

EXPLANATORY MEMORANDUM TO
THE INFORMATION AS TO PROVISION OF EDUCATION (ENGLAND)
(AMENDMENT) REGULATIONS 2023

2023 No. 1186

1. Introduction

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

2. Purpose of the instrument

- 2.1 This instrument amends the annual data collection requirements imposed on local authorities in England in the Information as to Provision of Education (England) Regulations 2016 (S.I. 2016/555) (“the 2016 Regulations”) in a number of ways, including the type of data collected, the collection methods and the timeframes. A key change is that it inserts requirements relating to pupils with special educational needs (“SEN”) so that each local authority in England must provide the Secretary of State with information annually about the capacity of certain specialist settings for pupils with SEN and forecasts of future demand for places for such pupils.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

4. Extent and Territorial Application

- 4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales.
- 4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England.

5. European Convention on Human Rights

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

6. Legislative Context

- 6.1 The 2016 Regulations require local authorities to provide the Secretary of State both with the information specified in Schedule 1 and reports containing the information in relation to pupil admissions specified in Schedule 2. The information requirements set out in Schedule 1 include the number of registered pupils, school capacity (school capacity being the number of pupil places schools can accommodate) and capital spending on the provision of new school places.
- 6.2 This instrument, which amends the 2016 Regulations by replacing regulations 2, 3 and 5 and Schedule 1 and inserting Schedule 1A, is being made to align the 2016 Regulations with the data collection relating to school capacity now required from local authorities in England by the DfE. The 2016 Regulations have not been updated

since 2016 and so new provisions are accordingly being added by this instrument to cover data collections relating to SEN and also to update some of the annual data collections requirements in the 2016 Regulations both in terms of the type of data and how and when the data is to be provided. This instrument does not amend Schedule 2.

7. Policy background

What is being done and why?

- 7.1 The 2016 Regulations prescribe information that local authorities in England (“LAs”) must provide to the Secretary of State each year, relating to the provision of primary and secondary education in their area. Both the 2016 Regulations and this instrument are made further to section 29(3) of the Education Act 1996 which enables regulations to be made requiring LAs to provide prescribed information relating to the provision of primary or secondary education in the LA’s area.
- 7.2 For LAs to be able to meet their duty to provide sufficient school places when required, the DfE provides capital funding to LAs in England. Basic Need capital funding allocations are paid to LAs by the DfE to provide new mainstream school places and High Needs Provision Capital Allocations (“HNPCA”) are also paid to LAs to provide new places and improve existing provision for pupils with SEN or who require alternative provision. The data collected through the 2016 Regulations informs the Basic Need capital funding allocations, whilst the data collected through the 2016 Regulations as amended by this instrument will inform both Basic Need capital funding allocations and HNPCA. Capital spend data is that data which the LAs submit to the DfE to evidence that they have spent allocated Basic Need or HNPCA on capital projects which are helping to ensure that sufficient school places are available for pupils in the LA’s area.

What did any law do before the changes to be made by this instrument?

- 7.3 The 2016 Regulations worked in much the same way as this instrument but included some data items which were no longer needed, such as the requirement for LAs to report on the capacity that was actually being used when new schools or expansions had been built but were not yet full. This instrument has removed any information no longer required of LAs from the 2016 Regulations.

Why is it being changed?

- 7.4 Since 2016, the DfE’s data requirements have changed as we look to support HNPCA, gather more information at school level and on the details of LA spending, and make better use of online systems. There is therefore a need to update the 2016 Regulations to align them with the data that is now required from LAs.

What will it now do?

- 7.5 The data collected through the 2016 Regulations helps the DfE to calculate Basic Need capital funding allocations, by comparing school capacity against forecast pupil numbers. The changes made to the 2016 Regulations by the instrument will help to facilitate this calculation.
- 7.6 Notably, methods for measuring capacity vary depending on the type of school and whether a whole school or year group is being measured. This instrument reflects this by accordingly requiring LAs to calculate capacity in accordance with published

guidance which covers these various methods, in substitution for the guidance which was referred to at regulation 5 of the 2016 Regulations.

