

**EXPLANATORY MEMORANDUM TO**  
**THE LOCAL AUTHORITY (DUTY TO SECURE EARLY YEARS**  
**PROVISION FREE OF CHARGE) REGULATIONS 2014**

**2014 No. 2147**

1. This explanatory memorandum has been prepared by the Department of Education and is laid before Parliament by Command of Her Majesty.

2. **Purpose of the instrument**

English local authorities are under a duty to secure that early years provision of a prescribed description and of a prescribed amount is available for children of a prescribed description and who are under compulsory school age. These Regulations prescribe those matters and how local authorities should discharge this duty.

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

None.

4. **Legislative Context**

4.1 Section 7(1) of the Childcare Act 2006 (the “2006 Act”) places a duty on English local authorities to secure that free early years provision of the prescribed description is available free of charge for young children in their area who are under school age and are of the prescribed description. These Regulations exercise powers under section 7 to prescribe the early years provision which is to be available free of charge, the amount of such provision, and to set out the eligibility of children who are entitled to receive free early years provision.

4.2 Additionally, section 87 of the Children and Families Act 2014 added two new sections into the 2006 Act. Section 7A contains a power to require an English local authority to discharge its section 7 duty by making arrangements which secure that an early years provider chosen by a parent provides the early years provision to which the child is entitled (if the early years provider is willing to provide the provision, and to accept the terms imposed by the local authority). Section 9A contains a power to prescribe requirements which may, or may not, be imposed in arrangements made by an English local authority for the purpose of discharging its duty under section 7. These Regulations are the first exercise of these new powers.

4.3 These Regulations revoke the Local Authority (Duty to Secure Early Years Provision Free of Charge) Regulations 2013 (the “2013 Regulations”) which come into force on 1<sup>st</sup> September 2014.

4.4 These Regulations prescribe early years provision for the purposes of section 7(1) of the 2006 Act. With one exception, the prescribed early years provision remains the same as the provision prescribed in the 2013 Regulations i.e. early years provision which is provided by a provider to whom section 40 of the 2006 Act applies. Section 40 applies to early years providers, providing early years provision in respect of which they are required by the 2006 Act to be registered with Her Majesty's Chief Inspector of Education, Children's Services and Skills, and certain schools providing early years provision which are exempt, in certain circumstances, from the requirement to be registered.

4.5 The change which these Regulations make to prescribed early years provision is to exclude provision where it is provided by:

- an independent school (other than an Academy) which does not meet the independent schools standard in relation to the spiritual, moral, social and cultural development of pupils at the school; or
- a provider in relation to whom the local authority has reasonable grounds to believe:
  - does not actively promote the fundamental British values of democracy, the rule of law, individual liberty and mutual respect and tolerance of those with different faiths and beliefs; or
  - promotes views or theories as evidence-based which are contrary to established scientific or historical evidence or explanations.

4.6 These Regulations maintain the same amount of early years provision which local authorities are under a duty to secure as is prescribed in the 2012 and 2013 Regulations (i.e. 570 hours over no fewer than 38 weeks of the year).

4.7 These Regulations provide that the local authority is under a duty to secure prescribed early years provision for all children from the term starting after the child's third birthday until the child is of compulsory school age. In addition, this duty applies in relation to certain children from the beginning of the term following the child's second birthday, provided that the child meets the eligibility criteria in these Regulations. These criteria are the same criteria set out in the 2013 Regulations which apply from 1<sup>st</sup> September 2014 i.e. that:

- the child comes within the criteria used to determine eligibility for free school meals;
- the parent of the child is entitled to Working Tax Credit under Part 1 of the Tax Credits Act 2002 by virtue of an award which is based on an annual income not exceeding £16,190;
- the child has a statement of special educational needs made under section 324 of the Education Act 1996;
- the child has an Education, Health and Care plan prepared under section 37 of the Children and Families Act 2014;
- the child is entitled to disability living allowance under section 71 of the Social Security and Benefits Act 1992;
- the child is looked after by a local authority;

- the child has previously been looked after by a local authority under section 22(1) of the Children Act 1989 and is no longer looked after because an adoption order, a special guardianship order or a child arrangements order has been made.

