

**EXPLANATORY MEMORANDUM TO
THE NON-MAINTAINED SPECIAL SCHOOLS (ENGLAND)
REGULATIONS 2015**

2015 No. 728

1. This explanatory memorandum has been prepared by the Department for Education (“the Department”) and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 These Regulations consolidate with amendments the Education (Non-Maintained Special Schools) (England) Regulations 2011 (“the 2011 Regulations”) and set out the requirements for a non-maintained special school (NMSS) to be approved and continue to be approved by the Secretary of State.

2.2 These Regulations remove unnecessary burdens on the sector contained in the 2011 Regulations and realign requirements for NMSSs following recent changes in primary legislation.

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

None.

4. Legislative Context

4.1 These Regulations set out the requirements for a NMSS to be approved and continue to be approved by the Secretary of State under section 342 of the Education Act 1996¹ (“the 1996 Act”).

4.2 The powers under sections 342A and 342C of the 1996 Act (regulations 5 and 6) are exercised for the first time.

¹ <http://www.legislation.gov.uk/ukpga/1996/56/contents>

4.3 These Regulations revoke and replace the 2011 Regulations and the Education (Non-Maintained Special Schools) (England) (Amendment) Regulations 2015.

5. Territorial Extent and Application

5.1 This instrument applies 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 The 2011 Regulations require updating to reflect the latest legislative and policy positions and the main changes are set out below.

7.2 In summary, these Regulations:

- Make provision under section 342A of the Education Act 1996 for the Secretary of State to seek an emergency order from a Justice of the Peace (JP) for a NMSS to cease to be approved. This would have the practical effect of closing the school immediately. The JP may only make an order if it appears to the JP that a pupil at the school is suffering or likely to suffer significant harm. The Department will only use this power in emergency situations, where a child's welfare is at serious risk (regulation 5). It is the Department's intention to issue guidance in order to ensure that this power is used appropriately and proportionately.
- Make provision for the right of appeal against an order made by a JP by the proprietor of a NMSS to the First-tier Tribunal

(under powers set out in section 342C of the Education Act 1996) (regulation 6).

- Introduce the requirement for NMSSs to include arrangements that actively promote the fundamental British values of democracy, the rule of law, individual liberty, and mutual respect and tolerance of those with different faiths and beliefs. The policy derives from the government’s Prevent Strategy². The government requires fundamental British values to be actively promoted across all schools in England. This requirement for NMSSs is consistent with the requirement on independent schools³, which also applies to academies and free schools, and the expectation on maintained schools as articulated in the Departmental guidance to the maintained sector on promoting fundamental British values as part of the spiritual, moral, social and cultural development of pupils⁴. Details on practical implications for NMSSs will be included in guidance (Paragraph 3(b) of Part 1 of the Schedule).
- Make changes to the complaints procedures so that NMSSs will have the freedom to decide how and where to record “informal” complaints, thereby reducing bureaucracy for NMSSs, whilst making clear the requirement to have a formal procedure for a complaint to be made in writing, where the complainant is not satisfied with the response to their complaint dealt with on an informal basis (paragraph 31 of Part 2 of the Schedule).
- Remove the detailed requirements for the prospectus that were set out in Part 3 of the Schedule to the 2011 Regulations, which were onerous for NMSS. The Department believes that individual NMSSs are best placed to decide what should be

² <https://www.gov.uk/government/publications/prevent-strategy-2011>

³ <http://www.legislation.gov.uk/uksi/2014/3283/contents/made-> see (5(a))

⁴ <https://www.gov.uk/government/publications/promoting-fundamental-british-values-through-smisc>

included in their prospectus (paragraph 33 of Part 2 of the Schedule).

7.3 When the 2011 Regulations were considered by the Merits Committee, it asked, “*Why does a governor require permission to work and not simply permission to live in the UK?*”. In its response, the Department gave a commitment that it would report back to the Merits Committee on this matter. This is the first time that the 2011 Regulations have subsequently been amended and consolidated; hence this is the first opportunity for the Department to report back to the Committee. The Committee will note that this provision has been retained in the Regulations; this is consistent with a decision Ministers took to retain the same provision in the Independent School Standards Regulations⁵ when these were reviewed and updated during 2014.

8. Consultation outcome

8.1 The Department ran a consultation on the draft instrument which was targeted at the sector, i.e. the 69 NMSSs and the major representative body for NMSSs, the National Association of Independent Schools and Non-Maintained Special Schools (NaSS). The consultation ran from 17 October 2014 to 19 December 2014. Due to the small size of the sector and the relative simplicity of the changes being made the Department chose not to run a formal consultation and so did not make it public via GOV.UK.

8.2 The Department received five responses from NMSSs and a response from NaSS. The proposed changes to the 2011 Regulations were generally positively received, with a majority of responses either in favour of the changes proposed, or in some instances “not sure”. Where respondents stated that they were “not sure” about the proposals, this was generally down to a perceived lack of clarity and the need for guidance. The Department will seek to clarify these points in guidance.

8.3 The consultation did not highlight any major issues. The Department received

⁵ <http://www.legislation.gov.uk/uksi/2014/3283/contents/made>

useful constructive feedback and consequently made minor changes, and in some instances highlighted topics to cover in guidance.

The consultation was conducted by email correspondence and as it wasn't a public consultation the results were not published on the GOV.UK website; a document summarising the outcomes of the consultation was circulated by email to the sector.

9. Guidance

9.1 The Department will publish guidance before the Regulations come into force. This will explain the changes in these Regulations and provide the clarity the sector has requested via the consultation. It will be made available to schools on the GOV.UK website.

10. Impact

10.1 The impact on business, charities or voluntary bodies is minimal.

10.2 The impact on the public sector is minimal.

10.3 The Impact Assessment (IA) estimates that there will be a small net benefit of £2,743 across the whole of the NMSS sector falling in any one year, as a result of the Regulations.

10.4 The IA is published alongside the Explanatory Memorandum on www.legislation.gov.uk

11. Regulating small business

11.1 The legislation applies to small business (where a NMSS is a small business).

11.2 The Department has not taken any action to minimise the impact of the requirements on small businesses.

11.3 The basis for this decision is that the Department believes quality of education and safeguarding to be basic requirements of the education system and, as such, they matter regardless of the size of the school concerned. Given the serious nature of the issues that the Regulations address, such as safeguarding, welfare, health, finances and accounting, the Department takes the view that small businesses should not be exempted from them.

11.4 The Department also believes that it would be inappropriate to award a partial exemption to small schools, to grant them an extended transition period, or to make compliance voluntary for the same reasons as set out above.

12. Monitoring & review

12.1 The Department will monitor and review the effectiveness of the instrument and the impact on NMSSs on a regular basis.

13. Contact

13.1 Michael Bell at the Department for Education (tel: 01325340430, email: michael.bell@education.gsi.gov.uk) can answer any queries regarding the instrument.