

EXPLANATORY MEMORANDUM TO

THE EARLY YEARS FOUNDATION STAGE (LEARNING AND DEVELOPMENT AND WELFARE REQUIREMENTS) (AMENDMENT) REGULATIONS 2023

2023 No. 780

1. Introduction

- 1.1 This explanatory memorandum has been prepared by Department for Education and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

- 2.1 This instrument amends the Statutory Framework for the Early Years Foundation Stage to make three changes:

- 1) a change to the current statutory minimum staff:child ratios in England for 2-year-olds from 1:4 to 1:5;
- 2) clarifying that childminders can care for more than the specified maximum of three young children if they are caring for siblings of children they already care for, or if the childminder is caring for their own child;
- 3) clarifying that “adequate supervision” while children are eating means that children must be within sight and hearing of an adult.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

4. Extent and Territorial Application

- 4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales.
- 4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England.

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 Section 39(1)(a) of the Childcare Act 2006 sets out that the Secretary of State must specify learning and development requirements that early years providers must comply with (in accordance with section 41 of that Act) as she considers appropriate. These requirements are set out in Statutory Framework for the Early Years Foundation Stage, known as “the Document” which is defined in Article 2 of the Early Years Foundation Stage (Learning and Development Requirements) Order 2007 (S.I. 2012/938) (“the 2007 Order”). The learning and development requirements are given legal force by the 2007 Order.

- 6.2 Article 3(2) in the 2007 Order sets out that providers “must have regard to” requirements outlined in Section 1, 2 and Annex B of the Document.
- 6.3 Section 39(1)(b) of the Childcare Act 2006 sets out that the Secretary of State must specify welfare requirements that early years providers must comply with (in accordance with section 43 of that Act) as she considers appropriate. These requirements are set out in “the Document” which is defined in regulation 2 of the Early Years Foundation Stage (Welfare Requirements) Regulations 2012 (S.I. 2012/938)(“the 2012 Regulations”). The welfare requirements are given legal force by the 2012 Regulations.
- 6.4 Regulation 3(2A) in the 2012 Regulations sets out that providers “must” follow the requirements outlined in Section 3 of the Document, including paragraphs 3.29, 3.33, and 3.43.
- 6.5 This instrument amends the definition of “the Document” to refer to the updated version of the Early Years Foundation Stage dated 12th July 2023 ([Statutory framework for the early years foundation stage \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/114444/early-years-foundation-stage-welfare-requirements-regulations-2012.pdf)), in both the 2007 Order and the 2012 Regulations.
- 6.6 The Document includes changes to the safeguarding and welfare requirements to change policy and clarify existing policy. A change is made to paragraph 3.33 to update the staff:child ratios for children aged two, to enable a ratio of 1:5 to apply instead of 1:4.
- 6.7 A change to paragraph 3.43 includes a clarification to make it explicit that childminders can care for more than the specified maximum of three young children if they are caring for siblings of children they already care for, or if the childminder is caring for their own baby or child. Current wording suggests childminders can care for more than the maximum of three young children if they are caring for a sibling baby, or their own baby.
- 6.8 A change in paragraph 3.29 includes a clarification to make it explicit that ‘adequate supervision’ whilst children are eating means that children must always be within sight *and* hearing of an adult – not within sight *or* hearing.

7. Policy background

What is being done and why?

- 7.1 Following an 11-week consultation from July – September 2022, the government announced as part of the 2023 Spring Budget, that it would proceed with the proposed changes on staff: child ratios and adequate supervision whilst eating.
- 7.2 The government is making these changes in support of the childcare reforms announced in the 2023 Spring Budget, and the significant increase in demand for childcare that is likely to emerge. These changes will support the childcare sector and provide greater flexibility to providers to utilise their staff in a more efficient and effective way.
- 7.3 In addition, the findings from the consultation and accompanying Natcen survey indicated that some settings would utilise these new changes (see section 10 for more details).
- 7.4 These respondents suggested that through implementing the proposals, they could offer new places to children, and/or could see a financial gain as a result of the

proposed changes. These financial gains could support their financial sustainability; support staff training and development; increase salaries; and some providers may pass on savings to parents. The changes to staff:child ratios would continue to be minimum requirements, and providers would be free to staff above these minimum requirements if that is their preference.

Explanations

What did any law do before the changes to be made by this instrument?

Staff:Child Ratios for 2-year-olds

- 7.5 Staff:child ratios are in place to ensure that children’s early learning and development needs are met, and to ensure their safety. Staff:child ratios are set out in the Document as the number of children per staff member. The minimum ratio requirements vary according to the age of the child and the qualification level of staff. They apply to the total number of staff available to work directly with children.
- 7.6 The Document states that ‘exceptionally, and where the quality of care and safety and security of all children is maintained, changes to the ratios may be made.

