EXPLANATORY MEMORANDUM TO

THE EDUCATION (PUPIL INFORMATION, SCHOOL PERFORMANCE INFORMATION AND NATIONAL CURRICULUM ATTAINMENT TARGETS AND PROGRAMMES OF STUDY) (ENGLAND) (AMENDMENT) REGULATIONS 2024

2024 No. 577

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.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Declaration

2.1 The Rt Hon Damian Hinds MP, Minister of State at the Department for Education confirms that this explanatory memorandum meets the required standard.

2.2 Kate Moore, Deputy Director for Assessment Operations and Services at the Standards and Testing Agency confirms that this explanatory memorandum meets the required standard.

3. Contact

3.1 Fee Watson at the Standards and Testing Agency, email: STA.Policy@education.gov.uk, can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 This statutory instrument will update the definitions of "the engagement model" (the 'EM') and "the pre-key stage standards [document] for key stage 1" (the 'KS1 PKS') referred to in the interpretation provisions within three pieces of secondary legislation concerning pupil and school performance information reporting and the setting of attainment targets.

4.2 The EM and KS1 PKS are statutory guidance documents applicable to the assessment of pupils working below the standard of the national curriculum and are defined in secondary legislation with reference to their previous date of publication – 23 July 2020. The EM and KS1 PKS have since been republished to clarify that end of key stage 1 assessments are optional as of the academic year 2023 to 2024. Thus, an update to the definitions is necessary to ensure that the law reflects the date of republication (15 April 2024), in turn giving the republished guidance statutory force.

4.3 For the avoidance of doubt this statutory instrument does not amend the existing teacher assessment frameworks under the EM and KS1 PKS nor does it amend any of the existing, or introduce any new, statutory requirements relating to the reporting of performance information or the setting attainment targets for primary aged pupils.

Where does the legislation extend to, and apply?

4.4 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales.

4.5 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England.

5. Policy Context

What is being done and why?

5.1 The end of key stage 1 national curriculum tests and teacher assessments became non-statutory from 1 September 2023 (the beginning of the academic year 2023 to 2024) via secondary legislation laid in March 2023.[1] This followed a commitment made by the government in response to the 2017 consultation on primary assessment[2] that the tests would become non-statutory once the Reception Baseline Assessment (RBA) was fully established.

5.2 The RBA became statutory in September 2021 and has now replaced the end of key stage 1 tests, providing the new baseline for primary school cohort level progress measures at the end of key stage 2. The first cohort of pupils with a statutory RBA will reach the end of key stage 1 in the academic year 2023 to 2024 and DfE will calculate the first end of primary school progress measures using the RBA as the baseline when this cohort reach the end of key stage 2 in the academic year 2027 to 2028.

5.3 As a result of this policy change, the Standards and Testing Agency (STA) have amended and republished existing guidance which informs teacher assessment for pupils working below the standards of the national curriculum. This includes the following documents that were republished by STA on 15 April 2024:

- the 'pre-key stage 1 standards' applicable to pupils engaged in subject-specific study.
- the 'engagement model' applicable to pupils not engaged in subject-specific study.

5.4 The purpose of the amendments to the guidance is to clarify that while end of key stage 1 teacher assessments are no longer statutory and assessment outcomes at key stage 1 are not required to be reported to parents or DfE as of the academic year 2023 to 2024, schools remain required by legislation to use the:

- pre-key stage 1 standards to set attainment targets for pupils in key stage 1 working below the standard of the national curriculum and engaged in subject-specific study.
- engagement model to set attainment targets at key stage 1 and key stage 2 as well as undertake assessments at key stage 2 for pupils working below the standard of the national curriculum and not engaged in subject-specific study.

5.5 These amendments are consequential to the original policy decision as outlined at paragraph 5.1 above and the changes to the guidance are necessary to ensure that the documents reflect the current legal position on primary assessments and correctly outline the statutory responsibilities placed on schools.

[1] See the Education (National Curriculum) (Key Stage 1 Assessment Arrangements) (England) (Amendment) Order 2023: https://www.legislation.gov.uk/uksi/2023/375/made.

[2] The 2017 consultation on primary assessment and the government's response can be located online at gov.uk: https://www.gov.uk/government/consultations/primary-assessment-in-england.

5.6 As the guidance documents are referred to, and given statutory effect, in existing secondary legislation, and the relevant statutory instruments define these documents with reference to their previous date of publication, 23 July 2020, we need to amend these statutory instruments to instead refer to the date of republication (15 April 2024). This is to ensure the new versions of the guidance documents have statutory force.

What was the previous policy, how is this different?

5.7 This statutory instrument does not introduce new policy, nor does it change any of the existing reporting and target setting requirements under the legislation being amended. Rather, it follows the policy decision announced by the government in July 2022 to make end of key stage 1 tests and assessments non-statutory and is part of the legislative changes required to ensure that the secondary legislation relating to primary assessments accurately reflects this.

6. Legislative and Legal Context

How has the law changed?

