

EXPLANATORY MEMORANDUM TO
THE PUPIL REFERRAL UNITS (MISCELLANEOUS AMENDMENTS) (ENGLAND)
REGULATIONS 2012

2012 No. 1825

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

2. Purpose of the instrument

2.1 This instrument amends other regulations so as to give the Secretary of State the power to:

- direct a local authority (LA) to close a Pupil Referral Unit (PRU) requiring significant improvement;
- constitute the management committee of a PRU so that it consists of interim executive members if the PRU requires significant improvement or special measures, or where the Secretary of State considers it to be underperforming.

2.2 The instrument also amends regulations on the closure of PRUs to take account of this change, and amends the definition and eligibility criteria of PRU management committee “community members”.

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

3.1 None

4. Legislative Context

4.1 Section 19 of the Education Act 1996 (the 1996 Act) requires LAs to make arrangements for the provision of suitable education at school or otherwise than at school for those children of compulsory school age who, by reason of illness, exclusion from school or otherwise may not for any period receive suitable education unless such arrangements are made for them. Any school established and maintained by a LA which is specially organised to provide education for such children is known as a PRU¹. Schedule 1 to the 1996 Act provides that enactments which apply to maintained schools can be applied, with or without modification, to PRUs by regulations².

4.2 The Education and Inspections Act 2006 (the 2006 Act³) gives the Secretary of State the power to constitute a maintained school’s governing body so that it consists of interim executive members where that school is eligible for intervention (schools

¹ See section 19(2B) of the 1996 Act.

² See paragraph 3 of Schedule 1 to the 1996 Act.

³ See section 69 of the 2006 Act.

requiring special measures or significant improvement or schools which have been issued LA warnings because they are underperforming and have failed to comply with the notice). Schedule 6 of the 2006 Act sets out the detail of how a governing body consisting of interim executive members is to be constituted and run. This instrument amends the Education (Pupil Referral Units) (Management Committees etc) (England) Regulations 2007 (the 2007 Management Committee Regulations) so that the Secretary of State has similar powers in relation to PRUs requiring special measures, significant improvement or which the Secretary of State considers to be underperforming. This instrument applies, with any necessary amendments, section 69 of, and schedule 6 to, the 2006 Act to PRUs.

4.3 The 2006 Act gives the Secretary of State the power to direct a LA to close a maintained school requiring special measures. These provisions were amended by the Education Act 2011 to include maintained schools requiring significant improvement or which have failed to comply with a warning notice given by the LA⁴. This instrument amends the Education (Pupil Referral Units) (Application of Enactments) (England) Regulations 2007 (the 2007 Application of Enactments Regulations) so that the Secretary of State may also direct a LA to close a PRU requiring significant improvement. This amendment brings PRUs further into line with maintained schools.

4.4 The Education (Short Stay Schools) (Closure) (England) Regulations 2010 (the 2010 Regulations) specify the process the LA has to follow when the Secretary of State directs the LA to close a PRU requiring special measures. This instrument extends this provision to those requiring significant improvement. The 2010 Regulations also require a LA to obtain the Secretary of State's consent before closing a PRU which requires special measures. This instrument amends the 2010 Regulations to extend this requirement to situations where a PRU requires significant improvement and to underperforming PRUs where Secretary of State has constituted the PRUs management committee so that it consists of interim executive members. These amendments have been made to take into account the changes outlined above. These amendments also replace any references to "short stay schools" with references to PRUs. The Education (Short Stay Schools) (Closure) (England) (Amendment) Regulations 2010 provided that any references to short stay schools in the 2010 Regulations should be read as references to PRUs until the coming into force of section 249(1) of the Apprenticeships, Skills, Children and Learning Act 2009 (the 2009 Act) – which changed the name of PRUs to short stay schools. However, as this name change never occurred and section 249(1) of the 2009 Act was repealed by the Education Act 2011⁵, these amending regulations no longer make sense. This instrument therefore revokes these amending regulations and brings the 2010 Regulations up to date following that repeal.

4.5 The 2007 Management Committee Regulations specify how a PRU management committee should be established and run. This instrument amends these regulations so that, when appointing community members to PRU management committees, the committee (or in certain circumstances, the LA) must first seek to appoint a person who is a governor or member of staff of a maintained school or an Academy school in the

⁴ See section 68 of the 2006 Act, as amended by section 44 of the Education Act 2011.

⁵ See section 51(1) and (2)(a) of the Education Act 2011.

community served by the PRU (“a school representative”). These amendments specify that a LA employee cannot be appointed as a community member (unless that person is employed in a school maintained by the LA). Also, from 1 September 2013, certain persons, including LA employees (except those employed in schools maintained by the LA), may not hold or continue to hold office on PRU management committees as community members.