- 7.7 Additionally, the instrument separates out the school capacity and corresponding pupil forecast data (covered by regulation 3 and Schedule 1 as amended by this instrument) from the capital spend data (covered by regulation 3A and Schedule 1A as inserted by this instrument). It provides for the capacity and forecasting data to be collected through the School Capacity Survey (“SCAP”) via a separate digital portal known as COLLECT (regulation 3(2) as amended by this instrument) and the capital spend data to be collected through the Capital Spend Survey (“CSS”), via the Capital Spend Survey portal (regulation 3A(2) as inserted by this instrument), with different dates applicable for each. The CSS allows for LAs to better report on the costs faced by LAs and academies and follows industry standard definitions for specific elements of building cost. This information will better inform the DfE’s understanding of what constitutes value for money in school place provision, and where best practice can be found.
- 7.8 This instrument also replaces Schedule 1 to reflect the DfE’s current data requirements. This includes:-
- Clarifying that LAs must supply information on the capacity of individual schools, rather than just the total capacity of all schools in a given planning area (paragraph 2);
 - Providing for capacity to be split between primary and secondary education where a school provides both (paragraph 2(b));
 - Requiring LAs to provide information about planned decreases in capacity at mainstream schools (rather than only planned increases in capacity) and to obtain the data at year group level, as opposed to for the whole school (paragraph 3);
 - Changing the information which needs to accompany the forecasts (paragraph 6);
 - Inserting a new requirement to provide the trend in pupil numbers for primary and secondary mainstream education and special educational provision, as well as, where relevant, the factors affecting or likely to affect such numbers (paragraph 7).
- 7.9 HNPCA has not historically been calculated based on data collected via the 2016 Regulations but additions made by this instrument will facilitate this. The DfE has also not historically collected central data on available capacity in settings reserved for pupils with SEN. The DfE is aware of evidence showing that the system is facing significant place pressures in respect of pupils with SEN and so, by collecting data relating to the capacity of these settings and corresponding pupil forecasts, the DfE can start to better understand the overall number of SEN places in the system and the possible extent of any overall shortfalls. As explained above, this will enable the DfE to better calculate HNPCA.
- 7.10 Accordingly, this instrument includes provisions to ensure all state funded special schools (not just academies) are in scope of the 2016 Regulations. It also adds provisions to cover the collection of specialist capacity available in special schools and in Special Education Needs units (“SEN units”) and resourced provision located within mainstream schools. A SEN Unit and resourced provision are both units in a mainstream school which are recognised by the LA as being specially

organised for pupils with SEN. The difference is that for the former, the SEN pupils are taught mainly inside the SEN unit, whilst with the latter, the pupil are taught mainly outside the resourced provision unit. Forecast data for demand for specialist places at special schools, independent schools, and alternative provision (being educational provision arranged by LAs for children for whom normal schooling is, for various reasons, inaccessible or unsuitable) is included, as well as details of any SEN units or resourced provision in mainstream schools.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act

9. Consolidation

9.1 There is no plan to consolidate the 2016 Regulations at this time.

10. Consultation outcome

10.1 As has been the established practice when amending the regulations underpinning the SCAP and CSS collections, no formal consultation process has taken place in relation to these changes. However, engagements have taken place with the DfE's Star Chamber Scrutiny Board, sector bodies, and LAs.

10.2 The Star Chamber Scrutiny Board has approved the changes to the SCAP and CSS, including the addition of new data items.

10.3 The Star Chamber Scrutiny Board helps to assess all DfE proposals for new, or revised, data collections relating to children and young people. It aims to ensure all new collections, or revisions to existing collections, are feasible, necessary, provide value for money and are timed to add as small a burden to the frontline as possible. The group is formed from frontline LA representatives involved in children's services data, including education, social care and early years, plus serving head teachers from primary and secondary education.

10.4 DfE's engagement with sector bodies and LAs consists of:

- The Education Building Officers Development Group ("EBDOG"), through regular meetings, informal working groups, attendance at their national conference in 2022 and 2023, and a meeting with the South East regional group of EBDOG;
- The National Association for Special Educational Needs ("NASEN") reference group in July 2022;
- LAs involved in the DfE's safety valve programme through dedicated workshops on the policy change, in summer 2022;
- All LAs, through sharing draft guidance and inviting them all to workshops in January 2023 (with over 300 LA attendees).

10.5 Stakeholder responses were strongly in favour of collecting data, as it will help address a key gap in DfE's current understanding of the school estate. LA views were considered and guidance changed accordingly. The DfE continues to engage with LAs and reflect this in guidance.

11. Guidance

- 11.1 Detailed guidance will be issued to LAs in Spring 2024 and published on GOV.UK ahead of the first collection of data under this instrument in June to July 2024, setting out in precise terms the data required and the timetable for returning this data to DfE. Workshops on the guidance will be held with LAs in June 2024.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 The impact on the public sector is that LAs will be required to provide additional data to DfE annually in relation to the capacity of certain specialist settings for pupils with SEN, and forecasts of future demand for places for such pupils. The cost of implementing this instrument is minimal as LAs already hold much of the new information being asked for, and most of the additional cost is related to completing the extra data fields in the survey rather than collecting new information. This cost had been estimated to be equivalent to an additional 56 hours of work per LA. To further mitigate any unforeseen costs, the DfE will also accept estimated data in the first year of collection where LAs do not yet have access to the exact figures.
- 12.3 A full impact assessment has not been prepared for this instrument because it has no impact on business, charities or voluntary bodies. The impact on LAs is not covered by an impact assessment but instead was assessed through the Star Chamber Scrutiny Board mentioned in section 10 above.

13. Regulating small business

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

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is that the collection process, and data from the collection, are monitored and reviewed each year by the DfE.
- 14.2 The instrument does not include a statutory review clause.

15. Contact

- 15.1 Kelly Taylor (Kelly.Taylor@education.gov.uk) or Emily Nunn (Emily.Nunn@education.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Phil Dixon, Deputy Director for the Central Capital Unit, at the DfE can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Baroness Barran at the DfE can confirm that this Explanatory Memorandum meets the required standard.