

EXPLANATORY MEMORANDUM TO

THE EDUCATION (NATIONAL CURRICULUM ASSESSMENT ARRANGEMENTS, ATTAINMENT TARGETS AND PROGRAMMES OF STUDY) AND (PUPIL INFORMATION AND SCHOOL PERFORMANCE INFORMATION) (AMENDMENT) (ENGLAND) REGULATIONS 2020

2020 No. 844

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Education (the department) and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Select Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 These Regulations remove the existing attainment framework, the Performance Scale (P Scales) document¹, for pupils with special educational needs (SEN) working below the standard of national curriculum assessments, and, for primary age pupils, replace it with three new frameworks; the pre-key stage standards (PKS) at key stage 1² (KS1)³ and key stage 2⁴ (KS2)⁵, from 1st September 2020, and the engagement model guidance⁶, from 1st September 2021, which applies for both KS1 and KS2. These changes implement the recommendations of the 2015 Rochford Review⁷, which were accepted by the government following statutory consultation. The Regulations also modify the requirements for the reporting of information following the introduction of these frameworks, and remove the standards of attainment, as set out in the P Scales document, for pupils with SEN at key stage 3⁸ (KS3), as there are currently no national curriculum assessments at that key stage.
- 2.2 The Regulations also require head teachers to make a declaration (the HDF) to the Secretary of State that the KS1 assessments have been administered in accordance with the Education (National Curriculum) (Key Stage 1 Assessment Arrangements) (England) Order 2004 (SI 2004/2783) (“the KS1 Assessment Arrangements Order”) and published guidance⁹, from 1st September 2020, because that requirement was omitted in error from the KS1 Assessment Arrangements Order. A printed copy of these Regulations is, therefore, being issued free of charge to all known recipients of the KS1 Assessment Arrangements Order.
- 2.3 As a result of the coronavirus (COVID-19)-related cancellation of the phonics assessment for pupils turning 6 (year 1) in the 2019/20 academic year, the Regulations

¹ The P Scales document can be found here: <https://www.gov.uk/government/publications/p-scales-attainment-targets-for-pupils-with-sen>

² Key stage 1: the two years of schooling when pupils are aged between 5 and 7 (years 1 and 2).

³ The PKS framework for KS1 can be found here: <https://www.gov.uk/government/publications/pre-key-stage-1-standards>

⁴ Key stage 2: the four years of schooling when pupils are aged between 7 and 11 (years 3 to 6).

⁵ The PKS framework for KS2 can be found here: <https://www.gov.uk/government/publications/pre-key-stage-2-standards>

⁶ The engagement model guidance can be found here: <https://www.gov.uk/government/publications/the-engagement-model>

⁷ Rochford Review: final report: <https://www.gov.uk/government/publications/rochford-review-final-report>

⁸ Key stage 3: the three years of schooling when pupils are aged between 11 and 14 (years 7 to 9).

⁹ The Standards and Testing Agency produces KS1 and KS2 Assessment and Reporting Arrangements, which are published annually and act as delegated supplementary provisions to the KS1 and KS2 Assessment Arrangements Orders.

also allow for pupils turning 7 (year 2) in the 2020/21 academic year to be assessed in phonics, using the phonics screening check (PSC), for a second time during the 2020/21 academic year where they have already been assessed in that academic year and have not met the required standard, and for the results of those assessments to be reported to the local authority.

3. Matters of special interest to Parliament

Matters of special interest to the Select Committee on Statutory Instruments

- 3.1 The making of these Regulations falls outside of the usual practice of providing schools with at least one full school term's notice. More than a full school term's notice has, however, been given for the statutory implementation of the engagement model.
- 3.2 These Regulations also correct an omission from and error in the KS1 Assessment Arrangements Order. A printed copy of these Regulations is, therefore, being issued free of charge to all known recipients of that Order.