5. Territorial Extent and Application

5.1 This instrument applies only to England.

6. European Convention on Human Rights

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

7. Policy background

7.1 Alternative Provision (AP) is education arranged for pupils who for various reasons, such as illness or exclusion, would not receive suitable education without these arrangements. PRUs are schools established and maintained by LAs to provide education for children who require AP. Children in AP are some of the most vulnerable in the education system. Many are from deprived backgrounds with a range of underlying issues that may affect their education. Their educational attainment falls far below those of their peers - just 1.4% of those in AP in Key Stage 4 obtaining 5 or more GCSEs at grades A*-C, including English and Maths, compared with 53.4% in all schools in England⁶.

7.2 As part of the Secretary of State’s plans to reform the sector he asked the Government’s Expert Adviser on behaviour Charlie Taylor to review AP. In March 2012 Charlie Taylor published his report *Improving Alternative Provision* which sets out the need to reform the AP sector and makes 28 recommendations for reform. The Secretary of State accepted the recommendations and this instrument implements several of them (27, 8 and 25).

Interim Executive Board (IEB)

7.3 Charlie Taylor’s review of AP concludes that Academy freedoms will give the education professionals in PRUs greater scope to innovate, allowing them to better meet the needs of some of the most vulnerable young people and play a leading role in driving up quality across the whole AP sector. He therefore recommends that all PRUs should have the opportunity to become AP Academies (recommendation 22) and failing PRUs should become sponsored AP Academies or be taken over by other successful PRUs/AP providers (recommendation 23). Primary and secondary legislation has already been made

⁶ Department for Education statistical first release GCSE and Equivalent Results in England, 2009/10 (Revised) - additional tables of experimental statistics relating to the KS4 achievements of pupils in alternative provision in 2009/10

which allows PRUs to become AP Academies and gives the Secretary of State the power to issue Academy Orders in relation to failing PRUs.

7.4 The Secretary of State currently has the power to direct LAs to issue warning notices to maintained schools which are underperforming but were not judged by Ofsted in their most recent inspection to be causing concern (requiring special measures or significant improvement). This power does not exist for PRUs and there is currently no way to tackle PRUs that are underperforming but not in an Ofsted causing concern category. The report therefore also recommends that the Secretary of State should be able 'to intervene to oblige PRUs to enter into Academy arrangements in cases where the PRU is not failing, but is not delivering expected outcomes' (recommendation 27). To implement this recommendation, part 2 of this instrument provides that the Secretary of State can constitute the management committee so that it consists of interim executive members in a PRU requiring special measures, a PRU requiring significant improvement, or where the Secretary of State is satisfied that the PRU is underperforming.

7.5 In maintained schools which are eligible for intervention (requiring special measures, significant improvement or where they have failed to comply with a warning notice which was given by a LA warning notice because they are underperforming) the Secretary of State can use powers to constitute the governing body so that it consists of interim executive members. IEBs can be used to ensure that the day to day running of the institution is effectively managed and the education of pupils not disrupted when intervention occurs. However, IEBs can also be used as an effective intervention strategy in their own right especially where the governance of the institution has broken down or is failing to take the necessary action to improve provision. For example, IEBs can vote in favour of conversion to become an AP Academy and apply for an Academy Order.

7.6 Part 2 of this instrument therefore creates a similar power in relation to PRUs and enables the Secretary of State to constitute a management committee so that it consists of interim executive members where the PRU requires significant improvement, special measures or where the PRU is underperforming. This change brings PRUs further into line with maintained schools and implements recommendation 27 by allowing the Secretary of State to intervene in underperforming PRUs. As with maintained schools, this power will only be used after work has taken place with the LA and PRU in question to try to broker voluntary solutions to improve the standard of the PRU. The instrument amends the 2007 Management Committee Regulations to define underperforming as PRUs where the Secretary of State is satisfied that:

- a) the standards of performance of pupils at the PRU are unacceptably low, and are likely to remain so;
- b) the quality of provision for pupils at the PRU is unacceptably low;
- c) there has been a serious breakdown in the way the PRU is managed or governed which is prejudicing, or likely to prejudice, such standards of performance; or

- d) the safety of pupils or staff of the PRU is threatened (whether by a breakdown of discipline or otherwise).

These criteria mirror those outlined in the 2006 Act for maintained schools with the addition of criteria (b). This new criteria has been included as for some PRUs performance data may not be meaningful, for example, because of the size or nature of the pupil cohort. We may therefore want to be able to consider other evidence about the quality of the provision including qualitative evidence such as Ofsted reports. Consultation responses on this issue argued that the Secretary of State should also be able to consider information about, for example, attendance, destinations and reintegration into mainstream – the above criteria would allow this.

7.7 To achieve this, part 2 of this instrument applies, with modifications, the legislation regarding IEBs in mainstream schools (section 69 of, and schedule 6 to, the 2006 Act) to PRUs. These provisions outline how interim executive members will be appointed and how the management committee operates when it is so constituted.

