EXPLANATORY MEMORANDUM TO

THE INDEPENDENT SCHOOL STANDARDS AND NON-MAINTAINED SPECIAL SCHOOLS (ENGLAND) (AMENDMENT) REGULATIONS 2022

2022 No. 905

1. Introduction

1.1 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 These Regulations ("the Amending Regulations") amend the Education (Independent School Standards) Regulations 2014 ("the 2014 Regulations") and the Non-Maintained Special Schools (England) Regulations 2015 ("the 2015 Regulations") to refer to the latest version of the National Minimum Standards ("NMS) for Residential Special Schools and in addition, in the case of the 2014 Regulations, to the latest version of the NMS for Boarding Schools.

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 territorial extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is England.

5. European Convention on Human Rights

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

6. Legislative Context

6.1 Under section 94 of the Education and Skills Act 2008, the Secretary of State must make regulations that set out standards which must be complied with by independent schools in order to become, and while, registered. These standards are set out in the Schedule to the 2014 Regulations.

6.2 Under section 342 of the Education Act 1996 ("the 1996 Act"), the Secretary of State may make regulations setting out requirements which a school must comply with in order to be, and while, approved as a non-maintained special school. The Schedule to the 2015 Regulations sets out these requirements.

6.3 The Secretary of State publishes the NMS for Boarding Schools and the NMS for Residential Special Schools under section 87C(1) of the Children Act 1989.

6.4 The 2014 Regulations currently reference both these NMS and the 2015 Regulations reference the NMS for Residential Special Schools, in each case as published in April 2015 (see paragraphs 8, 18, 19 and 30 of the Schedule to the 2014 Regulations and paragraphs 3 to 5 and 14 to 16 of the Schedule to the 2015 Regulations).

7. Policy background

What is being done and why?

7.1 The NMS referred to in this memorandum consist of standards for safeguarding and promoting the welfare of children for whom accommodation is provided by boarding schools or by residential special schools. The standards had not been updated since April 2015 but are under constant review and in 2020 we identified several areas where the standards could be strengthened. For this reason, following a public consultation, the NMS for Boarding Schools and the NMS for Residential Special Schools were updated and new versions were published in May 2022. Changes include updating references and content relating to safeguarding practice and introducing a stronger emphasis on the quality of provision. We have also re-ordered the standards into a more logical order. It is therefore necessary to amend the 2014 and 2015 Regulations to ensure that the relevant provisions refer to the most up-to-date version of each of these NMS and where standards have changed number to refer to the new number.

7.2 The Amending Regulations also include transitional provisions in relation to the 2014 Regulations. The department has a substantial volume of case work related to obligations under the 2014 Regulations and the transitional provisions ensure that decisions which are in the process of being considered, and inspections in the process of being carried out, on the date of the coming into force of these Amending Regulations can continue on the existing basis.

7.3 Similar provision is not made in relation to the 2015 Regulations. This is because the Department has no outstanding applications for approval under section 342 of the 1996 Act, or case work related to the NMS for Residential Special Schools which involves consideration of the exercise of powers under the 1996 Act, and none is expected between the laying and coming into force date of the Amending Regulations.

8. European Union Withdrawal and Future Relationship

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

9. Consolidation

9.1 There are no current plans to consolidate either the 2014 Regulations or the 2015 Regulations.

10. Consultation outcome

10.1 The Department for Education published a consultation on 2nd December 2020 closing on 23rd February 2021 which related to proposed changes to the NMS for Boarding Schools and the NMS for Residential Special Schools. A total of 108 responses were received to the consultation in respect of proposals for change to the NMS for Boarding Schools, while there were 36 responses to the NMS for Residential Special Schools.

10.2 Responses to the consultation came from a range of schools and organisations and were overwhelmingly positive in terms of strengthening both the NMS for Boarding Schools and the NMS for Residential Special Schools. The Department made a number of amendments to the NMS following the consultation, for example changing "choice" of accommodation for boarders to expressing a "preference" after consultation responses on the unintended consequences of using "choice"; and, in the NMS for Residential Special Schools, the standards were changed to provide that schools should avoid mixing accommodation for longer placements and short-term breaks. In the NMS for Residential Special Schools, in response to consultation responses, there is now a more explicit link between placement planning and a child's education, health and care plan where they have one. In some areas where consultees

wanted the NMS to be more detailed or prescriptive, for example on qualifications and training for staff and on medical treatments for children with special needs, the Department decided that as minimum standards this would not be appropriate. Both the boarding and residential special school sectors are very varied, and therefore schools are best placed to make their own decisions on these matters. The Department has accepted however that it will consider further questions on these areas when consulting on the next update of the NMS.

10.3 Given that the amendments to the 2014 and 2015 Regulations are expected in light of changes to each of the NMS, no consultation on the Amending Regulations was carried out.

11. Guidance

11.1 There will not be additional guidance related to the amendments made by the Amending Regulations. The changes that they make do not require elaboration.

12. Impact

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

12.2 There is no, or no significant, impact on the public sector.

12.3 The revisions made to the NMS for Boarding Schools and for Residential Special Schools are in the main providing clarity which will help the sector; providing links to guidance which will help the sector; and reinforcing existing legal duties relating to safeguarding and health and safety and as such are not new burdens. There are some changes which are a burden, however the estimated annual net direct cost of the changes to boarding schools and to residential special schools are well under the threshold for self-certification.

12.4 An Impact Assessment has not been prepared for this instrument because these changes are technical in nature and introduce no new obligations beyond those contained in the updated NMS (for which a full public consultation and related Impact Assessment were carried out).

13. Regulating small business

13.1 Some independent schools and non-maintained special schools will be small businesses, but it is anticipated that there will be no significant impact on these businesses.

14. Monitoring & review

14.1 The NMS are regularly reviewed, and a review of the standards contained in the 2014 Regulations is planned.

15. Contact

15.1 Michael Bell at the Department for Education [telephone: 07464648993 or email: michael.bell@education.gov.uk] can be contacted with any queries regarding the instrument.

15.2 Susan Whitehouse, Deputy Director for Independent Education and School Safeguarding Division at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.

15.3 Baroness Barran at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.