

EXPLANATORY MEMORANDUM TO
THE DAY CARE AND CHILD MINDING (NATIONAL STANDARDS)
(AMENDMENT) (ENGLAND) REGULATIONS 2005

2005 No. 2303

1. This explanatory memorandum has been prepared by the Department for Education and Skills and is laid before Parliament by Command of Her Majesty.
2. **Description**
 - 2.1 These Regulations amend the Day Care and Child Minding (National Standards) (England) Regulations 2003 (SI 2003/1996) ("the 2003 Regulations") by adding provision for dealing with complaints made by parents in respect of care provided by child minders or providers of day care.
3. **Matters of special interest to the Joint Committee on Statutory Instruments:**
 - 3.1 None.
4. **Legislative Background**
 - 4.1 Section 79C of the Children Act 1989 ("the 1989 Act") provides that the Secretary of State may make regulations governing the activities of registered persons who act as child minders, or provide day care, on premises in England.
5. **Extent**
 - 5.1 This instrument applies to England.
6. **European Convention on Human Rights**
 - 6.1 No statement is required.
7. **Policy background**
 - 7.1 The Chief Inspector (i.e. Ofsted) currently uses a voluntary disclosure process which allows for limited information about a complaint that they have dealt with to be made available to parents where the provider has given their consent. The policy intent is to formalise the complaint procedure and provide more information to parents. Child minders and providers of day care will be

under a duty to investigate complaints fully and provide the parent who made the complaint with an account of their findings of their investigation into the complaint. They are to keep records at their premises. Providers of day care are to, in addition, prepare and follow a written procedure for considering complaints.

7.2 We consulted over a 12 week period between 1 April and 24 June 2005, with organisations and individuals that have an interest in the day care and childminding.¹ 60% of respondents were supportive of these regulations. A summary of responses is held by the named contact below.

7.3 The consultation included discussion with a number of parents with specific concerns about the current system. It indicated that parents are demanding more information and openness both in respect of complaints records, as dealt with above, and in respect of the investigation of specific complaints.

8. Impact

81. A Regulatory Impact Assessment is attached to this memorandum.

9. Contact

Dave Bell at the Department of Education and Skills Tel: 0207 273 5686 or e-mail: David.BELL@dfes.gsi.gov.uk can answer any queries regarding the instrument.

¹ <http://www.dfes.gov.uk/consultations/conResults.cfm?consultationId=1305>. Consultation closed on 24 June 2005.

Full Regulatory Impact Assessment (RIA) for the proposed Day Care and Child Minding (National Standards) (Amendment) (England) Regulations 2005

Purpose and intended effect of measures

Amendments to the national standards regulations will require childcare providers to keep a record of complaints, share limited information from that record with parents on request, and investigate complaints relating to the national standards, reporting to the parents of the children involved on request.

These regulations will also introduce a standards addendum in order amend the existing standards documents. Some of these amendments are as a result of new regulations and some seek to clarify or correct ambiguities which have occurred in the existing criteria under the national standards. The amendments to the standards criteria are in the form of an addendum and will include changes under standard 12, partnership with parents standard, will reflect the new regulations on complaints records laid out in the first paragraph above.

Objectives

- To enable parents and other individuals to be able to complain about the nature or delivery of care where the provider is perceived to be failing to meet the national standards and to ensure that there is a proper timely response from the provider to complaints.
- To ensure that the standards accurately reflect regulatory requirements.

Background

Criteria in the national standards require providers to maintain a record of complaints. However, this is not mandatory. The Government consulted on a proposal for a small change to the national standards regulations which would give legal force to this requirement, enabling Ofsted to report on this as part of its regular inspections, and to the supporting criteria indicating that parents should be able to access limited information from that record.

Ofsted's latest annual report 'Early Years: protection through regulation' published on 31 August 2004, indicates that Ofsted investigated 6,250 complaints during the year April 2003 to March 2004, of which only 449 (7%) resulted in any kind of enforcement action. The number of complaints should be set in the context of the total number of registered childcare providers (118,000) where nearly two million children are being looked after.

Since publishing revised standards in 2003 a number of inaccuracies have been found in some of the criteria under the standards which include in them references to specific regulations. In a number of cases, highlighted by Ofsted inspectors, these inaccuracies have led to mis-interpretations of regulatory requirements. The standards addendum will correct these inaccuracies. The regulations will also correct the national standards regulation that deals with notifiable diseases. The addendum will

include new criteria under the health standard to ensure that providers understand their responsibility in this area.

