

EXPLANATORY MEMORANDUM TO
THE SPECIAL EDUCATIONAL NEEDS AND DISABILITY (FIRST-TIER
TRIBUNAL RECOMMENDATIONS POWER) REGULATIONS 2017

2017 No. 1306

1. Introduction

1.1 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 The purpose of The Special Educational Needs and Disability (First-tier Tribunal Recommendations Power) Regulations 2017 is to make provision to extend the powers of the First-tier Tribunal (Special Educational Needs and Disability) so that it may make non-binding recommendations in respect of certain types of health and social care needs and provision specified in Education, Health and Care (EHC) plans.

2.2 These Regulations have transitional provisions. The Regulations will only apply to appeals against certain decisions by a Local Authority made on or after 3rd April 2018 or appeals relating to Education, Health and Care (EHC) plans issued or amended after 3 April 2018.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

4.1 The Regulations are made in exercise of the powers in section 29(3) of the Education Act 1996 and sections 51(4) and (5) and 135(2) and (3) of the Children and Families Act 2014. This is the second time that regulations have been made under section 51(4) and (5) and section 135(2) and (3) to confer a power on the First-tier Tribunal to make recommendations in respect of matters against which no appeal may be brought.

4.2 The Special Educational Needs and Disability (First-tier Tribunal Recommendation Power) (Pilot) Regulations 2015 made provision for a pilot scheme involving 13 local authorities, the Special Educational Needs and Disability (First-tier Tribunal Recommendation Power) (Pilot) (Amendment) Regulations 2016 added four more local authorities to the pilot scheme and the Special Educational Needs And Disability (First-tier Tribunal Recommendation Power) (Pilot) (Revocation And Transitional Provision) Regulations 2016 revoked the earlier pilot regulations.

4.3 Section 79 of the Children and Families Act 2014 required the Secretary of State for Education and the Lord Chancellor to carry out a review of how effectively

disagreements about the exercise of functions under Part 3 of the Act were being resolved and to prepare and lay before Parliament a report on the outcome of the review. As part of this review, in 2015 the government piloted the extension of powers of the SEND Tribunal to make non-binding recommendations on health and/or social care needs and/or provision in EHC plans with 17 local authorities.

- 4.4 The outcome of the evaluation of the pilot scheme was included in the report to Parliament in March 2017. The report to Parliament set out that "We [the government] plan to introduce a two-year national trial, in early 2018, of the expansion of the First-tier Tribunal SEND powers to make non-binding recommendations on the health and social care elements of EHC plans." In October 2017, the Minister of State for Children and Families wrote to Directors of Children's Services announcing "the national trial will begin in March 2018 and will run for two years, following which a decision will be made on roll-out. Regulations will set out the new duties on all local authorities and health commissioners. These will be based on the duties required under the small pilot". The launch date has since changed to 3 April 2018. The regulations are not time limited, but the trial is to last for two years, where a decision on its continuation will be taken.

5. Extent and Territorial Application

- 5.1 This instrument applies to England.
- 5.2 These Regulations apply to all Local Authorities in 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

What is being done and why

- 7.1 EHC plans, which replace statements of special educational needs (SEN), were introduced in September 2014 through the Children and Families Act 2014, bringing together education, health and social care services for those children and young people with the most complex special educational needs. EHC plans place more emphasis on personal outcomes and describe clearly the support a child or young person will receive across these different services to achieve these outcomes.
- 7.2 Parents and young people can only appeal to the First-tier Tribunal (Special Educational Needs and Disability) in respect of the education aspects of their EHC plan. If they are not satisfied with the health or social care needs and provision within an EHC plan then they need to pursue separate complaint routes.
- 7.3 Debates during the passage of the Children and Families Act 2014 highlighted concerns about the appropriateness of the system for resolving disagreements. A number of sector organisations, including parent carer forums, wanted parents/young people to have a single route of appeal against decisions about the new EHC assessments and plans. It was thought that this would give the Tribunal a holistic, person-centred view of the child or young person's needs and may reduce the burden on families going down three separate routes of complaint. This led to the commitment in the Children and Families Act 2014 to review the current

arrangements for dispute resolution, looking at the earlier stages of disagreement resolution including mediation.

