EXPLANATORY MEMORANDUM TO

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

2016 No. 822

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 The purpose of these Regulations is to revoke the Special Educational Needs and Disability (First-tier Tribunal Recommendation Power) (Pilot) Regulations 2015 ("the 2015 Regulations") and the Special Educational Needs and Disability (First-tier Tribunal Recommendation Power) (Pilot) (Amendment) Regulations 2016 ("the 2016 Pilot Amendment Regulations").

2.2 The 2015 Regulations made provision for a pilot scheme by extending the powers of the First-tier Tribunal (Special Educational Needs and Disability) so that it could 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. The 2016 Pilot Amendment Regulations added four additional local authorities to the original 13 local authorities already participating in the pilot scheme.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

4.1 The 2015 Regulations creating the pilot scheme were made in exercise of the powers in sections 51(4)(c) and (5) and the general powers in section 135(2) and (3) of the Children and Families Act 2014.

4.2 The pilot scheme was set up as part of a review which was required under Section 79 of the Children and Families Act 2014. Section 79 required 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 of the Act were 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 scheme, the outcomes of which will be included in the report to Parliament.

4.3 The pilot scheme was referred to by the Parliamentary Under-secretary of State for Children and Families when answering a Parliamentary Question (200755) on 19 June 2014 affirming 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.

4.4 The pilot scheme was to run for a year but has been extended to 17 months. Closing on the 31 August 2016 will ensure sufficient time to gather evidence to report to Parliament by 31st March 2017.

4.5 These Regulations and the 2016 Pilot Amendment Regulations are also made in exercise of the powers in sections 51(4)(c) and (5) and the general powers in section 135(2) and (3) of the Children and Families Act 2014 ("the Act").

5. Extent and Territorial Application

5.1 The extent of this instrument is England and Wales.

5.2 This instrument applies to England only.

5.3 The pilot scheme only operates in the local authorities mentioned in the Schedule to the 2015 Regulations and the 2016 Pilot Amendment 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

What is being done and why

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 seek 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 Secretary of State and the Lord Chancellor must carry out a review of how effectively disagreements are being resolved and must report back to Parliament within three years of the implementation of the SEN provisions. The report must be laid by 31 March 2017.

7.5 The pilot scheme formed part of this review. In the pilot local authority areas, the Regulations extended the First-tier Tribunal's powers when 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.

7.6 These Regulations come into force on 31 August 2016 thus ending the pilot scheme on that date.

7.7 These Regulations have transitional provision so that the 2015 Pilot regulations and the 2016 Pilot (Amendment) Regulations will continue to have effect where, before 31 August, an appeal under section 51 of the Children and Families Act 2014 has been brought against a pilot local authority and is still to be determined.

8. Consultation outcome

8.1 We did not carry out a formal consultation on identifying local authorities to take part and the additional local authorities who joined the pilot as this is a time limited pilot involving only local authorities who volunteered to take part.

9. Guidance

9.1 Non-statutory guidance was drafted by the Department for Education and issued to the 13 local authorities participating in the pilot prior to it commencing on 1 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 was shared with the four new pilot local authorities who joined the pilot in February 2016.

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 were advised they could claim 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 that includes other government departments and three external expert members.

12.3 There is an external advisory group, made up of key stakeholders including the Council for Disabled Children, IPSEA, the Special Educational Consortium, the

National Network of Parent Carer Forums and the Association of Directors of Children's Services, which reviews progress.

13. Contact

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