Risk assessment

It is important that the requirements on complaints investigation and record keeping are strengthened so that providers are clear that this is a key aspect which Ofsted will look at and report on as part of their inspections. Parents have sought more information and without the proposed regulations will continue to feel that inspection reports generally do not adequately cover the level of complaints received by a particular childcare provider, that complaints investigations are not being handled appropriately, and that they do not have easy access to basic information both about specific complaints they have made and more generally.

Options

These regulations have been proposed in order to address concerns about the current arrangements which have come to light since Ofsted took over, in 2001, responsibility for regulating childcare under the Children Act 1989. Maintaining the status quo is clearly an option, relying on guidance and protocols, but without new regulations Ofsted would have to continue to work with what it considers to be an unsatisfactory legal basis for dealing with complaints.

A key aspect of these regulations is the strengthened requirement that providers keep records of complaints for sharing with parents and Ofsted. We have considered whether or not the regulations should prescribe in detail what those records will contain, and have concluded that this would be better covered in guidance. This guidance is currently being developed in conjunction with national organisations representing different groups of providers. Maintaining the status quo on this aspect of the regulations would not address the concerns that some parents have expressed about the lack of information providers are obliged to keep and share. Nor would it encourage the kind of transparency that we believe should be a hallmark of a good provider.

The consultation, which has included discussion with a number of parents with specific concerns about the current system, has indicated that parents are demanding more information and openness both in respect of complaints records, as dealt with above, and in respect of the investigation of specific complaints. Therefore in addition to the requirement to keep a record of complaints, the Government will also amend the standards regulations so that providers are required to share information from that record with parents on request, investigate complaints relating to the national standards and report to parents following the investigation. An obligation of providers to share information from their complaints record with parents has significant advantages over a system which only relies on the basic information that Ofsted will be including in its inspection reports. It means that providers will be able to interpret the records and explain them where, for example, a number of complaints has arisen over a single incident.

The Government has also considered whether Ofsted should have a specific duty to provide a written report of any investigation to parents. As Ofsted at present do not

routinely make a written report, having to do so would add significant costs to Ofsted's regulatory functions. Such a report would not add anything to what can already be disclosed and the Government believes that the benefits of introducing such a measure would be disproportionate to the costs.

Benefits

As explained above, the proposed regulations will give parents peace of mind by establishing a more transparent system for reporting back to parents the results of complaint investigations, and for keeping and sharing complaints information, where a contractual relationship exists.

Costs

Ofsted already expects childcare providers to keep a complaints record – this is in the criteria which support the national standards – and this features amongst the documentation that an Ofsted inspector looks at during the inspection process. Ofsted has calculated that it will cost £50,000 (?) to implement the new regulations into their operational systems but this will be absorbed within existing budgets. Information received prior to consultation and the consultation itself suggests that making this requirement mandatory is very unlikely to impose additional costs on providers.

The Government has also considered the impact on providers of the additional requirements incorporated into the regulations following consultation. There would be no additional costs in making the mandatory record of complaints available to parents. Nor would the requirement to investigate certain complaints and report to the parents of the child or children involved result in higher costs for providers. The regulations already require providers to have a written complaints procedure, and guidance is that they should take appropriate and prompt action on any concerns raised. The regulations will simply make explicit providers' obligation to investigate and report on those complaints which relate to the national standards.

To ensure that any compliance costs are minimal, and to reduce the risk of any other adverse impact as a result of the regulations, Ofsted is working with provider organisations on guidance about complaints handling and record keeping. This guidance will indicate the kind of complaints that would be covered by the new arrangements, what records Ofsted might expect to see during an inspection, and the level of information that it would be appropriate for a parent to see. Such guidance would address the principal concerns that providers might have (see section on equity and fairness below) as well as offering advice about such issues as data protection. Ofsted believes that the work they have done with provider organisations to draw up a standard format for a complaints record, which all providers can use, will negate any additional costs to them. Taken together the Government believes that the package of new regulations and guidance will help to protect providers against the expensive litigation that might arise from an inadequate handling of a complaint or an inappropriate or illegal sharing of information.

