EXPLANATORY MEMORANDUM TO

THE SCHOOL DISCIPLINE (PUPIL EXCLUSIONS AND REVIEWS) (ENGLAND) (AMENDMENT AND TRANSITIONAL PROVISION) REGULATIONS 2023

2023 No. 571

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Education and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

2.1 This instrument amends the School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012 [2012/1033] ("the 2012 Regulations") to lay out a process for head teachers to cancel school exclusions before a governing board considers[1] whether to reinstate the pupil (governing board consideration). This includes who the head teacher must notify of cancelled exclusions, and enables the governing board to have oversight of cancelled exclusions. It also amends the 2012 Regulations to provide for remote meetings to occur for governing board consideration of school exclusions and for Independent Review Panels[2] ("IRPs") in certain circumstances, including where the "relevant person" asks for this[3]; and it sets out transitional arrangements for exclusions that took place before the coming into force of the instrument.

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

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

[1] In this memorandum "governing board" is used to refer to the governing body of a maintained school, the management committee of a pupil referral unit, or the proprietor of an Academy school or alternative provision Academy (also known as the academy trust). "Head teacher" is used to refer to the head teacher of a maintained school, the teacher in charge of a pupil referral unit, or the principal of an Academy school or alternative provision Academy.

[2] Where a governing board decides not to reinstate a permanently excluded pupil, parents are also able to apply to the local authority or academy trust, requesting an IRP to review the decision. The role of the IRP is to decide whether or not to uphold the governing board's decision, recommend that it be reconsidered or, if the IRP find the decision flawed in light of the principles of judicial review, quash the decision and direct the governing board to reconsider.

[3] The "relevant person" is the excluded pupil if they are aged 18 or older, or their parent if they are under 18: regulation 2(1) of the 2012 Regulations.

5. European Convention on Human Rights

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

6. Legislative Context

6.1 The School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012 [SI 2012/1033] ("the 2012 Regulations") make provision in relation to the power of head teachers of maintained schools, teachers in charge of pupil referral units and principals of Academy schools and alternative provision Academies in England, to exclude pupils under section 51A of the Education Act 2002 (exclusion of pupils: England); and in relation to the procedures for governing boards and IRPs to consider whether excluded pupils should be reinstated.

6.2 These Regulations allow for the cancellation of school exclusions, in circumstances where a governing board has not yet considered reinstatement of the pupil and specified requirements are met.

6.3 The School Discipline (England) (Coronavirus) (Pupils Exclusions and Reviews) (Amendment) Regulations 2020 [SI 2020/543] inserted COVID-19-related provisions into the 2012 Regulations. They provided that, in relation to a 'relevant exclusion', defined as an exclusion occurring from 1st June to 24th September 2020, governing boards and IRPs could hold meetings remotely in certain circumstances. Those provisions for remote meetings were extended by the School Discipline (England) (Coronavirus) (Pupil Exclusions and Reviews) (Amendment) (No. 2) Regulations 2020 [SI 2020/908], then the School Discipline (Pupil Exclusions and Reviews) (England) (Coronavirus) (Amendment) Regulations 2021 [SI 2021/204] and the School Discipline (Pupil Exclusions and Reviews) (England) (Coronavirus) (Amendment) (No. 2) Regulations 2021[SI 2021/953] to apply to exclusions occurring up to 24th March 2021, then to 24th September 2021, then finally to 24th March 2022. They were not further extended and there has been no express provision for remote meetings in relation to exclusions occurring since 24th March 2022.

6.4 These Regulations will come into force on 1st September 2023. They make provision relating to the cancellation of school exclusions and the use of remote meetings as described in more detail below.

7. Policy background

What is being done and why?

7.1 The 2012 Regulations set out the process which must be followed in maintained schools, pupil referral units, Academy schools and alternative provision Academies in relation to an exclusion of a pupil. This includes rules on who must be informed of the decision to exclude a pupil and involved in or informed about any meetings to consider reinstatement or to review a decision not to reinstate a pupil, including parents, governing boards and local authorities, and the timescales in which this must be carried out.