Secretary of State's power to direct closure of a PRU

7.8 In our recent consultation on the reform of AP we outlined plans to update the legislation relating to PRUs to bring it into line with the position for maintained schools. The Education Act 2011 extended the Secretary of State's power to direct a LA to close a maintained school from those requiring special measures to those failing schools requiring significant improvement. Part 3 of this instrument updates the legislation applying to PRUs to take account of this change, and allows the Secretary of State to direct a LA to close a PRU requiring significant improvement.

7.9 The 2010 Regulations amended in part 4 of this instrument set out the process LAs need to follow when the Secretary of State directs a PRU (in special measures) to close and states that where a PRU is in special measures the LA has to seek consent before closing. The 2010 Regulations are amended so that they also apply to PRUs requiring significant improvement and to PRUs where the Secretary of State has constituted the management committee so that it consists of interim executive members. This is to take account of the changes outlined above, and ensure that the 2010 Regulations apply to all failing and underperforming PRUs.

Composition of management committee

7.10 Charlie Taylor's review of AP also recommended that head teachers and senior managers from schools should sit on PRU management committees and that the Secretary of State should amend regulations to achieve this (recommendations 8 and 25). This change would allow PRUs to be more responsive to the needs of local schools. Charlie Taylor found that, in some cases, LAs are over-represented on management committees (often because appointed community members are also LA employees), and that this may limit the PRU's autonomy from its LA. Part 2 of this instrument implements these recommendations by:

- amending the definition of ‘community’ member to state explicitly that school representatives can be community members;
- amending the definition of ‘community’ member to state explicitly that LA employees – apart from persons employed in schools maintained by the LA – cannot be appointed or, from 1st September 2013, hold or continue to hold office, as community members; and
- stating that when appointing a ‘community’ member the committee or LA should first seek to appoint a school representative.

Consolidation

7.11 The Department intends to consolidate the 2007 Application of Enactments Regulations next year.

8. Consultation outcome

8.1 A public consultation took place from 3 April to 15 May 2012 seeking the sector’s view on proposals to implement some of the recommendations in *Improving Alternative Provision*. The consultation was limited to 6 weeks to enable the Department to publish regulations before the end of the academic year so that the sector has time to make the changes before they come into force in September. It was published on the Department’s e-consultation webpage and was emailed to LAs and PRUs directly. The full report on the consultation responses can be found on the Department’s consultation website here <http://www.education.gov.uk/consultations>. Below is a summary of the questions and responses relevant to this instrument.

8.2 On the question of whether the proposals would allow the Secretary of State to effectively intervene in underperforming PRUs, the responses were inconclusive, with almost half of respondents indicating they were not sure. Around 30% felt these proposals should not be the only response to an underperforming PRU. We are therefore not currently implementing one of the proposals outlined in the consultation - to allow the Secretary of State to direct LAs to close an underperforming PRU. Instead, as outlined above, we currently plan to use another of the proposals outlined in the consultation - to allow the Secretary of State to constitute the management committee of a failing or underperforming PRU so that it consists of interim executive members - to intervene in underperforming PRUs. This, alongside the powers allowing for intervention in failing PRUs, would allow for greater diversity in the types of intervention that are possible. Also, as outlined above intervention powers will only be used after work has taken place with the LA and PRU in question to try to broker voluntary solutions to improve the standard of the PRU.

8.3 On the criteria for judging whether a PRU is underperforming, nearly half of respondents agreed to the proposed criteria. However, 44% of respondents felt that the criteria was too limited. We have therefore included an additional criteria on the quality of provision which will allow us to consider a wider range of evidence.

8.4 As there was a clear majority in favour of proposals to ensure schools are fully represented on management committees, we have implemented these without amendment.

9. Guidance

9.1 The consultation included new draft AP guidance. In response to issues raised in the consultation this will be revised and published in July 2012 to come into force in September 2012. The new guidance will outline the regulations in this instrument.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 The impact on the public sector is positive. Creating AP Academies will have the same impact on the public sector as mainstream Academies; the impact assessment for the Academies Act 2010 can be found on the Parliament website (www.parliament.uk) and shows the benefits are significantly higher than the costs. The impact of the changes to the composition of PRU management committees (in relation to community members) to the public sector will be negligible. Many PRUs already have schools representatives and do not have LA employees as management committee community members (in line with previous guidance). Where changes are needed to comply with this instrument the cost of PRUs replacing LA employees with new community members will be purely administrative and very small.

10.3 An Impact Assessment has not been prepared for this instrument as the total unfunded cost to the public sector will be less than £5m a year. An Equalities Impact Assessment on the implementation of Charlie Taylor's review of AP, to which these regulations contribute, can be found on the Department's equality analyses webpage.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The Academies Act 2010 requires the Secretary of State to publish an annual report containing information on the Academies (including AP Academies) opened during the year covered by the annual report, and on the performance of Academies. Furthermore Ofsted will be monitoring alternative provision using thematic surveys during academic year 2012/13.

13. Contact

13.1 Neil Remsbery at the Department for Education (tel: 02073407043 or email: neil.remsbery@education.gsi.gov.uk) can answer any queries regarding the instrument.