Removal and replacement of P Scales

- 3.3 The Regulations relating to the PKS, the engagement model and the KS1 HDF were originally intended to be laid in Parliament in March 2020. This timing would have ensured that schools used the PKS frameworks and submitted the KS1 HDF following completion of the KS1 national curriculum assessments for the 2019/20 academic year. The timing of the intended laying date coincided with the initial impact of coronavirus (COVID-19) on schools and the decision to cancel the 2019/20 national curriculum assessments. As a result of the uncertainty, the laying of the Regulations was delayed, to avoid implementing new statutory assessment requirements on schools, and to allow time to consider if amendment to the related policy was necessary as a result of the coronavirus (COVID-19) outbreak.
- 3.4 Although the Regulations do not provide a school term's notice of the obligations relating to use of the PKS frameworks or submission of the KS1 HDF these were both already practically in use by schools. Delaying the date of the statutory implementation of the PKS and KS1 HDF had no immediate practical impact on schools and is not expected to have negative impacts on the sector.
- 3.5 It was initially intended that the engagement model guidance would apply from 1st September 2020. However, following the disruption caused by coronavirus (COVID-19), the department recognised that some schools may not have had the opportunity to implement the guidance and training, and as a result may be less prepared to introduce the engagement model, while others will have appropriate arrangements in place. The Regulations therefore revoke P Scales for pupils for whom the engagement model is intended to apply from the beginning of the 2020/21 academic year although the engagement model provisions do not come into force until 1st September 2021. The 2020/21 academic year will, therefore, be a transitional year during which there will be no statutory attainment framework for pupils with SEN and who are not engaged in subject-specific study. No practical disadvantage therefore arises for schools.

Phonics screening check for year 2 pupils in the 2020/21 academic year

- 3.6 The changes relating to the PSC for all pupils turning 7 (year 2) in the 2020/21 academic year have arisen because of the need to consider and adapt the current

policy as a result of coronavirus (COVID-19) impacts. It was therefore not possible to provide schools with at least one full school term's notice of this change due to the need to develop and consult on the policy options, the imminent nature of the policy and proximity to the start of the 2020/21 academic year. The Standards and Testing Agency (STA) informed schools (in an email sent on 14 July 2020) of the policy proposal for the PSC for all pupils turning 7 (year 2) in the 2020/21 academic year, and, prior to consultation in July 2020, engaged with teacher unions and other school stakeholder groups in developing the proposals.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.7 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

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 only.

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 Regulations amend the Education (National Curriculum) (Attainment Targets and Programmes of Study) (England) Order 2013 (SI 2013/2232) ("the 2013 Order"), which provides for attainment targets for pupils, including those at KS1, KS2 and KS3 with SEN. They also amend the KS1 Assessment Arrangements Order, the Education (National Curriculum) (Key Stage 2 Assessment Arrangements) (England) Order 2003 (SI 2003/1038) ("the KS2 Assessment Arrangements Order"), and the Education (National Curriculum) (Key Stage 3 Assessment Arrangements) (England) Order 2003 (SI 2003/1039) ("the KS3 Assessment Arrangements Order"), which set out the arrangements for the statutory assessment of pupils at those respective key stages.
- 6.2 Article 3 of the 2013 Order provides for the national curriculum framework document to set out the attainment targets for pupils, including those at KS1, KS2 and KS3. Article 5 of that Order provides for the P Scales document to have effect for the purposes of specifying the attainment targets in relation to any pupil in KS1, KS2 or KS3 with SEN and who is working at a level set out in that document and below that of the national curriculum framework document.
- 6.3 The Assessment Arrangements Orders provide for how, via the national curriculum assessments, the attainment of pupils at the respective key stages is to be assessed in relation to the national curriculum framework document. Article 3 in each of the Assessment Arrangements Orders makes reference to attainment targets and programmes of study set out in documents published by the department *other than* the P Scales document.

- 6.4 Articles 4 and 5 of the KS1 Assessment Arrangements Order respectively require pupils to be assessed by a teacher in each core subject in the summer term, and, in English and mathematics, by the administration of standard tasks. Article 5A of the KS1 Assessment Arrangements Order requires pupils to whom that article applies to be assessed for the purpose of ascertaining the extent to which they understand the correspondence between graphemes and phonemes in English (phonics). Article 6A of that Order requires local authorities to perform a monitoring function in relation to assessments under article 5A, and places related obligations on head teachers and governing bodies to facilitate such monitoring.
- 6.5 The Regulations also amend the Education (Pupil Information) (England) Regulations 2005 (SI 2005/1437) which contain provisions about the duties on maintained schools to keep certain records and produce certain reports, including head teachers' annual reports (regulation 6 and Schedule 1), and the information to be provided to a school to which a registered pupil transfers, known as a "common transfer file" (CTF) (regulation 9 and Schedule 2). Amongst other things, an annual report needs to contain information, where applicable, regarding pupils' P Scale of attainment in English and mathematics, at the end of KS1 and the end of KS2, while the CTF must contain information, where applicable, regarding pupils' P Scale of attainment in English and mathematics, where such an assessment has been carried out at KS1 or KS2.
- 6.6 The Regulations also amend the Education (School Performance Information) (England) Regulations 2007 (SI 2007/2324) which include provision about the duties on schools to provide certain information, including the results of national curriculum assessments at KS1 (regulation 5 and Schedule 1) and KS2 (regulation 6 and Schedule 2, and regulation 12ZA and Schedule 8), to the local authority or to the Secretary of State. In each case the obligations include the provision of information about the P Scale achievements of relevant pupils.