Childminder ratio flexibilities

- 7.7 The Document sets out staff:child ratios for childminders when caring for sibling groups and their own children.

Adequate supervision whilst eating

- 7.8 The Document requires that those responsible for preparing food in early years settings are competent to do so, and that Paediatric First Aid (PFA) training must ensure competence to help a baby or child who is choking. Providers must ensure that children are adequately supervised, including whilst eating, and decide how to deploy staff to ensure children’s needs are met.

Why is it being changed?

Staff:Child Ratios for 2-year-olds

- 7.9 It has been assessed that this provision will provide greater regulatory flexibility for childcare providers to decide how best to staff their settings, according to the needs of their children. This change will also support the childcare reforms announced in the 2023 Spring Budget. It will enable providers to help more parents access the childcare they need in order to work.

Childminder ratio flexibilities

- 7.10 Childminders are an important part of the early years sector, providing childcare that is flexible and affordable. However, childminder numbers have declined steadily year on year. While the decline has not affected the overall sufficiency of early years childcare places, it has reduced the availability of one form of affordable and flexible childcare, limiting parental choice.
- 7.11 It has been assessed that this provision will provide greater flexibility to childminders, who are generally the most affordable and flexible form of childcare for many parents.

- 7.12 This will support childminders to develop a childcare offer that can help siblings grow up together and enable childminders to offer a more flexible provision whilst caring for their own children and babies.

Adequate supervision whilst eating

- 7.13 Mealtimes and snack times for babies and young children can be a high-risk environment for choking hazards. As a baby or young child who is choking can be completely silent, it is essential that children under five are within sight and hearing of staff members while eating so that immediate action can be taken, if necessary, to ensure their safety.
- 7.14 Engagement with early years providers to date suggests that for many settings, adequate supervision while eating is already understood to mean that children are within sight of a member of staff. It has been assessed that this provision will reinforce this practice without an overall impact on staff numbers.

What will it now do?

Staff:Child Ratios for 2-year-olds

- 7.15 This instrument will update the definition of the Document, to amend paragraph 3.33 regarding staff: child ratios for 2-year-olds and increase the number of children that one staff member can care for from four children to five children.
- 7.16 The changes to ratios will continue to be a statutory minimum requirement for providers, and there will be no obligation on them to operate at the statutory minimums. Providers can continue to work to tighter ratios if they decide that is best for the children and staff at their setting. The qualification requirements for staff members caring for 2-year-olds will remain the same.
- 7.17 Whilst like-for-like comparisons with other countries must be treated with caution due to very different childcare systems, England has equivalent or slightly tighter ratio requirements than other comparable countries. This change will bring England's ratios for 2-year-olds in line with Scotland, and ensure that England remains broadly consistent with other countries internationally. Furthermore, Scotland's Care Inspectorate has not found any evidence to suggest that the needs of children are not being met under their workforce model. The Government has therefore decided to introduce the staff:child ratio change for 2-year-olds.

Childminder ratio flexibilities

- 7.18 This instrument will update the definition of the Document to provide childminders with greater clarity on applying their ratios. It will not alter the usual childminder ratios, but will amend paragraph 3.43 by making it explicit that childminders can make exceptions to the usual ratios, to allow them to care for more than the currently specified maximum of three young children, when caring for siblings of children they already care for, or their own child.

Adequate supervision whilst eating

- 7.19 This instrument will update the definition of the Document to make it explicit that "adequate supervision" while children are eating means that children must always be within sight *and* hearing of a member of staff, not just within sight *or* hearing. The

following sentence will be added to paragraph 3.29: “Whilst eating, children must be within sight and hearing of a member of staff”.

8. European Union Withdrawal and Future Relationship

- 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 The 2012 Regulations are not being consolidated.

10. Consultation outcome

- 10.1 DfE have consulted on the instrument in accordance with section 43(2) of the 2006 Act with Ofsted and the public.
- 10.2 The Department launched a public consultation from 4 July – 16 September 2022 on regulatory elements of the [Statutory framework for the early years foundation stage \(publishing.service.gov.uk\)](https://publishing.service.gov.uk). This included staff:child ratios for 2-year-olds, childminder ratio flexibilities and supervision whilst eating. It also included additional non-consultation questions on further staff:child ratio reforms.
- 10.3 In total, the consultation received 14,043 responses. This figure includes: 9,813 parents; 1,190 group-based providers on the early years register; 608 maintained nursery schools; 552 childminders; 366 primary schools with nursery provision; 504 organisations providing childcare; 166 local authorities; 130 charities; 16 membership organisations; 7 Ofsted; and 1 childminder agency.