6.1 The EM and KS1 PKS are currently defined in secondary legislation with reference to their previous date of publication. This instrument updates the definitions within the following pieces of legislation to refer to the date of republication, in turn giving the republished guidance legal effect, it does not change any of the existing statutory requirements relating to the use of the EM and KS1 PKS as outlined below:

- The Education (Pupil Information) (England) Regulations 2005[3] (the 'Pupil Information Regulations') set out the requirements for schools to report information about individual pupil progress and achievements as well as maintain curricular and educational records. Where a pupil changes school, the Pupil Information Regulations require information to be transferred to the new school on the pupil's cumulative achievements in education. For pupils who completed key stage 1 in or before the academic year 2022 to 2023 and were assessed under the KS1 PKS, the information transferred must continue to include information on pupils' progress and achievements using the KS1 PKS. There is also a requirement for schools to transfer information regarding whether the EM is being used at the end of key stage 2 to specify the achievements and progress of a pupil but there is no requirement for schools to report, or transfer information, on the use of the EM at key stage 1.
- The Education (School Performance Information) (England) Regulations 2007[4] (the 'School Performance Information Regulations') set out, amongst other things, the requirements for schools to report national curriculum assessment results to their local authority, who in turn report this to DfE. The data is used by DfE to publish information on school performance. These regulations set the requirement for schools to report whether a pupil has been assessed by a teacher using the EM at the end of key stage 2 and clarifies that the EM and KS1 PKS are not applicable to the national curriculum standards of attainment.

[3] The Education (Pupil Information) (England) Regulations 2005, https://www.legislation.gov.uk/uksi/2005/1437/contents
[4] The Education (School Performance Information) (England) Regulations 2007, https://www.legislation.gov.uk/uksi/2007/2324/contents/made

- The Education (National Curriculum) (Attainment Targets and Programmes of Study) (England) Order 2013[5] (the 'Attainment Targets Order') details the requirement on schools to specify attainment targets for pupils. The EM and KS1 PKS (as applicable) must be used for the purposes of specifying attainment targets for pupils who are working below the national curriculum standards of attainment.

6.2 Updating the legislation in this way will ensure that users such as schools and teachers are directed to the updated versions of the EM and KS1 PKS, which is desirable in the interests of clarity and accuracy, to avoid confusion and to give statutory force to up-to-date versions of guidance.

Why was this approach taken to change the law?

6.3 This is the only possible approach to make the necessary changes.

7. Consultation

Summary of consultation outcome and methodology

7.1 Under section 408(5) of the Education Act 1996, the Secretary of State is required to consult any persons with whom consultation appears to be desirable before making any regulations using the power in section 408.

7.2 Under section 96(2) of the Education Act 2002, the Secretary of State is required to give notice of the proposal to amend the Attainment Targets Order to associations of local authorities, bodies representing the interests of school governing bodies, and organisations representing school teachers along with anyone else with whom consultation appears desirable. Once views have been collected, the Secretary of State must publish a draft of the proposed statutory instrument and a summary of the views expressed in response to the proposal for a period of at least one month for further stakeholder comment.

7.3 STA undertook a two-stage consultation to fulfil the requirements of the primary legislation engaging with stakeholders including the Office of Qualifications and Examinations Regulation (Ofqual), Office for Standards in Education, Children's Services and Skills (Ofsted), teacher and school leader unions, the Confederation of Schools Trusts, and the Local Government Association.

7.4 We received no concerns or substantial comments from stakeholders in response to either stage of the consultation. Those stakeholders which did respond to the consultation were in support of the proposed legislative changes under this instrument and the associated Order (see paragraphs 11.2 and 11.3 below).

8. Applicable Guidance

8.1 The updated engagement model[6] and pre-key stage 1 standards[7] were republished by STA on 15 April 2024 and are available online on gov.uk.

[5] The Education (National Curriculum) (Attainment Targets and Programmes of Study) (England) Order 2013, https://www.legislation.gov.uk/uksi/2013/2232/contents/made
[6] Standards and Testing Agency, The engagement model (2024), https://www.gov.uk/government/publications/the-engagement-model
[7] Standards and Testing Agency, Pre-key stage 1 standards (2024), https://www.gov.uk/government/publications/pre-key-stage-1-standards

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment has not been prepared for this instrument because there is no anticipated impact on businesses.

Impact on businesses, charities and voluntary bodies

9.2 There is no, or no significant, impact on business, charities or voluntary bodies because this instrument does not relate to legislation which imposes statutory obligations on these bodies.

9.3 The legislation does not impact small or micro businesses.

9.4 There is no, or no significant, impact on the public sector because the instrument maintains the existing statutory requirements relating to teachers' assessment of pupils working below the standard of the national curriculum in primary school.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The approach to monitoring this legislation will be to continue to engage with relevant stakeholders to monitor the impact of the changes to primary assessment policy.

10.2 The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, Minister Damien Hinds has made the following statement:

"This statutory instrument has no, or no significant, annualised net impact on businesses or business activity. Accordingly, a statutory review provision is not considered appropriate."

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 The making of these Regulations falls outside the usual practice of providing schools with at least one full school term's notice of any changes to guidance or legislation. The policy change to which these Regulations relate has, however, been communicated to schools with more than a full school's term notice as the original decision was made in July 2022 and implemented in September 2023.

11.2 Alongside these Regulations we will also be making an additional statutory instrument, which is not subject to parliamentary procedure. This is to amend the definitions of the same guidance documents within the following Orders:

- The Education (National Curriculum) (Key Stage 2 Assessment Arrangements) (England) Order 2003
- The Education (National Curriculum) (Key Stage 3 Assessment Arrangements) (England) Order 2003

11.3 The Amending Order is titled 'The Education (National Curriculum) (Key Stages 2 and 3 Assessment Arrangements) (England) (Amendment) Order 2024' and will also be made on 1 May 2024 for implementation on 1 June 2024.

12. European Convention on Human Rights

12.1 As this instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 (“relevant European Union Acts”).