EXPLANATORY MEMORANDUM TO

THE SPECIAL EDUCATIONAL NEEDS AND DISABILITY (FIRST-TIER TRIBUNAL RECOMMENDATION POWER) (PILOT) (AMENDMENT) REGULATIONS 2016

2016 No 2

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 amend the Special Educational Needs and Disability (First-tier Tribunal Recommendation Power) (Pilot) Regulations 2015 ("the 2015 Regulations") to add four additional pilot local authorities to the Schedule to those Regulations, for the purposes of the Special Educational Needs Tribunal pilot. The additional pilot local authorities are Birmingham City Council, Buckinghamshire County Council, East Sussex County Council and Northamptonshire County Council.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 The 2015 Regulations make provision for a pilot scheme to extend the powers of the First-tier Tribunal (Special Educational Needs and Disability) so that it may make non–binding recommendations in respect of certain types of health and social care needs and provision specified in Education, Health and Care (EHC) Plans. These Regulations add four additional pilot local authorities to the existing thirteen local authorities already participating in that pilot scheme.

4.2 Section 79 of the Children and Families Act 2014 requires the Secretary of State for Education and the Lord Chancellor to carry out a review of how effectively disagreements about the exercise of functions under Part 3 are being resolved and to prepare and lay before Parliament a report on the outcome of the review. There will be an evaluation of the pilot that will form part of the review, the outcomes of which will be included in the report to Parliament. Increasing the number of local authorities participating in the pilot will enable the department to have a more robust evidence base for the pilot evaluation as it will increase the potential number of appeals where non-binding recommendations could be sought.

4.3 In answer to a Parliamentary Question (200755) answered on 19 June 2014 the Parliamentary Under – Secretary of State for Children and Families affirmed the Government's commitment to a pilot to test an expansion of the powers of the First-tier Tribunal (Special Educational Needs and Disability) to make recommendations about the health and social care elements of EHC Plans.

5. Extent and Territorial Application

5.1 The extent of this instrument is England and Wales.

5.2 This instrument applies to England.

5.3 The pilot scheme will only operate in the local authorities specified in the Schedule to the 2015 Regulations.

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 EHC plans, which replace statements of special educational needs (SEN), were introduced in September 2014 through the Children and Families Act 2014, bringing together education, health and social care services for those children and young people with the most complex special educational needs. EHC plans place more emphasis on personal outcomes and describe clearly the support a child or young person will receive across these different services to achieve these outcomes.

7.2 Parents and young people can only appeal to the First-tier Tribunal (Special Educational Needs and Disability) in respect of the education aspects of their EHC plan. If they are not satisfied with the health or social care needs and provision within an EHC plan then they need to go down separate routes of complaint.

7.3 Debates during the passage of the Children and Families Act 2014 highlighted the concerns about the appropriateness of the system for resolving disagreements. A number of voluntary and community sector groups, including parent carer forums wanted parents/young people to have a single route of appeal against decisions about the new EHC assessments and plans. This led to the commitment in the Children and Families Act 2014 to review the current arrangements for dispute resolution, looking at the earlier stages of disagreement resolution including mediation.

7.4 The pilot scheme forms part of this review. In the pilot local authority areas, these Regulations extend the First-tier Tribunal's powers when it is determining certain appeals in relation to EHC plans, so that it may also make non-binding recommendations about the health and social care needs and provision that should be specified within EHC plans, providing a single point of access for parents and young people who are unhappy with the contents of an EHC plan

7.5 In the pilot, the Tribunal will share its recommendations on health care and social care needs and provision with the responsible commissioning body for health and the local authority respectively. These bodies will be expected to send written responses to the parent or young person and must include reasons if they decide not to follow the Tribunal's recommendation. We are increasing the number of local authorities in the pilot in order to ensure that the Tribunal has sufficient cases on which to make recommendations in order to inform the report to Parliament.

7.6 The Secretary of State and the Lord Chancellor will report back to Parliament within three years of the implementation of the SEN provisions making recommendations as to the future of redress and complaint arrangements, including recommendations on the role of the First-tier Tribunal. The report must be laid by 1st April 2017.

7.7 The local authorities listed in the Schedule have volunteered to participate in this pilot scheme and they have also secured the agreement of the Clinical Commissioning Groups (CCG) and/or health bodies attached to their area.

7.8 The Secretary of State will be recommended to revoke the regulations to bring the pilot to an end ahead of the report to Parliament as soon as a sufficient amount of data has been gathered.

8. Consultation outcome

8.1 We did not carry out a formal consultation on identifying additional local authorities to take part in the pilot as this is a time limited pilot involving only local authorities who volunteer to take part. We worked with the SEND advisors to identify and approach potential local authorities to take part in the pilot, based on the number of appeals by each authority over the past 12 months; the SEND advisors are SEND specialists commissioned by DfE to provide advice to the department on matters related to SEND policy and to support the implementation of national SEND policy and practice with local authorities and providers.

8.2 The Ministry of Justice and Her Majesty's Courts and Tribunal Service have been fully briefed on progress regarding our plans to increase the number of local authorities taking part in the pilot.

9. Guidance

9.1 Non-statutory guidance for local authorities participating in the pilot was drafted by the Department for Education and issued to local authorities participating in the pilot prior to it commencing on 1st June 2015. This guidance includes their duties and the processes they need to follow, such as responding to recommendations and taking part in the evaluation, as well as their duty to inform parents and young people about the pilot. The guidance will be shared with the four new pilot local authorities before they join the pilot.

10. Impact

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

10.2 The public sector bodies taking part in the pilot will receive funds from the Department for Education to reimburse the costs of additional work involved. This will include additional work to gather evidence to respond to requests for recommendations on health care and social care, as well as additional time for considering recommendations.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

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

12. Monitoring & review

12.1 We have procured an external organisation (CEDAR, University of Warwick) to carry out an evaluation of the Tribunal pilot and to gather evidence for the Review of Disagreement Resolution.

12.2 There is a steering group overseeing the above research project, including external members, which meets regularly

13. Contact

13.1 Maggie Brandon at the Department for Education can answer any queries regarding the instrument; Telephone: 02073407403 or email: Margaret.BRANDON@education.gsi.gov.uk