EXPLANATORY MEMORANDUM TO

THE EDUCATION (SPECIAL EDUCATIONAL NEEDS) (ENGLAND) (CONSOLIDATION) (AMENDMENT) REGULATIONS 2006

2006 No. 3346]

1. This explanatory memorandum has been prepared by Department for Education and Skills and is laid before Parliament by Command of Her Majesty.

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

2. Description

2.1 These Regulations amend the principal Regulations governing the assessment, making, review, transfer and maintenance of statements of special educational needs. Such statements specify the special educational provision to which children for whom it is necessary to specify such provision are entitled.

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

3.1 None.

4. Legislative Background

4.1 The Regulations contain an interim provision (contained in regulation 20) pending the coming into force of the Childcare Act 2006 which makes amendments in relation to the definition of 'relevant nursery education', replacing it with a broader concept of early years education.

5. Territorial Extent and Application

5.1 This instrument applies 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 Local authorities have a range of statutory duties under the Education Act 1996 towards children with special educational needs. The Education (Special Educational Needs) (England) (Consolidation) Regulations 2001 ('principal Regulations') relate to the assessment of special educational needs, the making of statements specifying such needs and the educational provision to be made to meet the needs under Part IV of the 1996 Act. They supplement the procedural framework for making a statutory assessment and a statement set out in the 1996 Act and its Schedules 26 and 27.

7.2 The Childcare Act 2006 makes changes to update the definition of 'relevant nursery education' in the light of changes it makes to early years provision more generally. These Regulations seek to cater for that change through Regulations 3 and 20

7.3 It is intended that notionally the provisions of the Education (Maintained Special Schools) (England) Regulations 1999 ('Maintained Special School Regulations') will be conflated with the Education (School Organisation Proposals) (England) Regulations 1999 and amended following enactment of the Education and Inspections Act 2006 to form an up-to-date composite set of regulations dealing with alterations and proposals to maintained schools. It was thought that Regulations 18 and 19 of the Maintained Special School Regulations would be somewhat incongruous in that composite set of Regulations given that they deal with a parental right to request his child be excused from religious education and worship and access to special schools. It was felt their provisions should be imported into the principal Regulations where they would be of greater relevance to the reader. Accordingly the Regulations import (with minor amendment) the provisions of Regulations 18 and 19 and omit the original provisions, see Regulations 4, 8 and 18.

7.4 In its Twelfth Report of 2001 the JCSI criticised the principal Regulations. Amendments are made to Regulations 6, 8 and 12 of the principal Regulations in the light of these comments, see Regulations 5, 6 and 7. As regards Regulation 6, misleading reference to notices not having been given under sections 323(1) or 329A(3) has been expunged from paragraph (1)(b) and the otiose reference to sub-paragraph (b) of paragraph (5) in regulation 6(6)(a) has been deleted. Regulation 8 has been updated more sensibly to refer to the case where advice of the required kind cannot be obtained (rather than advice of the wrong kind having been obtained) and regulation 12 has been amended helpfully to remind the reader of the presence of a statutory time limits arising from periods specified in statutory notices themselves.

7.5 There is no obligation on local authorities to amend statements of children transferring between infant school and junior school in advance of that transfer, as there is between other transfers between phases of schooling, for example the transfer between primary and secondary school under the principal Regulations. Neither are children with statements dealt with by the general provisions for allocation of maintained school places under the School Standards and Framework Act 1998. As a result there is nothing to require local authorities to amend the statements of children making the transfer from infant school to junior school by 15 February in the year of transfer. Though local authorities have the power to amend the statement earlier for these pupils that has not always been exercised (despite Departmental recommendation to the contrary) meaning pupils transferring between these phases have occasionally had diminished opportunities of finding school places and of appealing to the Special Educational Needs and Disability Tribunal (the 'Tribunal') against the contents of the statement– such an appeal can take several months and cannot commence until the contents of the statement have been proposed by the local authority. It was desired that the transfer between infant and junior school was covered in the Regulations to combat this problem by requiring their statements to be amended by 15 February in the year of transfer, see regulation 10.

7.6 Where a child with a statement moved from the area of one local authority to another there was no time limit on the original local authority to transfer the statement to the new local authority which could prejudice the recipient local authority's fulfilment of their statutory duties as well as jeopardize the proper educational attainment of the child. The Regulations provide for a 15 day time limit for transfers of statements and for it to commence from the day on which the original local authority is informed of the move, see regulation 11.

7.7 Local authorities are required to comply with orders of the Tribunal, or parental requests when a local authority concedes an appeal, within timescales set out in the principal Regulations. There was some confusion among local authorities about how the timescales were intended to operate and changes were proposed to clarify that:

- where a local authority is ordered by the Tribunal to carry out a statutory assessment, or concedes an appeal from a parent requesting such an assessment, they must send a notice to the child's parents within 4 weeks informing them that they will make an assessment;

- where a local authority is ordered by the Tribunal to make and maintain a statement, or concedes an appeal from a parent against a decision not to make and maintain a statement, the time limit is now five weeks to issue a proposed statement rather than to make a statement; and,

- where a local authority is ordered by the Tribunal to amend a statement or continue to maintain and amend a statement, or concedes an appeal from a parent on these matters, the local authority must amend the statement in 5 weeks rather than send a notice proposing to amend the statement.

See Regulations 13 and 14.

7.8 Local authorities must review a child's statement of special educational needs at least once a year. If they propose amendments to the statement they must send a statutory notice to the child's parent setting out those amendments (an 'amendment notice'), and send another notice giving the parent the opportunity to comment and to express a preference for a particular school to be named in the statement (this second notice is contained in Part B of the principal Regulations). Local authorities also send these notices when children transfer to a new phase of schooling, for example from primary to secondary school. It was proposed to clarify that the local authority could provide both notices in one document or else provide two separate documents; the former is preferred where there is minimal amendment, for example only a change in the name of the school named in the statement, the latter might be preferable where there are many amendments. Regulations 9 and 16 make provision in this respect. Other changes to the letter at Part B of Schedule 1 to the principal Regulations – which specifies the information that local authorities must send to parents – were proposed to clarify that:

- parents are not always expected to express a preference for another school (for example if their child is happy at his or her present school and he or she is not transferring to a new phase of schooling),

- the list of maintained schools to be enclosed with the letter must include special schools,

- if parents used local disagreement resolution services and wished to make an appeal to the Tribunal that the time limit for registering an appeal is unaffected, and to include the up-to-date title and address of the Tribunal.

Similar changes should be made to Part A of that Schedule, for notices sent where a new statement is proposed, see regulation 15.

7.9 Transitional provisions are proposed to enable the changes to be introduced in a manageable way and to respect existing orders of the Tribunal (or conceded appeals thereto), see regulation 19. Although the requirement for local authorities to amend the statements of children transferring from infant to junior school by 15 February would take effect in 2008 we will be writing to local authorities to say that we expect that the statements of such children transferring in 2007 will be amended by 15 February since we urged local authorities to exercise their powers to do so in a letter in November 2005.

7.10 The remaining amendments are mainly technical and updating amendments. They respond to feedback from local authorities on the operation of the principal Regulations in practice and are needed to clarify the provisions mentioned above and to ensure consistency of approach across local authorities.

7.11 There has been informal consultation on the amendments with local authorities, who welcomed the proposed changes.

8. Impact

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

9. Contact

9.1 Phil Snell at the Department for Education and Skills, Tel: 0207 273 1196 or e-mail: phil.snell@dfes.gsi.gov.uk can answer any queries regarding the instrument.