7.2 On 3 February 2022 the Department for Education ("the Department") launched an 8-week public consultation (with relevant schools, local authorities, parents, and other interested parties) on the *Suspension and Permanent Exclusion from maintained schools, academies and pupil referral units in England, including pupil movement* guidance ("Exclusion Guidance"). This consultation informed the School Discipline

(Pupil Exclusions and Reviews) (England) (Amendment) Regulations 2022 [SI 2022/788], which required social workers who are assigned to pupils and any Virtual School Heads who have responsibilities to a pupil to be notified about an exclusion, and required all fixed term exclusion data regardless of length to be shared without delay with local authorities.[4] The changes made by that instrument also responded to the evidence gathered during the Timpson Review of School Exclusion.

Remote meetings

7.3 Early in 2020, it became apparent that public health measures designed to limit the spread of COVID-19 made it difficult for governing boards and IRPs to meet in person within the normal time limits. In addition, there was uncertainty about whether the 2012 Regulations, as they were at the time, allowed for meetings to be held remotely.

7.4 In light of these difficulties, the series of amendments mentioned in paragraph 6.3 above were put in place to make the procedures for responsible body meetings and IRPs temporarily more flexible, without detriment to parents' and pupils' rights or to the fairness of the scrutiny system. Those instruments made provision for meetings of responsible bodies and IRPs to be held virtually where it was not reasonably practicable for the meeting to be held in person due to COVID-19 and where several conditions were met; they also made other temporary changes.

7.5 Evidence gathered through engagement with multiple stakeholders during COVID-19 about the earlier amendments outlined above was positive and several commented that remote meetings can be less intimidating for families. Many mentioned that it is easier for children/young people with special educational needs and disabilities ("SEND") to communicate over videoconferencing. Some have reported an increase in parent participation, as they too feel more comfortable. Some have found it more difficult to access advice from an advocacy service during a remote meeting as the usual removal to another room would not be available. Feedback suggests, however, that this difficulty can be overcome by 'creative' measures such as the use of instant messaging.

7.6 Following this engagement, the public consultation on the Exclusion Guidance, held in February 2022, asked stakeholders if they agreed that the Department should make remote meetings for all school exclusion meetings an option under any circumstances. 84% of the 726 respondents who answered this question agreed that remote meetings should be an option for governing board and IRP exclusion review meetings. A general theme arising in the written responses was that remote meetings should be kept as an option depending on individual cases, especially as it would help with the attendance of individuals such as social workers and Virtual School Heads, but emphasis was placed on remote meetings not becoming compulsory and ensuring participants were content with the format.

7.7 These Regulations provide for remote meetings to be used whenever the relevant person asks for this. Though if the relevant person expresses no preference, the governing board or IRP (as applicable) must meet face to face. They also provide for

[4] The definition of a parent can be found in the Education Act 1996, and this applies to all the legislation to which this memorandum relates. In addition to the child's birth parents, references to parents in this memorandum include any person who has parental responsibility (which includes the local authority where it has a care order in respect of the child) and any person (for example, a foster carer) who has care of the child. To reflect this, this memorandum uses 'parent' to refer to both parents and carers.

remote meetings to be used where a face-to-face meeting is not practicable in exceptional or unforeseen circumstances, even if the relevant person has not requested a remote meeting. In all cases, a meeting may only be held remotely if the governing board or IRP in question is satisfied that participants will be able to participate fully, that all participants have access to the necessary technology to be seen and heard throughout the meeting, and that the meeting can be fair and transparent if conducted remotely.

7.8 The updated Exclusion Guidance for 2023 provides good practice principles on how remote meetings should be conducted, explains what should be done if there are delays to statutory timescales due to connection issues, and is clear that schools should do their best to accommodate the wishes of parents, should the parents want to meet face to face.