7. Policy background

What is being done and why?

Removal and replacement of P Scales

- 7.1 Introduced in 1998, P Scales are performance attainment targets, or performance descriptors, set out in a numerical scale ranging from P1 to P8. They were designed to sit below the level descriptors used to assess the old (pre-2014) national curriculum.
- 7.2 In 2015, Ministers established an independent review of statutory assessment arrangements for pupils in primary school who are working below the standard of national curriculum tests, led by Diane Rochford. This review¹⁰ recommended removing P Scales because they were no longer fit for purpose, as they are based on the old (pre-2014) national curriculum; they do not support pupils to progress onto the new national curriculum; and they replicated the old system of levels, which over time had come to dominate teaching, and prioritised pace over consolidation. Following a public consultation, the government confirmed, in its response in September 2017¹¹, that P Scales would be removed as a statutory attainment framework.

¹⁰ The Rochford Review's final report can be found here: <https://www.gov.uk/government/publications/rochford-review-final-report>

¹¹ The government response to the Rochford Review consultation can be found here: <https://www.gov.uk/government/consultations/primary-school-pupil-assessment-rochford-review-recommendations>

- 7.3 In its response to the consultation, the government set out that it would replace the requirement to assess pupils engaged in the study of English reading, English writing, and mathematics using P Scales P5 to P8 with a requirement to report against PKS, from the 2018/19 academic year onwards. The government also set out that it would pilot the Rochford Review's recommended approach to assessing pupils not engaged in the study of English reading, English writing, and mathematics (broadly on P Scales P1 to P4) in the 2017/18 academic year, before taking any final decisions on whether to implement this approach on a statutory basis.
- 7.4 Schools were asked to use the PKS frameworks for the first time in the summer of 2019. The final versions of the PKS frameworks at KS1 and KS2 were published on 23 July 2020 as the frameworks to assess pupils with SEN working below the standard of the national curriculum assessments and engaged in the study of English reading, English writing, and mathematics, for use on a statutory basis from 1st September 2020. The Regulations give statutory effect to these proposals and make consequential changes to related reporting obligations.
- 7.5 The engagement model was developed with the support of an expert group involving members of the Rochford Review, and using evidence from the pilot carried out in the 2017/18 academic year. The engagement model recognises that engagement is multi-dimensional and that there is a complex interaction between pupils' physical, sensory, communication and learning disabilities that affects how they progress. Following the pilot, consultation and ministerial agreement, the final engagement model was published on 23 July 2020 as the framework to assess pupils with SEN working below the standard of the national curriculum assessments and not engaged in the study of English reading, English writing, and mathematics.
- 7.6 It was initially intended that the statutory implementation of the engagement model guidance would apply from 1st September 2020. However, following the disruption caused by coronavirus (COVID-19), we recognise that some schools may not have had the opportunity to implement the guidance and training, and as a result may be less prepared to introduce the engagement model. The Regulations therefore implement the proposals from 1st September 2021. The 2020/21 academic year will, therefore, be a transitional year during which there will be no statutory requirement to report on the assessment of pupils with SEN working below the standard of the national curriculum assessments and not engaged in subject-specific study. Schools that have used the engagement model will still be able to report against it, and schools that need more time to implement the engagement model will continue to have the option to assess against P Scales P1 to P4, for one final year. STA will provide non-mandatory guidance in relation to assessing and reporting, so that schools have the resources they need in the absence of a statutory framework.
- 7.7 Head teachers are required to complete and submit a HDF upon completion of the KS1 national curriculum assessments. The purpose of completing this is to confirm that the assessments have been administered according to the KS1 Assessment Arrangements Order and the assessment and reporting arrangements guidance, or that any maladministration issues have been reported to STA. The Regulations brings into law this requirement after it was previously omitted from the KS1 Assessment Arrangements Order in error.

