EXPLANATORY MEMORANDUM TO

THE EDUCATION (EDUCATIONAL PROVISION FOR IMPROVING BEHAVIOUR) (AMENDMENT) REGULATIONS 2012

2012 No. 2532

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 The Education (Educational Provision for Improving Behaviour) Regulations 2010 to:

- Remove the stipulation that any decision by a governing body to require a pupil to attend off-site provision to improve their behaviour cannot last beyond the end of the last school day of the school year in which the requirement is imposed;

- Remove the stipulation that the governing body reviews any such decision after 30 days and every subsequent 30 days, and replaces it with a requirement that they review it at intervals appropriate to the needs of the pupil; and

- Provides that parents, pupils who are 18 years or older, and the local authority where the pupil has a statement of special educational needs can request a review of a placement. On receipt of such a request the school's governing body must carry out a review meeting as soon as is reasonably practicable unless a review has been held in the 10 weeks preceding the request.

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

3.1 None

4. Legislative Context

4.1 Section 29A of the Education Act 2002 ("the 2002 Act") (as inserted by section 154 of the Education and Skills Act 2008) gives school governing bodies the power to require a pupil to attend at any place outside the school premises for the purpose of receiving educational provision which is intended to improve the behaviour of the pupil. Section 29A also provides that regulations must require prescribed persons to be given prescribed information relating to the requirement, and require the governing body to keep any such requirement under review.

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 is education arranged for pupils who for various reasons, such as illness or exclusion, would not receive suitable education without such arrangements being made. Children in alternative provision 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 mainstream peers, for example just 1.5% of those in alternative provision achieve 5 or more A*-C grades at GCSE, compared to 59% in schools as a whole[1].

7.2 Currently, while school governing bodies can require their pupils to attend off-site alternative provision which is designed to improve their behaviour there are restrictions in place which prevent their making best use of this option. A placement cannot extend beyond the end of the school year in which it begins, and the governing body must review every 30 days its decision to place the pupil in alternative provision. These restrictions apply regardless of how well the pupil is progressing in the provision. There may be little to consider after the first, or even subsequent, 30 days of the placement. Nevertheless the school's governing body is still required to hold a review meeting at these intervals, invite the parents and provider (and where the pupil has a statement of special educational needs, the local authority) and make the administrative arrangements for the review meeting. The head teacher and one of the school governors have to attend the meeting. This is wasted effort if there is nothing significant to consider, and is not a meaningful review of the pupil's progress. The same applies to the restriction on the length of an alternative provision placement: a placement must stop at the end of the school year in which it started, regardless of whether the pupil is making good progress and would benefit from remaining in the placement.

7.3 As part of the Secretary of State for Education's plans to reform the alternative provision sector he asked the Government's Expert Adviser on Behaviour, Charlie Taylor, to review alternative provision. In March 2012 Charlie Taylor published his report *Improving Alternative Provision* which sets out the case for reform of the alternative provision sector. The report makes 28 recommendations, all of which were accepted by the Secretary of State. One of these recommendations was that the restriction, in the Education (Educational Provision for Improving Behaviour) Regulations 2010, on how long a pupil can be required to attend off-site alternative provision should be relaxed. This is to allow pupils to remain in alternative provision for as long as is necessary to make progress, rather than subjecting them to an arbitrary cut-off point. In his report, Mr Taylor said that schools and alternative provision providers had told him during his research that this has led to pupils returning to mainstream school before they were ready to do so.

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[1] Department for Education statistical first release GCSE and Equivalent Results in England, 2010/11

7.4 Mr Taylor also found that the requirement to review alternative provision placements every 30 days is too onerous for all involved and does not reflect the needs of pupils. The reviews must be done at these intervals, regardless of whether there is anything useful to be gained by them at that point in time. There may be some cases where a review of a placement every 30 days is appropriate, but some where it is not. Teachers and other education professionals are best placed to determine what is best for their pupils, including the intervals at which each placement should be reviewed. Therefore these regulations remove the requirement for reviews of alternative provision placements, under 29A of the Education Act 2002, to take place every 30 days. They stipulate instead that school governing bodies should hold reviews at such intervals as they consider appropriate to meet the needs of the pupil. These intervals will vary according to each individual set of circumstances. The school's governing body should decide how often a placement will be reviewed according to the specific needs of the referred pupil and the circumstances of the referral.

7.5 These regulations also provide parents, a pupil aged 18 or over, or a local authority where a pupil has a special education needs statement an opportunity for input into the process should the need arise. They will be able to request a review of a placement and, if a review has not taken place in the 10 weeks prior to this request, the school's governing body must carry out a review meeting as soon as is reasonably practicable. If a review has been held within this period then the decision to hold a further review will be at the discretion of the school's governing body. (The 10 week period is used in lieu of a definition of a school term, which can vary from school to school). In exercising these powers the school's governing body must act reasonably, and the Secretary of State has the power to intervene where it can be shown that they have not done so.

8. Consultation outcome

8.1 The Department for Education consulted, from 3 April to 15 May 2012, on a package of reforms of alternative provision based on Charlie Taylor's report. The consultation included a question on the changes to the Education (Educational Provision for Improving Behaviour) Regulations 2010 that are contained in these amending regulations. The majority of respondents agreed with the proposals. Some stressed the need to quality-assure provision and review the needs of pupils, and the value of clear timeframes. The outcome of the consultation, and other related information, can be found at:

http://www.education.gov.uk/schools/pupilsupport/behaviour/a00204776/taylor-review-of-alternative-provision

9 Guidance

9.1 The Department for Education has published statutory guidance on alternative provision, which comes into force in January 2013 (to allow local authorities, PRUs and schools time to ensure they can comply with it). The guidance contains a section on off-site referrals to alternative provision under section 29A of the Education Act 2002, which states that reviews of off-site referrals should be:

"frequent enough to provide assurance that the off-site education is achieving its objectives and that the pupil is benefitting from it".

10. Impact

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

10.2 The impact on the public sector is positive. The amending regulations will reduce the burden on schools, local authorities, PRUs and providers by removing the requirement to have reviews regardless of whether they are relevant. They will also have a positive impact for providers, as well as pupils, as pupils will not be arbitrarily removed from them at the end of the school year.

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 alternative provision, 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 Ofsted will be monitoring alternative provision using thematic surveys during academic year 2012/13. The Department for Education will also continue to monitor alternative provision in the course of its business.

13. Contact

13.1 David Fugurally at the Department for Education (tel: 020 7783 8338 or email: david.fugurally@education.gsi.gov.uk) can answer any queries regarding the instrument.