

**EXPLANATORY MEMORANDUM TO**  
**THE LOCAL AUTHORITY (DUTY TO SECURE EARLY YEARS PROVISION FREE OF**  
**CHARGE) REGULATIONS 2008**  
**2008 No.1724**

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

2. **Description**

Section 7 of the Childcare Act 2006 (“the 2006 Act”) requires English local authorities to secure that early years provision of a prescribed description is available free of charge for prescribed periods, for children who have attained a prescribed age. These regulations prescribe those matters.

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

None.

4. **Legislative Background**

4.1 Section 7(1) of the 2006 Act places a duty on English local authorities (defined in section 106 of that Act) to secure that early years provision of a prescribed description is available free of charge for prescribed periods. Section 7(1) provides that the duty is in respect of children under compulsory school age (currently set by reference to prescribed dates following the child’s fifth birthday) who have attained a prescribed age.

4.2 From 1st September 2008, section 7 will supersede, for English local authorities, the duty in 118(1) of the School Standards and Framework Act 1998 (SSFA) on local authorities to secure that nursery education is sufficient for their area. Section 118(2) requires local authorities, in meeting their section 118(1) duty, to have regard to guidance given by the Secretary of State. That guidance is the “Code of Practice on the Provision of Free Nursery Education Places for Three- and Four- Year Olds”, published by the Department for Education and Skills in February 2006. That document will also be guidance to which English local authorities must have regard under section 7(2) of the 2006 Act.

4.3 The new duty on local authorities is to secure early years provision, rather than nursery education. This change follows the introduction of the Early Years Foundation Stage (“EYFS”) from September 2008. The EYFS is established by the Secretary of State under section 39 of the 2006 Act, and replaces the Foundation Stage (which is provided for in Part 6 of the Education Act 2002) in England. It is divided into two parts: learning and development requirements and welfare requirements. It removes the legal distinction between education and care for young children and is not part of the national curriculum. Section 46 of the 2006 Act gives power to the Secretary of State to make regulations enabling the Secretary of State and early years providers to grant exemptions from the learning and development requirements.

## **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**

- 7.1 Since April 2004 all three and four year olds have been entitled to a free, quality-assured, part-time early education place. This is a universal entitlement which benefits all eligible children regardless of their circumstances. From 1 April 2006 the minimum free early education entitlement was increased to 12 ½ hours a week for 38 weeks of the year in all sectors (Previously children accessing the free entitlement from private, voluntary and independent (“PVI”) providers only received 33 weeks a year). The regulations preserve that entitlement for children aged 3 and 4. The age of children to benefit is set in regulation 4 by reference to school term dates - although in practice many children will receive free early years provision from providers who are not schools and may start to receive it at an earlier date.
- 7.2 The “Code of Practice on the Provision of Free Nursery Education Places for Three- and Four- Year Olds” is statutory guidance which sets out the general principles the Secretary of State expects Local Authorities to follow in fulfilling their statutory responsibilities. The Code of Practice can be viewed on the Sure Start website <http://www.surestart.gov.uk/publications/index.cfm?document=1747>. Those principles are applicable across all settings and all sectors. They comprise eligibility criteria, the minimum free nursery education entitlement, and guidance on local authorities’ responsibilities to plan and manage the delivery of high quality, inclusive provision which meets the needs of parents and children.
- 7.3 The Code of Practice also makes clear that parents should not be charged any fee for any part of the free entitlement nor should parents be required to pay for additional services as a condition of accessing the free entitlement.
- 7.4 Free places are provided by a range of providers in the maintained and PVI sectors including maintained nursery schools, nursery classes in maintained schools, independent schools, day care settings, playgroups and registered childminder networks. In practice, many four year olds effectively receive their free entitlement in school reception classes. January 2008 figures show that virtually all four year olds and 95% of three year olds receive free provision.
- 7.5 Funding to deliver the free nursery education entitlement is distributed to local authorities through the Dedicated Schools Grant (DSG) which is a ring-fenced grant to local authorities to cover all pre-16 education. Subject to a requirement to pass a proportion of such funding to schools (through the individual schools budget) the department does not require local authorities to allocate DSG funding in a particular way. Local authorities are, however, constrained to some extent in their spending by the various legislative duties that are imposed upon them to e.g. ensure that there are sufficient primary and secondary school places. The Code of Practice makes clear that local authority funding to providers delivering the free entitlement should be fair and equitable and take account of local circumstances. Local authorities pay a locally

determined amount per child per term to providers who wish to provide free places.