4.8 These Regulations impose a new requirement on local authorities under the powers in section 7A. When discharging their duty under section 7(1) of the 2006 Act the local authority must fund early education places at providers chosen by the parent of a young child provided that the provider meets the prescribed quality criteria and the provider is prepared to accept the terms of the local authority funding.

4.9 The quality criteria are based on the most recent Ofsted<sup>1</sup> inspection judgement of the provider. Where the provider is a childminder registered with a childminder agency (CMA), local authorities must fund places based on the Ofsted judgement of the CMA. Local authorities must fund places for two-, three- and four-year-olds in provision judged ‘good’ or ‘outstanding’ and places for three- and four-year-olds in provision judged ‘satisfactory’ or ‘requires improvement’ or better. Local authorities must ensure that the arrangements they make to fund early education places can be terminated if the provider or CMA ceases to meet the quality criteria. The local authority is also required to fund a provider where Ofsted has not yet published an inspection report in relation to that provider.

4.10 These Regulations also set out for the first time (under the powers in section 9A) the requirements that local authorities may and may not attach to the funding they provide for the delivery of early education places. Local authorities may only impose requirements which are listed in regulation 8(1), and may not impose the requirements listed in regulation 8(2).

4.11 The new duty to fund early years providers based on Ofsted inspection judgements, and the new provisions about the requirements which local authorities may place on providers, do not apply to early years provision in a maintained school. This is because the funding arrangements between a local authority and a maintained school are set out in legislation, in particular the School Standards and Framework Act 1998 and the finance regulations made under that Act.

## **5. Territorial Extent and Application**

This instrument applies to England.

## **6. European Convention on Human Rights**

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

## **7. Policy background**

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<sup>1</sup> Or the judgement of an independent inspectorate approved by the Secretary of State

7.1 Since September 2008 local authorities have had a statutory duty to secure early years provision free of charge for all three- and four-year-olds in their area. This is known as funded early education. Since September 2013 the 20% most disadvantaged two-year-olds have been entitled to a funded early education place. From September 2014 the entitlement will be extended to the 40% most disadvantaged two-year-olds.

7.2 Local authorities are responsible for allocating Department for Education funding for early education places for two-, three- and four-year-olds. In order to make funding decisions local authorities often undertake assessments of the quality of provision in their area duplicating the work of Ofsted.

7.4 Typically local authorities place conditions on private, voluntary and independent (PVI) providers through their funding agreements. In the past, the conditions were often related to quality improvement, the flexibility of the provision, training and financial management requirements. Such conditions can place additional burdens on providers, particularly for providers operating in more than one local authority and can act as a disincentive for new providers to enter the market or existing providers to expand their business.

7.5 In January 2013 the Department published '*More great childcare*'<sup>2</sup> which outlined the Government's plan to improve the quality of early education and to give parents more choice. As part of this plan, between March and May 2013, the Department consulted on reforms to the role of the local authority to remove duplication with Ofsted and limit the requirements local authorities can place on PVI providers who deliver funded early education places. The Government response<sup>3</sup> to the consultation was published alongside '*More affordable childcare*'<sup>4</sup> in July 2013.

7.5 The Department published revised statutory guidance which local authorities must have regard to when discharging their duty under section 7 of the 2006 Act which came into effect in September 2013. The guidance makes clear that local authorities should base their decision whether to fund a provider to deliver early education places solely on the provider's Ofsted inspection judgment and not undertake a separate assessment of the quality of the provider. The guidance sets out the quality criteria providers must meet in order to receive funding to deliver early education places for two-, three- and four-year-olds.

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<sup>2</sup> '*More Great Childcare*' <https://www.gov.uk/government/publications/more-great-childcare-raising-quality-and-giving-parents-more-choice>

<sup>3</sup> Government response to the consultation on the role of the local authority in early education and childcare <https://www.education.gov.uk/consultations/index.cfm?action=conResults&consultationId=1889&external=no&menu=3>

<sup>4</sup> '*More Affordable Childcare*' <https://www.gov.uk/government/publications/more-affordable-childcare>

- 7.6 The guidance is also clear that local authorities should not place requirements on providers other than those which ensure that:
- funded places are entirely free to parents and offered flexibly to meet their needs;
  - the proper use of public funds;
  - providers meet the needs of disabled children or those with a special educational need and are keeping children safe.