Transitional arrangements

7.9 The Regulations set out transitional arrangements relating to the amended rules on remote meetings. The effect is that parents (and excluded pupils aged 18 years or older) can request remote meetings in relation to school exclusions that have occurred (i.e. begun) before 1 September but whose governing board consideration meetings or IRPs has not yet been concluded. Where this occurs, the head teacher must notify the relevant person that they may ask the Governing Board or IRP to hold the meeting remotely. This request must be made by the parent (or excluded pupil aged 18 years or older) within three school days of the notification. The notification must state the deadline and explain how and to whom to make the request.

Cancelling exclusions

7.10 While the Department considers it implicit from the legislation on school exclusions that exclusions can be cancelled at an early stage if certain requirements are met (and guidance on cancelling school exclusions has been available for some time), these Regulations amend the 2012 Regulations to make express provision regarding the cancellation of exclusions (which will assist users of the legislation). Specifically, express provision is made enabling a head teacher to cancel an exclusion if the governing board has not yet met to consider whether the pupil should be reinstated, provided that: (i) the pupil has not been excluded for a total of 45 or more school days in the school year, and (ii) relevant parties are notified of the cancellation and the reasons for it without delay. The Regulations also stipulate that, where an exclusion is cancelled, the pupil must be allowed back into their school without delay.

8. European Union Withdrawal and Future Relationship

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

9. Consolidation

9.1 There is no plan to consolidate the 2012 Regulations at this time.

10. Consultation outcome

10.1 These Regulations are informed by recommendations from the Timpson Review, Children in Need Review and feedback to the Department's 8-week online public consultation on updates to the Exclusion Guidance[5].

10.2 The consultation included questions relating to amendments of the 2012 Regulations. The survey, conducted through the Citizen Space platform, ran from 3rd February 2022 to 31st March 2022 and received 824 responses from head teachers, teachers, governors, parents, schools, local authorities and other interested parties. The Government's response to the consultation on the Exclusion Guidance, as well as the updated Behaviour in Schools Guidance, can be accessed here.

10.3 It was clear when analysing the consultation responses, that cancelling exclusions and the use of remote meetings warranted further policy consideration and engagement with key stakeholders before implementation and amendment to Regulations.

Remote meetings

10.4 The public consultation on the Exclusion Guidance asked stakeholders if they agreed that the Department should make remote meetings for all school exclusion meetings an option under any circumstances. 84% of the 726 respondents who answered this question agreed that remote meetings should be an option for governing board and IRP exclusion review meetings.

10.5 There was positive feedback to the temporary changes to the 2012 Regulations described in paragraph 6.3 above.

Cancelling exclusions

10.6 Responses to the public consultation, particularly from head teachers, highlighted that occasionally, additional evidence and information coming to light during the exclusion process warranted a review of the decision and the exclusion coming to an end.

10.7 These Regulations address this issue in paragraph 7.10 above, and additional guidance on good practice for cancellation of exclusions is given in the updated 2023 Exclusion Guidance.

11. Guidance

11.1 Guidance is provided and available at www.gov.uk/government/publications/school-exclusion

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 A full Impact Assessment has not been prepared for this instrument because Independent schools are free to read the Exclusion Guidance should they choose, but it does not apply to them. We also expect there will be a low level of impact on state-

[5] Consultation on Revised Behaviour in Schools Guidance and Suspension and Permanent Exclusion Guidance - Department for Education - Citizen Space

funded schools, local authorities and those with safeguarding responsibilities for excluded pupils.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The instrument does not include a statutory review clause. Monitoring and reviewing this legislation will be conducted through routine engagement with key stakeholders and the wider programme of work set out in the Schools White Paper "Opportunity for all: strong schools with great teachers for your child", SEND review: right support, right place, right time" and SEND &AP green paper consultation.

14.2 We will routinely discuss the impact of these changes with schools, local authorities and other relevant stakeholders to understand and monitor their effectiveness, ensuring the policy objective has been achieved.

15. Contact

15.1 Jessica Easto at the Department for Education, email: school.exclusions@education.gov.uk can be contacted with any queries regarding the instrument.

15.2 Sophie Taylor, Director for Attendance, Exclusions and Vulnerable Children's Unit, at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Minister of State for Schools at the Department for Education, Rt Hon Nick Gibb MP, can confirm that this Explanatory Memorandum meets the required standard.