

EXPLANATORY MEMORANDUM TO
THE SPECIAL EDUCATIONAL NEEDS (DIRECT PAYMENTS) (PILOT SCHEME)
ORDER

2011 No. [XXXX]

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 this Order is to make provision for a pilot scheme in accordance with which local authorities may make direct payments under section 532A(1) of the Education Act 1996 (“ the 1996 Act”) for the purpose of securing to a beneficiary (defined in section 532A(1)) the provision of any goods and services mentioned in section 532A(2). The goods and services are the special educational provision specified in a statement of special education needs under section 324 of the 1996 Act, provision identified in an assessment under section 139A of the Learning and Skills Act 2000 and transport or anything else that may be the subject of arrangements under section 508B(1), 508F(1) or 509AA(1) of the 1996 Act. Local authorities may only make direct payments under section 532A(1) in accordance with the pilot scheme which is set out in Schedule 1 to the Order. The authorities that may operate the pilot scheme are those authorities which are set out in Schedule 2 to the Order. The pilot scheme has effect for two years from the date on which the Order is made. The purpose of the Order is to test in a pilot scheme the use of direct payments for educational provision for children and young people with special educational needs or a disability.

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

3.1 None.

4. Legislative Context

4.1 The Order is made in exercise of the powers in sections 532B(1) and 532C(1) of the 1996 Act (inserted by section 75 of the Education Act 2011) and, by virtue of an amendment to section 568 of the 1996 Act by section 75, is subject to the affirmative procedure. This is the first exercise of that power.

4.2 Section 532B(7) of the 1996 Act provides that a pilot scheme may provide for paid-for goods and services (defined in subsection (10) of that section as goods and services acquired by direct payments) to be treated as goods and services provided or arranged by a local authority in pursuance of a statutory duty specified in the scheme. The only statutory duties which may be specified are those in section 532A(9). Paragraph 2 of the pilot scheme makes provision for this.

5. Territorial Extent and Application

5.1 This Order applies in relation to England.

5.2 The pilot scheme may only be operated by the local authorities specified in Schedule 2 to the Order.

6. European Convention on Human Rights

Sarah Teather has made the following statement regarding Human Rights:

In my view the provisions of the Special Educational Needs (Direct Payments)(Pilot Scheme) Order are compatible with the Convention rights.

7. Policy background

7.1 Personal budgets can give families more flexibility and empower them to make decisions about the support they receive. Families who took part in the Individual Budget Pilot, which began under the previous Government and pulled together a series of funding streams for families with disabled children, said that they felt they had more choice and control over the support they received and better access to, and greater satisfaction with, services. One element of a personal budget can be a direct payment to a parent to buy a service, for example assistance from a carer, or a piece of equipment for their child. Where this option was available (in relation to funding for social care), in the Individual Budget Pilots 63% of families opted to have a direct payment as part of their personal budget.

7.2 The purpose of the Order is to enable the Department for Education (“the Department”) to test making direct payments for special educational provision and educational and training needs and transport arrangements. The pilot scheme is being established, as part of a commitment made in the Green Paper, *Support and aspiration: A new approach to special educational needs and disability* (“the Green Paper”). It gives families of children with the proposed new Education, Health and Care Plan the option of a personal budget by 2014, and tests, from 2011, how the scope of direct payments could be increased to include funding streams from education and health. In September 2011, the Department announced the appointment of 20 pathfinders, covering 31 local authorities and their Primary Care Trust (PCT) and emerging Clinical Commissioning Group partners, to test the main proposals in the Green Paper including those relating to personal budgets. The pathfinders will be able to test the healthcare element of direct payments through the personal health budget pilot programme, run currently by the Department of Health.

7.3 The Order will enable the specified local authorities to pilot making direct payments for special educational provision for children with statements of special

7.4 The pilot scheme allows direct payments to be made to the parent of a beneficiary who has not attained the age of 16 and a beneficiary who has attained the age of 16 and who has capacity to consent to the making of direct payments to them. So a young person aged 16 will be able to manage their own direct payments. Payments may also be made to a nominee or a representative to enable parents or young people (aged over 16) who may not otherwise be able to or wish to do so to have the opportunity of direct payments.

7.5 The pilot scheme contains a number of safeguards for children, young people and their families. Local authorities must arrange information, advice and other support for families in connection with direct payments. Before making any payments the local authority must ensure that recipients have a clear understanding of, and that they agree, what the payment is in respect of, how much it is, whether payable in a lump sum or in instalments and when they will receive the funds.

7.6 The take up of a direct payment will be voluntary and local authorities must obtain written consent from the person to whom the direct payment is to be made and where a nominee is to receive direct payments, on behalf of the parent or beneficiary, their agreement must be obtained by the local authority as well. The local authority must also be satisfied that the provision which the child or young person needs can be secured by means of a direct payment and ensure that the amount of the direct payment is sufficient to meet the full cost of that provision.

7.7 The scheme safeguards the use of public funds through a requirement for local authorities to consider, before agreeing any individual direct payment, whether the payment is compatible with the local authority's efficient use of its resources and that it will not have an adverse impact on services for other children and young people with special educational needs and/or disabilities.

7.8 The scheme will require local authorities to monitor the use of direct payments and, as a minimum, undertake a review within three months of the first payment being made and at the end of the first year of their use by an individual and thereafter at appropriate intervals. The pilot scheme will operate for two years.

8. Consultation outcome

8.1 The 16-week, public consultation on the Green Paper closed on 30 June 2011. The Department for Education will be publishing a summary of the responses to the consultation shortly. This will also set out progress in taking forward the Green Paper reforms and next steps.

8.2 Respondents to the consultation broadly welcomed the proposals to introduce personal budgets and direct payments for special educational provision and provision to meet educational and training needs, citing the additional freedom and choice that they

could bring. There was recognition that the option may not be something that all families may wish to take advantage of and that is why we have made it a requirement that a local authority must obtain the written consent of the parent or beneficiary before making direct payments. Respondents also suggested a number of different types of provision that could be included in a personal budget, such as specialist support, auxiliary aids and transport, and highlighted important considerations including the need to ensure that families receive the appropriate support. The Department worked closely with a number of groups representing children and young people with special educational needs and disabilities during the passage of the Education Act 2011 and this work has included detailed discussions on the content of the pilot scheme. Many of the suggestions raised both in consultation and during the discussions with representative groups have been included in the pilot scheme. The pilot will help us to identify any other potential issues, and develop our understanding of the ways in which personal budgets, particularly direct payments, can help to improve families' choice and control.

9. Guidance

9.1 The pilot scheme will be undertaken as part of a wider Green Paper pathfinder programme. The Department has appointed a contractor to provide support to the pathfinder areas across the broad range of their activities. The Department will be working with the contractor to provide further advice, written guidance and information to pathfinders on their participation in this pilot scheme.

10. Impact

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

10.2 There is no impact on the public sector.

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 The pilot scheme will be evaluated as a distinct element of the full evaluation of the Green Paper pathfinder programme.

12.2 The pilot scheme set out in this Order has effect by virtue of article 3 of the Order for two years. Any subsequent extension of the scheme (which by virtue of section 532C(4) of the 1996 Act cannot exceed four years) or a new pilot is subject to a further order. The order making power is subject to a sunset clause that has the effect that sections 532A to 532C of the 1996 Act are repealed at the end of four

years from the date on which the Education Act 2011 received Royal Assent (15 November 2015).

13. Contact

Andrew Baxter at the Department for Education (Tel: 020 7340 7454 or email: andrew.baxter@education.gsi.gov.uk) can answer any queries regarding the instrument.