## **8. Consultation outcome**

8.1 There was a joint consultation between 28 March and 22 May 2014 on draft regulations relating to CMAs and the draft Local Authority (Discharge of Duty to Secure Early Years Provision Free of Charge) Regulations 2014 together with statutory guidance for local authorities on early education and childcare.

8.2 There were 678 responses to the consultation from a range of respondents including early years and childcare representative organisations, local authorities, early education providers and parents. Some respondents only responded to some of the questions.

8.3 Around 450 responses were from organisations or individuals expressing opposition to early education funding going to providers that promote extremist views or teach creationism as science. The Department has considered the issues raised and decided that it is appropriate to bring the rules for funded early education in line with those for maintained schools, academies and free schools by excluding these providers from the description of early years provision for the purposes of section 7(1) of the 2006 Act (regulation 2(2)(a) and (b)).

8.4 Considerably more respondents felt the draft statutory guidance was clear about what local authorities must do to discharge their duties relating to early education and childcare than those who felt it was unclear. Respondents made helpful suggestions about practical advice which could be included in the guidance to support the effective implementation of these Regulations.

8.5 A number of respondents expressed concern that a weaker childminder registered with a high quality CMA could receive early education funding whereas an independent childminder would not receive funding. The Department has addressed this concern by keeping the principle that funding is on the basis of the CMA's Ofsted grading but exempting local authorities from the requirement to secure funded places with a CMA-registered childminder if the CMA has signalled concerns to the LA about the quality of the provision by that childminder (regulation 6(3)(b)).

8.6 An analysis of the consultation responses and the Government's response was published on 8 August 2014<sup>5</sup>:

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<sup>5</sup> <https://www.gov.uk/government/consultations/childminder-agencies-and-changes-to-the-local-authority-role>

## **9. Guidance**

There is already statutory guidance for local authorities on early education and childcare, published on 16<sup>th</sup> July 2013 and which came into effect from 1<sup>st</sup> September 2013.<sup>6</sup> That guidance makes clear that local authorities should fund early education providers on the basis of the provider's Ofsted judgement and should limit the requirements they place on early education providers (see paragraphs 7.5. and 7.6). The guidance will be revised to include new elements relating to the extension of the entitlement to funded early years provision for two-year-olds from September 2014 and these Regulations on how local authorities should discharge their duty to secure funded early education. The Department expects to publish the guidance in autumn 2014. It will be available to download from the Department for Education's website: [www.education.gov.uk](http://www.education.gov.uk)

## **10. Impact**

10.1 A full impact assessment has not been produced for this instrument as no significant negative impact on the private or voluntary sector is foreseen.

10.2 Early years providers are not required to deliver funded early education places for two-, three- and four-year-olds. However, these Regulations will give high quality providers certainty that they will be guaranteed funding if they choose to deliver early education places. The guarantee of funding may encourage new childcare providers to enter the market and existing providers to expand their business giving parents more choice about where they take up their child's funded early education place. Limiting the requirements that local authorities may place on providers who deliver early education places will reduce bureaucracy and remove unnecessary administrative burdens on providers.

## **11. Regulating small business**

The legislation does not apply directly to small business, because, although PVI providers have an important role in providing funded early education place these Regulations do not require them to deliver funded places and they can choose not to do so.

## **12. Monitoring & review**

Take-up of funded early education places for two-, three- and four-year-olds is monitored through the annual Early Years Census and the School Level Annual School Census and is published annually in a Statistical First Release (SFR). The SFR also contains data on providers who deliver funded early education places. The Department will monitor the number and types of

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<sup>6</sup> [www.education.gov.uk/aboutdfe/statutory/g00209650/code-of-practice-for-las](http://www.education.gov.uk/aboutdfe/statutory/g00209650/code-of-practice-for-las).

providers who receive funding to deliver funded early education. The Department also collects data on childcare and early education providers through a bi-ennial survey. The survey collects information on the number and characteristics of providers, the places they deliver and the workforce composition and qualifications.

### **13. Contact**

Andy Todd at the Department for Education Tel: 0114 2742409 or email: [Andy.Todd@education.gsi.gov.uk](mailto:Andy.Todd@education.gsi.gov.uk) can answer any queries regarding the instrument.