EXPLANATORY MEMORANDUM TO

THE EDUCATION (AREAS TO WHICH PUPILS AND STUDENTS BELONG (AMENDMENT) (ENGLAND) REGULATIONS 2009

2009 No. 1301

1. This Explanatory Memorandum has been prepared by the Department for Children, Schools and Families and is laid before the House of Commons by Command of Her Majesty.

2. Description

These Regulations amend the Education (Areas to which Pupils and Students Belong) Regulations 1996 (the "Belonging Regulations"). The amendments make it clear that the Belongings Regulations do not have effect for the purposes of determining the local education authority which is the responsible authority for the purposes of section 321(3) of the Education Act 1996. The Regulations also remove the provisions of the Belongings Regulation which make specific provision in relation to further education students.

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

3. None

4. Legislative Background

4.1 The Belongings Regulations make provision for determining the local education authority to whose area a person belongs. The Explanatory Note to the Belonging Regulations stated that they applied for the purposes of recoupment and Mandatory Awards. Where a child, including a looked after child (LAC) with a 'statement' of special educational needs (SEN) is placed outside their home authority and educated by the authority where they were placed, the authority educating the child is able to recoup the cost of this from the authority the child 'belongs' to as determined under the Belongings Regulations. (SEN statements are legally enforceable documents drawn up by local education authorities, under section 324 of the Education Act 1996, following an assessment of a child's SEN. A statement sets out a child's SEN, the special educational provision required to meet those needs and the school at which the child will be educated or the 'education otherwise than at school' which will be provided for him or her.)

4.2 Responsibility for assessment, statementing and making provision for children with SEN is determined in accordance with section 321 of the Education Act 1996, with the responsible authority being the authority in whose area the child is. The Department issued guidance as an interpretive tool to assist authorities in determining responsibility for these functions.

4.3 A High Court judgement in the case of a LAC with an SEN statement placed out of authority concluded that the Belonging Regulations had wider application than just assigning which authority had financial responsibility in inter-authority recoupment cases and, in particular, were applicable when deciding which authority is responsible for

carrying out a local authority's SEN duties of identifying a child's SEN and, where necessary, assessing the child, drawing up an SEN statement and arranging the special educational provision set out in the statement. The effect of using the Belonging Regulations to interpret responsibility for SEN functions is that, in some instances, the responsible authority will not be the authority which the Department's guidance suggests is the responsible authority. The Department do not agree with the court's interpretation of the Belongings Regulations. Also, the result has been chaotic, with some local authorities continuing to use the Department's guidance to determine responsibility and other using the Belonging Regulations. Given the risk that children involved in protracted disputes between authorities may suffer, it has become necessary to take steps to clarify how the responsibility for SEN functions should be determined.

4.4 The main purpose of the Amendment Regulations is to make clear that the Belonging Regulations do not determine which local authority is responsible for carrying out these SEN duties so that the Department for Children, Schools and Families can reaffirm its guidance on this matter.

4.5 The Regulations also amend the Belonging Regulations to remove any provisions which make specific reference to 'further education students'. These special provisions are no longer appropriate because changes to the legislation mean that there are no current further education recoupment powers and therefore there is no need currently to determine which area a student belongs to for recoupment purposes.

5. Territorial Extent and Application

5 The Belonging Regulations apply to England and Wales. These Regulations only amend the Belongings Regulations in so far as they apply to local education authorities in England. Wales has consulted on parallel amendment regulations (the Education (Areas to which Pupils and Students Belong) (Amendment) (Wales) Regulations 2009) which will be laid and come into force at the same time as the Amendment Regulations in England.

6. European Convention on Human Rights

6. 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 Education (Areas to which Pupils and Students Belong) Regulations 1996 (the "Belonging Regulations") were made with the intention of them solely being used to determine which local authority was financially responsible in inter-authority recoupment cases. The then Department for Education and Employment's guidance Circular 1/96 said that: "The Belonging Regulations 1996 determine to which areas pupils and students belong for the purposes of determining claims relating to inter-authority recoupment and which LEA [local education authority] is responsible for considering an application for a mandatory award". They work in conjunction with The Education (Inter-authority) Recoupment Regulations 1994 for this purpose.