### *Consultation*

- 7.6 The Department consulted publicly on the 2006 Code of Practice between June and October 2005. The consultation included the proposed increase of the free entitlement to 38 weeks in all sectors from April 2006 (to address the long-standing anomaly whereby children taking up the entitlement in PVI providers typically received 33 weeks of provision whilst those accessing provision in the maintained sector received 38 weeks of provision) and the commitments to increase the amount of free provision to 15 hours a week for all children by 2010 and enable more flexible access to free provision outlined in the ten year strategy for childcare *Choice for parents, the best start for children*, published in December 2004. 585 responses were received from a range of providers (over half in the PVI sector), local authorities and parents. Respondents were broadly supportive of the April 2006 proposals to level the playing field by ensuring that children in all settings would receive the same basic 38 week entitlement. The Department provided additional funding through the Dedicated Schools Grant to support this extension of the entitlement. However, there were some concerns about the plans to increase the minimum free entitlement on provider sustainability which the Department has sought to meet by setting out a staged process of implementation and funding reforms.
- 7.9 The consultation on the draft Code of Practice on the provision of free nursery education places for 3 and 4 year olds and the Department's response can be viewed at <http://www.dfes.gov.uk/consultations/conResults.cfm?consultationId=1329>
- 7.10 The Department has not undertaken formal consultation on these regulations because they maintain the status quo in terms of the age of children to benefit from free provision, the amount and type of free provision they can expect. The 2006 Code of Practice will remain statutory guidance to which local authorities are required to have regard, by virtue of section 7(2) of the 2006 Act. Although the regulations put elements of the Code of Practice on to a statutory basis, the only change to the current position is that providers of the free provision are now expected to meet the requirements of the Early Years Foundation Stage rather than the Foundation Stage curriculum – this is provided for by regulation 2. The Department has consulted widely on the introduction and implementation of the Early Years Foundation Stage. The EYFS consultation can be viewed at <http://www.dfes.gov.uk/consultations/conResults.cfm?consultationId=1393>
- 7.11 Where exemptions have been granted from elements of the EYFS in accordance with Regulations made under section 46 of the 2006 Act, local authorities will not be required to fund such provision, but will have discretion whether or not to do so. The Department is providing guidance to local authorities on how to exercise that discretion. In the case of exemptions for providers from the learning and development requirements, the guidance provides that the early years provision should normally be funded where only minor modifications to the learning and development requirements have been granted. However if an exemption were to provide more significant disapplications or modifications to the learning and development requirements, or exemption from the assessment arrangements, the guidance provides that it would not normally be expected that early years providers receive funding to deliver the free early years provision entitlement. In the case of an exemption for an individual child, the guidance provides that the local authority ought to exercise its

discretion in favour of funding if the reason that the child is exempt relates to particular circumstances relating to the child beyond the child's or parents' control.

## **8. Impact**

8.1 An impact assessment has not been completed for these regulations because there is no change to the current policy of requiring local authorities to secure and fund free provision for three and four year olds. The regulations do not impose any additional burdens on local authorities or the private and third sector because:

8.2.1 Section 7 of the 2006 Act and the associated regulations effectively replace, for English local authorities, the duty to secure sufficient nursery education under section 118 of the School Standards and Framework Act 1998. The Code of Practice will continue to be statutory guidance to which local authorities are required to have regard.

8.2.2 Funding is made available to English local authorities to fulfil this duty through the Dedicated Schools Grant (a ring-fenced grant from DCSF to fund education for 3 – 16 year olds).

## **9. Contact**

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