Phonics screening check for year 2 pupils in the 2020/21 academic year

- 7.8 On 18 March 2020 the Secretary of State for Education announced that statutory national curriculum assessments would not take place in the 2019/20 academic year due to the coronavirus (COVID-19) outbreak. This included the PSC for year 1 and eligible year 2 pupils, and the KS1 Assessment Arrangements Order was subsequently amended accordingly. The cancellation of the 2019/20 assessments created a requirement under the KS1 Assessment Arrangements Order for all pupils turning 7 (year 2) in the 2020/21 academic year, having not completed the PSC in the school year in which they turned 6, in 2019/20, to complete the PSC in 2020/21.
- 7.9 In order to avoid the unnecessary burden on schools of administering a statutory assessment in phonics to two whole year groups of pupils in the summer term 2021, schools will administer an existing past PSC test paper (available on gov.uk) to all year 2 pupils in the second half of the autumn term 2020, in order to assess which pupils are at the expected standard in phonics. Schools will be required to report to the department, via a data return to their local authority, the results of that autumn term assessment of year 2 pupils; and administer the PSC only to year 2 pupils yet to meet the expected standard in phonics (based on the results of the autumn term 2020 check), in summer 2021 at the end of year 2 (alongside the year 1 cohort). The Regulations give effect to that proposal. The existing statutory guidance for the phonics assessment will be updated to provide guidance for schools in September 2020 on the arrangements for phonics assessment for the 2020/21 academic year.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 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 are no plans to consolidate relevant regulations or orders.

10. Consultation outcome

- 10.1 In March 2017 the department launched a 12-week public consultation on the final recommendations made by the Rochford Review which ran until 22 June 2017. The government response to the consultation was published in September 2017¹². Further to this, the department carried out a six-week statutory consultation between January and March 2020, with stakeholders with a special interest in education, for the submission of further evidence and representations related to the statutory assessment arrangements for pupils working below the standard of national curriculum assessments.
- 10.2 The consultation on the final recommendations made by the Rochford Review received 594 submissions, with respondents providing a diverse and informed range of views. The consultation received responses from: 122 teachers working in special schools, 77 teachers working in mainstream schools, 68 head teachers of special schools, 78 head teachers of mainstream schools and 37 local authority representatives. The number of people whose views have been considered as part of

¹² <https://www.gov.uk/government/consultations/primary-school-pupil-assessment-rochford-review-recommendations>

this process is, however, greater than 594. Representative organisations such as the teaching unions canvassed their members before responding and stakeholders also contributed via consultation events and meetings. Based on the consultation responses, the government accepted the Rochford Review’s recommendation to remove the statutory requirement for teachers to assess pupils using P Scales. The government response addressed the concerns raised by some consultees that the removal of P Scales would result in the loss of a common framework or language. The response also confirmed the PKS would provide this for pupils engaged in subject-specific study and explained why a change in approach was appropriate for pupils not engaged in subject-specific study. Further expert review of both the PKS and engagement model frameworks took place following the consultation and prior to the final guidance being published to accompany these Regulations.

- 10.3 Furthermore, in accordance with section 408(5) of the Education Act 1996 and sections 87(6A) and section 96(5) and (6) of the Education Act 2002, in January 2020 the Secretary of State published a draft of the proposed Regulations and the associated documents, and a summary of the views expressed in the 2017 consultation, and allowed a period of six weeks for the submission of further evidence and representations as to the issues arising.
- 10.4 Ofqual, the National Association of Head Teachers (NAHT), the National Network of Parent Carer Forums, and Voice (a union for education professionals), all agreed with the Regulations and associated documents without raising any concerns. The Association for Achievement and Improvement through Assessment (AAIA) also broadly support the PKS frameworks and engagement model guidance.
- 10.5 Views were subsequently sought between May and June 2020 from those consulted in January to March 2020, regarding the coming into force date for these Regulations, in light of coronavirus (COVID-19) impacts. Ofqual, NAHT and AAIA responded calling for a cautious approach to statutory implementation of the engagement model in September 2020, due to the lack of universal sector preparedness. Ofsted also responded but made no further comment. Members of the SEND Forum¹³ were also informally consulted to gather their views. Members expressed their strong desire to continue to see the engagement model implemented in the 2020/21 academic year, some stating that not introducing it would be a backwards step. They did however recognise that some schools are not as advanced in their preparations as others, and schools had not had the same opportunities to engage with the training or the guidance to be sufficiently prepared for September 2020 implementation, and so they agreed that providing schools with flexibility for the 2020/21 academic year would be a sensible compromise.
- 10.6 Views were subsequently sought in July 2020 from those consulted in January to March 2020 and May to June 2020, regarding the legislative proposal to implement the PKS frameworks from 1st September 2020, and the engagement model guidance from 1st September 2021. The consultation received responses from Ofqual, NAHT, Council for Disabled Children (CDC), AAIA and Ofsted. All respondents remained supportive of the implementation of the engagement model. Ofqual and NAHT confirmed support for the transitional year approach, and mitigations STA had proposed to reflect the lack of statutory framework for the 2020/21 academic year. AAIA indicated their preference was for P Scales to remain statutory for a further year (2020/21 academic year). CDC highlighted some concerns about the reporting