Staff:Child Ratios for 2-year-olds

- 10.4 A very small number agreed with the proposals to change 2-year-old ratios and childminder ratio exceptions, whilst most respondents disagreed with the proposals. This was a consistent finding across all the different types of respondents, such as parents, group-based providers and organisations representing the sector. Of those who disagreed, they did so on the grounds of concerns for quality of provision, staff workload, child wellbeing, concerns that financial savings made as a result of changes would not be passed to parents, and the argument that the ratio change itself failed to address the current challenges in the sector.
- 10.5 Of those who agreed, they did so on the grounds that proposals would go some way to addressing the recruitment and retention challenges the sector is facing, and it would offer increased autonomy and flexibility for owners to make the best decisions for the needs of their settings. Others agreed providing certain caveats were put in place (e.g. maintaining safety standards and allowing providers the choice of implementing changes based on whether it was right for their contexts).
- 10.6 The survey undertaken by Natcen, who surveyed a representative sample of early years providers, found that the majority of group settings with 2-year-olds (70%) said they would be unlikely or very unlikely to change their provision if ratio requirements were relaxed, with 45% saying they would be very unlikely to do so. 28% of group settings with 2-year-olds said they would be likely or very likely to make any changes to provision. This corresponds to 19% of all group settings (including those with and without 2-year-olds). 9% of group settings that do not currently provide places to 2-year-olds said that they would definitely or probably start offering places to 2-year-

olds if the ratio change were introduced. The most common reason given by providers who said they were likely to make changes to their provision was that this would help with staff shortages.

Childminder ratio flexibilities

- 10.7 Regarding childminder ratios, the Natcen survey found that the majority of childminders reported that they would not change their provision in response to the proposed childminder ratio change (56%), with 32% reporting they would be very unlikely to do so. Around a quarter (26%) reported they would be either likely or very likely to make changes. Almost one in five (18%) said that they did not know if they would make changes.
- 10.8 Childminders were asked an open-ended question about the reasons why they were either likely or unlikely to consider changing their provision. Of the majority who reported they would be unlikely to change their provision in response to the proposed childminder ratio flexibilities, the most common reasons provided related to quality of care and safety (this mirrors the findings for group settings). Nearly three in ten childminders reported concerns that the changes would compromise the quality of care they provided, and almost one quarter reported concerns that it would compromise child safety.
- 10.9 The most common reasons childminders gave for being likely to change their provision were to allow them to offer continuity of care for families (including those wanting childcare for siblings), or to increase revenue to help with their own living costs. All childminders (excluding those who were very unlikely to make changes) were asked whether new childminder ratio flexibilities would impact their delivery of care. 42% reported they would fill spare places, 42% reported reallocating places to younger children, and 16% reported they would do 'something else'.
- 10.10 Natcen found that the likely impact (excluding childminders unlikely to change their provision) is that 21% of all childminders would see an increase in income following the introduction of the new ratio requirements.

Adequate supervision whilst eating

- 10.11 Regarding the supervision whilst eating change, the vast majority of respondents agreed with the proposal. The most common reasons were regarding increasing safety for children, such as spotting choking incidents or allergic reactions. A minority of respondents disagreed. Potential areas for disagreement included, specifically for childminders, the layout of a setting making this difficult in practice, and capacity issues with staff members needing a break. Also, Natcen found that a small number of practitioners (2–3%) may need to adapt their practice to fulfil the requirement. But this is of the utmost importance in keeping children safe.
- 10.12 Some respondents considered the change in wording to be insufficiently robust to ensure high safety standards. Their reasons included it being open to interpretation as to what 'within sight' explicitly meant, with concerns that this wording could be interpreted that someone merely needs to be in the room with the children, without directly supervising them. Providers would not be fulfilling the requirement if this was the case as the requirement also states 'Providers must ensure children are adequately supervised', therefore we do not feel that the requirement needs to go further than our proposal. This change in the requirement is the absolute minimum expectation of early years providers.

10.13 The full consultation response and accompanying survey conducted by Natcen can be found here: [Childcare: regulatory changes - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/childcare-regulatory-changes)

11. Guidance

11.1 Alongside the laying of this instrument, the Department will issue communications to relevant stakeholders to ensure they are aware of the updating of the Document.

