

## EXPLANATORY MEMORANDUM TO

### THE LOCAL AUTHORITY (DUTY TO SECURE EARLY YEARS PROVISION FREE OF CHARGE) (AMENDMENT) REGULATIONS 2016

2016 No. 887

#### 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 In discharging its duty to secure early years provision of a parent's choice, a local authority is only obliged to fund such provision if the preferred childcare provider, or the childminder agency ('CMA') with which that provider is registered (as the case may be), meets certain prescribed quality criteria. Quality is assessed by reference to the grading awarded in the most recent inspection report published in respect of the provider or the CMA by Her Majesty's Chief Inspector of Education, Children's Services and Skills ("Ofsted"). The Local Authority (Duty to Secure Early Years Provision Free of Charge) (Amendment) Regulations 2016 amends the prescribed quality criteria specified in respect of CMAs for these purposes, as a consequence of Ofsted's decision to change the grading CMAs receive following inspections.

#### 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 Section 7(1) of the Childcare Act 2006 (the "2006" Act) places a duty on English local authorities to secure that early years provision of the prescribed description is available free of charge for young children in their area who are under compulsory school age and are of the prescribed description.
- 4.2 Section 87 of the Children and Families Act 2014 came into force on 13 May 2014 and added two new sections to 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.
- 4.3 Regulations made under section 7A state that an English Local authority will only be required to fund the parent's choice of early years provider where the provider meets the prescribed quality criteria (and if the early years provider is willing to provide the provision and to accept the terms imposed by the local authority).

- 4.4 The quality criteria are based on the most recent Ofsted<sup>1</sup> inspection judgement of the provider, or where the provider is a childminder registered with a CMA, Ofsted's most recent inspection of the CMA. Local authorities are also required to fund a childminder registered with a CMA where Ofsted has not yet published an inspection report in relation to that CMA.
- 4.5 These Regulations change the quality criteria CMAs must meet in order for childminders registered with the CMA to receive funding to deliver places. This means that following the coming into force of these Regulations a local authority must fund places for two-, three- and four-year-olds at childminders registered with CMAs judged 'effective' by Ofsted where parents wish to take up a funded place with that childminder. Local authorities must ensure that the arrangements they make to fund places can be terminated if the CMA ceases to be judged 'effective' by Ofsted. These Regulations do not change the current position that local authorities are not required to fund a childminder registered with a CMA if the CMA has notified the local authority that, in their reasonable opinion, the provision delivered by the childminder has ceased to be of satisfactory quality. The requirement on local authorities to fund a childminder registered with a CMA where Ofsted has not yet published an inspection report of the CMA is unchanged.
- 4.6 The Department and Ofsted will continue to keep the inspection regime under close review to ensure that it remains fit for purpose.

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

- 5.1 This instrument extends to England and Wales
- 5.2 This instrument applies in England.

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

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

## **7. Policy background**

### *What is being done and why*

- 7.1 Provisions in the Children and Families Act 2014 allowed for the registration of CMAs with Ofsted on the early years and general childcare registers and the registration of childminders with CMAs. Since September 2014 individuals and organisations have been able to apply to Ofsted to register as a CMA on the early years or general childcare register.
- 7.2 Ofsted began quality inspections of CMAs in summer 2016, based on the Inspection Handbook which contains guidance for inspectors on the preparation for, and conduct of, inspections of CMAs (Childminding Agencies: Inspection Handbook available here). It also contains the evaluation schedule for inspectors on judging the effectiveness of the CMA and sets out the main types of evidence inspectors will collect and analyse. These Regulations are being made as a result of Ofsted's decision to use inspection judgements of 'effective' and 'not effective' for CMAs.

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

### ***Consolidation***

- 7.3 These Regulations amend the Local Authority (Duty to Secure Early Years Provision Free of Charge) Regulations 2014. There are no plans for a consolidating instrument at present.

## **8. Consultation outcome**

- 8.1 The Department has not consulted on the change to the eligibility criteria that CMAs have to meet in order for their registered childminders to receive funding to deliver early education places as this change is a technical change as a result of Ofsted introducing inspection judgements of 'effective' and 'not effective' for CMAs. The criteria against which CMAs will be assessed have not changed, the change affects the scale Ofsted use to judge and report the findings.
- 8.2 Following the original consultation on CMAs, Ofsted has re-considered their decision to assess quality of CMAs against the four judgements of 'outstanding', 'good', 'requires improvement' and 'inadequate'. Ofsted's executive board has decided to apply the judgements of 'effective' or 'not effective' when inspecting an agency. The main rationale for this change is that childminders registered with an agency are not registered by Ofsted and therefore not inspected by Ofsted. Rather, childminder agencies are expected to put in place their own quality control and assessment procedures for individual childminders registered with the CMA. To apply the use of judgments, such as good or outstanding to an agency could be misinterpreted by parents and the wider community as an endorsement by Ofsted of the quality of individual childminder/s registered with that agency.

## **9. Guidance**

- 9.1 There is already guidance for local authorities on early education and childcare published in September 2014 and which came into effect on 8 September 2014. The guidance will be revised to reflect Ofsted's inspection judgements of 'effective' and 'not effective' for CMAs. The Department expects to publish the guidance early in 2017 to come into force from September 2017. It will be available to download from GOV.UK.

## **10. Impact**

- 10.1 An impact assessment has not been prepared for these Regulations as no significant negative impact on the private or voluntary sector is foreseen. The amendment is a technical change as the result of the introduction by Ofsted of inspection judgements of 'effective' and 'not effective' for CMAs. The criteria against which the CMAs will be inspected have not changed. The position for childminders not registered with a CMA will also remain the same as they will continue to be judged on the quality of the childcare they provide and will be issued with one of four inspection judgements: 'outstanding', 'good', 'requires improvement' or 'inadequate'. This difference arises due to the expectation that CMAs will be responsible for quality control of childminders registered with them and these Regulations do not change that position.
- 10.2 Early years providers, including childminders, registered with Ofsted or with CMAs are not required to deliver funded early education places for two-, three- and four-year-olds and these Regulations do not change that position. Childminders will continue to have the certainty that if they choose to deliver early education places and parents wish to take up those places, they will be guaranteed funding, provided that

they are registered with either newly registered CMAs or agencies judged 'effective' by Ofsted. The guarantee of funding is intended to encourage existing CMAs to expand their business, more childminders to register with a CMA and the establishment of new CMAs. Which in turn gives parents more choice about where they take up their child's funded early education place.

- 10.3 Furthermore, as Ofsted did not undertake any inspections of CMAs under the four-point scale there are no CMAs who have received a judgement of 'outstanding', 'good', 'requires improvement' or 'inadequate' (as a result there has been no need to put in place any transitional arrangements in these Regulations).
- 10.4 There is no impact on the public sector.

## **11. Regulating small business**

- 11.1 The legislation applies to small businesses, such as childminders and those small businesses which register as CMAs. Small businesses are free to choose whether or not to register as a CMA and childminders are free to choose whether to register with a CMA. These Regulations do not place any additional regulatory burden on these small businesses.

## **12. Monitoring & review**

- 12.1 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 providers including agency-registered childminders who receive funding to deliver places. The Ofsted inspection judgements of CMAs will be included in statistics on the quality of childcare provision published by Ofsted on a termly basis.

## **13. Contact**

- 13.1 Cath Rourke at the Department for Education Telephone: 0114 274 2384 or email: [Cath.Rourke@education.gsi.gov.uk](mailto:Cath.Rourke@education.gsi.gov.uk) can answer any queries regarding the instrument.