¹³ An independent forum comprised of national organisations with a keen interest in SEND.

approach arising from the implementation of the engagement model, but confirmed their support for implementation of the engagement model itself and made no comment on the transitional year arrangements.

- 10.7 Pursuant to section 87(6A) of the Education Act 2002 and section 408(5) of the Education Act 1996, a one-week consultation was carried out in July 2020 on the changes relating to the PSC for all pupils turning 7 (year 2 pupils) in the 2020/21 academic year. Consultees included Ofqual, Ofsted, major teacher and head teacher unions, and a range of stakeholders with an interest in primary school education. The consultation received five responses. Ofsted commented that the proposals were a sensible and practical way forward in difficult circumstances. Ofqual welcomed the clarity provided about the purpose of the autumn term 2020 assessment and the uses to which the outcomes will be put, but also noted the sector's concerns about the manageability of the additional assessment. The Local Government Association confirmed they had no comment.
- 10.8 NAHT and Voice were not supportive of the proposals. Both felt the statutory nature of the requirement to administer a past phonics paper and report the outcome of that assessment to the department was unnecessarily bureaucratic, and would add an unnecessary additional burden to schools at a time they were under unprecedented pressures. Both proposed that schools make their own formative assessment of year 2 pupils' ability in phonics, to decide who needs support, and determine which pupils need to take the existing end of year 2 PSC. This was considered but offering flexibility in assessment approach would make it challenging for schools to assess consistently if a pupil had met the department's expected standard. The data collection approach was aligned to the existing summer term process based on feedback from the department's Star Chamber Scrutiny Board¹⁴ to minimise change.
- 10.9 Additionally, when consulted under article 36(4) of the General Data Protection Regulation, the Information Commissioner's Office confirmed that it did not wish to provide any further input on these Regulations.

11. Guidance

- 11.1 Schools have been made aware of the forthcoming changes on the introduction of the PKS frameworks and the engagement model guidance through the government response to the Rochford Review consultation, through communications directly to all primary schools, and media coverage. Schools have also been made aware, via the assessment and reporting arrangements guidance, of the requirement to submit the KS1 HDF following completion of the KS1 national curriculum tests.
- 11.2 STA's annual statutory guidance to schools on assessment and reporting arrangements for national curriculum assessments will set out schools' legal duty related to the reporting and use of the PKS frameworks, as well as further guidance on the transitional year in the 2020/21 academic year, prior to the implementation of the engagement model, and arrangements for the assessment of phonics for pupils in year 2 in the 2020/21 academic year. STA will provide non-mandatory guidance to schools in relation to the assessment of and reporting in relation to pupils working below the standard of the national curriculum assessments and not engaged in subject-specific study.

¹⁴ The Star Chamber Scrutiny Board helps the Department for Education to assess data collections for schools and children's services: <https://www.gov.uk/government/groups/star-chamber-scrutiny-board>

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no significant impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for this instrument because there is no, or no significant impact on business, charities, voluntary bodies, or public sector.

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 operation of the Regulations will be kept under review on a periodic basis.

15. Contact

- 15.1 Rumana Begum at the Department for Education, Telephone: 0207 654 6458 or email: Rumana.Begum@education.gov.uk, can be contacted with any queries regarding the instrument.
- 15.2 Lisa Keenaghan, Deputy Director Assessment Development for Standards and Testing Agency, at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Rt Hon Nick Gibb, Minister for School Standards, at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.