7.2 Section 321 of the Education Act 1996 says that a local education authority is responsible for a child "for the purposes of this Part" [Part IV, Special Educational Needs] "if he is in their area". Accordingly, that the question of whether a child is in an authority's area for the purposes of carrying out its SEN functions is decided on the basis of whether the child is ordinarily resident in the area.

7.3 In 2003 and 2004 the Department for Education and Skills published letters giving guidance on which local authority should be responsible for carrying out the duties to identify a child's SEN and, if necessary, assess, draw up and maintain a statement in respect of LAC placed outside their home authority. These addressed questions which had been raised on this issue.

7.4 The 2007 case of R (on the application of L) v (1) the London Borough of Waltham Forest and (2) Staffordshire County Council was decided. It concerned a LAC with an SEN statement who was placed by Waltham Forest in Staffordshire in a non 52 week placement. The case was to determine which authority was responsible for maintaining the child's statement. The judgment said that the Belonging Regulations should be used as the appropriate tool for determining responsibility for SEN functions, and that regulation 7 of those Regulations applied. This says that LAC "shall be treated as belonging to the education authority area which coincides with or includes the area of the local authority which looks after him" and that "this regulation shall apply to the exclusion of any other regulation which would otherwise apply to such a person". It was drafted to mean that it applied to the exclusion of the other regulations in the Belonging Regulations. But the court interpreted it as excluding all Regulations which might apply to a LAC. In effect the judgment implied that the Belonging Regulations had a wider remit than just determining which authority is financially responsible in inter-authority recoupment cases and that they also determine which authority is responsible for carrying out the duties to identify a child's SEN and, where necessary, assess, draw up and maintain the child's statement. The effect of the judgement was that it would be the placing authority in all cases of LAC placed out of authority which must carry out these SEN functions.

7.5 The Department, and the Welsh Assembly Government, do not believe this is a correct interpretation of the scope of the Belongings Regulations, and that, in any event, it is not in the best interests of LAC with SEN placed outside their own area for the law to be construed as the "Waltham Forest judgment" suggests it should be construed. It would mean, for example, that Waltham Forest, if it placed a child in Staffordshire before it was known whether the child had SEN, would be responsible for identifying the child's SEN and, where necessary, assessing the child, drawing up a statement for the child, deciding which is the most appropriate school in Staffordshire for the child to attend and maintaining the statement, including carrying out annual reviews of the statement, from 150 miles away. The Department believes that in this case it would be better for Staffordshire, whose schools the child would be educated at, to undertake these duties. This would be the outcome if responsibility for SEN functions were determined in accordance with the principles of ordinary residence following the Department's interpretive guidance, but not if the Belonging Regulations are used to determine responsibility.

7.6 The Department estimates that there are 5,500 LAC with SEN statements who are placed out of their home authority areas. Both the Department and the Welsh Assembly Government are aware that local authorities in England and Wales are now unclear,

following the Waltham Forest judgment, as to which authority should be carrying out the SEN duties in respect of LAC placed out of authority. Most have abided by the Department's guidance while others have followed the legal interpretation in the judgement and returned the statements of LAC placed in their areas to the placing authorities.

8 Consultation outcome

8.1 In tandem both England and Wales have consulted on a proposal to amend the Belonging Regulations to make it clear that they do not apply for the purposes of determining which local authority is responsible for identifying children with special educational needs, assessing and statementing them. The consultation took place for 12 weeks between 19 January and 13 April. In England the consultation document was available on the Department's consultation website and respondents could respond either on line, via email or through the post. Local authorities were notified of the consultation through the Department's weekly email to the directors of children's services, who were asked to forward the notification through to the heads of SEN and LAC services. On the first day of the consultation the Special Educational Consortium, an umbrella organisation covering the main voluntary organisations with an interest in SEN, was notified of the consultation and asked to alert all its members and a number of organisations which represent the interests of LAC were emailed directly.