Business sectors affected

The registered childminding and day care sector. This covers childcare providers in the private, voluntary and public sectors, the majority of which would be self employed childminders (around 74,000 are currently registered) and small businesses operating day care services (there are about 34,000 day care providers). Sustainability in the sector is an issue, with many childcare providers operating on very low or non-existent profit margins, particularly childminders and voluntary sector day care providers. Some day care providers form part of larger companies, for example chains of day nurseries, where economies of scale have created greater viability.

Equity and fairness

Some childminders and day care providers may feel that the proposals are unfair because they will require them to be too open about the history of their childcare provision and any complaint that has been made to them, with reference to complaints appearing in a published inspection report, even when a number of complaints may be nothing to do with the quality of provision (for example, a provider may get complaints from parents about a fee increase). In addition, there may be complaints records which could be misinterpreted by a parent in the absence of adequate explanation, such as the suspension of a registration when a significant incident requires further investigation, but which results in the exoneration of the provider and lifting of the suspension. However, the planned guidance will help to allay any such fears from providers. The proposed arrangements will encourage transparency. Parents should have access to information which enables them to make judgements about the care so that they can be assured that their children's needs are being met and a childcare provider will normally have nothing to hide.

Unintended consequences

The amendments to the national standards regulations potentially create the opportunity for unhelpful practice: for example, a dissatisfied parent filing a series of spurious complaints against a provider, which would have to be investigated and reported on, thereby creating time-consuming work for a provider. However, guidance will help to safeguard providers by explaining how such complaints should be handled and recorded, and we believe that any risks associated with this are outweighed by the significant benefits from the greater transparency that the regulations will bring. Low profit margins in the sector mean that any increase in costs, however small, could have a negative impact. Again, this risk will be addressed by the guidance supporting the proposed regulations.

Small Firms' Impact Test

Discussions with representatives of provider organisations whose membership covers the majority of small firms in the sector have not identified any specific additional costs that would be incurred because of these regulations. During the Government's initial soundings with the provider organisations, concerns were raised as to how complaints were defined and recorded, and about how such complaints information would be shared with parents. Following agreement with the main provider organisations (National Childminders Association and National Day Nurseries Association) on how complaints would be recorded and that only complaints relating to the standards would be investigated, it has been accepted that the impact of the

regulations would be minimal. Full guidance will be prepared and issued after consultation with provider organisations.

As Ofsted already expects childcare providers to keep a complaints record – this is in the criteria which support the national standards – and for the most part these regulations seek to regulate what all good providers do anyway, they will have minimal impact. There is therefore nothing to prevent these regulations coming into effect as soon as possible. The Small Business Service “Guidance on Implementation Periods” allows for the recommended 12 week implementation period to be circumvented in circumstances where regulations do not have an adverse impact on business.

Competition Assessment

None identified other than the point raised under “unintended consequences” above.

Enforcement and sanctions

If childcare providers fail to comply with the regulations, sanctions can be applied in accordance with the normal enforcement procedures operated by Ofsted. Legal proceedings are only taken against providers where a range of other measures have failed to result in compliance, and/or where there is a serious risk of children coming to harm. As a first step, providers will normally be encouraged to see that it is in their own interests to be open and honest with parents.

Consultation

We consulted over a 12 week period from 1 April to 24 June 2005, with organisations and individuals that have an interest in the day care and childminding sectors and a large majority of respondents agreed with the proposals.

Monitoring and review

The Government will evaluate the effectiveness of these regulations within the first 24 months of operation. This evaluation will be undertaken with Ofsted, and will include statistical analysis of complaints made to Ofsted and a review of a sample of inspection reports. Following this evaluation, the Government will consider a further revision of the regulations if the need for changes is identified.

Summary and Recommendation

The key issue in developing the Government’s policy on disclosure of information was to ensure that Ofsted have a clear legal basis for passing information to parents and other agencies. It is clear that these proposed regulations will provide Ofsted with the legal framework they seek and will have the effect of making the complaints procedure more transparent for parents. Doing nothing or watering down these regulations would not achieve those aims and may not in some circumstances enable Ofsted to pass on to others information that raises doubts about a provider’s ability to care for children. The Government therefore recommend these regulations for the reasons outlined in this RIA.

Declaration

I have read the regulatory impact assessment and I am satisfied that the benefits justify the costs

Signed ...Beverley Hughes

Date: 16th August 2005

Beverley Hughes,

Children's Minister, DfES/DWP

Contact point; Russell Ewens, Dave Bell and Paul Oates

Early Years Regulations Team

Sure Start Unit, DfES.

020 7273 5741