EXPLANATORY MEMORANDUM TO

THE SPECIAL EDUCATIONAL NEEDS AND DISABILITY (FIRST-TIER TRIBUNAL RECOMMENDATION POWER) (PILOT) REGULATIONS 2015

2015 No. 358

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 The purpose of the Special Educational Needs and Disability (First-tier Tribunal Recommendation Power) (Pilot) Regulations 2015 ("the Regulations") is to 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.

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

3.1 None

4. Legislative Context

4.1 The Regulations are made in exercise of the powers in sections 51(4)(c) and (5) and the general powers in sections 135(2) and (3) of the Children and Families Act 2014. This is the first time that regulations have been made under section 51(4)(c) to confer a power on the First-tier Tribunal to make recommendations in respect of matters against which no appeal may be brought.

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.

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. Territorial Extent and Application

5.1 This instrument applies to England.

5.2 The pilot scheme will only operate in the local authorities specified in the Schedule to the 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 provided for by these regulations 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.

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 It is intended that the regulations will be revoked to bring the pilot to an end after one or two years, depending on whether a sufficient amount of data has been gathered in the first year.

8. Consultation outcome

8.1 We did not carry out a formal consultation on the regulations as they relate to a time limited pilot involving only local authorities who volunteer to take part. However, we have consulted the Deputy President of the Health, Education and Social Care Chamber of the First-tier Tribunal and an external advisory group with representatives from local authorties, parents and voluntary and community sector organisations who are in place to advise on the review as a whole and who have commented on the structure of the pilot as laid out in the Regulations.

9. Guidance

9.1 Non-statutory guidance for local authorities participating in the pilot will be drafted by the Department for Education and issued to local authorities participating in the pilot before it commences on 1st April 2015. This will incorporate comments from the pilot local authorities, as well as the external advisory group. The guidance will include their duties and the processes they need to follow, such as responding to

recommendations and taking part in the evaluation. The guidance will also cover the pilot local authorities duty to inform parents and young people about the pilot.

9.2 Guidance for Tribunal Judges and panel members will be drafted by the Deputy President of the Health, Education and Social Care Chamber. This will inform them of their new powers to make non-binding recommendations and the processes involved in being in 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 pliot 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 any 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 small business.

12. Monitoring & review

12.1 We will procure an external organisation to carry out an evaluation of the pilot and the measures in place to resolve disagreements, including mediation. This will include in-depth interviews with qualitative and quantitative evidence.

12.2 There will also be a steering group for the evaluation project that will gather evidence to evaluate the pilot. The group will meet regularly and produce an interim and final report.

13. Contact

Lauren Kocan at the Department for Education (Tel: 0207 340 8209 or email: lauren.kocan@education.gsi.gov.uk) can answer any queries regarding the instrument.