8.2 The consultation asked one question, whether respondents agreed with the Department's proposal to amend the Belonging Regulations so that they make clear that they do not determine which local authority is responsible for identifying children's SEN, assessing them, drawing up SEN statements and maintaining those statements in respect of LAC placed outside their home local authority areas. As a rider to the question it was explained that amending the Regulations in this way would allow the Department to reaffirm its guidance that the authority where the child is ordinarily resident is the authority responsible for fulfilling these duties.

8.3 The Department received 42 responses within the consultation period and four after the consultation closed, two of which supported the proposal, one was against and one was not sure. Of the 42, 23 were from local authority SEN or additional needs officers, 3 were from local authority looked after children officers and 6 were from voluntary organisations. There were also 10 responses from "other" organisations or people, such as Foster Care Associates, a Social Worker and freelance consultant, and Ofsted.

8.4 28 of the 42 respondents agreed with the Department's proposal (68%). These respondents thought that the Belonging Regulations should be used for the purpose for which they were originally intended, that is to be used in conjunction with The Education (Inter-authority Recoupment) Regulations to determine which authority was financially responsible in inter-authority recoupment claims. Responses which supported the Department's proposal said that the uncertainty which had been created by the "Waltham Forest" judgement was not working in the best interests of LAC. They said that the system based on the Department's guidance, which was very widely accepted before the judgment, had worked well, and emphasised the practicality of the local authority where the LAC was placed assessing, statementing and maintaining the statement, knowing, as they do, the local schools and the local arrangements for meeting children's SEN. Notable responses were from Ofsted which said that its evidence supported the

Department's proposal for LAC who are placed a long way from their home authorities and those in 52 week placements and the Advisory Centre for Education who said the feedback they have received from social workers and foster parents on its helpline supported the Department's view.

8.5 Seven responses were from people who were not sure whether they were for the proposal or not and another six were opposed to the proposal. Amongst the 28 respondents who supported the proposal, there were some who supported the proposal overall but had concerns about how the proposal would work for particular groups of pupils and, similarly, amongst those who were either not sure or opposed the Department's proposal concerns were raised that the Department's existing guidance did not sufficiently address particular circumstances: where LAC were placed in neighbouring authorities, where children were in termly residential placements in independent and non-maintained special schools, where LAC were in unstable placements which break down or short-term placements and are likely to move on to another authority and so on. The Department's report on the consultation is at:

http://www.dcsf.gov.uk/consultations/index.cfm?action=conResults&consultationId=1603&external=no&menu=3

8.6 The clear majority of responses were in favour of the Department's proposal. The Department considered all responses carefully, including the responses which were against the Department's proposal. The Department believes the concerns that these responses raised can be addressed by publishing more detailed guidance on 'ordinary residence'.

8.7 Eleven formal responses were received to the Welsh Assembly Government's parallel consultation of which six were broadly in favour.

9. Guidance

9.1 As indicated by the consultation, the Department will be re-affirming and updating its guidance on carrying out SEN functions in relation to LAC placed out of authority. In that guidance the Department will give examples of how the principle that these duties should be carried out by the authority where the child is ordinarily resident is applied in particular cases, and will emphasise that it is open to local authorities to come to an arrangement between themselves to carry out these duties on each other's behalf if that would be in the best interests of the child. The Department intends to publish the guidance in August/September.

10 Impact

10.1 An Impact Assessment has not been prepared for this instrument. The amendments to the Belonging Regulations will not of themselves affect the number of LAC being placed in independent and non-maintained special schools and, while there are local authority net importers and net exporters of LAC with statements, these amendments will be broadly neutral in their impact on the public sector.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring and review

12.1 A successful outcome would be that there is clarity in local authorities as to which authority carries out SEN duties in relation to LAC placed out of area. We will monitor this through the SEN National Advisers in the National Strategies who visit local authorities regularly and through asking the Government Office LAC leads to monitor through their contacts in the local authorities. If a year after the Department issues the guidance there continue to be disputes between local authorities we will revise the guidance.

13. Contact

9. Nigel Fulton at the Department for Children, Schools and Families Tel: 0207 273 4729 [0207 783 8266 from 30 June] or e-mail: Nigel.Fulton@dcsf.gsi.gov.uk can answer queries regarding the instrument.