher for that cost.

### **Competition Assessment**

There are no competition implications.

### **Enforcement, sanctions and monitoring**

In relation to non-maintained special schools, the Department for Education and Skills will have a central leadership role in ensuring that schools take the necessary steps to

safeguard their children from harm. Ofsted, as part of their regular inspection process will seek to determine how well schools comply with the regulations and associated guidance. Where schools are found to be placing the children for which they are responsible at risk of harm, Ofsted will comment on this in their report, if schools do not take the necessary steps to correct the situation then the Department for Education and Skills will, as a last resort, have powers of intervention, which they could use to ensure that schools comply with the regulations.

### **Implementation and delivery plan**

To be completed after the consultation.

### **Post-implementation review**

The date for the post-implementation review will be set after the public consultation.

### **Summary and Recommendation**

To be completed after the consultation.

### **Declaration and publication**

I have read the regulatory impact assessment and I am satisfied that the benefits justify the costs.

Signed ...*Andrew Adonis*.....

Date     *28th March 2007*

Lord Andrew Adonis  
Parliamentary Under Secretary of State for Schools  
Department for Education and Skills

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