- 7.4 The Secretary of State and the Lord Chancellor carried out a review of how effectively disagreements were being resolved and reported back to Parliament on 29 March 2017. The Department for Education piloted this single route of redress in 17 local authorities (LAs) across 15 months and this formed part of the review. In the pilot local authority areas, regulations extended the First-tier Tribunal's powers when determining certain appeals in relation to EHC plans. This enabled it to also make non-binding recommendations about the health and social care needs and provision that should be specified within EHC plans, providing a single point of access for parents and young people who were unhappy with the contents of an EHC plan.
- 7.5 The review showed that health and social care disagreements were resolved and it acted as a 'lever' to promote resolution prior to the hearing. The pilot stimulated more joint working across education, health and social care and increased the knowledge and understanding of the system. Most stakeholders, including parents and LAs, supported it in principle. However, there was not enough evidence (with only 30 cases) to enable assessment of the impact of the pilot with regard to health and social care responsiveness to recommendations, or any wider implications for the sectors. In March 2017 the government announced that it would be implementing a two year national trial from early 2018.
- 7.6 The national trial will run for 2 years, applying to local authority decisions and EHC plans issued or amended from 3 April 2018. It will involve all local authorities and clinical commissioning groups and will follow the same principles of the pilot. An appeal cannot include a health and/or social care element unless it also has an education element. Recommendations will be non-binding on health and social care but there will be a clear expectation that recommendations will be followed - there will be an opportunity for parents and young people to complain to the Ombudsmen or seek judicial review, if tribunal recommendations are not followed.

8. Consultation outcome

- 8.1 We did not carry out a formal consultation for this trial as it is time limited and will be evaluated independently. The evaluation will include assessing the views of a range of stakeholders. The national trial follows a small voluntary pilot of 17 local authorities, which was evaluated as part of a wider review of disagreement resolution arrangements. The evaluation of the pilot found that most parents, LA representatives, mediators and parent organisation representatives supported the principle of having a single route of redress for all the elements of an EHC plan.

9. Guidance

- 9.1 The Department for Education will issue non-statutory guidance for education, health and social care commissioners and for parents and young people prior to the national trial commencing on 3 April 2018. This guidance will include their duties and the processes they need to follow as well as what support will be available.

10. Impact

- 10.1 There is no impact on business. Charities or voluntary bodies may wish to offer support to families going through the tribunal process but we do not expect a significant impact on them.

- 10.2 Local authorities will be able to claim funds from the Department for Education for the duration of the trial to reimburse the reasonable costs incurred in taking part in the trial up to a ceiling value of £4,000 per appeal, to be reviewed quarterly. It is expected that this will cover the following additional work: informing the social care team and health commissioning body of the appeal and tribunal recommendations; collecting evidence from the social care team and health commissioning body regarding their responses to the recommendations; sending this information to the Tribunal; possible attendance at a Tribunal hearing; and payment to social care and health commissioning bodies in relation to the gathering of evidence, creating an outline argument and responding to recommendations from the Tribunal.
- 10.3 There was no significant impact on the local authorities and clinical commissioning bodies involved in the pilot scheme, however the evidence in the pilot scheme was limited and it was not possible to assess the full impact on the public sector. This is one of the reasons government is trialling the approach nationally and the impact will be assessed as part of the evaluation of the trial and will feed into any future decision on continuation of the policy.
- 10.4 A full Impact Assessment has not been prepared for this instrument.

11. Regulating small business

- 11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

- 12.1 There is an external steering group of key stakeholders from across the special education, health, social care and justice sectors that meets three times a year and supports the project with planning, implementation, communication and monitoring. Membership includes the Department of Health, NHS England, the Ministry of Justice, Her Majesty's Courts and Tribunals Service, the judiciary, LA and CCG representatives, National Network of Parent Carer Forums (NNPCF), Council for Disabled Children (CDC), SEC (Special Educational Needs Consortium), Independent Parental Special Education Advice (IPSEA), Local Government Association (LGA), Association of Directors of Children's Services (ADCS), Association of Directors of Adult's Social Services (ADASS), and the UK Administrative Justice Institute (UKAJI) among others.
- 12.2 We will procure an external organisation to carry out an evaluation of the trial. We expect regular progress updates via email and/or telephone, regular oral presentation of findings to the steering group, an interim report on findings after one year's worth of data and a final research report and research brief at the end of the evaluation, including a good practice guide for local authority and health commissioners to improve the wider system.
- 12.3 The evaluation will look at implementation, outcomes for families and commissioners/services and costs and will inform a decision on future roll-out.

13. Contact

- 13.1 Emma Sass at the Department for Education, telephone: 020 7340 8357 or email: Emma.Sass@education.gov.uk, can answer any queries regarding the instrument.