12. Impact

12.1 The impact on business, charities or voluntary bodies is low. The changes to ratios are minimal and discretionary – they are statutory minimums and evidence gathered demonstrated that 19% of all group settings (those with and without 2-year-olds) would be likely or very likely to make changes to 2-year-old ratios.¹ Evidence suggests that through these changes, an additional 17,400 - 24,500 2-year-olds could be looked after across group settings, an increase of approximately 4- 6%.

12.2 Overall, 9 – 15% of all group settings with 2-year-olds could see a reduction in their staffing costs as a result of the proposed ratio change. Taking income and costs together, the likely impact is that 15 – 28% of group settings with 2-year-olds would see an initial financial gain (through increased income and/or reduced staff costs).

12.3 Among settings who expected that they would see some financial gain, most (64%) reported that none of the gain would be passed on to parents through reduced fees. 31% said they would pass on some of it and only 5% indicated they would pass on most or all of it. Overall, the likely impact is that 7 - 12% of all settings with 2-year-olds would pass on any savings to parents. Most providers who said they would reduce fees, said they would reduce fees by 25p per hour or less (with 36% saying they would reduce fees by less than 10p per hour).

12.4 Among settings expecting some financial gain and not expecting to pass all the gain on to parents, most (63%) said they would use any financial gain to support the financial sustainability of their provision, for example by building up reserves or paying back loans. Around half of the settings (53%) said they would use it to pay for additional resources for staff training or career development. Just under half (49%) said they would use the surplus to increase staff salaries.

12.5 Evidence also found around a quarter (26%) of childminders reported they would be either likely or very likely to make changes. The most common reasons childminders gave for being likely to change their provision were to allow them to offer continuity of care for families (including those wanting childcare for siblings), or to increase revenue to help with their own living costs. All childminders (excluding those who were very unlikely to make changes) were asked whether new ratio flexibilities would impact their delivery of care. 42% reported they would fill spare places, 42% reported reallocating places to younger children, and 16% reported they would do ‘something else’.²

12.6 Regarding the supervision whilst eating change, Natcen found that 98% of group-based providers and 97% of childminders already understood adequate supervision whilst eating to mean that children should be both within sight and hearing of a

¹ [Childcare Regulatory Changes: Consultation Response \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/government/consultations/childcare-regulatory-changes) p. 11.

² [Childcare Regulatory Changes: Consultation Response \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/government/consultations/childcare-regulatory-changes) p. 13.

member of staff. The proportion of providers who will have to change their practice as a result of this change is 2% for group-based providers and 3% for childminders.

- 12.7 An equalities impact assessment has been completed on both elements of the consultation for staff:child ratio changes (2-year-olds and childminder ratio flexibilities) and the adequate supervision element.
- 12.8 The evidence suggests that for changes to 2-year-old staff:child ratios and childminder ratio flexibilities, the overall impact is positive for the sex protected characteristic. For those with protected characteristics related to disabilities, pregnancy and maternity, the changes will have a negative impact. For race and the remaining characteristics there are neutral impacts.
- 12.9 The evidence suggests that for adequate supervision whilst eating, there are positive impacts for children with a disability, and neutral impacts across the other protected characteristics. However, there were concerns when considering staff with hearing loss in statements about staff being considered within sight and hearing to supervise children whilst eating. We believe providers could mitigate against this by assessing how they deploy their staff during meal and snack times.
- 12.10 There is no significant impact on the public sector or families.
- 12.11 A full Impact Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 To minimise the impact of the requirements on small businesses (employing up to 50 people) the Department has consulted with sector organisations regarding EYFS reforms, representing small businesses on the regulatory changes to the safeguarding and welfare section of the framework, to ensure the changes are understood and do not create undue burdens.
- 13.3 With regards to transitional arrangements, no specific action is proposed because this legislation only imposes statutory minimum requirements. Early years providers can continue to adjust their staff:child ratios to meet the needs of the children and staff in their setting, and so they can continue to staff to tighter ratios if that is their preference. The EYFS also already allows for some flexibility to the staff:child ratios in exceptional circumstances, and so there is a precedent already for providers to adapt them outside of the statutory minimum requirements if there is a business need. These flexibilities within the EYFS will mean that settings have the benefit of adjusting their staff:child ratios if they need to.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is that the operation of this instrument will be kept under review on a periodic basis.

15. Contact

- 15.1 Bev Lawrence at the Department for Education (email: bev.lawrence@education.gov.uk) can be contacted with any queries regarding the instrument.

- 15.2 Mike Davies, Deputy Director for Early Years Markets and Strategy at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Claire Coutinho, Parliamentary Under Secretary of State for Children, Families and Wellbeing at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.